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CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

## FULL BENCH—Appeals against decision of Commission—

**2005 WAIRC 02081**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

| | |
|---|---|
| **PARTIES** | BONE DENSITOMETRY AUSTRALIA PTY LTD TRADING AS PERTH BONE DENSITOMETRY |
| | **APPELLANT** |
| | **-and-** |
| | SHARMAINE DEBORAH LENNY |
| | **RESPONDENT** |
| **CORAM** | FULL BENCH |
| | HIS HONOUR THE PRESIDENT P J SHARKEY |
| | COMMISSIONER P E SCOTT |
| | COMMISSIONER S M MAYMAN |
| **HEARD** | WEDNESDAY, 8 JUNE 2005 |
| **DELIVERED** | MONDAY, 18 JULY 2005 |
| **FILE NO.** | FBA 2 OF 2005 |
| **CITATION NO.** | 2005 WAIRC 02081 |

| | |
|---|---|
| **CatchWords** | Industrial Law (WA) – Appeal against decision of a single Commissioner – Unfair dismissal – Credibility of witnesses – Jurisdiction of Commission – Constructive dismissal – Point not taken at first instance competent – Repudiation of contract – Loss – Compensation for injury – *Industrial Relations Act* 1979 (as amended), s7, s23A, s29(1)(b)(i), s49, s49(4) – *Minimum Conditions of Employment Act* 1993, s41 |
| **Decision** | Appeal dismissed |
| **Appearances** | |
| **Appellant** | Mr T Caspersz (of Counsel), by leave |
| **Respondent** | Mr C Fayle, as agent |

*Reasons for Decision*

**THE PRESIDENT:**

**INTRODUCTION**

1 This is an appeal by the above-named appellant, Bone Densitometry Australia Pty Ltd trading as Perth Bone Densitometry (hereinafter referred to as "BDA") against the decision of the Commission, constituted by a single Commissioner, given on 8 March 2005 in matter No 1044 of 2004.

2 The appeal is brought under s49 of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "*the Act*"). The appeal would seem to be against parts of the decision only (see page 1 of the book (hereinafter referred to as "AB")). The decision appealed against is contained in an order made on 8 March 2005 in which the Commission:-

"(1) ORDERS that the Applicant's claim for contractual benefits, be and is herby (sic) dismissed;

(2) DECLARES that the Applicant was unfairly dismissed; and

(3) ORDERS that the Respondent pay to the Applicant within 14 days of the date of this order the sum of $12,395.84 as compensation for loss and injury."

**GROUNDS OF APPEAL**

3 The grounds of the appeal are as follows (see pages 1-2 (AB)):-

"1. The Commission erred in fact and law and exceeded its jurisdiction by making orders nos (2) and (3) of the orders dated 8 March 2005 in the decision appealed against (**the orders appealed against**) when there was no sufficient evidence that the appellant:

a) dismissed the respondent; or

b) repudiated the contract of employment such that the respondent was "constructively" dismissed.

2. The Commission erred in fact and law by making order no. (3) of the orders appealed against when, insofar as it relates to compensation for:

a) an amount equivalent to 17 weeks of salary:

I. the Commission failed to make any finding that such amount was the loss to the respondent that was caused by the dismissal, in accordance with the decision of the Full Bench in *Bogunovich v Bayside Western Australia Pty Ltd*;

II. there was no evidence that the respondent suffered a loss that was caused by the dismissal equivalent to such an amount;

b) an amount of $2,000 for injury:

I. the Commission took into account the conduct of the employer in determining such amount, contrary to the principles laid down by the Full Bench in *Capewell v Cadbury Schweppes Australia Limited*;

II. there was no sufficient evidence that the respondent suffered any injury that was caused by the dismissal justifying compensation equivalent to such an amount."

**BACKGROUND**

4 The above-named respondent, Sharmaine Deborah Lenny (hereinafter called "Ms Lenny"), claimed that she was harshly, oppressively and unfairly dismissed on 10 August 2004 by the appellant, BDA. Ms Lenny's claim was brought under s29(1)(b)(i) of *the Act*, and was heard and determined by the Commissioner resulting in the order to which I have referred above. The application was opposed by BDA.

5 Ms Lenny is a qualified medical technician with a Bachelor of Science degree.

6 At all material times, as an employer, BDA was engaged in the business of scientific scanning and measuring of bone density of patients for medical diagnostic purposes.

7 Ms Lenny was employed by BDA as a part-time medical technician. She was first employed by BDA in April 1998 as a casual employee to carry out bone scanning one day per week. She worked as a casual employee until August 1998 when she left to go to the United States of America for six months. Whilst she was overseas, she kept in touch with BDA's Practice Manager who was then Ms Margaret Minchin.

8 The business of BDA provides bone density scanning to patients who request that, either by a referral by their own doctors or a referral directly. BDA has operated in this business since 1992 and they have fourteen bone density units around Australia, several of which are in Western Australia. At all material times, BDA's business in Western Australia was conducted at and from the following locations, namely Victoria Park, Joondalup, Fremantle, Bunbury and the West Australian mobile unit as well as from a recently opened premises in Mandurah.

9 Whilst Ms Lenny was in the United States, Ms Minchin wrote to her and offered her a position as a full-time medical technician carrying out bone density scanning which would require her to tow a caravan containing a mobile scanning unit from town to town and scan persons in towns outside the metropolitan area. She accepted that position in February 1999 and worked for BDA, carrying out mobile bone density scanning work until February 2001 when she became tired of living out of a suitcase. She wished to return to Perth and spoke to Ms Minchin asking if there was any work available in the Perth office.

10 At that time, there was only one day's work available per week in Perth, but Ms Minchin told Ms Lenny that the practice was becoming busy and one of BDA's directors, Associate Professor Robert Keith Will, who is a consultant rheumatologist, had purchased five more mobile vans. (The other director was Dr G L Mastaglia.) Professor Will was referred to as an owner/proprietor at times during the proceedings at first instance, but neither he nor Dr Mastaglia could be, since BDA is a proprietary company.

11 In any event, Ms Lenny commenced work in Perth, bone scanning one day per week, and after a while, her work increased to two days per week and then to four days per week. She continued to carry out scanning duties four days a week until the end of 2002. Sometimes, she worked five days a week, but she decided after a while that five days a week was too much for her. She spoke to Ms Minchin about this and Ms Minchin told her that there was a young man in the office who was prepared to learn to scan.

12 Ms Lenny then reached an agreement with Ms Minchin to carry out bone scanning for a reduced time, namely two days a week and to take over the young man's general office duties two days a week at the Victoria Park office. She received the same rate of pay of $19.11 per hour, whether she did scanning or clerical duties. This is in fact how she worked from the end of 2002 until June 2004. In June 2004, Ms Lenny spoke to Professor Will. He said that he was not happy with the work of a woman who was carrying out bone scanning at Victoria Park twice a week. He asked if Ms Lenny would take over bone scanning at Victoria Park one day a week on a temporary basis until BDA engaged a replacement. Ms Lenny agreed.

13 From June 2004 until her employment was terminated, Ms Lenny worked three days a week bone scanning, and one day a week, she carried out office duties.

14 There was a written contract between the parties entered into on 10 May 2003 which had effect from 13 February 2003 and was current until 6 July 2004. The material provisions of the contract contained a provision that Ms Lenny was a part-time

employee, prescribed her duties, and provided for one month's notice in writing or by payment or forfeiture of one month's salary by way of termination of the contract. It also prescribed hours of work, duties and job description. Further and materially, the contract provided that it, the contract, might be varied by agreement between the parties in writing.

15 Ms Lenny was employed for a minimum of 32 hours a week, but sometimes worked longer, depending on the number of patients booked for bone scans. After she had done the bone scanning, she would have to type out reports. At the beginning of 2004, Professor Will introduced a new system of automatic reporting and, after that, Ms Lenny did not have to type each patient's report. In fact, an employee was engaged full-time in BDA's Brisbane office to type all the reports from all scanning machines owned by BDA in Australia.

16 Bone scanning, Ms Lenny said in evidence, was a technical skill which requires concentration and an application of the principles of physics, knowledge of anatomy and preparation of accurate reports. She admitted that the general office duties which she performed did not require any professional qualification at all. It was common ground that she was paid $19.11 an hour for each hour she worked, irrespective of whether she carried out bone scanning or office duties.

17 Part of Ms Lenny's duties at the Victoria Park office involved her keeping records for two research projects and sending the results by facsimile to Royal Perth Hospital. She attended to messages on answering machines and answered five incoming telephone lines. She was also required to make appointments for patients at the metropolitan bone scanning unit.

18 It was Professor Will's evidence and the case for BDA that, in about mid 2004, what are now popularly termed "cash flow issues" afflicted BDA. As a result, decisions were made by those responsible, including Professor Will and Dr Mastaglia, to make reductions in expenditure and outgoings. One such decision was to examine the duties of employees within the business, and to determine whether it was necessary for persons, particularly Ms Lenny, to undertake general office clerical duties when she was overqualified for such duties and was paid at a rate of pay which was in excess of what a junior, relatively non-skilled person could be paid to undertake the same general office clerical duties. As a result, a proposal was put to Ms Lenny at a meeting held on 6 July 2004 by Professor Will, and I will refer to that hereinafter.

19 On Thursday, 1 July 2004, after Ms Lenny finished her bone scanning work at Joondalup, she drove to Victoria Park to pick up her partner, Ms Leza Beth Bridges, who was also at that time employed by BDA. When Ms Bridges got into the vehicle, she told Ms Lenny that she had some bad news for her. That news was that BDA's then Practice Manager, Ms Marilyn McGee, had informed her that Ms Lenny's contract was going to be terminated and she would be offered another contract to work for three days a week, that is, reduced times. Ms Bridges also told her that Ms McGee had told Ms Bridges that, if Ms Lenny had a problem, she could telephone Ms McGee and discuss the matter.

20 Ms Lenny attempted to contact Ms McGee on the telephone but was unable to contact her and had a sleepless night arising from what she had been told. She then returned to work on the following Tuesday and asked if she could have a meeting with Professor Will with Ms Bridges present. They did have the meeting on 6 July 2004 and Ms Lenny said that she said to Professor Will, at the meeting, that she had heard from Ms McGee via Ms Bridges that her contract had been terminated and she wanted to know from him whether this was true. She said that Professor Will told her, "Yes, your current contract is terminated but I will be able to offer you another contract for three days but you'd be scanning only." He told her that it was not necessary for her to do any office duties.

21 Ms Lenny asked why her contract was terminated and said that Professor Will told her that BDA had a cash flow problem. He did explain that they would have to organise ways themselves of getting the extra work done (I paraphrase). She thought that, in fact, the work was increasing and therefore the reason which he gave her did not make any sense to her. She asked him to put this decision to her in writing because she was aware that he had recently terminated the employment of about five other employees and offered to change the contract of employment of other persons who were employed in the office. Ms Bridges then asked Professor Will who was going to do Ms Lenny's work and he said that they would have to prioritise their work in a way which would absorb the extra work.

22 Ms Bridges also asked him what was happening because there were people leaving, and the back office had gone from five to two employees. Professor Will then told Ms Bridges that he was happy with her work, that he had a few projects coming up and he would like her to be part of that. Ms Lenny said that she felt sick and humiliated when she heard this. She had just been told that her hours of work were going to be reduced and there was extra work that was coming up that would not be given to her, but to Ms Bridges. Professor Will told them that he was branching out into the exercise field, he had placed gym equipment in the front office and purchased another suite and was going to restructure the office. Ms Lenny then asked Professor Will when this new arrangement would commence and he said, "Today". She told him, "I am not going to make a decision until I see this in writing."

23 The salient parts of the new contract were employment for three days a week only and not four; employment for three months only with a review at the end of that time (instead of her ongoing, continuing contract of employment); a reduction in salary because of the reduction in time; and this would seem, the abolition of her clerical duties.

24 Ms Lenny agreed in cross-examination that she could not recall everything that was said in the 6 July 2004 meeting. She said that she was certain that Professor Will said that he was terminating her contract of employment because that was the first question she asked him. Ms Lenny did admit that, at no time, did Professor Will say to her that he wanted her to cease working for BDA. However, on her evidence, she had already been told that her contract was terminated, on 6 July 2004. She disagreed with what Professor Will had said in evidence. As the Commissioner accepted and found, Ms Lenny's contract ended that day. She did work for a further five weeks, however, but that was not pursuant to that contract. She was given a copy of the proposed new written contract and considered it and, having considered it, rejected it in a letter which she wrote on 15 July 2004. She never received any written reasons from Professor Will for the decision which he had made, notwithstanding that she had requested that this be provided.

25 On 15 July 2004, Ms Lenny wrote to Professor Will as follows:-

> "Dear Rob:
>
> On July 6th you informed me of your decision to terminate my contract dated 13th February 2004 and offered me a three-month contract which proposes a weekly total of eight hours less work. Given that my former contract has been terminated prematurely, I have reviewed my position with the Company and regrettably, I have decided not to accept the new contract. I understand from my former contract, under Conditions of Service, paragraphs one and two from the Section 2.2 Tenure clause, that you will provide me with five week's (sic) notice if you terminate the contract. This should be implemented from the new contract date of July 6th and is therefore due to take effect as of August 9th. I trust that all moneys due to me including accrued holiday leave, will be made available to me upon my departure.
>
> During my 5¾ years with your Company, I have thoroughly enjoyed my position, but unfortunately I cannot continue to work for you under the conditions of the new contract. I wish to gain employment with a Company that

> can offer me an on-going, stable and secure contract with tenure of a minimum of twelve months. I hope that you have been satisfied with my suggestions and efforts to secure maximum patient numbers for the success of both the mobile units and the fixed sites. I have also teamed up with Leza Bridges by keeping statistics on patient numbers for our Mobile Services so that I could write schedules that would improve patient numbers. A quick glance at last year's improved statistics bears testimony to my approach to scheduling and Leza's endeavours with advertising. Reduction in advertising expenditure over the past few months has unfortunately dramatically reduced last year's significant increase in patient numbers.
>
> I would appreciate it if you could provide me with a letter of reference in recognition of my loyalty and commitment to scanning a maximum number of patients. This has entailed months of extremely full days at Fremantle with only a 20-minute break during the entire day in order to provide an efficient service and to prevent you having to pay me overtime. I have also forfeited several days of office work due to the demand for extra scanning days both at Fremantle and Joondalup, in order to provide greater flexibility than our competitors. In addition, I have absorbed the extra time required to maintain extra projects such as Alral, Synarc and Total Body scans.
>
> I regret that I have been unable to inform you of my decision to not accept the new contract earlier. On Thursday July 8th at Joondalup, I asked you to put in writing the fact that you were going to be issuing a new contract so that I could review it before making a decision. Marilyn gave me the new contract yesterday and unfortunately I have financial commitments which prevent me accepting it."

26 That letter expressed an unequivocal rejection of the new contract in terms which made it clear that Ms Lenny considered that she was being offered a new contract and was not resigning, she having already been dismissed.

27 A few days after Ms Lenny informed BDA that she would not accept the new contract, Ms McGee advertised on behalf of BDA for a Curtain University student to do office work. Ms McGee said that, when two students were interviewed, they were asked if they wanted to be trained to carry out bone density scanning. She said one of the students was a 20 year old and the other person was 17 years old and neither of them had any medical training. Ms McGee was upset about this, she said.

28 On 22 July 2004, Professor Will wrote to Ms Lenny giving her a reference and saying that he was very happy to support her application for any future employment that she may wish to undertake (see page 9 (AB)). Ms Lenny said that the reference was inadequate, describing it as paltry. She wrote to Professor Will on 9 August 2004 complaining about the way she had been treated and the way in which Professor Will had treated other staff. Ms Lenny left this letter on Professor Will's desk on 9 August 2004.

29 That letter reads as follows in its first three paragraphs:-

> "Dear Rob:
>
> Since you have demonstrated an inability to find the time to see me in person after three attempts on my part to speak to you, I am writing to you in the hope you will have time to read this letter. I have strong concerns both for the way you have treated myself and other staff and for your practice.
>
> On July 8th I requested to speak to you about your decision to terminate my current contract and your offer of a three-month contract which consists of one less day of employment with your Company. You waved me away saying you didn't have time and I asked you to set out your decision in writing to which you agreed. After asking Marilyn several times in the ensuing week, I finally received the new 3 month contract. However, there was no official letter informing me of your decision to terminate my existing contract and to replace it with a significantly different contract (to the tune of almost 30% less hours per week and for only 3 months). Every day I asked Marilyn for that letter and finally, on August 2nd, I received a letter dated 22nd, which contained a brief statement that I had ceased working for you due to a change in my employment contract and a short reference for a prospective employer.
>
> I would have thought that after nearly six years of employment with your Company, you could have given me the courtesy of providing a reason in writing for changing my contract. You at least afforded this information in writing to Kieran Wilson (no longer require a full-time DXA operator), Leah Dolman (downsizing of staff), Lauren Hill (new requirements for from office staff) and Zoe McGuire (downsizing of staff)."

30 There was no response from Professor Will or anyone on behalf of BDA to this letter.

31 Ms Lenny set out complaints about how she had been treated and how other staff, including Ms Bridges, had been treated as follows:-

> "I now come to the major reason for this letter. The reasons I have been working for you. Patient care and the opportunity to provide a service which totally adheres to professional standards. I have always prided myself on the quality of care and compassion I give to my patients both physically and supportively by providing them with a safe and informative procedure. I tried to give you enough notice of my intention to not accept your new contract and I have observed with great disappointment, there has been no attempt to advertise the position for a person with nursing experience or a tertiary degree in Science. Not only is my position being replaced by 3 Casuals, (Ben at Fremantle, Ahmed at Vic Park and Joondalup and Veronica at Vic Park) the total hours they have been offered equates to 48 hours per week. Whilst I understand, that Ahmed and Veronica will also be doing office work, it does seen unfair that you in fact told me the reason you were cutting my hours was because it was no longer necessary to perform office duties. What you didn't tell me was that the work was still there to do, but you would rather pay a lesser rate of pay to junior staff. You didn't even attempt to negotiate with me to continue the office work and offer a lower rate for it."

32 Ms Lenny was unable to remember whether, on 6 July 2004, in her discussion with Professor Will, he told her that the new contract would be for a period of three months pending further review. She did not produce a copy of the new contract in evidence and the terms of it were not put to her in cross-examination.

33 She attended a general medical practitioner, Dr Len Atlas, because she was suffering from depression and insomnia, on 19 August 2004 and was prescribed medication.

34 Ms Lenny's evidence was corroborated by Ms Bridges insofar as it related to discussions with Ms Bridges, with Professor Will in Ms Bridges' presence and matters within Ms Bridges' knowledge, such as that Ms Lenny was upset.

35 Professor Will gave evidence that a decision was made in discussions with his partner, Dr G L Mastaglia, that it was not "appropriate" for Ms Lenny to work four days a week when one of those days she carried out clerical duties which could be undertaken by junior staff. The mobile bone scanning unit was no longer operating as well as they would like and this was a significant drain on the company's finances, Professor Will said. Therefore, they had decided to stop operating the mobile unit

continuously and only operated it when there was a demand for scanning. Professor Will said in evidence that it was inappropriate that Ms Lenny was doing clerical work for the company and was being paid an hourly rate of $19.11 when she should be carrying out bone density scanning. He said that he needed one other person to carry out scanning in Perth in addition to her.

36 Professor Will said that he did not make a decision to terminate Ms Lenny's employment and he did not say to her on 6 July 2004 that her contract of employment was terminated. The meeting on 6 July 2004, he said, was called to discuss "the change in her employment arrangements". At the meeting, it was clear to him that Ms Lenny was very unhappy about reducing her hours of work and, when he put this proposal to her, he relied on the express terms of Ms Lenny's terms of employment contract, which expressly specified that, as an employer, they had some flexibility to vary her duties and hours of work. He said that the termination of her employment came about because of her rejection of the proposal to accept an alternative contract.

**Credibility**

37 The crucial findings about credibility are contained in paragraph 39 of the reasons for decision, which I now reproduce:-

> "There is really only one substantially material factual issue in dispute between the parties and that is whether Dr Will informed the Applicant on 6 July 2004 that he intended to terminate her contract. Having observed the witnesses carefully and having considered their evidence, I prefer the evidence given by the Applicant and Ms Bridges to the evidence given by Dr Will in relation to this issue. Neither the Applicant nor Ms Bridges were shaken in their evidence. They both gave clear and consistent evidence in relation to this issue. Further, their evidence on this point is consistent with Dr Will's evidence that the new contract the Respondent intended to offer her would be for three months, which would enable the Respondent to reassess its requirements for bone scanning work at that time. I do not accept the contention put on behalf of the Respondent that Dr Will's evidence in relation to this point was not challenged in cross-examination (see transcript page 80, where it was put to Dr Will that he terminated the Applicant's contract on 6 July 2004)."

**ISSUES AND CONCLUSIONS**

38 Ground 1 of the grounds of appeal is a ground which alleges that the Commissioner at first instance erred in making orders when she lacked jurisdiction to do so and, it is submitted, the Commissioner lacked jurisdiction to do so because there was no "dismissal", within the meaning of that word, many times judicially defined in this Commission and as it appears in s23A and s29(1)(b)(i) of *the Act*.

39 That part of the grounds of appeal is not an appeal against a discretionary decision, or part thereof, as defined in s7 of *the Act*, and as characterised by many decisions of Full Benches of this Commission. In this appeal, part of ground 1 and all of ground 2(b) do constitute an appeal against the discretionary decision of a single Commissioner, as the term "discretionary decision" is defined in *Norbis v Norbis* [1986] 161 CLR 513 and *Coal and Allied Operations Pty Ltd v AIRC and Others* [2000] 203 CLR 194. It is the law in this Commission, carved in classic runes, that an appellant who alleges that the Commission at first instance or the Industrial Magistrate, has effected a miscarriage of the exercise of her/his discretion, applying the principles laid down in *House v The King* [1936] 55 CLR 499 and *Gromark Packaging v FMWU* (1992) 73 WAIG 220 (IAC), must establish that.

40 Unless it is established, then there is no warrant in the Full Bench to interfere with the exercise of the discretion at first instance and, in particular, no warrant for the Full Bench to substitute the exercise of its discretion for the exercise of the discretion of the Commission at first instance.

41 Insofar as the matter was decided by the Commission at first instance, on the credibility of a witness or witnesses, the Full Bench is bound to exercise its statutory jurisdiction and powers and carry out the statutory duty which s49 of *the Act* confers on it. However, the Full Bench is bound to do so, taking into account the well known rule often applied in this Commission as it is expressed in *Devries and Another v Australian National Railways Commission and Another* [1992-1993] 177 CLR 472 per Brennan, Gaudron and McHugh JJ. That is:-

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

42 The Full Bench is also required to act in the manner required by the principle expressed in *Fox v Percy* [2003] 214 CLR 118, also often expressed and applied in this Commission wherein the principle in *Devries and Another v Australian National Railways Commission and Another* (HC) (op cit) was reiterated and appeared, but in which the majority reminded appellate courts and tribunals that their own duties under the statutes could create remedies in appeal. Their Honours said at page 126:-

> "Within the constraints marked out by the nature of the appellate process, the appellate court is obliged to conduct a real review of the trial and, in cases where the trial was conducted before a judge sitting alone, of that judge's reasons. Appellate courts are not excused from the task of "weighing conflicting evidence and drawing [their] own inferences and conclusions, though [they] should always bear in mind that [they have] neither seen nor heard the witnesses, and should make due allowance in this respect."

43 Their Honours cited *Dearman v Dearman* [1908] 7 CLR 549 at 564. Their Honours also referred to the well known dictum in *Warren v Coombes* [1979] 142 CLR 531 at 551, observing that that dictum had been held by the High Court in *Warren v Coombes* (HC) (op cit) at 551 to be "not only sound in law, but beneficial in … operation".

44 Their Honours went on to observe that the decisions of *Jones v Hyde* (1989) 63 ALJR 349 at 351-352, *Abalos v Australian Postal Commission* [1990] 171 CLR 167 at 179 and *Devries and Another v Australian National Railways Commission and Another* (HC) (op cit) were "simply a reminder of the limits under which appellate judges typically operate when compared with trial judges". They then went on, importantly, to say:-

> "The cases mentioned remain the instruction of this Court to appellant decision-making throughout Australia. However, that instruction did not, and could not, derogate from the obligations of courts of appeal, in accordance with legislation such as the *Supreme Court Act* applicable in this case, to perform the appellate function as established by Parliament. Such courts must conduct the appeal by way of rehearing. If, making proper allowance for the advantages of the trial judge, they conclude that an error has been shown, they are authorised, and obliged, to discharge their appellate duties in accordance with the statute."

45 This approach has been consistently followed, as they are required to do, by Full Benches of this Commission.

**Dismissal? – Constructive or Express**

46 The complaint in ground 1 is a precise one. It is twofold.

47 First, it is alleged that the Commissioner erred in fact in making orders 2 and 3 which were made on 8 March 2005. Second, it is alleged that the Commissioner erred in law in making the same orders. Third, it is alleged that the Commission exceeded its jurisdiction in making the orders because there was no dismissal established to have occurred, within the meaning of s23A and s29(1)(b)(i) of *the Act*. Fourth, it is alleged that those errors were made because there was no sufficient evidence that the appellant dismissed the respondent or that the appellant repudiated the contract of employment so that the respondent was "constructively dismissed".

Dismissal

48 I wish to observe that a "dismissal" has been defined generally to be the termination of the employee's services by the employer without the employee's consent (see *Smith v Director-General of School Education* (1993) 51 IR 204 at 219 and *Ryde-Eastwood Leagues Club Limited v Taylor* (1994) 56 IR 385 at 391-393) (see, also, the definition applied in this Commission and expressed by the Industrial Appeal Court in *Metropolitan (Perth) Passenger Transport Trust v Gersdorf* (1981) 61 WAIG 611 (IAC), which is as follows:-

> "The meaning attributed by the Shorter Oxford Dictionary to the verb "dismiss" is "to send away or remove from office, employment, or position." Speaking of the meaning of the word "dismissal" in Auckland Transport Board v. Nunes (1952) N.Z.L.R. 412 Fair J. said at p.410:
>
> > The word "dismissal" may be used in a sense of a peremptory or arbitrary dismissal or a dismissal after due notice or payment under the terms of the contract of employment.
>
> Being qualified as the verb "dismissed" is in the context in which it appears in s.29(2)(a) by the adverb "unfairly" it seems to me that the subsection is designed to apply to all dismissals, whether wrongful or lawful at common law. To paraphrase the words of Bray C.J. in his reasons for judgment in The Queen v. The Industrial Court of South Australia; *ex parte* General Motors Holdens Pty. Ltd. 10 S.A.S.R. 582 at p. 586, a lawful dismissal on notice can, I think, in appropriate circumstances be categorised as unfair, e.g. if dismissed by reason of his religious persuasion – conversely, some wrongful dismissals, as when by excusable mistake a notice is given slightly short of the period specified in the contract of employment or at common law, might not deserve that adjective."

Constructive Dismissal

49 I wish to observe that "constructive dismissal" has been authoritatively defined by the Industrial Appeal Court in *The Attorney-General v WA Prison Officers' Union of Workers* (1995) 75 WAIG 3166 (IAC). That case is, in fact, an authority for the proposition, too, that, if an employee does not fully consent to the termination, then the termination is, in substance, equivalent to a dismissal by an employer.

50 In *Cargill Australia Limited, Leslie Salt Division v FCU of Australia, Industrial Union of Workers, WA Branch* (1992) 72 WAIG 1495 at 1497 (IAC), the Court referred to the judgment of the English Court of Appeal in *Western Excavating (EEC) Ltd v Sharp* [1978] QB 761 at 769 per Denning MR, where His Lordship dealt with the common law position in respect of "constructive dismissal" as follows:-

> "If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one of the more essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instance without giving any notice at all or alternatively he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains; for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."

51 It is certainly the case that in an industrial tribunal such as this, a constructive dismissal is a "dismissal" or a termination at the initiative of the employer. An employee is permitted to leave the employment without giving notice where there is a change in the employee's duties or location of work (see *Hawker Siddeley Power Engineering Pty Ltd v Rump* [1979] IRLR 425*; United Bank Ltd v Akhtar* [1989] IRLR 507), or a breach of contract by the employer (see *Western v Union Des Assurances de Paris* (unreported) Industrial Relations Court of Australia delivered 28 August 1996*; Pedersen v Camden London Borough Council (Note)* [1981] ICR 674 (CA) and *Russian v Woolworths (SA) Pty Ltd* (1995) 64 IR 169 and *Woolworths (SA) Pty Ltd v Russian* (1996) 66 IR 13).

52 Kennedy J, in *The Attorney-General v WA Prison Officers' Union of Workers* (IAC) (op cit), characterised for the purposes of that case and generally, the nature of constructive dismissal, quoting from the judgment of Stephenson LJ in *Sothern v Franks Charlesly & Co* [1981] IRLR 278 at 280:-

> "Did he trip or was he pushed? Was it murder or was it suicide? I know that such a simple consideration of starkly contrasted alternatives is too often outlawed by authority in deciding the issue of *vel non*. Even if the question 'Was the employee dismissed?' cannot always be answered by answering the question, 'Who really terminated his contract?', the real answer to the second question gives the right answer to the first…"

53 It is fair to observe that a constructive dismissal is often, by its very nature, unfair.

54 Quite clearly, an employee is dismissed if he or she is given no option by the employer's conduct, including a unilateral attempt in some circumstances to impose new and inferior conditions of employment, on an employee. That can very much constitute providing no option but to accept it or be dismissed (see the full discussion of these matters in *J L v Haydar Family Restaurants t/a McDonalds* (2003) 83 WAIG 3303 at 3309 (FB)).

55 In any event, an important element of dismissal of an employee by an employer is that the act of the employer results directly or consequentially in the termination of the employment and the employee does not voluntarily leave the employment relationship. Indeed, put another way, had the employer not taken the action which he/she did, then the employee would have remained in the employment relationship. Put another way, if the employer directly or consequentially brings about the termination of the contract and the employee has no effective or real choice but to resign, it can hardly be said that the termination of employment is effected by the employee or his/her act (see *J L v Haydar Family Restaurants* (FB) (op cit) at page 3309, para 67).

56 Conduct which strikes at the eventual trust and confidence between employer and employee may be sufficient (see *Walker v Josiah Wedgwood and Sons Ltd* [1978] ICR 744 at 754 and *Walker v Northumberland County Council* [1995] IRLR 35).

57 What happened in this matter is quite clear, and indeed, there is not a great deal of dispute about what happened. There were cash flow problems with the business which caused Professor Will and his co-director, Dr Mastaglia, to consider economies. As a result, inter alia, they decided to take Ms Lenny off clerical duties. They were paying her $19.11 per hour to perform those duties and they decided to offer her three days' bone density scanning per week for a three month period, subject to review at the end of that period. This was because the clerical duties which she was performing could be performed by a junior clerical employee for $10.00 to $11.00 per hour and not by her as a qualified medical technician at the much higher rate. There was no doubt that Ms Lenny was told on 1 July 2004 by Ms Bridges, who had been so informed by Ms McGee, that it was BDA's intention to reduce Ms Lenny's hours which she worked from four days to three days per week.

58 Further, it is clear that, at the meeting of 6 July 2004, Professor Will told her that she was going to work reduced hours because her contract was terminated.

59 The Commissioner so found, preferring the evidence of Ms Bridges and Ms Lenny to that of Professor Will on that point. The Full Bench was not taken to evidence, nor was it convincingly submitted that that opinion of the evidence or that that finding by the Commissioner was wrong. Accordingly, it is quite clear that, on 6 July 2004, Professor Will, on behalf of BDA, terminated Ms Lenny's existing ongoing and continuing contract of employment of four days per week.

60 The Commissioner's finding that Professor Will said that he intended to terminate the contract (paragraph 39 of her reasons) was, to some extent, incorrect, his actual words being said to be, "well, your contract has been terminated" or "Yes, your…your current contract has…is terminated…". That is, he was notifying Ms Lenny of the decision which he had already made, that the contract should be terminated and was so in his mind.

61 What, Professor Will said, is not at all inconsistent with a finding that it was common ground that Professor Will did not wish Ms Lenny to cease to work for BDA. That, in turn, is borne out by the fact that he offered her a new contract and, in fact, gave her a new written contract which she perused. It is clear from that evidence that a new offer was made to her to work only three days a week doing bone scanning, and that this was for a period of three months, subject to the review of the contract at the expiry of that time. This was distinct from and different from her existing contract which was not for a fixed term, but was ongoing and continuing for four days per week, yielding her a salary of 25% more than that which was offered on 6 July 2004. In addition, the existing contract was a contract to work as a bone scanner (medical technician) and a clerical worker, not purely as a bone scanner (medical technician) as the new offer required her to do, were she to accept it.

62 That offer was rejected by Ms Lenny by letter dated 15 July 2004 and the contract was ended thereby. Alternatively, of course, the contract of employment had already been repudiated and she rejected the new offer made to her because Professor Will said it was terminated.

63 The Commissioner found that the decision to reduce Ms Lenny's hours of work, and her remuneration as a result, by 25% with a review after three months was unfair and, indeed, so substantively unfair as to constitute a repudiatory breach of the employee's contract. The Commissioner went on to find that Clause 2.3 of the contract required BDA to consider its own needs and the needs of Ms Lenny when making a decision to vary her hours of work. The Commissioner then, having found that Ms Lenny was a long standing, hard working and efficient employee, and that her replacement by a junior clerical employee for one day per week would save $3,200.00 per year, also found that BDA's business was a small business and that the cost of retaining her, however, had not been considered against the 25% reduction of income to her. (There is no evidence that the cost of retaining her was considered.) There is no doubt, for those reasons, that the contract was repudiated and the repudiation accepted.

64 Thus, the decision to reduce Ms Lenny's work without regard to her needs, the Commissioner concluded, was unfair. However, it was submitted by the appellant that there was no dismissal because BDA, exercising its rights under the written contract of employment, Clause 2.3, offered a mere variation of the contract and it was never terminated by actual dismissal or constructive dismissal by BDA.

65 Clause 2.3, Hours of Work, the clause invoked by BDA, reads as follows:-

> "**2.3 HOURS OF WORK**
>
> The normal office hours are Tuesday to Friday: 8.30 am to 5.00 pm (1/2 hour unpaid lunch break)
>
> To ensure that the operational needs of the company are met, BDA may vary your hours of work. In such cases, BDA undertakes to provide you with reasonable notice of significant variation to you (sic) hours of work and due consideration will be given to the needs on both parties. However, BDA from time to time may require you to work outside your normal hours to ensure that the full requirements of your job are met. This has been taken into account in setting your salary.
>
> In event hat (sic) your hours of work are varied from that mentioned in this letter of offer for a significant period, time off in lieu for additional hours worked may also be granted at the discretion of the Practice Manager."

66 Insofar as what BDA offered could be said to be a variation of hours of work and effected within the parameters of Clause 2.3, which is what the Commissioner clearly found, and which was not challenged on appeal, then, in making the decision, due consideration was not given to the needs of both parties in accordance with the clause. I would so find. I would so find because, under the contract, too, under Clause 2.5, a job could be changed. Clause 2.5 reads as follows:-

> "**2.5 DUTIES AND JOB DESCRIPTION**
>
> Your duties will be those contained in you (sic) job description and such other duties as are assigned to you by the Practice Manager.
>
> It will be company policy to periodically examine its employees job descriptions and to update them to ensure that they relate to the requirements of the organization and to incorporate changes which are necessary. It is the company's aim to reach agreement on reasonable changes, but if agreement is not possible the company reserves the right to change your job following consultation with you."

67 I doubt that Clause 2.1(d), which reads as follows, assists BDA:-

> "**2.1 OBLIGATIONS TO BDA**
>
> ….
>
> (d) Your specific duties that you undertake for BDA will include performing bone density assessments and any promotional and office duties associated withe (sic) the running of BDA."

68 As I understand it, too, the variation was not in writing, as required by Clause 2.9 of the contract. Then there could be no valid variation.

69 The existing agreement (pages 161-167 (AB)) was current from 13 February 2003 and was current as at 6 July 2004, at least until the meeting of that date. That is what is clear on a fair reading of the whole of the contract.

70 However, due consideration of the needs could not require BDA to maintain Ms Lenny's then current income indefinitely when it was incontrovertibly detrimental to the welfare of BDA that it continue to pay her at the rate which it was doing.

71 The variation proposal did take into account the needs of both parties as was required, with some compromise, particularly given that three days a week, not four days a week was available. There was a submission on behalf of Ms Lenny that s41 of the *Minimum Conditions of Employment Act* 1993 had not been complied with. It is not at all certain, given the evidence of what occurred at the meeting of 6 July 2004. There was a failure to comply with Clause 2.3 of the contract in any event. In any event, too, this was not part of Ms Lenny's case at first instance and nothing about it was put to BDA's witnesses. It is barred by s49(4) of *the Act* and by the application of the principle in *Metwally* [No 2] *v University of Wollongong* (1985) 59 ALJR 481. That argument and that evidence was not required to be taken into account.

72 Next, it was submitted on behalf of BDA that the exercise of the contractual right to vary was not harsh, oppressive or unfair, because it was not necessary to vary. The contract could have been terminated on notice, as it was submitted. However, if that was done, the question might be whether the contract was fairly terminated, so such a consideration was not a telling one and Ms Lenny would then have lost all of her job in circumstances which, it might be submitted, were unfair.

73 Further it was submitted on behalf of BDA, that Ms Lenny was still paid her medical technician's rate of pay for her hours of bone scanning, or rather would have been had she accepted the offer of variation, if it was a variation. Her hours of work and duties had changed throughout her employment by BDA, so there was nothing new about that. Ms Lenny was given notice of and opportunity to consider and respond to the variation proposal and that notice was not only oral but in the form of a new contract in writing for her perusal and consideration, with time to do so, and she did so. In any event, even if there was a failure to give due consideration to Ms Lenny's needs, that breach of the contract was not sufficient to render the variation harsh, oppressive or unfair (see *Garbett v Midland Brick Company Pty Ltd* (2003) 83 WAIG 893 (IAC) per Heenan J at paras 84, 85 and 104, and Hasluck J at para 66).

74 It was submitted on behalf of Ms Lenny that what occurred was not a variation, but a new contract because the contract was terminated and the new contract was a very different one. That matter was not raised at first instance and it is not now necessary to raise it or consider it.

75 However, if I were wrong in that, I agree that it was a different and new contract, because it was one offering one day less per week, resulting in 25% less income for different duties, that is, purely medical technician duties and no clerical duties; and it was a contract which was for a fixed period of three months instead of for an indefinite or ongoing period. Even at the end of the three months, there was to be a review, no doubt to see whether it should be renewed or continued. In other words, the new contract was a new contract and not a mere variation in hours or salary.

76 In this case, there was no question that the contract had been terminated or varied by agreement. It is not always clear whether, if there is consensuality, that that has occurred.

77 Whether the changes result in a new contract being created or the old contract being continued, as varied, is a question of fact. Indeed, the parties may intend a variation, but achieve a termination. It is, of course, not open to an employer or employee to unilaterally change the terms of the contract (see, generally, *Byrne v Twaddle t/a Mount Hospital Pharmacy* (2002) 83 WAIG 5 at 12 (FB)). In this case, there was clearly no variation, for the reasons which I have expressed above. There was an express termination followed by the offer of a new contract significantly different in its terms.

78 However, for the same reason as I have found that if there was a variation it was not unfair, then I find the termination which was also replaced by the best offer which could be made in the circumstances, to be not unfair.

**Ground 1**

79 I think that this appeal ought to be disposed of in the following manner, insofar as ground 1 is concerned.

Point not taken at first instance competent

80 First, the evidence is quite clear, and the Commissioner accepted it, that there was an actual or express dismissal of Ms Lenny on 6 July 2004. Undoubtedly there was. Professor Will told her that she was dismissed and Ms Lenny, for some reason or another, worked out five weeks' notice even though she had been dismissed. The contract had come to an end, as the Commissioner correctly found. Ms Lenny was, however, presented with a new contract for her consideration and rejected it in her letter of 15 July 2004. (The new contract was not tendered in the evidence and was not before the Commissioner at first instance.)

81 All of that could readily lead to a conclusion that there was a dismissal and there was jurisdiction to hear and determine the matter contrary to the submissions for the appellant, there being no constructive dismissal but a simple and actual dismissal in terms as defined in *Metropolitan (Perth) Passenger Transport Trust v Gersdorf* (IAC) (op cit) and many cases in this Commission (and see, also the definition of "dismissal" as a wide term, cited by me supra in para 48).

82 Objection was taken to the respondent relying on a submission when it was not made or relied on at first instance. That submission was that, in actual terms, and as actually expressed, there was a dismissal of Ms Lenny by Professor Will on behalf of BDA on 6 July 2004 which was unfair. It is to be noted that, unless s49(4) of *the Act* operates to prevent such a matter being raised which no party submitted on appeal, then the respondent was entitled to raise that point in support of "the judgment", even though it was not raised at first instance (see *The Owners of the Ship "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 68 ALJR 311 (HC); and *NRMA Insurance Ltd v B & B Shipping and Marine Salvage Co Pty Ltd* (1947) 47 SR (NSW) 273 (SC); and *Osborne & Co v Anderson* [1905] VLR 427 (SC)).

83 The point that there was a dismissal, even if there was no constructive dismissal, was not raised below. It could not be a matter of cross-appeal because the point is not one they used to attack the decision at first instance, but to support it. However, within the principle laid down in *The Owners of the Ship "Shin Kobe Maru" v Empire Shipping Co Inc* (HC) (op cit), the submission was made within the general rule that a respondent to an appeal is entitled to support a judgment by an argument not presented below so long as the argument does not depend upon an issue of fact not litigated in the courts below and so long as it is open to the respondent on the pleadings and having regard to the way in which the case was conducted.

84 In this case, of course, it was very much open, because of the evidence and, indeed, the finding of the Commissioner on credibility, to say that it arose from the way the case was conducted. In this case, as I have said, the finding of actual dismissal and express dismissal, in the words which Professor Will used as found by the Commissioner, on 6 July 2004, to Ms Lenny. That finding is supported by the action of Ms Lenny who actually rejected the new contract offered to her and accepted that she had been dismissed under the previous one. Thus, there was jurisdiction to hear and determine the matter because there was an actual termination of the contract effected by a dismissal, albeit one upon inadequate or no notice.

85 The words used were clear words to dismiss her and she accepted that dismissal and rejected a new contract, which was an entirely different offer of employment under a new contract. It was open to so find.

Finding of Constructive Dismissal

86 However, that is not the way in which the Commissioner dealt with the matter at first instance. As I have already observed, the Commissioner found that the actions of BDA, in offering, through a director, Professor Will, a new contract which contemplated review after three months, for only three days work a week and a consequent 25% reduction in weekly salary with no clerical duties, even if it resulted in a resignation, constituted a constructive dismissal. That is, Ms Lenny was given no option but to accept the new contract or be sacked on that basis. That is, to accept the unilateral repudiation of the contract or be sacked.

87 The crux of the decision was that this proposal was so substantively unfair that it constituted a repudiatory breach. The words "substantively unfair" really can only mean a breach of the implied obligation of BDA to be good and considerate to its employees. A breach of that implied condition, as I have said, can certainly amount to a repudiation because of its seriousness and thus a finding of constructive dismissal if the repudiation is accepted, which it was found to have been. The letter of 15 July 2004 was, in its terms, not a resignation but an acceptance of the repudiation of the contract, put at its lowest, for Ms Lenny. In fact, it was a rejection of the offer of a new contract, on a proper reading of the letter.

88 The Commissioner found that there was a variation in her hours of employment and that that was effected pursuant to Clause 2.3, which permitted the employer to vary hours.

89 Firstly, I must say, because the point was permissibly raised on appeal for the reasons which I have expressed, that was an error because there was no variation in her hours. There was an express dismissal or constructive dismissal of Ms Lenny and the offer of a new and very significantly different contract, a fixed term contract with reduced hours for only three months, with different remuneration and different duties, instead of an ongoing, continuing contract.

90 Second, Clause 2.9 of the contract of employment was not complied with, in that no written notice of variation was given.

91 Further, even if that were wrong and the Commissioner was right and this was a variation of Clause 2.3, there was a repudiatory breach of the implied duty of considerateness and goodness and an express breach of Clause 2.3, because Ms Lenny's needs were not considered, there being a unilateral variation in that no notice was given, whether the requirement arose out of Clause 2.3 or not and for the reasons expressed for unfairness by the Commissioner in her reasons.

92 Repudiation has a variety of meanings (see *Breach of Contract*, Carter (1984) pp 222-223). However, in employment cases, it is accepted that a repudiation will exist either when there is a breach of a condition going to the essence of a contract or when one of the parties has evinced an intention, through her or his conduct, expressly or by implication, no longer to be bound by the contract (see *The Law of Employment*, Macken, McCarry & Sappideen (5th ed) pp 220-222).

93 As Carter said in *Breach of Contract*, a repudiation of an obligation occurs when a party to a contract clearly indicates an absence of readiness or willingness to perform her/his contractual obligations if the absence of readiness or unwillingness satisfies the requirements of seriousness (see, generally, the discussion of this subject in *Contract Law in Australia*, Carter & Harland (4th ed), paras 1933, 1934, 1935, 1937, 1938, 1940).

94 Whether a repudiation has occurred is not a question of law, but a question of fact (see *Woods v WM Car Services (Peterborough) Ltd* [1982] ICR 693). Thus, the wrongful dismissal of an employee constitutes repudiation, as does the breach of express or implied conditions of service, including the breach of an implied term to the effect that an employer must be good and considerate to its employees (see *Nettlefold v Kym Smoker Pty Ltd* (1996) 69 IR 370 and *Burazin v Blacktown City Guardian Pty Ltd* (1996) 142 ALR 144). See, too, the discussion of this point and the authorities cited in *Contracts of Employment: Renaissance of the implied term of trust and confidence* by Kelly Godfrey (2003) 77 ALJ 764. See, also, and relevantly, the findings that arbitrary conduct will be a breach of that duty and, in particular, unilaterally changing an employee's role (*United Bank v Akhtar* (op cit) and *Hilton v Shiner Builders Merchants* [2001] IRLR 727).

95 Further, another such example is exercising a discretionary power to relocate employees in a capricious manner which is akin to what occurred here, although the alleged exercise of power was arbitrary rather than capricious and certainly unfair (see *United Bank v Akhtar* (op cit) and *Johnstone v Bloomsbury Health Authority* [1992] QB 333.)

96 That was really the crux of the finding of the Commission of unfairness at first instance. Of course, such a breach may amount to a repudiation of the contract entitling the employee to treat the contract as at an end (see *J L v Haydar Family Restaurants t/a McDonalds* (FB) (op cit) at pages 3309-3310, para 71).

97 If there was a failure to be good and considerate, moreover, which could properly be otherwise styled unfairness, as the Commissioner purported to style it, a finding of unfairness did not have to depend and could not depend on Clause 2.3, for the reasons which I have already expressed. If that be wrong, then there was a contractual requirement for fairness which, manifested by the words of Clause 2.3, required the employer to consider Ms Lenny's needs as well as BDA's own, which was also breached and which would support the finding which the Commissioner actually made of constructive dismissal, in turn supported itself by the findings of unfairness in relation to the purported right to vary. That constituted a dismissal, on the authorities, too, because she was "pushed" and "did not jump".

98 There is no doubt, however, that there was a dismissal, actual or express, conveyed in unmistakeable words, on 6 July 2004 and correctly found, on the evidence, to have been so expressed. That is because the evidence of Ms Lenny and Ms Bridges on that point was accepted in preference to that of Professor Will and, on a fair reading of the evidence, for the reasons expressed, there was no reason why the Commissioner should not have made and correctly made that finding.

99 Some consideration of whether there was a variation or an express dismissal is necessary. Whilst there must be some allowance for a variation to duties not expressly provided for in the contract of employment, serious non consensual intrusions upon the status or responsibilities of or upon the remuneration attaching to the job, may amount to a repudiation by the employer (see *Western v Union Des Assurances de Paris* (op cit) per Madgwick J at 4).

100 A less drastic change sought by an employer, such as a change in working hours without a change in tasks to be performed or total hours worked, may not have the same consequences (see *Quinn v Jack Chia (Australia) Ltd* [1992] 1 VR 567 at 578, and generally, per Ashley J, and see *Byrne v Twaddle* (FB) (op cit)).

101 It is obviously not possible for an employer to unilaterally change the terms of the contract and, if the employer purports to do so, she/he is repudiating it, generally put (see *Byrne v Twaddle* (FB) (op cit) at 12).

102 Repeated attempts to vary the terms of employment may constitute repudiation (see *Reid v Campbell Engravers* [1990] ICR 435).

103 Within those principles, if the Commissioner was right in finding that there was variation of hours offered which, with respect, was not the case, the Commissioner was correct to find and it was open to find that there was a constructive dismissal of Ms Lenny because the act of variation did not take into account her needs as expressed in the contract, and was a serious

enough breach to be considered as a repudiation on the authorities to which I have referred above. Further, the repudiation was accepted. Alternatively, there was a repudiation within the principles outlined above, which was therefore accepted and constituted also a constructive dismissal because, within the principles which I have just discussed:-

a) This was an attempt to vary the contract by the employer in clear breach of Clause 2.3, for the reasons expressed by the Commissioner.

b) The alleged variation can constitute a serious non consensual intrusion upon the status, responsibilities, remuneration, hours and terms of the contract of employment of Ms Lenny.

c) This was an attempt to unilaterally change the terms of the contract amounting to a repudiation.

104 The dismissal was unfair, for the reasons found by the Commissioner and, in any event, because, in this case, it was a constructive dismissal which, ipso facto, was unfair.

105 Alternatively, therefore, there was a clear, constructive dismissal for the reasons which I have expressed and on the authorities to which I have referred, if there was unfairness supporting a finding of repudiatory breach.

106 If Ms Lenny was actually dismissed by the words of dismissal, as she was because the Commissioner correctly found that she was dismissed as at 6 July 2004, then Ms Lenny had to establish that the dismissal was unfair.

107 In my opinion, it was therefore clearly open to the Commissioner to find an unfair constructive dismissal, as she did, whether Clause 2.3 was irrelevant or not. It was, of course, in my opinion, irrelevant.

108 As to the reasons for finding unfairness, I make the following observations.

109 First, it was not established that there was not a cash flow problem being experienced by BDA such as to justify economies being taken. Second, the onus lay on the appellant to establish that the dismissal was unfair.

110 There was a unilateral express termination of the contract by the employer on 6 July 2004, as at 6 July 2004, as the Commissioner correctly found. That was sufficient to support a clear and correct finding of dismissal and for the reasons expressed in paragraph 111 hereof, to support a correct finding that the dismissal was unfair. The offer of a new contract, as I have characterised it above, with significant new features was no variation and could not be. There was, it was fair to say, no resignation, on a fair reading of Ms Lenny's letter of 15 July 2004 but a rejection of the proposed new contract.

111 I would add this. BDA's representation of its assertion that it wanted Ms Lenny to continue to work for it on a new and much less advantageous contract, for the reasons which I have said above, was not a variation in accordance with the contract of employment and not a variation at all and did not purport to be, even if the express words of dismissal had not been used by Professor Will on 6 July 2004. It is quite clear that Ms Lenny did not voluntarily leave her employment. She was dismissed, actually and expressly.

112 On the evidence, it was clearly established to be unfair and the Commissioner was correct to find that it was and would have been correct to find that it was, for the reasons I have said, because:-

a) Ms Lenny was a long standing, hard working and efficient employee.

b) The replacement of her by a junior employee would give only a small saving of $3,200.00 per annum compared to her 25% loss of annual income.

c) There was no reason given why she should have been offered a fixed term of three months instead of an indefinite contract.

d) Whether the contract required it or not, the decision to terminate her contract somewhat perplexingly, without considering her needs, was for that reason unfair.

e) There was no evidence of any such consideration of her needs including her obvious financial commitments referred to in correspondence and, for that reason, it was unfair and contrary to the implied term requiring the employer to be good and considerate.

f) That failure to consider her needs was evidenced, too, by the manner in which she was peremptorily dismissed without proper warning, without discussion and, as the Commissioner found, without notice, and presented with a new contract as a fait accompli with no suggestion that the new contract could even be negotiated.

113 Within the principles in *Miles and Others t/a Undercliffe Nursing Home v FMWU* (1985) 65 WAIG 385 (IAC), this was a harsh, oppressive and unfair dismissal, constituted by an oppressive use of BDA's right to dismiss, as the Commissioner would have been entitled to find.

114 Alternatively, the unfairness to which I have referred above constituted a repudiatory breach, the acceptance of which resulted in an unfair dismissal and the unfairness and/or breach of the implied term rendered the constructive dismissal, ipso facto, unfair.

115 Thus, for those reasons, there was a constructive dismissal, for the reasons found by the Commissioner too, based on a finding of variation of contract. Alternatively, for the reasons which I have expressed, there is a clear repudiation of the contract leading to a repudiation accepted by Ms Lenny and constituting a constructive dismissal.

116 Alternatively, and equivocally supported by the evidence and the findings of the Commissioner, that she preferred the evidence of Ms Bridges and Ms Lenny to that of Professor Will, on 6 July 2004, Professor Will told Ms Lenny that she was dismissed and offered her a significantly different and disadvantaged contract. She was dismissed, therefore, on that day. (Nothing was said to persuade me that that finding was in error, on a fair reading of all of the evidence, having regard to the principles in *Devries and Another v Australian National Railways Commission and Another* (HC) (op cit) and *Fox v Percy* (HC) (op cit), or for any other reason.) Mr Fayle's submission was that there was an actual dismissal, not a constructive dismissal and there was. At all material times, therefore, there was jurisdiction in the Commission to hear and determine the matter.

117 For all of those reasons, as expressed, the dismissal was unfair. There was no error of law or fact, as alleged.

118 For all of those reasons, ground 1 is not made out and fails.

**Ground 2**

119 I now turn to ground 2. First, by ground 2(a), BDA complains that the Commissioner at first instance erred in fact and in law in finding that there was a loss equal to 17 weeks' salary and in ordering compensation be paid in that amount, namely $10,395.84.

120 By that ground, it is alleged that the Commissioner failed to make any finding that the amount awarded was the amount of the loss suffered by Ms Lenny and caused by the dismissal according to the well known principles laid down in *Bogunovich v Bayside Western Australia Pty Ltd* (1998) 79 WAIG 8 (FB). I have difficulty understanding that part of the ground and the submission. The Commissioner was required to make a finding whether and what loss was established by Ms Lenny. Then,

she was required to consider what, if a loss was established, compensation she would award for that loss. The Commissioner dealt with the issue of loss and compensation in paragraph 45 (page 16 (AB)) of the reasons for decision. She makes it quite clear that she did not accept BDA's contention that Ms Lenny had not proved that she had suffered a loss. The Commissioner specifically found that Ms Lenny had suffered a loss. It is clear that she found that it was caused by the unfair dismissal and it was clear that she found that it was mitigated. That loss she found to be an amount of 17 weeks' salary, calculated at 32 hours per week at $19.11 per hour, 17 weeks being the time which elapsed from the date her employment came to an end and the date of hearing. That loss, on the evidence as was found, was, of course, caused by the dismissal and by nothing else, nor could it be said otherwise.

121 The amount was also awardable on the authority of *Steele v Clark and Nicholls* (2003) 84 WAIG 17 (FB) per Sharkey P at paras 38-42, Coleman CC and Gregor C (as he then was) agreeing.

122 The Commissioner did not err for those reasons and that part of the grounds is not made out.

123 Second, by ground 2(b), BDA complains that the Commissioner erred in fact and in law in awarding $2,000.00 compensation to Ms Lenny for injury caused by the unfair dismissal of her. The Commissioner gave careful consideration to the authorities relating to the award of compensation for injury and, in particular, the dicta of Coleman CC and Smith C in *AWI Administration Services Pty Ltd v Birnie* (2001) 81 WAIG 2849 where they said:-

> "It is accepted that there is an element of distress associated with almost all employer initiated terminations of employment. For injury to be recognised by way of compensation and thereby fall outside the limits which can be taken to have normally been associated with a harsh, oppressive or unfair dismissal there needs to be evidence that loss of dignity, anxiety, humiliation, stress or nervous shock has been sustained. Injury embraces the actual harm done to an employee by the unfair dismissal. It comprehends 'all manner of wrongs' including being treated with callousness (*Capewell v Cadbury Schweppes Australia Limited* (1998) (sic) 78 WAIG 299). The injury may be manifested by the detrimental impact on the physical or emotional wellbeing of the person whose services were terminated. However dismissals will impact to varying degrees on individuals and while the need for professional care may be evidence of that impact, this will not necessarily always be the case in order to establish the causal link between the termination of employment and the injury. While it is necessary to exercise a degree of caution to ensure that compensation is confined to reasonable limits (*Timms v Phillips Engineering Pty Ltd* (1997) 70 (sic) WAIG 1318 and *Burazin v Blacktown City Guardian Pty Ltd* 142 ALR 144) that is not to say that every claim for injury necessarily involves expert evidence of emotional trauma.
>
> 1 The circumstances in which the dismissal from employment has been effected may be sufficient to demonstrate the injury which is experienced. Situations where an employee is locked out of the workplace or is escorted from the premises, or the termination has been conducted in full view of other staff are examples of callous treatment justifying recognition for compensation for injury (*Lynham v Lataga Pty Ltd* (2001) 81 WAIG 986).
>
> 2 However, the Commission is not able to adjust the measure of compensation according to the opinion of the employer or employee or of the conduct of the respective parties (*Capewell v Cadbury Schweppes Australia Limited* (op cit))."

124 "Injury", as the Commissioner found, embraces the actual harm done to an employee by an unfair dismissal and "comprehends all manner of wrongs" including being treated with callousness. The Commissioner correctly observed, too, that whilst injury may be manifested by the detrimental impact on the physical or emotional wellbeing (or, for that matter, the reputation) of an employee unfairly dismissed, dismissals will affect individuals to varying degrees and, I might add, not at all.

125 The Commissioner observed, too, that, while the need for professional care may be evidence of this impact, this will not always be necessary to establish the causal link between the termination of employment and the injury. Not every claim for injury, as the Commissioner correctly observed, necessarily involves or should involve expert evidence of emotional trauma. (The Commissioner referred, too, to *Timms v Phillips Engineering Pty Ltd* (1998) 78 WAIG 4460 and *Burazin v Blacktown City Guardian Pty Ltd* (FC) (op cit).)

126 The Commissioner went on to observe, too, and correctly, that the circumstances in which the dismissal from employment had been effected may be sufficient to cause the injury experienced. Examples were given of locking an employee out of the workplace or escorting an employee from premises in full view of staff, particularly, I might add, if this were unjustifiably done by a police officer or uniformed security officer (see the discussion of these matters in *Lynham v Lataga Pty Ltd* (FB) (op cit).)

127 The Commissioner went on to find that the decision by the directors of BDA was conveyed in a callous manner to Ms Lenny. No apology was given to her that the matter had been prematurely revealed, third hand, in advance of 6 July 2004. There was clear evidence that Ms Lenny was told there would be a termination of her employment, as well as a reduction of the hours which she worked. It was not first conveyed by Professor Will and, indeed, Ms Lenny had to seek a meeting with him to find out what was actually occurring. The Commissioner found that, by informing Ms Bridges on 6 July 2004 that he intended to provide her with work in relation to new projects after he had said that Ms Lenny's hours would be reduced and she would no longer be required to carry out her clerical duties, was demeaning and it clearly was. Indeed, the whole episode, in my opinion, went further than that because the Commissioner should have found that Professor Will said, as he did, "Well your contract has been terminated." That is, she was faced with a bald fait accompli with no preliminary discussion or no negotiation and no alternative given to her other than to accept a vastly reduced contract.

128 All of those circumstances support the Commissioner's finding that Ms Lenny's treatment was demeaning. The Commissioner found that the manner in which Ms Lenny was informed that her contract was to be terminated was "callous, oppressive and humiliating". Again, I say that, on that evidence, Ms Lenny was told she was dismissed, not that she was going to be dismissed, which further supports the correctness of the finding. She did, indisputably, seek treatment for insomnia and depression. The Commissioner so found. There is nothing in the reasons to say that the Commissioner relied on what Dr Atlas said or what Centrelink said in their letter after an officer interviewed Ms Lenny.

129 The Commissioner found that, from the time Ms Bridges told Ms Lenny that Ms McGee had said that her contract was to be terminated and her hours reduced, to the conclusion of her meeting on 6 July 2004 with Professor Will, she was shocked and felt humiliated. Her evidence was that she was not usually an emotional person and that she had worked very hard for Professor Will and, whilst she agreed that she was emotional, she complained of having been bullied and exploited by Professor Will. This was said in cross-examination (see page 45 of the transcript at first instance (hereinafter referred to as "TFI")).

130 Her evidence-in-chief was that, after Ms McGee told Ms Bridges who in turn told Ms Lenny of the proposed termination and reduction of hours, Ms Lenny had three sleepless nights and was anxious and sick in the stomach. She consulted a doctor and gave her own evidence, not controverted, that she was given medicine. She did not return to work until 6 July 2004. During the meeting on 6 July 2004, she said, she was sick and humiliated. She was not shaken in cross-examination at all on these

points and it was not suggested that her evidence was not credible on these points. Ms Bridges corroborated that Ms Lenny was "pretty upset at the news that I told her". That evidence was not raised with her in cross-examination or at all controverted.

131 For BDA, it was submitted that there was no finding of actual harm done. The finding of the Commissioner and the unshakeable evidence to which I have referred above gives the lie to that. Ms Lenny said that she did interpret that Professor Will had rejected what she did in the performance of her office duties. That evidence was clearly a manifestation of her hurt and arose from the fact that she was not to do clerical work any more, even if she accepted the new contract. Whilst she admitted that Professor Will had not said that he was unhappy with her work, I am not persuaded that that, in the circumstances, could be reasonably be expected to dilute in her mind or objectively what had occurred on 6 July 2004.

132 Whilst Ms Lenny's characterisation of the reference given to her by Professor Will dated 22 July 2004 was not, on a fair reading, paltry, it is understandable, given her treatment, that Ms Lenny had somewhat of a jaundiced view of it. It does not detract at all from the fact that she undoubtedly and unjustifiably was caused hurt, shock and humiliation which affected her to some extent physically, to the extent that she required to obtain medicine from a doctor. It detracts not at all from the correctness of the findings made.

133 Ms Lenny clearly did not suffer shock and humiliation because of her personality. She, first of all, suffered it as a result of, and caused by, the unfair dismissal and the surrounding treatment of her, effected by Professor Will. That was entirely clear. That she might have suffered greater injury than someone else would, or any injury, was not established at all. Even if it were, it is trite to observe that BDA, as the respondent, was bound to take Ms Lenny as it found her. There was also unshaken evidence and uncontradicted evidence of her being bullied and exploited by Professor Will in the past, which might reasonably be found, if it were necessary, which it was not, to have caused a greater susceptibility to hurt and humiliation when the dismissal did come.

134 The submission for BDA that the finding that Professor Will's conduct on 6 July 2004 was callous, oppressive and humiliating was erroneous because Professor Will gave much challenged evidence that he had made no decision to dismiss Ms Lenny before the meeting of 6 July 2004, has no merit.

135 First, that is the case because, when Professor Will made the decision, Ms Lenny could not mitigate the character of the decision, its effect and the manner of its communication and implementation. Second, the evidence which the Commissioner preferred was that of Ms Bridges and Ms Lenny, namely that Professor Will had said, in answer to Ms Lenny's question, that "Yes, your …. your current contract has …. is terminated, but I will be able to offer you another contract with …. for 3 days but you'd be scanning only" (see page 14 (TFI)).

136 Ms Lenny's hurt and, indeed, anger and humiliation are expressed very obviously in a letter to Professor Will of 9 August 2004. I would also add that the complaint in ground 2 that the Commissioner erred in having regard to Professor Will's conduct when *Capewell v Cadbury Schweppes Australia Ltd* (1997) 78 WAIG 299 (FB) was authority for the proposition that one could not, in finding loss and assessing compensation, has no merit in it. *Capewell v Cadbury Schweppes Australia Ltd* (FB) (op cit) is authority for the proposition that the conduct of the parties plays no part in assessing compensation for loss following an unfair dismissal. In this case, and the authorities which I have cited above are clear, one must look at the nature of the unfair dismissal and other evidence to determine whether the unfair dismissal caused any injury alleged to have been caused by it. One has to look at the alleged injurious act and assess the conduct in that light when it has been alleged to be injurious.

137 I would also add that nothing was submitted which might establish to me that the sum of $2,000.00 awarded for compensation for injury was outside a reasonable exercise of discretion, nor was it a complaint in the grounds of appeal.

138 For all of those reasons, ground 2 is not made out and fails.

**FINALLY**

139 For all of those reasons, the Commissioner was correct to find that she had jurisdiction to hear and determine the matter and was correct in so doing.

140 For all of those reasons, the Commissioner correctly found that there was a dismissal and the Commissioner determined correctly that it was unfair. She was correct in her findings of loss and injury and the fact that they had been caused by the unfair dismissal, and correct in making the orders for compensation which she made. It has not been established otherwise.

141 Further, it was not established, applying the principles in *House v The King* (HC) (op cit) and *Gromark Packaging v FMWU* (IAC) (op cit), that the exercise of the Commissioner's discretion miscarried in any respect referred to in the grounds of appeal. There is no warrant in this Full Bench, therefore, to interfere with the discretion at first instance.

142 Insofar as findings of fact made by the Commissioner, dependent on findings made as to the credibility of witnesses, there was nothing submitted which would persuade me, I having read the transcript and other evidence, that the Commissioner erred according to the application of the principles in *Devries and Another v Australian National Railways Commission and Another* (HC) (op cit) and *Fox v Percy* (HC) (op cit).

143 For all of those reasons, I would dismiss the appeal, no ground of appeal having been made out.

**COMMISSIONER P E SCOTT:**

144 I have had the benefit of reading the Reasons for Decision of His Honour, the President, in which he sets out the background to this appeal and the grounds of appeal.

145 In respect of Ground 1 of the appeal, I agree with His Honour, that Ms Lenny's employment came to an end by virtue of a termination by the employer. The learned Commissioner at first instance, having had the benefit of hearing the evidence first hand, preferred the evidence of Ms Lenny and Ms Bridges as to what was said in discussion with Professor Will on 6 July 2004. According to that evidence, Professor Will told Ms Lenny that her contract had been terminated. There is no reason to conclude that the Commissioner erred in preferring the evidence of Ms Lenny and Ms Bridges to Professor Will. Although Professor Will also indicated that he did not wish Ms Lenny to stop working for the business, he offered her an alternative contract of employment which was unacceptable to her. It would have reduced her hours of work and consequently her pay, and was not an ongoing contract but subject to review after three months. This was not a variation to the existing contract in accordance with its terms, but a new contract, the existing one having been terminated by the employer.

146 In those circumstances, it was the employer's actions which brought about the termination of employment. It was open for the Commissioner to find and I conclude that there was a dismissal in accordance with the definition set out in *Metropolitan (Perth) Passenger Transport Trust v Gersdorf* (1981) 61 WAIG 611 (IAC).

147 This was not a constructive dismissal but an actual dismissal. Accordingly, there was jurisdiction for the Commission to hear and determine the application.

148 I agree with His Honour, for the reasons he expressed at paragraph 112 of his reasons that the dismissal was unfair.

149 For those reasons, Ground 1 is not made out.

150 As to Ground 2, I agree with His Honour that the loss and injury found by the learned Commissioner are set out in her reasons for decision and are supported by the evidence. I note that the amount of $2,000 awarded for injury was appropriate and not erroneous. This Ground is not made out.

151 Accordingly, I too, would dismiss the appeal.

**COMMISSIONER S M MAYMAN**

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

**THE PRESIDENT:**

153 For those reasons, the appeal is dismissed.

Order accordingly

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**2005 WAIRC 02073**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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| **PARTIES** | BONE DENSITOMETRY AUSTRALIA PTY LTD TRADING AS PERTH BONE DENSITOMETRY |
| | **APPELLANT** |
| | **-and-** |
| | SHARMAINE DEBORAH LENNY |
| | **RESPONDENT** |
| **CORAM** | FULL BENCH |
| | HIS HONOUR THE PRESIDENT P J SHARKEY |
| | COMMISSIONER P E SCOTT |
| | COMMISSIONER S M MAYMAN |
| **DATE** | MONDAY, 18 JULY 2005 |
| **FILE NO/S** | FBA 2 OF 2005 |
| **CITATION NO.** | 2005 WAIRC 02073 |

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| **Decision** | Appeal dismissed |
| **Appearances** | |
| **Appellant** | Mr T Caspersz (of Counsel), by leave |
| **Respondent** | Mr C Fayle, as agent |

*Order*

This appeal having come on for hearing before the Full Bench on the 8th day of June 2005, and having heard Mr T Caspersz (of Counsel), by leave, on behalf of the appellant and Mr C Fayle, as agent, on behalf of the respondent, and the Full Bench having heard and determined the matter, and reasons for decision having been delivered on the 18th day of July 2005, it is this day, the 18th day of July 2005, ordered that appeal No FBA 2 of 2005 be and is hereby dismissed.

By the Full Bench

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

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**2005 WAIRC 02043**

**AN APPEAL AGAINST THE DECISION OF THE COMMISSION IN MATTER PSAC 5/2005 GIVEN 27 APRIL 2005**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

| | |
|---|---|
| **PARTIES** | CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA |
| | **APPELLANT** |
| | **-and-** |
| | DR RUTH SHEAN, CHIEF EXECUTIVE OFFICER, DISABILITIES SERVICES COMMISSION |
| | **RESPONDENT** |
| **CORAM** | FULL BENCH |
| | HIS HONOUR THE PRESIDENT P J SHARKEY |
| | CHIEF COMMISSIONER A R BEECH |
| | SENIOR COMMISSIONER J F GREGOR |
| **HEARD** | FRIDAY, 1 JULY 2005 |
| **DELIVERED** | THURSDAY, 14 JULY 2005 |
| **FILE NO.** | FBA 4 OF 2005 |
| **CITATION NO.** | 2005 WAIRC 02043 |

| | |
|---|---|
| **CatchWords** | Industrial Law (WA) - appeal against the decision of the Public Service Arbitrator - Public Service Arbitrator's jurisdiction to make interim orders - application that appeal be dismissed - public interest - matter moot - whether appeal should lie - power to dismiss appeal - *Industrial Relations Amendment Act* 1987, *Industrial Relations Act* 1979 (as amended), s7, s26(1)(a), s27(1), s27(1)(a), s27(1)(a)(iv), s27(1)(b)-(r), s27(1)(u), s27(1)(v), s44(6), s44(6)(bb)(ii), s49, s49(1)-(9), s49(2a), s49(5), s49(5)(a), s49(5)(b), s49(5)(c), *Public Sector Management Act* 1994, s73(3)(b), s78, *Interpretation Act* 1984. |
| **Decision** | Appeal dismissed. |
| **Appearances** | |
| **Appellant** | Mr W Claydon, as agent and with him Ms J van den Herik |
| **Respondent** | Mr R Bathurst (of Counsel), by leave |

*Reasons for Decision*

**THE PRESIDENT:**

## INTRODUCTION

1 This is an appeal brought pursuant to s49 of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "*the Act*"). The appeal is against a decision of the Public Service Arbitrator (hereinafter referred to as the "Arbitrator") which is contained in an order made on 27 April 2005, whereby an application for an interim order for reinstatement was dismissed.

2 The appellant, the Civil Service Association of Western Australia (Inc) (hereinafter referred to as "the CSA") appeals against the decision on the basis that the exercise of the discretion miscarried, by reference to the discretionary powers under s44(6) of *the Act*.

3 It is also alleged, pursuant to Ground 2 of the grounds of appeal, that the Arbitrator erred in law and in fact in his interpretation of the *Public Sector Management Act* 1994 (hereinafter referred to as "*the PSM Act*") by failing to give appropriate consideration to actions or decisions made by the respondent carried out before it made a decision under s79(3)(b) of *the PSM Act*.

4 It was alleged that the Arbitrator failed to find that the CSA made the application, No PSAC 5 of 2005, and that the subject of the application was Ms Nancy Siew Muay Ngiam and thus that s78 of *the PSM Act* did not apply.

5 It is also alleged that the Arbitrator erred because he failed to consider the operation of the *Interpretation Act* 1984 and the objects of the *Industrial Relations Amendment Act* 1987 which introduced s44(6).

6 It was also alleged that the Arbitrator erred in law, having regard to the decision of the Commission in *Bellamy v Chairman, Public Service Board* (1986) 66 WAIG 1579.

7 That is a summary of the salient grounds of the appeal. It is not necessary to reproduce them or consider them in any detail.

## BACKGROUND

### Parties and Proceedings at First Instance

8 The CSA is and was, at all material times, an "organisation" of employees, as the term "organisation" is defined in s7 of *the Act*. At all material times, Ms Ngiam was a government officer and a Level 1 employee of the respondent, who was Chief Executive Officer of the Disability Services Commission. At all material times, too, one infers, Ms Ngiam was a member of the CSA.

9 A dispute arose between the respondent, Dr Shean, and Ms Ngiam because of Ms Ngiam's proposed dismissal by the respondent. Ms Ngiam was represented in the dispute by the CSA. It seems to be common ground that Ms Ngiam had received a letter from the respondent on 29 December 2004 requiring her to show cause why she should not be dismissed. On the same day, on her behalf, the CSA filed and served an application to the Arbitrator (application No PSAC 5 of 2005) whereby it sought an interlocutory or interim order maintaining the status quo, that is, it sought to prevent her dismissal until application PSAC 5 of 2005 was heard and determined. Later, it would appear, the order sought after her dismissal was effected was amended to or treated as an application for her interim reinstatement.

10 However, notwithstanding, the respondent terminated Ms Ngiam's contract, dismissing her on 21 January 2005. On 1 February 2005, Ms Ngiam appealed against that decision to the Public Service Appeal Board (hereinafter referred to as "the Appeal Board") by application No PSAB 2 of 2005, which seems to have been accepted as having the only jurisdiction to deal with the matter.

11 On 1 March 2005, there was a conciliation conference called by the Arbitrator. At that conference, the respondent (at first instance) foreshadowed that she would submit that there was no jurisdiction in the Arbitrator to hear and determine the application for interim orders, much less to make them. That application for interim orders, PSAC 5 of 2005, (and it was confined to an application for such orders) was heard on written submissions and determined by the Arbitrator on 27 April 2005 by the issue of his decision with the reasons therefor. (Significantly, there was no claim of unfair dismissal before the Arbitrator at any time and it seems that it was accepted by the parties that it could not be, since jurisdiction in such a matter was and is confined to the Appeal Board.)

12 As I said above, the Arbitrator's order dismissing the application was on 27 April 2005. The Arbitrator decided that there was no provision in the PSM Act or the Act enabling the Appeal Board to make the order sought in this case, (ie) an interim order reinstating Ms Ngiam.

13 Put shortly, the Arbitrator then went on to find that he lacked jurisdiction to make the interim order himself because, under s44(6)(bb)(ii) of the Act, there must be before the Commission "a claim of harsh, oppressive or unfair dismissal of an employee" and, further, because the power to make such an order could only be exercised "pending the resolution of the claim", (ie) the claim of harsh, oppressive or unfair dismissal of an employee.

14 The Arbitrator, noting that no such claim of unfair dismissal had been made in the Arbitrator's jurisdiction, also observed that it could not be because of the specific jurisdiction of the Appeal Board in relation to such claims. Without a claim before the Arbitrator, the Act, the Arbitrator found, gave no power or jurisdiction to make any interim order and the interim order sought. Thus, he found that there was no jurisdiction or power to make the interim order sought.

**This Appeal**

15 The CSA appealed against the Arbitrator's decision of 27 April 2005 to dismiss application PSAC 5 of 2005, by a Notice of Appeal filed in the Commission on 12 May 2005, brought under s49 of *the Act* to the Full Bench, and seeking orders that the application for interim orders be remitted back to the Arbitrator for hearing and determination.

16 The grounds of appeal herein set out the allegations of error and it is unnecessary to deal with them here.

**Finding – Appealed Against**

17 I should, however, observe that, on the date fixed for the hearing of the appeal, the CSA sought and was granted leave to add a paragraph alleging that the decision appealed against was a "finding", as defined in s7 of *the Act*, and also contending that the matter was one of such importance that, in the public interest, an appeal should lie.

18 It was correctly conceded on behalf of both parties that the appeal was against a "finding", as defined, which it clearly was, because the decision did not and could not finally dispose of the industrial matter of the proposed or actual dismissal of Ms Ngiam. Indeed, the matter of dismissal could not even be before the Arbitrator, because he had no jurisdiction entertain it as the parties seem to have agreed.

**Appeal Board Application Discontinued – Letter from Ms Ngiam**

19 It was common ground that, after this appeal was instituted and before the date of the hearing, 1 July 2005, the appeal to the Appeal Board was discontinued and there was no longer any matter pertaining to Ms Ngiam's dismissal before the Appeal Board. It was also clear, and there was evidence of it, that Ms Ngiam no longer required that the CSA take any further action in relation to her dismissal. Indeed, exhibit 1 which the Full Bench admitted was a letter purporting to be signed by Ms Ngiam and forwarded as a facsimile, undated but bearing facsimile dates of transmission 20 and 21 June 2005. That letter was addressed to the Secretary of the CSA marked "Attn: Mr Brendan Cusack", and also forwarded in copy form to the Registrar of this Commission and to the Disability Services Commission.

20 Formal parts omitted, that letter reads as follows:-

> "Please be advised that I have settled my dispute with my employer the Disability Services Commission.
>
> The proceedings before Kenner C in PSAC 5 of 2005, which seek orders for my interim reinstatement, are now of no relevance to me as I no-longer (sic) wish to have the Commission order me to be reinstated. No useful purpose would be achieved if the above appeal to the Full Bench of the Commission was allowed and the decision at first instance set aside.
>
> I request that you discontinue the appeal."

21 The letter is headed "Re: WAIRC FBA 4 of 2005 CSA –v- Disability Services Commission", clearly identifying itself as relating to this appeal.

**S27(1)(a)(iv) Application**

22 An application was filed on behalf of the respondent pursuant to s27(1)(a)(iv) of *the Act* on 22 June 2005 whereby she sought that the appeal be dismissed because Ms Ngiam had reached a settlement with the respondent and no longer wished the Arbitrator to order her reinstatement to the Disability Services Commission. The reinstatement issue, it was alleged in the application, was now a dead issue between the parties and it was contended that it is not the function of the Commission to decide hypothetical questions or dead issues or to provide legal advice to the parties.

23 That application was opposed by the CSA because Ms Ngiam was not a party to the appeal and neither she nor the Disability Services Commission had the right to interfere with the appeal rights of the CSA or other procedural rights under *the Act*. Further, it was alleged that the CSA had told Ms Ngiam and the Commission that it would not compromise its rights.

**S49(2a) of *the Act***

24 Whilst asserting, too, that it is in the public interest that the appeal proceed, the CSA also asserted that the question of public interest should be determined under s49(2a) of *the Act* and not under s27(1)(a).

25 At the hearing of the appeal, the Commission invited submissions in relation to the application under s27(1)(a)(iv) of *the Act* and in relation to the status of the appeal under s49(2a).

26 As an appeal against a finding, s49(2a) of *the Act* applies to this appeal. S49(2a) prescribes quite clearly that:-

> "An appeal does not lie under this section from a finding unless, in the opinion of the Full Bench, the matter is of such importance that, in the public interest, an appeal should lie."

27 As Full Benches of this Commission have held, that means that no appeal against a finding is competent until the Full Bench has reached the opinion that the matter is of such importance that, in the public interest, an appeal should lie. That means, of course, too, that the s27(1)(a)(iv) application is not competent because no appeal lies, (ie) no appeal is competent, until the Full Bench finds in accordance with s49(2a) of *the Act* that an appeal should lie. Therefore, the Full Bench's task was to decide whether the appeal should lie, having regard to the requirements of s49(2a). Full Benches have laid down principles relating to these matters (see *Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union of Western Australia and Others* (1989) 69 WAIG 1873 at 1879 (FB); see also *Mt Newman Mining Co Pty Ltd v Australian Workers' Union, West Australian Branch, Industrial Union of Workers* (1986) 66 WAIG 1925 (FB)).

28 Moreover, as was submitted, *Butterworths Concise Australian Legal Dictionary* defines "public interest" as:-

> "an interest common to the public at large or a significant portion of the public and which may or may not involve the personal or proprietary rights of individual people."

29 However, the interest of a particular organisation or peak body, it is trite to observe, in challenging the reasoning of a decision, is not to be equated with the public interest (see *Confederation of Western Australian Industry (Inc) v Federated Miscellaneous Workers Union of Australia, Hospital, Service and Miscellaneous, WA Branch and Others* (1990) 70 WAIG 1281 at 1282 (IAC)).

30 The degree of importance must be beyond *important simplicita*. Further, the words, "public interest" should not be narrowed to mean special or extraordinary circumstances. An application may involve circumstances which are neither special or extraordinary but which are, because of their very generality, of great importance in the public interest (see *Re Australian Insurance Employees Union; Ex parte Academy Insurance Pty Ltd and Others* 78 ALR 466). We agree with that proposition. In *Re Gas Industry Award* 104 CAR 376, Wright and Moore JJ and Gough C said that the question of sufficient importance cannot be decided on the basis of case law. Each case will be a question of impression and judgment whether the appeal has the required degree of importance. We agree.

31 Further, an appeal will not lie unless the Commission has formed a positive opinion of the public interest of the matter. Doubts or misgivings are not sufficient. Further, it is obviously impossible to express any general standard or degree of

importance which will satisfy the test of such importance and every case must be viewed on its merits according to its individual circumstances.

32 Important questions with likely repercussions in other industries apart from the industry in question or the subject of any matter before the Commission, can give rise to matters of sufficient importance in the public interest to justify an appeal.

33 Those are the matters which were referred to by the Full Bench in *Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union of Western Australia and Others* (FB) (op cit). They give some indication of what is required to be decided in relation to the question of public interest under s49(2a) of *the Act*.

34 The crux of the respondent's submission and, indeed, the s27(1)(a)(iv) application too, was that, since the appeal to the Appeal Board against Ms Ngiam's dismissal had been discontinued and the matter settled (see her letter exhibit 1), then the Full Bench should not and could not reach the opinion that the matter was of such importance that, in the public interest, the appeal should lie because the matter of the appeal was dead, the substantive matter of the dismissal and the remedy sought for it in the Appeal Board being entirely dead. That followed the discontinuance of the appeal in the Appeal Board.

35 It followed, of course, as I understand the submission, that the appeal, because it related to the question of the jurisdiction of the Arbitrator to make interim orders which could not be made by the Appeal Board, related to a dead issue for that reason also. Put shortly, the whole reason why an interim order was sought had vanished because there was no employment to reinstate, on an interim or other basis and no remedy was sought any longer at all, either in the Appeal Board or before the Arbitrator in relation to Ms Ngiam's dismissal. That was clearly the case.

36 The Full Bench was taken to a number of authorities. However, it is a clear principle applicable in this Commission that, unless the public interest dictates otherwise, the Commission's charter is to deal with practical solutions and not to engage in merely academic exercises (see *Civil Service Association of WA Inc v Director General, Department of Consumer and Employment Protection* (2002) 82 WAIG 952 at para 45 (FB)).

37 This Commission is also bound by the principle laid down in *Confederation of Western Australian Industry (Inc) v Federated Miscellaneous Workers Union of Australia, Hospital, Service and Miscellaneous, WA Branch and Others* (IAC) (op cit). That principle is expressible, as it was expressed in *Ku-Ring-Gai Municipal Council v Suburban Centres Pty Ltd* (1971) 2 NSWLR 335 at 339 as follows:-

> "it is not the function of the established courts to entertain applications which are designed solely or primarily as a means of obtaining legal advice for potential litigants, and courts should, so far as possible, avoid making determinations of hypothetical questions."

38 The Industrial Appeal Court in those reasons for decision applied the ratio of *Veloudos and Others v Young* [1981] 56 FLR 182 as follows:-

> "Courts will not decide a question that is academic in the sense that it is useless, merely hypothetical, raised prematurely or a dead issue; although they preserve a discretion to determine a question which has ceased to be a live issue *inter partes*, whether determination would be in the public interest."

39 As I have said, those dicta were applied in *Confederation of Western Australia Industry (Inc) v Federated Miscellaneous Workers Union of Australia, Hospital, Service and Miscellaneous, WA Branch and Others* (IAC) (op cit) at page 1282. Those principles were also applied by a Full Bench of this Commission in *Western Mining Corporation Limited v Australian Workers' Union, Western Australian Branch, Industrial Union of Workers* (1997) 77 WAIG 1079 at 1080-1081 (FB).

40 In my opinion, there is nothing to suggest that is not the law applicable in this Commission just because this Commission is not the Industrial Appeal Court.

41 That law was applied by the Industrial Appeal Court, to an "industrial matter" which is what determines the jurisdiction of this Commission. Thus, because Their Honours determined that those principles should apply to an appeal in relation to an industrial matter, then properly that ratio is applicable to decisions in relation to all industrial matters in this Commission, including those the subject of appeals to Full Benches.

42 *Confederation of Western Australia Industry (Inc) v Federated Miscellaneous Workers Union of Australia, Hospital, Service and Miscellaneous, WA Branch and Others* (IAC) (op cit) represents the law in this Commission and, indeed, was expressed in a different way, but to the same effect, to be the law in *Civil Service Association of WA Inc v Director General, Department of Consumer and Employment Protection* (FB) (op cit).

43 It was submitted for the CSA that this appeal should, in the opinion of the Full Bench, lie because it was in the public interest that it should do so. Central to the submission is the fact that the CSA represents both public service and government officers. It was also submitted that the matter was of sufficient public interest, within the meaning of s49(2a) of *the Act* because:-

(a) There was a need for a level playing field for all employees and unions or the maintenance of status quo in respect of the ability to apply for interim orders.

(b) To protect union members' rights of access to remedial legislation.

(c) To protect the CSA's representation rights to seek interim orders.

(d) To maintain consistent principles in respect of applications for interim orders in view of conflicting decisions of the Commission.

(e) To prevent remedial legislation from being undermined by minor canons of construction, when the statutory purpose is clear and the objects of *the Act* are capable of being advanced in accordance with the *Interpretation Act* 1984.

44 Of course, the opinion which the Full Bench is required by s49(2a) of *the Act* to form is not that it is in the public interest that the appeal should lie, but that, in the opinion of the Full Bench, the matter (of the appeal) is of such importance (my emphasis) that, in the public interest, the appeal should lie.

45 In my opinion, the question is of importance whether a person seeking a remedy from the Appeal Board has a remedy in that board, or before the Arbitrator, or at all, by way of an order for interim reinstatement. However, this matter is entirely dead, there is no controversy, and the person on whose behalf the proceeding was sought seeks no substantive remedy. Further, the reasons advanced by the CSA are all reasons in support of a submission that the appeal should be decided as a hypothetical matter and by way of legal advice. Given that the question of an interim remedy exists in such matters, that is, claims of unfair dismissal in the Appeal Board, and complementing it, claims for interim orders of reinstatement whilst a claim is made to the Appeal Board, before the Arbitrator, it is not of such public interest that, when the matter is moot, as it is, the Full Bench should determine that question of jurisdiction or power.

46 Indeed, *a fortiori*, provided that a substantive application to an Appeal Board can bring a remedy in reinstatement, if the merits are in favour of that occurring quickly, then the consideration of principles relating to jurisdiction to make interim orders, and

submitted to exist by the CSA, are not so important that they require an answer *in vacuo*, as a matter of public interest. That is because the question of whether there is a power to order reinstatement on an interim basis becomes a relatively unimportant matter if that remedy is available, and it is.

47 The matter is hypothetical and dead, in any event, within the authorities to which I have referred. The question of powers to order interim reinstatement are not so important that it is important that the Full Bench should, on this appeal, hear and determine this application when the matter is moot, or at all, in the circumstances of this matter.

48 For all of those reasons, I did not and was unable to reach the opinion required to be reached by s49(2a) of *the Act*. I therefore concluded that the appeal did not lie and agreed with my colleagues to dismiss it, since it was not a matter of such importance that, in the public interest, an appeal should lie.

**S27(1)(a)(iv) of *the Act***

49 As to the application under s27(1)(a)(iv) of *the Act*, which involved the same considerations of the issues of deadness, of the hypothetical and of public interest, it is unnecessary to deal with it, having regard to what I have decided under s49(2a). However, I will nonetheless consider it in the alternative, since it was raised in these proceedings.

50 S27(1)(a)(iv) of *the Act* reads as follows:-

> "(1) Except as otherwise provided in this Act, the Commission may, in relation to any matter before it —
>
> (a) at any stage of the proceedings dismiss the matter or any part thereof or refrain from further hearing or determining the matter or part if it is satisfied —
>
> ……
>
> (iv) that for any other reason the matter or part should be dismissed or the hearing thereof discontinued"

51 There was one preliminary submission for the CSA on this point which requires consideration. It was submitted that the power of the Commission conferred by s27(1)(a) of *the Act* did not apply to appeals brought under s49 because the relevant jurisdiction is expressly conferred under s49 and stands alone, the doctrine of *generalia specialibus non derogant* applies. In fact, the rule, arguably, does not apply but, even if it does, the observations which I now make dispose of the point.

52 The question is whether s27(1) powers apply or do not apply because s49 appeals are excepted from the application of s27 of *the Act* or are partly excepted from the application of s27. First, s27(1) is not excluded by the express or implied wording of s49 from applying to the jurisdiction of the Full Bench under s49. Thus, the powers prescribed by s27(1)(b) to (r) and (v) apply. It is clear that the sort of procedural matters they apply to are not proscribed either implicitly or expressly in s49, and that appeals under s49 could not be dealt without recourse to most or all of the powers prescribed by s27(1)(b) to (r) and (v), from time to time.

53 Further, that is the case, because s49(5) of *the Act* in particular, and no other part of *the Act*, purports to exclude those powers, all of which are and might be required to be resorted to from time to time and none of which conflicts with any provision of s49 insofar as it relates to appeals, particularly s49(5).

54 As to s27(1) of *the Act*, s49 prescribes special jurisdiction and powers in the Commission different from those prescribed by s27(1). They do not appear in s27(1). However, s27(1) would not seem to have, on the face of it, come into conflict with those powers but, if it does, it would fall by the wayside, insofar as it did. These include all of the sections from s49(1) to s49(9). In particular, however, s49(5) expressly provides how appeals are to be disposed of, which is not a matter dealt with at all by s27(1). The remedies in s49(5)(a) are unique in *the Act*, except for s84 which, whilst it differs to some extent, is generally similar to s49(5).

55 These powers consist of the power to uphold appeals and quash the decision appealed against and the power to suspend the operation of the decision appealed against and remit the case for further hearing and determination by the Commission.

**S49(5)(b) and (c) of *the Act***

56 There is also a power to dismiss the appeal. There is no restriction on that power to dismiss contained in s49(5)(a) of *the Act*, nor is there any implied limitation of the power, save and except by the four corners of *the Act*. Thus, an appeal under s49 can, for any lawful reason, express or implied, including the sort of reasons prescribed by s27(1)(a), be dismissed without recourse to s27(1)(a).

57 The power to dismiss is, as I have said, a wide and generally untrammelled power. Thus, an appeal could be dismissed in the public interest or because it is without merit or because it is trivial or for other good reason, as well as on the merits. If, however, I am wrong in that view, then s49(5) of *the Act* does not, within the meaning of s27(1), "provide otherwise than s27(1) does", and the powers conferred by s27(1)(a) apply in addition to the powers contained in s49(5).

58 In any event, for much the same reasons which I have expressed in relation to s49(2a) of *the Act*, having regard to s26(1)(a), the appeal requires to be dismissed at this time before it is heard and determined on the merits, because it is moot, hypothetical and it is not in the public interest that it be heard and determined. I would, if it were necessary, have dismissed the appeal under s27(1)(a) or s49(5). However, since it does not lie, those powers would not be available to me. If it was an appeal against a final decision and not a finding, either s27(1)(a) or, in my opinion properly, s49(5) would justify and provide the jurisdiction and power to dismiss it.

**Observation**

59 It might be helpful to the parties that there exists the right in a party, even during the hearing of a matter at first instance, to refer, with the consent of the President, to the Full Bench any question of law including any question of the interpretation of the rules of an organisation, arising in the matter (see s27(1)(u) of *the Act*).

**FINALLY**

60 For all of those reasons, I agreed with my colleagues to dismiss the appeal.

**CHIEF COMMISSIONER A R BEECH**

61 I agree that the appeal should be dismissed for the following reasons. Firstly, the CSA submitted that the arbitrator did not correctly categorise the issue brought by it in PSAC 5. The complete answer to that submission lies in the acknowledgement of the CSA that the proceedings before the Arbitrator are still live: the order against which the appeal was lodged did not finally dispose of PSAC 5. Accordingly, it is open to the CSA to ask for those proceedings to be re-listed for the purpose of putting submissions to the arbitrator directed towards a characterisation of the dispute which the CSA seeks. The dismissal of this appeal does not alter this position.

62 I thus am unable to agree with the submission of the CSA at [48] of its written submissions that the decision of the Arbitrator "affects the ability of the CSA to obtain Interim Orders for its members in order to check abuses of process". The decision of

the Arbitrator does not affect the ability of the CSA to apply to an Arbitrator to seek interim orders in order to check what the CSA might see as abuses of process prior to the dismissal of the employee the subject of the process; the decision of the Arbitrator relates only to the situation where an interim order of reinstatement is sought after dismissal and where the substantive matter of the dismissal is taken to the Public Service Appeal Board.

63 Secondly, while the application to the arbitrator initially lodged by the CSA was made while Ms Ngiam was still employed, that circumstance was overtaken by her dismissal shortly after that application was lodged. The CSA then amended the order it sought in PSAC 5 to seek an order that the Disability Services Commission be ordered to forthwith reinstate Ms Ngiam "to her substantive position within Disability Services Commission effective from 26 January 2005 pending the hearing and determination of PSAB 2 of 2005" (AB 13) (my emphasis). Its reasons for seeking that amendment related to the procedural issues raised by the CSA in its grounds (AB 13 and 14).

64 However, the point to be made is that the interim order sought was pending the hearing and determination of PSAB 2 of 2005. It is conceded by the CSA that PSAB 2 of 2005 was discontinued effective from 28 June 2005. It naturally follows, as the CSA's submission in [43] categorically states, that the basis upon which the CSA sought the interim order it now appeals is removed. With its removal also goes the basis for the CSA's argument that the dispute between it and the Disability Services Commission over the interim order of reinstatement remains live. It cannot remain live. If any other issue relating to Ms Ngiam's employment remains live between the CSA and the Disability Services Commission, and it is not immediately apparent to me what that might be, PSAC 5 of 2005 remains available to deal with it.

65 Finally, I wish to add that it is clear that the CSA is a principal in its own right and not merely an agent of its members (*ADSTE v. Hamersley Iron Pty Ltd* (1983) 63 WAIG 1918, with the appeal at 64 WAIG 852; *Registrar v. AMWSU* (1990) 70 WAIG 3947 at 3950). The fact that Ms Ngiam settled her appeal to the Public Service Appeal Board does not mean that the CSA is not able to proceed with PSAC 5 of 2005 or this appeal. The argument it must face when it does so is, however, the precise issue raised by the Disability Service Commission in this appeal. There is now no real dispute between the CSA and the Disability Service Commission over Ms Ngiam.

66 I agree the appeal must be dismissed.

**SENIOR COMMISSIONER J F GREGOR:**

67 I have had the opportunity of reading the reasons of His Honour the President. I agree with him, for the reasons he has enunciated, that the appeal should be dismissed and I add the following comments.

68 The appeal by the Civil Service Association (CSA) complains that the Arbitrator at first instance was in error when he declined to exercise a discretion which resides in him under the powers contained in s44 (6) of *the Act* to refer a matter for hearing and determination. The matter that the CSA says should have been referred was whether or not the Arbitrator should grant interim reinstatement in a case involving Ms Nancy Siew Muay Ngiam who had apparently been dismissed from service with the Respondent to this appeal.

69 The factual background shows that the dismissal became otiose because of an accommodation Ms Ngiam made with the Respondent to the appeal so that she was not dismissed. The CSA says notwithstanding this the Arbitrator should have pressed ahead with determining the question of interim reinstatement and because he did not he was in error. By this Appeal the CSA argues that this Full Bench should, in effect, make a declaratory judgement as to the power of the Arbitrator to deal with questions of interim reinstatement when a dispute relating to unfair dismissal previously notified to the Public Service Appeal Board is discontinued.

70 The matter before the Full Bench is clearly one which, on the authorities, falls within the category of a matter which is completed. The charter of the Commission is to deal with practical solutions and not mere academic exercises. The principles to be applied can gleaned from the authorities, to which the Honour has referred in detail, which hold that Courts will not decide a question that is academic or hypothetical or a dead issue except when those matters in the public interest.

71 Applying the principles relating to the formation of the public interest there is no such interest in this matter. I respectfully agree with analysis of His Honour the President has made in that respect.

72 The other matter which is raised for consideration is the suggestion by the CSA that the power on s27 (1) is not available to be applied in the circumstances because it is displaced by the specific provisions of s49 (5) of *the Act*. The Full Bench in exercise of its jurisdiction regularly invokes the range of powers which are contained in s27. I agree with His Honour there is no substance in that argument which does not support the contentions of the CSA. There are no grounds on which the Full Bench could reach the conclusion that there is public interest in the issues raised in this appeal and for those reasons the appeal has to be dismissed.

**THE PRESIDENT:**

73 For those reasons, the appeal is dismissed.

Order accordingly

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**2005 WAIRC 01953**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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|---|---|
| **PARTIES** | CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED<br>**APPELLANT**<br>**-and-**<br>DR RUTH SHEAN, CHIEF EXECUTIVE OFFICER, DISABILITY SERVICES COMMISSION<br>**RESPONDENT** |
| **CORAM** | FULL BENCH<br>HIS HONOUR THE PRESIDENT P J SHARKEY<br>CHIEF COMMISSIONER A R BEECH<br>SENIOR COMMISSIONER J F GREGOR |
| **DATE** | FRIDAY, 1 JULY 2005 |
| **FILE NO/S** | FBA 4 OF 2005 |
| **CITATION NO.** | 2005 WAIRC 01953 |

| | |
|---|---|
| **Decision** | Appeal dismissed |
| **Appearances** | |
| **Appellant** | Mr W Claydon**,** as agent and with him Ms J van den Herik |
| **Respondent** | Mr R Bathurst (of Counsel), by leave |

*Order*

This appeal having come on for hearing before the Full Bench on the 1st day of July 2005, and having heard Mr W Claydon, as agent, and with him Ms J van den Herik on behalf of the appellant and Mr R Bathurst (of Counsel), by leave on behalf of the respondent, and the Full Bench having heard and determined that the appeal herein should be dismissed, and having determined that reasons for decision will issue at a future date, it is this day, the 1st day of July 2005, ordered that appeal No FBA 4 of 2005 be and is hereby dismissed

By the Full Bench

(Sgd.) P J SHARKEY,
President.

[L.S.]

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**2005 WAIRC 01978**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

| | |
|---|---|
| **PARTIES** | PAUL ERNEST DALLASTON |
| | **APPELLANT** |
| | **-and-** |
| | CANON FOODS |
| | **RESPONDENT** |
| **CORAM** | FULL BENCH |
| | HIS HONOUR THE PRESIDENT P J SHARKEY |
| | SENIOR COMMISSIONER J F GREGOR |
| | COMMISSIONER S WOOD |
| **DATE** | WEDNESDAY, 6 JULY 2005 |
| **FILE NO.** | FBA 50 OF 2004 |
| **CITATION NO.** | 2005 WAIRC 01978 |

| | |
|---|---|
| **CatchWords** | Industrial Law (WA) - appeal against decision of a single Commissioner - unfair dismissal - whether appellant was an employee or independent contractor - jurisdiction of Commission - definition of employer and employee - indicia - authorities and principles - *Industrial Relations Act* (1979) as amended, s7, s23A, s29(1)(b)(i), s49. |
| **Decision** | Appeal dismissed. |
| **Appearances** | |
| **Appellant** | Mr K J Trainer, as agent |
| **Respondent** | Mr C S Fayle, as agent |

*Reasons for Decision*

**THE PRESIDENT:**

**INTRODUCTION**

1 This is an appeal by the above-named appellant, Paul Ernest Dallaston (hereinafter referred to as "Mr Dallaston"), against the decision of the Commission, constituted by a single Commissioner, made on 9 November 2004 in matter No 52 of 2004. The appeal is against the whole of the decision.

2 The decision appealed against is constituted by an order made on 9 November 2004 whereby the Commissioner dismissed Mr Dallaston's application made pursuant to s29(1)(b)(i) of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "*the Act*"), which sought orders pursuant to s23A of *the Act*. The application was dismissed for want of jurisdiction.

3 The appeal is brought pursuant to s49 of *the Act*.

**GROUNDS OF APPEAL**

4 The grounds of appeal are as follows:-

"1. The Commission erred in failing to find that the Appellant was at all times an employee of the Respondent.

2. The Commission failed to give due weight to

a. the degree of control exercised by the Respondent over the manner in which the Appellant performed the duties of the position.

b. the exercised right of the Respondent to direct the Appellant's activities.

c. the Respondent exercised right to direct the Appellant to participate in activities not associated with the ordinary work of the position.

d. the right exercised by the Respondent to unilaterally change the Appellant's terms, conditions and client base

3. The Commission failed to give due weight to the degree to which the Appellant was an integral part of the Respondent's business.

4. The Commission erred in concluding that the Appellant was conducting a business and ought to have concluded that the Appellant was an employee rewarded on a commission only basis.

   a. the Appellant had no goodwill

   b. the Appellant expressed uncertainty as to his status.

   c. the Respondent exercised the right to unilaterally change the client base and terms of engagement.

5. The Commission placed undue emphasis on the "purchase" of clients and the "sale" of the business and

   a. misconstrued the significance of those matters.

   b. misconstrued or misinterpreted (sic) those matters.

6. The Commission failed to give due consideration to the nature of the engagement in the previous employment with the Respondent as a factor in identifying the relationship between the parties.

7. The Commission misdirected itself in the construction and the interpretation of the definition of "employee" in s7 of the Industrial Relations Act 1979."

**BACKGROUND**

5 Evidence in documentary form was tendered at first instance, and the "founder" of the company, the Chief Executive Officer, Managing Director and Chairman of the Board of the respondent (hereinafter referred to as "Canon"), Mr Richard Henry Pace, gave evidence for Canon at first instance, whilst the only oral evidence for Mr Dallaston was given by him on his own account. Mr Gregory Anderson was Canon's Finance / Administrative Manager at the relevant times, Mr Kerry Lehane was the WA Sales Manager, and Ms Tracy Shaw, a Sales Representative, and after that was Assistant Sales Manager, Food Service until she left in 2003.

6 The appellant, Mr Dallaston, filed an application in the Commission claiming that he was, on or about 19 December 2003, harshly, oppressively or unfairly dismissed by Canon. Canon denied the claim and said that Mr Dallaston was not, at any material time, an employee of Canon and the matter was therefore beyond the jurisdiction of the Commission.

7 Whether the person is an employee is a question which arises because of the definition of "employee" and "employer" in s7 of *the Act*.

8 In 1984, Canon was engaged in the manufacture and distribution of food products, including cooked and raw chicken, primarily, in this State, and Mr Dallaston was first employed by Canon, in 1984, as a salesperson, prospecting, selling and delivering products. His sole remuneration then was, as it was later, commission calculated on the value of sales made of products manufactured and/or by Canon. He subsequently left Canon's employ in 1987, but later, on 1 December 1997, after applying through an advertisement in the newspaper, again commenced to work for Canon which continued to be engaged in the manufacture and distribution of food products. Again, he was paid on a commission only basis, generally at the rate of 10% of the value of sales made by him of Canon products, and as agreed.

9 He provided his own motor vehicle, a Ford van, which was to be used for the purposes of delivering Canon's products to its customers. The vehicle had an enclosed back section containing a refrigeration unit, namely a chiller and freezer box. Canon arranged for the signwriting on Mr Dallaston's van and insurance on his vehicle and he was invoiced for the cost. The signwriting was, however, as directed by Canon. It included the name "Canon Foods" and the office and factory telephone numbers of Canon, as well as a slogan referring to Canon. There was no reference to Mr Dallaston on any of the livery of the vehicle and he wore a shirt with Canon's name on it. Mr Dallaston ran the van at his own expense, paid for all of his own insurance and maintenance on the van and provided his own telephone at his own expense. He carried no workers' compensation or public risk insurance and none was carried for him by Canon.

10 Mr Dallaston gave evidence that he was not required originally to obtain an Australian Business Number, but did so as required by the management of Canon in November 1999. He requested and received a Goods and Services Tax (GST) registration number in July 2000 and he said that this was obtained following requests by Canon after the introduction of the GST. He complied with these requests until 1 July 2002, when the ABN number was "deregistered" at his request, because, he said, he was not earning enough income to warrant his continued registration, namely less than $50,000.00.

11 He was required to prospect for customers and to sell and deliver all of Canon's products to customers on a daily basis from his vehicle. That is, he dealt accordingly with products manufactured or "sourced" by Canon and only those products. His deliveries were not confined to his own sales. He had to help out other members of the sales team with deliveries and delivered orders for other sales representatives, too. He was limited to selling Canon's products. No other products were to be sold without the express approval of management. He would also receive orders on his mobile telephone for delivery of products, which came through the office.

12 When he commenced in 1997, Mr Dallaston was assigned to sell goods and to deliver them to customers such as Spotless Services and the Lunch Bar Association. On top of that, he had to prospect for his own customers.

13 Mr Dallaston had a business card which described him as "Area Manager Food Service". That card was provided to him by Canon who were responsible for so describing him. It was also produced and designed by Canon. Additionally, in a document entitled "Canon Foods Profile", he appeared on an organisational chart under the heading "Food Service", as one of three "sales representatives". On this chart it was noted that he reported to Canon's WA Sales Manager.

14 His name appeared in other promotional material tendered in evidence at first instance as a "part of the Canon Food's team".

15 Mr Dallaston gave evidence that, when he commenced in 1997, he was told by Mr Pace that "my status was going to be probably some kind of self-employment, looking towards self-employment, and I was hoping that that would transmit into something I could build on …. for the future". Mr Dallaston also said in evidence that he thought that his status was similar to what he was doing in 1984/85 for Canon, but "I soon realised that it wasn't" (see page 17 of the transcript at first instance (hereinafter referred to as "TFI"). Mr Pace was of the view, as he expressed it in evidence, that Mr Dallaston and some of his colleagues were responsible for building up their own businesses.

16 There was a lot of evidence at first instance about how Mr Dallaston engaged, acquired and serviced new customers. Each day, he would submit his orders to management. Canon gave to Mr Dallaston price sheets listing products and prices together with any change in the prices of the products.

17 Each day, he was given delivery documents prepared by Canon setting out what products were to be delivered to what customers. There was also an expectation that orders for delivery for the following day would be collected in the late afternoon of the previous day. I would add also that, each day, in accordance with Ms Shaw's directions, Mr Dallaston was required to be back at Canon's premises by 3.30pm. However, when loading up, he was required by management to be at Dispatch at 5.00am for daily stock requirements. They were given half an hour to load up. That was the direction to him on and from 23 June 2003. He thought the direction had been given by Mr Dickinson and Mr Pace. He would deliver the goods and the customer would then be given an invoice or delivery docket for the goods by Mr Dallaston, and Mr Dallaston would receive all payments for the goods from the customer. It was his duty to collect the monies. He would keep a running sheet, which was a summary of activity from his calls for each day of each month, detailing the customer's name, invoice number, total cost of goods delivered and how the account was paid. He also recorded cheques and cash received. He said that he was required by Canon to compile an end of month summary of his sales performance. All monies received from customers were given by Mr Dallaston to Canon along with his running sheet. His commission, which was 10% of sales, subject to exceptions which I mention hereinafter, was then subsequently paid to him by Canon, payments being recorded on a pay slip. From time to time, there were adjustments made to his commission by Canon reflecting overpayments made in error.

18 Management required the sales representatives, including Mr Dallaston, to attend at its offices on the Fridays closest to the end of each month, earlier than they did when they finished their runs on a normal day. This was required for the purposes of banking the proceeds of sales.

19 Canon gave to all of the sales representatives who worked for it price lists on Canon letterhead, setting out the prices of their product, as I have observed. Canon would change the prices from time to time and up to date price lists would then be issued to the sales representatives.

20 From time to time, Mr Dallaston secured new customers who were required to complete a customer application. Customers seeking credit from Canon were required to complete a credit application, all of which documents were then given to Canon. Mr Dallaston could not grant credit to customers. That could only be done by management. The pricing, and allocation of customers, was also controlled by Canon. Mr Dallaston gave evidence that, on some occasions, customers were taken from his round and given to other sales personnel by management. He was also required to produce a food service sales report, another document provided to him by Canon, and give that to the respondent. This recorded the client's name and the quantity and regularity of sales to the particular customer. As directed, too, Mr Dallaston was required to inquire of customers what they paid for products from competitors of Canon.

21 In an internal telephone contact document which was described as a "Staff List", Mr Dallaston and another person are described as "Food Service" in the Sales Department and there were three other persons described as "Sales Rep". Other employees were listed in the document. Mr Dallaston said in evidence that he regarded himself as part of the team of sales representatives working for Canon.

22 Customer complaints were entered onto a complaint form which were also given by him to Canon which dealt with complaints in accordance with procedures which Canon itself had laid down.

23 He was also required to attend regular Food Service meetings. These were meetings of those selling food products of Canon, known as sales representatives, convened by Canon's managers and presided over by them. The sales representatives could not choose not to attend. These were held every fortnight at a predetermined time. Some minutes of these minutes contain reference to various directions given by various management personnel to the sales staff. Mr Dallaston gave evidence that, at the regular Food Service meetings, various matters were discussed which included production ideas, sales performance, customer complaints and production and dispatch issues. The minutes bear that out.

24 Mr Dallaston was also expected to attend with some of his colleagues exhibitions run by associations and schools and to set up and man display stands for Canon's products. They were not paid for those attendances, and they were not paid for attendances at sales representatives' meetings. Canon was responsible for the costs associated with these displays as it was for all other publicity and promotions for products. Mr Dallaston made no financial contribution to them and had no responsibility for advertising. That was all done by Canon. He also did, as he was required to do by Canon, hand out Canon's flyers. Further, all gifts to customers such as diaries were produced by Canon and given to customers at no cost to him.

25 $100.00 per month was allowed to Mr Dallaston and other sales representatives for samples to provide to customers. However, the supply of samples had to be requested of management in writing two days ahead of the date required, and the application could be refused or acceded to by management. These requests usually went to Mr Lehane.

26 Sometimes, some significant customers whom he serviced, namely Eurest, Spotless, Lunch Bar Association and also, I should add, Uniting Church Homes, wrote to Mr Dallaston at Canon, but the correspondence was primarily with Canon's management. He was given authority by Canon to visit Spotless premises for keeping a check on what products might be required.

27 He was required from time to time to report on servicing of major customers. Mr Dallaston was required to give other reports, too, on request, to management. He was required to comply with Canon's stock control requirements. He was required by Canon to keep his mobile telephone on at all times in order to respond to delivery requests. Mr Dallaston was directed to and kept his code numbering of products correct.

28 There were also specified requirements for certain customers, advised by Canon to Mr Dallaston, as to the delivery times and specific locations. It was his evidence that he had no control over Canon's customers at all, as evidenced by the fact that Canon from time to time moved customers from Mr Dallaston to other sales personnel.

29 Mr Dallaston bought no stock from Canon and held none personally. All surplus stock at the end of each day had to be returned to Canon, and was returned by Mr Dallaston.

30 From "time to time", as required by management, Mr Dallaston was required to "chase up" customers who had not paid their accounts and, if possible, to collect from them the amount owing there and then. He was also required to follow up "inactive accounts" in the course of his daily work, (ie) to persuade them to buy from Canon again. He was given by Canon lists of both of these classes of customers.

31 Since companies like Eurest required a certain percentage of the price which they paid to be rebated, the amount of the rebate would be deducted from Mr Dallaston's commission each month. This was the senior management's decision. Mr Dallaston said that he was told this but it was not discussed and he had no involvement in the decision to give Eurest a 10% rebate. The effect was that his commission was unilaterally reduced by management from 10% to 6.75%.

32 There is also the clear example of the unilateral reduction of commission for deliveries by Mr Dallaston to Jester Foods (see pages 59-60 (TFI)). The arrangement with Jester Foods giving rise to this reduction, Mr Dallaston believed, was entered into by senior management, namely Mr Dickinson.

33 From time to time, customers were taken from or allocated to sales representatives by Canon. Some customers were given to sales representatives who were not equipped to deliver the products. For delivery purposes only and not for sales, management decided that the "equipped" sales representatives would be paid a commission of 7.5% for deliveries. They were expressly advised of this decision at a sales meeting and there was no discussion. However, again, as unilaterally decided by Canon, when Mr Dallaston did deliveries for a sales representative called Mariana to customers on her list, he was paid as determined by Canon, 8% on the deliveries.

34 It was probably before 2001 that Canon produced a list of its staff in a Canon Foods booklet called "Canon Foods Profile" in which Mr Dallaston's name appeared under "Sales Section – Food Service – Sales Representative" (exhibit A18). Mr Dallaston's name also appeared as "part of Canon Food's Team" in other promotional material tendered in evidence at first instance,

35 Some time in 2002, Mr Dallaston attempted to "buy" clients from one of the other sales representatives who was leaving Canon. This person, Mr Geoffrey Cook, wanted to "sell" his round, or list of customers. Mr Dallaston wanted to purchase the clients from Mr Cook. As Mr Dallaston said "we were told we could sell (the round) as a financial structure rather than a commodity structure". Mr Cook put on another driver who was going to purchase the round from him, but he allegedly could not keep up with the payments. However, Mr Cook received permission from management to sell the customers to another representative, Mr Grant Raynel and Mr Dallaston. He did so, Mr Dallaston paying $6,000.00 for his "share" of the customers listed on Mr Cook's round. This was because they had been told by Mr Pace many, many times, Mr Dallaston said, that they had their own business. However, when they asked Mr Pace what the businesses were, he was unable to tell them that they had a specific thing to sell. Then Mr Pace also told them, according to Mr Dallaston, that they could sell the "financial aspect", (ie) "the income that we gained off the deliveries, the commission". His evidence was also "We could sell that to people if we wanted to. And that is what I'm … referring to when I say "sell"". What they all, (ie) the sales representatives, did was to purchase the income and not the customers, he said.

36 Mr Pace's evidence was that he saw Mr Dallaston as having ownership in the delivery rights to the particular customers, for which he was paid a commission payment. However, on his evidence, all of the customers were customers of Canon and not Mr Dallaston. There was no doubt that customers became Canon's customers because Canon decided that they should be. In other words, no such decision could be made by Mr Dallaston and there was no evidence to that effect. No other sales staff decided that either.

37 Mr Dallaston was not provided with workers' compensation or other insurance cover, and he was responsible for his own taxation arrangements and for paying tax. It was not deducted by Canon from his commission. Mr Dallaston was entitled to no paid leave, but he could not withdraw from work without Canon's permission, on his evidence. Mr Pace, however, said that he could without consulting Canon.

38 Having, as I have said, purchased in 2003, in conjunction with another food service colleague, half of Mr Cook's round for $6,000.00, Mr Dallaston placed an advertisement in "The West Australian" newspaper to sell his "business" for $50,000.00 in about October 2003, not long before the termination of his contract with Canon. When he advertised the business, he described it as a "Food Service Sales and Delivery" business. His evidence was that he sold it "on that basis of goodwill". He said that he was selling his vehicle and "the goodwill of the income from … the customers' activities". The core of the business was described by him as "commission based job or sales activity" and he was selling the goodwill from the income to be derived with the vehicle as an additional component. It would seem that he was not successful in selling the business.

39 Mr Dallaston admitted that Canon management spoke to him about his personal hygiene on one occasion. That was done by both Mr Dallaston and Ms Shaw. He was once also spoken to by management because his van was dirty.

40 On 19 December 2003 he received a telephone call in the early afternoon from Mr Dickinson, who was a Director of Canon and a manager. He was asked to see Mr Dickinson in the office when he returned. He saw him in Canon's car park, where Mr Dickinson gave him a letter dated 18 December 2003. This letter referred to a "restructuring of the respondent's operations", and, as a consequence, Canon was no longer able to engage Mr Dallaston's services "as a contractor with Canon Foods Services." The arrangement between Canon and himself was terminated effectively as at that day. Mr Dallaston gave evidence that he had no prior warning that the arrangement between himself and Canon was in jeopardy. That evidence was not denied.

41 Mr Dallaston said that he presumed that his customer lists were given to other people to look after but did not know that for certain. He was paid no monies in lieu of notice. He said that he never believed that he was a contractor but that he was told that he was.

42 Mr Pace's evidence was that Mr Dallaston, in effect conducted the delivery business through the structure provided by Canon, and that he had property rights in relation to the product delivery component of the business. Mr Pace said that, since 1987, Mr Dallaston still owed $8,000.00 - $ 9,000.00 for stock purchased by him from Canon.

43 Mr Pace said that he did not control or tell Mr Dallaston where to go to deliver products, and that that was up to Mr Dallaston in accordance with his customer lists. Mr Pace said that Mr Dallaston was responsible for selling and delivering products that he sold, but Mr Pace agreed that Canon provided much of the infrastructure in terms of management systems etc which were used by Mr Dallaston and others in a similar position to conduct their affairs. Mr Pace said that, when he started in 1997, Mr Dallaston "gained ownership to be able to deliver product to that client, to the clients he got given initially and any clients … he developed …."

44 Mr Pace did accept that Mr Dallaston could be regarded as integrated into Canon's business but said that was no different from the cases where owner/drivers had provided services to businesses in similar circumstances. Mr Pace agreed that, at certain times, if Mr Pace took Mr Dallaston in to see a customer, he would "be the Area Manager". That is of course what he was described as on the business card provided to him by Canon. Mr Pace gave evidence that if customers did not make payments to Canon, then Mr Dallaston would not be paid his commission, and that he had an interest in pursuing people on the debtors' list.

45 Mr Pace agreed that Mr Dallaston had two primary functions; one, to prospect for new customers and two, to deliver any orders taken by him or generated through the company, to customers.

46 Mr Pace said that the role of the sales manager was to be responsible for daily sales activity in Western Australia; and the only real requirement imposed on Mr Dallaston was how he presented to customers and the production of sales reports, which was for the purpose of developing Mr Dallaston's customer base.

47 Mr Pace's evidence, too, was that the relationship between Canon and Mr Dallaston was no different to the relationship which Canon had with other contractors who provided transport and refrigeration services to Canon.

48 When the agreement between them was terminated, the amount Mr Dallaston paid for Mr Cook's round of $6,000.00 was not reimbursed (see page 130 (TFI)). No monies had been paid to Canon by Mr Dallaston when he commenced in 1997, or at any

time. There is no evidence that any list of customers was given to Mr Dallaston to take with him when the contract was terminated, nor was there any evidence that he took such a list with him.

**FINDINGS OF COMMISSIONER AT FIRST INSTANCE**

49 The Commissioner at first instance found as follows:-

(a) That within the meaning of s7 of *the Act* he held that even though paragraph (d) of s7 and the definition of "employee" means one applies the common law tests and if the person is found to be an employee on this basis then the ownership of a vehicle etc is to be discarded. This construction of the above-mentioned paragraph is not inconsistent with the structure of the definition as a whole and does not lead to any absurdity or repugnance with any other provision of *the Act*.

(b) That Mr Dallaston was not to be characterised as an employee, and that there was no jurisdiction in the Commission because the matter was not an industrial matter and he was not an employee because:-

(i) He was responsible for his own taxation arrangements.

(ii) Canon did not provide workers' compensation or any other insurance cover for him.

(iii) He purchased, for valuable consideration, part of the round of another person, who had a contractual relationship with Canon.

(iv) He offered his round for sale himself on another occasion for the sum of $50,000.00 or thereabouts, in late 2003.

(v) He would have sold the business if he had found a buyer willing and able to purchase it.

(vi) He was conducting a business and he saw it as such.

(vii) These factors were of great weight and were completely irreconcilable with any notion of employment in the accepted sense. Of themselves these factors took Mr Dallaston outside of the definition of "employee" for the purposes of paragraph (d), s7, of the definition of "employee", as it should be interpreted in *the Act*.

(viii) He owned and operated his vehicle at his own expense and paid for the livery on it.

(ix) There are indicia which point in the other direction towards employment, and these include the obvious degree of integration of Mr Dallaston into Canon's business, but this factor alone is not at all conclusive. The representation by Canon of the status of Mr Dallaston from his business card as an "Area Manager", Canon's profile document portrayed Mr Dallaston as "part and parcel" of Canon's business, and the fact that he was paid by commission was not determinative: (see *Commissioner of Taxation of the Commonwealth of Australia v Barrett and Others* [1973] 129 CLR 395).

(x) In terms of the actual reservation of the right to control the manner of the performance of Mr Dallaston's daily tasks no such right was in existence. It was up to him how he serviced the customers and in what order he performed his "round". It was ultimately up to him the hours which he worked. Although there was a requirement that he load the day's deliveries at a certain time in the morning, again, in terms of running a business such as Canon's, that was not surprising as there would need to be a degree of coordination between the manufacture, loading and delivery of food products to customers as there was for pre-mixed concrete in *Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch v Readymix Group (WA) and Others* (1981) 61 WAIG 1705 (IAC).

(xi) As a matter of fact and law he could not be characterised as an employee.

**ISSUES AND CONCLUSIONS**

**Not a Discretionary Decision**

50 I should observe that the facts in this matter are in little, if any, dispute as would be clear from my consideration of the evidence and the background in fact (supra).

51 This application was dismissed for want of jurisdiction because the Commissioner at first instance found that the appellant and respondent in this appeal (the applicant and respondent at first instance) were not "employer" and "employee" as defined in *the Act*. Thus, the Commissioner found that he had no jurisdiction to hear and determine the matter. If the parties were not employer and employee respectively, then the Commissioner was correct in what he found.

52 The decision appealed against was not a discretionary decision as defined by the High Court in *Norbis v Norbis* [1986] 161 CLR 513 and *Coal and Allied Operations Pty Ltd v AIRC and Others* [2000] 203 CLR 194. It was a finding that there was no jurisdiction because there was no contract of service and that was a finding of fact.

**Definition of Employer and Employee**

53 An "employer" is defined in s7 of *the Act* as follows:-

> **"employer"** includes —
>
> (a) persons, firms, companies and corporations; and
>
> (b) the Crown and any Minister of the Crown, or any public authority,
>
> employing one or more employees and also includes a labour hire agency or group training organisation that arranges for an employee (being a person who is a party to a contract of service with the agency or organisation) to do work for another person, even though the employee is working for the other person under an arrangement between the agency or organisation and the other person;"

54 Of course, whether Canon Foods was an employer, at all material times, depends also on whether, at all material times, Mr Dallaston was an employee.

55 The most relevant definitions of "employee" are definitions (a) and (d) in s7 of *the Act* and read as follows:-

> **"employee"** means —
>
> (a) any person employed by an employer to do work for hire or reward including an apprentice or trainee;
>
> …

(d) any person who is the lessee of any tools or other implements of production or of any vehicle used in the delivery of goods or who is the owner, whether wholly or partly, of any vehicle used in the transport of goods or passengers if he is in all other respects an employee,"

**Labelling**

56 It is to be noted that there is no written contract or evidence of the contract between the parties. In particular, there is no written provision where the parties express the nature of their relationship as employer and employee or at all. There is no labelling or attempted labelling in any written contract or any document evidencing any contract. However, there are sparse items of oral evidence as to what the contract was. There is the business card given to Mr Dallaston and there is evidence of the unilateral labelling of the contract by Canon, acted upon in the attempted selling of goodwill and the vehicle by Mr Dallaston. However, the absence of any clear labelling in written form distinguishes these facts from those in *Personnel Contracting Pty Ltd t/a Tricord Personnel v CFMEU* (2004) 85 WAIG 5 (IAC).

**Indicia Identified**

57 I now deal with a number of matters of facts which can be considered indicia:-

(a) Mr Dallaston worked for Canon selling and delivering its products.

(b) His remuneration was not by way of wage or salary, but by a percentage commission fixed by Canon on his sales.

(c) (i) He contributed his own van with a freezer unit on the back which he used and which was a contribution of a valuable asset.

(ii) He also used his own telephone, the expense of which he bore himself.

(iii) He also insured and ran his van at his own expense.

(iv) He contributed no other tools or equipment.

(v) He paid his own GST and his own PAYG and did not pay PAYE tax.

(vi) He maintained an ABN until his income fell below $50,000.00 he said. Implicit in that was an assertion that he did not have to maintain an ABN once his income fell below $50,000.00.

(vii) He purchased another sales list from another worker for $6,000.00 and purchased as it were a franchise when he commenced work for Canon, the second time around.

(viii) Mr Dallaston also in October 2003, a few weeks before the termination of his employment, advertised the sale of his sales list and vehicle, (ie) his vehicle and goodwill.

(d) It was not in dispute that Canon exercised actual control and the right to control Mr Dallaston in the following activities and aspects of his employment:-

(ii) The product sold and/or delivered by Mr Dallaston was not confined to his own sales or his own customers.

(iii) He sold and delivered only Canon's product or products owned by Canon, and was not permitted to sell any others without Canon's permission.

(iv) He owned no stock and purchased no stock from Canon after he commenced to work for Canon in 1997.

(v) He was, at all times, directed what products other than Canon's he could sell.

(vi) A pricing of products was done only by Canon.

(vii) Commissions payable to him were determined only by Canon and controlled by Canon.

(viii) He collected all monies due for goods sold and delivered to customers and paid the monies to Canon because he was required to.

(ix) Provision of samples to customers were supplied only by Canon to him and were made available to customers only as directed by Canon.

(x) He was given a list of deliveries to be done each day but how and when they were to be made on the day were matters for him.

(xi) All complaints by customers were dealt with and determined by Canon's management according to its own prescribed procedures.

(xii) He was held out, both on the business card provided to him by Canon and otherwise, as the Area Manager and a sales representative of Canon.

(xiii) He was required to attend sales meetings with other sales staff without any remuneration additional to his commission.

(xiv) His starting and finishing times were as directed by Canon.

(xv) He was required to and directed to provide reports and running sheets noting his sales and activities on forms provided by Canon.

(xvi) He was given directions about the use of stock codes.

(xvii) He was required to serve the customers whom Canon directed him to serve. Thus, his own customers could be and were taken away from him and he was assigned new customers purely upon the decision of Canon. (This was subject to his right to purchase customers to add to his round).

(xviii) He was required to seek Canon's approval in relation to who should be his customers.

(xix) Canon spoke to him and purported to counsel him about his appearance. He was directed about his personal hygiene and the cleanliness of his van by Canon.

(xx) Canon exercised a right to allow him to be absent or not.

(xxi) Lists of customers were obviously Canon's property and not his.

(e) At all material times, Mr Dallaston was an integral part of Canon's organisation because:-

(i) He was ordered and directed in every material facet of his work by or on behalf of Canon.

(ii) He was provided by Canon with run sheets which he had to complete daily and return to Canon in the prescribed form.

(iii) Canon prescribed the system for the completion of the written orders from customers.

(iv) Canon provided the invoices to customers which he used.

(v) Canon directed him and supervised him in the pursuit of Canon's unpaid accounts.

(vi) All stationery was supplied by Canon to him and he used none of his own.

(vii) All billing and account recording was done by Canon as part of its system and Mr Dallaston's part in it was to perform in accordance with the system.

(viii) Mr Dallaston used a business card provided for and to him by Canon at its expense which described him as "Area Manager".

(ix) All customer related correspondence to him was addressed to him at Canon Foods.

(x) At all material times, Canon held him out to be a member of its staff.

(xi) His authority to visit customers came only from Canon.

(xii) I have already referred to management handling complaints by customers, which was a fact.

(xiii) He was required to attend sales or staff meetings without additional payment, as I have observed above.

(xiv) He was required to set up and attend trade exhibitions with no extra remuneration.

(xv) He investigated the purchasing practices of existing clients and reported these matters to Canon. This included investigation of customers who had ceased to be active customers.

(xvi) All advertising and promotion of products was as directed and at the initiative of Canon.

(xvii) He collected products for Canon.

(xviii) The sign writing on his van was required, approved and paid for by Canon.

(xix) All customers prospected by Mr Dallaston or otherwise serviced by him were never his but were at all times Canon's.

(xx) He collected debts owing to Canon by customers.

(xxi) All monies collected by him from customers were handed to and accounted for to Canon by Mr Dallaston.

(f) (i) At no time did he operate a business because he believed that the nature of the engagement was the same as in 1984, when he had previously worked for Canon, when for a period he was employed as a salesperson by Canon.

(ii) There was no franchise or other contract in writing which could any way evidence a contract for services or of service between the parties.

(iii) At the direction of Canon, Mr Dallaston obtained but ceased to maintain an ABN.

(iv) The only tools or equipment provided by him were a refrigerated van and telephone.

(v) He used stationery designed and provided by Canon.

(vi) He had no shares or any financial interest in Canon.

(vii) He derived no profit from sales of goods. His only remuneration was his commission.

(viii) Whilst the job included soliciting and acquiring new customers, the ultimate decision as to who would be the customers of Canon was Canon's.

(ix) He did not own, buy or hold any stock. He delivered it to the customers to whom he or others sold as directed by Canon.

(x) The customers were never Mr Dallaston's, but were at all times Canon's.

(xi) At all times who his own customers were was a matter for Canon which could remove them from his list of customers and assign him others and did so.

(xii) There was no goodwill at the end of the engagement which he could take away.

(xiii) He worked exclusively for Canon.

(xiv) He collected monies from customers for sales and accounted to Canon for it daily.

(xv) He was required to keep his van clean for the transportation of Canon's goods.

(xvi) If a product were defective, Canon bore the cost.

(xvii) There is a relevant factor and that is the economic dependency of Mr Dallaston on Canon at all material times.

(xviii) His earnings were low by any standard.

**Authorities and Principles**

58 There are a number of relevant authorities. The binding authorities are *Hollis v Vabu Pty Ltd* [2001] 207 CLR 21 and *Stevens and Gray v Brodribb Sawmilling Co Pty Ltd* [1985-1986] 160 CLR 16. There are also *Personnel Contracting Pty Ltd t/a Tricord Personnel v CFMEU* (IAC) (op cit) and *United Construction Pty Ltd v Birighitti* (2003) 83 WAIG 434 (IAC); see too *Transport Workers Union of Australia Industrial Union of Workers v Readymix Group (WA) and Others* (IAC) (op cit).

59 In relation to the provision of vehicles by putative employees, there are a number of authorities. These include *Hollis v Vabu Pty Ltd* (op cit), *Australian Air Express Pty Ltd v Langford* (2005) NSWCA 96 (unreported) and *Humberstone v Northern Timber Mills* [1949] 79 CLR 389.

60 In connection with those authorities, I should observe that, generally speaking, they apply a principle that an owner/driver can accept a degree of control and supervision necessary for the efficient and profitable conduct of the business he is running on his own account as an independent contractor. In *Hollis v Vabu Pty Ltd* (op cit), the majority said this at pages 41-42 (paragraph 47):-

> "In classifying the bicycle couriers as independent contractors, the Court of Appeal fell into error in making too much of the circumstances that the bicycle couriers owned their own bicycles, bore the expenses of running them and supplied many of their own accessories. Viewed as a practical matter, the bicycle couriers were not running their own business or enterprise, nor did they have independence in the conduct of their operations. A different conclusion might, for example, be appropriate where the investment in capital equipment was more significant, and greater skill and training were required to operate it. The case does not deal with situations of that character. The

> concern here is with the bicycle couriers engaged on Vabu's business. A consideration of the nature of their engagement, as evidenced by the documents to which reference has been made and by the work practices imposed by Vabu, indicates that they were employees."

61 In *Humberstone v Northern Timber Mills* (op cit), applied in *Australian Air Express Pty Ltd v Langford* (unreported) (op cit), Dixon J said at pages 404-405:-

> "The question is not whether in practice the work was in fact done subject to a direction and control exercised by an actual supervision or whether an actual supervision was possible but whether ultimate authority over the man in the performance of his work resided in the employer so that he was subject to the latter's order and directions. In the present case the contract by the deceased was to provide not merely his own labour but the use of heavy mechanical transport, driven by power, which he maintained and fuelled for the purpose. The most important part of the work to be performed by his own labour consisted in the operation of his own motor truck and the essential part of the service for which the respondents contracted was the transportation of their goods by the mechanical means he thus supplied. The essence of a contract of service is the supply of the work and skill of a man. But the emphasis in the case of the present contract is upon mechanical traction. This was to be done by his own property in his own possession and control. There is no ground for imputing to the parties a common intention that in all the management and control of his own vehicle, in all the ways in which he used it for the purpose of carrying their goods, he should be subject to the commands of the respondents.

62 Gray J in *Re Porter; Re Transport Workers Union of Australia* 34 IR 179 and *Sammartino v Mayne Nickless t/a Wards Skyroad* (2000) 98 IR 168 at 185-186 and 192, 197 and 199 expressed the view that this test was not applicable in modern times.

63 The overall test is that pronounced in the joint judgment of the majority, Gleeson CJ, Guadron, Gummow, Kirby and Hayne JJ, in *Hollis v Vabu Pty Ltd* (op cit) where Their Honours cited and applied the exposition of the relevant test expressed by Mason J in *Stevens and Gray v Brodribb Sawmilling Co Pty Ltd* (op cit) at page 29. His Honour said there:-

> "… 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. ([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."

64 As a matter of fact, there is no written contract or evidence of a contract in existence to label the contract between Mr Dallaston and Canon (see the clear distinction from what was the case in *TNT Worldwide Express NZ Ltd v Cunningham* (1993) 3 NZLR 681 at 692).

**The Test – Indicia For**

65 If one looks at the totality of the circumstances, for the reasons which I have expressed above, and applying the tests laid down in *Stevens and Gray v Brodribb Sawmilling Co Pty Ltd* (op cit) and *Hollis v Vabu Pty Ltd* (op cit), the following factors apply to suggest that an employer/employee relationship or contract of service existed:-

(a) Mr Dallaston was not providing skilled labour. He drove a van and sold goods to shops.

(b) The work which he did did not require special qualifications.

(c) He was integrated, for the reasons which I have expressed above, in the daily activities and the organisation of Canon.

(d) As a salesman and delivery van driver he was presented to the public and customers and prospective customers of Canon as an emanation of Canon.

(e) Such persons were encouraged to identify him as "part of Canon's own staff".

(f) His finances were superintended and paid by Canon.

(g) There was no scope for him to bargain the amount of his remuneration by commission which was unilaterally fixed or varied by Canon.

(h) There was limited, if any, scope for the pursuit of any real business enterprise on his own account.

(i) There was actual daily control of who his customers were, what reports he made, and in all of the other elements of control to which I have referred above.

(All of the individual criteria to which I have just referred in (a) to (i) were present in *Hollis v Vabu Pty Ltd* (op cit)).

66 In addition, there were the strong indicia of control and integration referred to above in paragraph 57(d).

**Indicia Against**

67 However, as against that, unlike the case in *Hollis v Vabu Pty Ltd* (op cit), Mr Dallaston provided equipment, namely a van with a freezer unit which involved a comparatively large capital outlay by him. It was also a van which was not readily usable privately or for other work. It is therefore thoroughly distinguishable from a courier's push bicycle, which was the equipment provided by the employees in *Hollis v Vabu Pty Ltd* (op cit).

68 His work and his equipment, for the reasons which I have expressed above, were integrated in Canon's organisation. The integration and control, which was evidence, too, of integration, were not, however, determinative. In addition, he paid a further fee of $6,000.00 to acquire more customers, the goodwill of a sales round, from another salesperson who had a contract with Canon. That was very important. In addition, he attempted, before his contract was terminated, to sell his vehicle and the goodwill of a purported business for $50,000.00, advertising it for sale. There is no evidence that any sale was achieved but he would have sold it had a buyer who was ready and able to buy came forward. He was clearly conducting a business and saw it as such. He was not insured by Canon for workers' compensation or any other insurance.

69 That fact is very important because, by the advertising for sale of the goodwill of a purported business and the sale of the vehicle which was its major asset apart from goodwill, Mr Dallaston plainly considered that the goodwill of his sales delivery round was his to sell. That was entirely incompatible with an employment relationship because, in his own mind and as he expressed it, he was conducting a business of his own. That, as I have already observed, is further borne out by his outlaying $6,000.00 to acquire more customers by way of goodwill from Mr Cook.

70 I have already referred to the considerable scope for the actual exercise of control and the actual detailed daily control of how Mr Dallaston did his work when he did it, who his customers were etc. However, even having regard to that, the contribution of the van as capital, the purchase of the customers, the advertising for sale of his van and goodwill as his business, are significant counterweights in the consideration of the totality of the facts and circumstances in this matter. It should be

observed that there was no right to control the actual performance, notwithstanding the substantial integration and actual control exercised over Mr Dallaston in other matters.

71 Further, he paid tax on a PAYG basis, not a PAYE basis, and for some time maintained an ABN until his income fell below $50,000.00. I understood that that meant, according to him, that he was not required to have an ABN anymore. He also provided for and paid for his own telephone and insurance. He also paid GST and his own tax (it not being deducted from his commission). He was not given paid sick leave or paid holiday pay, but those criteria are somewhat neutral because holiday pay or sick leave may not have been paid or afforded by the employer because either the employer or both parties incorrectly thought that a relationship was not an employment relationship. That he was not paid commission was not determinative on the authority of *Commissioner of Taxation of the Commonwealth of Australia v Barrett and Others* (op cit).

72 In my opinion, the totality of the circumstances, as I have analysed them, lead to the clear conclusion that Mr Dallaston was, at all material times, notwithstanding the substantial evidence of control and integration, an independent contractor. His contribution of a valuable capital asset in the van and freezer unit, his purchase of a share of a list of customers for goodwill from Mr Cook, his advertised sale of the goodwill of a "business", along with his vehicle, bear that out. Further, *Humberstone v Northern Timber Mills* (op cit) and the other truck cases support such a conclusion. Without that, however, all of the other factors, as a totality of circumstances, for the reasons which I have expressed, lead to the correct conclusion that the contract was one for service, not of services.

73 The approach adopted to definition (d) to the word "employee" in *Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch v Readymix Group (WA) and Others* (IAC) (op cit) is an agreed approach by Wallace and Brinsden JJ. Wallace and Brinsden JJ agreed that the correct approach to definition (d), which was then present in *the Act* in no materially different form from the form of the definition now, was to determine first whether the putative employee was an employee, within the general part of the definition of "employee" in accordance with the accepted common law tests. Their Honours held that the terms of definition (d) did not take that person out of the category of an employee simply because that person leased or owned a vehicle used in the transport of goods or passengers within the meaning of definition (d). Brinsden J said at page 1708 as follows:-

> "The question being posed however, solely in relation to paragraph (d) I must now turn my attention more closely to that sub paragraph. The relevant portion is:
>
> > Any person… who is the owner, whether wholly [sic] or partly, of any vehicle used in the transport of goods or passengers if he is in all other respects an employee.
>
> I accept the contention of counsel for the appellant that the only owner spoken of is an owner of a vehicle who uses that vehicle in the execution of the contract with the employer. In this regard I differ from the view expressed by the President. Without implying that the vehicle must be one used in the contract with the employer the subsection would be in a form where ownership *per se* of a vehicle is a relevant factor which I think is not a very sensible conclusion.
>
> The subsection speaks of a person who is "in all other respects an employee". It has been argued that cannot possibly mean all the relevant *indicia* should point, and only point, to the person concerned being an employee, for otherwise if there were 10 relevant *indicia* (other than ownership of the vehicle) of which nine pointed to a contract of service then the subsection would not apply because of the one *indicia* which pointed against a contract of service. But in my view the weighing up of the pros and cons as expressed by Bray C. J. takes place when one is considering whether an employee comes within the first part of the definition, namely whether he is a person employed by an employer to do work for hire or reward. Subsection (d) makes for a special class of person, being a person who is in all other respects, that is other respects other than being the owner of the vehicle concerned, an employee, and in which case ownership is disregarded. I think the subsection has no application where the circumstances are that one or more of the *indicia* point to a contract for services for in that case it is not possible to say that the person concerned is "in all other respects an employee".

74 I respectfully agree with His Honour's opinion. Put another way, definition (d) prevents a person who meets the common law tests of whether she/he is an "employee" being declared not to be an employee because she/he owns or leases a vehicle, whether motor or not, for the purposes of transporting goods or passengers. The possession of the vehicle does not decide the issue. What is quite clear, as Brinsden J said, is that definition (d) has no application where the circumstances are that one or more of the indicia point to a contract for services rather than a contract of service. Kennedy J took a different view, but the view of Brinsden J and Wallace J at page 1706 was sufficiently similar for them to constitute a majority, the ratio of whose judgments, as I have identified them above, I would apply.

75 Clearly, as Brinsden J expressed it, as a matter of common law, Mr Dallaston could not be determined to be an employee and therefore, definition (d) could not negative such a finding.

76 It remains to me to consider whether definition (d) of the definition of "employee" in s7 of *the Act* alters that view. I think that it is clear that there are factors outside the mere ownership of a van to which I have referred above which clearly lead to the conclusion that Mr Dallaston was not an "employee", notwithstanding that he owned a van used in the transport of goods for Canon. That is because he was not "in all other respects" an employee given that he was carrying on a business as an independent contractor, pursuant to a contract for services, because of those "respects" which preponderantly lead to the conclusion that Mr Dallaston was an independent contractor.

77 As a result, it was open to the Commissioner at first instance and correct of him to find as he did in paragraphs 32 to 35 of the reasons for decision and, in particular:-

(a) That the offer and acceptance of the purchase of part of Mr Cook's round and the attempted sale of Mr Dallaston's "business" were of great weight and completely irreconcilable with any notion of employment in the accepted sense.

(b) That, of themselves, in my opinion, these factors take the application outside the definition of "employee" for the purposes of paragraph (d) of the definition, as it should be interpreted, and applying the common law test to definition (a).

(c) That, whilst there was an obvious degree of integration of Mr Dallaston into Canon's business, this factor alone was not at all conclusive, and not at all conclusive having regard to the other factors.

(d) That the representation by Canon about the status of Mr Dallaston from his own business card as an "Area Manager" and Canon's profile document portrayed Mr Dallaston as part and parcel of Canon's business.

(e) That, as to control, this was not determinative either because, in an industry such as food manufacturing and distribution, there are many requirements imposed relating to a number of matters, including health and safety, which mean that all persons involved, whether employees or independent contractors, have to observe them.

(f) That there was no actual reservation of the right to control the manner of performance of Mr Dallaston's daily tasks and, indeed, no such right was in existence.

(g) That, in order to run Canon's business, there was a degree of coordination between the manufacturing, loading and delivering of food products required for it, as there was for the premixed concrete in *Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch v Readymix Group (WA) and Others* (IAC) (op cit).

(h) That therefore, within definition (d) of the word "employee", Mr Dallaston was not to be characterised in fact or in law as an employee.

78 It is trite to observe, therefore, that in order to find jurisdiction the Commissioner had to find that, at all material times, there was a contract of service between Mr Dallaston and Canon. That is that within the meaning of definition (a) of "employee" in *the Act* (s7), he was employed by an employer to do work for hire or reward. He certainly did work for hire or reward. Further, within the meaning of definition (d) of "employee", he was, at all material times, the owner of a vehicle used in the transport of goods. Thus, if he was in all other respects an employee, his ownership of the van is and was no impediment to a finding that he was an employee within definition (d) of the definition of "employee". However, the provision is quite clear that he must be an employee in "all other respects" before his ownership of the van ceases to be a bar to a finding that he was an employee, at all material times.

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

**SENIOR COMMISSIONER J F GREGOR:**

80 This is an appeal against the whole of the decision of the Commission, constituted by a single Commissioner, made on 9 November 2004 in application No 42 of 2004. His Honour the President has set out the background in detail to which I have nothing to add.

81 The Commission at first instance dismissed the application because once the common law tests were applied the Appellant herein could not be characterized as an employee. Therefore there was no jurisdiction because the matter was not an industrial matter.

82 The learned Commissioner reached the conclusion he did after a detailed examination of the facts from which he made detailed findings. In his Reasons His Honour the President has analysed the authorities and applied them to the facts which he categorized as indicia although there were strong indications of control in the relationship, these were over whelmed by fact that the Appellant bought and/or sold his round. This was not able to be reconciled with the notion of an employment relationship.

83 Vehicle ownership of course is not fatal to the finding that a person is an employee. The person must be an employee in all other respects as required by s7(d) of the Act. The Appellant was in his own business, as it were, and for this reason he was not an employee under the Act. The Commission at first instance was correct so to find and I would dismiss the appeal.

**COMMISSIONER S WOOD:**

84 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:**

85 For those reasons, the appeal is dismissed.

Order accordingly

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**2005 WAIRC 01982**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

| | |
|---|---|
| **PARTIES** | PAUL ERNEST DALLASTON<br>**APPELLANT**<br>**-and-**<br>CANON FOODS<br>**RESPONDENT** |
| **CORAM** | FULL BENCH<br>HIS HONOUR THE PRESIDENT P J SHARKEY<br>SENIOR COMMISSIONER J F GREGOR<br>COMMISSIONER S WOOD |
| **DATE** | WEDNESDAY, 6 JULY 2005 |
| **FILE NO/S** | FBA 50 OF 2004 |
| **CITATION NO.** | 2005 WAIRC 01982 |

| | |
|---|---|
| **Decision** | Appeal dismissed |
| **Appearance** | |
| **Appellant** | Mr K J Trainer, as agent |
| **Respondent** | Mr C S Fayle, as agent |

*Order*

This matter having come on for hearing before the Full Bench on the 9th day of May 2005, and having heard Mr K J Trainer, as agent on behalf of the appellant, and Mr C S Fayle, as agent on behalf of the respondent, and the Full Bench having heard and determined the matter, and reasons for decision having been delivered on the 6th day of July 2005, it is this day, the 6th day of July 2005, ordered that appeal No FBA 50 of 2004 be and is hereby dismissed.

By the Full Bench

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

**2005 WAIRC 00454**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

| | |
|---|---|
| **PARTIES** | DIANA ELIZABETH DOWNS-STONEY |
| | **APPELLANT** |
| | **-and-** |
| | DERBARL YERRIGAN HEALTH SERVICE, VANESSA DAVIES, CEO DERBARL YERRIGAN HEALTH SERVICE, AND WALTER MCGUIRE, PRESIDENT OF THE BOARD OF DERBARL YERRIGAN HEALTH SERVICE |
| | **RESPONDENTS** |
| **CORAM** | FULL BENCH |
| | HIS HONOUR THE PRESIDENT P J SHARKEY |
| | COMMISSIONER P E SCOTT |
| | COMMISSIONER S J KENNER |
| **DATE** | MONDAY, 28 FEBRUARY 2005 |
| **FILE NO.** | FBA 29 OF 2004, FBA 47 OF 2004 |
| **CITATION NO.** | 2005 WAIRC 00454 |

| | |
|---|---|
| **CatchWords** | Industrial Law (WA) – Appeal against decision of a single Commissioner – Contractual benefits – Failure to file and serve appeal books within prescribed time – Non-compliance with *Industrial Relations Commission Regulations* 1985 (as amended) – Lack of merit alleged – Applications to strike out or dismiss appeals dismissed – *Industrial Relations Act* 1979 (as amended), s6(c), s7, s26(1)(a) and (c), s27, s27(1)(a), s27(1)(a)(i), s27(1)(v), s29(1)(b)(i) and (ii), s29AA, s49, s49(2a), s49(3) - *Industrial Relations Commission Regulations* 1985 (as amended), regulation 29(2), (3) and (10), regulation 89(1), regulation 93 |
| **Decision** | Applications dismissed and directions |
| **Appearances** | |
| **Appellant** | Mr A D Lucev (of Counsel), by leave |
| **Respondents** | Mr G T Stubbs (of Counsel), by leave |

*Reasons for Decision*

**THE PRESIDENT, COMMISSIONER P E SCOTT AND COMMISSIONER S J KENNER:**

## INTRODUCTION

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

2 These matters relate to two appeals by the above-named appellant, instituted under s49 of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "*the Act*"). There were two applications before the Commission to which we refer hereinafter and they were heard together by consent.

### Appeal No FBA 29 of 2004

3 A notice of appeal was filed by the above-named appellant, Diana Elizabeth Downs-Stoney, in which she appealed against the decision of the Commission, constituted by a single Commissioner, given on 23 July 2004 in application No 37 of 2003. In the appeal, she complained about the Commissioner's order dismissing the claim, and further, the finding that she was not entitled to TOIL when working as director of client services.

4 The respondent, Derbarl Yerrigan Health Service, which was, at all material times, her employer, by application filed on 2 December 2004, sought a dismissal of the appeal or that the Commission set aside the appeal pursuant to regulation 93 of the *Industrial Relations Commission Regulations* 1985 (as amended) (hereinafter referred to as "*the Regulations*") because, to summarise it, there had been no compliance with regulation 29(2), (3) or (10).

### Appeal No FBA 47 of 2004

5 The above-named appellant has appealed against the decision of the Commission, constituted by a single Commissioner, given on 26 October 2004 in application No 12 of 2004, namely that the employment relationship was lawfully terminated and that the appellant was only entitled to a portion of the contractual benefits which she claimed.

6 The grounds of appeal identify a number of alleged errors made by Commissioner Wood in his decision given on 26 October 2004 in application No 12 of 2004.

7 The respondents sought by application to have the appeal dismissed or set aside under regulation 93 of *the Regulations* because it is alleged that regulation 29(2), (3) and (10) have not been complied with.

## BACKGROUND

### Appeal No FBA 29 of 2004

8 On 27 July 2004, the Commission, constituted by a single Commissioner, gave a decision on an application made pursuant to s29(1)(b)(i) of *the Act* by the appellant claiming that she had been harshly, oppressively or unfairly dismissed by the respondent, in application No 37 of 2003. She also claimed contractual benefits to which she alleged she was entitled pursuant to s29(1)(b)(ii) of *the Act*.

9 The appellant had been the respondent's Director of Client Services, and the Commissioner found that she was not entitled to be paid for time off in lieu of overtime (TOIL), as claimed by her and dismissed the application, save and except that the Commissioner ordered an amount of $11,077.70 be paid by the respondent to the appellant within 14 days of the date of the order which was for the TOIL, whilst she was acting as Chief Executive Officer, not whilst she was occupying her substantive position as Director of Client Services.

10 A notice of application, of which there is evidence of service, was filed on behalf of the appellant on 25 November 2004 for an extension of time within which to file and serve appeal books, supported by an affidavit of Stephenie Jacqueline Vahala sworn on 25 November 2004.

11 On 12 August 2004, the appellant filed a document purporting to be a notice of appeal purporting to appeal against that decision. Appeal books were filed on 26 November 2004 but not served until 18 January 2005.

**Appeal No FBA 47 of 2004**

12 On 26 October 2004, the Commission, constituted by a different single Commissioner, gave a decision in relation to a claim by the appellant for relief for harsh, oppressive or unfair dismissal in application No 12 of 2004.

13 The Commissioner found that the appellant's employment had been lawfully terminated. The Commissioner also found that the appellant was only entitled to a portion of the contractual benefits which she claimed and ordered the respondents to pay to the appellant the sum of $14,840.12 being portion only of the amount claimed as contractual benefits to which she was entitled. There was a further order for payment of $1,335.61 by the respondents to a superannuation fund nominated by the appellant.

14 On 16 November 2004, the appellant filed a document purporting to be a notice of appeal against that decision.

15 The appeal books were filed on 13 December 2004 and served on the solicitors for the respondents on the same day. At the same time, the appellant filed and served an application to file and serve appeal books out of time.

## COMPLAINTS ABOUT BOTH APPEALS

**Alleged Failure to Comply with Regulation 29(3)**

16 Both appeals were alleged to be defective in that they were alleged to have failed to comply with regulation 29(3) of *the Regulations* because the decisions appealed against were "findings", as defined in s7 of *the Act* and therefore, there was a failure to comply with regulation 29(3), which reads as follows:-

> "In the case of an appeal from a decision which is a finding the statement setting out the grounds of appeal shall in addition briefly state the reasons why it is considered that the matter is of such importance that in the public interest an appeal should lie."

17 That regulation relates to s49(2a) of *the Act* which reads as follows:-

> "An appeal does not lie under this section from a finding unless, in the opinion of the Full Bench, the matter is of such importance that, in the public interest, an appeal should lie."

18 Neither notice of appeal contains that statement. Neither alleges that the relevant appeal is against a "finding". In s7 of *the Act*, "finding" is defined as follows:-

> "… a decision, determination or ruling made in the course of proceedings that does not finally decide, determine or dispose of the matter to which the proceedings relate;"

19 In relation to appeal No FBA 29 of 2004, the decision appealed against is not a "finding", as defined in s7 of *the Act*, because it finally determined and disposed of the application, therefore there was no requirement that it comply with regulation 29(3). In any event, the appeal is in fact against Order 2 of the order made which, apart from the order for payment of $11,077.70, which is a final order, constitutes a dismissal of the whole of the application finally. There was therefore no requirement to comply with regulation 29(3), because neither order was a finding within the definition of that term in s7 of *the Act*.

20 Further, since the appeals are not against findings, as defined, there is no issue before the Full Bench about whether the appeals are competent. In any event, an appeal may be instituted under s49(3) of *the Act*, but if it is against a "finding", then the Full Bench has no jurisdiction until it decides what it is required to decide under s49(2a) (see *Burswood Resort (Management) Ltd v ALHMWU* (1994) 74 WAIG 1215 (FB)), and in favour of the appellant.

21 In any event, as we will say later in these reasons, failure to comply with *the Regulations* does not, of itself, render proceedings void. Further, the appellant is willing to undertake to file and serve an amended notice of appeal, deleting reference to the appeal against the "finding" referred to in the grounds of appeal.

22 As to appeal No FBA 47 of 2004, that decision also was not a "finding", as defined, and for the same reasons. There was therefore no requirement to comply with regulation 29(3).

23 For those reasons, we find that there is no substance in that complaint.

## FAILURE TO COMPLY WITH REGULATIONS 29(10) AND 89(1)

24 The respondents complained that the appellant failed to comply with regulation 29(10) of *the Regulations* by failing to file and serve appeal books within 14 days of filing the notice of appeal, as regulation 29(10) requires. Further, the complaint was that, in relation to the first appeal, the appellant committed a breach of regulation 89(1) in that, contrary to regulation 89(1) which requires that all documents filed in the Commission must be served forthwith, the appeal books had not been served forthwith.

**Appeal No FBA 29 of 2004**

25 The appeal books were filed two months out of time because the appeal books were required to be filed and served on or before 27 August 2004, the notice of appeal having been filed on 12 August 2004. This application to dismiss was filed on 2 December 2004 on the basis that no appeal books had been filed or served, which they had not. It is quite clear that the appeal books were filed and served three and one half months out of time. Whilst an application was filed on 25 November 2004 seeking an extension of time within which to file and serve appeal books, it was not served on the respondent until much later.

26 One complicating factor is that the solicitors on the record for the appellant, on 17 January 2005, advised the respondent's solicitors that they had filed a notice of ceasing to act, but the same was not served on the solicitors for the respondent. It was submitted that the reasons advanced for the delay which were advanced in the affidavit of one Ms Vahala were inadequate.

27 In relation to the reason advanced that the appellant had "funding issues" in relation to the appeal and that she was impecunious in that her entire income was derived solely from Centrelink benefits, it was contended that this was wrong. What was contended was that she had received workers' compensation payments of $64,358.32, had been paid $22,429.31 to satisfy orders made by this Commission within the last 12 months and, further, that she had settled the workers' compensation claim in the sum of about $90,000.00.

28 Further, it was submitted that the contention of the former solicitors for the appellant had difficulty in obtaining transcript and in inspecting exhibits, were not adequate reasons. This was because the solicitors should have attended to these matters within the prescribed time limit of 14 days.

29 Further, it was submitted that there was no adequate explanation for the late filing and service of the appeal books and the long periods during which there was a failure to comply with *the Regulations*. In addition, it was submitted that, as a result, the respondent had suffered prejudice.

**Appeal No FBA 47 of 2004**

30 The complaint was that, in this case, the appeal books were filed and served on 13 December 2004, 12 days out of time. The respondents contended that the reasons advanced for the delay were manifestly inadequate because, even though she advised the appellant's solicitors that she would be unable to satisfy the terms of the retainer, on or about 20 November 2004, the affidavit does not explain why no steps were taken to prepare the appeal books between 16 and 20 November 2004.

31 However, the affidavit does contain evidence that a misunderstanding arose between the appellant and her solicitors about whether the appellant was personally responsible for the preparation of the appeal books as of 20 November 2004. In fact, the appellant explained that there was a misunderstanding between the appellant and her solicitor on 25 November 2004, her solicitors being under the impression that she was to take responsibility for the preparation of the appeal books as at 20 November 2004. However, the solicitors, in any event, commenced to prepare the appeal books on 28 November 2004 and inspected exhibits on 29 November 2004. The appeal books however were not filed until 13 December 2004.

32 The delays are not explained in the affidavit, so the submission for the respondents went.

33 In our opinion, the failure to file and serve the appeal books within the prescribed time in both matters clearly arose because of a misunderstanding about who was to be responsible for the actual preparation of the appeal books and the preparation was further delayed by the solicitors' view of the appellant's financial situation. In any event, even after that was resolved, the solicitors still delayed to a small extent in filing and serving the appeal books. We are not, however, satisfied that the appellant was so impecunious as to be unable to pay for solicitors, although she was said to be living off benefits. However, that issue is not fatal to the exercise of discretion in her favour (see *Esther Investments Pty Ltd v Markalinga Pty Ltd* (1989) 2 WAR 196 at 199 and 204 (FC) and *Christie v Harvey* (1900) 2 WALR 146 at 150, a case cited in *Esther Investments Pty Ltd v Markalinga Pty Ltd* (op cit)).

34 We are, however, satisfied and find that the failure to file and serve the appeal books within time did primarily arise from a misunderstanding about what her solicitors were to do, and what she was to do, and that, in fact, the solicitors then attended to the filing and serving of the appeal books too late.

35 Overshadowing this matter was the issue of whether the appellant's then solicitors were acting or continuing to act for the appellant or not. She should, however, not be penalised in this case given that there was no irremediable or overwhelming prejudice to the respondents caused by the delays, nor will there be by any order which allows her to file and serve the appeal books out of time. In particular, the solicitors' failure to attend to the filing and serving of the appeal books in time, either through error or through a misunderstanding between the appellant and her solicitors, should not be visited against her.

**MERITS**

36 The notices of appeal are attacked on the grounds that they are incompetent because they fail, contrary to the requirements of regulation 29(2) of *the Regulations* to specify either adequately or at all the particulars relied on to demonstrate that the decisions are against the evidence and the weight of the evidence, and the specific reasons why the decisions are alleged to be wrong in law.

**Appeal No FBA 29 of 2004**

37 There are no particulars as required for grounds 1 and 2 and, indeed, it is conceded that there are no sufficient particulars, as required by *the Regulations*, provided for grounds 1 and 2. On a fair reading, the same applies to ground 3. Nonetheless, the appellant was prepared to undertake to give particulars of those grounds and of any grounds which the Full Bench requires to be given, where the particulars are adjudged inadequate. We would order that such particulars be provided.

**Appeal No FBA 47 of 2004**

38 Grounds 1, 2, 3, 4 and 5, as pleaded, do not comply with *the Regulations* (see, generally, *Director General of the Department of Community Development v CSA* (2001) 82 WAIG 16 and *Burswood Resort (Management) Ltd v ALHMWU* (FB) (op cit) at 1216 per Sharkey P, Coleman CC and Kennedy C).

**PREJUDICE TO THE RESPONDENTS**

39 It was submitted for the respondents that it was not known for some months whether the appellant was proceeding with appeal FBA 29 of 2004 or whether it might face further liabilities as a result of the appeal. Thus, its ability to budget effectively for its operations has been affected, so the submission went. This, it is said, might cause a reduction in the respondent's funding because it is a non-government health service provider, entirely dependent on government grants. Therefore, so the submission went, because it would be diverting funds away from its major work of providing assistance in medical matters, this would negatively affect its performance indicators and put in jeopardy the quantum of government funding available.

40 The failure to file and serve appeal books, however, does not prejudice the respondents because it has not been necessary to prepare for the hearing, the matter not having been listed. We can see no reason why the matter should not be listed with some expedition. There is some prejudice in this matter to the respondents because the matter has not been resolved and listed as soon as it could be. Nonetheless, the matter is determinable in the appellant's favour because the prejudice to the appellant in the appeal being dismissed is far greater than that occasioned to the respondents. The respondents still have their right to defend the appeal, but the appellant would lose the right to an appeal which has some merit and to obtain financial benefit from it.

**LACK OF MERIT**

**Appeal No FBA 29 of 2004**

41 It was submitted that both appeals lacked merit and that the applications should not succeed for those reasons. For the respondent, it was submitted that the Commission erred in law in finding that the compromise agreement did not give rise to an entitlement to costs. Next, it was submitted, in relation to ground 2 that it was open to the Commissioner on the evidence to find that the conditions of employment, as adopted by the compromise agreement, did not include use of a mobile telephone and motor vehicle.

42 As to ground 3, it was submitted that there was sufficient evidence before the Commission to enable it to conclude that the appellant had received the equivalent wage to what she would have received had she been continuously employed by the respondent. It was also submitted that there was no principle of natural justice requiring a tribunal to provide an opportunity to adduce new evidence in opposition to another party's submissions. This was because the respondent was given an opportunity to make submissions in reply to the submissions made by the appellant and she was therefore afforded natural justice.

43 In respect of ground 5, it was submitted that the Commissioner had not perfected her decision on 8 April 2004 and there is no principle requiring a tribunal to give adequate or any reasons for their interim deliberations.

**Appeal No FBA 47 of 2004**

44 It was submitted that, in respect of Ground 1, on all of the evidence, it was open to find that the amount in issue was part of the appellant's salary for the purposes of s29AA of *the Act*. Further, it was submitted that the definition of "salary" in law is well settled and there is no merit in this ground of appeal.

45 In relation to ground 2, it was submitted that it was open to the Commissioner to find as he did because the appellant's own evidence supported the conclusion that the parties had different beliefs about the contract under which the appellant had been employed.

46 In relation to ground 3, the respondents submitted that it was open to the Commissioner on the evidence to find as he did. Further, because the finding depended in part on the advantage enjoyed by the Commissioner in seeing and hearing the witnesses, it meant that the finding would not be readily disturbed by the Full Bench.

47 In respect of ground 4, it was submitted that the ground of appeal was against the weight of authority and had no reasonable chance of success.

48 In relation to grounds 5 and 6, it was submitted that, on the evidence, it was open to the Commissioner to find as he did.

49 Generally, it was submitted that many of the grounds of appeal related to findings on the evidence and that the Full Bench should be reluctant to disturb those findings made on the basis of assessment of character, demeanour, conduct and credibility. Generally, it was also submitted that the onus lay on the appellant to establish merit and the appellant had not even provided sufficient particulars of the grounds of appeal to enable that question to be determined.

50 For the appellant, it was submitted that the nature of the appeals are discernible on the papers and it is clear what orders are sought.

51 As to appeal No FBA 47 of 2004, that appeal is against the failure of the Commissioner to order the payment of contractual benefits, namely the amount of a further sum said to be owing pursuant to a term of contract, namely the alleged balance of a five year fixed term contract.

52 The notice of appeal refers itself to the mistakes which Commissioner Wood made in finding that the contract was the subject of mutual mistake.

53 In accordance with the authority, we have essayed only a rough and ready assessment of the merits, since the appeal is not, on all that was put to the Full Bench, so devoid of merit that it would be futile to extend time (see *Morgan v Wanneroo Smash Repairs Pty Ltd* BC 2003 010504 (2003) WASCA 41 at 187).

54 In relation to appeal No FBA 29 of 2004, questions such as the ambit of the claim for legal costs and the compromise agreement and the conditions of employment adopted by that are matters of construction and evidence and the findings in relation to them raise questions for determination on appeal (see grounds 1 and 2).

55 Further, it is arguable and we put it no higher than that, that the appellant did not receive the equivalent wage to what she would have received had she been continuously employed by the respondent between 13 December 2002 and 23 December 2002 (grounds 4 and 5). Grounds 4 and 5 are also arguable and we put it no higher than that, for the reasons which we have expressed.

56 As to appeal No FBA 47 of 2004, we are of opinion that a question does arise whether there was a mutual mistake about the terms of the contract and whether the contract was void for uncertainty (ground 2). Further, whether a breakdown in trust between the parties constituted grounds for a fair dismissal is a matter for some argument (ground 3).

57 That is the case, even if the Commissioner were right in deciding that the requisite trust required for the relationship could have been maintained.

58 There is also an argument that the test for ostensible authority was misapplied by the Commissioner (grounds 5 and 6). We have not considered all the grounds. However, accordingly the appeals are not groundless and should not be dismissed for that reason.

## PRINCIPLES

59 We now want to express the principles which we apprehend as applying to these matters:-

(a) This is a case where the appeal was instituted within time so that the Commission should take a more liberal approach to other applications to extend time such as this one.

(b) The merits of the appeal do no furnish the criterion for refusing or extending the extension of time and, in most cases such as this, the only issues would be the length of time involved and, most importantly, whether the respondents or the administration of the Commission's business would be prejudiced by granting the application (see *Jackamarra v Krakouer and Another* [1998] 195 CLR 516 at 519; see also *Moylan v City of South Perth* (2002) 82 WAIG 2649 at 2652).

(c) Even if the delay is explained, the application for an extension of time should be refused if the appeal would have no prospects of success (see *Kwa v City of Stirling* (SCFC) Lib No 990169, 16 March 2003 (unreported) BC 9901673). It is an unnecessary exhaustion of judicial time for more than a rough and ready assessment of the merits to be made unless an appeal is so devoid of merit that it would be futile to extend time.

(d) It is open to a respondent, if an appellant is not pursuing an appeal in accordance with the time scale provided by *the Regulations*, to apply to dismiss under s27 of *the Act* for want of prosecution.

(e) These observations we make about particulars:-

(i) A party who is served with an inadequately particularised "pleading" in this Commission should just apply by letter to the opponent and specify the particulars sought.

(ii) That is, of course, subject to the obvious fact that particulars cannot cure a defective "pleading" and, most importantly, particulars cannot render an application or appeal which is devoid of merit one of merit.

(iii) Notwithstanding this, in practice, defective pleadings are often cured by the delivery of particulars usually voluntarily and without recourse to the Commission (see *Agtrack (NT) t/as Spring Air v Hatfield* (2003) 174 FLR 395 at 404 (per Ormiston JA). The practice should be to comply with a legitimate request for particulars.

(iv) Any application to the Commission for particulars should be made promptly after the need for the particulars is apparent, although particulars can be ordered at any time (see, generally, *Australian Civil Procedure* (6th Edition) at pages 188-194).

60 In relation to failure to comply with *the Regulations* of this Commission, the following should be observed:-

(a) This Commission is bound to act in all matters according to equity, good conscience and substantial merits of the case without regard to technicalities or legal forms.

(b) The Commission has the power to generally give all directions and do all such things as are necessary or expedient for the expeditious and just hearing and determination of the matter before it (see s27(1)(v) of *the Act*).

(c) The Commission is required, too, in the exercise of its jurisdiction under *the Act*, to have regard to the interests of the persons immediately concerned, whether directly affected or not and, where appropriate, for the interest of the community as a whole (see s26(1)(c) of *the Act*).

(d) An object of *the Act* is to provide means for preventing and settling industrial disputes not resolved by amicable agreement, including threatened impending and probable industrial disputes, with the maximum of expedition and the minimum of legal form and technicality (see s6(c) of *the Act*).

(e) It is noteworthy that a failure to comply with *the Regulations* ((ie) by not providing the prescribed particulars or by failing to file and serve an appeal book in time) does not, by those acts of non-compliance, render the proceedings before the Commission void. However, the Commission may set the proceedings aside wholly or in part as irregular, or amended or otherwise dealt with in such manner and upon such terms as the Commission thinks fit (see regulation 93).

(f) Also, the Commission may, in relation to any proceedings before it, "in special circumstances" and either absolutely or subject to conditions, exempt any person from compliance with any procedural requirement of these regulations (regulation 92).

(g) Above all, the Commission may, for the reasons prescribed in s27(1)(a)(i) of *the Act*, dismiss or refrain from hearing or determining the matter further for the reasons expressed in that sub-section, including the reasons that the matter or part of it is trivial, that further proceedings are not necessary in the public interest or for any other reasons (see s27(1)(a) of *the Act*).

61 It follows that the law relating to these matters, as we have expressed it above, means that the exercise of the Commission's power and/or discretion is to be exercised with more liberality and informality consistent with its duties under s26(1)(a) and (c) of *the Act* than a court of pleadings or a court which is not an industrial court or tribunal.

62 In this case, the particulars should be ordered because not to do so and to dismiss the claim for lack of particulars would create substantial prejudice to the respondents which merely has a claim to face, whereas the appellant, if such an order were made, would be deprived of her right of appeal.

63 Further, no request was made for particulars before this application was made, given that the application without the prescribed particulars was not void (see regulation 93).

64 Further, the claim has merit without particulars or, in any event, has not been established to be devoid of merit and has been established to be arguable in future.

65 As to the failure to file and serve the appeal books within the prescribed 14 days, the 3½ months' delay in relation to appeal No FBA 29 of 2004 is a lengthy one, but it has been explained. It was not, for the most part, the appellant's fault. It was her solicitors' omission and she should not suffer for it.

66 Further, the appeal having been filed, there should be something of a liberal approach taken by the Commission, on the authorities.

67 In the case of appeal No FBA 47 of 2004, the delay was such a short one that the appellant should not be penalised for it. Next, the appeal books have now been filed and served in any event.

68 Further, the prejudice to the respondents, provided that there is no inordinate delay in listing the matter, is much less than the prejudice to the appellant, who loses her right to appeal if the Full Bench dismissed it. We have already said that the appeal has merit or has not been established to be groundless.

69 For all of those reasons, we find that the equity, good conscience and substantial merits of the case lie with the appellant and that the interests of the appellant prevail over those of the respondents. For those reasons, we agreed to make the orders which the Full Bench made.

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**2005 WAIRC 00128**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

| | |
|---|---|
| **PARTIES** | DIANA ELIZABETH DOWNS-STONEY |
| | **APPELLANT** |
| | **-and-** |
| | DERBARL YERRIGAN HEALTH SERVICE; AND<br>VANESSA DAVIES, CEO DERBARL YERRIGAN HEALTH SERVICE, AND WALTER MCGUIRE PRESIDENT OF THE BOARD OF DERBARL YERRIGAN HEALTH SERVICE |
| | **RESPONDENTS** |
| **CORAM** | FULL BENCH<br>HIS HONOUR THE PRESIDENT P J SHARKEY<br>COMMISSIONER P E SCOTT<br>COMMISSIONER S.J. KENNER |
| **DATE** | FRIDAY, 21 JANUARY 2005 |
| **FILE NO/S** | FBA 29 OF 2004, FBA 47 OF 2004 |
| **CITATION NO.** | 2005 WAIRC 00128 |

| | |
|---|---|
| **Decision** | Applications dismissed and directions. |
| **Appearances** | |
| **Appellant** | Mr A D Lucev (of Counsel), by leave |
| **Respondent** | Mr G T Stubbs (of Counsel), by leave |

*Order*

This matter having come on for hearing before the Full Bench on the 21st day of January 2005, and having heard Mr A D Lucev (of Counsel), by leave, on behalf of the appellant, and Mr G T Stubbs (of Counsel), by leave, on behalf of the respondent, and the Full Bench having heard and determined the matter, and having determined that reasons for decision will issue at a future date, and the parties herein having waived their rights pursuant to s35 of the *Industrial Relations Act* 1979 (as amended), it is this day, the 21st day of January 2005, ordered and declared as follows:-

(1) THAT the applications in Appeals Nos FBA 29 of 2004 and FBA 47 of 2004 to strike out the said appeals for lack of merit, be and are hereby dismissed.

(2) THAT there be and is hereby granted to the appellant an extension of time to file and serve appeal books to the time and date of actual service.

(3) THAT there be leave and leave is hereby granted to the appellant to delete ground 1 in FBA 29 of 2004, so that the appeal against any finding is deleted, within 10 days of the date of this order.

(4) THAT leave is granted to the applicant to file and serve, within 10 days of the date of this order, amended grounds of appeal, containing full particulars as required by regulation 29(2) of the *Industrial Relations Regulations* 1985.

(5) THAT the applications are otherwise dismissed.

By the Full Bench

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

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**2005 WAIRC 01958**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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|---|---|
| **PARTIES** | DIANA ELIZABETH DOWNS-STONEY<br>**APPELLANT**<br>**-and-**<br>DERBARL YERRIGAN HEALTH SERVICE<br>**RESPONDENT** |
| **CORAM** | FULL BENCH<br>HIS HONOUR THE PRESIDENT P J SHARKEY<br>COMMISSIONER P E SCOTT<br>COMMISSIONER S J KENNER |
| **DATE** | MONDAY, 4 JULY 2005 |
| **FILE NO.** | FBA 29 OF 2004, FBA 47 OF 2004 |
| **CITATION NO.** | 2005 WAIRC 01958 |

| | |
|---|---|
| **CatchWords** | Industrial Law (WA) – Appeals against decision of a single Commissioner – Unfair dismissal – Denial of contractual benefits – Higher duties – Payment for time off in lieu – Overtime – Alleged set-off against amount of lump sum paid by way of redemption of workers' compensation weekly payments – Assessing loss and injury – *Industrial Relations Act* 1979 (as amended), s23(1), s23A(6), s29(1)(b)(i), s29(1)(b)(ii), s32, s49 – Workers' Compensation and Injury Management Act *1981 (as amended)*, s67(1), s76(1), s93C, s183, s183(1) |
| **Decision** | Appeals dismissed |
| **Appearances** | |
| **Appellant** | Mr A D Lucev (of Counsel), by leave, and with Ms J M Stevens (of Counsel), by leave |
| **Respondent** | Mr G T Stubbs (of Counsel), by leave |

*Reasons for Decision*

**THE PRESIDENT:**

**INTRODUCTION**

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

2 These are two appeals against two decisions of the Commission at first instance, in each case constituted by a single Commissioner, and both are brought pursuant to s49 of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "*the Act*"). Both appeals were heard together by consent.

3 Appeal No FBA 29 of 2004 is an appeal against the finding that the appellant was not entitled to payment for time off in lieu of overtime ("TOIL") when working as Director, Client Services for Derbarl Yerrigan Health Service (hereinafter referred to as "Derbarl"), and against the order dismissing the appellant's claim. The decision appealed against is constituted by an order made on 27 July 2004 whereby the Commission, constituted by Commissioner J H Smith, ordered that Derbarl pay to the appellant within 14 days of the date of the order the sum of $11,077.70, but otherwise ordered that the application be dismissed.

**APPEAL NO FBA 29 OF 2004**

4 The appellant now appeals against the finding of Commissioner Smith in appeal No FBA 29 of 2004 referred to above, in accordance with the amended notice of appeal filed herein on 31 January 2005, on the following grounds, as amended by leave of the Full Bench:-

"1. The Commission erred in law and fact in taking into account, and setting off, a lump sum redemption (of $40,500) of the Appellant's weekly payments of workers compensation when determining whether the Appellant had, under a Compromise Agreement entered into with the Respondent, been repaid a sum of money equal to the gap between the "salary" to which she would have been entitled during her absence from her place of employment with the Respondent (over the period 13 Decemebr (sic) 2002 to 23 September 2003), and "salary monies" received by the Appellant from workers compensation and other insurers during the aforementioned period, because:

a) Section 183 of the Workers Compensation and Rehabilitation Act, 1981 (WA) (sic) prohibits a redemption sum being set off against any claim;

b) The Commission, by taking the redemption sum into account for the purposes of calculating the "salary" — "salary monies" gap under the Compromise Agreement, set off the sum of the redemption payment contrary to section 183 of the Workers Compensation and Rehabilitation Act, 1981 (WA) (sic); and

c) The redemption payment was not "salary monies", and therefore not able to be taken into account for the purposes of calculating the "salary" — "salary monies" gap under the Compromise Agreement.

2. By reason of the error referred to in appeal ground 1, and for the same reasons, the Commission erred in law in failing to consider and assess, alternatively properly consider and assess, the Appellant's entitlement to monies repayable under the Compromise Agreement.

3. By reason of the error referred to in appeal ground 1, and for the same reasons, the Commission erred in law in failing to consider and assess, alternatively properly consider and assess, the Appellant's entitlement to superannuation in respect of monies repayable under the Compromise Agreement.

4. The Commission erred in law and fact in finding that the Appellant was not entitled under the Compromise Agreement to payment for TOIL for time worked as Director Client Services for which approval was given by the Respondent prior to the Appellant's departure from the Respondent's place of employment on 13 December 2002, when:

a) Such a finding was contrary to the evidence, alternatively the weight of the evidence, of:

i. the Appellant; and

ii. Ms Harry,

whose evidence was that the Respondent approved payment of TOIL for all time worked as Director of Client Services prior to the Appellant's departure from the Respondent's place of employment on 13 December 2002;

b) There was no evidence at all on the issue from the Respondent;

c) The proposition that the Appellant was not entitled under the Compromise Agreement to payment for TOIL for time worked as Director Client Services was not put to the Appellant or any of the Appellant's witnesses in cross-examination; and

d) The Commission denied the Appellant procedural fairness by denying the Appellant an opportunity to lead further evidence and/or make further submissions on the mailer when it was raised for the first time in the closing submissions of the Respondent.

5. By reason of the error referred to in appeal ground 4, and for the same reasons, the Commission erred in law in failing to consider and assess, alternatively properly consider and assess, the Appellant's entitlement to superannuation in respect of monies payable for TOIL for time worked as Director Client Services.

6. The Appellant seeks an Order varying the Order at first instance as follows:

"(1) ORDERS that the Respondent pay to the Applicant within 14 days of the date of this order the sum of $11,077.70, for time off in lieu whilst acting as Chief Executive Officer in the period prior to 13 December 2002;

(2) ORDERS that the Respondent pay to the Applicant within 14 days of the date of this order the sum of $8,909.58, for time off in lieu whilst working as Director Client Services in the period prior to 13 December 2002;

(3) ORDERS that the Respondent pay to the Applicant within 14 days of the date of this order the sum of $6983.87, being the gap between the salary payable to the Applicant in the period 13 December 2002 to 23 September 2003 and the salary monies received by the App1icant from workers compensation and other insurers in that period;

(4) ORDERS that the Respondent pay to the Applicant within 14 days of this order, as and by way of superannuation, the amount of $2,427.40 to a superannuation fund nominated by Diana Elizabeth Downs Stoney.""

**APPEAL NO FBA 47 OF 2004**

5 An amended notice of appeal was filed in appeal No FBA 47 of 2004 by notice dated 31 January 2005, against the decision of the Commission, constituted by Commissioner S Wood, given on 26 October 2004 in matter No 12 of 2004, and those parts of the decision constituted by the finding that the employment relationship between the appellant and Derbarl was lawfully terminated and the finding that the appellant was only entitled to a portion of the contractual benefits claimed.

6 The appellant appeals against the finding of Commissioner Wood in appeal No FBA 47 of 2004 on the following grounds, as amended:-

"1. The Commission erred in law and fact in assessing and determining the loss and injury caused by the Appellant's summary dismissal, and specifically:

a) Erred in substituting the Commission's view as to how the employment relationship ought to have terminated, and further erred in assessing loss on that basis, rather than on the basis of the loss actually suffered by the Appellant;

b) Erred in law and fact by:

i. Failing to consider and assess, alternatively properly consider and assess, the loss caused by the Appellant's summary dismissal; and

ii. Failing to have any regard at all for the loss actually suffered by the Appellant and caused by the summary dismissal;

c) Erred in law by determining loss caused by the Appellant's summary dismissal as if it were a claim for denied contractual benefits, rather than on the basis of the loss actually suffered by the Appellant;

d) Erred in law and fact by:

i. Failing to consider and assess, alternatively properly consider and assess, injury caused by the Appellant's summary dismissal; and

ii. Failing to have any regard at all for injury actually suffered by the Appellant and caused by the summary dismissal.

2. The Appellant seeks an Order varying the Order at first instance to the following:

"(1) ORDERS that the Respondent do hereby pay within 7 days of this order, as and by way of wages and notice the amount of $14,840.12 less any taxation payable to the Commissioner of Taxation;

(2) ORDERS that the Respondent do hereby pay within 7 days of this order, as and by way of superannuation, the amount of $1,335.61 to a superannuation fund nominated by Diana Elizabeth Downs Stoney;

(3) ORDERS that the Respondent do hereby pay within 7 days of this order, as and by way of compensation for the Appellant's summary dismissal, the amount of $47,341.41 less any taxation payable to the Commissioner of Taxation.""

**BACKGROUND - APPEAL NO FBA 29 OF 2004**

7 The above-named appellant made an application under s29(1)(b)(i) and (ii) of *the Act*, claiming firstly that she was harshly, oppressively or unfairly dismissed by Derbarl on 13 December 2002. She also claimed that she was denied benefits under her contract of employment. She also claimed what she said was a higher duties amount, underpaid overtime, and time off in lieu, not paid, of approximately 800 hours, and underpayment of sick leave and annual leave. The application was filed on 10 January 2003.

8 The appellant was employed by Derbarl as Director, Client Services, from January 2002 until 13 December 2002. At all material times, Derbarl operated as an aboriginal health service for the benefit of aboriginal people. The appellant's claim was that, during that time, she was employed for 40 hours per week and worked approximately 20 hours overtime each week. She was not employed after 13 December 2002 because Derbarl terminated her employment. However, she was later "reinstated" by agreement.

9 During the time after her dismissal, the appellant was in receipt of weekly workers' compensation payments, in total a sum of $23,852.32 for the period 19 December 2002 to 13 June 2003, and, indeed, agreed to accept a lump sum of $40,500.00 by way of redemption of future weekly payments of workers' compensation. She also received a gross amount of $17,813.96 for disability payments between 18 February 2003 and 24 September 2003. There were also payments to her, or made on her behalf, for medical expenses, rehabilitation expenses and an HIC contribution.

10 On 17 September 2003, after some amendments were agreed to by the appellant and Mr Robin John Yarran, the President of Derbarl's governing Board, a written offer to settle was signed. This was an agreement to compromise the appellant's claims in respect of her earlier dismissal and was agreed by the parties to be such an agreement.

11 During the time when the appellant was not employed, Mr Haydn Lowe, a former head of the Aboriginal Affairs Department in this State, acted at the request of the Board as an independent consultant, having been duly appointed by the Board, to investigate the allegations of an Acting Human Resources Manager, Ms Nadia Zader Burgess, about the affairs of Derbarl, and to carry out an investigation into the appellant's "unfair dismissal" (see page 229 of the appeal book (hereinafter referred to as "AB")). At the time Mr Lowe was not employed by any government agency. It should also be observed that the Chief Executive Officer, Ms Marion Kickett, had been dismissed, and there was, on Mr Lowe's uncontradicted evidence, "factionalisation" within the community surrounding the Board, this factionalisation also extended into the Board of Derbarl.

12 There was a great deal of difficulty for Derbarl to convince funding bodies, particularly the Commonwealth, that Derbarl was a viable concern, Mr Lowe said. This evidence was not contradicted. Amongst other things, Mr Lowe looked into the question of whether the appellant should be reinstated, and, in a report to the Board, recommended the appellant's reinstatement as an employee of Derbarl as soon as was reasonably possible. He also recommended amongst other things (see paragraph 24 (page 12 (AB)) that an offer be made to "return her to her original contract with no loss of salary or other entitlements; any offer should be made without prejudice".

13 At first this recommendation was not accepted by the Board, also called the Executive Committee, but later the Board had agreed that she should be returned without loss of privilege or service, so that the payments which she received by way of workers' compensation or otherwise during the time when she was not employed, would be "topped up" to the salary that she would have received in her absence. This meant, Mr Lowe said, that her leave would be restored, as would her superannuation and her long service leave entitlements. Mr Lowe also gave evidence that, in relation to her claim for higher duties, the Board had some flexibility in the way in which it approached the negotiations. This was, he said, because the idea was that "if there was any legitimate financial claim that related to work that had been signed off previously, yes, that looked to be part of the deal".

14 Mr Lowe confirmed also that he drafted the letter signed by Mr Robin Yarran, Derbarl's President, containing an offer to compromise the appellant's claims, addressed to her and dated 17 September 2003. That offer (see page 316 (AB)), which is in the following terms, was accepted by the appellant, and it was common ground that it constituted an agreement by way of compromise:-

> "Please be advised that the Board of Derbarl Yerrigan Health Service has resolved to offer you reinstatement to your position at Derbarl Yerrigan. I am authorised to negotiate your return with you.
>
> Our offer is that you return at the same salary conditions and with no loss of your leave and other entitlements. You will be repaid a sum of money equal to the gap between the salary to which you would have been entitled during your absence, and the salary monies received from Worker's Compensation and other insurers.
>
> You will also be reimbursed for any overtime worked for which approval was given prior to your departure from Derbarl Yerrigan Health Services. These payments will be made immediately upon your acceptance of this offer.
>
> You have also requested payment of your legal fees. Please provide Derbarl Yerrigan Health Service with receipts or invoices for unpaid accounts. So that these may be paid or reimbursed. We understand that you estimate these costs to be circa $10,000.00, and agree to pay your legal costs up to this amount.
>
> I understand that you are keen to return to work at Derbarl Yerrigan. The Executive Committee and I welcome you back and look forward to working with you again. We hope to put all this sorry business behind us and apologise to you for what has happened.
>
> Your return of course is with our acknowledgment that you had no case to answer with respect to the allegations made and the subsequent termination of your employment. This will be made clear to staff at Derbarl Yerrigan Health Service and other relevant parties, following consultation with you.
>
> To accept this off [sic] please sign below as indicated."

15 There was a second letter of offer dated 17 September 2003 which was almost the same in its terms (see page 315 (AB)), to which we will refer hereinafter.

16 Both letters were signed as having the offer contained therein accepted by the appellant (see pages 315-317 (AB)).

17 A contract of employment was then signed by the appellant and Mr Yarran to evidence the appellant's reinstatement to her position and the terms on which that was effected. It was not part of the compromise which formed the basis of the claim for contractual benefits at first instance by the appellant. The appellant was, therefore, of course, "reinstated" in her position as Director, Client Services. She also acted at one time simultaneously in the position of Director or Chief Executive Officer of Derbarl.

18 The Commissioner canvassed the main terms of the compromise agreement dated 17 September 2003 (see pages 21-22 (AB)). First, and most relevantly, there was a condition that the appellant was to return to her employment with no loss of leave or other entitlements and was to be repaid a sum of money equal to the gap between the salary to which she would have been entitled during her absence, and the "salary monies" (sic) received from workers' compensation and other sources.

19 Thus, as the Commissioner correctly found, the appellant's service was to be treated as continuous from January 2002, for the purposes of annual leave, sick leave, long service leave, bereavement leave and superannuation. She was also to be paid the same salary which she was previously paid in her position as Director, Client Services. It is unnecessary here to canvass in detail the other conditions.

20 It was not in issue at all that the appellant was entitled to be paid overtime approved before her departure from Derbarl's employ. That is, she was entitled to be paid an amount approved as overtime, provided that approval was given prior to the appellant's termination of her employment on 13 December 2002. There was a provision enabling such payments.

21 There was evidence about what was called "time off in lieu of overtime" ("TOIL"). That was said to characterise her claim. However, the appellant asserted in evidence that Derbarl had a history of paying TOIL. Thus, it was really only a payment for overtime, and to call it time off in lieu is something of a misnomer. As we understand that, and it is perfectly clear, Derbarl paid for overtime worked. Accordingly, it follows that there was no question of TOIL being afforded or applicable. No policy to support or refute such evidence was said by either side to exist.

22 The appellant produced no copy of any minutes of any Board meeting where there was a resolution that additional hours of work performed by her were to be paid out. It was for the period 28 January 2002 to 14 June 2002 that the appellant said that Derbarl approved payment to her of overtime for extra hours worked, both as Acting Chief Executive Officer and Director, Client Services. Indeed, she gave evidence (see page 12 of the transcript at first instance) that she was, in fact, carrying out the duties of three positions, working extraordinarily long hours, and that the Board had approved payment of extra hours worked since she was unable to take any extra time off.

23 There was evidence given by Ms Abigail Harry, a former Treasurer of Derbarl, that the Board had approved payment to the appellant for extra hours worked by her whilst she was acting as Chief Executive Officer or Director, and that this approval was by resolution of the Board made before 13 December 2002.

24 The appellant tendered copies of all minutes of the Board meetings in evidence ((ie) for meetings between January 2001 until the end of December 2002). The Commissioner was not satisfied that the bundle of minutes contained a complete record of Board resolutions passed during that period. It was not asserted otherwise to the Full Bench.

25 The Commissioner, having found that Derbarl had an entitlement to payment for TOIL, then heard further evidence. The claim, actually quantified, was as follows (see page 30 (AB)):-

> "1. Whilst employed as Director of Client Services:
>
> (a) No. of hours of TOIL: 220.75
>
> (b) Hourly rate: $40.3605
>
> (c) Calculation: 220.75 (hours) x $40.3605 (hourly rate) = $8,909.58
>
> 2. Acting as CEO:
>
> (a) No. of hours of TOIL: 309.45
>
> (b) Hourly rate: $47.0769
>
> (c) Calculation: 309.45 (hours) x $47.0769 (hourly rate) = $14,567.94
>
> 3. TOTAL: $23,447.52"

26 In the end, the Commissioner found only that the appellant was entitled to be paid 18.5 hours of TOIL for hours worked on the weeks ending 18 January 2002 and 25 January 2002, and that she was only entitled to be paid for additional hours worked

whilst she was acting as Chief Executive Officer, and not whilst she was working in her substantive job as Director, Client Services.

27 After accepting the compromise agreement, the appellant then commenced employment with Derbarl on 23 September 2003 as the Director, Client Services and commenced also to act in the position of Deputy Chief Executive Officer for a period of time. She said that she was required to produce a medical certificate certifying that she was fit for work and assessing her future risk of injury. This was because she had redeemed a workers' compensation claim in June 2003 in relation to an injury or disability suffered by her while working for Derbarl.

28 On 9 October 2003, the appellant produced to the Board a medical certificate from a Consultant Psychiatrist certifying her fit for work as Deputy Chief Executive Officer. It was later, in December 2003, as we have said, that her employment with Derbarl came to an end. She then sought, following her dismissal, to reactivate the application in the Commission on the basis that the terms of compromise had not been satisfied.

29 On 29 January 2004 at a conference, the Commissioner set down for hearing the jurisdictional issue as to whether the claims for unfair dismissal and contractual benefits had been compromised and whether the Commission could make orders in terms of the compromise for hearing. In accordance with formal directions, a number of particulars were provided by the appellant in support of that claim. Derbarl denied that the matter was an industrial matter because there was in controversy Mr Yarran's authority to enter into the compromise. It was, of course, pleaded that she had been reinstated to the position of Director, Client Services. It was denied that any amount was due to her under the terms of the compromise, as pleaded by her.

30 The appellant claimed the difference in salary between 13 December 2002 and 23 September 2003, less the amounts received as workers' compensation weekly payments and temporary disability payments received in that period. She said that, pursuant to the workplace agreement signed by her in January 2002, she should have received an increment on 7 January 2003. She received a gross amount of $17,813.96 for disability payments between 18 February 2003 and 24 September 2003. The appellant was off work for 40 weeks from 13 December 2002 to 23 September 2003. During that time, had she worked, she would have been paid $48,656.15. She was paid a total amount of $41,672.28, consisting of $23,858.32 in weekly payments of workers' compensation and $17,813.96 as disability payments.

31 In addition to the above-mentioned weekly payments of workers' compensation, the appellant also received, during the time of her dismissal when she was not employed, the following amount of payments for workers' compensation:-

| | | |
|---|---|---|
| (a) | Medical expenses | $ 1,361.20 |
| (b) | Rehabilitation expenses | $ 303.34 |
| (c) | HIC contribution | $ 4,500.00 |
| (d) | Redemption | $40,500.00 |

32 The Commissioner decided that, whilst no express power was vested in the Commission to make an order in terms of the compromise agreement, she was of opinion that the Commission had inherent power to do so in relation to the matter. She based this on the fact that the matter was referred for conciliation and arbitration under ss23(1) and 32 of *the Act*. The Commissioner then considered whether she ought to make orders in terms of the compromise and considered the terms of the agreement at pages 21-22 (AB). However, the Commissioner held that the appellant was entitled to receive an amount between the amounts she would have received in the period she was off work, assessed at the rate of $63,253.00 per annum, and the amounts which she received as salary for workers' compensation and other insurers, if those latter amounts are less than the former.

33 The appellant admitted that the amounts that she received as weekly payments of compensation and disability payments should be deducted from the amount which she would have received as salary had she not been dismissed. It was also her case that the sum of $40,500.00 paid as a lump sum in redemption of weekly payments was an amount which should not be taken into account when determining if she was owed any amount by way of salary under the terms of the compromise agreement. The appellant referred the Commissioner to s67(1) and s76(1) of the *Workers' Compensation and Injury Management Act* 1981 (as amended) (hereinafter referred to as "*the WCIM Act*") (formerly known as the Workers Compensation and Rehabilitation Act, 1981 (WA)) and the respondent referred to s183 of the same Act. The agreement, it was held, does not contravene s183 of *the WCIM Act*.

34 The Commissioner found that several elements of a set off were absent from the arrangement proposed in the agreement:-

(a) There was nothing in the agreement to compromise which has the character of the demand which Derbarl had against the appellant. Derbarl had not claimed in the agreement to compromise that any monies were owed by the appellant to it.

(b) There was nothing in the agreement to compromise which could be said to be extrinsic to the appellant's "cause of action". The appellant's claim against Derbarl arose from the termination of their relationship as employer and employee. The agreement arose from the same circumstances.

(c) The appellant was unable to prove that she was entitled to amounts in items 10 and 11 since she was unable to prove that the salaried money she received from workers' compensation and her disability insurer were less than the money she would have received had she not been dismissed.

**Overtime**

35 The appellant was entitled to be paid for any overtime approved before her departure from Derbarl. However, the Commissioner was not satisfied that there was a complete record of Board resolutions in a bundle of minutes tendered to evidence the approval of TOIL payments to the appellant.

36 The Commissioner also found:-

(a) That she was not satisfied that the amounts claimed in items 1 and 2 of the claims, arising out of higher duties performed between January 2002 until June 2002, formed part of the compromise. She found that any claim in respect of those amounts had been extinguished by the compromise agreement.

(b) That she was not satisfied that items 3 and 5, claims for compensation for loss of the private use of a mobile telephone and motor vehicle, were amounts due and owing under the terms of the compromise agreement and, for those reasons, they had no merit.

(c) That it was not a term of the agreement that the appellant be reimbursed for an amount for vehicle deductions in item 4.

(d) That the appellant did have an entitlement in respect of items 6 and 7, providing that she could produce evidence of the hours worked. The Commissioner was not satisfied that the appellant should be paid the rate which was paid to Ms Kickett. The Commissioner said that she would hear further evidence about that.

(e) That an entitlement to items 8 and 9, the claims for payment of annual leave and leave loading at the Chief Executive Officer's rate, did not form part of the terms of the compromise agreement and the claims had no merit. The claims related to a period between January 2002 and June 2002 when, as the appellant gave evidence, she took no leave.

(f) That a claim for salary and additional superannuation for the period 13 December 2002 to 23 September 2003 was not proved because the appellant did not prove that the amounts paid by Derbarl's workers' compensation insurer and her disability insurer were less than the amount she would have received had she been continuously employed by Derbarl between 13 December 2002 and 23 September 2003.

37 In supplementary reasons for decision dated Friday, 23 July 2004, the Commissioner found that the appellant worked the hours set out by her in exhibit C (see page 30 (AB)), but did not accept that the cumulative total of hours in that document, in either handwritten or typewritten form was correct. The Commissioner therefore deducted one hour per day from the total because the appellant's evidence established that, as a senior manager, she was required to work some additional hours above 37.5 hours per week without payment, which was reflected in her contract of employment. Thus, the Commissioner deducted 90 hours from the total of 309.45 hours claimed and found that the appellant was entitled to be paid for 219.45 hours at $47.0769 per hour, making a total of $10,331.03, and ordered that the total amount of $11,077.70 be paid to the appellant.

## BACKGROUND - APPEAL NO FBA 47 OF 2004

38 This was an appeal against the orders of Commissioner Wood that Derbarl pay by way of wages and notice in the amount of $14,840.12 to the appellant, by order dated 26 October 2004, and, further, that the amount of $1,335.61 superannuation be paid to a superannuation fund nominated by the appellant.

39 The appellant claimed that she was harshly, oppressively and unfairly dismissed on 4 December 2003. It was common ground that she was never paid for a period of "employment" from 24 September to 4 December 2003. Derbarl denied that she was ever employed and that a contract was ever entered into. The appellant characterised the claim as a claim for loss arising from an unfair dismissal.

40 The Commissioner found that he did not accept the evidence of Ms Abigail Harry because it was "inconsistent, unconvincing and partisan", and could not "be adopted without considerable reservation". Further, the evidence of Ms Sandra Harben had to be considered in the light of her "obvious dislike of the appellant". The evidence of the other witnesses the Commissioner accepted without reservation.

41 The Commissioner accepted that the contract as the appellant submitted was the actual contract that included salary plus salary sacrifice. The Commissioner set the contract aside, because Mr Yarran did not have authority and did so, in any event, under s26 of *the Act*. He also held that there was a mistake as to the terms of the contract because there was not a true meeting of the minds.

42 The Commissioner found that the appellant was not treated fairly and that there were no established grounds for a summary dismissal. He therefore held that he did not believe that the requisite trust required of the employment relationship could have been present or maintained. However, the Commissioner awarded an amount for two weeks' notice which was the notice which should have been given, namely $2,432.80 and a superannuation payment of $218.95.

## ISSUES AND CONCLUSIONS

### Appeal No FBA 29 of 2004

### Ground 1

43 By ground 1 it was alleged that the Commissioner at first instance erred in taking into account and, thereby, setting off the lump sum paid by way of redemption of future weekly payments of workers' compensation, namely $40,500.00, during the period before the appellant's reinstatement against the salary due and payable to the appellant had she worked during that time. This, it was alleged, occurred when determining whether the appellant had (under the compromise agreement referred to above and entered into with Derbarl) been repaid a sum of money equal to the gap between the salary to which she would have been entitled during her absence from her place of employment with Derbarl over the period 13 December 2002 to 23 September 2003, and "salary monies" received by the appellant from workers' compensation and other insurers during that period.

44 This ground relied on s183 of *the WCIM Act*. That section provides:-

> "(1) A payment of compensation, or a sum paid by way of redemption thereof, is not capable of being assigned, charged or attached, and shall not pass to another person by operation of the law, nor shall any claim be set off against such payment or sum, except in respect of voluntary advances of future compensation made by an employer or insurer with the approval of the Directorate.
>
> (2) A person who purports or agrees to do anything the doing of which is prevented by subsection (1) commits an offence and is liable to a fine of $5 000."

45 The section clearly and expressly prohibits a sum paid by way of redemption from being assigned, charged or attached and prohibits any claim being set off against such payment or sum except in respect of voluntary advances of future compensation made by an employer or insurer with the approval of the Directorate.

46 The agreement to compromise cannot, of course, be described at law as a charge, attachment or conveyance by operation of law of a sum paid by way of redemption within the meaning of s183 of *the WCIM Act*. It was not contended to this Full Bench that that was so, and it is unnecessary to consider that matter further. The agreement to compromise was entered into by a voluntary act of the appellant. It is clearly not an assignment because that involves the transfer to another of all or part of one's property, interest or right.

47 The only relevant part of s183(1) in this appeal is that part of it which prohibits any claim for workers' compensation, or a sum paid by way of redemption of a payment or payments of workers' compensation from being set off. Here there were weekly payments of workers' compensation to the appellant. There was also and relevantly to this ground of appeal a sum paid by way of redemption of future weekly payments in the sum of $40,500.00.

48 It is quite clear, by the words of the section, that such a set off is prohibited by the section is unlawful, and that a person who purports to or agrees to do such an act is prevented by s183(1), and commits an offence for which a penalty is imposable.

49 There is no doubt that the purpose of s183 is to prevent a payment of compensation, or a lump sum paid by way of redemption thereof, being redirected or otherwise applied so that a worker is effectively denied the benefit of it or actually denied the benefit of it.

50 A set off is defined in *Blacks Law Dictionary*, which was referred to in submissions to the Commissioner at first instance and in submissions to the Full Bench, as:-

> "A counter-claim demand which defendant holds against plaintiff, arising out of a transaction extrinsic of the plaintiff's cause of action; and
>
> Remedy employed by defendant to discharge or reduce plaintiff's demand by an opposite one arising from transaction which is extrinsic to plaintiff's cause of action."

(It was applied by the Commissioner at first instance).

51 A set off is a form of countervailing claim which can be made by a person against whom a claim is being made by another. It can arise in the course of litigation or in non-litigious contexts. In some circumstances it can be the subject of private agreement. That is the case here. In other circumstances it is imposed by operation of the law (see, generally, *The Laws of Australia*, Volume 15, 5-41).

52 A set off, of course, is distinguishable from other forms of countervailing claims such as a counter claim because it operates as a defence to an originating or initiating claim (see, for example, *Westwind Air Charter Pty Ltd v Hawker de Havilland Ltd* (1990) 3 WAR 71).

53 We do not agree with Mr Lucev's submission that the longstanding legal definition of set off and the substantial body of law built up around it can be abandoned for a definition which does not have judicial approval, in this case. No authority was cited to justify such a path being followed.

54 The Commissioner at first instance correctly found that the terms of the compromise agreement were contained in all letters of 17 September 2003 from Derbarl to the appellant, and to which we have referred above. Also, the relevant and correct findings as to the terms of the compromise agreement made between the parties were contained in the findings of the Commissioner set out in paragraph 61 (see page 21 (AB)) of the reasons for decision, and we reproduce the relevant part of that paragraph hereunder:-

> "The terms of the compromise agreement are in my view clear and unambiguous. Those are:
>
> (a) The Applicant is to be reinstated to her position as Director, Client Services; and
>
> (b) The Applicant is to return at the same salary conditions and with no loss of leave and other entitlements. The Applicant is to be repaid a sum of money equal to the gap between the salary to which she would have been entitled during her absence and the salary monies received from workers' compensation and other insurers. These conditions mean the Applicant is to be treated as if her employment was continuous from January 2002, for the purposes of annual leave, sick leave, long service leave, bereavement leave and superannuation. Further the Respondent is obliged to pay the Applicant the same salary and conditions that she was previously engaged in her position as Director, Client Services. This condition was subject to the condition subsequently imposed by the Steering Committee that the Applicant's appointment would not have an adverse affect on the Respondent's workers' compensation insurance premiums. This condition was satisfied."

55 We agree that the appellant had, at the time of the agreement, already received all of the prescribed workers' compensation payments to which she was entitled, and that the agreement does not propose that the appellant should pay any of the monies received by her to Derbarl or any other party. However, the nature of a set off does not require that an amount be actually paid. The Commissioner at first instance found that there was nothing in the agreement to compromise which has the character of a demand which Derbarl had against the appellant. There was no claim that monies were owed in the agreement to compromise, or that the appellant owed any monies to Derbarl.

56 Next, there was nothing in the agreement to compromise which could be said to be extrinsic to the appellant's cause of action. Further, the appellant's claim arose from the termination of the relationship between them as an employer and employee. The agreement arose from the same circumstances.

57 There is no doubt that there was a compromise of a claim of unfair dismissal by the appellant who had solicitors acting for her. There is no doubt that the appellant was not deprived of her payments of workers' compensation either weekly or a lump sum paid by way of redemption of future weekly payments. There was certainly no agreement to or arrangement whereby she was deprived of payment of the lump sum or her entitlement to it.

58 What did occur was that the appellant was not paid the total amount of salary which should have been paid to her because she had received workers' compensation payments.

59 The agreement was one whereby she was reinstated and was paid her entitlements to put her in the position which she would have been had she not been dismissed. In other words, what the parties agreed was that Derbarl would pay the appellant an amount, on top of the amount of payments for workers' compensation of a weekly type and other payments to her so that adding all of those together she would have been paid an amount equal to the amount she would have received for salary had she remained employed by Derbarl up until the date of her reinstatement.

60 Whilst the agreement for compromise cannot be characterised as any of the other transactions prohibited by s183 of *the WCIM Act*, and it was not submitted otherwise on this appeal, the question of whether the payments provided for in the agreement were evidence of a set off remains.

61 The agreement sought to take workers' compensation payments into account in calculating compensation for the loss, and, indeed, her loss for the purposes of compromise. True it is that if it were not permissible for such arrangements to take account of workers' compensation payments the effect would be to allow an employee in the position of the appellant to receive workers' compensation and other payments in lieu of wages in respect of the same period. It is likely that she cannot claim any amount other than workers' compensation for that period. If this were not so, it would allow compensation for losses not actually suffered.

62 As against that, it was submitted that when the Commissioner at first instance was determining whether the appellant was entitled to $20,115.89 as claimed the Commissioner took into account the payment of $40,500.00 as a lump sum redemption of weekly payments, and therefore set off the amount of that lump sum against the claim, contrary to s183 of *the WRC Act*.

63 In our opinion, the Commissioner at first instance made no orders setting off the amount of the lump sum paid by way of redemption of workers' compensation weekly payments. She made an order to pay the amount actually promised to be paid

pursuant to the agreement to compromise. There was no agreement to pay anything further. It was no part and could be no part of the contractual benefit claimed.

64 It is, however, we think, open to be argued that any claim for the amount of the lump sum redemption payment, or which comprehended such an amount, was not an amount to which the appellant was entitled under the contract, the subject of this claim, or under any contract. It is quite irrelevant to the claim that workers' compensation payments were made, that is for the purposes of this s29(1)(b)(ii) claim. Further, there was, as the Commissioner found, nothing in the agreement to compromise which in any way could be said to be a demand by Derbarl against the appellant; nor was there any countervailing claim of any description. Further, Derbarl made no claim in the agreement for any monies said to be owed by the appellant to Derbarl.

65 Next, as the Commissioner at first instance found, the compromise agreement took no account of anything extrinsic to the appellant's "cause of action". The agreement arising from the same circumstances on both sides arose from the termination of their relationship as employer and employee and effected a reinstatement of that relationship without loss of benefits or entitlements. Put shortly, there was nothing in the Commissioner's order or reasons therefore which caused the sum paid by way of redemption of weekly workers' compensation payments to be redirected or otherwise applied so that the appellant was deprived of the benefit of it. Quite the contrary. She was allowed to retain those amounts. Indeed, nothing else could have been done lawfully.

66 Further, it is not at all clear that the redemption of a lump sum for future weekly payments takes account of all or much of the period of the appellant's "unemployed period" without there being established that there is no prospect of any set off existing, if the absence of other characteristics as we have explained also were the case.

67 For those reasons, the Commissioner did not err and permitted no breach of s183 of *the WCIM Act* in ordering as she did. Whether the agreement is one which requires action by any person under *the WCIM Act* is not a matter which is or was within the purview of this Commission, nor was it submitted that it was.

68 The Commissioner did not err in ordering an amount equal only to the amount to be paid by way of a difference between the appellant's salary and the quantum of weekly payments and other insurance paid during the period to be paid, by way of contractual benefits claimed.

69 There was another matter and that related to ground 1(c). For the appellant it was submitted that the redemption sum was not "salary monies" which could be taken into account, within the meaning of that term in the compromise agreement. It had none of the characteristics of monies paid as or for salary (we were referred to *The Totalisator Agency Board v Fisher* (1997) 77 WAIG 1889 (IAC)). There were two written agreements signed by or on behalf of the parties on 17 September 2003. They are almost in identical terms. However, what we will call "the first agreement", which is reproduced at page 315 (AB), refers to payment of "the gap between the workers compensation and other funds you have received and your salary entitlements for the period you were away". That payment is to effect the agreement that the appellant return to work "at the same salary conditions with no loss of your leave or other entitlements".

70 The second paragraph of "the second agreement" (see pages 316-317 (AB)) differs only from the first agreement in that the third sentence in the second paragraph contains the words "the salary monies received from Worker's Compensation and other insurers", instead of the words "your salary entitlements for the period you were away", which latter words are those contained in the first agreement. Thus, the second agreement contains as the second sentence in its second paragraph, the following:-

> "You will be repaid a sum of money equal to the gap between the salary to which you would have been entitled during your absence, and the salary monies received from Worker's Compensation and other insurers."

71 However, there was an opposing submission that ground 1(c) should constitute a separate ground of appeal because ground 1(c) appears to allege that the Commissioner at first instance erred in characterising any portion of the redemption payment as "salary monies" for the purposes of the relevant term of the compromise agreement. The Commissioner found that the expression "salary monies" used in exhibit R32(1), the compromise agreement, formed part of the terms of the compromise agreement. That finding was not challenged.

72 Further, the respondent submitted that, given that the clear intention of the parties was that the appellant was to return to employment without any loss and as if she had not been dismissed, then the agreement should be construed on the following basis. That is that the parties clearly intended that at least some of the monies paid to the appellant by Derbarl's workers' compensation insurer should be included within the expression "salary monies", and therefore deducted from the amount which Derbarl was to be paid to reimburse the appellant because the salary monies were expressed as being "received from Worker's (sic) Compensation and other insurers".

73 It was also submitted by the respondent that if the words "salary monies" were construed so as not to include any of the monies received by the appellant from Derbarl's workers' compensation insurer, then the appellant would "receive a windfall" and would be "unjustly enriched". That is, she would be paid compensation in lieu of unpaid wages for the same period twice, once pursuant to *the WCIM Act*, and again pursuant to the compromise agreement.

74 The term "salary monies" was clearly, in the context of the agreement, intended to mean something other than "salary". Thus, it was submitted that the words "salary monies" should be interpreted to mean monies which are in some way related to salary or have some of the character of a salary. This, upon a proper construction of the agreement, the Commissioner was entitled to find and correct to find, and to take the redemption payment into account in calculating what was the gap between salary and salary monies under the compromise agreement. That that is clearly the case is corroborated by the wording of "the first agreement" which unmistakeably identifies the amount payable to the appellant under the agreement as the amount of the gap between her salary entitlements for the period when she was absent from her employment due to the dismissal, and the total amount paid to her for the period by workers' compensation and from other sources called "other funds".

75 We agree that such a construction was correct on those submissions, for those reasons. For all of those reasons, ground 1 is not made out.

**Grounds 2 and 3**

76 Grounds 2 and 3 should be dismissed for the same reasons because ground 1 is dismissed.

**Ground 4**

77 By this ground it is alleged that the Commissioner at first instance erred in law and in fact in finding that the appellant was not entitled under the compromise agreement to payment for TOIL for time worked as Director, Client Services. It is quite clear that the appellant could not be paid for overtime unless the Board approved such a course. That was no in issue.

78 The claim concerned related to overtime worked as Director and Director, Client Services. There was no contention that she did not work overtime in either position.

79 The appellant and Ms Abigail Harry gave evidence that Derbarl, through its Board, approved payment of overtime for all the overtime worked as Director, Client Services before the appellant ceasing to be employed by Derbarl on 13 December 2002. The claim as far as this appeal was concerned related to her time as Director, Client Services and the overtime worked during that period.

80 Ms Harry's evidence was that a motion was passed authorising payment of overtime to the appellant. Ms Harry was unable to remember when it was passed. She was only able to say that it was passed before 13 December 2002 when she ceased her employment. Ms Harry's evidence was also that the motion was passed after the appellant's reinstatement in 2003, and therefore after her dismissal on 13 December 2002. Ms Harry was confused about the date when the motion was passed. In re-examination she was led in evidence by leading questions (see pages 197-198 (AB)), and on a fair reading of her evidence it was quite unconvincing, when so led. However, her evidence was that the first motion to pay overtime was passed during the period in which the appellant was acting as Director or Chief Executive Officer of Derbarl, as well as working in her own position as Director, Client Services. Ms Harry gave evidence that the motion that overtime be paid was passed "given the circumstances of your position at the time as an acting director".

81 The appellant's own evidence was that she was employed as the Director, Client Services but also acted as Chief Executive Officer for the period 29 January 2002 until 14 June 2002, a period of almost four months.

82 There was no other evidence that overtime payments had been approved. The minutes produced contained no record that any such resolution had been passed.

83 The Commissioner at first instance considered the evidence of Ms Harry and the appellant and placed little weight on it. However, she correctly found, even having regard to their evidence, that there was no evidence before her that after the June 2002 payment for overtime had been approved either by the Chief Executive Officer or the Board.

84 The question of approval of overtime by the Board was put in cross-examination to the appellant and Ms Harry, and there was no substance in the allegation in the ground of appeal that it was not.

85 The Commissioner made specific findings about the credibility of witnesses in paragraphs 58 and 59 of her reasons for decision. She found that Mr Lowe's evidence was to be preferred to that of Ms Harry and Mr Yarran because although they were honest witnesses their recollections of some events were poor. She observed that Ms Harry's recollection of the timing of events was better than Mr Yarran's however. She accepted the appellant's evidence where it was corroborated by other witnesses or documentary evidence.

86 There was nothing submitted which could lead to the conclusion that, in making findings based on credibility, the Commissioner had misused her advantage.

87 The onus of proving that the appellant was entitled to be paid overtime and every ingredient of her claim lay of course at all times on the appellant, and that included proving that payment of overtime had been properly authorised by or on behalf of Derbarl. The issue of authorisation was raised in the proceedings and clearly put in cross-examination to both the appellant and Ms Harry (see pages 187-191 (AB), pages 90-97 of the transcript at first instance).

88 It was alleged in ground 4(d) that there was a denial of natural justice to the appellant, at first instance, in that no reasonable opportunity was afforded her to put her case. In fact, every reasonable opportunity was afforded to her to put her case on a fair reading of the transcript. There was no application by her to adduce further evidence. In any event, it was not submitted that she was in any way deprived of a successful result (see *Stead v State Government Insurance Commission* [1986] 161 CLR 141).

89 For those reasons, we would dismiss ground 4.

**Ground 5**

90 Since ground 4 was dismissed, so also should ground 5 be.

91 For those reasons, no ground has been made out and appeal No FBA 29 of 2004 should be dismissed.

**Appeal No FBA 47 of 2004**

92 We now turn to the grounds of appeal in appeal No FBA 47 of 2004.

**Ground 1(a)**

93 By ground 1(a) it is alleged that the Commissioner at first instance erred in law and in fact in assessing and determining the loss and injury caused by the appellant's summary dismissal, firstly, because the Commissioner substituted his view of how the employment relationship ought to have been ended, and, secondly, by assessing the loss on that basis rather than on the basis of loss actually suffered.

94 Derbarl's submission was that all that the Commissioner found was that there was no ground for any summary dismissal, and that therefore any dismissal should have been on notice. Further, he found that procedurally the appellant was not treated fairly.

95 The Commissioner found that whilst a summary dismissal was not warranted the employment relationship could and should have been terminated by giving notice, not by a summary dismissal. In other words, he found that a summary dismissal was not justified.

96 The Commissioner did not express his own view but made a finding on the evidence before him. Thus, the dismissal was unfair and found to be unfair because it was a summary dismissal, and the Commissioner correctly so found. The appellant's loss was therefore that loss caused by her dismissal, which was a summary dismissal. It is trite to say that the dismissal, which had to be determined to be unfair or not, was the dismissal which occurred, which was the summary dismissal, (and not some other hypothetical dismissal).

97 There is no substance in that ground for those reasons. It is not made out and should be dismissed.

**Ground 1(b)**

98 By that ground it is alleged that the Commissioner at first instance erred in law and in fact in his determination of the appellant's loss and injury caused by the summary dismissal. In particular, the appellant alleges that the Commissioner failed to consider and assess "properly" or at all the loss caused by the dismissal and failed to have any regard for the loss which was caused by the dismissal and actually suffered by the appellant. The claims include claims which are properly to be characterised as claims for contractual benefits, and a claim for punitive damages which is an incompetent claim. A claim for punitive damages cannot be made because of the express terms of *the Act* which only enables a claim for compensation "for loss or injury" to be made. Punitive damages are obviously neither. The actual loss and only loss established on the evidence was caused by the failure to give notice ((ie) two weeks provided for by the contract). Therefore ground 1(b) of the appeal is not made out.

**Ground 1(c)**

99 The Commissioner, it is said, erred in law and in fact in assessing and determining the loss and injury caused by the appellant's summary dismissal. In particular, the error is alleged to be that the Commissioner erred in law by determining the loss caused by the appellant's summary dismissal as if it were a claim for denied contractual benefits, rather than making a finding as to the loss actually suffered by the appellant. The claim at first instance was for unfair dismissal and also for denial of entitled contractual benefits.

100 In any event, what we have observed above in relation ground 1(b) answers the allegation. Accordingly, that ground is not made out.

**Ground 1(d)**

101 That ground also alleges that the Commissioner erred in law and in fact in assessing and determining the loss and injury caused by the appellant's summary dismissal because the injury was not properly considered or assessed or considered or assessed at all. Our reasons in relation to ground 1(b) apply. It was also submitted by the respondent that s93C of *the WCIM Act* limits the power of courts to award damages in respect of work related injuries. S93C reads as follows:-

> "**93C Limit on powers of courts**
>
> If this Division applies a court is not to award damages to a person contrary to this Division [30, 30a]."

102 That section deals with common law damages and claims for personal injuries suffered in the course of employment. It does not and cannot exclude the express operation of *the Act* which by s23A(6) confers an express right to compensation for loss or injury caused by the (harsh, oppressive or unfair) dismissal of an employee. There can be no claim unless such a dismissal is proven and the remedies prescribed are remedies which exist by virtue only of *the Act*. A claim seeking s23A(6) remedies is not a claim for damages, but is a claim for specifically prescribed statutory remedies for the statutory tort of unfair dismissal.

103 That ground is not made out for those reasons.

104 For all of those reasons, appeal No FBA 47 of 2004 is not made out and should be dismissed.

**FINALLY**

105 Insofar as the decisions appealed against were discretionary, nothing has been established, according to the principles in *House v The King* [1936] 55 CLR 499 to require the Full Bench to interfere with the exercise of the discretion at first instance. Insofar as the appeals are not against the discretionary decisions, then for the reasons which we have expressed also above, the grounds of appeal are not made out. For those reasons, both appeals should be dismissed.

Order accordingly

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**2005 WAIRC 01959**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

| | |
|---|---|
| **PARTIES** | DIANA ELIZABETH DOWNS-STONEY |
| | **APPELLANT** |
| | **-and-** |
| | DERBARL YERRIGAN HEALTH SERVICE |
| | **RESPONDENT** |
| **CORAM** | FULL BENCH |
| | HIS HONOUR THE PRESIDENT P J SHARKEY |
| | COMMISSIONER P E SCOTT |
| | COMMISSIONER S J KENNER |
| **DATE** | MONDAY, 4 JULY 2005 |
| **FILE NO/S** | FBA 29 OF 2004, FBA 47 OF 2004 |
| **CITATION NO.** | 2005 WAIRC 01959 |

| | |
|---|---|
| **Decision** | Appeals dismissed |
| **Appearances** | |
| **Appellant** | Mr A D Lucev (of Counsel), by leave, and with him Ms J M Stevens (of Counsel), by leave |
| **Respondent** | Mr G T Stubbs (of Counsel), by leave |

*Order*

These matters having come on for hearing before the Full Bench on the 4th day of May 2005, and having heard Mr A D Lucev (of Counsel), by leave, and with him Ms J M Stevens (of Counsel), by leave, on behalf of the appellant, and Mr G T Stubbs (of Counsel), by leave, on behalf of the respondent, and the Full Bench having heard and determined the matter, and reasons for decision having been delivered on the 4th day of July 2005, it is this day, the 4th day of July 2005, ordered that appeal Nos FBA 29 and FBA 47 of 2004 be and are hereby dismissed.

By the Full Bench

(Sgd.) P J SHARKEY,
President.

[L.S.]

**2005 WAIRC 02031**

**APPEAL AGAINST THE DECISION OF COMMISSIONER HARRISON GIVEN ON 17 MARCH 2005 IN MATTER CR 252/03**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

| | |
|---|---|
| **PARTIES** | MASTERCARE PROPERTY SERVICES (WA) PTY LTD |
| | **APPELLANT** |
| | **-and-** |
| | LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH |
| | **RESPONDENT** |
| **CORAM** | FULL BENCH<br>HIS HONOUR THE PRESIDENT P J SHARKEY<br>SENIOR COMMISSIONER J F GREGOR<br>COMMISSIONER S WOOD |
| **HEARD** | WEDNESDAY, 15 JUNE 2005 |
| **DELIVERED** | THURSDAY, 14 JULY 2005 |
| **FILE NO.** | FBA 3 OF 2005 |
| **CITATION NO.** | 2005 WAIRC 02031 |

| | |
|---|---|
| **CatchWords** | Industrial Law (WA) – appeal against the decision of a single Commissioner – unfair dismissal – mitigation of loss – alleged quantum of compensation awarded in error – whether bound by case at first instance – raising of fresh points or matters of objection for first time on appeal - *Industrial Relations Act* 1979 (as amended), s7, s23A(6), s23A(7)(a), s26(1)(c), s29(1)(b)(i), s49, s49(4) – *Labour Relations Reform Act* 2002, s138. |
| **Decision** | Appeal dismissed. |
| **Appearances** | |
| **Appellant** | Mr T Lyons (of Counsel), by leave |
| **Respondent** | Mr M Swinbourn, as agent |

*Reasons for Decision*

**THE PRESIDENT:**

## INTRODUCTION

1 This is an appeal by the above-named appellant, Mastercare Property Services (WA) Pty Ltd (hereinafter referred to as "Mastercare"), brought pursuant to s49 of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "*the Act*").

2 The appeal is against two parts of the decision of the Commission at first instance, constituted by a single Commissioner, and given on 17 March 2005 in matter No CR 252 of 2003. Those parts are:-

> "(1) the dismissal of Don Ajith Kaluthanthrige by the Appellant (Respondent) was unfair and reinstatement is impracticable; and
>
> (2) the Appellant (Respondent) pay Don Ajith Kaluthanthrige compensation in the sum of $11,675.30,"

3 The grounds of appeal were amended at the hearing in accordance with the amended grounds of appeal handed to the Full Bench, save and except that ground 2 of those grounds was deleted.

4 The appeal was, in fact, restricted to grounds 3 and 4 and to an allegation that the quantum of compensation awarded was awarded in error, and, in particular, that the finding of the Commissioner at first instance was in error because Mr Don Ajith Kaluthanthrige (hereinafter referred to as "Mr Kaluthanthrige") had failed to mitigate his loss.

5 Ground 5 was not competent because the appeal was not an appeal against a "finding" as defined in s7 of *the Act*. It was an appeal against a decision as otherwise defined in s7.

## BACKGROUND

6 The appellant, Mastercare, was, at all material times, an employer who had employed Mr Kaluthanthrige, at all material times also.

7 At all material times, the respondent was an "organisation" as that term is defined in s7 of *the Act*.

8 Mr Kaluthanthrige was employed by Mastercare as a cleaner from 1 July 1999 until 28 October 2002 and then from 26 May 2003 on a permanent part-time basis. His duties which he carried out at the Hyatt Centre in Perth in this State from 26 May 2003, primarily consisted of cleaning the toilets.

9 Later he worked at the QV1 building, commencing on 10 June 2003 where his duties consisted primarily in cleaning and maintaining the lobby area of that building.

10 His employment by Mastercare ended on 1 September 2003, when, as the Commissioner at first instance found, and that finding is not challenged, he was unfairly dismissed by Mastercare. The unfairness, as the Commissioner found (see paragraph 40 of the reasons for decision at first instance) was procedural unfairness. Paragraph 40 reads as follows:-

> "I find that Mr Kaluthanthrige's termination was effected in a procedurally unfair manner. I accept Mr Kaluthanthrige's evidence that he was contacted by Mr Sotiroski on the evening of 1 September 2003 and told not to report for duty the following day. As a result Mr Kaluthanthrige was not given any notice of his termination, he was not given any warning that his employment was to cease as at 1 September 2003 and he was unable to canvass alternatives to his termination from his existing shift."

11 In my opinion, it is probably wrong to characterise the unfairness as procedural because, in fact, the unfairness was constituted by a failure to give any or any proper notice in accordance with the contract of employment. It consisted, in effect, of summary dismissal without there being justification for it. If that be wrong, of course, it was entirely procedurally unfair for the reasons which the Commissioner at first instance expressed, and it was not alleged otherwise.

12 It is important to observe that, at first instance, the only oral evidence given for the respondent (who was the applicant at first instance) was that of Mr Kaluthanthrige and Ms Fiona Katherine Bennett who was the internal organiser for the manufacturing and property services team for the Liquor, Hospitality and Miscellaneous Union, WA Branch, at the time of the matter. There was also documentary evidence submitted. There were two witnesses called on behalf of Mastercare. They were Ms Anna Barabas, Mastercare's operations manager at the time, and Ms Toni Norooz, its administrative payroll clerk.

13 Significantly, Mr Kaluthanthrige was not cross-examined at all about mitigation of loss at the hearing at first instance. No evidence was adduced for Mastercare about mitigation of loss and no submissions were made on behalf of Mastercare on that point at first instance. In particular, there was no submission that Mr Kaluthanthrige had failed to act reasonably or had failed to mitigate his loss.

14 The uncontroverted evidence in relation to that issue was as follows. After his dismissal Mr Kaluthanthrige waited in case Mastercare contacted him. However, some five weeks elapsed between 1 September 2003, the date of the termination and when he commenced employment in mid October 2004 with Heritage Patios. During that time Mr Kalunthanthrige had waited to hear from Mastercare and did not hear from them. As I have said, he sought other employment during his time, and, as a result, obtained that employment with Heritage Patios for about two months and with another cleaning company for about two weeks. He gave other unchallenged evidence explaining that he stayed waiting for a telephone call from Mastercare for a month, and that when they did not telephone him he went and sought assistance from his "union", the respondent, and asked it to look into the matter for him.

15 Ms Bennett wrote to Ms Sally-ann Davis, the Financial Controller of Mastercare, by letter dated 3 October 2003 and questioned what had occurred in relation to Mr Kaluthanthrige and required a response from Ms Davis by close of business 7 October 2003. This followed a facsimile and a discussion between them on 23 September 2003 of which there is no evidence of any satisfactory response or result.

16 Ms Davis replied by letter dated 7 October 2003 in which, inter alia, she wrote:-

> "Don only worked in this position for a short period of time before approaching us to find alternative employment to (sic) which we are still looking. Don needs to contact the office and advise as to exactly what he is able to do."

17 Of course, around that time Mr Kaluthanthrige commenced other employment with Heritage Patios. It is to be noted that the letter does not offer reinstatement, nor does it offer any position or positions. It seems unnecessarily vague and tardy, and it is doubtful, on a fair reading, that there is any conviction in the suggestion that there might be employment for Mr Kaluthanthrige.

18 Further, the response took place only at the instance of the respondent and some five weeks after the dismissal. It also occurred against the background of a dismissal which the Commissioner at first instance found to be unfair and which finding is not challenged on this appeal. Indeed, it occurred against the background of an unfair dismissal which caused injury to Mr Kaluthanthrige for which the Commissioner at first instance ordered payment of compensation. Again, that finding and order were not challenged on this appeal.

19 Mr Kaluthanthrige said that he "was waiting" for four weeks for a job or more hours with Mastercare, but did not get it. He was, in fact, not offered any alternative position. That explanation is accentuated by his further unchallenged and uncontradicted evidence that he waited for four weeks for a response before contacting the respondent for assistance. By this time, he had become depressed and said he was affected psychologically. He explained that he was really depressed and he went to see a counsellor, and after seeing the counsellor, he started looking for jobs. He had lost his trust in Mastercare and he was desperate to get a job, he said, and that evidence was not contradicted. During this time he applied for every job that he could in the newspaper.

20 He worked at Heritage Patios for a period of about eight weeks in a full-time position from about mid October 2003 until about mid-December 2003. He did give no evidence about why he left that employment. He was then without employment for about 10 weeks from mid-December 2003. He gave no explanation about that and remained unemployed during that period. He gave no evidence of any attempts to find employment during that period, save and except to say that he applied for "all other job" with a "lot of companies". He applied for one job with a cleaning company and they offered him a job at Margaret River. Then they asked him to come and work for two days in Perth and he went for training but they did not give him the job. Then he had a job with a building company, that is cleaning buildings after constructions had finished, and he worked for them for one day, but they put him off because they were really looking for "really strong guys" and it was work which was too heavy for him.

21 It was after that, on 29 February 2004, that he got a job with NAJK or NJAK and worked for them for about two weeks until about 14 March 2004 when he left that employment. He said that he did that because he did not "have any luck", and also he had decided to go home for a while to Sri Lanka.

22 From 15 March 2004 until he left for Sri Lanka he was unemployed. He was in Sri Lanka from May 2004 to early August 2004 and there he attended his brother's wedding. He volunteered in evidence that he did attempt to find work there, and again that was not contradicted or challenged in any way. He could not obtain work because he did not have the required visa or permit. He is, he said, an Australian citizen or resident.

23 From mid August 2004 he worked in Geraldton running a friend's coffee shop and, indeed, was still working there at the time when this matter was heard at first instance on 10 January 2005. He explained that he took the unpaid work in Geraldton after he returned from Sri Lanka because he was really lost in life. He described himself as "homeless and stateless", even though he had an Australian passport.

24 The person who ran the said coffee shop in Geraldton was not well and Mr Kaluthanthrige's friend (the proprietor) asked him to go up and help him. Mr Kaluthanthrige was given, and had, accommodation and food so that he had, and has, no expenses. He also gave evidence that he owed the proprietor money and it would seem worked and was still working to pay him back. He managed the coffee lounge for this employer. He has not, he said, been paid any way at all by the proprietor of the coffee lounge.

## ISSUES AND CONCLUSIONS

**Issue**

25 The Commissioner at first instance found that Mr Kaluthanthrige had an on-going expectation of work for at least 12 months with Mastercare. She therefore found that he should be compensated for a loss of earnings for 12 months, minus any period during this time that he was unavailable to work (see paragraph 44, page 22 of the appeal book). Thus, his loss was found to be as follows:-

| | | |
|---|---|---|
| 12 months earnings gross per fortnight | = | $23,350.60 |
| Less actual earnings for the same period | = | $ 5,095.00 |
| Amount | = | $18,255.60 |
| Less 15 weeks overseas May to Mid-August | | |
| 2004 when he did not work | = | $ 6,735.75 |
| Loss | = | $11,519.85 gross |

26 For Mastercare it was contended that that figure for loss and compensation was incorrect because there were a number of periods during that 12 months when the respondent did not establish that Mr Kaluthanthrige had mitigated his loss. Thus, it was submitted that the loss should have been found and compensation ordered to be paid calculated as follows:-

| | |
|---|---|
| "$898.10 per fortnight X 26 | $23,350.60 |
| Less Earnings | $ 5,095.00 |
| | **$18,255.60** |
| Less time overseas: | |
| May2003 to mid-August 2003 (15 weeks) | $ 6,735.75 |
| Less time between termination and starting | |
| at Heritage Patios (2 September 2003 to | |
| mid-October 2003 – 5 weeks) | $ 2,245.25 |
| Less time between finishing at Heritage Patios | |
| and starting at NAJK (mid-December 2003 to 29 | |
| February 2004 – 10 Weeks) | $ 4,490.50 |
| Less time between finishing at NAJK and leaving | |
| for Sri Lanka (15 March 2004 to May 2004) | |
| (6 Weeks) | $ 2,694.30 |
| Less time between returning to Australia and 1 | |
| September 2004 (3 Weeks) | $ 1,347.15 |
| | **$ 742.35** |
| Plus allowance for injury | $ 500.00 |
| TOTAL COMPENSATION | **$ 1,242.35 gross**" |

**Principles – S49(4) – Whether Bound by Case at First Instance**

27 This part of the decision was a discretionary decision as that term is defined in *Norbis v Norbis* [1986] 161 CLR 513 and *Coal and Allied Operations Pty Ltd v AIRC and Others* [2000] 203 CLR 194, although the decision depends on mixed findings of fact and law. Thus, the appellant must establish that the exercise of the discretion at first instance miscarried and that the amount of compensation ordered to be paid was in error and based on an erroneous finding of loss (see, generally, *House v The King* [1936] 55 CLR 499 and *Gromark Packaging v FMWU* (1992) 73 WAIG 220 (IAC) and a multitude of Full Bench decisions in this Commission to the same effect).

28 Only if that is established can the Full Bench interfere with the exercise of discretion at first instance, and, in particular, only then can the Full Bench substitute the exercise of its discretion for the discretion of the Commissioner at first instance.

29 The principles which apply in relation to mitigation of loss or injury in the Commission are well settled. They were laid down by a Full Bench in *Growers Market Butchers v Backman* (1999) 79 WAIG 1313 at 1316 (FB) per Sharkey P (Parks C agreeing), and are binding.

30 Inter alia, that case is authority for the following propositions:-

(a) The obligation to mitigate loss is on the claimant employee in claims of unfair dismissal.

(b) In practical terms this requires the employee to diligently seek suitable alternative employment.

(c) The onus of proof of failure to mitigate loss is on the respondent.

(d) 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.

(e) The duty to act reasonably to mitigate loss does not generally require the employee to take employment of a different or inferior kind, although in some cases it may be unreasonable not to accept employment of a lower status and salary level.

31 I would also add this. The onus of proving that the claimant employee has not taken reasonable steps to mitigate his loss lies on the respondent employer in a s29(1)(b)(i) claim (see *Metal Fabrications (Vic) Pty Ltd v Kelcey and Another* (1986) VR 507 at 513 (SC) per Murphy, Brooking and Nicholson JJ and *Watts v Rake* [1960] 108 CLR 158, as well as *Goldburg v Shell Oil Co of Australia Ltd* (1990) 95 ALR 711 (FC)).

**S49(4) and/or Binding Effect of Case at First Instance**

32 There was first a submission on behalf of the respondent that, since the issue of mitigation was not raised in evidence or cross-examination or in submissions by or on behalf of Mastercare at first instance, then it could not be raised on appeal. Such a finding was made in *Growers Market Butchers v Backman* (FB) at page 1316 when the respondent employee was not cross-examined about whether he had mitigated his loss. Further, in that case, as in this case, it was not put to him or submitted that he had not diligently sought suitable alternative employment. In that case, too, the Full Bench found that the obligation of the employee was to act reasonably, and the evidence was that he did. In that case, too, as in this case, there was no submission of a failure to mitigate and no evidence of a failure to mitigate, in accordance with the principles to which I have referred.

33 As Mr Lyons submitted, that case was decided by a Full Bench before *the Act* was amended by the insertion of s23A(7) by the *Labour Relations Reform Act* 2002, s138.

34 S23A(7)(a) of *the Act* requires that in deciding an amount of compensation for the purposes of making an order accordingly under s23A(6), the Commission is required to have regard to "the efforts (if any) of the employer and employee to mitigate the loss suffered by the employee as a result of the dismissal". (It should be noted that what is mitigation of injury and the compensation therefore will be different and more alignable to some acts of mitigation in personal injury claims).

35 Giving the words of s23A(7)(a) their natural meaning, the section clearly means that the employer's and employee's efforts to mitigate ((ie) reduce the loss suffered by the employee) are to be taken into account in calculating what amount is to be ordered to be paid to the employee by way of compensation, and before that in determining loss. Again that issue and no matters relevant to it were in any way raised by Mastercare at first instance. No submission was made to the Full Bench about its effect, save and except that it was submitted that it was now required to be considered by the Commission. However, there was no ground of appeal which alleged a failure to comply with that provision, and the Full Bench should not therefore consider any submission on that point if there were one, which there has not been.

**New Points or Objections Raised for the First Time on Appeal**

36 In order to avoid confusion it is necessary to state again the law relating to the raising of fresh points or matters of objection before an Appeal Bench when they were not raised at first instance.

37 Generally speaking, insofar as s49(4) of *the Act* forbids an appeal being heard and determined on anything but "matters" raised in the proceedings before the Commission at first instance, and insofar as the common law permits such a course, which remains an open question, in my opinion, then because of the express words of the statute the Full Bench will take a stricter view than at common law in relation to the raising of points or objections before it which were not raised on appeal. It may be that s49(4) forbids the raising of such points altogether, but that argument can await another day.

38 Assuming, however, that s49(4) of *the Act* does not prohibit the raising of fresh points or matters of objection, then I am of opinion that the following principles apply which are well settled:-

(a) The appellant cannot, for the first time, raise a point or objection on appeal (see *Dairy Farmers Co-Operative Ltd v Azar* [1990] 170 CLR 293 and *O'Brien and Others v Komesaroff* [1982] 150 CLR 310) unless the evidence relevant to the point has been established beyond controversy (see *National Australia Bank Ltd v KDS Construction Services Pty Ltd* [1987] 163 CLR 668) or the point is one of law or construction which is irremediably correct (see *Chalmers Leask Underwriting Agencies v Mayne Nickless Ltd* [1983] 155 CLR 279 and *Holcombe and Others v Coulton and Others* (1988) 17 NSWLR 71 (CA)).

(b) In determining whether a point or objection was taken below no narrow or technical view will be taken (see *Water Board v Moustakas* [1988] 180 CLR 491).

(c) If, on a proper view, the point was not raised, then the parties are normally bound by the course taken below, particularly when evidence relevant to the new point could have been given at trial if the point had been raised (see *Wingate Marketing Pty Ltd and Another v Levi Strauss and Co and Another* (1994) 121 ALR 191 and *Franklin v Rabmusk Pty Ltd* [1993] 1 Qd R 258 (SC)).

(d) If a point is permitted to be raised for the first time on appeal, the appellant may be penalised in costs for not raising the point below, but subject to the cost provisions of this Act (see, generally, *Wickstead and Others v Browne* (1992) 30 NSWLR 1 (CA) per Handley and Cripps JJA at page 19 and *Spies v Commonwealth Bank of Australia* (1991) 24 NSWLR 691 (CA) per Handley JA at page 702).

(e) Full Benches of this Commission should be very reluctant to allow a point or objection to be raised for the first time on appeal if that point was either expressly or in effect conceded or abandoned in the Courts below.

(f) Such an approach should also be taken where there is no cross-appeal to a respondent seeking to raise for the first time a point or objection if that point or objection is not raised in support of the judgment below, save and except that a respondent may ordinarily do so subject to proper and reasonable notice being given to the appellant (see *Owners of the Ship "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 68 ALJR 907 (HC) and *NRMA Insurance Ltd v B & B Shipping and Marine Salvage Co Pty Ltd* (1947) 47 SR (NSW) 273 (SC)).

(g) It is a further rule that generally a party will be bound by the case presented by him or her at first instance at common law (see *Metwally v University of Wollongong* (1985) 60 ALR 68 (HC)) which is a separate and additional obstacle.

39 As I have said, the evidence of Mr Kaluthanthrige was not challenged, called into question, shaken, denied or cross-examined upon by or on behalf of the employer. No contradictory evidence was adduced. It was not submitted in any way at first instance that the loss found to have been suffered was not mitigated or was erroneous, in addresses or otherwise.

40 On the principles which I have expressed above, grounds 3 and 4, which purport to raise it, were incompetent and the submissions in relation to them could not be put and were incompetent. The Full Bench could and should not entertain them. In particular this is so because if the points now being put to the Full Bench had been put to Mr Kaluthanthrige at first instance, then he could have had an opportunity to answer them in cross-examination and further explain matters in re-examination. He was deprived of that opportunity. The respondent may wish, too, to have adduced evidence to support Mr Kalunthanthrige's own evidence and strengthen his case. He was deprived of that opportunity. Had submissions to that effect been made, then they could have been answered at first instance, too, by his counsel. It seems quite clear that that part of the case was obvious and if it was to be challenged then it should have been challenged and it was not, at first instance.

41 Those submissions and those grounds should be decided as being incompetent and not allowable on this appeal because:-

(a) Mastercare has clearly raised a point for the first time on appeal which was not raised at first instance when the evidence relevant to Mastercare's point had not at all been established or even adduced. It is caught by the general prohibition of such points being raised referred to in paragraph 38(a) and the cases cited therein.

(b) On a proper view it is obvious that the point was not raised so Mastercare is bound by the course which it took at first instance, particularly since evidence or further evidence relevant to the new point could have been given at first instance if the point had been raised.

(c) The submissions are disallowable, too, on the basis of each of the points (b) to (g) in paragraph 38 hereof.

(d) S49(4) of *the Act* at least reinforces such an approach even if it does not require it.

(e) The point on appeal is supported by submissions as to fact which should have been put to Mr Kaluthanthrige in accordance with the decision in *Browne v Dunn* (1893) 6 R 67 (HL) and cannot now be put as submissions on appeal.

(f) The equity, good conscience and the substantial merits of the case lie with the respondent and its member, for those reasons, and pursuant to s26(1)(c) of *the Act* which requires their interests, for those reasons, to be preferred to those of Mastercare.

(g) Effectively the approach to mitigation on this appeal was abandoned and simply not taken at first instance, and thus, the broad principle that the appellant as respondent at first instance is bound by the case which it then presented is an absolute bar to that approach being raised on appeal.

42 This was a case, as I have already observed, where the point that the respondent had not mitigated its member's claim was never raised as a point or objection at first instance and should not be allowed on this appeal or allowed to be considered upon this appeal.

43 Alternatively, there is sufficient unchallenged evidence for the finding to have been made given Mr Kalunthanthrige's status as a low paid worker, the effect on him psychologically of all of these events, the attitude taken by Mastercare, his fear and worry, and the fact that he clearly acted reasonably at all times. It was not suggested or submitted otherwise at first instance. Indeed, it was not submitted that he had not mitigated his loss or taken reasonable steps to do so. There is, with the exception of his time in Sri Lanka, continuing evidence of his finding work or attempting to find work. Indeed, there was his uncontradicted evidence which should be accepted that he did attempt to find work in Sri Lanka but was prevented from obtaining work by his lack of citizenship or other suitable qualifications to be given work in Sri Lanka. Given his mental state and his lack of work on his return from Sri Lanka in August 2004, his taking up the job in Geraldton for the three weeks or so of his period of proven loss was entirely reasonable and it was not submitted at first instance to be otherwise.

44 There was no attempt to discharge the onus upon Mastercare at first instance in the face of the uncontroverted and credible evidence of Mr Kaluthanthrige as to his efforts to obtain employment.

45 The Commissioner at first instance correctly took into account that period in Sri Lanka when he was not working and excluded it from the finding as to loss. Nothing was done at first instance to prove failure to mitigate loss and it was not proven. In particular, in the face of somewhat detailed evidence of finding work and attempts to find work, and also given his mental condition at times and his undisputed physical inability to do some types of work, the onus on Mastercare to prove that he had not taken reasonable steps to mitigate his loss was simply not discharged.

46 There was, further, I should add, no obligation upon him to make the telephone call in October 2003 after his dismissal when the message he received was late and vague, when he had already obtained employment after making a number of efforts to do so, with Heritage Patios, and given his obvious mistrust and the anxiety which he was suffering in circumstances where he had financial difficulties. The late letter of 7 October 2003 from Mastercare, even if it included a reasonable offer and a genuine offer, and it is doubtful that it was genuine even if it was reasonable, which it was not, was not required to be accepted or otherwise answered by Mr Kaluthanthrige, particularly given that his uncontroverted evidence which should have been accepted was that he had attempted by telephone to contact Mastercare's employee, "Anna", but that she did not respond to him. The fact of the matter is that there was no concrete offer of alternative employment and no credible offer made by Mastercare before Mr Kaluthanthrige, mitigating his loss, obtained employment with Heritage Patios. The fact of the matter is, too, that there was no reasonable or credible offer, it was open to find, made to him, even after he obtained that employment.

47 Accordingly, being bound by its case at first instance, Mastercare cannot properly submit that the Commissioner at first instance, on what was before her, did not correctly find when she found as she did. If it were necessary to so find I would so find, that is as the Commissioner at first instance had found, and dismiss the appeal for the same reasons.

48 I would thus find that it had not been established that the Commissioner at first instance erred in finding the quantum of loss which she found and ordering the amount of compensation which she ordered. I also would find that she did not err in finding that Mr Kaluthanthrige acted reasonably, at all times, and mitigated his loss.

49 Further, no argument was presented which prayed in aid s23A(7)(a) of *the Act* at first instance, and there is nothing in s23A(7)(a) which affects the consideration of mitigation in accordance with the common law principles laid down in this Commission. It has not been established that in finding loss, as she did, the exercise of the Commissioner's discretion at first instance, in any way, miscarried.

50 There is nothing either put to distinguish *Growers Market Butchers v Backman* (FB) to that extent that it cannot be said to be applicable to this case if it were necessary to say so.

51 For those reasons, grounds 3 and 4 have no merit and fail, and, accordingly, the appeal, in my opinion, fails and should be dismissed.

52 For all of those reasons, I would find no merit in the appeal and dismiss it.

**SENIOR COMMISSIONER J F GREGOR:**

53 I have had the opportunity of reading the Reasons for Decision of His Honour the President. I agree with his conclusion that the Appeal should be dismissed and have nothing further to add.

**COMMISSIONER S WOOD:**

54 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:**

55 For those reasons, the appeal is dismissed.

Order accordingly

**2005 WAIRC 02031**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

| | |
|---|---|
| **PARTIES** | MASTERCARE PROPERTY SERVICES (WA) PTY LTD |
| | **APPELLANT** |
| | **-and-** |
| | LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH |
| | **RESPONDENT** |
| **CORAM** | FULL BENCH<br>HIS HONOUR THE PRESIDENT P J SHARKEY<br>SENIOR COMMISSIONER J F GREGOR<br>COMMISSIONER S WOOD |
| **DATE** | THURSDAY, 14 JULY 2005 |
| **FILE NO/S** | FBA 3 OF 2005 |
| **CITATION NO.** | 2005 WAIRC 02032 |

| | |
|---|---|
| **Decision** | Appeal dismissed. |
| **Appearances** | |
| **Appellant** | Mr T Lyons (of Counsel), by leave |
| **Respondent** | Mr M Swinbourn, as agent |

*Order*

This matter having come on for hearing before the Full Bench on the 15th day of June 2005, and having heard Mr T Lyons (of Counsel), by leave on behalf of the appellant, and Mr M Swinbourn, as agent on behalf of the respondent, and the Full Bench having heard and determined the matter, and reasons for decision having been delivered on the 14th day of July 2005, it is this day, the 14th day of July 2005, ordered that appeal No FBA 3 of 2005 be and is hereby dismissed.

By the Full Bench

(Sgd.) P J SHARKEY,
President.

[L.S.]

# PRESIDENT—Matters dealt with

**2005 WAIRC 01818**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

| | |
|---|---|
| **PARTIES** | AESTHETICS DENTAL GROUP PTY LTD |
| | **APPLICANT** |
| | **-and-** |
| | JUNE GARDNER |
| | **RESPONDENT** |
| **CORAM** | HIS HONOUR THE PRESIDENT P J SHARKEY |
| **DATE** | WEDNESDAY, 15 JUNE 2005 |
| **FILE NO.** | PRES 2 OF 2005 |
| **CITATION NO.** | 2005 WAIRC 01818 |

| | |
|---|---|
| **CatchWords** | Industrial Law (WA) – application for a stay of the order at first instance pending appeal – unfair dismissal – no serious issue to be tried – balance of convenience – no exceptional circumstances - *Industrial Relations Act* 1979 (as amended), s26(1)(a), s26(1)(c), s29(1)(b)(i), s29(1)(b)(ii), s49(3), s49(11). |
| **Decision** | Application dismissed. |
| **Appearances** | |
| **Applicant** | Dr A C Furlan appeared for the applicant |
| **Respondent** | Mr A G McDonald appeared for the respondent |

*Reasons for Decision*

**THE PRESIDENT:**

**INTRODUCTION**

1 This is an application by the above-named employer, Aesthetics Dental Group Pty Ltd (hereinafter referred to as "Aesthetics"). The above-named respondent, June Gardner (hereinafter referred to as "Ms Gardner"), was its employee until the termination of her employment. On the hearing of the application, Dr A C Furlan appeared for Aesthetics as a director of the company, and Mr A G McDonald appeared as agent for Ms Gardner. The application was opposed.

2 Aesthetics makes an application to the Commission, constituted by the President, pursuant to s49(11) of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "*the Act*") for the stay of the operation of the order made at first instance by the Commission, constituted by a single Commissioner, on 13 October 2004, in application No 185 of 2004, and deposited in the office of the Registrar on the same day.

3 The order sought is that the operation of the decision at first instance be stayed until appeal No FBA 44 of 2004 is heard and determined.

4 The order and declaration sought to be stayed are as follows:-

> "(1) DECLARES that the Applicant was unfairly dismissed by the Respondent; and
>
> (2) ORDERS that the Respondent pay the Applicant $2,568 within seven days of the date of this Order."

5 As the reasons for decision reveal, $1,500.00 of that amount of $2,568.00 is compensation for injury and the balance is compensation for loss.

6 Ms Gardner had filed an application pursuant to s29(1)(b)(i) and (ii) of *the Act* claiming that she was unfairly dismissed from her employment by Aesthetics on 19 September 2003, and also claiming that she had been denied contractual benefits not being an entitlement under an award or industrial agreement, namely pay for the last two weeks of her employment by Aesthetics. (She was employed by Aesthetics as a dental technician in Dr Alexandrina Camelia Furlan's dental practice, called "Imagine 21 Dental Centre", from 24 March 2003 to the date of the termination of her contract of employment on 19 September 2003).

7 The notice of appeal, No FBA 44 of 2004, was filed on 20 October 2004, and served, according to the declaration of service, on the same day.

8 This application was filed on 1 June 2005, and, according to the declaration of service, was served on 2 June 2005, almost eight months after the notice of appeal was filed and served.

9 I am satisfied and find that, since Aesthetics was the respondent and therefore a party to the proceedings at first instance, it was and is a person with sufficient interest to make this application, within the meaning of s49(11) of *the Act.*

10 Further, since the notice of appeal was duly filed and served, the appeal was validly instituted within the meaning of s49(11) of *the Act,* and it was instituted within time ((ie) within 21 days) as required by s49(3) of *the Act*.

11 I also add that the Commissioner at first instance found that the claim by Ms Gardner for contractual benefits denied was not made out. There is no appeal by Ms Gardner against that finding.

## GROUNDS OF APPLICATION

12 This application was made on narrow grounds, but developed orally to encompass much broader grounds. Some arguments did not relate to the merits of the appeal, and I take no account of them. However, the complaint was that the sum ordered by way of compensation for loss and injury was based "on incorrect data and calculations".

13 This was said to be first because an amount of $587.84 had been paid to Ms Gardner after her employment ended and had not been deducted from the amount ordered to be paid by way of compensation.

14 It was also alleged that if payment were to be paid to Ms Gardner in accordance with the order of the Commissioner at first instance, and Aesthetics was successful on appeal, a "reimbursement of funds could not be retrieved" from Ms Gardner. The application was opposed.

## FINDING OF CASUAL EMPLOYMENT

15 The Commissioner at first instance found that Ms Gardner was casually employed, and that finding is not appealed against. That finding was made for the purposes only of finding what loss had been suffered by Ms Gardner and calculating compensation. Indeed, the Commissioner went on to find that even if Ms Gardner were a part-timer, it would make no difference to the amount of the loss and compensation to be ordered. No party appeals against that finding.

## CREDIBILITY

16 It is important to note that the Commissioner at first instance made findings in relation to the credibility of witnesses, noting that "it is apparent little is in dispute between the Applicant and the Respondent as to the relevant factual circumstances in respect of the reasons for termination".

17 The exception was the question of whether she was a part-time or casual employee to which I have already referred above, because that point was in issue.

18 The Commissioner found that Dr Furlan had little to do with the day to day running of the business, a fact which was undisputed. Further, the Commissioner preferred the evidence given by Ms Gardner to the evidence given on behalf of Aesthetics. The Commissioner also found that the evidence of Ms Angela Nicole McGuinness, who worked for Aesthetics and also Image 21 Dental Centre in a position with duties somewhat wider than that of a bookkeeper, did not conflict with the evidence of Dr Furlan or of Ms Gardner. Further, those findings are not attacked in the grounds of appeal.

## PRINCIPLES

19 The principles to be applied to applications for a stay of an order pending the hearing and determination of the appeal are well settled in this Commission (see, for example, *DVG Morley City Hyundai v Fabbri* (2002) 82 WAIG 2440).

## GROUNDS OF APPEAL

20 I summarise the grounds of appeal in appeal No FBA 44 of 2004.

21 First, it is alleged that the Commissioner at first instance erred in finding as she did that Ms Gardner was harshly, oppressively and unfairly dismissed.

22 Ms Gardner's employment was, it is clear, terminated by Ms Kate Burnett on 19 September 2003, as the Commissioner found. Ms Burnett was, in fact, a management consultant who was managing the practice of dentists conducted by Dr Furlan under the name Image 21 Dental Centre. However, the employees, including Ms Gardner, were managed by and employed by the applicant, Aesthetics. Ms Burnett, in turn, was a management consultant engaged by Dr Furlan, through the applicant, Aesthetics, for the purpose of managing that practice.

23 It was not established that it was not open to the Commissioner to find that Aesthetics' management consultant, Ms Burnett, did not terminate Ms Gardner in a very callous way. What she did was to interrupt Ms Gardner without warning in a session of work at her other employment and inform her that she was dismissed. In fact, she told Ms Gardner that there was no work for her and that she should not come in. The evidence of Ms Gardner was that she was shocked. That evidence was not contradicted or refuted.

24 No reasons were given to her for her dismissal by Ms Burnett, and certainly no reasons were given that she was being dismissed because the practice was being sold or transferred to Dr Catlin Iacob, Dr Furlan's brother. Ms Gardner had no warning of her dismissal, and it was not discussed with her and there was no suggestion that she was dismissed for incompetence or misconduct.

25 There was no evidence otherwise than that she was summarily dismissed without consultation or notice, and that no valid reason for her dismissal was given in evidence. None of that was contradicted. It was arguable that Ms Gardner had been very callously dismissed in humiliating circumstances.

26 It was also open to find, too, on Ms McGuinness' evidence, evidence accepted by the Commissioner, that Ms Gardner's employment could have continued until 20 October 2003, following Ms McGuinness' evidence that she did not then come back after 20 October 2003, the date on which her own employment ceased. Once the Commissioner preferred that evidence it was clear that it was open to find that the business had not been transferred to Dr Iacob on or before 20 October 2003. Indeed, Dr Furlan's own evidence was that the practice was unofficially transferred to her brother, Dr Iacob, which, of course, could only mean that it was not in fact or at law transferred. Further, in her facsimile letter to Ms Gardner of 18 October 2003, Dr Furlan certainly represents herself as the present employer's representative and not any past employer's representative.

27 Further, Ms Gardner was not challenged in her evidence that there were bookings of patients made right up until the time when she was dismissed.

28 It was open to the Commissioner at first instance to find that Ms Gardner was deprived of employment until 20 October 2003.

29 As to the second complaint that the Commissioner at first instance erred in finding that she was denied employment from 19 September 2003 to 20 October 2003, it is quite clear that since she was dismissed on 19 September 2003 and further, that there was no real evidence that the practice had been sold to Dr Iacob, it is quite clear that Ms Gardner was denied that employment. In any event, she was denied that employment because she was dismissed without notice. Further, it was contended that the business was unofficially sold, which is an admission in itself that it was not. There were no documents before the Commission evidencing any transfer. Further, there was no evidence that Dr Iacob was running the staff and the clinic after 30 September 2003, even if he were helping out there.

30 There is also no evidence that Ms Gardner was paid $587.84 after the termination of her employment.

31 The contention that her employment was not found to be of a casual nature is entirely wrong because the Commissioner clearly found that it was of a casual nature.

32 There was also an allegation that the Commissioner was wrong in finding that Ms Gardner had suffered injury because of the nature of her dismissal and the effect of it on her. I have already referred to the telephone call without notice to her other place of employment, and to her dismissal without warning or notice and for no good reason. Ms Gardner's own evidence was that she was shocked. The Commissioner obviously relied on all of that evidence in finding that the dismissal was callous, and I reiterate the observations which I have made above.

33 Ms Gardner's facsimile to Ms McGuiness was sought to be relied on as being evidence that she did not feel callously treated. However, that was addressed to Ms McGuiness, not to Dr Furlan. It did not refer to Dr Furlan. It was evidence of nothing else but an expression of pleasure at having worked with Ms McGuiness and other employees and could not be read higher than that. It certainly could not be read as evidence to contradict her own clear evidence that she did not like being dismissed and that she was shocked by what occurred.

34 Further, the nature of the communication itself must be taken into account in measuring whether an injury had occurred, as I have observed above.

35 Whether Dr Furlan was declared unfit to work or not is irrelevant to this ground and generally irrelevant.

36 Overall, it has simply not been established by Aesthetics, which is obliged to do so, that the Commissioner at first instance erred in finding as she did.

37 The applicant, Aesthetics, for those reasons, has not satisfied me that any ground of appeal has such a strong chance of succeeding that I can hold that there is a serious issue to be tried.

**BALANCE OF CONVENIENCE**

38 In this case there has been a very long and serious delay in Aesthetics applying for an order for a stay. The application was filed and served almost eight months after the date of the decision appealed against. As I understand it, the application for a stay was only made because Ms Gardner sought to enforce the order made at first instance.

39 The reason which Dr Furlan gave for the delay was that she thought that once the appeal had been instituted then the matter was "processed" by the Commission. She informed me also from the bar table that some time ago, she did not say when, Ms Gardner did not pay rent. It is not clear to me why or what it was in respect of that she failed to pay rent, or whether it arose from an inability to pay rent, or a refusal to pay rent. I place no reliance on that evidence.

40 However, there was no evidence that Ms Gardner would be unable to pay the monies back if the appellant, Aesthetics, were successful on appeal. I note, too, that, comparatively, it is not a large sum.

41 Mr McDonald unequivocally, on Ms Gardner's behalf, assured the Commission on this application that, if the appeal was successful, Ms Gardner could and would pay the monies back to the appellant, Aesthetics.

42 The Commissioner at first instance found that Ms Gardner was dismissed on 19 September 2003. Thus, at the time I heard this application, it was almost 21 months after Ms Gardner was dismissed. It was also approximately eight months after the order at first instance was made.

43 The explanation that, having filed the notice of appeal, Dr Furlan left the matter to the Commission is simply inadequate. She had been involved in proceedings at first instance and should have gained some idea of the nature of proceedings in the Commission. This appeal was not prosecuted with any diligence, and the appellant, Aesthetics, seeks to further deprive Ms Gardner of the "fruits of her judgment", after the lapse of an inordinate amount of time. I am not satisfied, on all of the evidence, that the amount ordered to be paid cannot be paid if necessary, on the evidence of Dr Furlan and the assurance of Mr McDonald from the bar table, if the appellant, Aesthetics, is successful in this appeal. It is unnecessary to make any order therefore to preserve the subject matter of the appeal.

44 Since Ms Gardner, has been deprived of the fruits of her order for almost eight months without good or adequate reason, and it is over 21 months since the application was filed at first instance, I am satisfied that the balance of convenience falls on the side of the respondent, Ms Gardner, who should not be denied the fruits of her order any longer I am not satisfied that to make such an order will deprive the appellant, Aesthetics, if they are successful on appeal, of the refund of the monies, the subject matter of the appeal.

45 Aesthetics has not discharged the onus upon it to establish that the balance of convenience lies with it.

**FINALLY**

46 Since there is no serious issue to be tried, or none so established, this application cannot succeed. Even if that were not the case, then, for the reasons which I have expressed above, the balance of convenience has not been established to lie with the applicant, Aesthetics. Indeed, I am satisfied that it lies with the respondent, Ms Gardner.

47 For those reasons, there are no exceptional circumstances which exist warranting my making a s49(11) order.

48 Within the meaning of s26(1)(c) of *the Act*, for all of the reasons expressed by me, the interests of the respondent must take precedence over those of the applicant. Indeed, for the reasons which I have expressed, they lie with the respondent. The equity, good conscience and the substantial merits of the case do not lie with the applicant (see s26(1)(a)). The applicant has not established that.

49 For those reasons, I dismissed the application herein.

50 I wish to make it clear that any finding or observations which I make in this application relate and can only relate to the issues before me in these proceedings which are, of course, vastly different from the issues which arise on appeal, and the manner in which I am required to deal with matters on appeal as a member of the Full Bench. They do not and cannot influence the findings which I may make after hearing argument on the appeal itself.

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**2005 WAIRC 01795**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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| **PARTIES** | AESTHETICS DENTAL GROUP PTY LTD |
| | **APPLICANT** |
| | **-and-** |
| | JUNE GARDNER |
| | **RESPONDENT** |
| **CORAM** | HIS HONOUR THE PRESIDENT P J SHARKEY |
| **DATE** | FRIDAY, 10 JUNE 2005 |
| **FILE NO/S** | PRES 2 OF 2005 |
| **CITATION NO.** | 2005 WAIRC 01795 |

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| **Decision** | Application dismissed |
| **Appearances** | |
| **Applicant** | Dr C A Furlan appeared for the applicant |
| **Respondent** | Mr A G McDonald appeared for the respondent |

*Order*

This matter having come on for hearing before me on the 10th day of June 2005, and having heard Dr C A Furlan on behalf of the applicant and Mr A G McDonald on behalf of the respondent, and having determined that the application herein should be dismissed, and having determined that reasons for decision will issue at a future date, it is this day, the 10th day of June 2005, ordered that application No PRES 2 of 2005 be and is hereby dismissed.

(Sgd.) P J SHARKEY,
President.

[L.S.]

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**2005 WAIRC 01611**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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| **PARTIES** | MASTERCARE PROPERTY SERVICES (WA) PTY LTD |
| | **APPLICANT** |
| | **-and-** |
| | LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH |
| | **RESPONDENT** |
| **CORAM** | HIS HONOUR THE PRESIDENT P J SHARKEY |
| **DATE** | FRIDAY, 20 MAY 2005 |
| **FILE NO.** | PRES 1 OF 2005 |
| **CITATION NO.** | 2005 WAIRC 01611 |

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| **CatchWords** | Industrial Law (WA) - application for a stay of the order pending appeal - general principles relating to stays - mitigation of loss - delay in prosecution of application at first instance - preserving subject matter of appeal - application granted on conditions - *Industrial Relations Act* 1979 (as amended), s7, s26(1)(c), s27(1), s44, s49(4), s49(11). |
| **Decision** | Application granted on conditions. |
| **Appearances** | |
| **Applicant** | Mr T B Lyons (of Counsel), by leave |
| **Respondent** | Mr M D Swinbourn, as agent |

*Reasons for Decision*

**THE PRESIDENT:**

**INTRODUCTION**

1 This is an application pursuant to s49(11) of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "*the Act*"). By the application, the above-named applicant, Mastercare Property Services (WA) Pty Ltd (hereinafter referred to as "Mastercare") seeks a stay of the operation of order 2 of the orders made by the Commission at first instance, constituted by a single Commissioner, on 17 March 2005 in matter No CR 252 of 2003, pending the hearing and determination of the relevant appeal, namely appeal No FBA 3 of 2005.

2 The notice of appeal was filed herein on 7 April 2005.

3 Order 2 of the order made by the Commission at first instance reads as follows:-

> "ORDERS the respondent (Mastercare) to pay Don Ajith Kaluthanthrige compensation in the sum of $11,675.30 gross within seven (7) days of the date of this order."

4 The amount of the order has not been paid.

5 I am satisfied and find that the applicant has, and had, sufficient interest within the meaning of s49(11) of *the Act* to make this application, since the above-named applicant was the respondent in the proceedings at first instance. I am also satisfied and find that the appeal herein was properly instituted within the meaning of s49(11) of *the Act*.

6 At all material times, Mastercare was an employer and, at all material times, the respondent (hereinafter referred to as "the LHMU") was an organisation of employees, within the meaning of "organisation" in s7 of *the Act*. At all material times, as I understand it, Mr Kaluthanthrige was a member of the LHMU.

**BACKGROUND**

7 The LHMU made application dated 4 December 2003 to the Commission for the holding of a s44 conference. The matter in dispute which was sought to be referred for hearing and determination was the allegation that Mastercare dismissed Mr Kaluthanthrige in a manner which was "unfair, harsh and oppressive". The matter was referred for conference. It was not resolved at conference. The parties referred the matter for arbitration and it was heard and determined, with the Commissioner determining the matter by a declaration that Mr Kaluthanthrige had been unfairly dismissed and that reinstatement was impracticable and, also, by making the order to pay compensation which I have reproduced above.

8 In particular, the Commissioner found also:-

(a) That Mr Kaluthanthrige was dismissed in a procedurally unfair way.

(b) That reinstatement was impracticable.

(c) That he had an ongoing expectation of work for at least twelve months, with Mastercare, because he had a permanent part-time position with that company and there were no difficulties about his performance. Further, he was a loyal employee.

(d) That he should be compensated for his loss of earnings for a period of twelve months minus any period during this time when he was unavailable to work.

(e) The Commissioner calculated the amount as follows:-

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|---|---|---|
| $898.10 gross per fortnight x 26 | = | $23,350.60 |
| Less earnings | = | $ 5,095.00 |
| | | $18,255.60 |
| Less time overseas May to mid | | |
| August 2004 (15 weeks) | = | $ 6,735.75 |
| Loss | = | $11,519.85 gross |

(f) The Commissioner also found that Mr Kaluthanthrige had suffered injury as a result of his dismissal by Mastercare and awarded him $500.00 compensation for injury.

(g) The Commissioner found that the amount of compensation due to Mr Kaluthanthrige was $12,019.85 for his loss and injury capped as required by *the Act* in the total amount of $11,675.30.

**PRINCIPLES**

9 The principles to be applied to s49(11) applications have been well settled in this Commission for many years (see most appositely Stephen G May t/a Little Muppets Child Care Centre v Hedley (2003) 83 WAIG 3579 (Pres) at 3580-3581, for example; see also generally G & M Partacini t/as Bayswater Powder Coaters v SDEA (2005) 85 WAIG 51(Pres) at 52-53).

**GROUNDS OF APPLICATION – SERIOUS ISSUED TO BE TRIED**

10 In support of this application, it is alleged that grounds 1 and 2 of the Grounds of Appeal raise serious issues to be tried because, summarised, they alleged that there was inordinate delay in the prosecution of the application, by the LHMU at first instance.

11 This, it was said, was because an application was not filed until 4 December 2003 in respect of a dismissal alleged to have taken place on 1 September 2003. Further, there was a conciliation conference conducted on 13 January 2004 and the arbitration hearing did not take place until 10 January 2005, the final order being made and perfected, as I have said, on 17 March 2005.

12 First, I observe that there was some delay in the matter which was attributable to both parties. Second, it is not clear that the delay between 13 January 2004 and the arbitration which took place on 10 January 2005 was attributable to anyone. Third, there is and was no complaint at first instance or upon this application about the delay by either party and, particularly, no such complaint by Mastercare.

13 Indeed, it is possible that the delay in the matter was of some advantage to Mastercare since it did not have to meet any order for compensation until about sixteen months after the dismissal.

14 Most cogently, of course however, Mastercare, as respondent in the proceedings at first instance, at no time applied for the dismissal of the proceedings for inordinate delay or for any other reasons pursuant to s27(1) of *the Act*. Indeed, there was certainly no complaint of any prejudice to Mastercare caused by any delay. Without the component of prejudice, it is very difficult to see any merit established in grounds 1 and 2.

15 As I have already said, too, such a complaint did not arise at first instance and therefore be excluded on appeal by the operation of s49(4) of *the Act*. Further, that point is not arguable on appeal because, on appeal, the appellant/applicant would be bound by the conduct of its case at first instance (see *Metwally (No 2) v University of Wollongong* (1985) 60 ALR 68 (HC).

16 For those reasons, too, there is no merit in those grounds.

17 I deal with ground 2 which complains that the Commissioner had erred by failing of her own motion to hear and determine the Form 1 application at first instance. It is quite clear that this was a matter in which no complaint was made, and which the Commissioner was not required by any obligation thrust upon her by *the Act*, to dismiss the application of her own motion.

18 The fact that the merits of the matter were found to lie with the applicant is sufficient answer to that, or that there was sufficient merit for the matter to proceed and eventually be decided in favour of the LMWU is also an answer to that submission.

19 I am therefore satisfied that grounds 1 and 2 raise no serious issue to be tried.

20 As to ground 3 of the appeal, that ground alleges, with particulars, that against the weight of the evidence, Mr Kaluthanthrige was found to have mitigated his loss and the Commissioner therefore erred in awarding compensation for loss on that finding. This ground is partly based on a letter written to the LHMU (attention: Ms Fiona Bennett) regarding Mr Kaluthanthrige by Mastercare about five weeks after Mr Kaluthanthrige's dismissal, and dated 7 October 2003, which stated that Mr Kaluthanthrige needed to contact Mastercare to advise exactly what work he was able to do. As I understood the submission, this was said to constitute an offer of new employment by Mastercare to him.

21 Thus, as I understand the submission, Mr Kaluthanthrige could have accepted an offer of employment and thereby mitigate his loss. It was not in issue that he did not respond to the letter and that he explained in evidence that he feared humiliation because of an earlier experience with Mastercare when he was first employed by them.

22 I first observe that there was no offer of employment anyway. There was merely a call for expression of interest. There was no indication or evidence that Mr Kaluthanthrige could or would be employed again by Mastercare, even if he did reply to the letter and, if he did, what he might earn. In any event, an offer of reinstatement was not made at the hearing. Therefore, as the Commissioner found, the bona fides of the offer is subject to question. Further, Mr Kaluthanthrige was under no obligation to answer, even if the offer was genuine because, as the Commissioner found and it has not been challenged on appeal, reinstatement was impracticable because the working relationship between Mr Kaluthanthrige and Mastercare had broken down. It is also to be noted that it was not unreasonable that he failed to reply because he could not be expected to return to employment with an employer whom the Commissioner found had treated him, in relation to his dismissal, in a callous manner so that the Commissioner awarded him compensation for injury.

23 Most cogently, however, Mr Kaluthanthrige was in other employment at the time and, having obtained it, had mitigated his loss by so doing. It is and was open to find that a reasonable or prudent person would, in the circumstances of this case, treat that letter of 7 October 2003 in the same way as Mr Kaluthanthrige did. It was open to find on that basis that he had mitigated his loss (see, generally, the discussion in *Growers Market Butchers v Backman* (1999) 79 WAIG 1313 at 1316 (FB)). The principles expressed in that case were binding upon the Commission at first instance, but the case does not seem to have been adverted to by the Commissioner.

24 I wish to add that the duty to mitigate loss in claims of unfair dismissal lies on the claimant employee. However, the onus of proof of a failure to mitigate loss lay on Mastercare on this application and lies on employers generally in matters of unfair dismissal (see *Growers Market Butchers v Backman* (FB) (op cit)).

25 There is a serious question to be tried, however, and that is whether Mr Kaluthanthrige discharged the onus on him to mitigate his loss, having regard to the fact that he lost his employment after about two and a half months, that is, the employment commencing in October 2003 with Heritage Outdoor. He did not explain why he lost that employment and what steps he had taken to gain other employment, save and except that he did gain other employment which he later lost and, again, in relation to which loss, he gave no explanation. There was an exception. He explained that he was unable to do building cleaning because he was not strong enough.

26 He did go back to Sri Lanka in May 2004 and remained there until August 2004, attending his brother's wedding. Further, on his own uncontradicted evidence, he did unsuccessfully seek work there. In any event, that period of unemployment was not a counted part of his loss, nor compensated for by the Commissioner as the calculations of the Commissioner to which I refer above clearly indicate.

27 Ground 3 raises a serious issue to be tried, therefore, for those reasons. In addition, Mr Kaluthanthrige's inability to seek and obtain employment after the two periods of employment in which he was engaged after his dismissal in Australia, and up until May 2004, is not explained and raises a serious issue to be tried, given the onus upon him to mitigate. There is no serious issue to be tried otherwise raised by ground 3 of the appeal grounds.

**BALANCE OF CONVENIENCE**

28 It was the clear concession on behalf of the LMWU by Mr Swinbourn that, as at the time of hearing this application, Mr Kaluthanthrige was in the same position as he was at the time of the hearing of the application at first instance. That is, he owed an unspecified sum of money to an unnamed person or persons. Further, he was employed by a friend to manage his coffee lounge in Geraldton. That was the situation as at the time of the hearing before me.

29 Mr Kaluthanthrige received no monetary remuneration for managing the coffee lounge but was given accommodation and provided with food. He was not therefore engaged in paid employment.

30 It was submitted that, because of his admitted inability to pay the amount of the award for compensation back in the foreseeable future or at all, as I understood the submission, the operation of the order to pay compensation should be stayed.

31 Further, it was submitted by the applicant, in effect that Mr Kaluthanthrige might return to Sri Lanka and impliedly not return to Australia again or perhaps be unlocatable in Sri Lanka. It was not disputed that he was an Australian citizen, not a Sri Lankan citizen. Accordingly, I agree with Mr Swinbourn's submission that Mr Kaluthanthrige could not remain in Sri Lanka for an indefinite period, not being a citizen of that country and would have to return, more likely than not. There is not sufficient evidence to support an inference that he would go to Sri Lanka and be indefinitely unlocatable. Therefore, that fact does not arise as an obstacle to allowing the order to operate so that the amount of compensation is paid to him.

32 However, applying what I said in *DVG Morley City Hyundai v Fabbri* (2002) 82 WAIG 2440 (FB) and *Stephen G May t/a Little Muppets Child Care Centre v Hedley* (op cit), and applying what Anderson J said in *Hamersley Iron Pty Ltd v Lovell (No 2) and Another* (1998) 20 WAR 79 at 80 and 88 (FC), a stay should be granted if it is necessary to preserve the subject matter of the appeal. In this case, it is open to find and I find that, due to Mr Kaluthanthrige's parlous financial position which has remained the same at least since 10 January 2005, and of which there is no evidence of any future improvement, that it would unlikely that the monies could be recovered from him if they were paid out and the appeal was successful, in the foreseeable future or at all. I so find.

33 Thus, having regard to those authorities, the subject matter of the appeal requires to be protected. The subject matter of the appeal is an amount of $11,675.30. The only way in which it can be protected is to stay the operation of the order requiring that the monies be paid to Mr Kaluthanthrige.

34 I am prepared, therefore, to find and do find that, notwithstanding that the order appealed against is dated 17 March 2005 and the application was not filed until 9 May 2005, a delay which was not complained of, that the balance of convenience, for the reasons which I have expressed, rests with the applicant.

**FINALLY**

35 The equity, good conscience and substantial merits of the case have been established to lie with the applicant and not with the respondent. The applicant has therefore been established, within the meaning of s26(1)(c) of *the Act*, to have interests which should be served in preference to those of the respondent by my granting this application and making the order sought.

36 However, because of the time which has elapsed since the dismissal on 1 September 2003, I am of opinion that there should be an order, in order to achieve some security for Mr Kaluthanthrige, that Mastercare pay the amount of the compensation ordered to be paid by it into a joint bank account pending the hearing and determination of the appeal on the conditions which I drew to the attention of the parties during the hearing of this application. I canvassed the possibility of my making an order in these terms if Mastercare established its case and I understood that such a course, if a stay were to be granted, was not likely to cause difficulty to the parties.

37 I would also add that, if the appeal is not brought to hearing expeditiously, then it is open to the LHMU to apply to discharge the order.

38 For those reasons, I will make an order, on the conditions to which I have referred above, that the order appealed against be stayed until the hearing and determination of appeal No FBA 3 of 2005 or further order.

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**2005 WAIRC 01635**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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| **PARTIES** | MASTERCARE PROPERTY SERVICES (WA) PTY LTD<br>**APPLICANT**<br>**-and-**<br>LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH<br>**RESPONDENT** |
| **CORAM** | HIS HONOUR THE PRESIDENT P J SHARKEY |
| **DATE** | WEDNESDAY, 18 MAY 2005 |
| **FILE NO/S** | PRES 1 OF 2005 |
| **CITATION NO.** | 2005 WAIRC 01635 |

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| **Decision** | Order for a stay |
| **Appearances** | |
| **Applicant** | Mr T B Lyons (of Counsel), by leave |
| **Respondent** | Mr M D Swinbourn as agent |

*Order*

This matter having come on for hearing before me on the 17th day of May 2005, and having heard Mr T B Lyons, (of Counsel), by leave, on behalf of the applicant and Mr M D Swinbourn as agent, on behalf of the respondent, and I having reserved my decision on the matter, and having determined that my reasons for decision will issue at a future date, it is this day, the 18th day of May 2005, ordered and declared as follows:-

(1) THAT the applicant has a sufficient interest as required by s49(11) of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "*the Act*") and was therefore entitled to apply for the orders which appear hereunder.

(2) THAT appeal No. FBA 3 of 2005 has been instituted within the meaning of s49(11) of the Act.

(3) THAT the order made by the Commission on the 17th day of March 2005 in application No. CR 252 of 2003 be and is hereby wholly stayed pending the hearing and determination of appeal No. FBA 3 of 2005, or until further order, subject to and conditional upon the applicant complying with the orders and conditions hereinafter expressed.

(4) THAT the applicant herein shall, on or before the 25th day of May 2005, pay the total amount of $11,675.30 ordered to be paid by the Commission in its said order of the 17th day of March 2005 in application No. CR 252 of 2003 into a bank account offering the best obtainable interest rates.

(5) THAT account shall be opened in agreement by the person to be nominated in writing to the respondent by the applicant and by the respondent or their nominee on or before the 25th day of May 2005 aforesaid.

(6) THAT such account shall be in the joint names of and shall be jointly administered by the applicant and the respondent or their nominees on behalf of the parties.

(7) THAT if any dispute as to the administration of the said account shall arise the same shall be referred forthwith to the Registrar of the Western Australian Industrial Relations Commission for the time being, whose decision in the matter shall be final and bind all persons referred to in order (6) hereof.

(8) THAT all or any liabilities for taxes or charges of any kind which might become due and payable in respect of such account shall be discharged by the applicant who shall indemnify the respondent against any claim in respect of the same.

(9) THAT all administration expenses in respect of the said account shall be paid forthwith by the applicant.

(10) THAT in the event of any failure to comply with all or any of these conditions then there shall be liberty to apply on 48 hours notice to revoke this order or any part thereof, and/or for any other necessary orders or directions.

(11) THAT in the event of the appeal herein being dismissed then the monies in such account, including any interest earned by the same, shall be paid forthwith without any deduction to Don Ajith Kaluthanthrige.

(12) THAT in the event of the appeal herein being upheld then the monies in such account, including any interest earned by the same, shall be paid forthwith without any deduction to the applicant.

(13) THAT the President may at any time upon application by any party hereto and without affecting the generality of his ability to give further directions:-

(a) Fix further conditions.

(b) Direct that the account be administered by a person or persons in lieu of the persons referred to in order (6) hereof.

(c) Vary these orders.

(14) THAT there be liberty to apply on 48 hours notice in relation to clarification of this order or for any ancillary orders or directions necessary to achieve what these orders require, save and except in relation to decisions made by the Registrar and pursuant to order (7) hereof.

(15) THAT the applicant forthwith serve a copy of this order on the Registrar.

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

# AWARDS/AGREEMENTS—Variation of—

**2005 WAIRC 01984**

**ELECTRONICS INDUSTRY AWARD NO. A 22 OF 1985**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES** COMMUNICATIONS, ELECTRICAL, ELECTRONIC,ENERGY,INFORMATION, POSTAL, PLUMBING, AND ALLIEDWORKERS UNION OF AUSTRALIA, ENGINEERING & ELECTRIC
**APPLICANT**

**-v-**

ALDETEC PTY LTD, ALLCOM PTY LTD, ACTION ELECTRONICS PTY LTD
**RESPONDENT**

**CORAM** SENIOR COMMISSIONER J F GREGOR
**DATE** WEDNESDAY, 6 JULY 2005
**FILE NO/S** APPL 141 OF 2005
**CITATION NO.** 2005 WAIRC 01984

**Result** Award Varied

*Order*

HAVING heard Mr L. Edmonds, of Counsel, on behalf of the Applicant and there being no appearance for the Respondent, and by consent, the Commission pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Electronics Industry Award No. A22 of 1985 be varied in accordance with the following Schedule and that such variation shall have effect from the first pay period on or after 24th June 2005.

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

SCHEDULE

**1. Clause 13. – Car Allowance: Delete subclause (3) of this Clause and insert in lieu the following:**

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

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

| **AREA AND DETAILS** | **ENGINE DISPLACEMENT** | | |
|---|---|---|---|
| | **(IN CUBIC CENTIMETRES)** | | |
| **Rate per kilometre (cents)** | **Over** | **1600cc** | **1600cc** |
| | **2600cc** | **-2600cc** | **& Under** |
| Metropolitan Area | 68.2 | 60.9 | 52.9 |
| South West Land Division | 69.7 | 62.3 | 54.3 |
| North of 23.5$^{o}$ South Latitude | 76.4 | 68.8 | 59.9 |
| Rest of the State | 71.7 | 64.5 | 55.9 |
| **MOTOR CYCLE** (IN ALL AREAS) | 23.3 cents per kilometre | | |

**2. Clause 15. – Distant Work: Delete subclauses (4) and (5) of this Clause and insert in lieu the following:**

(4) An employee, to whom the provisions of subclause (1) of this Clause apply, shall be paid an allowance of $28.75 for any weekend that the employee returns home from the job, but only if -

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

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

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

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

(5) Where an employee, supplied with board and lodging by the employer, is required to live more than 800 metres from the job the employee shall be provided with suitable transport to and from that job or be paid an allowance of $12.60 per day, provided that where the time actually spent in travelling either to or from the job exceeds 20 minutes, that excess time shall be paid for at ordinary rates whether or not suitable transport is supplied by the employer.

**3. "Part II Construction Work"-Clause 6. – Allowance for Travelling and Employment in Construction Work: Delete paragraphs (a), (b) and (c) of subclause (1) of this Clause and insert in lieu the following:**

(a) On places within a radius of 50 kilometres from the General Post Office, Perth - $13.75 per day.

(b) For each additional kilometre to a radius of 60 kilometres from the General Post Office, Perth - 70 cents per kilometre.

(c) Subject to the provisions of paragraph (d), work performed at places beyond a 60 kilometre radius from the General Post Office, Perth shall be deemed to be distant work unless the employer and the employees, with the consent of the union, agree in any particular case that the travelling allowance for such work shall be paid under this clause, in which case an additional allowance of 70 cents per kilometre shall be paid for each kilometre in excess of the 60 kilometre radius.

**4. Clause 7. – Distant Work: Delete subclause (6) and (7) respectively and insert in lieu the following:**

(6) An employee, to whom the provisions of subclause (1) of this clause apply, shall be paid an allowance of $28.00 for any weekend that the employee returns home from the job, but only if -

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

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

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

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

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

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**2005 WAIRC 01983**

**ENGINEERING TRADES (GOVERNMENT) AWARD, 1967 AWARD NOS. 29, 30 AND 31 OF 1961 AND 3 OF 1962**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

| | |
|---|---|
| **PARTIES** | COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED WORKERS' UNION OF AUSTRALIA, ENGINEERING AND ELECTRICAL DIVI |
| | **APPLICANT** |
| | **-v-** |
| | THE MINISTER FOR WORKS |
| | **RESPONDENT** |
| **CORAM** | SENIOR COMMISSIONER J F GREGOR |
| **DATE** | WEDNESDAY, 6 JULY 2005 |
| **FILE NO/S** | APPL 401 OF 2005 |
| **CITATION NO.** | 2005 WAIRC 01983 |

**Result** Award Varied

*Order*

HAVING heard Mr L. Edmonds, of Counsel, on behalf of the Applicant and there being no appearance for the Respondent, and by consent, the Commission pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Engineering Trades (Government) Award, 1967 Award No.'s 29, 30 and 31 of 1961 & 3 of 1962 be varied in accordance with the following Schedule and that such variation shall have effect from the first pay period on or after 24th June 2005.

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

SCHEDULE

**1. Clause 14. – Overtime**

**A. Delete paragraphs (e) of subclause (3) of this clause and insert in lieu the following:**

(e) Subject to the provisions of paragraph (f) of this subclause, an employee required to work overtime for more than one hour shall be supplied with a meal by the employer or be paid $9.20 for a meal if, owing to the amount of overtime worked, a second or subsequent meal is required, he/she shall be supplied with each such meal by the employer or be paid $6.45 for each meal so required

**B. Delete paragraphs (h) of subclause (3) of this clause and insert in lieu the following:**

(h) An employee required to work continuously from 12 midnight to 6.30 a.m. and ordered back to work at 8.00 a.m. the same day shall be paid $4.30 for breakfast.

**2. Clause 17. – Special Rates and Provisions:**

**A. Delete subclause (1) – (5) of this clause and insert in lieu the following:**

(1) Height Money: An employee shall be paid an allowance of $2.05 for each day in which he/she works at a height of 15.5 metres or more above the nearest horizontal plane, but this provision does not apply to linespersons nor to riggers and splicers in ships or buildings.

(2) Dirt Money: Dirt Money of 43 cents per hour shall be paid as follows:-

(a) To employees employed on hot or dirty locomotives, or stripping locomotives, boilers, steam, petrol, diesel or electric cranes, or when repairing Babcock and Wilcox or other stationary boiler in site (except repairs on bench to steam and water mounting), or when repairing the conveyor gear in conduit of power houses and when repairing or overhauling electric or steam pile-driving machines and boring plants.

(b) Bitumen Sprayers - Large Units:

(i) To employees whilst engaged on work appertaining to the spraying of bitumen but exclusive of the standard chassis engine form the front end of the main tank to the back end of the plant. Provided that work on the compressor and its engines shall not be subject to dirt money.

(ii) To motor mechanics in the motor section for all work performed on the standard chassis from and including the sump to the rear end of the chassis, but excluding the engine and parts forward thereto unless the work is of a specially dirty nature, where clothes are necessarily unduly soiled or damaged by the nature of the work done. Provided that to employees engaged as above on sprays of the Bristow type, dirt money of 47 cents per hour shall be paid.

(c) Bitumen Sprayers - Small Units:

(i) To employees for work done on main tank, its fittings, pump and spray arms.

(ii) To motor mechanics on work from and including the sump to the rear end of the chassis, but excluding the engine and parts forward thereto unless the work is of a specially dirty nature where clothes are necessarily unduly soiled or damaged by the nature of the work done.

(d) To employees on all other dirty tar sprays and kettles.

(e) Diesel Engines: Work on engines, or on gear box attached to engines, but excluding work on rollers (wheels) on which a diesel powered roller travels.

(f) Dirt Money shall only be paid during the stages of dismantling and cleaning and shall not cover employees who receive portions of the work after cleaning has taken place.

(g) Notwithstanding anything contained in the foregoing provisions, dirt money shall not be paid unless the work is of an exceptionally dirty nature where clothes are necessarily unduly soiled of damaged by the nature of the work done.

(3) Confined Space:

52 cents per hour extra shall be paid to an employee working in any place, the dimensions of which necessitate the employee working in an unusually stooped or otherwise cramped position, or where confinement within a limited space is productive of unusual discomfort.

(4) Any employee actually working a pneumatic tool of the percussion type shall be paid 26 cents per hour extra whilst so engaged.

(5) Hot Work: An employee shall be paid an allowance of 43 cents per hour while working in the shade in any place where the temperature is raised by artificial means to between 46.1 and 54.4 degrees Celsius.

**B. Delete subclauses (8) – (16) and insert in lieu the following:**

(8) Any employee working in water over his/her boots or, if gumboots are supplied, over the gumboots, shall be paid and allowance of $1.20 per day.

(9) Employees using Anderson-Kerrick steam cleaning units or unit of a similar type on cranes or other machinery shall be paid an allowance of 43 cents.

(10) Well Work: Any employee required to enter a well nine metres or more in depth for the purpose in the first instance of examining the pump, or any other work connected therewith, shall receive an amount of $2.50 for such examination and 93 cents per hour extra thereafter for fixing, renewing or repairing such work.

(11) Ship Repair Work: Any employee engaged in repair work on board ships shall be paid an additional $4.50 per day for each day on which so employed.

(12) An employee shall, whilst working in double bottom tanks on board vessels, be paid an allowance of $1.76 per hour.

(13) An employee shall, whilst using explosive powered tools, be paid an allowance of 13 cents per hour, with a minimum payment of $1.05 per day.

(14) Abattoirs -

An employee employed in and about an abattoir shall be paid an allowance calculated at the rate of $14.40 per week. The allowance shall be paid during overtime but shall not be subject to penalty additions. An employee receiving this allowance is not entitled to any other allowance under this clause. The allowance prescribed herein may be reduced to $13.20 with respect to any employee who is supplied with overalls by the employer.

(15) Employees engaged to iron ore and manganese or loading equipment at the Geraldton Harbour shall be paid an allowance of 44 cents per hour, with a minimum payment for four hours.

(16) Morgues -

An employee required to work in a morgue shall be paid 44 cents per hour or part thereof, in addition to the rates prescribed in this clause.

**C. Delete subclause (19) and insert in lieu the following:**

(19) An employee required to repair or maintain incinerates shall be paid $2.65 per unit.

**D. Delete subclauses (21) – (24) and insert in lieu the following:**

(21) (a) Subject to the provisions of this clause, an employee whilst employed on foundry work shall be paid a disability allowance of 31 cents for each hour worked to compensate for all disagreeable features associated with foundry work, including heat, fumes, atmospheric conditions, sparks, dampness, confined space and noise.

(b) The foundry allowance herein prescribed shall be in lieu of any payment otherwise due under this clause and does not in any way limit an employer's obligations to comply with all relevant requirements of Acts and Regulations relative to conditions in foundries.

(c) The foundry allowance herein prescribed shall be in lieu of any payment otherwise due under this clause and does not in any way limit an employer's obligations to comply with all relevant requirements of Acts and Regulations relative to conditions in foundries.

(d) For the purpose of this subclause foundry work shall mean:

(i) Any operation in the production of castings by casting metal in moulds made of sand, loam, metal moulding composition or other material or mixture of materials, or by shell moulding, centrifugal casting or continuous casting; and

(ii) Where carried on as an incidental process in connection with and in the course of production to which paragraph (i) of this definition applies, the preparation of moulds and cores (but not in the making of patterns and dies in a separate room), knock-out processes and dressing operations, but shall not include any operation performed in connection with:

(aa) Non-ferrous die casting (including gravity and pressure);

(bb) Casting of billets and/or ingots in metal mould;

(cc) Continuous casting of metal into billets;

(dd) Melting of metal for use in printing;

(ee) Refining of metal.

(22) An electronics tradesperson, an electrician - special class, an electrical fitter and/or an armature winder or an electrical installer who holds and in the course of employment may be required to use a current "A" grade or "B" grade licence issued pursuant to the relevant regulation in force on the 28th day of February, 1978 under the Electricity Act, 1948 shall be paid an allowance of $17.50 per week.

(23) Where an employee is engaged in a process involving asbestos and is required to wear protective equipment, i.e: respiratory protection in the form of a high efficiency class H particulate respirator and/or special clothing, a disability allowance of 56 cents per hour shall be paid for each hour or part thereof that such employee is so engaged.

(24) Towing Allowance: A Level 1, 2 or 3 Tradesperson who drives a tow truck towing an articulated bus in traffic shall be paid an allowance of $3.97 per shift when such duties are performed. This allowance shall be payable irrespective of the time such work is performed and is not subject to any premium of penalty additions.

**E. Delete subclauses (26) – (29) and insert in lieu the following:**

(26) First Aid Allowance: A worker, holding either a Third Year First Aid Medallion of the St John Ambulance Association or a "C" Standard Senior First Aid Certificate of the Australian Red Cross Society, appointed by the employer to perform first aid duties, shall be paid $8.50 per week in addition to his/her ordinary rate.

(27) Polychlorinated Biphenyls

Employees required to remove or handle equipment or fittings containing polychlorinated biphenyls (PCBs) for which protective clothing must be worn shall, in addition to the rates and provisions contained in this Clause, be paid an allowances of $1.76 per hour whilst so engaged.

(28) Nominee Allowance:

A licensed electrical fitter or installer who acts as a nominee for the employer shall be paid an allowance of $15.30 per week.

(29) Hospital Environment Allowance:

Notwithstanding the provisions of this clause, the following allowances shall be paid to maintenance employees employed at hospitals listed hereunder:

(a) (i) $12.20 per week for work performed in a hospital environment; and

(ii) $4.20 per week for disabilities associated with work performed in difficult access areas, tunnel complexes, and areas with great temperature variation at -

Princess Margaret Hospital

King Edward Memorial Hospital

Sir Charles Gairdner Hospital

Royal Perth Hospital

Fremantle Hospital

(b) $8.80 per week for work performed in a hospital environment at -
Kalgoorlie Hospital
Osborne Park Hospital
Albany Hospital
Bunbury Hospital
Geraldton Hospital
Mt. Henry Hospital
Northam Hospital
Swan Districts Hospital
Perth Dental Hospital

(c) $5.90 per week for work performed in a hospital environment at -

| | |
|---|---|
| Bentley Hospital | Derby Hospital |
| Narrogin Hospital | Port Hedland Hospital |
| Rockingham Hospital | Sunset Hospital |
| Armadale Hospital | Broome Hospital |
| Busselton Hospital | Carnarvon Hospital |
| Collie Hospital | Esperance Hospital |
| Katanning Hospital | Merredin Hospital |
| Murray Hospital | Warren Hospital |
| Wyndham Hospital | |

**3. Clause 18. – Car Allowance: Delete subclause (3) and (5) and insert in lieu the following:**

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

| RATES OF HIRE FOR USE OF EMPLOYEE'S OWN VEHICLE ON EMPLOYER'S BUSINESS | | | |
|---|---|---|---|
| MOTOR CAR | | | |
| AREA AND DETAILS | ENGINE DISPLACEMENT (IN CUBIC CENTIMETRES) | | |
| DISTANCE TRAVELLED EACH | Over | Over 1600cc | 1600cc |
| YEAR ON OFFICIAL BUSINESS | 2600cc | -2600cc | & Under |
| Rate per Kilometre (Cents) | | | |
| Metropolitan Area | 69.0 | 58.9 | 48.9 |
| South West Land Division | 71.5 | 61.1 | 51.0 |
| North of 23.5º South Latitude | 78.7 | 67.3 | 56.4 |
| Rest of the State | 73.7 | 62.9 | 52.4 |
| Motor Cycle (In All Areas) | 23.9 cents per kilometre | | |

(5) The allowances prescribed in this clause shall be varied in accordance with any movement in the allowances in the Public Service Award 1992.

**4. Clause 19. – Fares and Travelling Allowances: Delete paragraphs (a), (b) and (c) of subclause (1) and insert in lieu the following:**

(a) On places within a radius of fifty kilometres from the General Post Office, Perth - $14.35 per day;

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

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

**5. Clause 20. – Distant Work-Construction: Delete subclause (6) and (7) of this clause and insert in lieu the following:**

(6) An employee to whom the provisions of subclause (1) of this clause apply shall be paid an allowance of $29.50 and for any weekend that he/she returns to his home from the job but only if -

(a) The employer or his/her agent is advised of the intention no later than the Tuesday immediately preceding the weekend in which the employee so returns;

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

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

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

(7) Where an employee supplied with board and lodging by the employer, is required to live more than eight hundred metres from the job, he/she shall be provided with suitable transport to and from that job or be paid an allowance of $12.90 per day provided that where the time actually spent in travelling either to or from the job exceeds 20 minutes, that excess travelling time shall be paid for at ordinary rates whether or not suitable transport is supplied by the employer.

**6. Clause 21. – District Allowances: Delete subclause (6) of this clause and insert in lieu the following:**

(6) The weekly rate of District Allowance payable to employees pursuant to subclause (3) of this clause shall be as follows:

| COLUMN I DISTRICT | COLUMN II STANDARD RATE | COLUMN III EXCEPTIONS TO STANDARD RATE | COLUMN IV RATE |
|---|---|---|---|
| | $ Per Week | Town Or Place | $ Per Week |
| 6 | 67.90 | Nil | Nil |
| 5 | 55.50 | Fitzroy Crossing | 74.80 |
| | | Halls Creek | |
| | | Turner River Camp | |
| | | Nullagine | |
| | | Liveringa (Camballin) | 69.70 |
| | | Marble Bar | |
| | | Wittenoom | |
| | | Karratha | 65.60 |
| | | Port Hedland | 60.90 |
| 4 | 28.10 | Warburton Mission | 75.40 |
| | | Carnarvon | 26.30 |
| 3 | 17.70 | Meekatharra | 28.10 |
| | | Mount Magnet | |
| | | Wiluna | |
| | | Laverton | |
| | | Leonora | |
| | | Cue | |
| 2 | 12.60 | Kalgoorlie | 4.20 |
| | | Boulder | |
| | | Ravensthorpe | 16.70 |
| | | Norseman | |
| | | Salmon Gums | |
| | | Marvel Loch | |
| | | Esperance | |
| 1 | Nil | Nil | Nil |

Note: In accordance with subclause (4) of this clause employees with dependants shall be entitled to double the rate of district allowance shown.

**5. First Schedule – Wages:**

**A. Delete subclause (5) and insert in lieu the following:**

(5) (a) In addition to the rates contained in subclauses (2) and (3) hereof, employees designated in classifications C 14 to C 7 inclusive shall receive an all purpose industry allowance of $13.70.

(b) This allowance shall be paid in two instalments, as follows:

(i) $6.90 of the allowance shall be paid after the first 12 months of Government service; and

(ii) the remaining $6.80 - totalling $13.70 - shall be paid on completion of 24 months of Government service.

(c) The industry allowance shall be adjusted in accordance with any movements to the wage prescribed in subclause (2) hereof, as follows:

(i) The increase shall apply to the 'plus 24 months of service' rate;

(ii) The increase is to be rounded to the nearest ten cents;

(iii) The rate is to be divided by two to calculate instalments in accordance with subparagraphs (i) and (ii) of paragraph (b) hereof, provided that the instalment rates are not expressed in less than ten cents amounts; and

(iv) In the event of such an equal division of the industry allowance not resulting in the rates being expressed in less than ten cent amounts, as provided in subparagraph (iii) hereof, the division shall be unequal and weighted to the 12 months' service instalment.

**B. Delete subclause (8) and insert in lieu the following:**

(8) (a) Leading Hands

A tradesperson placed in charge of three or more other employees shall, in addition to the ordinary rate, be paid per week:

| | $ |
|---|---|
| If placed in charge of not less than three and not more than ten other employees | 22.10 |
| If placed in charge of more than ten and not more than twenty other employees | 33.60 |
| If placed in charge of more than twenty other employees | 43.20 |

(b) Any tradesperson moulder employed in a foundry where no other jobbing moulder is employed shall be paid at the rate prescribed for leading hands in charge of not less than three and not more than ten other employees.

(c) A Certificated Rigger or Scaffolder on ships and buildings, other than a Leading Hand, who, in compliance with the provisions of the Occupational Health, Safety and Welfare Act and Regulations 1988, is responsible for the supervision of not less than three other employees, shall be deemed to be a Leading Hand and be paid at the rate prescribed for a Leading Hand in charge of not less than three and not more than ten other employees.

(d) In addition to any rates to which an employee may be entitled under this clause a Mechanic-in-Charge, employed by the Department of Conservation and Land Management in the following towns, shall be paid per week -

| | $ |
|---|---|
| Manjimup, Collie | 54.00 |
| Harvey, Dwellingup, Mundaring, Yanchep | 27.00 |
| Ludlow, Nannup, Margaret River, Kirup, Walpole, Pemberton | 13.50 |
| Jarrahdale | 13.50 |

**C. Delete subclause (10) - (12) and insert in lieu the following:**

(10) Construction Allowance

(a) In addition to the appropriate rate of pay prescribed in subclause (1) hereof, an employee shall be paid -

(i) $38.80 per week if engaged on the construction of a large industrial undertaking or any large civil engineering project;

(ii) $34.90 per week if engaged on a multi-storeyed building but only until the exterior walls have been erected, the windows completed and a lift made available to carry the employee between the ground floor and the floor upon which he/she is required to work. A "multi-storeyed building" is a building which, when completed will consist of at least five storeys.

(iii) $20.60 per week if engaged otherwise on construction work falling within the definition of construction work in Clause 5. - Classification Structure and Definitions of this Award.

(b) Any dispute as to which of the aforesaid allowances applies to particular work shall be determined by the Western Australian Industrial Relations Commission.

(c) Any allowance paid under this subclause includes any allowance otherwise payable under Clause 17. - Special Rates and Provisions of this Award.

(11) 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) $12.20 per week to such tradesperson; or

(ii) In the case of an apprentice a percentage which appears against the relevant year of apprenticeship in subclause (5) of this Schedule,

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) hereof shall be included in, and form part of, the ordinary weekly wage prescribed in this Schedule.

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

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

(12) Drilling Allowance

A driller using a Herbert two-spindle sensitive machine to drill to a marked circumference shall be paid an additional $2.03 per hour whilst so engaged.

**6. Fifth Schedule – Building Management Authority Wages and Conditions:**

**A. Delete paragraphs (c), (d) and (e) of subclause (5) of this Schedule and insert in lieu the following:**

(c) In addition to the wage rates provided in paragraph (a) hereof, electricians employed by the Building Management Authority will receive an all purpose payment of $23.00 per week.

(d) In addition to the wage rates prescribed in paragraph (a) hereof, by agreement between the employer, the employee and the Union, evidenced in writing, a Mechanical Fitter and a Refrigeration Mechanic may receive 25% loading in lieu of overtime payments.

(e) Leading hand electricians who are required to perform duties over and above those normally required of leading hands shall be paid an all purpose allowance of $31.00 per week in addition to the relevant leading hand rate prescribed in subclause (8) of the First Schedule – Wages of this Award.

**B. Delete subclause (7) of this Schedule and insert in lieu the following:**

(7) Computing Quantities:

An employee, other than a leading hand, who is required to compute or estimate quanitites of materials in respect of work performed by others, shall be paid $3.30 per day, or part thereof, in addition to the rates otherwise prescribed in this award.

**2005 WAIRC 00576**

**HOSPITAL WORKERS (GOVERNMENT) AWARD NO. 21 OF 1966**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

| | |
|---|---|
| **PARTIES** | AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH<br>**APPLICANT**<br>**-v-**<br>BOARD OF MANAGEMANT, SIR CHARLES GAIRDNER HOSPITAL & OTHERS<br>**RESPONDENTS** |
| **CORAM** | CHIEF COMMISSIONER A R BEECH |
| **DATE** | FRIDAY, 11 MARCH 2005 |
| **FILE NO/S** | APPL 625 OF 2003 |
| **CITATION NO.** | 2005 WAIRC 00576 |

| | |
|---|---|
| **Result** | Award varied |
| **Representation** | |
| **Applicant** | Ms C. Kazakoff |
| **Respondent** | Mr C. Gleeson on behalf of the Department of Health |

*Order*

HAVING heard Ms C. Kazakoff on behalf of the applicant and Mr C. Gleeson on behalf of the Department of Health, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders –

THAT the *Hospital Workers (Government) Award No. 21 of 1966* 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.

(Sgd.) A R BEECH,
[L.S.] Chief Commissioner.

SCHEDULE

**1. Clause 15. – 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 $7.80 as meal money.

**2. Clause 16. – Shift Work: Delete subclauses (1) and (2) of this clause and insert the following in lieu thereof:**

(1) Subject to subclause (2) of this clause, a loading of $2.05 per hour or pro rata for part thereof shall be paid for time worked on afternoon or night shift as defined hereunder:

(2) A loading of $3.10 per hour or pro rata for part thereof shall be paid for time worked on permanent afternoon or night shift.

**3. Clause 17. – Weekend Work: Delete subclauses (1) and (2) of this clause and insert the following in lieu thereof:**

(1) In addition to the ordinary rate of wage prescribed by this award an employee shall be paid a loading of $8.30 per hour or pro rata for part thereof for ordinary hours worked between midnight on Friday and midnight on Saturday.

(2) In addition to the ordinary rate of wage prescribed by this award an employee shall be paid a loading of $16.55 per hour or pro rata for part thereof for ordinary hours worked between midnight on Saturday and midnight on Sunday.

**4. Clause 19. – Allowances and Special Provisions: Delete this clause and insert the following in lieu thereof:**

19. - ALLOWANCES AND SPECIAL PROVISIONS

In addition to the rates prescribed in Clause 39. - Wages of this award, the following allowances shall be paid:

(1) (a) Employees handling foul linen in the course of their duties shall be paid 80 cents per hour or any part thereof, to a maximum of $2.80 per day.

(b) Employees handling materials such as carpet tiles, curtains, sealed bags or fabrics, which have become soiled in the same manner as foul linen as defined in Clause 5. - Definitions, shall be paid an allowance according to subclause (1)(a) of this clause.

(2) Orderlies employed on boiler firing duties - $1.94 per day.

(3) Orderlies required to handle a cadaver - $1.61 per hour with a minimum payment of one hour.

(4) Orderlies - Sir Charles Gairdner Hospital, sterilising sputum mugs - $1.94 per day.

(5) (a) A storeman required to operate a ride-on power operated tow motor, a ride-on power operated pallet truck or a walk-beside power operated high lift stacker in the performance of his/her duties shall be paid an additional 41 cents per hour whilst so engaged.

(b) A storeman required to operate a ride-on power operated fork lift, high lift stacker or high lift stock picker or a power operated overhead traversing hoist in the performance of his/her duties shall be paid an additional 54 cents per hour whilst so engaged.

(6) A Food Service Attendant who is required to reconstitute frozen food and/or reheat chilled food, in addition to or in substitution of their normal duties, shall be paid an allowance of 66 cents per hour or part thereof whilst so engaged.

**5. Clause 21. – Public Holidays: Delete subclause (3) of this clause and insert the following in lieu thereof:**

(3) Any employee who is required to work on a day observed as a public holiday shall be paid a loading of $24.95 per hour or pro rata for part thereof in addition to his/her ordinary rate of wage or if the employer agrees be paid a loading of $8.30 per hour or pro rata for part thereof in addition to his/her ordinary rate of wage and be entitled to observe the holiday on a day mutually acceptable to the employer and employee.

**6. Clause 22. – Public Holidays – Graylands and Selby Lodge/Lemnos Hospitals: Delete subclause (3)(c) of this clause and insert the following in lieu thereof:**

(c) Any employee who is required to work on the day observed as a holiday as prescribed in this clause in his/her normal hours work or ordinary hours in the case of a rostered employee shall be paid a loading of $8.30 per hour or pro rata for part thereof and be entitled to observe the holiday on a day mutually acceptable to the employer and the employee.

Provided that in any specified 12 monthly period, after an employee has accumulated five days in lieu of public holidays, by agreement between the employee and the employer, the employee may be paid for work performed on a day observed as a holiday as prescribed in this clause a loading of $24.95 per hour or pro rata for part thereof in addition to his/her ordinary rate of wage in lieu of the foregoing provisions of this subclause.

**7. Clause 28. – Uniforms: Delete subclause (8)(d) of this clause and insert the following in lieu thereof:**

(d) All washable clothing forming part of the uniforms supplied by the employer shall be laundered free of cost to the employee. Provided that in lieu of such free laundering the employer may pay the employee $1.54 per week to partly cover the cost of same.

**8. Clause 39. – Wages: Delete subclause (4)(b)(i), (ii) & (iii) of this clause and insert the following in lieu thereof:**

(4) (b) Except where this clause specifies classifications which require the employee to be in charge of other employees, any employee who is placed in charge of:

(i) not less than three and not more than ten other employees shall be paid $19.25 per week in addition to the ordinary wage prescribed by this clause;

(ii) more than 10 and not more than ten other employees shall be paid $28.85 per week in addition to the ordinary wage prescribed by this clause;

(iii) more than 20 other employees shall be paid $38.40 per week in addition to the ordinary wage prescribed by this clause.

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 Hospital Worker Level 1.

2. For Work Related Allowances – the percentage increase in:

- Clause 16. – Shift Work
- Clause 17 – Weekend Work
- Clause 19. – Allowances and Special Provisions
- Clause 21 – Public Holidays
- Clause 22. – Public Holidays Graylands and Selby Lodge/Lemnos
- Clause 39. - Wages

is derived from $17 divided by $475.50 equals 3.58% (2003) and $19 divided by $492.50 equals 3.84% (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 15. - Overtime has been varied for the CPI Take Away Food – Perth for the period September 2002 to December 2004 giving the percentage of 7.10%.

| | | | | | |
|---|---|---|---|---|---|
| December 2004 | 161.5 | X | 100 | = | 7.10% |
| September 2002 | 150.8 | | 1 | | |

CPI Meals Out and Take Away Foods - Perth

Please note that a mistake was made in the 2002 Order placing the overtime allowance at $7.25 instead of $7.30 as represented in the table appended to the 2002 application. This application seeks to correct this mistake by applying the 3.65% increase in CPI to the correct 2002 rate of $7.30, rather than the rate as applied in the Order.

- Clause 28. – Uniforms has been varied for the CPI Clothing Services and Shoe Repair – All for the period September 2003 to December 2004 giving the percentage of 9.92%.

| | | | | | |
|---|---|---|---|---|---|
| December 2004 | 172.9 | X | 100 | = | 9.92% |
| September 2002 | 157.3 | | 1 | | |

CPI Clothing Services and Shoe Repair – Perth

For all allowances previous rates are identified in Column A of the 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 – HOSPITAL WORKER LEVEL 1

| Clause | | A | B | C |
|---|---|---|---|---|
| Clause 16. – Shift Work | (1) | $1.92 | $2.07 | $2.05 |
| | (2) | $2.90 | $3.12 | $3.10 |
| Clause 17. – Weekend Work | (1) | $7.70 | $8.28 | $8.30 |
| | | $15.40 | $16.56 | $16.55 |
| Clause 19. – Allowances and Special Provisions | | | | |
| | (1)(a) | $2.60 | $2.80 | |
| | | $1.81 | $1.94 | |
| | | $1.50 | $1.61 | |
| | | $1.81 | $1.94 | |
| | | $0.38 | $0.41 | |
| | | $0.50 | $0.54 | |
| | | $0.62 | $0.66 | |
| Clause 21. – Public Holidays | (3) | $23.20 | $24.93 | $24.95 |
| | | $7.70 | $8.29 | $8.30 |
| Clause 22 – Public Holidays and Selby Lodge/Lemnos | | $7.70 | $8.29 | $8.30 |
| | | $23.20 | $24.93 | $24.95 |
| Clause 39. – Wages | (4)(i) | $17.90 | $19.25 | $28.85 |
| | (ii) | $26.80 | $28.83 | |
| | (iii) | $35.70 | $38.40 | |

**EXPENSE RELATED ALLOWANCES**

CPI Take Away Food – Perth

| Clause | A | B | C |
|---|---|---|---|
| | ($7.25 in order) | | |
| Clause 15. – Overtime | $7.30 | $7.82 | $7.80 |

CPI – Clothing Services and Shoe repair – All

| Clause | | A | B | C |
|---|---|---|---|---|
| Clause 28 – Uniforms | (8)(d) | $1.40 | $1.54 | |

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**2005 WAIRC 01985**

**LIFT INDUSTRY (ELECTRICAL AND METAL TRADES) AWARD 1973**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES** COMMUNICATIONS, ELECTRICAL, ELECTRONIC,ENERGY,INFORMATION, POSTAL, PLUMBING, AND ALLIEDWORKERS UNION OF AUSTRALIA, ENGINEERING & ELECTRIC
**APPLICANT**

**-v-**

KONE ELEVATORS (AUST) PTY LIMITED, OTIS ELEVATOR COMPANY PTY LTD, SCHINDLER GRANT LIFTS
**RESPONDENT**

**CORAM** SENIOR COMMISSIONER J F GREGOR
**DATE** WEDNESDAY, 6 JULY 2005
**FILE NO/S** APPL 140 OF 2005
**CITATION NO.** 2005 WAIRC 01985

**Result** Award Varied

*Order*

HAVING heard Mr L. Edmonds, of Counsel, on behalf of the Applicant and there being no appearance for the Respondent, and by consent, the Commission pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Lift Industry (Electrical & Metal Trades) Award 1973 be varied in accordance with the following Schedule and that such variation shall have effect from the first pay period on or after 24th June 2005.

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

SCHEDULE

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

(f) Subject to the provisions of paragraph (g) of this subclause, an employee required to work overtime for more than two hours shall be supplied with a meal by the employer or be paid $9.40 for a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required the employee shall be supplied with each such meal by the employer or be paid $6.40 for each meal so required.

**2. Clause 16. – Special Rates and Provisions: Delete subclause (5) and (6) and insert in lieu the following:**

(5) An Electrician Special Class, an electrical fitter and/or armature winder or an electrical installer who holds and, in the course of the employee's employment may be required to use a current "A" Grade or "B" Grade License issued pursuant to the relevant regulation in force on 28th day of February 1979 under the Electricity Act, 1945 shall be paid an allowance of $17.80 per week.

(6) An employee holding either a First Aid Medallion of the St. John Ambulance Association or a Senior First Aid Certificate of the Australian Red Cross Society, appointed by the employer to perform first aid duties shall be paid $8.70 per week in addition to his/her ordinary rate.

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

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

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

| **AREA AND DETAILS** | **ENGINE DISPLACEMENT (In Cubic Centimetres)** | | |
|---|---|---|---|
| **Rate per Kilometre (Cents)** | **Over 2600cc** | **Over 1600cc -2600cc** | **1600cc & Under** |
| Metropolitan Area | 68.0 | 60.7 | 52.8 |
| South West Land Division | 69.4 | 62.2 | 54.0 |
| North of 23.5' South Latitude | 76.3 | 68.6 | 59.7 |
| Rest of the State | 71.7 | 64.3 | 56.0 |
| **Motor Cycle** (In All Areas) | 23.4 cents per kilometre | | |

**4. Clause 18. – Fares & Travelling Allowances: Delete subclause (2) and insert in lieu the following:**

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

(a) On places within a radius of 50 kilometres from the General Post Office, Perth - $14.05 per day.

(b) For each additional kilometre to a radius of 60 kilometres from the General Post Office, Perth - 77 cents per kilometre.

(c) Subject to the provision of paragraph (d), work performed at places beyond a 60 kilometres radius from the General Post Office, Perth shall be deemed to be distant work unless the employer and the employees, with the consent of the Union, agree in any particular case that the travelling allowance for such work shall be paid under this Clause, in which case an additional allowance of 77 cents per kilometre shall be paid for each kilometre in excess of 60 kilometres radius.

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

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

**5. Clause 19. – Distant Work: Delete subclause (6) and (7) and insert in lieu the following:**

(6) An employee, to whom the provisions of subclause (1) of this Clause apply, shall be paid an allowance of $28.60 for any week-end they return home from the job, but only if -

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

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

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

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

(7) Where an employee, supplied with board and lodging by the employer, is required to live more than 800 metres from the job, the employee shall be provided with suitable transport to and from that job or be paid an allowance of $12.70 per day, provided that where the time actually spent in travelling either to or from the job exceeds 20 minutes, that excess travelling time shall be paid for at ordinary rates, whether or not suitable transport is supplied by the employer.

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

(1) Tradespeople and their assistants who perform work in connection with the installation, servicing, repairing and/or maintenance of lifts and escalators, other than in the employer's workshops, shall be paid an amount of $83.20 per week as a lift industry allowance in consideration of the peculiarities and disabilities associated with such work and in recognition of the fact that employees engaged in such work may be required to perform and/or assist to perform, as the case may be, any of such work.

**7. First Schedule - Wages. –Delete subclause (3) and (6) and insert in lieu the following:**

(3) **Leading Hands**:

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

| | | $ |
|---|---|---|
| (a) | If placed in charge of not less than three and not more than ten other employees | 22.40 |
| (b) | If placed in charge of more than ten and not more than twenty other employees | 34.20 |
| (c) | If placed in charge of more than twenty other employees | 44.20 |

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

(i) $12.40 per week to such tradesperson; or

(ii) In the case of an apprentice a percentage of $12.40 being the percentage which appears against his/her years of apprenticeship in Clause 3 of this schedule, for the purpose of such tradesperson or apprentice supplying and maintaining tools ordinarily required in the performance of his/her work as a tradesperson or apprentice.

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

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

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

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**2004 WAIRC 11944**

**SHARK BAY SALT AND GYPSUM (PRODUCTION AND PROCESSING) USELESS LOOP AWARD NO. A 15 OF 1988**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

| | |
|---|---|
| **PARTIES** | THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS |
| | **APPLICANT** |
| | **-v-** |
| | SHARK BAY SALT JOINT VENTURE & OTHERS |
| | **RESPONDENTS** |
| **CORAM** | COMMISSIONER S J KENNER |
| **DATE** | FRIDAY, 25 JUNE 2004 |
| **FILE NO/S** | APPL 1437A OF 2002 |
| **CITATION NO.** | 2004 WAIRC 11944 |

| | |
|---|---|
| **Result** | Award varied |
| **Representation** | |
| **Unions** | Mr D McLane as agent |
| **Employer** | Mr K Dwyer as agent |

*Order*

HAVING heard Mr D McLane as agent on behalf of The Australian Workers Union, Western Australian Branch, Industrial Union of Workers, the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division (WA Branch) and the Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers' Union of Australia, and Mr K Dwyer as agent on behalf of the employer, and there being no appearance on behalf of the Automotive, Food, Metal, Engineering, Printing & Kindred Industries Union, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 and by consent hereby orders –

1. THAT the unions' claims in relation to matters not agreed to by the employer be and are hereby divided as application 1437B of 2002.

2. THAT otherwise the Shark Bay Salt and Gypsum (Production and Processing) Useless Loop Award No. A 15 of 1988 be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the date of this order.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

**SCHEDULE**

**1. Clause 2. – Arrangement: Delete this clause and insert in lieu thereof the following:**

**2. - ARRANGEMENT**



**2. Clause 5 – Definitions: Delete this clause and insert in lieu thereof the following:**

**5. – DEFINITIONS**

(1) General:

In this award, unless a contrary intention is apparent from the context:

"Parties" means the unions, parties to this award and the employer.

"Employer" means the joint venture party to this award.

"Group 1 Plant Operator" means an employee who is competent to a high standard on all site equipment (harvester, bulldozer, grader) and having either operated this equipment consistently for a minimum of three years on site or to a similar high standard in his or her previous work history so that the employee is competent when assessed on site by the supervisor.

"Group 1 Advanced Truck Driver" means an employee –

(a) Normally engaged as a haul truck driver but competent to operate at a high standard one or more items of site equipment (harvester, bulldozer, grader) and is willingly prepared to do so if and when asked; or

(b) Normally engaged as a plant operator with a high level of competence in one or more items of site equipment (harvester, bulldozer, grader), but competent to drive a haul truck and is willingly prepared to do so if and when asked.

"Unions" means the Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union of Workers – WA Branch; the Australian Workers' Union, West Australian Branch, Industrial Union of Workers; the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division, WA Branch and the Construction, Forestry, Mining and Energy Union of Workers.

"Union Representative" means an employee –

(a) Who has been appointed, in accordance with the rules of the union of which he or she is a member, to represent his or her fellow employees employed by the employer at Useless Loop;

(b) Who has been accredited by his or her union;

(c) Whose accreditation has been notified to the employer by his or her union in writing, and

(d) Subject to provisions in paragraphs (a), (b) and (c) of this clause the Union Representative shall be recognised as such by the employer.

"Shift Work" means a two-shift or three-shift system which, except for breakdowns or other circumstances beyond the control of the employer, is worked over five days of the week (Monday to Friday).

"Employee" means a person who has signed a contract of service with the employer and who is a member, or entitled to be a member, of a union party to this award.

"Temporary Employee" means an employee whose term of employment exceeds two weeks but not more than four months.

"Commission" means the Western Australian Industrial Relations Commission.

(2) General Engineering:

"Tradesperson" means an employee who in the course of his or her employment works from drawings or prints, or makes precision measurements or applies general trade experience, but does not include an apprentice.

"First Class Machinist" means a tradesperson who is engaged in setting up or in setting up and operating the following machines: Lathe, Boring machine, Planing machine, Milling machine, Shaping machine, Slotting machine and Grinding machine.

"Automotive Electrical Fitter" means an employee engaged in the manufacture and repair of the starting, lighting and ignition equipment of motor vehicles (including motor cycles).

"Motor Mechanic" means an employee engaged in assembling (except for the first time in Australia) making, repairing, altering or testing the metal parts (including electric) of the engines or chassis of motor vehicles other than motor cycles.

(3) Electrical:

"Electrical Fitter" means an employee engaged in making, repairing, altering, assembling, testing, winding, or wiring electrical machines, instruments, meters, or other apparatus, other than wires leading thereto, but an employee shall not be deemed to be an electrical fitter:

(a) Solely by reason of the fact that his or her work consists of placing electrodes in "neon" tubes sealed by the employee; or

(b) If he or she is employed as a meter tester.

"Electrical Installer" means an employee engaged in the installation of electric lighting, electric meters, bells, telephones or motors and apparatus used in connection therewith and includes an employee engaged in running, repairing, or testing of conductors used for lighting, heating, or power purposes but does not include an employee who is a linesperson or a meter fixer.

"Linesperson" means an employee engaged (with or without labourers assisting), in erecting poles for electrical wires, cables or other conductors, or erecting wires, cables or other conductors on poles or over buildings, or tying them up to insulators, or joining or insulating them or doing any work on electrical poles off the ground.

"Electrician – Special Class" means, subject to paragraph I hereunder, an electrical fitter or electrical installer who –

(a) (i) has satisfactorily completed a prescribed post trade course in industrial electronics; or

(ii) has, whether through practical experience or otherwise, achieved a standard or knowledge comparable to that which would be achieved under sub-paragraph (i) hereof; and

(b) (i) is engaged on work on or in connection with complicated or intricate circuitry, which work requires for its performance the standard of knowledge referred to in paragraph (a) hereof; and

(ii) is able, where necessary and practicable, to perform such work without supervision and to examine, diagnose and modify systems comprising inter-connected circuits;

but does not include such an employee unless the work on which he or she is engaged requires for its performance knowledge in excess of that gained by the satisfactory completion of the appropriate Technical College trade course.

(c) For the purposes of this award an employee shall be deemed to be an Electrician – Special Class only for the time during which the employee meets the foregoing conditions, unless –

(i) that time exceeds 16 hours per week; or

(ii) in the opinion of the employer or, in the event of disagreement, as determined by the Commission, that time is likely during the course of his or her employment to exceed 16 hours per week on average in which case the employee shall be classified as Electrician – Special Class for as long as his or her employment continues on either basis.

(d) In the event of disagreement about the implementation of this Electrician – Special Class provision, the Commission shall determine the matter.

(e) For the purpose of this definition the following courses are deemed to be prescribed post trade courses in industrial electronics –

(i) Post Trade Industrial Electronics Course of the N.S.W. Department of Technical Education.

(ii) The Industrial Electronics Course (Grade 1 and 2) as approved by the Education Department of Victoria.

(iii) The Industrial Electronics Course of the South Australian School of Electrical Technology.

(iv) Industrial Electronics (Course "C") of the Department of Education, Queensland.

(v) The Industrial Electronics Course of the Technical Education Department of Tasmania.

(vi) The Certificate in Industrial Electronics of the Technical Education Division, Education Department of Western Australia.

(4) "Boilermaker" means an employee who is required to develop work from scaled drawings or prints, or to make templates, or to apply general trade experience without the guidance of a foreperson or other tradesperson.

(5) Welding:

"First Class Welder" means an employee using electric arc and/or oxy-acetylene equipment in the fabrication and repair of metal products, structures and machines.

(6) Crane Drivers:

"Certificated Crane Driver" means an employee who holds a Crane Driver's Certificate of Competency under the Occupation Safety and Health Act 1984 (as amended from time to time) and the Mines Safety and Inspection Act 1994 (as amended from time to time).

(7) Engine Drivers:

"Internal Combustion Engine Driver" means an employee who holds an Internal Combustion Engine Driver's Certificate of Competency under the Occupation Safety and Health Act 1984 (as amended from time to time) and the Mines Safety and Inspection Act 1994 (as amended from time to time).

**3. Clause 6. – Contract of Employment: Delete this clause and insert in lieu thereof the following:**

**6. – CONTRACT OF SERVICE**

(1) A contract of employment to which this award applies may be terminated in accordance with the provisions of this clause and not otherwise, but this subclause does not operate so as to prevent any party to a contract from giving a greater period of notice than is hereinafter prescribed.

(2) Termination of Employment

(a) Full time and Part time employees (permanent or temporary)

(i) Should an employer wish to terminate a full time or part time employee, the following period of notice shall be provided:

| Period of Continuous Service | Period of Notice |
|---|---|
| Not more than 1 year | 1 week |
| More than 1 year but not more than 3 years | 2 weeks |
| More than 3 years but not more than 5 years | 3 weeks |
| More than 5 years | 4 weeks |

(ii) Employees over 45 years of age with 2 or more years' continuous service at the time of termination shall receive an additional week's notice.

(iii) Where the relevant notice is not provided, the employee shall be entitled to payment in lieu. Provided that employment may be terminated by part of the period of notice and part payment in lieu.

(iv) Payment in lieu of notice shall be calculated using the employee's weekly ordinary time earnings.

(v) The period of notice in this clause shall not apply in the case of dismissal for serious misconduct, that is, misconduct of a kind such that it would be unreasonable to require the employer to continue the employment during the notice period.

(vi) Notice of termination by employee. Except in the first three months of service, one week's notice shall be necessary for an employee to terminate their engagement or the forfeiture or payment of one week's pay by the employee to the employer in lieu of notice.

(vii) An employee is not entitled to the above notice periods if they are employed by a new employer after the succession, assignment of transmission of business of their former employer and a new employer is under an obligation enforceable by the employee to recognise the employee's entire period of service and apply the above notice periods of payments in lieu.

(viii) Probation. An employee engaged under the terms of this award may be engaged under probation for an agreed period not exceeding three months. Notwithstanding placitum (i) of paragraph (a) of subclause (2) above, should an employer wish to terminate an employee still on probation, one day's notice shall be given by either party, or one day's pay in lieu shall be paid or forfeited.

(b) Casual Employees

The employment of a casual employee may be terminated by the giving or receiving of one hour's notice.

(3) On the first day of engagement, the employer or the employer's representative –

(a) shall notify the employee whether he or she is employed on a permanent or temporary basis, as defined by this award;

(b) shall provide written advice to the employee, in the case of a temporary employee, as to the nature and expected duration of his or her employment.

(4) The employer is under no obligation to pay for any day not worked, upon which the employee is required to present themselves for duty, except where this award makes specific provisions for payment for such absence.

(5) (a) The employer is entitled to deduct payment for any day or part of any day upon which an employee cannot be usefully employed through any cause which the employer could not reasonably be held responsible. Before any stand-downs occur the site management and site union representatives shall confer and should any dispute exist the matter shall be referred to the Commission for determination.

(b) Where the stoppage of work has resulted from damage or a breakdown of the employer's machinery the Commission in determining a dispute under paragraph (a) of this subclause, shall have regard for the duration of the stoppage and the endeavours made by the employer to repair the breakdown.

(6) (a) An employee who without prior notification to and the prior or subsequent approval of the employer is absent from work for five days shall be deemed to have abandoned his or her employment unless and until in the circumstances of any particular case, the employer otherwise agrees, or in the event of dispute, the Commission otherwise determines but this subclause does not affect the employer's right of dismissal referred to in subclause (2).

(b) In the event of refusal by the employer of a request for approval of absence from work the onus is upon the employee to have returned to his or her normal work on time.

(7) Each employee shall be supplied with a copy of this award on commencement of employment.

**4. Clause 7. – Higher Duties: Delete this clause and insert in lieu thereof the following:**

**7. – HIGHER DUTIES**

(1) An employee engaged on duties carrying a higher rate than his or her ordinary classification shall be paid the higher rate for the time the employee is so engaged but if he or she is so engaged for two hours or more of one day or shift the employee shall be paid the higher rate for the whole day or shift.

(2) An employee is not entitled to payment pursuant to this clause where the work on which he or she is engaged forms part of his or her normal daily or weekly duties.

(3) An employee who has relieved in a higher classification for a period of six consecutive weeks or more, and where that period ends up to one week before the employee commences annual leave, shall be paid for the period of annual leave at the higher rate.

(4) Where an employee has been acting on a higher rate for three months he or she shall be permanently reclassified to that higher position, provided that –

(a) in the case of training, the three month period shall recommence if further training is necessary.

(b) such provision shall not apply when an employee is relieving another employee who is on long service and/or annual leave for a period of up to 18 weeks.

**5. Clause 8. – Under Rate Or Part Time Employees: Delete this clause and insert in lieu thereof the following:**

**8. – SUPPORTED WAGE**

(1) This clause defines the conditions which will apply to employees who because of the effects of a disability are eligible for a supported wage under the terms of this award. In the context of this clause, the following definitions will apply:

(a) 'Supported Wage System' means the Commonwealth Government system to promote employment for people who cannot work at full award wages because of a disability as documented in "[Supported Wages System: Guidelines and Assessment Process]".

(b) 'Accredited Assessor' means a person accredited by the management unit established by the Commonwealth under the Supported Wage System to perform assessments of an individual's productive capacity within the Supported Wage System.

(c) 'Disability Support Pension' means the Commonwealth pension scheme to provide income security for persons with a disability as provided under the Social Security Act 1991, as amended from time to time, or any successor to that scheme.

(d) 'Assessment instrument' means the form provided for under the Supported Wage System that records the assessment of the productive capacity of the person to be employed under the Supported Wage System.

(2) Eligibility Criteria

Employees covered by this clause will be those who are unable to perform the range of duties to the competence level required within the class of work for which the employee is engaged under this award, because of the effects of a disability on their productive capacity and who meet the impairment criteria for receipt of a Disability Support Pension. (The clause does not apply to any existing employee who has a claim against the employer that is subject to the provisions of workers' compensation legislation or any provision of this award relating to the rehabilitation of employees who are injured in the course of their current employment).

The clause also does not apply to employers in respect of their facility, programme, undertaking, services or the like which receives funding under the Disability Services Act 1988 and fulfils the dual role of service provider and sheltered employer to people with disabilities who are in receipt of or are eligible for a disability support pension, except with respect to an organisation which has received recognition under s10 or s12A of the Act, or if a part has received recognition, that part.

(3) Supported Wage Rates

Employees to whom this clause applies shall be paid the applicable percentage of the minimum rate of pay prescribed by this award for the class of work which the person is performing according to the following schedule:

| Assessed Capacity (subclause 4) | % of Prescribed Award Rate |
|---|---|
| 10%* | 10% |
| 20% | 20% |
| 30% | 30% |
| 40% | 40% |
| 50% | 50% |
| 60% | 60% |
| 70% | 70% |
| 80% | 80% |
| 90% | 90% |

(Provided that the minimum amount payable shall be not less than $60.00 per week).

* Where a person's assessed capacity is 10%, they shall receive a high degree of assistance and support.

(4) Assessment of Capacity

For the purpose of establishing the percentage of the award rate to be paid to an employee under this award, the productive capacity of the employee will be assessed in accordance with the Supported Wage System and documented in an assessment instrument by either:

(a) the employer and the union in consultation with the employee or, if desired by any of these; or

(b) the employer and an accredited Assessor from a panel agreed by the parties to the award and the employee.

(5) Lodgement of Assessment Instrument

(a) All assessment instruments under the conditions of this clause, including the appropriate percentage of the award wage to be paid to the employee, shall be lodged by the employer with the Registrar of the Western Australian Industrial Relations Commission.

(b) All assessment instruments shall be agreed and signed by the parties to the assessment, provided that where a union which is party to the award, is not a party to the assessment, it shall be referred by the Registrar to the union by certified mail and shall take effect unless an objection is notified to the Registrar within 10 working days.

(6) Review of Assessment

The assessment of the applicable percentage should be subject to annual review or earlier on the basis of a reasonable request for such a review. The process of review shall be in accordance with the procedures for assessing capacity under the Supported Wage System.

(7) Other Terms and Conditions of Employment

Where an assessment has been made, the applicable percentage shall apply to the wage rate only. Employees covered by the provisions of the clause will be entitled to the same terms and conditions of employment as all other employees covered by this award paid on a pro-rata basis.

(8) Workplace Adjustment

An employer wishing to employ a person under the provisions of this clause shall take reasonable steps to make changes in the workplace to enhance the employee's capacity to do the job. Changes may involve re-design of job duties, working time arrangements and work organisation in consultation with other employees in the area.

(9) Trial Period

(a) In order for an adequate assessment of the employee's capacity to be made, an employer may employ a person under the provisions of this clause for a trial period not exceeding 12 weeks, except that in some cases additional work adjustment time (not exceeding 4 weeks) may be needed.

(b) During the trial period the assessment of capacity shall be undertaken and the proposed wage rate for a continuing employment relationship shall be determined.

(c) The minimum amount payable to the employee during the trial period shall be no less than $60.00 per week; or, in the case of paid rates award, the amount payable to the employee during the trial period shall be $60.00 per week or such greater amount as is agreed from time to time between the parties (taking into account the Centrelink income test free areas for earnings) and inserted into this award.

(d) Work trials should include induction or training as appropriate to the job being trialed.

(e) Where the employer and employee wish to establish a continuing employment relationship following the completion of the trial period, a further contract of employment shall be entered into based on the outcome of assessment under subclause (4) of this clause.

**6. Clause 9. – Temporary Employees: Delete this clause and insert in lieu thereof the following:**

**9. – TEMPORARY EMPLOYEES**

(1) This clause shall apply to employees who are members of or eligible to be members of the unions which are parties to this award.

(2) The employer may employ employees as "temporary employees" whose period of employment shall be two weeks or more but shall not exceed four months.

(3) Prior to employing temporary employees the employer shall consult with the representative of the relevant union.

(4) On engagement of a temporary employee, the employer shall –

(a) advise the employee in writing that he or she is a temporary employee, and the expected duration of his or her employment.

(b) notice of termination may be given by the employer at any time and such notice will be in accordance with Clause 6. – Contract of Service of this award.

(c) any change in the duration of employment, as advised, is to be agreed between the employer, the employee and the union.

(5) (a) A temporary employee shall be entitled pro rata to all entitlements in this award relating to permanent employees.

(b) The employer shall provide a non-transferable airline ticket from site to the point of engagement on termination of employment, if the employment terminates after the completion of the advised or agreed period of duration of engagement.

(c) The provisions of subclause (5)(b) above do not apply to student employees.

(6) The employer shall endeavour to provide permanent employment to temporary employees at the end of their temporary employment providing a suitable vacancy exists.

**7. Clause 11 – Hours: Delete this clause and insert in lieu thereof the following:**

**11. – HOURS**

(1) Day Employees:

(a) The ordinary hours of work of day employees –

(i) shall be 38 hours per week.

(ii) shall be worked in five days of not more than seven hours 36 minutes per day, Monday to Friday inclusive;

(iii) shall, subject to the provisions of paragraph (b) of this subclause, start no earlier than 7.00am and end not later than 5.30pm each day, except employees eligible to be members of the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers – Western Australian Branch and the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division, WA Branch engaged in accordance with this award who shall start no earlier than 6.30am and end not later than 6.00pm each day;

(iv) shall be worked consecutively each day, except for a meal interval that shall not exceed one hour;

(v) the first seven hours and 36 minutes worked between 7.00am or 6.30pm for employees eligible to be members of the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers – Western Australian Branch and the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division, WA Branch shall be deemed to be ordinary hours.

(b) Starting times prior to and finishing times later than the ordinary hours specified in subclause (1)(a)(iii) hereof paragraph (a) of subclause (1) of this clause may be fixed by agreement between the employer, the union or unions and employees concerned.

I All work performed by part-time employees, Monday to Friday, shall be deemed to be ordinary hours for the first seven hours and 36 minutes of each day.

(2) Shift Employees:

(a) The ordinary hours of work of shift employees –

(i) shall be 38 hours per week;

(ii) shall be worked in shifts of seven hours and 36 minutes per day Monday to Friday inclusive;

(iii) shall be worked consecutively each shift;

(iv) the first seven hours and 36 minutes worked in any shift shall be deemed to be ordinary hours, except where subclause (2)(b)(iii) of Clause 12. – Overtime of this award applies;

(v) starting times for ordinary hours shall be agreed between the parties as required.

(3) Mess Personnel:

Notwithstanding the foregoing provisions of this clause, the following shall apply to Mess Personnel –

(a) All time worked by employees in the mess, outside the daily spread of 12 hours or in excess of 38 hours in any one week, shall be deemed overtime and be paid at the rate of time and three-quarters, provided that overtime in excess of four hours in any one week shall be paid at the rate of double time.

(b) All time worked during ordinary hours on a Saturday shall be paid for at the rate of time and a half and all time worked on a Sunday at the rate of time and three-quarters and, on a holiday as prescribed in Clause 16. – Public Holidays of this award at the rate of double time.

(4) All Employees:

(a) Notification –

An employee who, without prior notice to or arrangement with the employer, is absent on any day or shift shall unless he or she is unable to do so, notify the department in which he or she is employed of his or her inability to attend for work on that day or shift and such notification shall be given, where possible, before the time at which the employee is due to commence work on that day but in any event no later than eight hours after that time.

(b) Smoko/Rest Period –

(i) Subject to the provisions of this paragraph two smoko/rest periods of ten minutes shall be allowed each shift. Such periods shall be taken at a mutually agreed time but in any case one in each half of the shift, except employees eligible to be members of the Australian Workers' Union and engaged in accordance with this award shall be allowed one smoko/rest period of ten minutes each shift. This period shall be taken at a mutually agreed time but in any case in the first half of the shift.

(ii) The smoko/rest periods shall count as time worked without deduction of pay and shall be taken on the job.

(iii) Refreshments may be taken by the employees during the smoko/rest period but shall only be taken in a recognised smoko area if the employee is not absent for longer than the prescribed period.

(iv) Taking of the smoko/rest period in a recognised smoko area shall be by prior agreement between the employee or employees and the appropriate Foreperson, Supervisor or Department concerned.

(v) It is recognised that subject to the provisions of paragraph (b)(iii) of this clause, smoko for field employees shall normally be taken on the job.

I Mid-Shift Meal Interval –

(i) The mid-shift crib break (meal interval) shall be 20 minutes, and be counted as time worked during ordinary hours.

(ii) The mid-shift crib break (meal interval) shall be allowed, where applicable, between the fifth and sixth hours of the shift, to enable the fixed plant to keep running for the duration of the shift.

(iii) Taking of the crib will be in one of the recognised crib rooms where the 20 minute crib period will apply. The commencement of the crib break, adequate time for travel and ablutions and the

nomination of the particular crib room will be by prior agreement between the employee or employees, and the appropriate Foreperson, Supervisor or Department concerned.

(iv) When an employee is required for duty during their usual meal time and the meal time is thereby postponed for more than half an hour, the employee shall be paid at overtime rates until the employee has their meal.

(v) An employee shall not be compelled to work for more than five hours without a break for a meal.

**8. Clause 12. - Overtime: Delete this clause and insert in lieu thereof the following:**

**12. - OVERTIME**

(1) (a) Subject to the provisions of this subclause, all work done beyond the ordinary working hours on any day, Monday to Friday inclusive, shall be paid for at the rate of time and one half for the first two hours and double time thereafter.

(b) (i) Work done on Saturdays after 12.00 noon, or on Sunday, shall be paid for at the rate of double time.

(ii) Work done on any day prescribed as a holiday under this award shall be paid for at the rate of double time and a half.

(iii) Work done by part-time employees on a Saturday shall be paid for at the rate of time and a half for the first two hours and double time thereafter.

(iv) Work done by part-time employees on a Sunday shall be paid for at the rate of double time.

(c) In computing overtime each day shall stand alone, but when an employee works overtime which continues beyond midnight on any day, the time worked after midnight shall be deemed to be part of the previous day's work for the purpose of this subclause.

(2) (a) (i) An employee who, after leaving the job, returns by direction of the employer to work overtime is deemed to have been recalled whether notified before or after leaving the employer's premises of the requirement to work.

(ii) An employee recalled to work overtime shall be paid for at least three hours, inclusive of reasonable time getting to and from work, at the appropriate rate for each such occasion but except where subparagraph (iii) applies, not more than once in respect of any period of time.

(iii) Where an employee works less than three hours overtime on a recall and the overtime is, except for a reasonable meal break, continuous with the commencement of their ordinary hours of work, the employee shall be paid for the recall in accordance with subparagraph (ii) without diminution of the payment due to the employee for their ordinary hours of work, but this subparagraph does not apply where the employee was notified of the requirement to work before leaving the job on the previous day or earlier.

(iv) Unless unforeseen circumstances arise, an employee recalled for a specific job shall not be required to work for the maximum period applicable to them if the job is completed in less time than that maximum period.

(v) The provisions of this paragraph do not apply -

(aa) Where it is customary for an employee to return to perform a specific job outside their ordinary hours of work, or

(bb) Where the overtime is, except for a reasonable meal break, continuous with the completion of the ordinary hours of work.

(b) (i) When overtime work is necessary, it shall, where reasonably practicable, be so arranged that employees have at least ten consecutive hours off duty between the work of successive days.

(ii) Where the time worked by an employee on a recall is less than the minimum period applicable to them under paragraph (a) the time so worked shall not be regarded as overtime for the purposes of this paragraph, but this subparagraph does not apply with respect to recalls within the ten hour period immediately preceding the time at which the employee is to commence their ordinary hours of work if they are recalled on two or more occasions within that period and the overtime worked by the employee on the last of such occasions ends before that ordinary commencing time.

(iii) An employee who works so much overtime between the termination of their ordinary work on one day and the commencement of their ordinary work on the next day that they have not had at least ten consecutive hours off duty between those times shall, subject to this paragraph, be released after completion of such overtime until they have had ten consecutive hours off duty without loss of pay for ordinary working time occurring during such absence.

(iv) If, on the instructions of the employer, such an employee resumes or continues work without having had such ten consecutive hours off duty, they shall be paid at double rates until the employee is released from duty and shall then be entitled to be absent until they have had ten consecutive hours off duty without loss of pay for ordinary working time occurring during such absence.

(v) If the ordinary hours of work falling within the rest period extend beyond the mid-shift meal break, the employee shall not be required to attend work but will be paid for seven hours and 36 minutes ordinary hours.

(c) Where an employee works on a Sunday or holiday immediately preceding an ordinary working day, the provisions of paragraph (b) shall be applied to them as if the termination of their work on the Sunday or Public Holiday were the termination of ordinary hours of work on an ordinary working day, but this paragraph does not apply where the work done on the Sunday or Public Holiday is pre-notified, pre-start overtime.

(d) When an employee is required to hold themself in readiness for a call to work after ordinary hours, they shall be paid at ordinary rates for the time or period that employee has been advised to so hold themself in readiness.

(e) Subject to the provisions of paragraph (f) of this subclause, an employee required to work overtime for more than two hours beyond their normal shift, shall be supplied with a meal as per existing arrangements.

(f) The provisions of paragraph (e) of this subclause do not apply -

(i) Ii respect of any period of overtime for which the employee has been notified on the previous day or earlier that they will be required; or

(ii) to any employee who lives in the locality in which the place of work is situated in respect of any meal for which they can reasonably go home.

(g) Where overtime work extends more than two hours beyond the normal shift period, paragraph (i) above is superseded by the provision that an employee shall -

(i) be allowed a crib break of 20 minutes without deduction of pay before commencing the overtime; or

(ii) if that rest period has not been allowed shall, in addition to the overtime worked, be paid for 20 minutes at overtime rates in lieu thereof.

(h) The employer may require any employee to work reasonable overtime at overtime rates and such employee shall work overtime in accordance with such requirement, subject to the limit that no shift will exceed 14 hours duration, exclusive of travelling and waiting time.

(i) The provisions of this subclause do not operate so as to require payment of more than double time rates.

(j) Where rostered overtime is required the principle to apply will be that the employee who normally carries out the major component of the proposed work will be first approached as to the rostered overtime. Where more than one employee normally carries out that duty and rostered overtime occurs more than once the principle of equitable roster will apply.

**9. Clause 13. - Shift Work: Delete this clause and insert in lieu thereof the following:**

**13. - SHIFT WORK**

(1) The provisions of this clause apply to shift work as defined in this award, or to such system of work as agreed to between the employer, the Union and the employees.

(2) Subject to the provisions of subclause (3) of this clause, the employer may work the establishment on shifts but before doing so shall give notice of their intention to the Union and of the intended starting and finishing times of ordinary working hours of the respective shifts.

(3) (a) Where an employee is transferred from day shift to night shift, and works on that night shift for less than five consecutive shifts, then the employee shall be paid at overtime rates for such shifts.

(b) The sequence of work shall not be deemed to be broken under the preceding paragraph by reason of the fact that shifts are not carried out on a Saturday or Sunday or any holiday.

(4) Where a shift commences at or after 11.00 p.m. on any day, the whole of that shift shall be deemed, for the purposes of this award, to have been worked on the following day.

(5) A shift employee, when on afternoon or night shift shall be paid 15 per cent in addition to the ordinary rate for each shift of eight hours.

(6) The employer will provide to an employee as much notification as possible of a request to change from day work to night work or vice versa.

If an employee is transferred from day work (or day shift) to night work (or night shift) or vice versa, they shall be notified of the change by the end of their preceding shift. Where that notification is not given by the end of the shift (whether notified before or after leaving the premises) the employee shall be entitled to payment for ordinary hours on that anticipated following shift that they would have worked if not for the transfer.

Notwithstanding the foregoing, where an employee within 48 hours of being notified of the transfer works on the shift to which they have been transferred, they shall be paid at overtime rates for all the time worked on that shift during that 48 hours.

(7) The provisions of subclauses (3) and (6) shall equally apply to an employee who is transferred from or to afternoon shift.

**10. Clause 14. – Payment of Wages: Delete this clause and insert in lieu thereof the following:**

**14. – PAYMENT OF WAGES**

(1) Wages shall be paid fortnightly and shall, if the employee so requests, be paid into a bank account nominated by the employee but may otherwise, at the employer's option, be paid in cash or by cheque or, if the employee so agrees, into a nominated bank account.

(2) At or before the time at which the employee receives their wages they shall be issued with a slip showing the gross amount of wages and allowances due to them, all deductions there from, the total number of hours worked by the employee, including the number of overtime hours and the rate at which such overtime has been paid.

(3) Any error in the compilation of an employee's pay shall, at their request, be adjusted within 48 hours of the time at which they make that request.

(4) (a) All monies due to an employee on the termination of their employment shall be paid to them within one hour of the employee presenting their final clearance to the pay office unless they present that clearance less than one hour before the normal time of closing of that office in which case such monies shall be paid to them within one hour of the opening of that office on the following day.

(b) An employee, if required, will have access to the pay office by the middle of their last shift in order to check their termination pay calculation.

**11. Clause 16. – Public Holidays: Delete this clause and insert in lieu thereof the following:**

**16. – PUBLIC HOLIDAYS**

(1) The following days or the days observed in lieu thereof shall be allowed as holidays without loss of pay, namely:-

Christmas Day

New Year's Day

Good Friday

Labour Day

Anzac Day

In the case of Christmas Day, New Year's Day, Good Friday, Labour Day and Anzac Day the holiday shall be granted on the day on which that holiday is observed.

(2) When any of the days mentioned in subclause (1) falls on a Saturday or a Sunday, the holiday shall be observed on the next succeeding Monday. In each case the substituted day shall be a holiday without deduction of pay and the day for which it is substituted shall not be a holiday.

(3) Any employee who absents themselves from work on the working day following a day observed as a holiday pursuant to this clause is not entitled to payment for that holiday unless the employee satisfies the employer that they had a reasonable excuse for their absence.

(4) No employee shall be compelled to work on Christmas Day or Good Friday pursuant to this clause unless the employee is required for the provision of essential services.

**12. Clause 17 – Annual Leave: Delete this clause and insert in lieu thereof the following:**

**17. – ANNUAL LEAVE**

(1) (a) (i) Except as hereinafter provided, a period of five consecutive weeks' leave, with payment as prescribed in paragraph (b) of this subclause, shall be allowed annually to an employee by the employer accrued on a weekly basis.

(ii) Part-time employees will receive annual leave, pro rata on five weeks' leave, based on the number of hours usually worked each week.

(b) An employee before going on leave shall be paid the wages he or she would have received in respect of the ordinary time the employee would have worked had he or she not been on leave during the relevant period.

(c) During the period of annual leave an employee shall receive a loading calculated on the rate of wage prescribed by paragraph (b) hereof. This loading shall be as follows:-

(i) Day Employees – An employee who would have worked on day work had he or she not been on leave – a loading of 17.5 per cent.

(ii) Shift Employees – An employee who would have worked on shift work had he or she not been on leave – a loading of 17.5 per cent.

Provided that where the employee would have received shift loadings prescribed by Clause 13. – Shift Work had he or she not been on leave during the relevant period and such loadings would have entitled him or her to a greater amount than the loading of 17.5 per cent, then the shift loadings shall be added to the rate of wage prescribed by paragraph (b) of this clause in lieu of the 17.5 per cent loading. Provided further, that if the shift loadings would have entitled him or her to a lesser amount than the loading of 17.5 per cent then such loading of 17.5 per cent shall be added to the rate of wage prescribed by paragraph (b).

The loading prescribed by this subclause shall not apply to proportionate leave on termination. The loading shall apply to each portion of leave taken under the provisions of subclause (5) of this clause and in respect of accrued leave for each full week of service to be paid on termination.

(2) If any award holiday falls within an employee's period of annual leave and is observed on a day which in the case of that employee would have been an ordinary working day, there shall be added to that period one day being an ordinary working day for each such holiday observed as aforesaid.

(3) If after one week's continuous service, an employee lawfully leaves their employment or their employment is terminated by the employer through no fault of the employee, the employee shall be paid all accrued leave entitlements.

(4) In the event of an employee being employed by the employer for portion only of a year, they shall be entitled, subject to subclause (3) of this clause, to such leave on full pay as is proportionate to their length of service during that period with such employer, and is such leave is not equal to the leave given to the other employees they shall not be entitled to work or pay whilst the other employees of the employer are on leave on full pay.

(5) Annual leave shall be granted as arranged between the employer and the employee. Should an employee desire to take annual leave in more than one period he or she may arrange to do so with the employer. Provided however that no such period of leave shall be less than one week.

(6) (a) Subject to the provisions of this subclause an employee who, during a period of annual leave, is confined to his home or hospital for seven consecutive days or more as a result of personal sickness or injury is entitled to claim payment under Clause 19. – Sick Leave in lieu of payment for annual leave for all or part of the period of confinement.

(b) A claim under paragraph (a) of this subclause –

(i) may not exceed the period of sick leave to which the employee was then entitled;

(ii) shall be made within 14 days of the employee resuming work after his or her leave;

(iii) shall be supported by evidence that would satisfy a reasonable person as to the sickness or injury and the necessity for confinement; and,

(iv) shall, if the foregoing conditions are satisfied, be granted.

(c) Where an employee is paid for a period of confinement under this subclause he or she is entitled to a period of annual leave equivalent to the ordinary hours so paid which shall be taken in conjunction with his or her next annual leave or paid for if his or her service ends before that leave is taken.

(7) (a) Subject to the provisions of paragraph (b) of this subclause an employee who desires to accumulate annual leave for a period of two years may do so if the employee so notifies the employer in writing prior to the commencement of the second year. Such notice, once given, may only be revoked with the consent of the employer.

(b) The maximum amount of leave that may be accumulated and carried forward under paragraph (a) of this subclause is five weeks.

**13. Clause 18 – Annual Leave Travel Costs: Delete this clause and insert in lieu thereof the following:**

**18. - ANNUAL LEAVE TRAVEL COSTS**

(1) The intent of this policy is to provide travel assistance to allow employees and their partners and dependant children resident with them to spend time, if they wish to do so, in a locality having significantly greater medical, dental, commercial and recreational facilities than are available at Useless Loop.

It is agreed, therefore, that travel assistance will be provided to enable visits to be made to Perth, once a year.

(2) An employee will be entitled to a return journey to Perth for annual leave purposes once only each year, subject to the following conditions.

(a) Provided that no other leave travel assistance has already been granted in that year, and provided that the leave is taken upon the completion of 12 months continuous service in that year, less the period of annual leave itself.

(b) That the employee resumes his or her contract of employment after the completion of the period of annual leave for which the assistance is granted and continues that contract of employment for one week after that resumption.

(c) Absence from Useless Loop must be for a minimum of five (5) ordinary working days.

(d) The maximum extent of assistance will be the provision of economy return airfare tickets from Useless Loop to Perth for the employee, his or her partner and dependent children or the equivalent amount in money if the employee elects to drive.

(e) In the case of an employee travelling without dependants a return airfare from Useless Loop to Perth or, if an employee elects to drive, the equivalent amount of money.

(3) (a) It is an express condition of these policies that all tickets issued under these policies are not transferable and remain the property of the employer if not used for the purpose or destinations for which they have been issued by the employer.

(b) The right of an employee to any of the above assistance with travel costs is not cumulative and if not taken within 12 months of the annual leave falling due, the right to claim assistance lapses. However, where an employee's leave is advanced or deferred at the convenience of the employer to meet variations in seasonal workloads, that employee will not be disadvantaged in respect of the time at which the subsequent year's travel assistance falls due. Leave travel assistance having been granted in any one year, the next entitlement would not fall due until 12 months after that date.

(c) A person who is a permanent employee and is also a partner or a dependant child of a permanent employee is entitled to annual leave travel assistance either as an employee, or as a dependant, but not both.

(d) An "employee" is defined as a male or female who has a contract of service with the employer on a permanent basis.

(e) A "dependant child" is a child who is dependent on the employee and is over three but under 16 years of age or is fully dependant on the employee and is over 16 years of age and a bona fide full time student.

(f) In cases of financial necessity the employer may pay in advance leave travel assistance provided that proof of travel as specified is provided within one week of resumption of contract of service.

(g) The employer may deduct from any monies due to the employee the cost of travel assistance granted under this award if the employee fails to resume and maintain his or her contract of employment as specified, or if proof of travel is not provided.

(4) (a) An employee's partner (and dependants if applicable) may claim travel assistance separately to the employee, as long as the employee then takes the required minimum leave in order to claim travel assistance in the 12 months in which it is due. If leave is not taken by the employee in the required period, any travel assistance paid to his partner (or dependants) must be refunded.

(b) The provisions in paragraph (a) of this subclause above apply to couples who are recognised by the Personnel Department as having lived together for a minimum period of 12 months.

(c) The combined travel assistance claimed in paragraph (a) of this subclause shall not exceed the equivalent that would have been paid if the employee and his or her family had travelled together on one occasion in any twelve months period.

**14. Clause 19. – Absence Through Sickness: Delete this clause and insert in lieu thereof the following:**

**19. - SICK LEAVE**

(1) Subject as hereinafter provided a full-time employee shall be entitled to payment for non-attendance on the ground of personal ill health or injury for up to 10 working days or 80 hours, whichever is the lesser, each year accrued on a weekly basis. Part-time employees who are paid a proportion of a full-time employee's pay or paid according to the number of hours worked shall be entitled to the proportion of the number of hours worked each week that the average number of hours worked each week bears to 38, up to 80 hours each year. This clause shall not apply where the employee is entitled to compensation under the Workers' Compensation and Rehabilitation Act 1981.

(2) An employee shall not be entitled to receive wages from the employer for any time lost through an illness or injury caused by the employee's own serious and wilful misconduct or gross and wilful neglect.

(3) An employee, who claims to be entitled to paid leave under this clause, is to provide the employer with evidence that would satisfy a reasonable person of the entitlement.

(4) (a) An employee absent from work for reasons of personal ill-health shall, unless he or she is unable to do so, notify the department in which he or she is employed of his or her inability to attend for work on that day or shift and such notification shall be given, where possible before the time at which the employee is due to commence work on that day, but in any event not later than eight hours after that time.

(b) Notwithstanding the above, to be entitled to payment on the ground of personal ill-health, where it has not been practicable to advise in the above manner, the employee shall within 24 hours advise the employer of his or her inability to attend for work, the nature of his or her illness (so far as is practicable) and the estimated duration of the absence.

(5) Sick leave shall accumulate from year to year so that any balance of the period specified in subclause (1) of this clause which has in any year not been allowed to any employee by the employer as paid sick leave may be claimed by the employee and, subject to the conditions hereinbefore prescribed, shall be allowed by the employer in any subsequent year without diminution of the sick leave prescribed in respect of that year.

**15. Clause 20. – Long Service Leave: Delete this clause and insert in lieu thereof the following:**

**20. – LONG SERVICE LEAVE**

Employees covered by this award shall be entitled to Long Service Leave in accordance with the Long Service Leave General Order published in Part I of January of each volume of the Western Australian Industrial Gazette.

**16. Clause 21. – Travelling On Engagement and Termination: Delete this clause and insert in lieu thereof the following:**

**21. - TRAVELLING ON ENGAGEMENT AND TERMINATION**

(1) Subject to the provisions of this clause the fare of an employee from the place of engagement to the place of employment shall be paid by the employer and the employee shall be paid at ordinary rates for not more than eight hours for time spent in travelling to the place of employment including time occupied in waiting for transport connections. If the employee uses a mode of travel not approved by the employer, travelling time in excess of eight hours shall not be allowed.

(2) The amount of the fare paid by an employer pursuant to subclause (1) of this clause may be deducted from the subsequent earnings of the employee concerned in such manner as is agreed in writing between the employee and the employer.

(3) If an employee completes six months' continuous service with the employer or is terminated before that time for any reason other than misconduct, any amount deducted by the employer from the employee's wages pursuant to subclause (2), to the extent that it does not exceed the cost of a minimum air fare from the place of engagement to the site, shall be refunded to the employee.

(4) An employee who upon employment is notified in writing that an employer's house will be allocated when available may either elect to receive assistance from the employer to transfer dependant members of his or her family from Perth to Useless Loop whichever is applicable in the form of economy class non-transferable air tickets or to be reimbursed at the rate of $0.48 per kilometre if he or she elects to drive his or her own vehicle from Perth, up to the maximum air fares which would be paid, whichever is the lesser.

(5) Upon termination of employment after 12 months or more of continuous service the employer shall provide either a non-transferable airline ticket from Useless Loop to Perth, whichever is applicable, or, if the employee elects to drive a motor vehicle reimbursement at the rate of $0.48 per kilometre, up to a maximum of the appropriate single airfare upon presentation of proof of the journey having been undertaken. The provisions of subclause (4) do not apply on termination of employment.

An employee wishing to travel to a destination, other than Perth, can claim up to the equivalent Useless Loop/Perth journey.

(6) A tradesperson who on engagement elects to travel by air will be reimbursed for excess baggage costs for the purpose of transporting his or her tools to site.

**17. Clause 22. – Representative Interviewing Employees: Delete this clause and insert in lieu thereof the following:**

**22. – REPRESENTATIVE INTERVIEWING EMPLOYEES**

(1) On notifying the employer or their representative a full time Union official shall be permitted to interview an employee during the recognised meal hour or at some other time agreed by the employer on the business premises of the employer.

(2) In the case of disagreement existing or anticipated concerning any of the provisions of this award a full time Union official may with the permission of the employer or their representative, and acting in accordance with site operating regulations, be permitted to enter the business premises of the employer to view the work, work area, or that which may be the subject of any disagreement but shall not interfere in any way with the carrying out of such work.

(3) A full time Union official may, with the permission of the employer or their representative, interview the Union representative during working hours providing it does not interfere with work in which the Union representative may be so engaged, unless prior notice has been given as regards the proposed interview. In accordance with the intent of this clause, the employer shall endeavour to provide the circumstances and facilities for the interview to take place.

(4) The employer agrees to arrange for accommodation at its premises for visiting full time officials of a Union, subject to the following:

(a) prior notice of intention to visit is given to the employer;

(b) the official is concerned with the employer’s business;

(c) vacant employer accommodation is available.

**18. Clause 25. – Wages: Delete this clause and insert in lieu thereof the following:**

**25. – WAGES**

(1) Interpretation:

(a) It is the intention of the parties that the following wages structure shall provide an opportunity for all employees to progress along a career path. Such progression shall encompass the ability of employees to undertake work within their level that they are competent to safely perform, subject to statutory obligations.

(b) Progression through skill levels shall be on both a “vertical” and horizontal” basis with the aim of securing a more skilled and flexible workforce with greater work opportunities for all employees.

(c) Cross-skilling is to be continued over a period of time so that within three to five years all employees covered by this award will carry out work dependent only on their ability and qualifications to do such work and shall encompass those matters agreed in the “Memorandum of Agreement” dated 10 May 1990 between the site representatives and the employer.

(d) Management will provide training to enable employees to broaden their skills.

(e) Employees are encouraged to accept more responsibility in planning their work and implementing such plans where possible.

(2) (a) Wage Groups:

| | | Total Rate Per Week $ |
|---|---|---|
| **Group 1** | | **605.30** |
| | Fitter | |
| | Boilermaker | |
| | Plumber | |
| | Carpenter | |
| | Motor Mechanic | |
| | Sandblaster/Spray painter with trade qualifications | |
| | Qualified Cook | |
| | Engine Driver (Power House) | |
| | Electrician | |
| | Advanced Truck Driver | |
| | Plant Operator competent to a high standard on all site equipment for a minimum of three years, on site or to a similar high standard in his or her previous work history so that he or she is competent when assessed on site by the supervisor | |
| | Horticulturist | |
| **Group 2** | | **563.90** |
| | Plant Operator able to operate all site equipment to a basic but competent standard | |
| | Experienced Cook | |
| | Mobile Crane Driver with a minimum of 12 months' experience | |
| | Driller | |
| | Store person with formal computer and heavy inventory control experience | |
| | Haul Truck Driver | |
| | Licensed Rigger/Scaffolder (working over 6m) | |
| **Group 3** | | **542.00** |
| | Mobile Plant Operator competent up to bulldozer category | |
| | Welder – second class, competent on oxy/cutting – welding MIG and arc welding | |
| | Sandblaster/Painter, competent in airless/conventional spray painting without formal qualifications | |
| | Employee able to carry out work on mobile and fixed plant unsupervised but lacking formal apprenticeship qualifications | |
| | Store person competent in all stores work | |
| | Person in charge of fixed plant | |
| | Truck driver (not otherwise categorised) | |
| **Group 4** | | **518.20** |
| | Sandblaster | |
| | Backhoe/Bobcat and light equipment Operator | |
| | Gardener able to carry out all horticultural work unsupervised | |
| | Fixed Plant Assistant – washery and ship loader | |
| | Employee able to work in a single area of plant maintenance unsupervised but without sufficient training to move to Category 3 | |
| **Group 5** | | **497.50** |
| | Unskilled site duties | |
| | Cleaning | |
| | Gardener | |
| | Mess Attendant | |
| | Janitor | |

(3) 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.

(4) Leading Hands:

In addition to the appropriate total wage prescribed in subclause (2) hereof, a Leading Hand shall be paid –

| | | $ |
|---|---|---|
| (a) | if placed in charge of not less than three and not more than 10 other employees | 19.30 |
| (b) | if placed in charge of more than ten and not more than 20 other employees | 29.00 |
| (c) | if placed in charge of more than 20 other employees | 37.70 |

**19. Clause 26. – Service Payments: Delete this Clause and insert in lieu thereof the following:**

**26. – SERVICE PAYMENTS**

**(20)** In addition to the amounts prescribed by Clause 25. – Wages of this award, the following service payments shall be payable per week –

| After continuous service of - | $ |
|---|---|
| 12 months | 8.70 |
| 24 months | 15.40 |
| 36 months | 22.30 |
| 48 months | 29.00 |
| 60 months | 36.10 |

(2) The above amounts are not payable for all purposes of this award. The amounts prescribed are payable to part-time employees on a pro rata basis, according to their hours normally worked each week.

**20. Clause 27. – Site Disability Allowance: Delete this clause and insert in lieu thereof the following:**

**27. - SITE DISABILITY ALLOWANCE**

(1) In addition to the amounts prescribed by Clauses 25. - Wages and 26. - Service Payments of this award, the following site disability payments shall be payable weekly to an employee when accommodated in -

| | | $ |
|---|---|---|
| (a) | Single Person's Quarters | 9.30 |
| (b) | House or Module | 18.80 |
| (c) | Caravan | 36.40 |

(2) The above amounts are not payable for all purposes of this award.

**21. Clause 29. – Protective Equipment and Toxic Substances: Delete this clause and insert in lieu thereof the following:**

**29. - PROTECTIVE EQUIPMENT AND TOXIC SUBSTANCES**

(1) The employer shall have available a sufficient supply of protective equipment for use by the employees when engaged on work for which some protective equipment is reasonably necessary.

(2) An employee shall sign an acknowledgement when he or she receives any article of protective equipment and shall return that article to the employer when the employee has finished using it or on leaving his or her employment.

(3) An employee to whom an article of protective equipment has been issued shall not lend that article to another employee and if he or she does so both the employee and that other employee shall be deemed guilty of wilful misconduct.

(4) Before helmets, goggles, glasses or gloves or any such substitute which have been used by an employee are re-issued by the employer to another employee, they shall be effectively sterilised.

(5) During the time any article of protective equipment is on issue to the employee, he or she shall be responsible for any loss or damage thereto, fair wear and tear attributable to ordinary use excepted.

(6) An employee who is required to use toxic or other substances or materials which, if used incorrectly are likely to constitute a health hazard, shall be informed by the employer of the hazards involved and instructed in the use of such substances or materials.

(7) An employee using such substances or materials shall be provided with and use any protective equipment prescribed or recommended by the Occupational Safety and Health Act 1984 (as amended) and the Occupational Safety and Health Regulations 1996 (as amended), and shall observe the required procedures. Where no prescription or recommendation has been made by the Occupational Safety and Health Act 1984 (as amended) and the Occupational Safety and Health Regulations 1996 (as amended), the protective equipment to be supplied and used and the procedures to be followed shall be determined by agreement between the employer and the appropriate Union, or, failing agreement, by the Commission.

**22. Clause 30. – Tool Allowance: Delete this clause and insert in lieu thereof the following:**

**30. – TOOL ALLOWANCE**

(1) (a) All tradespersons shall be required to provide themselves with a suitable kit of tools appropriate to their trade of employment.

(b) A tool allowance of $13.10 shall be paid to compensate tradespersons for wear and tear on their tools in their job at Shark Bay Salt Joint Venture.

(2) The replacement of tools by the employer will be restricted to circumstances where the employee may be requested or, on his or her initiative, modifies one of his or her own tools to undertake an unusual task (always recognising that it is the responsibility of the employer to supply specialist tools), or where, through no fault of the employee, irretrievably loses a tool. The latter circumstances would only apply while working over sewerage systems or over water.

**23. Clause 32. – Supply of Clothes: Delete this clause and insert in lieu thereof the following:**

**32. – SUPPLY OF CLOTHES**

(1) The employer shall provide two pairs of work shirts and shorts or overalls for each employee at the commencement of each year of service.

(2) In the event that an employee terminates their employment prior to six months of service in any year, they shall pay to the employer half of the cost of their clothing issue.

**24. Clause 35. – Overtime - Power Station Engine Drivers: Delete this clause and insert in lieu thereof the following:**

**35. - OVERTIME - POWER STATION ENGINE DRIVERS**

(1) (a) The provisions of this subclause shall apply only to continuous shift employees.

(b) Subject as hereinafter provided all time worked in excess of or outside the ordinary working hours shall be paid for at the rate of double time except -

(i) where an employee is called upon to work a sixth shift in not more than one week in any four weeks, when they shall be paid for such shift at the rate of time and a half for the first two hours and double time thereafter; and

(ii) where an employee is called upon to work outside their ordinary hours on a holiday named in Clause 37. - Holidays - Power Station Engine Drivers - Continuous Shift Employees of this award, when they shall be paid for such work at the rate of double time and one half.

(c) Time worked in excess of or outside the ordinary working hours shall be paid for at ordinary rates -

(i) if it is due to private arrangements between the employees themselves; or

(ii) if it does not exceed two hours and is due to a relieving man not coming on duty at the proper time; or

(iii) if it is for the purpose of effecting the customary rotation of shifts.

(2) (a) The provisions of this subclause apply to all employees.

(b) Meal Allowance -

Where an employee, without being notified on the previous day or earlier, has to continue working after their usual knock-off time for more than two hours, they shall be provided with any meal required.

(c) Standing by -

When an employee is required to hold themself in readiness for a call to work after ordinary hours they shall be paid at ordinary rates for the time they so hold themself in readiness.

(d) Ten or Eight Hour Break -

(i) When overtime work is necessary it shall, wherever reasonably practicable, be so arranged that employees have at least ten consecutive hours off duty between the work of successive days.

(ii) An employee (other than a casual employee) who works so much overtime between the termination of their ordinary work on one day and the commencement of their ordinary work on the next day that they have not at least ten consecutive hours off duty between these times shall, subject to this paragraph, be released after completion of such overtime until they have had ten consecutive hours off duty without loss of pay for ordinary working time occurring during such absence.

(iii) If, on the instructions of the employer, such an employee resumes or continues work without having had such ten consecutive hours off duty, they shall be paid at double rates until they are released from duty for such period and the employee shall then be entitled to be absent until they has had ten consecutive hours off duty without loss of pay for ordinary working time occurring during such absence.

(iv) Where an employee (other than a casual employee or an employee engaged on continuous shift work) is called in to work on a Sunday or holiday preceding an ordinary working day they shall, wherever reasonably practicable, be given ten consecutive hours off duty before their usual starting time on the next day. If this is not practicable then the provisions of subparagraphs (ii) and (iii) of this paragraph shall apply shall apply the necessary changes having been made; but overtime worked as a result of a recall shall not be regarded as overtime for the purposes of this paragraph when the actual time worked is less than three hours on such recall or on each of such recalls.

(v) The provisions of this subclause shall apply in the case of shift employees who rotate from one shift to another, as if eight hours were substituted for ten hours when overtime is worked -

(aa) for the purpose of changing shift rosters; or

(bb) where a shift employee does not report for duty; or

(cc) where a shift is worked by arrangement between the employees themselves.

(e) Recall -

When an employee is recalled to work after leaving the job he shall be paid for at least three hours at overtime rates.

(f) Working During Meal Interval -

Where an employee to whom subclause (1) of this clause applies is required for duty during their usual meal time and their meal time is thereby postponed for more than half an hour, the employee shall be paid at overtime rates until they receive their meal.

(g) (i) The employer may require any employee to work reasonable overtime at overtime rates, and such employee shall work overtime in accordance with such requirement.

(ii) No Union or association party to this award, or employee or employees covered by this award, shall in any way, whether directly or indirectly, be a party to or concerned in any ban, limitation, or restriction upon the working of overtime in accordance with the requirements of this subclause.

**25. Insert a new Clause 38. – Dispute Settlement Procedure as follows:**

**38. – DISPUTE SETTLEMENT PROCEDURE**

In the event of a problem, grievance, question, dispute, claim or difficulty that affects one ore more employees, or arises from the employees work or contract of employment, the following procedure shall apply:

(1) At first instance the matter shall be raised at site level with the foreperson/supervisor/manager as appropriate.

(2) In the event that the matter is unresolved it shall be raised at the Company level by the shop steward or Union Official involved. Whilst these procedures are being followed the status quo will be maintained by the parties.

(3) If the matter is still not resolved it may be referred to the Western Australian Industrial Relations Commission for determination, and if necessary arbitration.

(4) The parties will attempt to resolve the matter prior to either party referring the matter to the Western Australian Industrial Relations Commission.

**26. Insert new Appendix 1 – Make Up of Total Wage as follows:**

*Appendix 1 – Make Up of Total Wage*

This appendix shows how the total wages paid to employees under this award are made up. It details base wage rates, supplementary payments and safety net adjustments as well as the total rate published above in Clause 25. – Wages.

| | **Rate Per Week $** | **Safety Net Adjustments $** | **Total Rate Per Week $** |
|---|---|---|---|
| Group 1 | 461.30 | 144.00 | 605.30 |
| Group 2 | 419.90 | 144.00 | 563.90 |
| Group 3 | 400.00 | 142.00 | 542.00 |
| Group 4 | 376.20 | 142.00 | 518.20 |
| Group 5 | 355.50 | 142.00 | 497.50 |

**28. Insert new Schedule A – Parties to the award as follows:**

**SCHEDULE A – PARTIES TO THE AWARD**

**UNIONS**

The Australian Workers Union,
West Australian Branch,
Industrial Union of Workers,
Cnr Moore & Lord Streets,
EAST PERTH WA 6004

Communications, Electrical, Electronics, Energy,
Information, Postal, Plumbing and Allied Workers
Union of Australia,
Engineering and Electrical Division,
WA Branch,
U24/257 Balcatta Road,
BALCATTA WA 6021

The Automotive, Food, Metals, Engineering,
Printing & Kindred Industries Union of Workers,
Western Australian Branch,
121 Royal Street,
EAST PERTH WA 6004

The Construction, Forestry, Mining and Energy
Union of Australia,
82 Royal Street,
EAST PERTH WA 6004

**COMPANIES**

Shark Bay Salt Joint Venture,
22 Mount Street,
PERTH WA 6000

Soustreet Pty Ltd,
22 Mount Street,
PERTH WA 6000

**2005 WAIRC 01834**

**SHARK BAY SALT AND GYPSUM (PRODUCTION AND PROCESSING) USELESS LOOP AWARD NO. A15 OF 1988**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

| | |
|---|---|
| **PARTIES** | THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS |
| | **APPLICANT** |
| | **-v-** |
| | SHARK BAY SALT JOINT VENTURE & OTHERS |
| | **RESPONDENTS** |
| **CORAM** | COMMISSIONER S J KENNER |
| **DATE** | MONDAY, 20 JUNE 2005 |
| **FILE NO/S** | APPL 1437B OF 2002 |
| **CITATION NO.** | 2005 WAIRC 01834 |

| | |
|---|---|
| **Result** | Award varied. Order issued. |
| **Representation** | |
| **Applicant** | Mr G Trotter |
| **Respondent** | Mr K Dwyer as agent |

*Order*

HAVING heard Mr G Trotter on behalf of the applicant and Mr K Dwyer as agent on behalf of the respondents, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 and by consent hereby orders –

THAT the Shark Bay Salt and Gypsum (Production and Processing) Useless Loop Award No. A15 of 1988 be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the date of this order.

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

SCHEDULE

**1. Clause 2. – Arrangement: Delete this clause and insert in lieu thereof the following:**

**2. – ARRANGEMENT**

28. Wet Weather Conditions – Stand-down
29. Protective Equipment and Toxic Substances
30. Tool Allowance
31. Supply of Footwear
32. Supply of Clothes
33. Essential Services
34. Hours – Power Station Engine Drivers
35. Overtime – Power Station Engine Drivers
36. Shift Work – Power Station Engine Drivers
37. Holidays – Power Station Engine Drivers – Continuous Shift Employees
38. Dispute Settlement Procedure
39. Redundancy
40. Superannuation
41. Parental Leave
42. Carer's Leave

Appendix 1 – Make Up of Total Wage

Schedule A – Parties to the Award

**2. Clause 24. – Bereavement Leave: Delete this clause and insert in lieu thereof the following:**

**BEREAVEMENT LEAVE**

(1) All employees on the death of :

(a) Spouse or de facto partner

(b) Child or step child

(c) Parent or step parent

(d) Sibling or step sibling

(e) Grandparent

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

are entitled to paid bereavement leave.

(2) The period of paid bereavement leave shall be:

(a) Where the funeral necessitates travel to Perth or further – three days;

(b) Where the funeral necessitates travel within the area – two days;

which do not have to be consecutive.

(3) Evidence of entitlement to bereavement leave that would satisfy a reasonable person is to be furnished to the employer if so requested.

(4) Bereavement leave is not to be taken during a period of any other kind of leave.

(5) Bereavement leave applies to casual employees.

(6) For the purposes of this clause, the pay of an employee employed on shift work shall be deemed to include any usual shift allowance.

**3. Insert new Clauses as follows:**

**39. – REDUNDANCY**

39.1 Termination of Employment

39.1.1 Statement of Employment

An employer shall, in the event of termination of employment, provide upon request to the employee who has been terminated a written statement specifying the period of employment and the classification or type of work performed by the employee.

39.1.2 Job Search entitlement

(a) During the period of notice of termination given by the employer an employee shall be allowed up to one day's time off without loss of pay during each week of notice for the purpose of seeking other employment. The time off shall be taken at times that are convenient to the employee after consultation with the employer.

(b) If the employee has been allowed paid leave for more than one day during the notice period for the purpose of seeking other employment, the employee shall, at the request of the employer, be required to produce proof of attendance at an interview or he or she shall not receive payment for the time absent. For this purpose a statutory declaration will be sufficient.

39.2 Introduction of Change

39.2.1 Employer's Duty to Notify

(a) Where an employer decides to introduce changes in production, program, organisation, structure or technology, that are likely to have significant effects on employees, the employer shall notify the employees who may be affected by the proposed changes and, if an employee nominates a union to represent him or her, the union nominated by the employee.

(b) "Significant effects" includes termination of employment, major changes in the composition, operation or size of the employer's workforce or in the skills required; the elimination or diminution of a job opportunity, a promotion opportunity or job tenure; the alteration of hours of work; the need for retraining or transfer of employees to other work or locations and the restructuring of jobs.

39.2.2 Employer's Duty to Consult over Change

(a) The employer shall consult the employees affected and, if an employee nominates a union to represent him or her, the union nominated by the employee, about the introduction of the changes, the effects the changes are likely to have on employees (including the number and categories of employees likely to be dismissed, and the time when, or the period over which, the employer intends to carry out the dismissals), and the ways to avoid or minimise the effects of the changes (e.g. by finding alternate employment).

(b) The consultation shall commence as soon as practicable after making the decision referred to in the "Employer's Duty to Notify" clause.

(c) For the purpose of such consultation the employer shall provide in writing to the employees concerned and, if an employee nominates a union to represent him or her, the union nominated by the employee, all relevant information about the changes including the nature of the changes proposed, the expected effects of the changes on employees, and any other matters likely to affect employees, provided that any employer shall not be required to disclose confidential information, the disclosure of which would be adverse to the employer's interests.

39.3. Redundancy

39.3.1 Definition

Business includes trade, process, business or occupation and includes part of any such business.

Redundancy occurs where an employer has made a definite decision that the employer no longer wishes the job the employee has been doing done by anyone.

Transmission includes transfer, conveyance, assignment or succession whether by agreement or by operation of law and "transmitted" has a corresponding meaning.

Weeks' pay means the ordinary time rate of pay for the employee concerned. Provided that such rate shall exclude:

(a) Overtime;

(b) Penalty rates;

(c) Disability allowances;

(d) Shift allowances;

(e) Special rates;

(f) Fares and travelling time allowances;

(g) Bonuses; and

(h) Any other ancillary payments of a like nature.

39.3.2 Consultation Before Terminations

(a) Where an employer decides that the employer no longer wishes the job the employee has been doing to be done by anyone and that decision may lead to termination of employment, the employer shall consult the employee directly affected and if an employee nominates a union to represent him or her, the union nominated by the employee.

(b) The consultation shall take place as soon as is practicable after the employer has made a decision to which clause 39.3.2(a) applies and shall cover the reasons for the proposed terminations, measures to avoid or minimise the terminations and/or their adverse affects on the employees concerned.

(c) For the purpose of the consultation the employer shall, as soon as practicable, provide in writing to the employees concerned and if an employee nominates a union to represent him or her, the union nominated by the employee, all relevant information about the proposed terminations including the reasons for the proposed terminations, the number and categories of employees likely to be affected, the number of employees normally employed and the period over which the terminations are likely to be carried out. Provided that an employer shall not be required to disclose confidential information, the disclosure of which would be adverse to the employer's interests.

39.3.4 Transfer to lower paid duties

(a) Where an employee is transferred to lower paid duties by reason of redundancy the employee shall be entitled to the same period of notice of transfer as the employee would have been entitled to if the employee's employment had been terminated.

(b) The employer may, at the employer's option, make payment in lieu thereof of an amount equal to the difference between the former amounts the employer would have been liable to pay and the new lower amount the employer is liable to pay the employee for the number of weeks of notice still owing.

(c) The amounts must be worked out on the basis of:

(i) The ordinary working hours to be worked by the employee; and

(ii) The amounts payable to the employee for the hours including for example, allowances, loading and penalties; and

(iii) Any other amounts payable under the employee's contract of employment.

39.3.5 Severance Pay

(a) In addition to the period of notice prescribed for ordinary termination, an employee whose employment is terminated by reason of redundancy must be paid, subject to further order of the Commission, the following amount of severance pay in respect of a continuous period of service: Provided that the entitlement of any employee whose employment terminates on or before 1 February 2006 shall not exceed 8 weeks' pay.

| Period of continuous service | Severance pay |
|---|---|
| Less than 1 year | Nil |
| 1 year and less than 2 years | 4 weeks' pay |
| 2 years and less than 3 years | 6 weeks' pay |
| 3 years and less than 4 years | 7 weeks' pay |
| 4 years and less than 5 years | 8 weeks' pay |
| 5 years and less than 6 years | 10 weeks' pay |
| 6 years and less than 7 years | 11 weeks' pay |
| 7 years and less than 8 years | 13 weeks' pay |
| 8 years and less than 9 years | 14 weeks' pay |
| 9 years and less than 10 years | 16 weeks' pay |
| 10 years and over | 12 weeks' pay |

(b) Provided that the severance payments shall not exceed the amount which the employee would have earned if employment with the employer had proceeded to the employee's normal retirement date.

(c) For the purpose of this clause continuity of service shall not be broken on account of -

(i) Any interruption or termination of the employment by the employer if such interruption or termination has been made merely with the intention of avoiding the obligations of this clause in respect of leave of absence;

(ii) Any absence from work on account of leave granted by the employer; or

(iii) Any absence with reasonable cause, proof whereof shall be upon the employee;

Provided that in the calculation of continuous service any time in respect of which any employee is absent from work except time for which an employee is entitled to claim paid leave shall not count as time worked.

Service by the employee with a business which has been transmitted from one employer to another and the employee's service has been deemed continuous in accordance with clause 2(3) or (4) of the Long Service Leave Provisions published in Part 1 (January) of each volume of the Western Australian Industrial Gazette shall also constitute continuous service for the purpose of this clause.

39.3.6 Employee leaving during notice period

An employee whose employment is terminated by reason of redundancy may terminate his/her employment during the period of notice and, if so, will be entitled to the same benefits and payments under this clause had they remained with the employer until the expiry of such notice. However, in this circumstance the employee will not be entitled to payment in lieu of notice.

39.3.7 Alternative employment

(a) An employer, in a particular redundancy case, may make application to the Commission to have the severance payment prescribed varied if the employer obtains acceptable alternative employment for an employee.

(b) This subclause does not apply in circumstances involving transmission of business as set out in clause 39.3.8.

39.3.8 Transmission of business

(a) The provisions of clause 39.3 are not applicable where a business is before or after the date of this order, transmitted from an employer (in this subclause called "the transmittor") to another employer (in this subclause called "the transmittee"), in any of the following circumstances:

(i) Where the employee accepts employment with the transmittee which recognises the period of continuous service which the employee had with the transmittor and any prior transmittor to be continuous service of the employee with the transmittee; or

(ii) Where the employee rejects an offer of employment with the transmittee:

(aa) In which the terms and conditions are substantially similar and no less favourable, considered on an overall basis, than the terms and conditions applicable to the employee at the time of ceasing employment with the transmittor; and

(bb) Which recognises the period of continuous service which the employee had with the transmittor and any prior transmittor to be continuous service with the transmittee.

(b) The Commission may vary 39.3.8(a)(ii) if it is satisfied that this provision would operate unfairly in a particular case.

39.3.9 Notice to Centrelink

Where a decision has been made to terminate employees in the circumstances outlined in the "Consultation Before Terminations" clause, the employer shall notify Centrelink as soon as possible giving all relevant information about the proposed terminations, including a written statement of the reasons for the terminations, the number and categories of the employees likely to be affected, the number of employees normally employed and the period over which the terminations are intended to be carried out.

39.3.10 Employees exempted

(a) This clause does not apply:

(i) Where employment is terminated as a consequence of serious misconduct that justifies dismissal without notice.

(ii) Except for clause 39.3.2, to employees with less than one year's service.

(iii) Except for clause 39.3.2, to probationary employees.

(iv) To apprentices.

(v) To trainees.

(vi) Except for clause 39.3.2, to employees engaged for a specific period of time or for a specified task or tasks; or

(vii) To casual employees.

39.3.11 Employers Exempted

Subject to an order of the Commission, in a particular redundancy case, subclause 39.3.5 shall not apply to employers who employ less than 15 employees.

39.3.12 Incapacity to pay

An employer or a group of employers, in a particular redundancy case, may make application to the Commission to have the severance payment prescribed varied on the basis of the employer's incapacity to pay.

## 40. – SUPERANNUATION

(1) The subject of superannuation is dealt with extensively by legislation including the Superannuation Guarantee (Administration) Act 1992, the Superannuation Guarantee Charge Act 1992, the Superannuation Industry (Supervision) Act 1993 and the Superannuation (Resolution of Complaints) Act 1993. This legislation, as varied from time to time, governs the superannuation rights and obligations of the parties to this Award.

(2) Definitions

For the purposes of this clause:

"Fund" means a complying superannuation fund as that term is used in the superannuation legislation.

(3) In order to comply with the provision of s48B of the Industrial Relations Act 1979, employees may nominate a complying superannuation fund or scheme into which the contributions by an employer on behalf of the employee will be made.

(4) The employer is required to notify employees of the entitlements to nominate an alternative complying superannuation fund or scheme.

(5) The employer and the employee are bound by the nomination of the employee unless the employer and the employee agree to change the complying superannuation fund or scheme. The employer shall not unreasonably refuse to agree to a change of complying superannuation fund or scheme required by an employee.

(6) Superannuation arrangements in place at the date of this order are not required to be altered unless an employee seeks to do so in accordance with subclauses (3) and (4) of this clause.

(7) An employer is not required to contribute to more than one Fund in respect of an employee under this Award.

(8) If a dispute or difficultly arises over the implementation or continued operation of this provision, it must be handled in accordance with the dispute resolution procedure in Clause 38. - Dispute Settlement Procedure.

## 41. – PARENTAL LEAVE

**(1) Basic Entitlements**

(a) An employee, other than a casual employee, and their partner are entitled to unpaid parental leave totalling 52 weeks in respect of:

(i) The birth of a child; or

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

(b) To obtain parental leave, an employee must satisfy the following basic requirements:

(i) The employee has, before the expected date of birth or placement, completed at least 12 months continuous service with the employer;

(ii) The employee has given the employer at least ten weeks written notice of their intention to take the leave, unless due to circumstances it is impractical or unreasonable to do so;

(iii) Complied with paragraph (c) of this subclause.

(c) Except for a period of one week at the time of the birth or placement, an employee and their partner must take parental leave at different times.

(d) The entitlement to parental leave is reduced by any period of parental leave taken by the employee's partner in relation to the same child, except for the period of one week's leave referred to in paragraph (c) of this subclause.

(e) An employee may take other leave (for example, annual leave) in conjunction with parental leave, but this will reduce the amount of parental leave they may take in accordance with subclause (6) of this clause.

(f) An employee who takes parental leave is, in most circumstances, entitled to return to the position which they held before the leave was taken.

(g) The absence of an employee on parental leave shall not break the continuity of service of an employee but shall not be taken into account in calculating the period of service for any purpose in terms of this award.

**(2) DEFINITIONS**

**''Adoption''** in relation to a child, is a reference to a child who:

(a) Is not the natural child or the step-child of the employee or the employee's partner;

(b) Is less than 5 years of age;

(c) Has not lived continuously with the employee for six months or longer.

**''Employee**'' includes a part-time employee, but not a casual or seasonal employee;

**''Continuous service''** means service (otherwise than as a casual or seasonal employee) under an unbroken contract of employment, and includes a period of leave, or a period of absence, authorised:

(a) By the employer; or

(b) By an award or order of a court or tribunal or a workplace agreement certified by such a body; or

(c) By a contract of employment.

**''Expected date of birth''** means the day certified by a medical practitioner to be the day on which the medical practitioner expects the employee or the employee's partner, as the case may be, to give birth to a child.

**''Medical certificate''** means a certificate signed by a registered medical practitioner.

**''Placement''** means the placement, by an adoption agency, of a child with an employee for adoption.

''**Partner**'' means a spouse or de facto partner

**(3) Notice Requirements**

The written notice required in placitum (ii) of paragraph (b) of subclause (1) shall include:

(a) A specification of the first and last days of the period of leave, provided that a female employee who has given notice of her intention to take parental leave, other than for adoption, is to start the leave six weeks before the expected date of birth unless in respect of any period closer to the expected date of birth a medical practitioner has certified that the employee is fit to work;

(b) In the case where parental leave is taken for the birth of a child, the employee must give to the employer:

(i) A medical certificate that states that the employee or the employee's partner is pregnant and specifies the estimated date of birth;

(ii) A statutory declaration that:

(aa) Supports the particulars notified;

(bb) The employee will be the child's primary care-giver throughout the period of parental leave; and

(cc) That the employee will not engage in any conduct inconsistent with their contract of employment while on parental leave

(c) In the case where parental leave is taken for the adoption of a child, the employee must give to the employer:

(i) A statement from the adoption agency of the proposed date of placement of the child; and

(ii) A statutory declaration that:

(aa) The child will be at the proposed date of the placement, or was, at the date of the placement, as the case requires, under the age of 5 years; and

(bb) Is not a child or step-child of the employee or the employee's partner; and

(cc) Will not have, at the proposed date of the placement, or had not, at the date of the placement, as the case requires, previously lived with the employee for a continuous period of 6 months or more.

(dd) The employee will be the child's primary care-giver throughout the period of parental leave.

(ee) Will not engage in any conduct inconsistent with the employee's contract of employment while on adoption leave.

(d) An employee who has given notice of their intention to take parental leave is to notify the employer, in the form of a statutory declaration, of particulars of any period of parental leave taken or to be taken by the employee's partner in relation to the same child.

(e) An employee who is taking parental leave is to notify the employer of any change to the date on which the employee wishes to start or finish the leave.

(f) The starting and finishing dates of a period of parental leave is, subject to this subclause, to be agreed between the employer and employee.

**(4) Transfer to Safe Job**

(a) Where, in the opinion of a registered medical practitioner, illness or risks arising out of the pregnancy or hazards connected with the work assigned to the employee make it inadvisable for the employee to continue at her present work, the employee shall, if the employer deems it practicable, be transferred to a safe job at the rate and on the conditions attaching to that job until the commencement of the parental leave.

(b) Where the transfer to a safe job is not practicable, the employee may, or the employer may require the employee to, take leave for such period as is certified necessary by a registered medical practitioner. Such leave shall be treated as parental leave for purposes of this section.

**(5) Variation to Period of Parental Leave**

(a) Provided the maximum period of parental leave does not exceed the period to which the employee is entitled under subclause (7) hereof:

(i) The period of parental leave may be lengthened once only by the employee giving not less than 14 days notice in writing stating the period by which the leave is to be lengthened;

(ii) The period may be further lengthened by agreement between the employee and the employer.

(b) The period of maternity leave may, with the consent of the employer, be shortened by the employee giving not less than 14 days notice in writing stating the period by which the leave is to be shortened.

**(6) Special Parental Leave**

(a) Where an employee is not yet on parental leave and her pregnancy terminates after 28 weeks other than by the birth of a living child, the employee shall be entitled to:

(i) Such period of unpaid leave as a registered medical practitioner certifies as necessary before her return to work; and/or

(ii) For illness other than the normal consequences of confinement, paid sick leave to which she is entitled and which a registered medical practitioner certifies as necessary for her return to work.

(b) The aggregate of parental leave, special parental leave and sick leave shall not exceed the period of leave granted under subclause (7) of this clause.

**(7) Period of Entitlement**

An employee who qualifies for parental leave under this subclause, is entitled to a period of 52 weeks unpaid leave, less the total of:

(a) Each period of unpaid leave, or paid sick leave, other than parental leave, that the employer has already granted to the employee in respect of the same pregnancy; and

(b) Each period of annual leave, or long service leave, that the employee has applied for instead of, or in conjunction with, parental leave in respect of the pregnancy; and

(c) Each period of special parental leave; and

(d) Each period of parental leave taken by the employee's partner and specified in paragraph (d) of subclause (3) of this clause.

**(8) Effect on Parental Leave of Failure to Complete 12 months Continuous Service**

If parental leave has been granted on the basis that it is reasonable to expect that the employee will complete a period of at least 12 months continuous service with the employer on a particular day, the employer may cancel the leave if the employee does not complete such a period on that day.

**(9) Effect on Parental Leave in Certain Circumstances**

(a) This subclause applies if an employer has granted parental leave to an employee and:

(i) The pregnancy terminates otherwise than by the birth of a living child; or

(ii) The employee gives birth to a living child but the child later dies; or

(iii) The adoption of a child does not take place; or

(iv) The adoption of a child takes place but does not continue.

(b) The employer may cancel the parental leave at any time before it begins.

(c) If the parental leave has begun, the employee may notify the employer in writing that he or she wishes to return to work.

(d) If he or she does so, the employer must notify him or her in writing of the day on which he or she is to return to work. That day must be within four weeks after the employer received the notice under subclause (3) of this clause.

(e) If the parental leave has begun, the employer may notify the employee in writing that he or she must return to work on a specified day that is not less than four weeks after the notice is given.

(f) If the employee returns to work, the employer must cancel the rest of the parental leave.

**(10) Effect on Parental Leave if Employee Ceases to be Primary Caretaker of Child**

(a) This subclause applies if:

(i) For a substantial period beginning on or after the beginning of an employee's parental leave, the employee is not the child's primary care-giver; and

(ii) Having regard to the length of that period and to any other relevant circumstances, it is reasonable to expect that the employee will not again become the child's primary care-giver within a reasonable period.

(b) The employer may notify the employee in writing that he or she must return to work on a specified day that is not less than four weeks after the notice is given.

(c) If the employee returns to work, the employer must cancel the rest of the leave.

**(11) Return to Work After Parental Leave**

(a) This subclause applies when an employee returns to work after a period of parental leave.

(b) The employer must employ the employee in the position he or she held immediately before starting parental leave, provided that in the case of a female employee:

(i) If she was transferred to a safe job because of her pregnancy, the position shall be the one immediately before the transfer; or

(ii) If she began working part-time because of the pregnancy, the position shall be the one immediately before she so began.

(c) If that position no longer exists but there are other positions available which the employee is qualified for and is capable of performing, the employee shall be entitled to a position as nearly comparable in status and pay to that of their former position.

**(12) Replacement Employee**

An employer must not employ a person:

(a) To replace an employee while he or she is on parental leave; or

(b) To replace an employee who, while another employee is on parental leave, is to perform the duties of the position held by the other employee;

Unless the employer has informed the person:

(c) That their employment is only temporary; and

(d) About the rights of the employee who is on parental leave.

**(13) Termination of Employment**

(a) An employee on parental leave may terminate their employment at any time during the period of leave by notice given in accordance with this award.

(b) An employer shall not terminate the employment of an employee on the ground of her pregnancy or of their absence on parental leave, but otherwise the rights of the employer in relation to termination of employment are not hereby affected.

**(14) Part-Time Work**

(a) This subclause only applies where the employer and employee have reached agreement that an employee may work part-time under the circumstances and according to the conditions contained in this subclause.

(b) With the agreement of the employer:

(i) An employee may work part-time in one or more periods at any time from the date of birth of their child until its second birthday or, in relation to adoption, from the date of placement of the child until the second anniversary of the placement.

(ii) A female employee may work part-time in one or more periods while she is pregnant where part-time work is, because of the pregnancy, necessary or desirable.

(c) An employee, who has had at least 12 months continuous employment with an employer immediately before commencing part-time work under this subclause, has at the expiration of the period of such part-time employment the right to return to their former position.

(d) Subject to the provisions of this subclause part-time employment shall be in accordance with the provisions of this award which shall apply pro-rata.

(e) Before commencing a period of part-time employment under this subclause the employee and the employer shall agree:

(i) That the employee may work part-time;

(ii) Upon the hours to be worked by the employee, the days upon which they will be worked and commencing times for the work;

(iii) Upon the classification applying to the work to be performed; and

(iv) Upon the period of part-time employment.

(f) The terms of the agreement may be varied by consent.

(g) The terms of this agreement or any variation to it shall be reduced to writing and retained by the employer. A copy of the agreement and any variation to it shall be provided to the employee by the employer.

(h) (i) The employment of a part-time employee under this subclause, may be terminated in accordance with the provisions of this award but may not be terminated by the employer because the employee has exercised or proposes to exercise any rights arising under this subclause or has enjoyed or proposes to enjoy any benefits arising under this subclause.

(ii) Any termination entitlements payable to an employee whose employment is terminated while working part-time under this subclause, or while working full-time after transferring from part-time work under this subclause, shall be calculated by reference to the full-time rate of pay at the time of termination and by regarding all service as a full-time employee as qualifying for a termination entitlement based on the period of full-time employment and all service as a part-time employment on a pro rata basis.

(i) An employer may request, but not require, an employee working part-time under this subclause to work outside or in excess of the employee's ordinary hours of duty provided for in accordance with paragraph (e) of this subclause.

(j) The work to be performed part-time need not be the work performed by the employee in their former position but shall be worked otherwise performed under this award.

## 42. – CARER'S LEAVE

(1) Use of Sick Leave

(a) An employee with responsibilities in relation to either members of their immediate family or members of their household who need their care and support shall be entitled to use, in accordance with this subclause, any sick leave entitlement for absences to provide care and support for such persons when they are ill or injured. Such leave shall not exceed five (5) days in any calendar year and is not cumulative.

(b) The employee shall provide evidence to the employer as to the fact of illness or injury of the person for whom the care and support is required that would satisfy a reasonable person.

(c) The entitlement to use sick leave is subject to:

(i) The employee being responsible for the care of the person concerned; and

(ii) The person concerned being either a member of the employee's immediate family or a member of the employee's household.

(iii) The term "immediate family" includes:

(aa) The employee's spouse or partner (including a former spouse or partner).

(bb) A child or an adult child (including an adopted child, a step child or an ex nuptial child), parent, grandparent, grandchild or sibling of the employee.

(d) The employee shall, wherever practicable, give the employer notice prior to the absence of the intention to take leave, the name of the person requiring care and their relationship to the employee, the reasons for taking such leave and the estimated length of absence. If it is not practicable for the employee to give prior notice of absence, the employee shall notify the employer by telephone of such absence at the first opportunity on the day of absence.

(2) Use of Unpaid Leave

An employee may elect, with the consent of the employer, to take unpaid leave for the purpose of providing care to a family member who is ill or injured.

# AGREEMENTS—Industrial—Retirements from—

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. 433 of 2005

IN THE MATTER of the Industrial Relations Act 1979

and

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

The Civil Service Association of Western Australia Incorporated ceased to be a party to the Department of Education Public Service, Government and Ministerial Officers' Agency Specific Agreement 2003, No. PSA AG 11 of 2003 on and from the 27th day of May 2005.

DATED at Perth this 8th day of August 2005.

J. SPURLING,
Registrar.

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WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. 436 of 2005

IN THE MATTER of the Industrial Relations Act 1979

and

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

The Civil Service Association of Western Australia Incorporated ceased to be a party to the Disability Services Commission (Social Trainers and Client Assistants) Agency Specific Agreement 2003, No. PSA AG 30 of 2003 on and from the 27th day of May 2005.

DATED at Perth this 8th day of August 2005.

J. SPURLING,
Registrar.

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WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. 434 of 2005

IN THE MATTER of the Industrial Relations Act 1979

and

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

The Civil Service Association of Western Australia Incorporated ceased to be a party to the Western Australian Department of Training Public Service and Government Officers' Agency Specific Agreement 2003, No. PSA AG 62 of 2002 on and from the 27th day of May 2005.

DATED at Perth this 8th day of August 2005.

J. SPURLING,
Registrar.

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WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. 733 of 2005

IN THE MATTER of the Industrial Relations Act 1979

and

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

The Civil Service Association of Western Australia Incorporated will cease to be a party to the Workcover WA Agency Specific Agreement 2003, No. PSA AG 20 of 2003 on and from the 19th day of August 2005.

DATED at Perth this 8th day of August 2005.

J. SPURLING,
Registrar.

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# NOTICES—Award/Agreement matters—

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**Application No. AG 176 of 2005**

**APPLICATION FOR REGISTRATION OF AN INDUSTRIAL AGREEMENT TITLED "F.C.L. CONSTRUCTION / CFMEUW INDUSTRIAL AGREEMENT 2005-2008"**

NOTICE is given that an application has been made by The Construction, Forestry, Mining and Energy Union of Workers under the Industrial Relations Act 1979 for registration of the above Agreement.

As far as relevant, those parts of the Agreement that relate to area of operation or scope are published hereunder.

**1. DEFINITIONS**

The following terms will have the following meanings when used in this Agreement:

"Award" means the Building Trades (Construction) Award 1987, Award No. R14 of 1978 as amended from time to time;

**2. PARTIES AND PERSONS BOUND**

The Parties to this Agreement are the Employer, the Union and all employees of the Employer whose employment is, at any time when this Agreement is in operation, subject to the Agreement.

This agreement is binding on the Employer and any successor assignee, transmittee (whether immediate or not) to or of the business or any part of the Business of the Employer.

**4. SCOPE & APPLICATION**

This Agreement applies in the state of Western Australia to:

(a) the Employer in respect to all of its employees including junior workers and unregistered apprentices engaged in work on, in connection with, or in any way incidental to building, civil works, construction, alteration, maintenance repair or demolition of or on buildings or any other structures of any kind.

(b) Employees of the Employer who are engaged in any of the occupations, callings or industries specified in the Award.

(c) The Union and all employees of the Employer who are members or eligible to be members of the Union.

(d) There is approximately 15 covered by this Agreement.

**6. RELATIONSHIP TO PARENT AWARD**

6.1 The provisions of the Award are incorporated into and form part of this Agreement (**"Incorporated Terms"**) .

6.2 The express terms of this Agreement are supplementary to, and shall be read and interpreted wholly in conjunction with the Incorporated Terms provided that the terms of whichever provision is more beneficial to the employees will prevail to the extent of any inconsistency.

A copy of the Agreement may be inspected at my office at 111 St George's Terrace, Perth.

J. SPURLING,
Registrar.

27 July 2005

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**WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

Application No. PSA A 2 of 2005

**APPLICATION FOR A NEW AWARD ENTITLED**

**"HEALTH SERVICES UNION – DEPARTMENT OF HEALTH – HEALTH SERVICE SALARIED OFFICERS (STATE) AWARD 2005"**

NOTICE is given that an application has been made to the Commission by the Health Services Union of Western Australia under the Industrial Relations Act 1979 for the above Award.

As far as relevant, those parts of the proposed Award which relate to area of operation or scope are published hereunder.

3. – EFFECT AREA AND SCOPE

This Award

(1) shall extend to and bind:

(a) all salaried employees engaged in professional, administrative, clerical, technical, and supervisory capacities – including, but not limited to, those employed in the callings listed in "Schedule B - Classes and/or Groups and/or Callings Covered" - employed in the industry and/or industries of any public hospital and/or health service operated by the boards of any public hospital and or health service constituted under the Hospital and Health Services Act 1927 (as amended) in such hospitals or for the provision of health services in any district or area in which boards are required or have a duty to provide such services including, but not limited to, the boards of the hospitals and health services named in "Schedule C - Employers Bound and/or Named Parties to the Award"; and

(b) all employers employing those employees, including but not limited to the employers and associated hospitals and health services listed in Schedule C. – Employers Bound and/or Names Parties to the Award;

and

(2) shall operate throughout the State of Western Australia.

4. – NAMED PARTIES TO THE AWARD

The named parties to the Award are:

(1) The Health Services Union of Western Australia (Union of Workers); and

(2) The employers listed in Schedule C - Employers Bound and/or Named Parties to the Award.

SCHEDULE B

Classes and/or Groups and/or Callings Covered

**All Professional, Administrative, Clerical, Technical AND Supervisory employees including but not limited to:**

| | |
|---|---|
| Architect | Audiologist |
| Bio-Chemist | Bio-Engineer |
| Chemist | Clinical Psychologist |
| Dental Officer | Dentist |
| Dietician | Engineer |
| Librarian | Medical Imaging Technologist |
| Medical Scientist | Nuclear Medicine Technologist |
| Occupational Therapist | Pharmacist |
| Psychologist | Physicist |
| Physiotherapist | Podiatrist |
| Radiation Therapist | Research Officer |
| Scientific Officer | Social Worker |
| Speech Pathologist | Ultrasonographer |
| Accountant | Accounting Officer |
| Accounting Services Officer | Administrative Assistant (Administrative/Manager) |
| Administrative Officer | Administrator |
| Admissions Officer | Asset Management Officer |
| Auditor | Bereavement Officer |
| Budgeting Officer | Casemix Officer |
| Cashier | Catering Manager |
| Catering Officer | Claims Management Officer |
| Cleaning Services Officer | Cleaning Services Supervisor |
| Clinic Liaison Officer | Co-ordinator Allied Health |
| Co-ordinator Allied Health Early Discharge | Co-ordinator Patient Information Systems |
| Co-ordinator Transport | Co-ordinator-Human Resources |
| Co-Ordinator-Support Services | Community Health Officer |
| Computer Assistant | Computer Services Officer |
| Computer Systems Officer | Consultant (Not Medical) |
| Curator of Art | Data Manager |
| Director (Finance & Information Technology) | Director - Other Than Director of Nursing or Medicine |
| Director of Administration Services | Director of Information Services |
| Engineer | Establishments Officer |
| Executive Assistant | Executive Officer |
| Farm Supervisor | Finance Officer |
| Fire and Safety Officer | General Manager |
| General Services Supervisor | Graduate Assistant |
| Grounds Supervisor | Health Education Officer |
| Human Resources Officer | Industrial Officer |
| Information Planning Officer | Information Services Officer |
| Language Services Officer | Linen Services Manager |
| Manager (CSSD) | Manager Accounting Services |
| Manager Information Systems | Manager Orderly & Transport Services |
| Manager, Other Than Nurse Manager | Manager-Human Resources |
| Materials Management Systems Co-ordinator | Medical Records Officer |
| Morbidity Coding Officer | Museum Curator |
| Occupational Health & Safety Officer | Occupational Health Officer |

Patients' Fees Officer
Personnel Officer
Planning Officer
Principal Industrial Officer
Property Officer
Purchasing & Stores Officer
Purchasing Supply Officer
Quality Improvement Officer
Relieving Officer
Salaries Officer
Senior Aboriginal Health Officer
Staff Clerk
Superintendent
Supply Officer
Training Officer
Transport Liaison Officer
Warehouse Controller
Accounts Clerk
Assistant Cashier
Assistant Patients' Fees Officer
Community Health Clerk
Engineering Clerk
Filing Clerk
Key Punch Operator
Medical Records Clerk
Medical Typist
P.A.T.S Clerk
Purchasing Clerk
Receptionist
Salaries Clerk
Shorthand Typist
Surgical Appliance Clerk
Telephonist
Typist
Anaesthetic Technician
Architectural Draughtsperson
Assistant Cath. Lab Technician
Audio Metrician
Bio-Engineering Technician
Cardiology Technician
Cath. Lab Technician
Craft Worker
Dark Room Assistant
Draughtsperson
EEG/EMG Recordist
Handicraft Instructor
Laboratory Technician
Library Technician
Maxillo Facial Technician
Medical Photographer
Neurophysiology Technician
Orthopaedic Appliance Assistant
Orthopaedic Footwear Maker
Orthoptist
Paymaster
Pharmacy Store Officer
Policy Officer/Analyst
Project Officer
Public Relations Officer
Purchasing Officer
Quality Assurance Officer
Rehabilitation Officer
Risk Management Officer
Security Officer
Services Officer
Stores Officer
Supply Manager
Systems Administrator
Transplant Co-ordinator
Warden
Workers Compensation Officer
Administrative Assistant
Assistant Medical Records Officer
Clerk
Data Processing Officer
Enquiries Clerk
Junior Administrative Assistant
Mailroom Clerk
Medical Secretary
Morbidity Coding Clerk
Public Relations Assistant
Receival Liaison Officer
Research Assistant
Secretary
Stores Assistant
Switchboard Operator
Transport Clerk
Workers Compensation Clerk
Animal House Technician
Art Therapist
Assistant In Pharmacy
Audio Visual Assistant
Cardiac Technician
Catering Officer
Clinical Perfusionist
Cyto-technician
Dental Therapist
E.C.G Recordist
Film Processor
Handicraft Worker
Library Assistant
Maintenance Engineer
Medical Artist
Mortuary Technician
Occupational Therapy Assistant
Orthopaedic Appliance Technician
Orthopaedic Technician
Orthotic Technician

| | |
|---|---|
| Orthotist | Outreach Worker |
| Pharmacy Assistant | Pharmacy Intern/Trainee |
| Phlebotomist | Physiotherapist Assistant |
| Production Assistant | Rehabilitation Technologist |
| Research Officer | Respiratory Technician |
| Security Officer | Shift Engineer |
| Specimen Control Officer | Technical Assistant |
| Technical Officer | Technician |
| Technician (Air Systems) | Technician (Bioengineering) |
| Technician (Condition Monitoring) | Technician (Dialysis) |
| Technician (Electrical Systems) | Technician (Electronics) |
| Technician (Instruments) | Technician (Mechanical) |
| Technician (Physics) | Technician (Radioisotopes) |
| Theatre Technician | Therapy Assistant |
| Trade Instructor | Urology Assistant |
| Urology Technician | Welfare Officer |
| X-ray Assistant | Catering Services Supervisor |
| Cleaning Services Supervisor | Clerk In Charge |
| CSSD Supervisor | Food Services Supervisor |
| Office Supervisor | Supervisor (Administration) |
| Supervisor Admission Centre | Supervisor Coding |
| Supervisor Filing Systems | Supervisor Preparation |
| Supervisor-Cardiac Catheter Laboratory | |

Any of the above callings may be read as appropriate in conjunction with the following prefixes * suffixes.

| | |
|---|---|
| Assistant | Officer |
| Chief | Regional |
| Co-ordinator | Senior |
| Deputy | Superintendent |
| Director | Supervisor |
| In-Charge | Trainee |
| Manager | |

NOTE: In some cases, the use of the prefix may cause some callings/classes of Employees to be considered under more than one heading.

SCHEDULE C

Employers Bound and/or Named Parties to the Award

Organisation of Employees Party to the Award:

The Health Services Union of Western Australia (Union of Workers).

Employers Named as parties to the Award and/or Bound:

BOARDS

The Minister for Health in his incorporated capacity under s.7 of the Hospitals and Health Services Act 1927 (WA) as :

(i) the Hospitals formerly comprised in the Metropolitan Health Service Board,

(ii) the Peel Health Services Board,

(iii) the South West Health Board,

(iv) the WA Country Health Service.

(c) The Minister for Health has in his incorporated capacity delegated all powers and duties as such to the Director General of Health.

(d) The Director General of Health, as delegate to the Minister to be referred to for the purposes of this agreement variously as “the employer”.

ASSOCIATED HEALTH SERVICES AND HOSPITALS

HEALTH SERVICES

The Board of Management of and/or the Minister for Health being the Board of Management of:

| | |
|---|---|
| Aged Care Assessment Teams | Armadale Health Service |
| Avon Health Service | Bentley Health Service |
| Boyup Brook Health Service | Bunbury Health Service |

Central Desert Health Service
Central Great Southern Health Service
Central Wheatbelt Health Service
Community and Population Health Services
Donnybrook/Balingup Health Service
Dundas Health Service
East Kimberley Health Service
East Pilbara Health Service
Eastern Wheatbelt Health Service
Fremantle Health Service
Gascoyne Health Service
Geraldton Health Service
Goomalling Health Service
Graylands Selby Lemnos and Special Care Health Service
Harvey Yarloop Health Services
Inner City Health Services
Lower Great Southern Health Service
North Metropolitan Area Health Service
Mental Health Services
Midwest Health Service
Mount Henry Health Service
Mullewa Health Service
Murchison Health Service
Northampton Kalbarri Health Service
Northern Goldfields Health Service
Peel Health Services
Ravensthorpe Health Service
Rockingham/Kwinana Health Service
South East Coastal Health Service
South Metropolitan Area Health Services
Swan and Kalamunda Health Service
Upper Great Southern Health Service
Upper North Metropolitan Health Service
Vasse-Leeuwin District Health Service
West Kimberley Health Service
West Pilbara Health Service
Western Wheatbelt Health Service
Women's and Children's Health Service

**HOSPITALS**

**Howsoever constituted, the Boards of Management of:**

Royal Perth Hospital
Sir Charles Gairdner Hospital
Fremantle Hospital
Princess Margaret Hospital for Children
King Edward Memorial Hospital
Beverley District Hospital
Boddington District Hospital
Bridgetown District Hospital
Bruce Rock (Memorial) Hospital
Corrigin District Hospital
Cunderdin District Hospital
Dalwallinu District Hospital
Dumbleyung District Hospital
Gnowangerup District Hospital
Goomalling District Hospital
Harvey District Hospital
Jerramungup Health Centre
Kalamunda District Community Hospital
Kellerberrin Memorial Hospital
Kojonup District Hospital
Kondinin District Hospital
Kukerin Hospital
Kununoppin District Hospital
Moora District Hospital
Morawa District Hospital
Mukinbudin District Hospital
Mullewa District Hospital
Murray District Hospital
Nannup District Hospital
Narembeen District Hospital
Norseman District Hospital
North Midlands District Hospital
Northampton District Hospital
Northcliffe Nursing Post
Numbala-Nursing/Derby Nursing Home
Ord Street Hospital
Pemberton District Hospital
Pingelly District Hospital
Plantagenet District Hospital
Quairading District Hospital
Ravensthorpe District Hospital
Rottnest Island Nursing Post
Southern Cross District Hospital
Tambellup Nursing Post
Boyup Brook and Districts Soldiers' Memorial Hospital
Warren District Hospital
Williams Nursing Post
Wongan Hills District Hospital
Wyalkatchem-Koorda and Districts Hospital
Yalgoo Nursing Post
Yarloop District Hospital
Western Australian School of Nursing
Albany Regional Hospital
Armadale/Kelmscott Memorial Hospital
Augusta District Hospital
Bentley Hospital
Broome District Hospital
Bunbury Regional Hospital
Busselton District Hospital
Carnarvon Regional Hospital
Collie District Hospital
Cue Nursing Post
Denmark District Hospital
Derby Regional Hospital

Donnybrook District Hospital
Esperance District Hospital
Exmouth District Hospital
Geraldton Regional Hospital
Hawthorn Hospital
Katanning District Hospital
Lake Grace District Hospital
Leonora District Hospital
Margaret River District Hospital
Menzies Nursing Post
Mount Henry Hospital
Narrogin Regional Hospital
Newman Hospital
Onslow District Hospital
Paraburdoo Hospital
Port Hedland Regional Hospital
Rockingham/Kwinana Hospital
Sandstone Nursing Post
Sunset Hospital
Telfer Nursing Post
Varley Nursing Post
Wanneroo Hospital
West Kambalda Nursing Post
Wickham Hospital
Wittenoom Nursing Post
Wooroloo District Hospital
York District Hospital
Dwellingup Nursing Post
Eucla Nursing Post
Fitzroy Crossing District Hospital
Halls Creek District Hospital
Kalgoorlie Regional Hospital
Kununurra District Hospital
Laverton District Hospital
Marble Bar Nursing Post
Meekatharra District Hospital
Merredin District Hospital
Mount Magnet Health Centre
Nickol Bay Hospital
Northam Regional Hospital
Osborne Park Hospital
Pemberton District Hospital
Raventhorpe Health Centre
Roebourne District Hospital
Shark Bay Nursing Post
Swan District Hospital
Tom Price Hospital
Wagin District Hospital
Warburton Range Hospital
Wickepin Nursing Post
Wiluna Nursing Post
Woodside Maternity Hospital
Wyndham District Hospital

A copy of the proposed Award may be inspected at my office at 111 St. Georges Terrace, Perth.

J. SPURLING,
Registrar.

9 August 2005

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IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**Application No. AG 181 of 2005**

**APPLICATION FOR REGISTRATION OF AN INDUSTRIAL AGREEMENT TITLED "IMAGING THE SOUTH ENTERPRISE AGREEMENT 2005"**

NOTICE is given that an application has been made by The Health Services Union of Western Australia (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.

**4. PARTIES**

The parties to this agreement are Imaging The South Pty Ltd CAN 077 474 518 trading as Imaging The South ("the employer"), the Health Services Union of Western Australia (Union of Workers) ("the union") and all employees eligible to be members of the Health Services Union of Western Australia (Union of Workers).

**5. AREA AND SCOPE**

This Agreement shall apply to employees of Imaging The South in the callings of Medical Imaging Technologist and Clinical Assistant employed throughout the State of Western Australia.

It is estimated that there will be 35 employees who will be bound by the Agreement upon registration.

**9. RELATIONSHIP TO AWARD**

The Agreement shall be read and interpreted as a single, stand alone Agreement and shall operate to the exclusion of any award.

A copy of the Agreement may be inspected at my office at 111 St George's Terrace, Perth.

J. SPURLING,
Registrar.

9 August 2005

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**WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

**APPLICATION NO. APPL 398 OF 2004**

**APPLICATION FOR VARIATION OF AWARD**

**ENTITLED**

**"LAUNDRY WORKERS' AWARD, 1981"**

NOTICE is given that an application has been made to the Commission by Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch under the Industrial Relations Act 1979 for a variation of the above Award.

As far as relevant, those parts of the proposed variation that relate to area of operation or scope are published hereunder: -

1. Clause 3. – Scope – Delete this clause and insert in lieu –

   3. – SCOPE

   This award shall apply to all employees employed in a calling or callings set out in Clause 7. - in the Laundry Industry.

2. Clause 6. – Definitions – Add a new subclause (6) –

   6. – DEFINITIONS

   (6) Laundry Industry: means any business or operation which performs laundry work and including a "laundrette" and the industries carried out by the Respondents set out in the schedule to this award. Laundry work shall include but not be limited to the laundering of overalls, coats, towels, nappies Manchester and sheets which are laundered by the proprietor and hired out for fee or reward.

The application also seeks to vary Schedule B – Respondents. The proposed Schedule B – Respondents, - is published hereunder: -

SCHEDULE B – RESPONDENTS

ALSCO Linen Service Pty Ltd
33-37 Canvale Rd 6155
CANNING VALE WA 6155

The Fremantle Stream Laundry Co Pty Ltd
7 Emplacement Crs
HAMILTON HILL WA 6163

Spotless Group Limited
355 Scarborough Beach Rd
OSBORNE PARK WA 6017

D & M Laundry Services
U5/43 Buckingham Drv
WANGARA WA 6065

Sun Laundry Services
24 Ewing St
BENTLEY WA 6102

Westralian Laundries & Linen Services
U1/7 Clavering Rd
BAYSWATER WA 6053

Silver Pty Ltd
41 Robinson Avenue
BELMONT WA 6104

Three Rings Pty Ltd t/as Prime Laundry & Drycleaning
41 Robinson Avenue
BELMONT WA 6104

A copy of the proposed variation may be inspected at my office at 111 St George's Terrace, Perth.

(Sgd.) J. SPURLING,
Registrar.

[L.S.]

26 July 2005

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IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**Application No. AG 150 of 2005**

**APPLICATION FOR REGISTRATION OF AN INDUSTRIAL AGREEMENT TITLED "NUCEIL 2004 PTY LTD / CFMEUW INDUSTRIAL AGREEMENT 2005-2008"**

NOTICE is given that an application has been made by The Construction, Forestry, Mining and Energy Union of Workers under the Industrial Relations Act 1979 for registration of the above Agreement.

As far as relevant, those parts of the Agreement that relate to area of operation or scope are published hereunder.

**1. DEFINITIONS**

The following terms will have the following meanings when used in this Agreement:

"Award" means the Building Trades (Construction) Award 1987, Award No. R14 of 1978 as amended from time to time;

**2. PARTIES AND PERSONS BOUND**

The Parties to this Agreement are the Employer, the Union and all employees of the Employer whose employment is, at any time when this Agreement is in operation, subject to the Agreement.

This agreement is binding on the Employer and any successor assignee, transmittee (whether immediate or not) to or of the business or any part of the Business of the Employer.

**4. SCOPE & APPLICATION**

This Agreement applies in the state of Western Australia to:

(a) the Employer in respect to all of its employees including junior workers and unregistered apprentices engaged in work on, in connection with, or in any way incidental to building, civil works, construction, alteration, maintenance repair or demolition of or on buildings or any other structures of any kind.

(b) Employees of the Employer who are engaged in any of the occupations, callings or industries specified in the Award.

(c) The Union and all employees of the Employer who are members or eligible to be members of the Union.

(d) There is approximately 12 covered by this Agreement.

**6. RELATIONSHIP TO PARENT AWARD**

6.1 The provisions of the Award are incorporated into and form part of this Agreement ("**Incorporated Terms**") .

6.2 The express terms of this Agreement are supplementary to, and shall be read and interpreted wholly in conjunction with the Incorporated Terms provided that the terms of whichever provision is more beneficial to the employees will prevail to the extent of any inconsistency.

A copy of the Agreement may be inspected at my office at 111 St George's Terrace, Perth.

J. SPURLING,
Registrar.

27 July 2005

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IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**Application No. AG 125 of 2005**

**APPLICATION FOR REGISTRATION OF AN INDUSTRIAL AGREEMENT TITLED "PB FOODS LIMITED OPERATIONS ENTERPRISE AGREEMENT 2005"**

NOTICE is given that an application has been made by the Transport Workers Union of Australia, Industrial Union of Workers, Western Australian Branch under the Industrial Relations Act 1979 for registration of the above Agreement.

As far as relevant, those parts of the Agreement that relate to area of operation or scope are published hereunder.

**5 .-SCOPE & RELATIONSHIP TO AWARDS**

(1) This Agreement applies to and is binding on the parties to this Agreement and to employees engaged in the classifications covered by this Agreement. It is estimated that this Agreement will apply to 395 employees.

(2) During it operation, this Agreement will be read and interpreted wholly in conjunction with the following Awards, as varied from tine to time, applying to the employees at the date of this Agreement:

(a) Transport Workers (General) Award No. 10 of 1961;

(b) Metal Trades (General) Award 1966 No 13 of 1965;

(c) Laboratory & Technical Employees (Peters (WA) Limited) Award 1971;

(d) Clerks' (Wholesales and Retail Establishments) Award No 38 of 1947; and

(e) Food Industry (Processing and/or Manufacturing) Award 1991.

Where there is any inconsistency between this Agreement and any relevant award, this Agreement will prevail to the extent of any inconsistency.

**7 .-PARTIES**

The parties to this Agreement are:

(1) PB Foods Ltd and its employees who am engaged in classifications covered by this Agreement in or in connection with the Company's operations at Balcatta, O'Connor and Country Distribution Depots at Broome, Bunbury, Albany, Kalgoorlie, Esperance, Northam and Geraldton.

(2) The Transport Workers Union of Australia, Industrial Union of Workers, Western Australian Branch (**the TWU**) .

(3) The Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division, Western Australian Branch (**the CEPU**) .

(4) The Australian Manufacturing Workers' Union of Western Australia (**the AMWU**) .

(5) The Australian Municipal, Administrative, Clerical, and Services Union of Employees, WA Clerical and Administrative Branch (**the ASU**) .

A copy of the Agreement may be inspected at my office at 111 St George's Terrace, Perth.

J. SPURLING,
Registrar.

18 July 2005

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IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**Application No. AG 171 of 2005**

**APPLICATION FOR REGISTRATION OF AN INDUSTRIAL AGREEMENT TITLED "QED FABRICATION PTY LTD / CFMEUW INDUSTRIAL AGREEMENT 2005-2008"**

NOTICE is given that an application has been made by The Construction, Forestry, Mining and Energy Union of Workers under the Industrial Relations Act 1979 for registration of the above Agreement.

As far as relevant, those parts of the Agreement that relate to area of operation or scope are published hereunder.

**1. DEFINITIONS**

The following terms will have the following meanings when used in this Agreement:

"Award" means the Building Trades (Construction) Award 1987, Award No. R14 of 1978 as amended from time to time;

**2. PARTIES AND PERSONS BOUND**

The Parties to this Agreement are the Employer, the Union and all employees of the Employer whose employment is, at any time when this Agreement is in operation, subject to the Agreement.

This agreement is binding on the Employer and any successor assignee, transmittee (whether immediate or not) to or of the business or any part of the Business of the Employer.

**4. SCOPE & APPLICATION**

This Agreement applies in the state of Western Australia to:

(a) the Employer in respect to all of its employees including junior workers and unregistered apprentices engaged in work on, in connection with, or in any way incidental to building, civil works, construction, alteration, maintenance repair or demolition of or on buildings or any other structures of any kind.

(b) Employees of the Employer who are engaged in any of the occupations, callings or industries specified in the Award.

(c) The Union and all employees of the Employer who are members or eligible to be members of the Union.

(d) There is approximately 1 covered by this Agreement.

**6. RELATIONSHIP TO PARENT AWARD**

6.1 The provisions of the Award are incorporated into and form part of this Agreement (**"Incorporated Terms"**) .

6.2 The express terms of this Agreement are supplementary to, and shall be read and interpreted wholly in conjunction with the Incorporated Terms provided that the terms of whichever provision is more beneficial to the employees will prevail to the extent of any inconsistency.

A copy of the Agreement may be inspected at my office at 111 St George's Terrace, Perth.

J. SPURLING,
Registrar.

27 July 2005

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IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**Application No. AG 166 of 2005**

**APPLICATION FOR REGISTRATION OF AN INDUSTRIAL AGREEMENT TITLED "REEVES STEEL FABRICATION PTY LTD / CFMEUW INDUSTRIAL AGREEMENT 2005-2008"**

NOTICE is given that an application has been made by The Construction, Forestry, Mining and Energy Union of Workers under the Industrial Relations Act 1979 for registration of the above Agreement.

As far as relevant, those parts of the Agreement that relate to area of operation or scope are published hereunder.

**1. DEFINITIONS**

The following terms will have the following meanings when used in this Agreement:

"Award" means the Building Trades (Construction) Award 1987, Award No. R14 of 1978 as amended from time to time;

**2. PARTIES AND PERSONS BOUND**

The Parties to this Agreement are the Employer, the Union and all employees of the Employer whose employment is, at any time when this Agreement is in operation, subject to the Agreement.

This agreement is binding on the Employer and any successor assignee, transmittee (whether immediate or not) to or of the business or any part of the Business of the Employer.

**4. SCOPE & APPLICATION**

This Agreement applies in the state of Western Australia to:

(a) the Employer in respect to all of its employees including junior workers and unregistered apprentices engaged in work on, in connection with, or in any way incidental to building, civil works, construction, alteration, maintenance repair or demolition of or on buildings or any other structures of any kind.

(b) Employees of the Employer who are engaged in any of the occupations, callings or industries specified in the Award.

(c) The Union and all employees of the Employer who are members or eligible to be members of the Union.

(d) There is approximately 10 covered by this Agreement.

**6. RELATIONSHIP TO PARENT AWARD**

6.1 The provisions of the Award are incorporated into and form part of this Agreement ("**Incorporated Terms**") .

6.2 The express terms of this Agreement are supplementary to, and shall be read and interpreted wholly in conjunction with the Incorporated Terms provided that the terms of whichever provision is more beneficial to the employees will prevail to the extent of any inconsistency.

A copy of the Agreement may be inspected at my office at 111 St George's Terrace, Perth.

J. SPURLING,
Registrar.

27 July 2005

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IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**Application No. AG 168 of 2005**

**APPLICATION FOR REGISTRATION OF AN INDUSTRIAL AGREEMENT TITLED "REORIGHT PTY LTD / CFMEUW INDUSTRIAL AGREEMENT 2005-2008"**

NOTICE is given that an application has been made by The Construction, Forestry, Mining and Energy Union of Workers under the Industrial Relations Act 1979 for registration of the above Agreement.

As far as relevant, those parts of the Agreement that relate to area of operation or scope are published hereunder.

**1. DEFINITIONS**

The following terms will have the following meanings when used in this Agreement:

"Award" means the Building Trades (Construction) Award 1987, Award No. R14 of 1978 as amended from time to time;

**2. PARTIES AND PERSONS BOUND**

The Parties to this Agreement are the Employer, the Union and all employees of the Employer whose employment is, at any time when this Agreement is in operation, subject to the Agreement.

This agreement is binding on the Employer and any successor assignee, transmittee (whether immediate or not) to or of the business or any part of the Business of the Employer.

**4. SCOPE & APPLICATION**

This Agreement applies in the state of Western Australia to:

(a) the Employer in respect to all of its employees including junior workers and unregistered apprentices engaged in work on, in connection with, or in any way incidental to building, civil works, construction, alteration, maintenance repair or demolition of or on buildings or any other structures of any kind.

(b) Employees of the Employer who are engaged in any of the occupations, callings or industries specified in the Award.

(c) The Union and all employees of the Employer who are members or eligible to be members of the Union.

(d) There is approximately 4 covered by this Agreement.

**6. RELATIONSHIP TO PARENT AWARD**

6.1 The provisions of the Award are incorporated into and form part of this Agreement ("**Incorporated Terms**") .

6.2 The express terms of this Agreement are supplementary to, and shall be read and interpreted wholly in conjunction with the Incorporated Terms provided that the terms of whichever provision is more beneficial to the employees will prevail to the extent of any inconsistency.

A copy of the Agreement may be inspected at my office at 111 St George's Terrace, Perth.

J. SPURLING,
Registrar.

27 July 2005

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IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**Application No. AG 126 of 2005**

**APPLICATION FOR REGISTRATION OF AN INDUSTRIAL AGREEMENT TITLED "SUPPORT SERVICES & ENROLLED NURSES (MERCY HOSPITAL & LHMU) UNION RECOGNITION & JOB SECURITY AGREEMENT 2005"**

NOTICE is given that an application has been made by the Liquor, Hospitality and Miscellaneous Union, Western Australian Branch under the Industrial Relations Act 1979 for registration of the above Agreement.

As far as relevant, those parts of the Agreement that relate to area of operation or scope are published hereunder.

**3. DEFINITIONS**

'Employer' means Mercy Hospital Mt Lawley.

'Union' or 'LHMU' means Liquor Hospitality and Miscellaneous Union, Western Australian Branch.

**4. APPLICATION OF AGREEMENT**

4.1 This Agreement is binding on the Employer and the Union.

4.2 It is estimated that this Agreement shall apply to 150 employees.

4.3 The Employer and the Union intend this Agreement to create legally enforceable terms and conditions of employment for employees of the Employer eligible to be members of the Union at the suit of either party, or any employee authorised in writing by the Union.

4.4 In the event that this Agreement (or part thereof) becomes unenforceable as a registered agreement under the Industrial Relations Act 1979 for any reason, the Union and the Employer intend this Agreement to be otherwise enforceable under the law in force in Western Australia.

**6. RELATIONSHIP TO AWARDS AND AGREEMENT**

6.1 This agreement shall be read in conjunction with the Private Hospital and Residential Aged Care (Nursing Homes) Award 2002 and the Enrolled Nurses and Nursing Assistants (Private) Award 1978 and the Nursing Assistants Award 2002 (the awards).

6.2 This agreement shall be read in conjunction with the Support Services & Enrolled Nurses (Mercy Hospital & LHMU) Enterprise Agreement 2005 ("the Federal Agreement") certified pursuant to the Workplace Relations Act 1996.

A copy of the Agreement may be inspected at my office at 111 St George's Terrace, Perth.

J. SPURLING,
Registrar.

21 July 2005

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IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**Application No. AG 175 of 2005**

**APPLICATION FOR REGISTRATION OF AN INDUSTRIAL AGREEMENT TITLED "TOTAL TRADE SERVICES / CFMEUW INDUSTRIAL AGREEMENT 2005-2008"**

NOTICE is given that an application has been made by The Construction, Forestry, Mining and Energy Union of Workers under the Industrial Relations Act 1979 for registration of the above Agreement.

As far as relevant, those parts of the Agreement that relate to area of operation or scope are published hereunder.

**1. DEFINITIONS**

The following terms will have the following meanings when used in this Agreement:

"Award" means the Building Trades (Construction) Award 1987, Award No. R14 of 1978 as amended from time to time;

**2. PARTIES AND PERSONS BOUND**

The Parties to this Agreement are the Employer, the Union and all employees of the Employer whose employment is, at any time when this Agreement is in operation, subject to the Agreement.

This agreement is binding on the Employer and any successor assignee, transmittee (whether immediate or not) to or of the business or any part of the Business of the Employer.

**4. SCOPE & APPLICATION**

This Agreement applies in the state of Western Australia to:

(a) the Employer in respect to all of its employees including junior workers and unregistered apprentices engaged in work on, in connection with, or in any way incidental to building, civil works, construction, alteration, maintenance repair or demolition of or on buildings or any other structures of any kind.

(b) Employees of the Employer who are engaged in any of the occupations, callings or industries specified in the Award.

(c) The Union and all employees of the Employer who are members or eligible to be members of the Union.

(d) There is approximately 100 covered by this Agreement.

**6. RELATIONSHIP TO PARENT AWARD**

6.1 The provisions of the Award are incorporated into and form part of this Agreement (**"Incorporated Terms"**) .

6.2 The express terms of this Agreement are supplementary to, and shall be read and interpreted wholly in conjunction with the Incorporated Terms provided that the terms of whichever provision is more beneficial to the employees will prevail to the extent of any inconsistency.

A copy of the Agreement may be inspected at my office at 111 St George's Terrace, Perth.

J. SPURLING,
Registrar.

27 July 2005

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# PUBLIC SERVICE ARBITRATOR—Matters dealt with—

**2005 WAIRC 01349**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

| | |
|---|---|
| **PARTIES** | THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED<br>**APPLICANT**<br>**-v-**<br>CHIEF EXECUTIVE OFFICER DISABILITY SERVICES COMMISSION<br>**RESPONDENT** |
| **CORAM** | COMMISSIONER S J KENNER<br>PUBLIC SERVICE ARBITRATOR |
| **DATE** | WEDNESDAY, 27 APRIL 2005 |
| **FILE NO.** | PSAC 5 OF 2005 |
| **CITATION NO.** | 2005 WAIRC 01349 |

| | |
|---|---|
| **Catchwords** | Industrial law - Application to seek reinstatement of applicant's member pending hearing and determination of Public Service Appeal Board appeal - Whether Arbitrator has jurisdiction or power to make interim orders sought - Arbitrator has no jurisdiction to make orders - Application dismissed - *Industrial Relations Act 1979* (WA) s 32, s 44, s 80C, s 80E, s 80G, s 80H, s 80I, s 80L; *Public Sector Management Act 1994*, s 78 |
| **Result** | Application dismissed |
| **Representation** | |
| **Applicant** | Ms J van den Herik |
| **Respondent** | Ms N Jones |

*Reasons for Decision*

1 The substantive application in this matter is one brought by the applicant against the respondent which originally sought from the Public Service Arbitrator ("Arbitrator"), the determination of an industrial dispute concerning the proposed dismissal of a member of the applicant by the respondent. In conjunction with the substantive application filed, was a further application seeking from the Arbitrator, an interlocutory order to prevent the dismissal of the applicant's member until the hearing and determination of the substantive dispute.

2 It appears that despite best endeavours being undertaken to list the compulsory conference pursuant to s 44 of the Industrial Relations Act 1979 ("the Act") expeditiously, the day after the notice of application was filed, the relevant member's employment was terminated.

3 Upon that event, the applicant commenced an appeal to the Public Service Appeal Board ("Appeal Board") in application PSAB 2 of 2005. Subsequently, a compulsory conference in the herein matter was convened pursuant to s 44 of the Act. At that conference, the issue of the Arbitrators' jurisdiction to entertain both the substantive claim and additionally, an amendment brought by the applicant to seek an interim order of reinstatement of the applicant's member, pending the hearing and determination of PSAB 2 of 2005, were raised. Given the jurisdictional issues being raised at that time, I directed the parties to file and serve submissions as to their contentions on the Arbitrator's jurisdiction, in particular, the jurisdiction of the Arbitrator in this case, to make an interim order of reinstatement, pending the hearing and determination of PSAB 2 of 2005 before the Appeal Board.

4 The parties have duly filed their written submissions in accordance with my direction. I have carefully considered those submissions in coming to my conclusions in relation to this matter.

**Contentions**

5 In summary, the applicant contended that the Arbitrator's jurisdiction and powers are wide as to government officers under the Act, and the mere institution of an appeal to the Appeal Board, does not deprive the Arbitrator of its jurisdiction and power to make an interim order, given that s 44 of the Act, is by reason of s 80G of the Act, incorporated into the Arbitrator's jurisdiction. The submission was that by s 44 of the Act, the Commission constituted by a Commissioner, has power to make an interim reinstatement order, and accordingly, such an order can and should be made in this case.

6 For the respondent, in short it was contended that the jurisdiction and powers of the Arbitrator and the Appeal Board are separate and distinct under the Act. The Parliament has determined that the Appeal Board has jurisdiction over certain matters, and its jurisdiction does not extend to conciliation or the making of interim orders, as does the jurisdiction of the Arbitrator. It was the respondent's submission, that this is made plain by s 80L of the Act, which in contrast to s 80G of the Act, does not incorporate conciliation powers under ss 32 and 44 of the Act.

**Consideration**

7 The short issue to be determined is whether an Arbitrator has jurisdiction and power to make an interim order of reinstatement pending the hearing and determination of an appeal to the Appeal Board. The provisions of Part IIA of Division 2 of the Act, in relation to the jurisdiction of an Arbitrator and the Appeal Board, are exclusive to that of the general jurisdiction of this Commission: *Bellamy v Public Service Appeal Board* (1986) 66 WAIG 1579. This proposition is founded upon the principle of statutory interpretation known as *generalia specialibus non derogant* meaning where there is a conflict between general and specific provisions in an enactment, the specific provisions will prevail: *Statutory Interpretation Australia* Fifth Ed Pearce and Geddes at par 4.30. Therefore, both the jurisdiction of the Arbitrator and the Appeal Board are special and exclusive jurisdictions to deal with industrial matters for government officers.

8 By s 80E of the Act, the Arbitrator has exclusive jurisdiction to inquire into and deal with any industrial matter relating to a government officer. Relevantly, s 80E of the Act provides as follows:

***"Jurisdiction of Arbitrator***

*(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.*

*(2) Without limiting the generality of subsection (1) the jurisdiction conferred by that subsection includes jurisdiction to deal with —*

*(a) a claim in respect of the salary, range of salary or title allocated to the office occupied by a Government officer and, where a range of salary was allocated to the office occupied by him, in respect of the particular salary within that range of salary allocated to him; and*

*(b) a claim in respect of a decision of an employer to downgrade any office that is vacant.*

*(3) An Arbitrator also has the jurisdiction conferred on an Arbitrator as a relevant industrial authority by —*

*(a) Part VID Division 5 Subdivision 3;*

*(b) section 97WI; and*

*(c) section 97WK.*

*(4) The jurisdiction referred to in subsection (3) is to be exercised in accordance with the relevant provisions of Part VID, and the provisions of —*

*(a) subsection (6); and*

*(b) section 80G,*

*do not apply to the exercise of any such jurisdiction by an 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.*

*(6) Notwithstanding subsection (1), but subject to subsection (7), an Arbitrator may —*

*(a) with the consent of the Chief Commissioner refer an industrial matter referred to in subsection (1) or any part of that industrial matter to the Commission in Court Session for hearing and determination by the Commission in Court Session; and*

*(b) with the consent of the President refer to the Full Bench for hearing and determination by the Full Bench any question of law, including any question of interpretation of the rules of an organisation, arising in a matter before the Arbitrator,*

*and the Commission in Court Session or the Full Bench, as the case may be, may hear and determine the matter, or part thereof, or question, so referred.*

*(7) Notwithstanding subsections (1) and (6), an Arbitrator does not have jurisdiction to enquire into or deal with, or refer to the Commission in Court Session or the Full Bench, any matter in respect of which a procedure referred to in section 97(1)(a) of the Public Sector Management Act 1994 is, or may be, prescribed under that Act."*

9 By s 80G of the Act, the Arbitrator has available "Subject to this Division" (i.e. Division 2 of Part IIA) such powers as may be exercised by the Commission constituted by a Commissioner. Section 80G provides as follows:

***"Provisions of Part II, Division 2, to apply***

*(1) Subject to this Division, the provisions of Part II Divisions 2 to 2G that apply to or in relation to the exercise of the jurisdiction of the Commission constituted by a Commissioner shall apply with such modifications as are prescribed and such other modifications as may be necessary or appropriate, to the exercise by an Arbitrator of his jurisdiction under this Act.*

*(2) For the purposes of subsection (1), section 49 shall not apply to a decision of an Arbitrator on a claim mentioned in section 80E(2)."*

10 Therefore the Arbitrator has a broad general jurisdiction and powers in relation to government officers as set out in Division 2 of Part IIA the Act.

11 By s 80H, there is established the Appeal Board. The Appeal Board is established for the specific purpose and the only purpose, of hearing and determining appeals brought pursuant to s 80I of the Act. Section 80H relevantly provides as follows:

***"Public Service Appeal Board***

*(1) For the purpose of an appeal under section 80I there shall be established, within and as part of the Commission, a Board to be known as a Public Service Appeal Board.*

*(2) A Board shall consist of 3 members.*

*(3) In the case of an appeal referred to in section 80I(1)(a), (b) or (c), the members of a Board shall be —*

*(a) the President, who shall be the Chairman;*

*(b) an employer's representative appointed by the employer of the appellant; and*

*(c) an employee's representative appointed by the relevant organisation.*

*(4) In the case of an appeal referred to in section 80I(1)(d) or (e), the members of a Board shall be —*

*(a) a Public Service Arbitrator, who shall be the Chairman;*

*(b) an employer's representative appointed by the employer of the appellant; and*

*(c) an employee's representative appointed by the relevant organisation.*

*(5) In subsections (3) and (4) **"relevant organisation"** means the Association unless the appellant is a member of another organisation in which case it means that organisation.*

*(6) In this section and section 80J **"organisation"** means an organisation of employees registered under Division 4 of Part II, an association of employees registered as an organisation pursuant to the provisions of the Commonwealth Act or, in the case of an appeal by a medical practitioner employed in a public hospital, the Western Australian Branch of the Australian Medical Association Incorporated.*

*(7) In subsection (4) **"Public Service Arbitrator"** means a Commissioner who is, for the time being, a Public Service Arbitrator appointed under section 80D."*

12 For the purposes of the jurisdiction of the Appeal Board, it has certain powers of the Commission as set out in s 80L of the Act, but notably, not all of the powers as for the Arbitrator pursuant to s 80G of the Act. Specifically, there is no power available to the Appeal Board, to convene conciliation conferences either under s 32 or 44 of the Act.

13 The matters that may be the subject of an appeal to the Appeal Board are set out in s 80(I) of the Act which provides as follows:

***"Appeals***

*(1) Subject to section 52 of the Public Sector Management Act 1994 and subsection (3) of this section, a Board has jurisdiction to hear and determine —*

*(a) an appeal by any public service officer against any decision of an employing authority in relation to an interpretation of any provision of the Public Sector Management Act 1994, and any provision of the regulations made under that Act, concerning the conditions of service (other than salaries and allowances) of public service officers;*

*(b) an appeal by a Government officer, who is the holder of an office included in the Special Division of the Public Service for the purposes of section 6(1) of the Salaries and Allowances Act 1975, under section 78 of the Public Sector Management Act 1994 against a decision referred to in subsection (1)(b) of that section;*

*(c) an appeal, other than an appeal under section 78(1) of the Public Sector Management Act 1994, by any Government officer who occupies a position that carries a salary not lower than the prescribed salary from a decision, determination or recommendation of the employer of that Government officer that the Government officer be dismissed;*

*(d) an appeal by a Government officer, other than a person referred to in paragraph (b), under section 78 of the Public Sector Management Act 1994 against a decision referred to in subsection (1)(b) of that section;*

*(e) an appeal, other than an appeal under section 78(1) of the Public Sector Management Act 1994, by any Government officer who occupies a position that carries a salary lower than the prescribed salary from a decision, determination or recommendation of the employer of that Government officer that the Government officer be dismissed,*

*and to adjust all such matters as are referred to in paragraphs (a), (b), (c), (d) and (e).*

*(2) In subsection (1) **"prescribed salary"** means the lowest salary for the time being payable in respect of a position included in the Special Division of the Public Service for the purposes of section 6(1) of the Salaries and Allowances Act 1975.*

*(3) A Board does not have jurisdiction to hear and determine an appeal by a Government officer from a decision made under regulations referred to in section 94 of the Public Sector Management Act 1994.*

*[Section 80I inserted by No. 94 of 1984 s. 47; amended by No. 32 of 1994 s. 14; No. 1 of 1995 s. 29.]*

14 Therefore, the legislature in this State, has prescribed a specific jurisdiction under the Act for government officers, and within that jurisdiction, has also distinguished between appeals under s 80I to the Appeal Board, and the general jurisdiction of an Arbitrator under s 80E of the Act. The Arbitrator's "exclusive jurisdiction", must in my opinion, be read under the Act, as subject to the jurisdiction and powers of the Appeal Board in s 80I, otherwise the whole of the Appeal Board's jurisdiction and powers would be otiose.

15 In Pearce and Geddes, the learned authors, in relation to the *generalia specialibus non derogant* principle observed as follows:

*"[4.30] The principle that provisions of general application give way to specific provision when in conflict is discussed fully in [7.18]-[7.21] relating to repealing Acts. But the approach is also applicable to the resolution of internal conflicts between sections within an Act: Perpetual Executors and Trustees Assoc of Australia Ltd v FCT (1948) 77 CLR 1 at 29. An Act may well contain provisions of a general nature and also provision relating to a particular subject matter. It is commonsense that the drafter will have intended the general provisions to give way should they be applicable to the same subject matter as is dealt with specifically: Refrigerated Express Lines (A' Asia) Pty Ltd v Australian Meat and Live-stock Corp (1980) 29 ALR 333 at 347. A particular example of the approach in question was demonstrated in Commercial Radio Coffs Harbour Ltd v Fuller (1986) 66 ALR 217. Gibbs CJ and Brennan J at 219 ruled that a general provision making non-compliance with a provision of the Act an offence had to be read down if another law prohibited the activity that the Act required. See also Smith v R (1994) 125 ALR 385 at 391."*

16 In dealing with the application of the principle within a particular Act, the learned authors further said at par 4.30:

"*The generalia specialibus rule should, it is suggested, be observed more strictly in the interpretation of provisions in a particular Act that in the case of the separate enactments. In the latter circumstance, it may well be that the drafter did not consider the effect of the competing Acts. When a single document is being considered, however, the drafter will be more likely to have relied on the rule. White v Mason [1958] VR 79 affords a good example of this. 'Licensed premises' were expressly excluded from the operation of a part of the Health Act 1956 that required the registration of premises selling food. Without such exclusion the part would normally have been taken to have applied to those premises. The Act also contained general catch-all provisions. Herring CJ considered that the express exclusion of licensed premises from the part of the Act that would otherwise specifically have applied to them indicated an intention that they should also be excluded from the general provisions of the Act."*

17 It was this principle of statutory interpretation that the Full Bench relied upon in *Bellamy*.

18 It is clear from the plain language of the relevant provisions of the Act, that the Appeal Board's jurisdiction is relatively narrow and specific to deal with appeals brought in respect of the matters set out in s 80I(1)(a) to (e) and it has the power is to "adjust all such matters". By contrast, the jurisdiction and powers of an Arbitrator under s 80E of the Act, are general and broad, and in my view, the remedies available under both s 80E(5) and under s 80I(1) are different. There may be some scope for conflict if there was to be concurrent jurisdiction.

19 In my opinion, taking the legislation as a whole, applying the principle of interpretation referred to above, the draftsperson of Division 2 of Part IIA of the Act, did not intend there to be concurrent jurisdiction exercised by both the Arbitrator and the Appeal Board in relation to remedies for the dismissal of government officers. Government officers who are dismissed in the circumstances set out in s 80I(1) only have available to them the jurisdiction of the Appeal Board in respect of an appeal commenced under s 80I of the Act.

20 This conclusion is fortified in my opinion by s 78 of the Public Sector Management Act 1994("PSM Act"). Section 78 of the PSM Act relevantly provides as follows:

***"Rights of appeal and reference***

*(1) Subject to subsection (3) and to section 52, an employee who —*

*(a) is a Government officer within the meaning of section 80C of the Industrial Relations Act 1979; and*

*(b) is aggrieved by a decision made in the exercise of a power under section 79(3)(b) or (c) or (4), 82, 86(3)(b), (8)(a), (9)(b)(ii) or (10)(a), 87(3)(a), 88(1)(b)(ii) or 92(1),*

*may appeal against that decision to the Industrial Commission constituted by a Public Service Appeal Board appointed under Division 2 of Part IIA of the Industrial Relations Act 1979, and that Public Service Appeal Board has jurisdiction to hear and determine that appeal under and subject to that Division.*

*(2) Despite section 29 of the Industrial Relations Act 1979, but subject to subsection (3), an employee who —*

*(a) is not a Government officer within the meaning of section 80C of that Act; and*

*(b) is aggrieved by a decision referred to in subsection (1)(b),*

*may refer the decision mentioned in paragraph (b) to the Industrial Commission as if that decision were an industrial matter mentioned in section 29(b) of that Act, and that Act applies to and in relation to that decision accordingly.*

*(3) Despite section 29 of the Industrial Relations Act 1979, but subject to section 52, an employee —*

*(a) against whom proceedings have been taken under this Part for a suspected breach of discipline arising out of alleged disobedience to, or disregard of, a direction which is by virtue of section 94(4) a lawful order for the purposes of section 80(a); and*

*(b) who is aggrieved by a decision made in the exercise of a power under section 82, 86(3)(a), (8)(a), (9)(b)(i) or (10)(a), 87(3)(a) or 88(1)(b)(i),*

*may refer the decision referred to in paragraph (b) to the Industrial Commission as if that decision were an industrial matter mentioned in section 29(b) of that Act, and that Act applies to and in relation to that decision accordingly.*

*(4) In exercising its jurisdiction under subsection (3) in relation to a decision consisting of a lawful order referred to in section 94(4), the Industrial Commission shall confine itself to determining whether or not that decision has been, or is capable of having been, complied with."*

21 It is notable that there is specific provision made in s 78(1) for appeals to the Appeal Board only and indeed, arguably, this section confers jurisdiction on the Appeal Board in respect of such matters. There is no reference to the Arbitrator in relation to such matters in s 78 of the PSM Act. I am also at least in part, fortified in my conclusions by the legislative history of Division 2 of Part IIA, as dealt with by the Full Bench in *Bellamy* at 1580-1582.

22 Given the foregoing, in my opinion, no provision exists for the Appeal Board to make interim reinstatement orders of the kind sought in this case. It is clear that the powers of an Appeal Board are limited.

23 There is a further difficulty for the applicant in the present proceedings. The applicant purports to rely upon s 44(6)(ba) and (bb) incorporated by s 80G of the Act, as the source of power for its claimed interim reinstatement order, "pending the hearing and determination of PSAB 2 of 2005".

24 The substance of PSAC 5 of 2005, the herein application, was originally to prevent the respondent from taking steps to dismiss the applicant's member on the grounds as set out in the schedule to the application, and for conciliation and if necessary arbitration, to resolve that dispute. As noted above, prior to the s 44 compulsory conference being listed, the applicant's member was dismissed by the respondent and appeal PSAB 2 of 2005 was filed, challenging the dismissal of the employee under s 80I of the Act. It was only after the s 80I appeal was filed, and prior to the s 44 conference in PSAC 5 of 2005 being listed, was an amendment made to the schedule to the application to seek an interim reinstatement order.

25 By s 44(6)(bb)(ii) of the Act, the Commission is empowered "in the case of a claim of harsh, oppressive or unfair dismissal of an employee" to make any interim order that the Commission thinks appropriate in the circumstances "pending the resolution of the claim".

26 There is no doubt in my opinion, that the s 44 compulsory conference power is available to an Arbitrator exercising jurisdiction under s 80E of the Act, in this context, by s 80G(1) of the Act, "with such modifications as are prescribed and such other modifications as may be necessary or appropriate." This latter section requires reference to "the Commission" in s 44 of the Act, to be read as "an Arbitrator" as defined in s 80C(1) of the Act.

27 It is clear from the textual provisions of s 44(6)(bb)(ii), that for the interim order power to be exercised by the Commission, there must be before the Commission "a claim of harsh, oppressive or unfair dismissal of an employee" and the power of the Commission is only to be exercised "pending the resolution of the claim." In my view, clearly, "the claim" is to be read as the claim of harsh, oppressive or unfair dismissal of an employee.

28 In the instant application before me, no such claim of unfair dismissal is made. Nor can there be in my view, for the reasons set out above, given the specific jurisdiction of the Appeal Board, in relation to such matters. Thus there is no claim on foot before the Arbitrator that could found any such interim reinstatement order in any event.

29 For all of the foregoing reasons, I conclude that there is no jurisdiction or power for the Arbitrator in the context of the present application, to make the interim orders sought. The application is dismissed.

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**2005 WAIRC 01347**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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| **PARTIES** | THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED<br>**APPLICANT**<br>**-v-**<br>CHIEF EXECUTIVE OFFICER DISABILITY SERVICES COMMISSION<br>**RESPONDENT** |
| **CORAM** | COMMISSIONER S J KENNER<br>PUBLIC SERVICE ARBITRATOR |
| **DATE** | WEDNESDAY, 27 APRIL 2005 |
| **FILE NO/S** | PSAC 5 OF 2005 |
| **CITATION NO.** | 2005 WAIRC 01347 |

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| **Result** | Application dismissed |
| **Representation** | |
| **Applicant** | Ms J van den Herik |
| **Respondent** | Ms N Jones |

*Order*

HAVING heard Ms J van den Herik on behalf of the applicant and Ms N Jones 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 for an interim order of reinstatement be and is hereby dismissed.

(Sgd.) S J KENNER,
[L.S.] Public Service Arbitrator.

**2005 WAIRC 00177**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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| **PARTIES** | CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED<br>**APPLICANT**<br>**-v-**<br>COMMISSIONER OF POLICE<br>**RESPONDENT** |
| **CORAM** | COMMISSIONER S.J. KENNER |
| **DATE** | FRIDAY, 28 JANUARY 2005 |
| **FILE NO/S** | PSACR 24 OF 2003 |
| **CITATION NO.** | 2005 WAIRC 00177 |

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| **Result** | Order issued |
| **Representation** | |
| **Applicant** | Mr B Cusack |
| **Respondent** | Mr D Eacott |

*Order*

HAVING heard Mr B Cusack on behalf of the applicant and Mr D Eacott on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders –

THAT the document described as "notice of answer and counter proposal" filed by the respondent on 11 January 2005 be and is hereby taken to be the notice of answer and counter proposal in relation to the herein matter.

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

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**2005 WAIRC 01183**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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| **PARTIES** | THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED<br>**APPLICANT**<br>**-v-**<br>COMMISSIONER OF POLICE<br>**RESPONDENT** |
| **CORAM** | COMMISSIONER S J KENNER<br>PUBLIC SERVICE ARBITRATOR |
| **DATE** | TUESDAY, 12 APRIL 2005 |
| **FILE NO/S** | PSACR 24 OF 2003 |
| **CITATION NO.** | 2005 WAIRC 01183 |

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| **Result** | Application dismissed. Order issued. |
| **Representation** | |
| **Applicant** | Mr B Cusack |
| **Respondent** | Ms R Lavell as agent |

*Order*

HAVING heard Mr B Cusack on behalf of the applicant and Ms R Lavell 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's application for an order pursuant to s 27(1)(a)(ii) of the Act be and is hereby dismissed.

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

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**2005 WAIRC 02217**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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| **PARTIES** | CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA<br>**APPLICANT**<br>**-v-**<br>COMMISSIONER OF POLICE<br>**RESPONDENT** |
| **CORAM** | COMMISSIONER S J KENNER |
| **HEARD** | 2 MAY 2005 |
| **DELIVERED** | TUESDAY, 2 AUGUST 2005 |
| **FILE NO.** | PSACR 24 OF 2003 |
| **CITATION NO.** | 2005 WAIRC 02217 |

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| **Catchwords** | Industrial law - Reclassification of applicant's position - Applicant not personally reclassified along with position - Whether respondent acted in accordance with principles of equity and good conscience - No findings of unfair or inequitable treatment of applicant by respondent - Respondent followed due process in review of position - Application for personal reclassification dismissed - *Industrial Relations Act 1979* (WA) s 44. |
| **Result** | Order issued |
| **Representation** | |
| **Applicant** | Mr B Cusack |
| **Respondent** | Ms R Lavell |

*Reasons for Decision*

1 The application brought in this matter is one pursuant to s 44 of the Industrial Relations Act 1979 ("the Act") by which the applicant claims that its member Mr Colin Carlisle be personally re-classified to a Level 5 position effective 25 February 1997.

2 The application has an extensive and somewhat tortuous background which briefly is as follows. The subject matter of these proceedings was originally commenced in application PSAC 30 of 2002 by the applicant on behalf of Mr Carlisle. Those proceedings came before Scott C. Ultimately, in May 2003, that file was closed by the Commission and the applicant then filed a fresh application PSAC 24 of 2003 seeking the relief presently sought. Following conciliation proceedings before Scott C over some period of time, in February 2004 the Commission issued a declaration determining that it was not in the public interest that the applicant's claim proceed. That declaration was the subject of an appeal to a Full Bench of the Commission, which appeal was upheld and the matter was remitted to the Commission as presently constituted.

3 Further conciliation before me failed to resolve the issues in dispute and the application was listed for hearing and determination on the merits.

4 In March 2005, prior to the substantive hearing on the merits, the respondent filed an interlocutory application seeking orders from the Commission pursuant to s 27(1)(a) (ii) of the Act that the application be dismissed. The respondent in essence argued that because of the effluxion time from the relevant events in 1997 and subsequent proceedings before this Commission, and because of a lack of merit in the applicant's substantive claim, the Commission should dismiss the application or alternatively refrain from further hearing the matter. This was strongly opposed by the applicant who submitted that the reason for the lengthy period of time over which this matter has been in dispute were readily explained and that Mr Carlisle's claim was not without merit.

5 After considering the submissions and evidence in relation to this application, the Commission determined that it would dismiss the s 27(1)(a)(ii) application. I was not persuaded that the effluxion of time would present insurmountable difficulties for the parties and also, in my view, there was a genuine industrial dispute unresolved which required resolution by this Commission. Accordingly, the substantive claim proceeded to be heard on its merits.

**Factual Background**

6 Evidence on behalf of the applicant was adduced through Mr Carlisle who filed a detailed witness statement with numerous annexures, setting out the entire history of the matter from his perspective. Additionally, evidence was adduced from Mr Padmanabham, who is employed in the respondent's community safety branch. On behalf of the respondent, evidence was adduced from Superintendent Langford the superintendent in charge of the school crossings section at the material time, and Mr Clissa, a human resources manager involved in the relevant reclassification at the material times.

7 Most of the evidence was uncontroversial and can be summarised as follows. In October 1995 through the process of civilianisation, the position of supervisor school crossings section, which was then occupied by a sergeant, was identified as appropriate for conversion to a civilian position. Approval was granted for this to occur in November 1995. That process led to a classification review committee recommendation that the position of supervisor school crossings section be classified at Level 3 as a civilian position. This was confirmed in January 1996. In June 1996 Mr Carlisle, who had previously been employed by another government agency, applied for and was successful in an appointment to the position of supervisor school crossings section with the respondent as a re-deployee.

8 In February 1997, Mr Carlisle expressed the view that he considered the classification Level 3 of his position did not properly reflect the nature of the duties and considered that a more appropriate classification would be Level 5. Mr Carlisle based this view upon a number of considerations including various comparison documents then in existence between sworn and unsworn officers' positions within the respondent and also his view of the nature and responsibilities of the position. In particular, Mr Carlisle had the view that the position was responsible for supervision of a considerable number of full time equivalent positions; he was responsible for payroll for these positions; he was responsible for recruiting, selecting and appointing traffic wardens throughout the State; the position required involvement in and management of the business of the then school crossings and road safety committee and a degree of planning and administration in relation to the school crossings section generally. Mr Carlisle expressed these views in a memorandum dated 25 February 1997 (annexure 5 exhibit A1) to the then Commander Traffic and Operation Support. The respondent then replied in March 1997 (annexure 6 exhibit A1) to the effect that during the process of civilianisation a full evaluation of the position of supervisor school crossings section was undertaken and a classification Level 3 was recommended and adopted. Notwithstanding this, Mr Carlisle was invited to submit a formal re-classification request, if he was not content with the respondent's reply. This did not seem to have occurred.

9 From that time until about September 1999, Mr Carlisle testified that he had a number of discussions with various persons within the respondent about the classification of his position, all of which did not result in any changes. Additionally, he testified that in this period there appeared to be some differences of view between himself and senior management responsible for the school crossings section about its operations and resourcing.

10 Superintendent Langford testified that in May 1999 issues were raised concerning the management of the school crossings section and its associated operations. These concerns were raised in a memorandum from the then Assistant Commissioner Traffic and Operation Support to the Commander of that section dated 7 May 1999 and tendered as exhibit R1. As a consequence of these issues being raised, Superintendent Langford said he undertook a review of the area and held discussions with Mr Carlisle regarding any difficulties he was experiencing in his position. Superintendent Langford

testified that this ultimately led to a decision to offer the opportunity to Mr Carlisle of a transfer to another Level 3 position at the PCYC.

11 Ultimately Mr Carlisle accepted this transfer and Superintendent Langford said it was to assist Mr Carlisle at the time. Additionally, a functional review was to take place of the school crossings section from this time. Mr Carlisle was informed that his Level 3 position would remain open to him subject to this functional review and there was a possibility he may return to that position, depending upon the outcome of the review. Mr Carlisle testified that he considered he was given an undertaking by Superintendent Langford and Mr Ellsom of the respondent, who also attended meetings with him that he would return to his former position.

12 Subsequently, meetings took place in June and July 2000 between Mr Carlisle and Superintendent Langford and Mr Ellsom. At that time, the functional review had not commenced and according to Superintendent Langford, Mr Carlisle expressed some disappointment at not then returning to his former position. This was consistent with Mr Carlisle's evidence. At that time, it appeared that Mr Carlisle involved the applicant to assist him in further discussions with the respondent. Ultimately, in November 2000, Mr Carlisle was informed that he was to be formally transferred to the position of Level 3 Administration Officer at the PCYC and would not be returning to the school crossings section.

13 As a part of other organisational reviews occurring from the "Delta Reform" process, in 2000 the traffic ancillary branch was abolished and the school crossings section was also reviewed. A recommendation was made after a functional review by the respondent that the position of supervisor school crossings be abolished and a Level 5 manager position be created. Superintendent Langford testified that the focus of the Level 5 manager position which was created was quite different to the supervisor position formally occupied by Mr Carlisle. In particular he testified that the position would be responsible formally for a substantial budget; the position would have a strategic focus with forward planning and was responsible for the overall delivery of the school crossings services within the allocated budget.

14 Superintendent Langford emphasised that the ability to plan, lead and organise the whole section was involved and the new position would report to an Inspector and would be part of the traffic management team. He compared the position descriptions for both the Level 3 and Level 5 positions and distinguished them. In particular, Superintendent Langford said that the Level 3 position did not have the same budget allocation, was not responsible for policy development; was not responsible for risk management and nor was it a strategic management role. Additionally, the Level 5 process entailed a staff management role including performance evaluation for traffic wardens and other staff. In summary, Superintendent Langford said the focus of the Level 3 position was supervisory and administrative whereas the Level 5 position was more focused on strategic planning within an overall budget responsibility. He did not consider that Mr Carlisle was performing the same type of duties when in the Level 3 position.

15 Suffice to say that Mr Carlisle disputed that his former position was properly classified at Level 3 in the first place. He testified that there was in essence little difference between the duties he was formally performing and that required of the new Level 5 position.

16 Mr Clissa testified as to the process of the re-classification of the Level 3 position to the Level 5 position. He said that this occurred as a part of the functional review of the area during the civilianisation process of a number of positions. He said that established re-classification guidelines were used including a document called the Classification Determination Approved Systems and Procedures and Key Guidelines for Chief Executive Offices (exhibit R3) and the Approved Procedure 1 for Approved Classification System and Procedures, authorised by s 29(1)(h) of the Public Sector Management Act 1994 ("the PSM Act"). Mr Clissa testified that the review was comprehensive and was the subject of a determination by the classification review committee applying these established procedures. Mr Clissa said that he was responsible for finally approving the re-classification by two levels and rigorously tested the basis for the proposed re-classification. As the position was being re-classified by two levels, a new position was to be created applying the relevant guidelines, and the position was to be filled by open competition. At all times, Mr Clissa said the respondent sought appropriate advice from the Department of Premier and Cabinet.

17 It was common ground that Mr Carlisle did apply for the new Level 5 manager's position but his application was not successful. Given all of the circumstances, Mr Clissa said that applying the relevant guidelines including Approved Procedure 1, Mr Carlisle had not been in the re-classified position for 12 months and was therefore not eligible for a personal re-classification. It was also his view that over many years experience, custom and practice was such that there had never been a personal re-classification by more than one level.

**Consideration**

18 I have carefully considered all of the oral and documentary evidence tendered in this matter and the parties' submissions. I have no doubt that Mr Carlisle at all times felt a genuine sense of grievance in relation to the appropriate classification of his prior position of supervisor school crossings section. I have in particular reviewed the initial classification of the supervisor school crossings section as a Level 3 position and in particular, compared it to the Level 5 manager school crossings position, subsequently created. I am satisfied that from the evidence before the Commission, on work value grounds, there is a difference between the Level 3 and Level 5 positions, in particular in relation to the change of focus of the position from an operational focus to a strategic focus in terms of planning, strategy and risk management. Additionally, the new position is formally responsible for a substantial budget and is seen as a part of the traffic management senior management group. Overall, I am not persuaded that the positions performed by Mr Carlisle and the new Level 5 position were one and the same.

19 There were a number of contentions dealt with by the parties in support of their respective cases put to the Commission. The first contention was that Mr Carlisle was not the substantive occupant of the position of supervisor school crossings section for a continuous period of at least 12 months as at February 1997 in accordance with the Approved Procedure. Secondly, he was not performing the duties of the Level 5 position as at March 2001 when it was created such that he could not, in any event, be considered for a personal reclassification under the Approved Procedures. Furthermore, it was submitted by the respondent that Mr Carlisle could not be reclassified by more than one level as this would be inconsistent with established custom and practice.

20 I am not persuaded by the latter argument that custom and practice would necessarily preclude Mr Carlisle's reclassification by more than one level. This Commission is required to determine matters of this kind on the basis of the equity and good conscience of the matter and not based on any custom or practice in the public sector in relation to such circumstances.

21 From a review of the relevant re-classification guidelines and administrative procedures, whilst this Commission is of course not bound by any such procedures in determining matters before it, I am satisfied on the evidence that the respondent has followed due process in relation to the review of the school crossings section and the positions concerned, and has afforded Mr Carlisle every reasonable opportunity of progressing his grievances. I accept that Mr Carlisle did not at any time, let alone for a period of at least twelve months, perform the duties of the new Level 5 position as provided in the

Approved Procedure. Whilst Mr Carlisle was transferred to the PCYC position, such a transfer was permissible within the terms of the PSM Act. Furthermore, given the evidence before me, I am not persuaded that the move to the PCYC was because of any ulterior motives towards Mr Carlisle indeed on all of the evidence in part it was to assist him in the circumstances prevailing at the time. Furthermore, Mr Carlisle, consistent with sound practice, was able to apply for the reclassified position in open competition, but was however not successful. Additionally, it was the case that at least as at February 1997, had the position been reclassified at that time, Mr Carlisle had not occupied the position of supervisor school crossings section for at least 12 months.

22 As a matter of equity and good conscience, whilst I accept that Mr Carlisle was genuine in the pursuit of his grievance, I am not persuaded that the Commission should interfere with the respondent's decision making on this occasion, and nor am I of the view that it would be appropriate to grant Mr Carlisle's request for a personal re-classification in the present circumstances, given that it has not been established that the respondent treated Mr Carlisle unfairly or inequitably.

23 For these reasons the application is dismissed.

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**2005 WAIRC 02218**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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| **PARTIES** | CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA |
| | **APPLICANT** |
| | **-v-** |
| | COMMISSIONER OF POLICE |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER S J KENNER |
| **DATE** | TUESDAY, 2 AUGUST 2005 |
| **FILE NO/S** | PSACR 24 OF 2003 |
| **CITATION NO.** | 2005 WAIRC 02218 |

| | |
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| **Result** | Order issued |
| **Representation** | |
| **Applicant** | Mr B Cusack |
| **Respondent** | Ms R Lavell |

*Order*

HAVING heard Mr B Cusack on behalf of the applicant and Ms R Lavell 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 J KENNER,
[L.S.] Commissioner.

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# INDUSTRIAL MAGISTRATE—Complaints before—

**2005 WAIRC 02110**

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES' COURT

| | |
|---|---|
| **PARTIES** | NAUM NIKOLOSKI |
| | **CLAIMANT** |
| | **-v-** |
| | MOJAK PLASTICS PTY LTD |
| | **RESPONDENT** |
| **CORAM** | INDUSTRIAL MAGISTRATE G. CICCHINI |
| **DATE** | WEDNESDAY, 13 JULY 2005 |
| **FILE NO.** | M 65 OF 2005 |
| **CITATION NO.** | 2005 WAIRC 02110 |

| | |
|---|---|
| **Representation** | |
| **CLAIMANT** | The claimant appeared in person |
| **RESPONDENT** | Mr B Jackson (of Counsel) instructed by *Gadens Lawyers* appeared for the Respondent. |

**Catchwords:**

Dismissal of claim, abuse of process, issue estoppel, res judicata, costs, frivolous or vexatious.

**Legislation:**

*Industrial Relations Act 1979*;

*Industrial Magistrates Court (General Jurisdiction) Regulations 2000* – regulations 5, 7, 17 & 32;

**Result:**

Application granted and claim dismissed as an abuse of process. No order as to costs.

**Case(s) referred to in decision:**

*CPSU v Murdoch University 2005 WAIRC 01898*

**REASONS FOR DECISION**

*(Delivered extemporaneously at the conclusion of the hearing, extracted from the transcript and edited by His Worship)*

1. I am dealing with an application made by the Respondent that;
    1. The claim be struck out, or alternatively;
    2. That the claim be dismissed and judgment entered for the Respondent; and in any event
    3. That the Claimant pay the Respondent's costs of the action including today's appearance.

2 Mr Nikoloski opposes the application.

3 This matter has a history. The history is that the same parties were involved in another action being M 283 of 2004. With respect to that matter, on 20 April 2005, my brother Mr Tarr made orders by consent that the claim be dismissed and that there be no orders as to costs. Subsequent to the making of that order, the Claimant has instituted this fresh proceeding. On the face of it, this proceeding has been instituted for the same matters in issue as the matter previously concluded by way of consent orders in M 283 of 2004. Effectively, the Claimant has started again using a different action in respect of the original claim.

4. Having heard from the Claimant today, it is quite apparent that he is aggrieved by the dismissal of his claim on 20 April 2005. He is concerned that that order was not appropriately made. He submits that there was no actual consent. Further he submits that even if the claim in that matter was dismissed on that date, that it does not bear or impact upon this matter because it was not dealt with on its merits.

5. The Respondent argues that when the matter proceeded before my brother it was determined in such a way that it was regarded by the parties as being conclusive of the matters in issue between them. That is the effect of the order and accordingly, any further claim such as the one before me is, in those circumstances, an abuse of process. The fresh claim is vitiated by pleas of issue estoppel and res judicata, which the Respondent says bars any further action.

6. It is the case that a judgment made on an interlocutory basis can finally determine the issue between the parties. There is no question about that. That is what appears to have occurred in this particular case.

7. It seems to me, from having heard the parties today that the Claimant is, in essence, unhappy with the orders made previously. If that is the case, then his remedy is one of appeal to a higher Court. It is not appropriate that he simply ignores the orders previously made concluding the issues between the parties and starts all over again, which he seems to have done in this matter. His decision to start again may have resulted from his misunderstanding of the law and or his inability to fully comprehend the effect of what had previously occurred. Notwithstanding that, to enable this claim to proceed further would in my view continue an abuse of process.

8. The Court is empowered by regulation 7 of the ***Industrial Magistrates Courts (General Jurisdiction) Regulations 2005*** to control and manage cases coming before it. Regulation 7(1) provides that:

*"A Court may do all or any of the following for the purposes of controlling and managing cases and trials –*

*(r) "take any other action or make any other order for the purpose of complying with regulation 5."*

9. Regulation 5 provides:

***5. Court's duties in dealing with cases***

*(1) A Court is to ensure that cases are dealt with justly.*

*(2) Ensuring that cases are dealt with justly includes ensuring —*

*(a) that cases are dealt with efficiently, economically and expeditiously;*

*(b) so far as is practicable, that the parties are on an equal footing; and*

*(c) that a Court's judicial and administrative resources are used as efficiently as possible.*

10. In determining this matter it is the case that to allow this matter to proceed further would not result in a just outcome. This claim is one, which offends that principle. The matter should not be dealt with over again. Matters should not be re-litigated. Any attempt at re-litigation constitutes an abuse of process. In my view, the institution of this claim constitutes an abuse of process. Further, I would go so far as to say that by virtue of the agreement reached on the previous occasion, the Claimant is now estopped from taking the action that he has in this matter. That is not to say that the Claimant does not have any right or that he has lost his right to seek to set aside the previous orders. He may have a remedy in respect of the previous dismissal, but that remedy is not achieved by taking further action as he has done here. That remedy may lie in instituting an appeal to overturn the order of dismissal in the previous matter. However so far as this matter is concerned, given that the claim is on all fours with the claim previously made and further given that the Claimant seeks to re-litigate that matter which finally determined the issues between the parties, and further given that I cannot go behind the order made by my brother, it seems to me that the claim before me should not proceed and should be struck out because it constitutes an abuse of process. The claim will accordingly be struck out.

11. The Respondent (the applicant in this application) seeks costs. I am invited to make a costs order against the Claimant on the basis that it is implicit or axiomatic that costs would follow a finding that the claim constitutes an abuse of process.

12. In determining this issue I shall refer to my recent decision concerning costs made in the context of my consideration of section 347 of the ***Workplace Relations Act 1996***. In that matter, being ***CPSU v Murdoch University 2005 WAIRC 01898***, I reviewed at length the authorities in relation to costs. In so doing, I considered the question of vexatiousness. My views in that matter have equal application here. Vexatiousness imports intent on the part of one party to abuse the process. In this matter I cannot conclude that the Claimant has intended to abuse the process. An abuse of process has occurred as a result of a misguided view of the law. An abuse of process can result from a mistake without intent to harass or embarrass. In those circumstances it cannot be said that it is axiomatic that once there has been a finding of an abuse of process, a finding of vexatiousness follows. In my view, there can be an abuse of process without it being vexatious. It can simply happen as a result of a misguided view as has occurred in this particular case. I do not find that in this matter the Claimant has intended to abuse the process. He was of the view that, because the order that was previously made was not made in what he viewed to

be the appropriate way that he could simply start again. He was simply misguided. I take the view that his actions were not vexatious although they did, in the end, amount to an abuse of process. Further it cannot be said that the claim in this matter was frivolous in all the circumstances.

13. For those reasons I would not order costs. The orders that I make in this matter are that the claim be struck out as an abuse of process and that there be no order as to costs.

**G Cicchini**
**Industrial Magistrate**

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# POLICE ACT 1892—APPEAL—Matters Pertaining To—

**2005 WAIRC 02151**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

| | |
|---|---|
| **PARTIES** | JENNIFER LORRAINE MCKAY |
| | **APPELLANT** |
| | **-v-** |
| | COMMISSIONER OF POLICE |
| | **RESPONDENT** |
| **CORAM** | CHIEF COMMISSIONER A R BEECH |
| | COMMISSIONER J H SMITH |
| | COMMISSIONER J L HARRISON |
| **DATE** | TUESDAY, 26 JULY 2005 |
| **FILE NO.** | APPL 452 OF 2004 |
| **CITATION NO.** | 2005 WAIRC 02151 |

| | |
|---|---|
| **Result** | Appeal dismissed |
| **Catchwords** | Removal of police officer – loss of confidence by Commissioner of Police - whether harsh, oppressive or unfair – appeal dismissed – *Police Act 1892* (WA) s 8 & s 33P |
| **Representation** | |
| **Appellant** | Mr D Moen (of counsel) |
| **Respondent** | Mr R Andretich (of counsel) |

*Reasons for Decision*

**CHIEF COMMISSIONER A R BEECH AND COMMISSIONER J H SMITH:**

1 This is an appeal by Jennifer Lorraine McKay under s 33P of the *Police Act 1892* against the action taken by the Commissioner of Police to remove her from the WA Police. The appeal was heard on 23 December 2004 and 2 March 2005. Following the hearing both parties sought to put additional material and submissions before the Commission. Final evidence and submissions were filed on 26 May 2005 and the parties were advised on that date that they were required to inform the Commission by Wednesday, 1 June 2005 at 1500 whether they wished to place anything further before the Commission or make any further submissions. No further material or submissions were received.

2 In July 2002 Ms McKay made a formal complaint that on 40 different occasions she had been subjected to harassment, threats, intimidation and assault by Constable X. The complaints are set out in the reasons of decision of Commissioner Harrison. Following an investigation of the complaints, a number of allegations were made against Ms McKay by the investigating officers which resulted in Constable McKay being given a notice under s 8 of the *Police Act 1892* in relation to the following allegations which were said to give rise to the Commissioner of Police's loss of confidence in her:

> "(1) That you made a false allegation that Constable X deliberately sprayed you with oleoresin capsicum spray on 9 September 2001.
>
> (2) That you made a false allegation that Constable X approached you from behind and poked you in the ribs with a baton in May 2002.
>
> (3) That you made telephone calls to your home telephone number and your mobile telephone on 4 September 2002 and mislead internal investigators in relation to those calls.
>
> (4) That you made a false allegation that Constable X indecently assaulted you at the Cannington Police station on 10 September 2002.
>
> (5) That you fabricated a threatening letter and alleged that you found it in your locker at the Cannington Police station on 9 September 2002.
>
> (6) That you made telephone calls to your home telephone number and your mobile telephone on 18 September 2002 and mislead internal investigators in relation to those calls."

3 Constable McKay responded in detail to that notice on 29 August 2003 (Tab 4).

4 The Commissioner of Police considered Ms McKay's response and on 16 December 2003 he wrote to Ms McKay informing her that he continued to have a loss of confidence in her suitability to remain a member of the Police. We now consider the Commissioner of Police's reasons for deciding to take removal action.

5 The letter dated 16 December 2003 from the Commissioner of Police to Ms McKay enclosed the recommendation for her removal from office. The Commissioner noted that Ms McKay had provided a "very full response with supporting

appendices" to the six specific allegations. He noted that an analysis of the response by Superintendent Green concluded that no information had been raised to alter his original review. The Commissioner of Police stated that Superintendent Green had noted that none of the allegations made by Ms McKay could be sustained but acknowledged it could not be shown that they all lacked substance and that Superintendent Green had confirmed his earlier view there were a number of allegations where available information pointed to the conclusion that Ms McKay had made a false allegation or had fabricated evidence or a situation.

6 The Commissioner of Police noted:

> "The prospect of any of our female employees having their career terminated as a result of making false complaints of sexual harassment poses considerable risks to the Police Service. The perception, which could arise, is that we are not committed to eradicating sexual harassment and providing a supportive environment for women in the agency. This would be contrary to what the Police Executive has sought to achieve over recent years.
>
> Consequently I have taken great care before reaching the same conclusion as the review officer. To that end I met with McKay and her solicitor Mr Moen on 11 November where a full opportunity was provided for her to present her case and to raise issues, which needed more detailed analysis before I came to a determination."

7 As a result, the Commissioner gave Ms McKay the benefit of the doubt on the first two allegations. In relation to the remaining four allegations the Commissioner held as follows:

1. Allegation (3): Making telephone calls and misleading investigators about 4 September 2002 phone calls.

   The Commissioner noted that there is clear evidence to suggest that the telephone calls were not made by Constable X. Correspondingly, when Ms McKay's own whereabouts were examined at the times the calls were made, none of her accounts could be correct and the inference that she made the malicious calls to her own telephones remains undisturbed. The Commissioner concluded that it was also clear that she misled investigators about the calls.

2. Allegation (6): Making telephone calls and misleading investigators about 18 September 2002 phone calls.

   The Commissioner noted that silent anonymous calls to Ms McKay's home and mobile phones originated from a telephone box in the Armadale/Kelmscott Health Campus in Kelmscott. These were listened to by IAU investigators. Constable X denies making the calls or even knowing Ms McKay's telephone numbers. Correspondingly, Ms McKay's explanation for her whereabouts at the time satisfied the Commissioner that she was in the Kelmscott area at the time of the malicious calls and he was led to the conclusion that she made the calls and misled investigators about them.

3. Allegation (4): False allegation of indecent assault on the evening of 10 September 2002.

   The Commissioner noted that the alleged assault took place in a corridor at the Cannington station. No person witnessed the assault. Constable X denied the event occurred or even going to the Cannington station at that time. The Commissioner noted that Constable X's partner was emphatic that he had been at home all that evening; there is no computer record of him entering the station using his access card; there is no other record of him entering the station via the front counter area and none of the six staff working at the same time saw him that evening. The Commissioner noted that Ms McKay neither complained nor mentioned what had happened to anyone, including her husband, until she told a friend the following day. The Commissioner noted there is not evidence to refute Constable X's denial of attending the station that evening nor to support the allegation of Ms McKay being assaulted. He concluded that the allegation was false.

4. Allegation (5): Fabrication of threatening letter and alleging letter found in locker on 9 September 2002.

   The Commissioner stated that the preparation of the typewritten letter by Ms McKay was clearly intended to create a false impression and to cause investigators to take particular action against Constable X. The Commissioner stated that the initial denial of, and subsequent admission by, Ms McKay that she had typed the words in the second letter "to undertake her own investigation" was a complete nonsense because there is no evidence that the letter was typed twice on the typewriter. The Commissioner concluded that on its own, this allegation is sufficient for him to conclude that having evaluated Ms McKay's conduct and integrity, he did not consider she met the high standards required and expected of a member of the Police and he accordingly had lost confidence in her suitability to remain as a member and considered that she should be removed from office forthwith. However, considering the remaining three allegations together and having evaluated Ms McKay's conduct and integrity he did not consider she met the high standards required and expected of a member of the Police.

8 The Minister for Police approved the Commissioner of Police's recommendation and Ms McKay was accordingly removed from the Police under s 8 of the *Police Act 1892*.

9 We now consider the case presented by Ms McKay as to why that decision was harsh, oppressive or unfair. On behalf of Ms McKay it was submitted that the decision to recommend her removal was harsh, oppressive, unfair and unreasonable for a number of reasons. It was said that the case was quite important because of its significance to other female officers within the Police who may have come forward to make allegations against other officers. In this case, it was submitted that Ms McKay's investigation was turned against her. It was submitted that the allegations made by Ms McKay were inherently plausible and should have been accepted over the uncorroborated and conflicting evidence of Constable X.

10 In relation to allegation (3), Ms McKay refutes that she was ever told that Constable X was at the Maylands Academy on the particular date in question. The respondent failed to enquire whether Ms McKay had spoken to Ms Catherine McDonald. This information would have corroborated Ms McKay as to what her state of mind was at the time and also the fact that she was not aware that Constable X was at the Maylands Academy. There was nothing by way of surveillance of Constable X which indicated that he did not go to a telephone box on this particular date and make the call.

11 Further, it was submitted Ms McKay also has corroboration regarding her whereabouts, being a statement from her husband and from the person who repaired the vehicle. These pieces of information were not acted upon by the respondent yet they clearly corroborate her contentions. It is incorrect to say that Ms McKay picked her daughter up at about 1500 because she had done so during school hours. Ms McKay also has corroboration from Ms Elke Winkens of her taking her daughter to the convention centre on that day but this evidence was not relied upon for its timing; Ms Winkens was not spoken to in relation to the specific time when the daughter left on that particular day; yet it clearly places Ms McKay in an area away from the telephone boxes at the material time. The evidence of Ms Linda Hobson corroborates Ms McKay in this respect. It was submitted that the location of the mobile telephone is an important thing but it does not pinpoint precisely where a person is. Further, there is conflicting testimony regarding the movements of Constable X on that day.

12 A finding was made that Ms McKay said that she was at Ms Hobson's home when she received a call on her mobile but this was not entirely correct: if she arrived between 1030 and 1045 and stayed an hour to an hour-and-a-half then Ms McKay would have left between 1200 and 1230 and therefore she could not have been in that particular area in Maylands. Conversely, it was submitted that Constable X's position was not corroborated by the evidence of Constable Slyns.

13 It was also submitted that given that Ms McKay knew of the telephone surveillance at the material time it defies logic that she would then go to the Maylands area herself to make a telephone call at a time when she believed the accused was under constant surveillance.

14 In relation to allegation (4) it was submitted that the Commissioner of Police relied upon the fact there is no corroboration of the allegation; however, it was submitted that the nature of the offence was such that it would not occur if there were other people able to see it. Ms McKay says she was traumatised; this was confirmed by the Police Department psychologist, Ms Angela Martinovich, which is in turn confirmed in the running sheets. Ms McKay had sent an email on this particular day seeking, basically, to resign from the Police; why would this have occurred if nothing had happened? She did not disclose the incident to her husband because of her concerns but the following morning she did disclose the incident to a close female friend which, it was submitted, was clear corroboration close in time and to the event. However, this corroboration was not relied on by the Commissioner and findings were made that matters were not corroborated. Ms McDonald would be able to corroborate the mark that Ms McKay said was on her neck. However, no reference was ever made to this matter by either the investigators or the Commissioner.

15 It was submitted that it was not open to the Commissioner of Police to make a finding that the accused did not go to the police station that night. Further, the Customer Service Officer had left the station at between 2145 and 2150 whereas in his report Senior Sergeant Wilson states that the Customer Service Officer left at 2255, which is incorrect.

16 In relation to allegation (5) it was submitted there was a fundamentally flawed portion of the investigation in that there was clear corroboration from Ms McDonald which was not acted upon either by the investigators or the respondent. Ms McKay did not find the letter on 9 September 2002 when she was alleged to have gone to Cannington Police Station. Rather, there were two letters: the first was found on 5 September 2002 when Ms McKay attended the station with her daughter and yet her daughter was not spoken to by the investigators. On that date she recalls typing a note for her daughter on the police station typewriter.

17 On 6 September 2002 she reported that her locker had been trashed. This could be corroborated by her daughter but the investigators did not speak to her. It was at this time that she started to undertake her own investigations. She informed Senior Sergeant Wilson of this, although Senior Sergeant Wilson, as the investigator refutes it.

18 On 8 September 2002 she received a telephone call on her mobile telephone, lost her temper and said various words. It was submitted that it was coincidental that it was on the day after receiving that call she found the second letter in her locker. She says she conducted her own investigation using the police station typewriter and advised Senior Sergeant Wilson of this and there was an email message to that effect. It was submitted that Ms McKay had used the typewriter on two occasions: once before the time when she instigated her own investigation to type out a form for her daughter (which does not appear on the typewriter ribbon) and again to type the words of the second letter in the typewriter as part of her own investigation.

19 It was also submitted that Ms McKay believed there were two typewriters at that particular time at the Cannington Police Station. This was supported by the Customer Service Officer whose evidence stated initially there were two typewriters at the police station. It was submitted that obviously the typewriter had been used before 6 September 2002 and, obviously, somebody removed the other cartridge at some stage. We were taken to the interview of Ms McKay regarding her use of the typewriter and it was submitted that it was a lengthy interview and there was confusion in respect of the night and exactly what document was being spoken about in relation to this allegation.

20 In relation to allegation (6) it was submitted that the fact that Constable X was not interviewed regarding this allegation because it was considered that Ms McKay telephoned her own telephone numbers, and that Constable X had endured enough without putting him through the ordeal and further humiliation of being interviewed, showed bias on behalf of Senior Sergeant Wilson and effectively stopped the further investigation of the allegation. There had been telephone calls from Cannington Police Station to Ms McKay's home which she had answered. Further it was submitted that Constable X was rostered on at that station that night.

21 Ms McKay's movements on 18 September 2002 are clear and corroborated by her husband and by a garage receipt on that date. However, these were not referred to as being corroborative by Ms McKay.

22 It was submitted generally on behalf of Ms McKay that in her response to the Commissioner of Police she did ask for further enquiries to be made in respect of each of these allegations but there were no further enquiries made. This has led to a justifiable sense of grievance. We were then taken to a number of allegations which had not been relied upon by the Commissioner but which provide the background to evaluate the submissions that had been made. It was said that the investigation was biased and that it was relied upon by the Commissioner. Therefore, the Commissioner's decision should be null and void because it is based upon a biased report.

23 We now consider the case presented by the Commissioner of Police in answer to Ms McKay's case. It was submitted on behalf of the Commissioner of Police that of some 59 complaints made by Ms McKay, 47 were comprehensively investigated and not one was capable of providing any positive evidence that the misconduct alleged to have occurred actually took place. There are two lever-arch files dealing with the allegations, the investigations and the end-point of the investigative process was more than adequate and more than comprehensive.

24 The evidence in the interview of Ms McKay held on 20 September is telling, and demonstrates that Ms McKay's answers became vague even though the incident being referred to was only some 10 days earlier. The Commissioner of Police regarded Ms McKay's evidence as vague, evasive and untruthful about her use of the typewriter and that is what colours the whole transaction. It was submitted that the misconduct alleged involved the most heinous sort of conduct that one employee can visit on another involving allegations of sexual assault, threatening Ms McKay's life, making her working life an absolute misery; yet it continued for one year before she reported it. Even during the investigation she alleged that she was assaulted at work and yet she did not report the allegation to the investigators at that time. She merely told a friend about it. There is no reason why she should not have done so; there was nothing to fear given the parallel investigation already in place.

25 It was submitted that even if Constable X may have engaged in any of the alleged conduct, the issue before this appeal bench is Ms McKay's conduct in isolation as a police officer. The evidence raises at the very least a suspicion that she engaged in conduct incompatible with her status as a serving officer in seeking to obtain evidence and to mislead investigators in order to implicate Constable X in the alleged conduct. It was submitted that history is full of police officers who thought they knew what the result was and who tried to fill in the gaps between the evidence themselves. This is not able to be done.

26 It was submitted that a reasonable person in the position of the Commissioner of Police being provided with the evidence that he has reviewed, that is the source material and his interview with Ms McKay, was entitled to decide as he did. His recommendation to the Minister demonstrates that he has made up his own mind.

**Conclusions**

27 The decision of the Commissioner of Police was based upon four of the six allegations upon which the Section 8 notice was based. We have therefore considered only those four allegations, together with the issues submitted on behalf of Ms McKay, in what is to follow.

28 We agree with the submission made on behalf of the Commissioner of Police that the investigation into Ms McKay's allegations was comprehensive and extensive. We note that 54 potential witnesses including Ms McKay were interviewed by investigators. On 30 August 2002 a telephone intercept warrant was granted and calls to her home phone were monitored.

29 The first allegation (allegation (3)) arose out of telephone calls made on Wednesday, 4 September 2002. On 4 September 2002 Ms McKay received a "silent" call to her home number at 1218 from a pay phone, immediately followed by a "silent" call to her mobile phone at 1220. The phone calls were traced to a telephone box in Peninsula Road, Maylands near the Police Academy. Telstra mobile phone records record that at the time the calls were made Ms McKay's mobile telephone was located within the range of towers situated on Guildford Road, Maylands and Heirisson Way, Victoria Park. The Guildford Road tower in Maylands has coverage directed approximately in a 120 degree arc in a south, south-west direction. The Heirisson Way, Victoria Park tower has coverage of a 120 degree arc facing in a north direction. This technical evidence put Ms McKay's telephone in an area slightly north of Victoria Park and within a 120 degree arc pointing north of this location and the second tower at the same time placed her mobile telephone somewhere south south-west from a location near the intersection of Guildford Road and Peninsula Road, Maylands (Tab 8, page 79). In light of this evidence investigators and the Commissioner of Police concluded Ms McKay drove to Peninsula Road, Maylands and telephoned her own home and mobile telephone.

30 In relation to allegation (3) we have noted each of the matters raised on behalf of Ms McKay during the appeal to cast doubt upon the conclusions of the Commissioner of Police. In relation to these, we find as follows. We acknowledge that in the record of interview of Ms McKay she denies ever being told that Constable X would be at the Police Academy in Maylands; rather, it was her understanding that he would have been at Joondalup. The submission is that this should have been followed up with Ms McDonald. However, we do not consider the point to carry great weight because if Ms McKay did believe Constable X was at Joondalup, she would have no reason to borrow Ms Hobson's car and say to her that she was afraid that Constable X would recognise her own car. We consider it unlikely that Constable X would have been in a position to see or recognise Ms McKay's car if he was in Joondalup. We are therefore of the view that it would not make any material difference whether Ms McDonald's recollection would be that Joondalup, and not Maylands, was mentioned.

31 We have also noted the submission that if Constable X was not under surveillance during the duration of the course (which is factually correct on the evidence) there is thus no evidence to say that he did not make the call from the telephone box in Maylands. However, the evidence does show that Constable X was under surveillance during his travel to and from the Police Academy outside the course times. As for the lunch time, he stated that on each occasion he left the Police Academy to get lunch he was in the company of another constable. Constable Slyns' evidence is in fact confirmatory of that (Tab 8, pages 76-78 and 80 and Tab 11). We therefore do not accept the submission.

32 We have also noted the statement of Ms McKay's husband that on 4 September 2002 he was aware that Ms McKay had borrowed Ms Hobson's car. He stated that his wife's car had a screw in the passenger-side rear tyre which made a thumping noise; he noted that there is therefore nothing at all sinister in Ms McKay using her friend's car on this occasion. However, we have found the significant point to be the reason Ms McKay gave at the time for wanting to use her friend's car. That reason was that she was afraid that Constable X would recognise her own car. This reason is verified by Ms Hobson. Ms McKay did not mention a damaged tyre as the reason. As to the statement from Tyrepower Kelmscott, it might confirm that there was a problem with the tyre, but it does not confirm Ms McKay's whereabouts at the time the telephone calls were made. We therefore reject the submission that these are clearly corroboration supportive of Ms McKay.

33 The evidence of Ms Winkens does not show that Ms McKay dropped her daughter at the Burswood Convention Centre on 4 September 2002. It does state that on Wednesday 4 September 2002 (the correct date) the daughter attended an early convention rehearsal but the statement itself does not state the time she did so. The interview by the investigating officers of Ms Winkens (Tab 44 and Tab 53) shows that Ms Winkens' recollection is that on that date the daughter attended "definitely after 1500". We therefore reject the submission that there was corroboration of Ms McKay's whereabouts by Ms Winkens and therefore the criticism in the submission that this evidence was not relied upon is similarly rejected.

34 The submission referred to the evidence of Ms Hobson corroborating Ms McKay in respect of this allegation. However, although Ms Hobson's evidence confirms Ms McKay's attendance at her home, Ms Hobson does not recollect Ms McKay's mobile telephone ringing and her evidence tends to suggest that Ms McKay had left her home by midday. This does not support Ms McKay's evidence that she was at Ms Hobson's house when she received the call.

35 We are therefore left with the evidence relied upon by the Commissioner of Police in respect of this allegation. We observe that in relation to that evidence:

(1) Ms McKay's evidence of where she was at the time the mobile telephone call was received changed. The running sheet (Tab 18) for that day records Ms McKay saying approximately three hours after the call had been received that at the time she had received it she was at Ms Hobson's house because the children were sick. The investigators say Ms McKay then changed her recollection and maintained when interviewed on 20 September 2002 that she was at the Carousel Shopping Centre when the call was received. She also mentioned at the same time a phone call from Roleystone (the second allegation – allegation (6), Tab 16, pages 41-42). Consequently her response could be regarded as equivocal but at that time she could give no explanation as to why her mobile phone was located in the Maylands area on 4 September 2002. She made no mention on 20 September 2002 that she had been at Burswood on 4 September 2002. She did not mention it until she provided her response to the Commissioner of Police on 29 August 2003 (Tab 4, pages 10-11), yet she says her response was based on notes made by her at the time events occurred (Tab 4, page 23). We have found it significant given the apparent central importance of the alleged conduct of Constable X towards Ms McKay that within three hours of receiving a call apparently related to that conduct, she could not recall where she was when she received it.

(2) The Telstra information shows that at the time the calls were made Ms McKay's mobile telephone could not have been in either of the two locations she gave. Further, it is after it was made known to Ms McKay that her mobile telephone had been located in the Maylands area that she stated she could have been at Burswood for her daughter's dancing class.

(3) The reason Ms McKay gave for using Ms Hobson's car on that day changed from one of being concerned Constable X would recognise her to a tyre fault. There had been no mention of a tyre fault to Ms Hobson.

36 Therefore, in respect of this allegation we consider that the conclusion reached by the Commissioner of Police was manifestly open on the material before him. We also find that the submissions made on behalf of Ms McKay in relation to this allegation are not made out.

37 In relation to the second allegation (allegation (6)), on 18 September 2002, at 1120 a call was received from a payphone in the foyer of the Armadale/Kelmscott Health Campus to Ms McKay's home telephone. Shortly after at 1121 a call was received from the same payphone to Ms McKay's mobile telephone. Telstra call data information showed Ms McKay's mobile telephone was within the Kelmscott area at the time the calls were made. (Tab 8, pages 88-89, see also chart at Tab 17). At 1436 on the same day Ms McKay reported the call to her mobile to Senior Sergeant Wilson. Senior Sergeant Wilson asked her where she was when she received the call and she said she was shopping at Carousel in Cannington. When interviewed on 20 September 2002 she strongly denied being in Roleystone at the time the call was made and maintained she was in Carousel. It was submitted on Ms McKay's behalf that there was corroboration from her having spoken to Ms McDonald soon after the event that she had had a "funny" call and also by way of the statement of Ms McKay's husband, Derek McKay. Upon examination of their statements we find that they corroborate Ms McKay's statements to them about having received a call. However there is no dispute that this call was received by Ms McKay on her mobile telephone. These calls were monitored by Internal Affairs Unit. Therefore, the corroboration referred to does not advance the matter to any great extent.

38 Rather, the issue in this allegation turns upon Ms McKay's statement that she was at the Carousel Shopping Centre when she received the call. The essence of the conclusion of the Commissioner of Police is that the Telstra evidence shows that Ms McKay's mobile telephone was in the Kelmscott area when the calls were made. Ms McKay may be correct in using the statement of Mr McKay and of Ms Little to show that she had a legitimate reason to be in the Kelmscott area at the time but that does not alter the conclusion of the Commissioner of Police (Tab C, page 5) that Ms McKay was in the Kelmscott area at the time of the calls which casts doubt upon Ms McKay's statement that she was at the Carousel Shopping Centre. Further she did not say she was in Kelmscott on that day until almost a year later when she provided her response to the Commissioner of Police (Tab 4, page 24). We believe the central point to be that Ms McKay stated that the call was received at the Carousel Shopping Centre when the evidence showed that she could not have been there at that time.

39 The submission was also made that Ms McKay had set out a number of other matters at pages 25 to 40 of her reply which required further investigation but which were not acted upon by the investigators. An examination of those matters reveals that they do not relate to the allegations on which the Commissioner of Police reached the conclusions that he did. Accordingly, we have not found them to be of relevance to our consideration of the four allegations.

40 The submission was then made that the investigators did not obtain the positive character evidence in relation to Ms McKay that they obtained in relation to Constable X and that the investigation was thus biased and one-sided. We consider it correct to observe that the investigators did not include any positive references in relation to Ms McKay. We note, however, that the issue before the investigators, at least initially, was whether Constable X had committed the acts of which he was accused. In the absence of cogent evidence supporting Ms McKay's allegations against Constable X, we consider it proper that the investigators considered whether or not it was in Constable X's character to commit the acts of which he was accused. Further in Ms McKay's response she attached letters of commendation about herself and these were therefore before the Commissioner of Police before he made his decision. We do not consider that the submission therefore is a ground for upholding the appeal.

41 It was argued on behalf of Ms McKay that the Commissioner of Police wrongly concluded that Constable X denied making the telephone calls received on 18 September 2002 because these calls were never put to Constable X when he was interviewed on 12 September 2002. However we consider this submission does not take Ms McKay's case very far because Constable X denied when interviewed that he had made any phone calls or knowing her telephone numbers.

42 The submissions made which cast more emphasis on the need to pursue the alibi evidence of Constable X and the inferences that may have been open to the Commissioner of Police relating to the honesty of Constable X are similarly, in our respectful observation, beside the point. The Commissioner of Police concluded on the evidence available to him that Ms McKay had committed the acts of which she had been accused irrespective of whether or not Constable X had committed any of the acts of which she had accused him. We are not persuaded that Ms McKay is assisted in discharging the onus upon her to show that the decision to remove her was harsh, oppressive or unfair by these submissions.

43 We consider the final submissions on this ground are able to be viewed in a similar way. In the absence of the evidence referred to in these four allegations which have cast doubt upon the conduct of Ms McKay herself, then the submission that the investigators turned the investigation back on Ms McKay when they realised the severity of their nature, and the potential for the repercussions which would flow from these allegations having been made, would undoubtedly carry great weight. However, the material before the Commission, and in turn which was before the Commissioner of Police, does cast doubt upon Ms McKay's allegations against Constable X in these four matters. On that basis, and in the absence of evidence which shows that the Commissioner of Police's conclusions were not reasonably open in relation to this allegation, we do not consider that the submission made, and the attack on the conduct of Senior Sergeant Wilson, advances Ms McKay's case in any material manner.

44 The Commissioner of Police made his decision based upon the material before him which examined more than merely the conduct of one of the investigators, Senior Sergeant Wilson. The factual Telstra evidence which is against Ms McKay's recollection that she received the call at the Carousel Shopping Centre makes it difficult for Ms McKay to show that the Commissioner of Police was incorrect in the conclusion he reached. Even though Ms McKay told her psychologist, Ms Genevieve Milnes sometime in 2003 that when she was interviewed on 20 September 2002 she did not have a good recollection of this day (Tab 4, page 23), and that she is hazy about dates and times by reason of suffering from post-traumatic stress disorder, her recollection at 1436 on the day of the call itself (Tab 18, Internal Affairs Unit running sheet), which was about three hours after the time of the call, was nevertheless that she was shopping at Carousel in Cannington when she received the call on her mobile. On the evidence, that could not have occurred. Ms Milnes first saw Ms McKay in February 2003 (Tab 4, Annexure 8). Whilst she expressed an opinion that the reason Ms McKay is hazy on dates and times is because she was suffering from post traumatic stress, her opinion appears to be made in the context of Ms McKay's recollection of the events of harassment (see also Tab 4, Annexure 2 - email 1 August 2003 from Ms Martinovich the Police Department psychologist). We also note that the diagnosis of post traumatic stress was made sometime after Ms McKay was interviewed on 20 September 2002 and we note that Ms Martinovich informed investigators on 13 September 2002 that Ms McKay was very emotional and there was a concern that she may become irrational and a threat to Constable X. Further Ms McKay says her answers provided in her response given on 29 August 2003 rely upon her notes made by her closer to the time (we take that to mean when events occurred) (Tab 4, page 23).

45 We therefore do not find that this ground has been made out.

46 In relation to the third allegation (allegation (4)) on 11 September 2002 Ms McKay made a complaint that Constable X indecently assaulted her between 2130 and 2145 on 10 September 2002 at Cannington Police Station. Ms McKay initially reported the incident to Ms Martinovich. Ms McKay also informed the investigating officers through Ms Martinovich that few officers present on her shift may be able to corroborate her allegation. Inquiries by investigators revealed that Constable X was on leave from 2 September 2002 to 10 September 2002 and that he did not access the Cannington Police Station on this date using his swipe card nor access the police computer (Tab 8, page 61). When Constable X was interviewed he denied attending the Police Station on this evening and his wife says that he was home that evening (Tab 23, page 6). On 12 September 2002 investigators interviewed six officers who were on duty when the assault was alleged to have occurred and found no evidence to corroborate Ms McKay's allegation. None of the six officers saw Constable X enter the station that shift. When interviewed on 12 September 2002 Constable Luketina said that between 2045 and 2255 on 10 September 2002 (which was during the period the assault was alleged to have occurred) he sat next to Ms McKay at the computer. He said her demeanour was quiet and normal, he was joking and she laughed at his jokes.

47 Ms McKay reported on 11 September 2002 through Ms Martinovich that she was traumatised due to the alleged indecent assault at the Cannington Police Station the previous night. The Internal Affairs Unit running sheet shows that the police officers who were interviewed at Cannington Police Station on 12 September 2002 and the investigation regarding whether or not Constable X had attended the police station at the time of the alleged assault revealed no evidence to corroborate the allegation relayed through Ms Martinovich or by Ms McDonald.

48 It was submitted that Ms McKay had given a description of the clothes worn by Constable X on that occasion but that the investigators had failed to obtain them in order to corroborate the allegation. We have considered this in the context of the investigation of all of the allegations: in the absence of any evidence positively linking Constable X to any of the allegations made, we are not inclined to attach great weight to this submission given that there is no positive reason for suggesting that had the investigators investigated whether Constable X possessed clothes of the type described, there was a strong likelihood that the clothes would have been discovered.

49 The submission was made on behalf of Ms McKay that there was corroboration of Ms McKay's allegations by the comments she made to Ms Martinovich and in particular that Ms McDonald could have provided evidence that she (Ms McDonald) observed a mark on Ms McKay's neck in close proximity to the events. We accept from this submission that Ms McKay did complain to them in the manner described at that time. It was argued on behalf of Ms McKay that the Commissioner of Police did not take into account the supporting material of Ms McDonald and nowhere was any interview with her referred to. However for the reasons set out below we are of the opinion that such evidence would be of marginal value; we are of the opinion that the Commissioner of Police was entitled to lose confidence in Ms McKay, based only on the fourth allegation (allegation (5)).

50 Finally, it is correct that Senior Sergeant Wilson's report at page 64 cites the incorrect time that the Customer Service Officer finished her shift. We do not consider that has advanced Ms McKay's position a great deal. The conclusion that he reached, that for Constable X to have committed the offence he would have had to enter Cannington Police Station undetected, commit the offence in a very public and regularly accessed part of the station when several officers were present on duty and depart undetected, remains. On the material before the Commissioner of Police, and presented to this Commission, the conclusion is against this having occurred. The submission in relation to this ground is not made out.

51 In relation to the fourth allegation (allegation (5)) on 10 September 2002 at 1435 Inspector Hutchinson received a telephone call from Ms McDonald to the effect that Ms McKay had received a second typed threatening letter in her locker and that three police note books were missing from the locker. Ms McKay came into work that afternoon and Ms McDonald collected the letter from her and conveyed it to Inspector Hutchinson. At 1815 on 10 September 2002 Senior Sergeant Wilson spoke to Ms McKay. She told him she had started doing her own investigation by typing the letter into the computer to see how the printed hardcopy compared with the type of the original letter. Senior Sergeant Wilson requested she send an email stating the time and machine she typed this information into for the purposes of electronic comparison by the Computer Crime Unit. The second threatening letter was examined by Computer Crime detectives who advised it was not printed on a computer printer but an electronic typewriter. On 11 September 2002 inquiries revealed that Cannington Police Station only had one electric typewriter. The ribbon was seized and examined by the Forensic Branch. The ribbon only contained two impressions, one relating to a firearm report dated 6 September 2002 followed by the text of the second threatening letter.

52 In relation to this allegation we accept that Ms McKay spoke to Ms McDonald on 10 September 2002 in relation to a threatening letter she had received the day before. The Commission also accepts that there may have been corroborative evidence that Ms McKay's locker had been trashed on 5 September 2002 when she says the first threatening letter was found by her. However, Constable X was on leave from 2 September 2002 to 10 September 2002 and there was no evidence of electronic access to the police station or the computer system by him in this time.

53 Ms McKay was on sick leave on 4 and 5 September 2002. However she went into the Cannington Police Station at night either on 4 or 5 September 2002 (running sheet Tab 18; Tab 4, page 17; Tab 8, page 82) and says she found the first threatening letter. No allegation was made by her that she found the second letter until she told Ms McDonald on 10 September 2002 that she had found the second letter on 9 September 2002. Ms McKay was on leave from 4 September 2002 to 9 September 2002 (Tab 8, page 86). On 20 September 2002 Senior Sergeant Lockhart and Sergeant Brandis interviewed Constables Walker and Woon who worked with Ms McKay on the afternoon of 9 September 2002. Constable Walker recalled this was Ms McKay's first day back after leave. He saw Ms McKay unplug a typewriter and move it to another desk at about 2200/2215 and use it for five to ten minutes. Constable Woon made the same observations. He said the typewriter is rarely used.

54 When Ms McKay was interviewed on 20 September 2002 Ms McKay gave the investigators a number of conflicting explanations of her conduct in relation to this allegation. As the investigators provided information to her about what their inquiries revealed she changed her version of events. Whilst the interviewing officers can be criticised for interviewing Ms McKay without Ms Martinovich being present, having read the interview carefully we do not accept that she was denied a reasonable opportunity to respond or that she was confused or not able to comprehend the questions put to her. Further, it was not argued by her counsel that her mental state meant that she was not able to answer or comprehend questions when Ms McKay was interviewed on 20 September 2002.

55 When interviewed on 20 September 2002, which was ten days after Ms McKay reported she had found the second letter:

(a) Ms McKay said she found the second threatening letter in her locker on 9 September 2002 (Tab 16, pages 23-24).

(b) After Ms McKay was informed by Senior Sergeant Wilson that the ribbon from the typewriter had been seized and it had the firearm addition dated 6 September 2002, followed by an imprint of the second threatening letter, Ms McKay was asked when was the last time she used the typewriter and she replied "Probably a couple of weeks ago I'd say when I typed up something for my daughter". She then said it was a form (Tab 16, page 25). At that stage, there was no

suggestion by Ms McKay that she had used the typewriter to type out a copy of the note she had received on 9 September 2002.

(c) Ms McKay was then told that Constables Walker and Woon had observed her using the typewriter on 9 September 2002, and it was then put to her that she typed the second threatening letter on that date. She denied that she had done so (Tab 16, pages 28-29).

(d) After dealing with another allegation, Ms McKay was asked what she typed on the typewriter on 9 September 2002 and she said she typed the form that she filled in for her daughter (Tab 16, page 35). The Commission notes that Ms McKay's statement to the investigators that she typed something for her daughter cannot be correct as the evidence does not show any typing after 6 September 2002 to do with the form for Ms McKay's daughter. Yet Ms McKay stated that that is what she had typed on the typewriter when the two officers saw her using it.

(e) It was then put to her again that she had typed the first and second threatening letter and Ms McKay said she typed them on her computer and she "may" have typed both letters on the typewriter to see whether the matching print was the same because she decided to do her own investigation (Tab 16, pages 35-36).

(f) When Ms McKay was asked how she remembered the exact text of the first letter when it had by then been given to the investigators, Ms McKay then said that she had made a photocopy of it yet she says she screwed up all copies she made (Tab 16, page 50). Importantly she made no mention to anyone that she had done this until the evidence had been presented to her that she had been seen using the electric typewriter on 9 September 2002. Nor had she expressed an opinion to anyone as to whether the copies she made on the electric typewriter matched the print of the photocopy.

56 Ms McKay could not have typed a form for her daughter or made a copy of the first letter on the typewriter on 9 September 2002, as the ribbon did not contain imprints of such documents.

57 In our opinion the Commissioner of Police was entitled on all the material before him to conclude Ms McKay had not been truthful when she was interviewed.

58 We accept the evidence that one day after the second letter was received Ms McKay stated to the Internal Affairs Unit that she had started her own investigation by typing the text of the last letter into the "computer" to see how the printed hardcopy compared with the type of the original letter. A proper consideration of this allegation turns on more than this one point. In particular what Ms McKay investigated must be reviewed carefully. A proper consideration of her conduct includes the issue of whether or not Ms McKay informed the Internal Affairs Unit that she was typing the letters on a typewriter as well as the computer, or instead of the computer. This might have been be resolved by production of the email she was requested to send stating the time and the machine she typed a copy of the letter. However, despite a request for a copy of this email the email was not presented in evidence to the Commission.

59 Significantly, the consideration also includes the evidence that the second letter was typed on an electric typewriter and not a computer. On 10 September 2002 the Internal Affairs Running Sheet records that Ms McKay at 1815 telephoned Senior Sergeant Wilson and told him that she had started her own investigation by typing the text of the threatening letter she had found on 9 September into the computer to see how the text compared with the type of the original letter. At that point in time she made no mention of making a copy of the letter on the electric typewriter. The seizing of the tape cartridge of the electric typewriter and the evidence that the cartridge showed that the letters had been typed on it were critical to the conclusions reached by the Commissioner of Police.

60 We have considered the submission that there may have been more than one typewriter at the Cannington Police Station. However, we consider that it is improbable that there was a second typewriter given that the statement made by the Customer Service Officer (Tab 25) on 12 September 2002, which was only three days after Ms McKay used the typewriter, was that there was only one typewriter; there had been another one but she could not even state when it had last been seen. In particular she said "There was some guy came in I think – I'm sure it was last week and asked to borrow the typewriter and then he sort of wandered around and said: oh, is this the only one here, or something. But that would have been, yes, in the past couple of weeks … all of a sudden there was just this one and that sort of gets moved from table to table." (Tab 25 at page 5). This evidence supports the advice noted from Sergeant Thompson on 11 September 2002 as noted in the Internal Affairs Unit running sheet that there is only one typewriter at the Cannington Police Station.

61 We consider, in the context of the allegation which had been made by Ms McKay against Constable X regarding the threatening note found on 9 September 2002, that Ms McKay's failure to state that she had used the electric typewriter to type a copy until she had been provided with the evidence of the content of the tape from the typewriter to be very supportive of the conclusion reached by the Commissioner of Police. The submission on Ms McKay's behalf does not persuade us to the contrary.

62 We therefore do not uphold the submission on this allegation.

63 We do not say that none of the alleged incidents occurred. We note there is evidence from the Internal Affairs Unit itself that Ms McKay did receive "silent" calls that originated from Cannington Police Station. We regard very seriously acts of sexual harassment. We have considered carefully the opening submission on behalf of Ms McKay that it will send the wrong message to female police officers if Ms McKay, having complained of sexual harassment, has the complaint turned against her and her own career terminated. Nevertheless, we can deal only with the evidence before us. That evidence allows the conclusion of the Commissioner of Police that Ms McKay by her own conduct went beyond merely reporting allegations of sexual harassment. It was not that Ms McKay reported allegations of sexual harassment; it was rather that independent, and technical evidence, revealed that some of those allegations could not be factual or truthful.

64 It was argued on behalf of Ms McKay that the Commissioner of Police relied upon all four of the allegations for making his finding that he had lost confidence in Ms McKay and that if the Commission finds that the Commissioner of Police could not rely upon the information in respect of one of those allegations then the whole of the decision should be set aside. That submission however cannot be made out as the Commissioner of Police in his reasons for decision clearly states that the fourth allegation (allegation (5)) on its own was sufficient for him to conclude that he had lost confidence.

65 Prior to the Commissioner of Police making the decision to recommend Ms McKay's removal he met with her and her counsel on 11 November 2003. Ms McKay says that various discrepancies and important issues were brought to the Commissioner's attention and that the Commissioner undertook to look at the matter again and get back to Ms McKay. The Commissioner of Police wrote to Ms McKay's counsel and advised that he had obtained clarification over a number of issues raised at the meeting and considered this additional information along with other material. This material was never identified and Ms McKay was not able to comment on it before the recommendation was initiated by the Respondent.

66 In a memorandum dated 8 June 2004 the Commissioner of Police says:

> "I met with Constable McKay and Mr Moen on 11 November 2003 and I agreed that it was unsatisfactory that many of the events that were the subject of the Section 8 had occurred in 2001 and it was not resolved until 2003. ...

The two areas that I did acknowledge were poorly done, was the supply of a running sheet containing details of an informer to Constable McKay and her Solicitor and secondly, confusion over the caution used in the video interview and the interview not being terribly well structured.

I indicated to McKay and her solicitor that I would follow up on five areas which I felt required further inquiry. These were:-

i. The suggestion that a DNA sample from the public call box was not analysed due to cost cutting.

ii. A requirement for further technical evidence to refute the possibilities of an error in cell site sectors.

iii. Further inquiry as to the tenants at a domestic incident where McKay and her husband had identified an address where it occurred.

iv. Whether in fact, Wilson had wrongly identified the entrance at the Police Station where an indecent assault was alleged to have occurred and,

v. The advice given by psychologist Martinovich to the investigators and suggestions that there was insufficient support to McKay."

67 The Commissioner of Police goes on to say in his memorandum that he made enquiries into these areas and satisfied himself before making a recommendation to the Minister on Ms McKay's removal. He then says that no DNA was found on the public telephone, the technical evidence on cell sites was provided to his satisfaction, checks on the domestic incident did not support Ms McKay's allegations, Senior Sergeant Wilson had not wrongly identified the area of assault and Ms Martinovich did provide him with advice on the arrangements with Ms McKay and information provided to the investigators prior to interview.

68 It was submitted on behalf of the Commissioner of Police that the evidence contained in the extra material set out in paragraph 66 of these reasons all relates to the misconduct of Constable X and in no way relates to the grounds relied upon by the Commissioner which are, as they must be, concerned with Ms McKay's own conduct. Comment by Ms McKay on this evidence could not have affected the Commissioner's decision (*Stead v SGIO* (1986) 161 CLR 141).

69 Ms McKay takes issue with the following matters raised in the Commissioner of Police's memorandum, in relation to which we make the following observations:

(a) Ms McKay says that a request was made that the DNA found in the telephone box be tested and the Commissioner of Police wrongly states that DNA was not found. Ms McKay is correct in her assertion that DNA was found. Senior Sergeant Wilson says in a report dated 4 December 2003 (Tab 53, page 9) that although some DNA had been collected, Superintendent Milner advised that as the sample had come from a telephone box in a busy location it would probably come back as "inconclusive" and of little or no evidentiary value. However, this DNA relates to an allegation made by Ms McKay that she had received a telephone call on 27 August 2002 and does not relate to any of the allegations made against her.

(b) It was submitted that in relation to the domestic incident the investigation did not go into incident reports, nor were Constable X's note books obtained and that this failure is germane. We observe that this incident also does not relate to any of the allegations made against Ms McKay but to the allegations she makes against Constable X.

(c) In relation to whether Senior Sergeant Wilson wrongly identified the area of assault at the Cannington Police Station we do not consider this to be material (even if he had wrongly identified the location) as there is no evidence to support the conclusion that Constable X was at the Cannington Police Station on 10 September 2002.

(d) Ms McKay complains that the Commissioner of Police should have had regard to the advice given by psychologist Ms Martinovich that she should not have been interviewed on 20 September 2002 without her (Ms Martinovich's) presence. However most of the evidence provided to the Commissioner of Police does not rely upon that interview. For example her stated whereabouts when telephone calls were received and her explanation for borrowing Ms Hobson's car are not contained in this interview. In any event Ms McKay has not sought to materially to depart from what she said in that interview, nor has she put forth any evidence that she was confused or that her mind was affected in any way when she was interviewed.

70 It was argued on behalf of Ms McKay that the principle enunciated by the High Court in *Stead v SGIO (op cit)* does not apply; Ms McKay should have been provided with the additional material and afforded an opportunity to respond prior to the Commissioner for Police making his determination because the legislation requires that Ms McKay be provided with the material within seven days of the notice of removal. However, s 33L(5) of the *Police Act 1892* only obliges the Commissioner of Police to provide Ms McKay with a copy of any documents and to make available to her any materials within seven days of making a decision to take removal action that were examined and taken into account by the Commissioner in making the decision.

71 In any event the only possible prejudice to Ms McKay is that the material was not before her when she was considering whether or not to appeal. It is difficult to see that she has suffered any prejudice from this and she does not argue that she has done so. The application of the principle in *Stead v SGIO (op cit)* to appeals instituted under the *Industrial Relations Act 1979* is well established (see for example *Hathaway v The West Australian Locomotive Engine Drivers', Firemen's and Cleaners Union of Workers & Ors* (1996) 76 WAIG 2509 and *Robe River Iron Associates v The Amalgamated Metal Workers & Shipwrights' Union of Western Australia and Ors* (1993) 73 WAIG 1993), and we consider that principle applies to these appeals.

72 We are satisfied that the Commissioner of Police did look at the matter again prior to making his decision to recommend to the Minister that Ms McKay be removed from the Police. Although he did not "get back" to Ms McKay, the Commissioner of Police was under no obligation to do so. Further given his findings which resulted from the further enquiries, it is not able to be said that had he done so there could have been a different result.

73 It is also argued on behalf of Ms McKay that the investigation was flawed in that the Commissioner of Police failed to ensure that Detective Peter Trotter (in relation to an event Ms McKay says she reported to him), Ms Jones from the Health and Welfare Unit and Ms Hodgson from the Equal Opportunity Unit to whom Ms McKay spoke in March 2002 were interviewed. In our opinion Marissa Jones and Renae Hodgson could not provide any relevant information or evidence about the allegations made against Ms McKay. As to Detective Trotter, he was interviewed on 27 August 2002. In the interview Detective Trotter confirmed that Ms McKay had informed him that a male officer had removed her service revolver and held it at her head but that she did not identify the person in question (see Tab 53). Consequently any information Detective Trotter could provide appears to be very limited and again does not relate to the allegations the Commissioner of Police found to be proven against Ms McKay.

74 Further we do not accept that a finding is open that Ms McDonald could or could not have shed additional light on the allegations made against Constable X. The Commissioner of Police consented to Ms McDonald's statement being put before this Commission and Ms McKay did not provide the statement of Ms McDonald as it was her right not to do so. As this statement is not before us it is not open to draw any inferences about anything Ms McDonald may or may not have to say.

75 Ms McKay has at all times the burden of establishing that the decision to take removal action against her was harsh, oppressive or unfair. We take into consideration the interests of Ms McKay. On the material from her statement and its supporting documents, she has wanted to remain with the Police. The loss of her career is necessarily a matter of serious moment to her. The Commission is obliged to take into account also the public interest which includes, in this case, the special nature of the relationship between the Commissioner of Police and members of the Police. Given the inconsistencies in the accounts by Ms McKay of the four allegations above, we do not consider that Ms McKay has discharged the onus upon her of establishing that the decision to take the removal action was harsh, oppressive or unfair in relation to these four allegations.

**COMMISSIONER J L HARRISON:**

**Background**

76 In July 2002 Ms McKay made a formal complaint to the Commissioner of Police that on over 40 different occasions since mid 2001 she had been subjected to harassment, threats, intimidation and assault, sometimes of a sexual nature, by Constable X whilst both were serving at Cannington and Armadale Police Stations.

77 The allegations Ms McKay made against Constable X were as follows:

| | |
|---|---|
| 5/7/01 | Touched her breast and said, "While you're down there, Jen." |
| 28/7/01 | Grabbed her between the crotch when getting down from a wall. |
| 29/7/01 | Placed his hands on her hips and brushed against her (happened several times). |
| 29/7/01 | Poked her in the ribs with his pen. |
| 4/8/01 | At a disturbance, put his baton between her legs and tried to poke her with it. |
| 4/8/01 | Told her to stay in the car when dealing with bikies. |
| Early 2002 | She was eating a banana and he [made a sexually explicit comment] whilst standing with his crotch very close to her face. |
| May 2002 | Poked her with his baton whilst attending an incident at Woolworths and this frightened her. |
| Not specified | At a domestic dispute in Queens Park, placed her left hand on his crotch and [made a suggestion of a sexual nature]. |
| Not specified | Ran past her, pushed and sent her flying into lockers. |
| Maybe May/June 2002 | Stood in open doorway of her vehicle, talking to her partner and rubbing his private parts. |
| Possibly about July 2002 | At a crash scene possibly in Willeri Drive, Lynwood placed his hand on her waist, pushed himself against her and [made a suggestion of a sexual nature]. |
| 13/7/02 | As she sat down he put his fingers on the chair and she sat on them. |
| 16/7/01 | He yelled at her, "When you work with me you ask no-one else questions." He later apologized |
| 9/7/01 | Criticised her driving while she was driving him to Fremantle Hospital. |
| 25/7/?? | She was asked to stay for a drink after work but declined and was told she was not a team player. |
| July 2001 | Said to her, [made a comment about her husband and a comment about her sex life]. |
| July 2001 | Said that he was having an affairs and that, "We did it out the front of the station" or similar. |
| Not specified | Placed his hands on her shoulders and massaged them. Happened on more than one occasion. |
| Not specified | He drove like a maniac (speed and burn-outs) in a police vehicle — happened more than once — and later she commented that some biscuits looked like dog biscuits and he said, "Well, you had better have some them." |
| Not specified | Walked past her, brushed against her and grabbed her hips. |
| Not specified | Pulled her gun halfway from her holster. |
| 30/7/01 | He did burnouts in a car and fired about six rounds from a Police Service handgun, he pointed the gun at her and said, "It would be easy to get rid of someone up here." |
| 28/8/01 | Stopped at a bed shop and whispered in her ear, "That's our bed babe." |
| 28/8/01 | He said that she was a typical dumb blonde, all bitchy women are the same. |
| 13/8/?? | When getting out of a car he pulled her back by her hair and said she did not need to take a statement. When she queried what to write on the Action Report he said, [made a derogatory comment using sexist language]. |
| Not specified | Pushed her gun down in its holster constantly and pulled her by the belt. |
| Not specified | Stuck his hands down the back of her pants. |
| 9/9/01 | Went to an attempted suicide and oleoresin capsicum her in the face, and at the Police Station told everyone how useless she was. |
| 25/7/01 | Grabbed her knees and squeezed them. |
| Not specified | He kicked the back of her knees making her lose balance (this happened many times). |
| Not specified | Constantly kicked the levers of her chair, one time making her fall off. |

| | |
|---|---|
| Not Specified | Leant over her and pushed himself into her shoulder. |
| Not specified | Nametag from locker found screwed up on the floor. |
| Not specified | The sticker of her gun has been ripped off the cabinet, ripped up and found in a yellow bin. |
| Not specified | Pulled the gun from her holster and held it to the back of her head and said, "It comes out easy, hey." |
| 12/7/02 | Pinched her on her 'bum'. |
| Not specified | Has verbally abused her many times, eg to keep her mouth shut, he knows people, his word against hers, called her a 'wrinkled up slag, a dumb blonde, a bitch'. |
| Not specified | Constantly putting her down, has mood swings, comments on hers and his sexual life. |
| Not specified | Flicking her in the head. |
| Not specified | Refused to stop a vehicle so she could go to the toilet. |
| Not specified | Made up a poem about her and Bill Clinton. |
| Not specified | A police video went missing from her locker and was returned after he came to the Police Station off holidays, it was found in the storeroom. |
| Not specified | Mobile telephone thrown at her head and a 'snoopy' (a plastic toy) from McDonalds. |
| Not specified | Came from behind her and pulled her arm up into the middle of her back and [made a derogatory and demeaning comment]. |
| 29/7/02 | He pushed her in the back. |
| 2/8/02 | He grabbed her in the crotch. |
| 30/7/02 | Fell onto her back when she was typing. |
| 10/8/02 | Smelt his fingers and [made a sexually explicit comment] and pushed her shoulder. |
| 25/7/02 | Pushed her in the back and [made a derogatory comment about her appearance]. It is noted that this matter is included on the Internal Affairs Unit Running Sheet [2] as having occurred on the 29th July 2002. |
| 3/8/02 | Ran his hand up the back of her bum from underneath then ran his fingers across his nose and said something (not disclosed). |
| 14/8/02 | Touched her with his torch between her legs and whispered, [a sexually inappropriate comment]. |
| 16/8/02 | Pushed himself into her as she was bending over and [made a sexually explicit comment]. |
| 30/8/02 | She received a telephone call at home and heard only panting. |
| 30/8/02 | Received a call from Constable X on her mobile where he [made sexually suggestive comments] and made threats against her and her children. |
| 18/9/02 | Received a telephone call at home and on her mobile whilst she was shopping' at Carousel. |
| 10/9/02 | Constable X indecently assaulted her. |
| 9/9/02 | Found a threatening letter in her locker. |
| 4/9/02 | Received telephone calls on her mobile whilst she was at Carousel. |

78 On 12 March 2003 Senior Sergeant Wilson of the Internal Affairs Unit ("IAU") completed a report into Ms McKay's allegations against Constable X and concluded that none of the allegations could be substantiated and that some of the allegations were unfounded. The report also stated that whilst completing the report evidence was gathered indicating that Ms McKay may have engaged in improper conduct by making six false allegations against Constable X and in conduct which was designed to implicate Constable X in these six allegations. Four of these six allegations were later relied upon by the Commissioner of Police to reach the conclusion that he had lost confidence in Ms McKay.

79 Following is an extract of the report completed by Senior Sergeant Wilson into Ms McKay's allegations (Tab 7):

**SUMMARY OF INVESTIGATION**

"In July 2002 the Risk Assessment Unit (RAU) received advice from Constable Jennifer Lorraine McKay of South Eastern Metropolitan District that she had been the subject of a large number of assaults, sexual harassment and indecent assaults over a 12-month period when she was stationed at Armadale and Cannington Police Stations. She is presently attached to Cannington Police Station.

McKay was interviewed at length on audio-tape on 10/8/02 where she confirmed 47 allegations against Constable X. These allegations ranged from insignificant "slights" on her character to very serious indecent assaults, physical assaults, bullying, sexual innuendo and a wide range of EEO issues.

The services of Ms Angela Martinovich, Organisational Psychologist, Health and Welfare Branch, were utilised from the outset and she was present at the lengthy record of interview on 10/8/02 and the majority of other contacts Internal Affairs Unit (IAU) investigators have had with McKay.

The EEO co-ordinator, Ms Renae Hodgeson, was involved from the initial stages.

As the investigation progressed (after 10/8/02) McKay reported incidents between her and Constable X as they happened, although these allegations were invariably relayed through a third person to Inspector Hutchinson at RAU. These allegations ranged from further indecent assaults to nuisance telephone calls to her home telephone.

On 27/8/02 there was a telephone call from a payphone in Roleystone to McKay's house. The caller remained on the line but said nothing. Constable X lives in Roleystone and was on weekly leave this day. Forensic attended and fingerprinted telephone at 89 Brookton Highway. No prints located.

On 29/8/02 she received another "silent" call to her mobile from a shopping centre in Thornlie. Constable X was recalled to duty to attend court in Fremantle on this day and it appeared he had the ability to make this call while on route from Cannington to Fremantle.

Due to concerns for McKay's safety a "last party release"(LPR) was initiated on her home telephone. The LPR was activated almost immediately with several calls originating from the "Property Office" at Cannington Police Station. Constable X was rostered on at the times the calls were made.

As fears for McKay's safety and emotional stability escalated, a Telephone Intercept Warrant was granted on 30/8/02 and calls to her home telephone monitored. On this very evening, at 2310 hours, McKay alleged she received a call where the caller remained silent. One minute later she received a call on her mobile telephone. She alleged the caller, whom she identified as Constable X, used threatening words to her and her children as well as being sexually suggestive. Inquiries showed the calls originated from the "Property Office" at Cannington Police Station.

As a result of this another Telephone Intercept Warrant was granted to monitor her mobile telephone.

On 4/9/02 McKay received a further "silent" call from a payphone in Maylands, immediately followed by a "silent" call to her mobile phone, Constable X was attending an in-service course in Maylands during this week. McKay said she was at a friend's address in Thornlie at the time.

On 8/9/02 an unanswered call was made to McKay's home address from a payphone in Roleystone. About 15 minutes later a call was made to her mobile phone from a shopping centre in Thornlie. Constable X was on weekly leave on this date.

During this period McKay advised she had received two threatening letters, on 6 and 10 September, 2002, both in police issue envelopes. The first message was typed on a computer, the second on an electronic typewriter.

A complete audit was performed on all computer accesses for McKay and Constable X. Nothing concrete arising from this line of inquiry as the date of creation is not known, however Constable X was on a course at Maylands at the time and last accessed a police computer on 31/8/02. McKay accessed the police computer system at Cannington on 5, 6, 9 & 10 September while she was on annual and sick leave. Prior to this her last access was on 30/8/02.

Computer Crime Unit covertly seized eleven computers in the office and associated areas of Cannington Police Station. The hard drives in all machines were "mirrored" and then examined, however, the words contained in the threatening letter were not found on any of the machines.

Investigators seized two computers belonging to Constable X and his de-facto wife. Computer Crime Unit examined these and neither contained the words of the threatening letters.

The typewriter ribbon from the machine in the office area of the Cannington Police Station was seized and forensically examined. It was established the exact words, without alteration or erasure, were located on the ribbon. Following the impression on the ribbon immediately preceding these words, it was established the threatening letter received by McKay was typed after 6/9/02. Inquiries revealed Constable X was at a course in Maylands until 6/9/02 followed by four days of weekly leave.

On 11/9/02 McKay reported to Inspector Hutchinson that she was indecently assaulted at Cannington Police Station the previous night while she was on afternoon relief

At this point in time there were 55 allegations against Constable X and Internal Affairs Unit (IAU) officers were very concerned for McKay's safety.

**Interview of Constable X**

On 12 September 2002, Constable X was removed from his workplace and interviewed at (sic) Internal Investigations Unit. The majority of the allegations were put to him and he responded with complete denials. He gave alibi evidence to a number of the allegations. Several of the alibis were pursued on the same day and found to be supportive of Constable X.

Over the following week a considerable number of the allegations were investigated and none corroborated Constable McKay's statement.

**Further Allegations**

On 18/9/02 McKay alleged she received a "missed call" to her home address and a "silent" call to her mobile phone. She said she was shopping in Carousel Shopping Centre in Cannington at the time of the call to her mobile.

The calls were traced to the Armadale Kelmscott Health Centre. At this time Constable X had been transferred and was working at the Armadale Police Station.

When "cell site" information was examined it was apparent McKay's mobile telephone was situated in the Kelmscott area and it is not technically possible that she was in Cannington as she alleged.

The cell site information for the call from the Maylands payphone was examined and it became apparent McKay's mobile telephone was situated in the Maylands area and it was not technically possible for her mobile to be in Thornlie as she alleged.

**Interview of Constable McKay & Issue of "Stand Down Notice"**

Due to the anomalies in her mobile telephone locations, the "blown-out" alibi for the indecent assault at Cannington Police Station on 10/9/02, additional information that McKay was observed using the electronic typewriter on 9/9/02 and other evidence discrediting or failing to corroborate her allegations, she was interviewed at the office of Internal Affairs Unit on 20/9/02.

McKay elected to be interviewed on video. While making no admissions it became apparent she was not being truthful and the weight of evidence against her had started to mount. At the conclusion of the interview she was served with a "Stand Down Notice".

Following the interview a number of interviews were conducted resulting in a considerable amount of McKay's alibi evidence being discredited.

**Further Allegations**

On 16/10/02 investigators received information that McKay had received four threatening and offensive letters in the mail. Investigators doubted the authenticity of the letters and extensive inquiries were made in the Thornlie area resulting

in the seizure and subsequent forensic examination of a personal computer. While yielding no evidence the investigation consumed considerable time and involved the interview of a number of witnesses."

(Tab 7)

**Findings and Conclusions**

80 On the information before the Commission in relation to this matter I conclude that there were a number of relevant issues and evidence that the Commissioner of Police did not and should have considered during the process of deciding that he had lost confidence in Ms McKay.

81 I conclude that the Commissioner of Police did not give sufficient weight to the fact that over a lengthy period Ms McKay alleged that a number of incidents occurred involving Constable X in relation to harassing phone calls, indecent assaults and threatening letters which were similar in nature to the four allegations relied upon by the Commissioner of Police to form the view that he had lost confidence in Ms McKay. Following is a summary of relevant information concerning a number of Ms McKay's allegations against Constable X, which was compiled from information provided to the Commission from information provided by Ms McKay, records held by the Commissioner of Police and records of interviews conducted during the investigation of issues raised by Ms McKay, which in my view demonstrates that there was a strong possibility that Constable X could have been involved in these allegations. It is therefore my view that these allegations should have been taken into account and given some weight by the Commissioner of Police when reaching his conclusions in relation to Ms McKay's actions.

**Allegations 1 and 2 -Allegations of indecent assault and harassment**

(Unsubstantiated)

*On afternoon relief, 25/7/01, at Armadale Police Station, did Constable X deliberately touch McKay's left breast as she reached into the back seat of a police vehicle to retrieve a street directory and say, "While you are down there Jen"?*

*On afternoon relief, 25/7/01, at Armadale Police Station, it was alleged Constable X grabbed Constable McKay on the knees and squeezed them when they were together in the police vehicle. When she objected he allegedly said, "You love it."*

Records show that Ms McKay and Constable X worked together on this date (Tab 7).

**Allegation 3 - Allegation of indecent assault**

(Unsubstantiated)

*On afternoon relief, 28/7/01, at Armadale, it is alleged Constable X grabbed Constable McKay by the crutch as she climbed over a wall.*

Records show that Ms McKay and Constable X worked together on this date (Tab 7).

**Allegations 4, 5 and 6 - Allegations of assault and harassment**

(Unsubstantiated)

*On 29/7/01, at Armadale Police Station, it was alleged Constable X repeatedly poked Constable McKay in the ribs with a pen.*

*On 29/7/01, 1200 hours, early start duty, it was alleged Constable X placed his hands on Constable McKay's hips and brushed himself against her as he moved past.*

*On 29/7/01, it was alleged Constable X pulled back on Constable McKay's police Hellwig belt 3 to 4 times as she was walking.*

Inquiries reveal that both officers were rostered for duty on this day (Tab 7).

**Allegation 7 - Allegation of harassment**

(Unsubstantiated)

*On an un-named date at Armadale Police Station, did Constable X push down on Constable McKay's revolver and partially remove it from the holster?*

Constable X concedes that he has touched another officer's gun and in doing so does not exclude touching Ms McKay's gun (Tab 22, page 26).

**Allegations 9 and 10 - Allegations of misconduct and threatening behaviour**

(Unsubstantiated)

*On 30/7/01 did Constables X and McKay go to Karragullen and Constable X do "burn-outs" in the police vehicle?*

*On the same date and location it was alleged Constable X fired about six rounds from his revolver into an abandoned vehicle (a bus) and then pointed the revolver at Constable McKay, saying, "It would be easy to get rid of someone up here."*

Police records for 30 July 2001 confirm that Ms McKay and Constable X were rostered to work together on this date (Tab 7). Subsequent to investigating this complaint the Police Service put in place a mechanism to account for ammunition drawn by officers at a number of Police Stations as one didn't exist prior to this complaint being made (Tab 8, page 100).

**Allegation 11 - Allegation of indecent assault**

(Unfounded)

*On 4/8/01, on afternoon relief at Armadale, it was alleged Constable X placed his extendable baton between Constable McKay's legs as both were closing their batons after an Aboriginal disturbance.*

Police records show that Ms McKay and Constable X were partnered in a vehicle on this date (Tab 7).

**Allegations 12 and 13 - Allegations of harassment and assault**

(Unfounded)

*On 13/8/01 it was alleged Constable X prevented Constable McKay from taking a statement from a male assault victim due to the person's intoxicated condition.*

*At the same incident it was alleged, in an endeavour to prevent her taking the statement, Constable X pulled her back into the police vehicle by her hair.*

Police records show that Ms McKay and Constable X were partnered in a vehicle on this date (Tab 7).

**Allegation 14 - Allegation of assault and harassment**

(Allegation fabricated and is therefore unfounded)

*On 9/9/01, while at Armadale Police Station and attending an attempted suicide, Constables McKay and X attended an attempted suicide in Armadale. Constable McKay alleged Constable X used excessive force on the subject of the complaint and then deliberately sprayed her on the face with OC spray.*

Records show that Ms McKay and Constable X attended this job (Tab 7). Ms McKay's husband stated that after this incident he asked Ms McKay what was wrong as her eyes were red and that Ms McKay told him that she had been sprayed with OC spray and that her body was burning, (Tab 4, Annexure 1). Ms McKay stated that she told Ms Hobson that Constable X had used excessive force during this incident and that she mentioned this incident to Ms McDonald shortly after the incident took place (Tab 4, page 7).

**Allegation 18 - Allegation of assault and serious misconduct**

(Unsubstantiated)

*At Cannington Police Station, on night relief, on an un-named date, it was alleged Constable X approached Constable McKay from behind, pulled her revolver from her holster and held the revolver to the back of her head. She alleged he then said: "It comes out easy, hey."*

Detective Trotter recalled that at a social function he attended with Ms McKay in April or May 2002 he had a discussion with Ms McKay about a person who she refused to name, who had dislodged her gun whilst she was working at Cannington Police Station. This person then pointed the firearm at Ms McKay whilst she was working at a computer on night shift. Detective Trotter encouraged Ms McKay to report this incident to her supervisor (Tab 8, page 41).

**Allegation 26 - Allegation of indecent assault**

(Unsubstantiated)

*While stationed at Cannington on an un-named date on night relief, did Constable X place one hand on her waist, push himself against Constable McKay at the scene of a vehicle crash, and say, "Come on Jen, help me blow my load"?*

This allegation was put to Constable X at his interview on 12 September 2002 and he was not re-interviewed about this incident after the correct date of the alleged incident was ascertained (Tab 7).

**Allegation 27 - Allegation of assault and sexual harassment**

(Unsubstantiated)

*While stationed at Cannington on an un-named date, Constable McKay related an incident where she had just finished talking to the senior sergeant. She alleged Constable X approached her and forced her arm up her back. She alleged he [made a suggestion of a sexual nature]. She said he then questioned her by [making a derogatory and demeaning comment].*

Constable X conceded that whilst stationed at Cannington Police Station he saw Ms McKay talking to the Officer in Charge, Senior Sergeant Gardiner (Tab 22, page 33). Ms McKay stated that she discussed this allegation with Ms McDonald (Tab 4, page 32).

**Allegation 28 - Allegation of indecent assault**

(Unsubstantiated)

*On 13/7/02, at Cannington Police Station on afternoon relief, did Constable X place his hand on a chair, as Constable McKay was about to sit down and indecently assault Constable McKay.*

Ms McKay alleged that this incident with Constable X happened soon after the start of her shift and Ms McKay claims that she spoke to Ms McDonald about this incident. There was evidence confirming that Constable X finished his shift at 1500 that day (Tab 8, page 57), that Ms McKay commenced her shift at 1500 and that Ms McKay left the station due to illness soon after commencing this shift (Tab 7), which is consistent with an incident having occurred on this date around the time Ms McKay commenced her shift.

**Allegation 29 - Allegation of sexual harassment**

(Unsubstantiated)

*On 26/7/02, at Cannington, did Constable X approach Constable McKay, push her in the back and say, "Fuck, you look even uglier in the morning"?*

This allegation was not put to Constable X.

**Allegation 32 - Allegation of sexual harassment**

(Unsubstantiated)

*On 10/8/02 at Cannington Police Station, did Constable X approach Constable McKay in the armoury, close the door and make a sexually inappropriate comment. And then call her a "slag"?*

The IAU running sheet dated 9 September 2002 states that there was evidence that as at this date Constable X may be aware that he was being watched (Tab 18).

**Allegation 33 - Allegation of indecent assault**

(Unsubstantiated)

*On 16/8/02 at Cannington Police Station, did Constable X approach Constable McKay, push his body into hers and make a comment of a sexual nature.*

Ms McKay claims that she reported this assault to Ms McDonald on 17 August 2002 and Ms McDonald then advised investigators about the alleged assault. Constable X confirmed that he sometimes jogs before and after his shift and that he has jogged on his own (Tab 22, pages 40-41**)**. When interviewed about his duty of care towards Ms McKay on 16 August 2002, Sergeant Connor (Cannington Police Station) stated that he understood that Ms McKay was safe at this time on this date because he assumed Constable X had already left on his jog (Tab 7).

**Allegation 35 - Allegation of harassment**

(Unsubstantiated)

*At 0848 hours on 24/8/02, did Constable X telephone Constable McKay's home telephone number from the Cannington Police Station and remain silent when (sic) telephone was answered?*

The IAU investigation report confirmed that Ms McKay received a telephone call from the property office at Cannington Police Station on her home phone at this time. Constable X was on duty at this time along with four other officers and the IAU investigation report determined that Constable X had the opportunity and means to make this call (Tab 7).

**Allegation 36 - Allegation of harassment**

(Unsubstantiated)

*At 1126 hours on 25/8/02, did Constable X telephone Constable McKay's home telephone number from the Cannington Police Station and remain silent when telephone was answered?*

The IAU investigation report confirmed that a telephone call from Cannington Police Station was made at this time and on this date. Constable X was on duty at this time and the IAU investigation report determined that Constable X had the opportunity and means to make this call (Tab 7).

**Allegation 37 - Allegation of harassment**

(Unsubstantiated)

*At 0959 hours on 27/8/02, did Constable X telephone Constable McKay's home telephone number from a payphone in Roleystone and remain silent when telephone was answered?*

The IAU running sheet confirmed that a call was made from a telephone box in Roleystone at 9.38 am on this date. The IAU investigation report determined that Constable X was on weekly leave on this date and therefore had the opportunity to contact Ms McKay. When interviewed about this incident Constable X put the location of this pay phone as being approximately 700 house numbers away from his house. Within an hour of the call a DNA sample was taken from the phone box by investigators but neither Constable X nor Ms McKay was swabbed for DNA (Tab 7), nor was the DNA tested as it was believed the test results would probably come back as inconclusive.

**Allegation 39 & 40 - Allegations of harassment and threats to kill**

(Unsubstantiated)

*At 2310 hours on 30/8/02, did Constable X telephone Constable McKay's home telephone from Cannington Police Station and remain silent when telephone was answered?*

*At 2311 hours on 30/8/02, did Constable X telephone Constable McKay's mobile telephone from Cannington Police Station and make sexually explicit comments and a death threat against McKay's two children? On this occasion Constable McKay recognised Constable X's voice.*

The IAU investigation report confirmed that a call was made to Ms McKay's home on 30 August 2002, that Ms McKay also received two mobile phone calls on that date and the IAU also confirmed that these calls originated from the Cannington Police Station (Tab 7). The IAU investigation report confirms that of all the police officers on duty at Cannington Police Station, Constable X along with one other Constable were the only two police officers on duty at Cannington Police Station on 24, 25 and 30 August 2002 when the previous calls were made to Ms McKay and the IAU also concludes that the other Constable on duty at Cannington Police Station on the relevant dates had a different accent which could not be confused with Constable X's accent (Tab 7).

**Allegations 43 and 44 - Allegations of harassment**

(Unsubstantiated)

*At 1331 hours on 8/9/02, did Constable X telephone Constable McKay's home telephone and remain silent when the telephone was answered?*

*At 1442 hours on 8/9/02, did Constable X telephone Constable McKay's mobile telephone and remain silent when the telephone was answered?*

The IAU investigation report confirmed that the first call was from a pay phone in Kelmscott and after being answered by Ms McKay's husband the caller remained silent. The second call was made from Thornlie. At the time the calls were made Constable X was on weekly leave (Tab 7). Constable X stated that he spent this weekend with his family and that on the afternoon of Sunday 8 September 2002 he was with his family at Burswood (Tab 22, page 60). Constable X's partner claimed the family went to Burswood on Saturday morning, 7 September 2002, and that Constable X was outside in the garden at Constable X's house for most of the afternoon of 8 September 2002. Constable X's partner also stated that she was asleep for 'a couple of hours' on the afternoon of 8 September 2002 (Tab 23, pages 3 and 9).

**Allegation 45 - Allegation of threat to kill**

(Unsubstantiated)

*Prior to 5/9/02, did Constable X deliver a computer typed death threat to Constable McKay's personal locker? Constable McKay nominated Constable X as the most likely suspect as the words on the typed letter are similar to words she alleged he has used in the past, including the telephone call of 30/8/02.*

Ms McKay told Ms McDonald that she found a threatening note in her locker on 6 September 2002 containing abusive and threatening language, including a threat to physically harm Ms McKay (Tab 7).

Constable X denied knowing the location of Ms McKay's locker, which had Ms McKay's name labelled on the door and which was very close to Constable X's locker. Forensic examination failed to find any identifying evidence on the letter (Tab 7).

82 It is my view that the conclusions reached by the Commissioner of Police in relation to the following four allegations (the Allegations) were not open to be reached by him based on the following findings:

**Allegation (3): Making telephone calls and misleading investigators about 4 September 2002 phone calls.**

*"In the afternoon of 4/9/02, Constable McKay returned home and checked her home telephone for "missed calls" by pressing "*10#" and listening to the Telstra recorded message. This check revealed a "missed call" at 1218 hours from a payphone in Maylands. The inference is that Constable X made this telephone call. Telephone Intercept Unit ("TIU") relayed the time of the original call to Internal Affairs Unit.*

*"At 1220 hours on 4/9/02, TIU reported a telephone call to Constable McKay's mobile telephone from a payphone in Maylands. Constable McKay and investigators were aware Constable X was attending a course at the old Police Academy in Maylands for the entire week."*

The Commissioner of Police concluded that there was clear evidence to suggest that the telephone calls made on this day were not made by Constable X, that Ms McKay gave incorrect accounts as to her movements on this date and that Ms McKay made the calls to her own phones.

It is my view that even though Ms McKay incorrectly stated that she was at Ms Hobson's home when she received the phone call at 12.20 pm, it does not follow that Ms McKay made the phone calls to herself. I have reached this conclusion based on the following:

1. The Review Officer, Superintendent Hadyn Green, considered that Constable X had the opportunity to make the calls during his lunch break as there is no provision for lunch to be bought at the Maylands Academy and because Constable X would have travelled past or near the phone box on the corner of Joseph Street and Peninsula Road when travelling to buy his lunch (Tab B, page 7).
2. As Constable X's evidence about his movements during the lunch breaks on the week of 4 September 2002 was at odds with the evidence given by another Constable who attended the course (Constable Slyns) his denial about making the calls on 4 September 2002 should have been given little if any weight. Constable X stated that he was in the company of Constable Slyns at lunch time on the day the calls were made and that on this day he left the Academy at lunch time with Constable Slyns. Constable Slyns stated that he twice left the Maylands Academy with Constable X to buy lunch. Constable Slyns stated that he drove with Constable X to buy lunch on Monday 2 September 2002 and on Friday 6 September 2002 (Tab 11). In contrast, Constable X stated that he did not leave the Academy on Monday and that he left the Academy on Wednesday 4 September 2002 and Tuesday 3 September 2002 at lunch time with Constable Slyns to buy lunch and may have also left the Academy with Constable Slyns at lunch time on Thursday and Friday of that week (Tab 22, page 57).
3. There was evidence corroborating Ms McKay's claim that it would not have been physically possible for Ms McKay to make these calls. Ms Hobson stated that Ms McKay left her home in Thornlie around midday (Tab 36) and as the calls were made from a telephone box in Joseph Street Maylands at 12.18 pm and 12.20 pm Ms McKay therefore did not have the time to travel from Thornlie to Peninsula Road Maylands within this timeframe to make the calls. Even if it is accepted that Ms Hobson's evidence about the time Ms McKay left was vague, it would have been virtually impossible for Ms McKay to travel north of the river to Peninsula Road to make these calls by 12.18 pm based on the evidence of both Ms McKay and Ms Hobson about the series of events which transpired at Ms Hobson's house that morning after Ms McKay arrived at Ms Hobson's house around 10.30 am.
4. The Commissioner of Police was incorrect to assume that Ms McKay was wrong when she stated on 20 September 2002 that she was at Carousel Shopping Centre on this date and that on this basis she gave a wrong account as to her movements on this date as it is my view that Ms McKay did not give evidence that she received the call on her mobile on this date whilst she was at Carousel Shopping centre, as claimed by the Commissioner of Police and the Review Officer (Tab C, page 4 and Tab 3, page 8). On a fair reading of Ms McKay's interview on 20 September 2002 (Tab 16, page 42), Ms McKay was referring to the call made on 18 September 2002 when she stated that she was at Carousel Shopping Centre when she was supposed to have received this call.
5. Ms McKay was adamant that she was not told that Constable X was attending Maylands Academy during this week and apart from assertions, there was no evidence to suggest otherwise. Even though Senior Sergeant Wilson claimed that Ms McKay was advised that Constable X would be at Maylands Academy during this week no documentary evidence was given to the Commissioner of Police confirming that Ms McKay was advised that Constable X was attending Maylands Academy during this week (Tab 4). In contrast, Ms McKay maintains that at a meeting held at Ms McDonald's house on 3 September 2002 where Ms McDonald was in attendance, Ms McKay was not specifically advised by Senior Sergeant Wilson that Constable X would be attending Maylands Academy (Tab 4, page 9). Even though it appears Ms McDonald was interviewed by the IAU no statement was available to the Commissioner of Police disputing Ms McKay's claim.
6. In support of Ms McKay's claim that she understood Constable X was not at Maylands Academy during this week Ms McKay maintained that when she was advised that Constable X would be attending the course she told Ms McDonald that 'it is a pity (her husband) Kevin McDonald is not there this week (Joondalup) – maybe he could watch Constable X'.
7. Ms McKay understood that Constable X was under constant surveillance throughout this week from the time he left home until he went to bed at night and there was no documentary evidence suggesting that any advice to the contrary was given to Ms McKay. As Ms McKay assumed that Constable X would be observed making this call, it is therefore highly unlikely that Ms McKay would have made the calls to herself.
8. Telstra records put Ms McKay's mobile phone in the vicinity of Victoria Park/Maylands at 12.19 pm on this date but not in the exact location of the phone box from where the calls were made (Tab 3, page 8). Ms McKay maintains that a possible explanation for her being in the vicinity of Victoria Park at the time of the call to her mobile was because she was taking her daughter to a dancing rehearsal at Burswood that afternoon and she was required to be in attendance prior to this rehearsal commencing to prepare her daughter for the rehearsal and there was no dispute that Ms McKay's daughter attended Burswood that afternoon.
9. As Ms McKay was aware that her home and mobile telephones were being monitored at the time these calls were made, it does not make sense that she would make the calls to herself.
10. Ms McKay and her husband both gave consistent explanations as to why Ms McKay borrowed Ms Hobson's vehicle on this date (Tab 4), notwithstanding Ms Hobson's claim to the IAU that Ms McKay mentioned borrowing her car to avoid being seen by Constable X.
11. The calls that were made to Ms McKay on this date are consistent with a number of phone calls that Ms McKay received on her home phone number and mobile around this period and at least four of these calls were from the Cannington Police Station when Constable X was on duty (Allegations 35, 36, 39 and 40). Further, another silent phone call was made to Ms McKay on 21 August 2002 from Cannington Police Station which was not investigated (Tab 4, page 43). Ms McKay also received silent calls which did not originate from the Cannington Police Station and these calls could have been made by Constable X as he was not on duty at the times the calls were made.
12. Even though Ms McKay was inaccurate as to her whereabouts when she received this call on her mobile on this date (she claimed she was at Ms Hobson's house at the time of the call) I accept that Ms McKay was suffering from post traumatic stress disorder at this time and as a result could well have been easily confused about the precise times and places that events took place (see medical advice and attachments in Tab 4). Further, Senior Sergeant Wilson's Summary of Investigation refers to Ms McKay being emotionally unstable at this time.
13. Ms McKay consistently denied that she made these calls to herself.

**Allegation (6): Making telephone calls and misleading investigators about 18 September 2002 phone calls.**

*At 1120 hours on 18/9/02 TIU reported that someone had dialled Constable McKay's private telephone from a payphone in Kelmscott. Constable McKay was not at home.*

*At 1121 hours on 18/9/02 TIU reported there was a telephone call to Constable McKay's mobile telephone from a payphone in Kelmscott.*

The Commissioner of Police was satisfied that as Ms McKay was in the Kelmscott area when the calls were made and not elsewhere as claimed by her, he concluded that Ms McKay made the calls and misled investigators about them.

It is my view that even though Ms McKay incorrectly stated in her interview on 20 September 2002 that she received this call whilst at Carousel Shopping Centre, it does not automatically follow that Ms McKay made these calls and misled investigators about the calls. I have reached this conclusion based on the following:

1. Ms McKay had a legitimate reason for being in the Kelmscott area around the time the calls were made as both Ms McKay and her husband confirmed that they were refuelling Mr McKay and Ms Hobson's cars in Kelmscott before lunch time that day and Mr McKay provided fuel receipts in support of this claim (Tab 4).
2. Even though Ms McKay did not receive this call when she was at Carousel Shopping Centre as she initially claimed, Ms McKay visited Carousel Shopping Centre on 18 September 2002 as verified by Ms Hobson (Tab 36) and Ms McKay's notes confirm her visit to Carousel Shopping Centre on this date (Tab 4, page 23),
3. Ms McKay's notes show that she received a call whilst at Carousel Shopping Centre and Ms McKay does not recall initially telling the investigators that this was the call which eventually became the subject of this allegation (Tab 4, page 24).
4. Ms McKay stated that she was hazy about the times of the calls made on this date and that she did not have a good recollection of this date as she was suffering from post traumatic stress disorder at the time. Even though Ms McKay gave inaccurate information as to her whereabouts when she received the call on her mobile I accept that Ms McKay was suffering from post traumatic stress disorder at the time this call was made and that as a result she could well have been confused about the precise times and places of relevant events.
5. The Commissioner of Police recognised that Telstra evidence cannot specifically identify the exact location in Kelmscott where Ms McKay's mobile phone was located at the time the call was made (Tab C, page 5).
6. As Ms McKay was aware that her home and mobile telephones were being monitored at the time these calls were made, it does not make sense that she would make the calls to herself.
7. Constable X had been transferred to Armadale Police Station at the time this call was made from the Armadale/Kelmscott Health Centre and he therefore had the opportunity to make these calls.
8. The calls that were made to Ms McKay on this date are consistent with a number of phone calls that Ms McKay received on her home phone number and mobile around this period and at least four of these calls were from the Cannington Police Station when Constable X was on duty (Allegations 35, 36, 39 and 40). Further, another silent phone call was made to Ms McKay on 21 August 2002 from the Cannington Police Station which was not investigated (Tab 4, page 43). Ms McKay also received silent calls which did not originate from the Cannington Police Station and these calls could have been made by Constable X as he was not on duty at the times the calls were made.
9. Ms McKay consistently denied that she made these calls to herself.
10. This allegation was not put to Constable X therefore no specific denial was made by Constable X in relation to this allegation.

**Allegation (4): False allegation of indecent assault on the evening of 10 September 2002.**

*Between 2130 & 2145 on 10/9/02 at Cannington Police Station, it was alleged Constable X (who was off duty) approached Constable McKay in the corridor of the police station between the meal room and the female change room. She said he grabbed her by the throat, made a threatening statement to her and then indecently assaulted her by touching her private parts.*

The Commissioner of Police formed the view that this incident was fabricated by Ms McKay as he accepted the evidence of Constable X's partner that Constable X was home this evening, there was no record of Constable X entering Cannington Police Station, Ms McKay did not mention this incident until the following day and there was no evidence to support Ms McKay's claim that she was assaulted and no other staff on duty at Cannington Police Station that evening saw Constable X.

It is my view that it was not open for the Commissioner of Police to reach these conclusions as there was ample evidence that Ms McKay may have been assaulted by Constable X on this date. I have reached this conclusion based on the following:

1. Ms McKay discussed this incident with Ms McDonald the following day (11 September 2002) very soon after it occurred and Ms McKay stated that at the time she showed a mark on her neck to Ms McDonald which resulted from this incident. The Review Officer also confirmed that Ms McDonald 'says that McKay's neck looked different but cannot say why as there was bruising or redness. McKay rubbed her neck when they were talking' in relation to this incident (Tab 5, point 5.8).
2. Ms McKay attended her psychologist, Ms Martinovich, on the afternoon of 11 September 2002 and claimed that she was too traumatised by the assault to talk to IAU officers on this date (Tab 16, page 4).
3. Constable X may have returned to Cannington Police Station on the evening of this incident as IAU officers were not monitoring Constable X's movements at the time this incident was alleged to have occurred.
4. It was conceded by investigators that it was possible for Constable X to enter Cannington Police Station without being seen or detected.
5. On the same evening of the alleged assault, and after the assault was alleged to have taken place, Ms McKay emailed Inspector Hutchinson about resigning, which is consistent with Ms McKay having been subject to trauma that evening.
6. As Ms McKay believed that Constable X would have been under surveillance at this time and would have been seen entering Cannington Police Station she asked Inspector Hutchinson on the evening after the assault if IAU officers had caught Constable X in relation to this incident (Tab 4).
7. Constable X was not asked what time he went to bed on the night of the alleged assault.
8. The detailed description of the clothes Ms McKay claims Constable X was wearing on the evening of the assault was not put to Constable X.
9. Constable X's partner stated that Constable X sometimes returns to Cannington Police Station after hours.
10. Ms McKay gave a detailed response to the Commissioner of Police as to why her demeanour did not change whilst on duty after the alleged assault and she gave a comprehensive and in my view plausible explanation of her interactions with fellow officers after this incident (Tab 4). It is arguable that Ms McKay's behaviour subsequent to this incident was consistent with her being a private person and with Ms McKay's fragile emotional state at the time. Her response was also consistent with Ms McKay's response to previous alleged assaults. I also note that Ms McKay could well have been measured in her response to this incident as this incident was alleged to have occurred soon after Ms McKay claimed her

children were threatened during a call which was confirmed to have originated from Cannington Police Station (allegation 40) and after Ms McKay claimed to have received a death threat on 5 September 2002 (allegation 45).

11. Throughout the investigation Ms McKay maintained that this incident took place.

**Allegation (5): Fabrication of threatening letter and alleging letter found in locker on 9 September 2002.**

*Prior to 10/9/02 a typed threatening letter was delivered to Constable McKay's personal locker. The type of print indicated an electronic typewriter was used. The inference is that Constable X was the author of the letter.*

*On the same date someone allegedly removed three police-issue notebooks from Constable McKay's personal locker.*

*At about this time someone allegedly poured coffee over the contents of her personal locker.*

The letter reads as follows:

"you dumbe fucken piece of blonde shit
big mistake
huge mistake
do you think i am fucken stupied
bitch bitch bitch"

The Commissioner of Police stated that Ms McKay's preparation of the letter was intended to cause investigators to take action against Constable X and he rejected Ms McKay's claim that she was undertaking her own investigation into the letter.

It is my view that there was no evidence before the Commissioner of Police which categorically demonstrated that the original of the letter Ms McKay claimed to have found in her locker on 9 September 2002 was generated by Ms McKay and that this letter was generated by Ms McKay to cause investigators to take action against Constable X. I have reached this conclusion based on the following:

1. There is evidence that Ms McKay was undertaking her own investigation into the letter as this was confirmed in the IAU running sheet dated 10 September 2002 which refers to Ms McKay advising Senior Sergeant Wilson that she was conducting her own investigation into the letter and Ms McKay claimed that she advised Senior Sergeant Wilson that she was conducting her own investigation about the letter using a typewriter.
2. Senior Sergeant Wilson maintained that Ms McKay advised him that she was conducting her own investigation into the letter using a computer, yet despite a comprehensive search there was no evidence confirming that Ms McKay typed the original of this letter on a computer at Cannington Police Station.
3. Ms McKay's daughter confirmed that on 5 September 2002 her mother used a typewriter at Cannington Police Station to type part of an assignment for her. This could explain Ms McKay's response to the question asked of her during her interview dated 20 September 2002 (Tab 16) about when she last used the typewriter. Further, 5 September 2002 pre-dates the first entry on the tape removed from the typewriter at Cannington Police Station and there was no evidence about the whereabouts of the previous tape which was in the typewriter and what was on this tape to contradict this evidence.
4. There was no evidence confirming that the original of the letter Ms McKay claimed she found in her locker on 9 September 2002 was typed on the same typewriter which Ms McKay used to type out the letter whilst undertaking her investigation into the letter. Indeed, the letter could have been generated on a similar typewriter located at a number of other venues. The Review Officer assumed that the original of this letter was the one typed by Ms McKay as there was no other imprint on the ribbon of this typewriter at Cannington Police Station (Tab 5, page 9).
5. At some point there were two typewriters at Cannington Police Station, however one of them appears to have gone missing at some unspecified point prior to 12 September 2002 and this second typewriter may have been used to type the letter the subject of this allegation.
6. Constable X had the opportunity to visit Cannington Police Station prior to 9 September 2002 and may have done so (see interview of Constable X's partner, Tab 23).
7. Ms McKay promptly reported to Ms McDonald that she received this letter the day after finding the letter.
8. Ms McKay believed Constable X typed the letter as it contained the type of language he had previously used towards her.
9. The letter had similar spelling and like content to the letter Ms McKay claimed she received on 5 September 2002, the origin of which was never determined (allegation 45).
10. This letter was one of many anonymous letters Ms McKay claimed she received and the IAU investigators were unable to confirm the origin of any of these other letters and IAU investigators found no evidence that any of the other letters Ms McKay received were generated by Ms McKay, notwithstanding comprehensive searches of a number of computers (both work related and non-work related computers).
11. The two other allegations raised by Ms McKay at this time are consistent with Ms McKay's locker being broken into on this date. Ms McKay supplied photos of coffee stains over items contained in her locker as at 9 September 2002, which points to someone unlawfully accessing Ms McKay's locker and there appears to be no dispute that three police issue notebooks belonging to Ms McKay were removed from Ms McKay's locker on or about 9 September 2002.
12. The letters found by Ms McKay on 5 and 9 September 2002 were both found in police issue envelopes indicating that the letters were generated by someone within the police service.
13. IAU investigators were aware that an officer could access another officers' personal locker with ease at Cannington Police Station.
14. Ms McKay consistently maintained that she did not initiate this letter.

83 It is my view the Commissioner of Police did not give sufficient weight or consideration to a number of other relevant issues when reaching the conclusion that he had lost confidence in Ms McKay.

84 In making his decision about Ms McKay's actions in relation to the Allegations I find that there was no evidence that the Commissioner of Police took into account that Ms McKay had a different recollection to Senior Sergeant Wilson about two critical issues concerning allegations 3 and 5 nor was there any indication that he took steps to clarify these inconsistencies. Senior Sergeant Wilson refuted Ms McKay's claim that she was unaware that Constable X was at Maylands Academy in the first week of September 2002 and Senior Sergeant Wilson disputed that Ms McKay advised him that she was conducting an investigation into the letter she received on 9 September 2002 using a typewriter. In my view these were two significant matters which if Ms McKay's claims were verified, would have had a material impact on the conclusions reached by the

Commissioner of Police. If Ms McKay was not aware that Constable X was at Maylands Academy then it would not have made sense for the calls to have been made from Maylands and if there was confirmation that Ms McKay was investigating the letter using a typewriter this could have impacted on the Commissioner of Police's rejection of Ms McKay's claim that she was undertaking her own investigation into the letter. Given the critical nature of this disputed evidence the Commissioner of Police should have sought further information about these two issues prior to making any decision about these two allegations.

85 As two relevant emails which were critical to allegations 4 and 5 were not supplied to the Commissioner of Police prior to him making his decision about Ms McKay's future I find that the decision the Commissioner of Police made about these allegations was therefore compromised. Ms McKay sent an email about resigning to Inspector Hutchinson on 10 September 2002 soon after the alleged indecent assault took place on this date and Ms McKay sent an email to Senior Sergeant Wilson on or about 10 September 2002 in relation to the investigation she was conducting into the letter found in her locker on 10 September 2002. It is my view that as the content and timing of these emails could have influenced decisions made about allegations 4 and 5 (for example, Ms McKay insisted she told Senior Sergeant Wilson that she was conducting her investigation using a typewriter) they should have been reviewed by the Commissioner of Police prior to him reaching a concluded view about these two allegations.

86 There was no evidence that when the Commissioner of Police made his decision about the Allegations that he gave any or sufficient weight to the fact that Ms McKay made a number of complaints to various Police Officers and Police Departments about Constable X prior to lodging a formal complaint about Constable X in July 2002. In my view this omission is significant as the Commissioner of Police did not appear to take into account that Constable X's alleged behaviour in September 2002 was similar to the previous complaints made by Ms McKay against Constable X and these complaints were well known to the Police for some time. Ms McKay stated that on or about August 2001 she informed Sergeant Beet that she did not wish to work with Constable X (see evidence of this possibility in Sergeant Beet's statement, Tab 13, page 12 onwards). Ms McKay had a meeting with Senior Constable Jones from the Police's Health and Welfare Section on 28 March 2002 and was advised to deal with her complaints about Constable X through her Sergeant (Sergeant Horrocks) and at the time she was also advised to contact the Police's Equal Employment Opportunity ("EEO") unit or the "Blue Line". After this meeting Ms McKay rang the EEO unit on an anonymous basis seeking confidential advice and was advised to raise her concerns with her Officer in Charge. The IAU running sheet confirms that this call to the EEO unit was made by Ms McKay (Tab 18 - 25/7/02). In March 2002 Ms McKay contacted the Blue Line on an anonymous basis and was given a confirmation number of her complaint. Again, it appears that no action was taken in relation to her complaint. Ms McKay then spoke to Sergeant Horrocks, she stated that she identified Constable X as the perpetrator and made it clear to him that she was being sexually harassed by Constable X. Ms McKay stated that Sergeant Horrocks assured her that he would speak to his supervisor and that her complaints would be reviewed and he indicated that he would get back to Ms McKay (Tab 4). By this point approximately half of Ms McKay's allegations against Constable X had arisen (Tab 8, page 100). Further, the IAU criticised Sergeant Horrocks for not taking Ms McKay's complaints seriously and recommended that he be charged with neglect of duty over his failure to adequately supervise staff under his control (Tab 8, page 97 onwards and page 101 point 5). These complaints clearly indicate that Ms McKay's claims that she was being harassed by Constable X were not a recent invention as at July 2002 and add weight to the conclusion that Constable X may well have committed all of the allegations as alleged by Ms McKay.

87 In my view the Commissioner of Police did not give sufficient weight to the inappropriateness of interviewing Ms McKay on 20 September 2002 given Ms McKay's health problems and emotional state at the time this interview took place. I also conclude that he gave insufficient weight to the inappropriate way in which this interview was set up and structured, and he placed too much reliance on the inconsistencies in Ms McKay's evidence about the letter Ms McKay claimed she found on 9 September 2002. When Ms McKay was interviewed on 20 September 2002 the interview took place without Ms McKay treating psychologist from the Police Health and Welfare branch, Ms Martinovich, being present despite her recommending that Ms McKay not be interviewed in future without her being in attendance (Tab 4, attachment 13). As Ms McKay's interview on 20 September 2002 was poorly handled and structured, as acknowledged by the Commissioner of Police, I find that this compromised Ms McKay's right to a reasonable opportunity to respond to the Allegations against her. For example, confusion arose in relation to the calls on 4 September 2002 and 18 September 2002 due to the way in which questions were asked of Ms McKay about these calls (see Tab 16, page 42). It was also not made clear to Ms McKay until just prior to the interview that it was to be a criminal interview and Ms McKay stated that when she agreed to being interviewed she did not fully understand the ramifications of an interview of this nature (Tab 4, attachment 8).

88 As the Commissioner of Police did not have before him the statement made by Ms McDonald when he made his decision about the Allegations it is my view that this seriously compromised the decisions he made about Ms McKay's behaviour in relation to the Allegations (see Tab 8, page 41; Tab 5, point 5.8). The Commissioner of Police was made aware that Ms McKay discussed Constable X's behaviour a number of times with her friend Ms McDonald over a period of 15 to 18 months up to September 2002. However, no witness statements from Ms McDonald were presented to the Commissioner of Police despite them being available, nor did the Commissioner of Police ask to view these statements. Even though it could be argued that Ms McDonald would only be able to and did relate to the IAU (see Tab 18 running sheet) what Ms McKay told her about Constable X her evidence about the details of her discussions with Ms McKay may have shed additional light on the substance of the allegations against Constable X and Ms McDonald could have commented on Ms McKay's emotional state around the time the allegations were made, which in my view could have been relevant to allegations 4 and 5. Further, Ms McDonald was able to and did verify the physical injury Ms McKay claims to have received on 10 September 2002 (allegation 4).

89 In my view the Commissioner of Police erred when he formed the view that Constable X was a credible witness and therefore accepted his outright denials about the Allegations Ms McKay made against him. I am also concerned that the Commissioner of Police accepted Constable X's alibis about his whereabouts on relevant dates as some of his alibis were not corroborated by other witnesses. For example, Constable X's statement about his movements on the weekend of 8 September 2002 was inconsistent with information given by his partner (see allegations 43 and 44) and Constable X's statements about his movements at the Maylands Academy at lunch time in the first week of September 2002 was inconsistent with another police officer's statement (see allegation 3). I find that some of the statements made by Constable X lacked credibility and therefore bring his blanket denials about any untoward contact with Ms McKay into question. For example, Constable X claimed that he was unaware of the location of Ms McKay's locker yet Ms McKay's locker was located close to his locker and had Ms McKay's name written on it. Constable X also initially claimed that he had no contact with Ms McKay whilst stationed at Cannington Police Station, yet Ms McKay stated that even though Constable X had never been on night shift with her and nor had he been rostered on a shift with Ms McKay at any time at Cannington Police station their paths occasionally crossed due to Ms McKay starting work at 7.00 pm. Indeed, later in his interview Constable X conceded that there had been contact between Ms McKay and Constable X whilst they were both stationed at Cannington Police Station. Ms McKay disputes Constable X's assertion that Constable X did not attend any jobs in Cannington where Ms McKay had been or was attending with another officer and she gave by way of example a job that both Constable X and Ms McKay attended on 26 February 2002 and another

job she attended at Queens Park in April or May 2002 (Tab 4, page 8). It is my view that on a fair reading of the transcript of Constable X's interview on 12 September 2002 that parts of Constable X's evidence was unconvincing. Constable X initially denied that whilst at Cannington Police Station he had seen Ms McKay talking to her supervisor Senior Sergeant Gardiner and claimed that he could not have seen them together as he did not work the same shifts as Ms McKay. However, soon after making this claim, not only does Constable X agree that at times he was at Cannington Police Station at the same time as Ms McKay he confirmed that he had seen Ms McKay speaking to Senior Sergeant Gardiner (Tab 22, page 33). In my view Constable X was not forthcoming when asked about his movements on 16 August 2002. When asked if he went running he initially stated that he ran prior to commencing his shifts. After being asked if he jogged after his afternoon shift Constable X then conceded that he had done so once, and then he stated that he had done so once or twice (Tab 22, page 40). Constable X also denied that it would be easy to find someone's home phone number at the police station yet he was aware of a red book kept in the Sergeant's desk which held these phone numbers (Tab 22, page 55).

90 The Commissioner of Police does not appear to have given any weight to the likelihood that Constable X was aware that the IAU was investigating him in advance of his interview on 12 September 2002 and that he therefore had the opportunity to conceal his movements and actions during the month of September 2002 when the allegations took place (see IAU running sheet entry Tab 18 9/9/02).

91 I am concerned that the Commissioner of Police gave little if any weight to Ms McKay's fragile mental health at the time Ms McKay formally raised the allegations against Constable X and during the subsequent investigation into these allegations and the prospect that Ms McKay's health difficulties would have impacted on her ability to recall precise dates and times about the incidents concerning Constable X. The IAU running sheets throughout August 2002 refer to concerns about Ms McKay's safety and emotional stability and it was also the case that on 30 August 2002 Ms McKay reported that she received a call from Constable X (there was no dispute that this call was made from the Cannington Police Station and that Constable X was on duty at the time) and Ms McKay maintains that death threats were made by Constable X to Ms McKay's children during this call which would have not been helpful to Ms McKay's emotional stability at the time. It is within this context that the events of September 2002, on which the Commissioner of Police relied to form the view that he had lost confidence in Ms McKay occurred, should have been reviewed. At the time the investigations into the allegations took place Ms Martinovich was providing psychological counselling to Ms McKay and Ms Martinovich confirmed that she advised Senior Sergeant Wilson of the IAU that Ms McKay was not to be interviewed or attend meetings without her being present (Tab 4, attachment 13). Further, Ms McKay's fragile emotional state throughout this period and the impact of her health on her mental state was confirmed by a number of medical professionals. Ms McKay's GP, who had been treating Ms McKay since January 1999 stated that since the alleged assaults on Ms McKay and during the ongoing investigation she had worked with a psychologist and psychiatrist to treat Ms McKay 'for a significant post traumatic stress disorder' (Tab 4, attachment 14). Ms McKay's consultant psychiatrist stated that since treating Ms McKay after October 2002, she had 'not heard or seen anything that would make one doubt the credibility of the clinical issues which she has presented' (Tab 4, attachment 15). Ms McKay's clinical psychologist concurred with the view of Ms McKay's consultant psychiatrist that Ms McKay was suffering from a post traumatic stress disorder and in a report to the Commissioner of Police dated 27 August 2003 Ms Milnes stated the following:

> "… that Ms McKay's illness was 'due to prolonged harassment by a male fellow worker and the consequent trauma of not being believed by those to whom she reported it' … 'I have no reason to doubt her accounts as she is cohesive, credible and has integrity'…
>
> "There is a period of time surrounding the reporting of the incidents in which Jenny was under extreme internal pressure. She said her life had been threatened by the man who had harassed her. At times she said they were verbal threats and at one stage she said he removed her gun and threatened her with it. There is no-one who can attest to those threats or to that internal conflict. **The reason that Jenny is hazy on dates and times is because she was suffering from Post Traumatic Stress.** The trauma started on a night in June 2000 when the harassment began. Jenny said her fellow police officer got to her outside work and yelled at her saying, 'When you work with me you don't ask anyone else any questions, only me!"
>
> (Tab 4, attachment 8 pages 1-2).

92 On the basis of the above findings and conclusions it is my view that in all of the circumstances the decision of the Commissioner of Police to lose confidence in Ms McKay in relation to the Allegations and to take removal action against Ms McKay was harsh, oppressive and unfair. I would therefore uphold Ms McKay's appeal and order that Ms McKay be re-instated to her previous position with no loss of continuity of service or entitlements.

**CHIEF COMMISSIONER A R BEECH**: Accordingly, by majority decision, the appeal is dismissed.

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**2005 WAIRC 02150**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

| | |
|---|---|
| **PARTIES** | JENNIFER LORRAINE MCKAY |
| | **APPELLANT** |
| | **-v-** |
| | THE COMMISSIONER OF POLICE |
| | **RESPONDENT** |
| **CORAM** | CHIEF COMMISSIONER A R BEECH<br>COMMISSIONER J H SMITH<br>COMMISSIONER J L HARRISON |
| **DATE** | TUESDAY, 26 JULY 2005 |
| **FILE NO/S** | APPL 452 OF 2004 |
| **CITATION NO.** | 2005 WAIRC 02150 |

| | |
|---|---|
| **Result** | Appeal dismissed |
| **Representation** | |
| **Appellant** | Mr D. Moen (of counsel) |
| **Respondent** | Mr R. Andretich (of counsel) |

*Order*

HAVING HEARD Mr D. Moen (of counsel) on behalf of the appellant 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 01939**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

| | |
|---|---|
| **PARTIES** | DON PATRICK AARELA |
| | **APPLICANT** |
| | **-v-** |
| | PIPE SUPPORTS AUSTRALIA |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER S M MAYMAN |
| **DATE** | THURSDAY, 30 JUNE 2005 |
| **FILE NO.** | APPL 292 OF 2005 |
| **CITATION NO.** | 2005 WAIRC 01939 |

| | |
|---|---|
| **CatchWords** | Industrial Law (WA) – Termination of employment – Harsh, oppressive and unfair dismissal – principles applied –lack of procedural fairness – applicant harshly oppressively and unfairly dismissed – reinstatement impracticable – compensation ordered – *Industrial Relations Act* 1979 (WA) section 29(1)(b)(i) |
| **Result** | Application alleging unfair dismissal upheld and order for compensation in lieu of reinstatement |
| **Representation** | |
| **Applicant** | Mr D Aarela (in person) |
| **Respondent** | Mr S O'Hehir (as agent) |

*Reasons for Decision*

1 This is an application by Don Patrick Aarela pursuant to section 29(1)(b)(i) of the *Industrial Relations Act* 1979 ("the Act"). Mr Aarela claims he was harshly, oppressively and unfairly dismissed by Pipe Supports Australia Pty Ltd ("the employer"). Mr Aarela seeks an order for loss of remuneration in the unfair dismissal claim namely, a sum equivalent to four weeks' pay at $550.00 (gross) per week, a total of $2,200.00 (gross). The employer opposes the claim.

**Background**

2 Mr Aarela commenced work with the employer at the beginning of October 2004 as a general stores person in a warehouse, employed to undertake delivery driving where necessary. Mr Aarela was employed on $550.00 (gross) per week by the employer.

3 A relevant fact that is not in dispute is that Mr Aarela was approached by the employer on 15 February 2005 and agreed to undertake welding duties for a short period of time, following the resignation of the welder.

4 Some 3 to 4 weeks later, on 9 March 2005, Mr Aarela advised the employer he was no longer willing to undertake welding duties, whereupon he was terminated. Furthermore, Mr Aarela was advised the termination would be effective on the expiry of one week's notice. Mr Aarela continued to report to work for the duration of the notice period and received his final pay cheque on 15 March 2005.

**Applicant's evidence**

5 In evidence Mr Aarela saw the job advertised through an employment agent. As part of the pre-employment process Mr Aarela and Mr Craighill, on behalf of the employer, walked through the factory and the discussion which took place at this point between the two becomes relevant. On the evidence of Mr Aarela, when he accepted the job he did so on the understanding that he would not be performing welding duties. There was a discussion about welding at the time of the walk-through between Mr Craighill and Mr Aarela. What is critical is that the evidence appears to differ between the two as to the understanding reached from that discussion. Mr Aarela understood the discussion to exclude the possibility of him welding and he, on that basis, agreed to accept the position

6 Mr Aarela led evidence that from time to time following his employment in October he volunteered to assist the welder, given his metal trades background. These were stopgap measures and were undertaken to help Trevor (the welder), and were not at the direction of the employer.

7 Mr Aarela led evidence that he had a number of concerns regarding safety issues with respect to welding. He asserted that there was little personal protective equipment provided for the welding process and in undertaking welding duties he wore tracksuit pants and a raincoat. Mr Aarela did agree in cross examination that a face shield and gloves were provided. The discussion regarding safety went on to the issue of ventilation. Rather than extraction fans in the employer's premises there

were two holes in the roof and some pedestal fans. Mr Aarela, in evidence, expressed concern regarding the pedestal fans, given his own training had taught him that such fans do nothing other than push poisonous fumes around the workplace.

8 Mr Aarela led a document in evidence outlining specific concerns relating to his experience with welding at the employer's premises:

> "I was not provided with the correct personal protective equipment, I was only wearing track pants and short sleeves to work. There was no jacket or apron provided which left me with small burns all over my arms and legs. The workshop also has very poor ventilation and I was left breathing welding fumes, including those produced from galvanised iron. These gasses are extremely poisonous." (*Exhibit 2)*

9 It is not denied that the duties changed and Mr Aarela agreed to undertake welding when the permanent welder resigned. The understanding on the part of Mr Aarela was that this was a temporary arrangement. He thought at the time perhaps "one to two weeks". It had in fact been more than three weeks and, the safety issues, together with the non-tradesperson's rates of pay for the work had become uppermost in his mind.

10 On the day he was terminated Mr Aarela approached Mr Craighill and indicated that he did not wish to undertake any further welding duties. Whereupon Mr Craighill immediately terminated his employment.

> "Within seconds of the words leaving my mouth he (Mr Craighill) replied 'you're no good to me then, your last day will be next Wednesday' and he turned and walked away."
>
> (*Exhibit 2*)

11 Mr Aarela led in evidence that it appeared at the time he was terminated Mr Craighill was not willing to engage in a discussion. Mr Aarela based this view given the employer, at the time he terminated Mr Aarela, was unzipping his clothing and turning to walk towards to restrooms. Mr Aarela asserts in evidence that the employer was difficult to engage on matters:

> "I had the impression that I would get into trouble if I caused too many problems, which proved to be true seeing as the second I said 'no' to one task (this was the first time I had refused any task, even though I considered some of it to be dangerous) I was fired without any warning, written or verbal and without discussion." (*Exhibit 2*)

12 Mr Aarela indicated that since his employment had been terminated he had applied for jobs both through Centrelink and through newspaper advertisements. Up to four jobs each week had been formally applied for, many of which went unanswered. Centrelink had provided a payment effective as of 16 March 2005, of $350.00 per fortnight.

13 Furthermore, Mr Aarela advised that together with his final cheque the employer had paid out an entitlement equivalent to four days' annual leave.

14 Mr Aarela submitted that the termination by the employer was unfair because:

> "…I wasn't given any warning whatsoever, verbal, written. I was given no opportunity to explain. I was just instantly dismissed and that's why I believe the claim is harsh and unfair." *(Extract from transcript, page 3)*

**Respondent's submissions and evidence**

15 The employer submits that Mr Aarela was employed as a warehouse employee and it was intended that such a position would undertake general store work, loading and unloading of stock as well as delivery driving when necessary. As part of the employer's pre-employment interview, Mr Peter Craighill, Manager, accompanied Mr Aarela on a tour of the workshop. On the evidence of Mr Craighill, one of the key factors that led him to offer employment to Mr Aarela was that he could handle the welding because of his metal trade background.

16 Following Mr Aarela's employment, the employer submitted he was observed occasionally assisting with welding even though he was not employed in that area. In February 2005 the employer approached Mr Aarela to assist with welding duties, given the permanent welder had resigned. It is the evidence of both parties that was agreed and further, it was for a short period while the employer advertised for a new welder.

17 Mr Craighill gave evidence that on the day Mr Aarela was terminated Mr Craighill was approached by Mr Aarela who indicated he was not willing to weld anymore whereupon Mr Craighill said to him:

> "Well, if you're not going to weld you're not going to be much help to me," and he, Mr Aarela said "That's right" and Mr Craighill said "Well, unfortunately you've got a week's notice." (*Extract transcript, page 17*)

18 Mr Craighill submitted in evidence that at no stage did Mr Aarela provide any reason as to why he did not wish to weld nor had he raised any safety concerns that day, or on any day leading up to this date. It is also Mr Craighill's evidence that no safety concerns were raised following the advice of termination and before the termination took effect on 15 March 2005.

19 Mr Craighill explained that the protective measures at the employer's premises, for the purposes of welding, were welding masks, gloves and apron.

20 The employer submitted that some three weeks after Mr Aarela agreed to undertake the welding duties, without giving any reason, he refused to perform duties which were within the scope of his knowledge, skills and abilities.

21 The employer submits he was entitled to terminate Mr Aarela's employment on the grounds that he had refused to comply with a lawful and reasonable order and appeared unlikely to carry out this lawful and reasonable order in the foreseeable future.

22 In concluding, the agent for the employer submitted that Mr Aarela was terminated because of his insubordinate behaviour in that he failed to follow a lawful instruction. Further his employment was ended following a rational conversation. Mr Aarela, in the employer's view, had the opportunity to raise issues that were of concern and failed to do so and that in these circumstances there was no abuse of the right of an employer to terminate an employee. In all respects the termination was fair.

**Conclusions and findings**

23 The question to be determined by the Commission is whether the legal right of the employer to dismiss Mr Aarela has been exercised so harshly or oppressively against him, so as to amount to an abuse of that right: *Ronald David Miles, Norma Shirley Miles and Lee Gavin Miles v Rose and Crown Hiring Service t/a The Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385 at 386.

24 The onus is on Mr Aarela to establish that the dismissal was, in all the circumstances, unfair. It is the Commission's view that Mr Aarela has discharged the onus is this regard.

25 In the matter before the Commission it is to be determined whether the right of the employer to terminate the employment has been exercised so harshly, oppressively or unfairly against Mr Aarela as to amount to an abuse of that right. Further, where there is a valid reason within the meaning of the Act for an employer effecting a dismissal it may still be found to be unfair in circumstances where the procedure of the dismissal is unfair. However, terminating an employment contract in a manner

which is procedurally irregular may not of itself mean the dismissal is unfair as per the principles outlined in *Shire of Esperance v Mouritz* (1991) 71 WAIG 891. In that decision the Industrial Appeal Court considered, and in particular Kennedy J, observed that unfair procedures adopted by an employer when dismissing an employee is but one element that needs to be considered when determining whether a dismissal was harsh or unjust.

26 The Commission has listened carefully to both Mr Craighill on the part of the employer and Mr Aarela and observed each of them closely whilst they were giving evidence. It is my view that Mr Aarela gave evidence honestly and to the best of his recollection. In the main his evidence was not broken down. He did concede points and did so readily, contrary to the evidence of Mr Craighill. Critical to the evidence given by Mr Aarela was the document accompanying the s29(1)(b)(i) application which was written soon after his termination and was largely uncontested. Mr Aarela was, in the Commission's view, honest and convincing in the evidence given.

27 With respect to Mr Craighill, his evidence was also given in a clear manner, however, where the evidence given on behalf of Mr Aarela and Mr Craighill conflicts I prefer the evidence given by Mr Aarela as he remained unshaken. Mr Craighill, on the contrary, in part, contradicted his own evidence, particularly where it came to the manner of the dismissal.

28 The Commission finds that Mr Aarela was treated callously and harshly when the employer terminated his employment on 9 March 2005 effective with a week's notice. The Commission finds that Mr Aarela was given no warning prior to his dismissal regarding his alleged failure to carry out a lawful and reasonable instruction.

29 On the evidence of Mr Aarela I find that he had genuine concerns regarding the issue of safety. There is no doubt that in the circumstances of undertaking work an employee has a statutory duty to exercise "reasonable care". Courts have held that this is an objective rather than a subjective test. The Full Court of the Industrial Commission of New South Wales in *WorkCover Authority of New South Wales (Inspector Gordon) v Gregory Ronald Wallace* [1994] NSWIRC 163 at 7 explained that the duty of an employee to take reasonable care is mandatory and imposes a positive duty. The Commission finds that it was not unlawful for Mr Aarela to refuse to undertake welding duties however, Mr Aarela should have then made every attempt to discuss the issue of safety with the employer. Where the risk of injury at the workplace is, in the employee's mind, one that may impose injury that is serious or imminent then, there is a statutory provision which allows for the employee to cease such work.

30 Further, the Commission finds that at no stage, was Mr Aarela given an opportunity to respond to any issue relating to his own conduct. The manner in which the dismissal was executed, was in all of the circumstances, harsh and unfair.

31 On the basis of the submissions and the evidence, the Commission finds that Mr Aarela was unfairly dismissed by the employer.

**Remedy**

32 Mr Aarela is not seeking reinstatement and the Commission is satisfied on the evidence, that the working relationship between Mr Aarela and the employer has broken down such that an order for re-employment would in this case be impracticable. Additionally, and relevant to my consideration is that Mr Aarela seeks to return to Adelaide to be with his parents, given the detrimental effect the dismissal has had on Mr Aarela's wellbeing. The Commission turns, therefore, to the question of compensation and in so doing applies the principles as set out in *Ramsay Bogunovich v Bayside Western Australia Pty Ltd* (1998) 78 WAIG 3635.

33 On the evidence before the Commission I am satisfied that Mr Aarela took reasonable steps to mitigate his loss, evidence which was unchallenged by the employer. Mr Aarela has applied for at least four jobs per week since his termination, on some occasions through Centrelink and on other occasions through formally advertised positions.

34 Further, the Commission is satisfied that Mr Aarela would have continued to work with the employer at least until the date of hearing and I find that Mr Aarela was without income, with the exception of unemployment benefits ($350.00 per fortnight), from 15 March 2005 through to 15 June 2005, some 13 weeks. The Commission is required, as a matter of law when assessing compensation to deduct any payments made for annual leave by the employer to Mr Aarela, as per *Dellys v Elderslie Finance Corporation Ltd* (2002) 82 WAIG 1193 at 39. Taking into account the four days' annual leave payment made to Mr Aarela on his termination, the Commission determines that he has suffered a loss arising from his dismissal of $4,475.00. Accordingly, this amount in compensation is awarded to Mr Aarela, less any taxation payable.

It is apparent from Mr Aarela's submissions and when regard is had to the monies lost as a result of his dismissal, that Mr Aarela is entitled to the amount of compensation as specified by the Commission in this matter. The amount awarded is in excess of that sought by Mr Aarela, however, in accordance with the provisions of s26 of the Act the Commission is not restricted to the claim as sought.

35 A Minute of Proposed Order will now issue.

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**2005 WAIRC 02084**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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| **PARTIES** | DON PATRICK AARELA |
| | **APPLICANT** |
| | **-v-** |
| | PIPE SUPPORTS AUSTRALIA |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER S M MAYMAN |
| **DATE** | TUESDAY, 19 JULY 2005 |
| **FILE NO** | APPL 292 OF 2005 |
| **CITATION NO.** | 2005 WAIRC 02084 |

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| **Result** | Application alleging unfair dismissal upheld and compensation ordered |
| **Representation** | |
| **Applicant** | Mr D Aarela (in person) |
| **Respondent** | Mr S O'Hehir (as agent) |

*Order*

HAVING heard Mr D Aarela on his own behalf and Mr S O'Hehir as agent on behalf of the respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act 1979* hereby:

(1) DECLARES that the dismissal of Don Patrick Aarela by the Respondent was unfair and that reinstatement is impracticable.

(2) ORDERS that the Respondent shall pay to Don Patrick Aarela the amount of $4,475.00 as compensation for his loss within seven (7) days of the date of this Order.

(Sgd.) S M MAYMAN,
[L.S.] Commissioner.

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**2005 WAIRC 01940**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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| **PARTIES** | JEFF VAN ALTENA |
| | **APPLICANT** |
| | **-v-** |
| | AIRROAD DISTRIBUTION PTY LTD |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER S M MAYMAN |
| **DATE** | THURSDAY, 30 JUNE 2005 |
| **FILE NO.** | APPL 400 OF 2005 |
| **CITATION NO.** | 2005 WAIRC 01940 |

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| **CatchWords** | Industrial Law (WA) – Termination of employment – Harsh, oppressive and unfair dismissal – Application referred outside of 28 day time limit – Relevant principles to be applied – Commission satisfied applying principles that discretion should be exercised – Acceptance of referral out of time granted – *Industrial Relations Act 1979 (*WA) – s29(1)(b)(i), s29(3) |
| **Result** | Application to accept applicant's claim which was lodged out of time, granted |
| **Representation** | |
| **Applicant** | Mr J Van Altena (on his own behalf) |
| **Respondent** | Ms L Nickels (of counsel) |

*Reasons for Decision*

1 This is an application under s29(3) of the *Industrial Relations Act 1979* ("the Act") for an extension of time for filing an application under s29(1)(b)(i) by Mr Jeff Van Altena ("the applicant"). He claims that he has been harshly, oppressively and unfairly dismissed by Airroad Distribution Pty Ltd ("the respondent") on 11 March 2005.

2 The application was filed in the Western Australian Industrial Relations Commission on 14 April 2005, some six days outside of the 28 day time limit as prescribed in s29(2) of the Act. The Commission, in considering the application, is to have regard to the principles as laid out in *Malik v Paul Albert, Director General, Department of Education of Western Australia* (2004) 84 WAIG 683, in particular Heenan J, with whom Steytler J agreed, held at [74] that the principles enunciated by Marshall J in *Brodie Hanns v MTV Publishing Ltd* (1995) 67 IR 298, ought to be applied when the Commission is considering whether or not to accept a referral of a claim for unfair dismissal out of time under s29(3) of the Act. Those principles are as follows:

> "1. Special circumstances are not necessary but the Court must be positively satisfied that the prescribed period should be extended. The prima facie position is that the time limit should be complied with unless there is an acceptable explanation of the delay which makes it equitable to so extend.
>
> 2. Action taken by the applicant to contest the termination, other than applying under the Act, will be relevant. It will show that the decision to terminate is actively contested. It may favour the granting of an extension of time.
>
> 3. Prejudice to the respondent including prejudice caused by the delay will go against the granting of an extension of time.
>
> 4. The mere absence of prejudice to the respondent is an insufficient basis to grant an extension of time.
>
> 5. The merits of the substantive application may be taken into account in determining whether to grant an extension of time.
>
> 6. Consideration of fairness between the applicant and other persons in a like position are relevant to the exercise of the Courts' discretion."

3 In applying these guidelines the Commission also takes into account that the Act provides a 28 day time frame to lodge an application and whether the Commission's discretion ought be exercised in relation to a matter of this nature is confirmed in the negative unless it would be unfair not to do so.

**Background**

4 It was not in dispute that the applicant commenced employment with the respondent as a transport worker. The employment included the sorting of freight, deliveries, unpacking and loading of freight and associated administrative paperwork to confirm freight movements. The applicant commenced employment with the respondent on 19 December 2003 and was terminated on 11 March 2005, effective immediately.

**Applicant's evidence**

5 The applicant gave evidence that his application was late in being filed because despite repeated requests to both Airroad Perth and Airroad Sydney, the respondent refused to advise the applicant of his final payment. Accordingly, some 28 days lapsed between the first request being submitted and the cheque arriving in Perth. The applicant collected the cheque from the Perth

Depot, banked it the same day and forwarded the application by way of registered post, some 28 days after termination. During that time several phone calls were made to the Perth Depot and the queries were forwarded to Airroad Sydney's head office, who was also unable to advise what the final payment would be.

6 Turning to the reasons for the applicant's dismissal, he submitted in evidence he disputed failing to follow up a customer complaint. It was the view of the applicant that he had undertaken the follow up with customer in the terms provided by Airroad and in accordance with company policy.

7 In cross-examination the applicant indicated that the forwarding of his application on 8 April 2005, had been undertaken by way of express, certified registered post and that prior to submitting the application he had spoken with the Department of Productivity and Labour Relations ("DOPLAR") on several occasions. Further, it was on the basis of advice received from DOPLAR that the applicant was to wait for the cheque to arrive from the employer and forward the application on. The conversation with DOPLAR took place two to three days prior to the expiry of the 28 day time limit.

8 In cross-examination the applicant had confirmed that he had approached the respondent to have the signage removed from his truck in a hurry so other work could be undertaken, which appears in the respondent's view, to be inconsistent with an applicant seeking reinstatement in his application and seeking to challenge the decision made by the respondent to terminate employment.

**Respondent's evidence**

9 It is the respondent's submission that following the applicant's discussions with DOPLAR even though aware of the 28 day time limit, he was awaiting details of final payments to come through before making the application to the Commission. Furthermore, the delay related to a payment issue and not an alleged unfair dismissal.

10 The respondent submits that there has been no acceptable explanation as to why the time limit was not complied with.

11 In addressing the issue of prejudice that the respondent would suffer in the event the applicant is reinstated, economic factors have to be taken into consideration, such as replacing the tail lift and signage on the vehicle at the respondent's cost. In addition, the respondent would suffer the normal disadvantage of dealing with an unfair claim and the time and expense that might involve.

12 With respect to the merits of the substantive application the respondent submits that the Commission in this matter has no jurisdiction, given the applicant was an independent contractor and not an employee. It is admitted in evidence that the applicant provided his own truck, paid for his own fuel, although he did receive from the respondent a bonus to cover the increased cost of fuel. Further and relevant to the question of whether he was a contractor is that he had no set finishing time although the applicant's starting time was set by the respondent to accommodate the loading of freight. Payments received were inclusive of GST, no tax was deducted and no superannuation payments were made. Further submissions were led that the applicant was able to provide a substitute driver should he wish to take leave or otherwise not provide services to the respondent. His rate of pay was calculated according to the kilos of freight that he delivered and at no time did the applicant receive any paid leave.

13 Further, the respondent submits that there was a valid reason for the termination of employment which related to customer complaints regarding the alleged rude and abusive behaviour of the applicant; firstly, in November 2004, again in December 2004 and subsequently in February 2005.

**Conclusion**

14 Having considered all of the evidence, I am of the view I should exercise my discretion to extend time to file an application for unfair dismissal. It is the Commission's view that the applicant has established that the discretion ought be exercised in his favour. Having said that the Commission notes the issue of jurisdiction raised by the employer, however, determines that there is insufficient evidence before it and until such time as a determination has been made with respect to this matter the Commission is unable to hear further the question in relation to jurisdiction.

15 Further, it is plain that the applicant, on the basis of his understanding with respect to finalising the claim before it was submitted to the Commission, was held up by the employer in receiving his final pay cheque. The Commission so finds.

16 The Commission finds, contrary to the evidence, that the applicant forwarded his application by way of registered post not express post and did so from a post office in the hills, on the 28th day following his termination.

17 The Commission has had regard for the respondent's submissions with respect to prejudice.

18 The principles that have been developed in matters such as this suggest that the merits of the applicant's claim may or may not be relevant, Steytler J at [25] in *Malik v Paul Albert, Director General, Department of Education of Western Australia* (op cit) observed:

> "A Commissioner is empowered to accept a late referral if it would be 'unfair' not to do so and, while an assessment of the merits 'in a fairly rough and ready way' (see *Jakamarra v Krakouer* (1998) 195 CLR 516 at [9]) will often be an important consideration, there is nothing in the words of s29(3) which imports any obligation, on the part of an applicant, to establish any degree of merit (and it should not be overlooked in this regard, that the Commission is given broad powers to dismiss a matter summarily under s27(1)(a) of the Act). It is, of course, difficult to imagine that it would ever be unfair to an applicant to deny him or her the right to lodge a referral out of time where it was positively shown that the applicant had no prospect of success."

19 The Commission in matters such as this is required to assess the merits of the applicant's substantive application in a rough and ready way. The Commission has done this. In matters such as these I am not required to determine whether the applicant has established any degree of merit.

20 Considering the issue of fairness between the applicant and other persons in a like position and having regard to what is before the Commission, in these proceedings I am prepared, on this occasion to exercise my discretion to extend the time for the filing of the application. I conclude that the applicant's referral ought be accepted out of time.

21 Accordingly, a declaration will now issue granting the extension of time.

**2005 WAIRC 02169**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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| **PARTIES** | JEFF VAN ALTENA |
| | **APPLICANT** |
| | **-v-** |
| | AIRROAD DISTRIBUTION PTY LTD |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER S M MAYMAN |
| **DATE** | WEDNESDAY, 27 JULY 2005 |
| **FILE NO/S** | APPL 400 OF 2005 |
| **CITATION NO.** | 2005 WAIRC 02169 |

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| **Result** | Application to extend time under the Industrial Relations Act 1979, granted |
| **Representation** | |
| **Applicant** | Mr J Van Altena (on his own behalf) |
| **Respondent** | Ms J Nickels (of counsel) |

*Order*

HAVING heard Mr J Van Altena on his own behalf and Ms J Nickels (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* hereby:

DECLARES that Application 400 of 2005 be accepted out of time in accordance with the provisions of s29(3) of the Act.

[L.S.] (Sgd.) S M MAYMAN, Commissioner.

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**2005 WAIRC 01992**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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| **PARTIES** | PAUL CHARLES BARRON |
| | **APPLICANT** |
| | **-v-** |
| | WORSLEY ALUMINA PTY LTD |
| | **RESPONDENT** |
| **CORAM** | SENIOR COMMISSIONER J F GREGOR |
| **DATE** | THURSDAY, 7th JULY 2005 |
| **FILE NO.** | APPL 1249 OF 2004 |
| **CITATION NO.** | 2005 WAIRC 01992 |

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| **CatchWords** | **Termination of employment-Unfair dismissal-Jurisdiction-Principles applied-*Industrial Relations Act*, 1979..** |
| **Result** | Dismissed |
| **Representation** | |
| **Applicant** | Mr P.C. Barron appeared in person |
| **Respondent** | Ms M. Cash, of Counsel appeared on behalf of the Respondent |

*Decision*

*(Ex Tempore as edited by Senior Commissioner Gregor)*

1 This is an application by Paul Charles Barron (hereinafter referred to as "the Applicant") pursuant to section 29 of the *Industrial Relations Act* 1979 (hereinafter referred to as "*the Act*"). There has been a previous proceeding as to whether jurisdiction arises. The Commission has made some observations to the parties which resulted in the final decision relating to jurisdiction being held over pending these proceedings.

2 The original application seeks orders pursuant to s23A of *the Act* on the basis that the Applicant says he was subject to a harsh, oppressive or unfair dismissal. He now does not seek reinstatement, which is a primary remedy provided by s23A of *the Act*. Instead, as I understand it, he seeks compensation.

3 The disposition of this case turns around the employment history. The chronology runs something like as follows: between February to October 2002 the Applicant was employed via a labour hire company in the combination of a 2 month and a 6 months contract (Exhibits A and B) and from October 2002 to 31st of January 2003 he was employed upon what is described as a temporary fixed term contract directly with Worsley Alumina Pty Ltd (hereinafter referred to as "the Respondent") (Exhibit D). The temporary contract was offered in the classification of temporary refinery process operator. The contractual period was weekly and the duration of the employment was expected to be for the period up to the 27th of June 2003. The contract carries as a proviso that it may be terminated any time prior to its term should the workload so determine by giving a week's notice, hence it has the flavour of temporary nature; then between 10th of February 2003 to the 27th of June 2003 there is a formal extension of that contract, but with a gap, and there is a continuation of the employment.

4 During this last period the Applicant applied for and was successful in obtaining a place in the traineeship programme about which I will say some more later. The offer of the traineeship is evidenced in Exhibit C. The traineeship was for a period not

exceeding 12 months. There is another document before the Commission (Exhibit D) which mentions a term of a traineeship being 24 months. That, though, is a document produced by the Department of Education and Training (hereinafter referred to as "TAFE"). The direct contractual relationship in terms of employment is with the Respondent as evidenced in Exhibit C.

5 The recipient of a traineeship, in this case the Applicant, was required to attend TAFE in accordance with the training scheme and which is partially evidenced in Exhibit D. The arrangements between the parties provided for a base rate of pay with disabilities for shift allowance, an entitlement to 5 weeks leave, a notation that the trainee would be based at the Worsley site, and that there would be a probationary period of 3 months.

6 The next significant event occurred on the 21st of July which 2003. The employment continued until the traineeship contract was signed on the 11th of August 2003. In June 2004 the Applicant was advised that permanent work would not be offered to him at the completion of the traineeship. The evidence indicates that a short term contract of 2 weeks was offered for the period 6th of August to the 26th of August. A further offer was made towards the end of that arrangement. The Applicant says in the final few days there was an offer of a further 3 months work as a temporary, but he had already found alternative employment and decided not to take that work.

7 The evidence seems to indicate that the last day worked was the 27th of August 2004. That was in accordance with the arrangement for an extended term which was made earlier in that month, around about the 6th, that the Applicant would have a temporary contract after being told that he would not be permanently engaged after an assessment was made of the persons who would be retained as permanent employee.

8 What the Applicant says is that he applied for the traineeship on the basis that this was a means to obtain permanent work with the Respondent and that he had been told by Mr Hahn that successful completion of the traineeship would lead to permanent work. That is his position. Mr Hahn does not disagree that a successful completion of the traineeship would not lead to permanent work, but he says there would only be permanent work if there were positions available at the time. In this case, there were nine trainees and only seven positions. Therefore the Respondent went into a process of selection of who those seven would be. I will deal with that process later. First I will deal with the contractual side of the relationship.

9 The Applicant says he was informed in June 2004 that he would not be gaining permanent employment as he was rated second-last in a group of nine. As I said there were only seven positions available, and he questioned this assessment. He raised the issue with Mr Hahn on two occasions and they debated it. On one of those occasions, probably the second one, Mr Hahn said, "Why don't you go and see HR and talk to them about that?", and the Applicant did so.

10 It is not entirely clear from the evidence what was said to the Applicant by HR, but he says that the assessment sheet showed he was below average in a range of competencies. That is his allegation, and he says, if that was the case, that was unfair, and if it is an inaccurate assessment it could lead to his termination, or at least lead to him not being appointed. That too was unfair because his own experiences had been that he had been successful in the work, had been competent, had trained people and his skills had been used by the Respondent during the period. He could not reconcile his own impression of how well he was going with how the Respondent assessed him in the end. This led to his concern about the fairness or otherwise of the processes.

11 In response the Respondent say this: there were a series of temporary engagements, the first two were not even with it they were with another employer. There was a gap of a couple of weeks between getting these contracts going, but the important thing is those gaps did not lead to a cessation of the relationship. The relationship continued and they say as a matter of law these contracts were brought to an end and new contracts were entered into back-dated, as it were. There is nothing in this process which changes the nature of those contracts, that is, that they were individual fixed term contracts, by the fact that they were continuous.

12 The implication is the Respondent could have said, "Well, go away for 2 weeks and come back and we will engage you again.", but that did not happen.

13 Along came the traineeships offers; the Respondent standards for appointment to a traineeship are high; that they do not offer the traineeships if they do not think the person is going to make the grade I think is a fair assessment of the evidence of Mr Hahn. Even if a traineeship is offered, there is no guarantee that a job will be result at the end. What would be gained at the end is a Certificate 3 from TAFE which the Applicant, or whoever gets it, could carry with them anywhere. So that is a positive out of the trainee scheme for anybody doing it regardless of whether they get a job with the Respondent or not.

14 The Respondent says through the evidence of Mr Hahn that the Applicant was told about this, and, what is more, he was told in writing. He was eventually invited, in accordance with those arrangements in April 2004, to apply for a permanent appointment, as was everybody who had been allocated a traineeship, and he did make an application. They then made their assessments about what appointments they could make. Mr Hahn was sure that he could absorb four. He made a budget request for another three positions. He was confident that he would get those, so therefore he set up a selection process to make a choice between the nine people as to who would get one of the seven positions. His evidence is he would have liked to give a job to everybody. Everyone was competent as far as he was concerned. What Mr Hahn had to do is select amongst nine competent people the seven most competent which would be to the Respondent's benefit. That is the raison d'etre of the selection process, and that is what Mr Hahn evidenced before the Commission. How he went about that process is that he asked the "supervisors" sometimes known as "facilitators" (hereinafter referred to as "facilitators") to come to a meeting.

15 In the meantime there had been quarterly assessments done. The Applicant has made quite a lot of those assessments because he says there is a dichotomy between the results in those and what he achieved in the final assessment. As I apprehend the documents, and I accept the evidence of Mr Hahn that the differences between Exhibit H, which was a copy given to the Applicant when he finished the interview with a facilitator, and Exhibit I, which was the final document, was that there was a transmission of the handwritten document into the final document. Mr Hahn had directed the facilitators to submit the trainee performance quarterly assessments, prior to the meeting of the 1st of June 2004 at 6 am where the selection for appointment was to take place. Some of the assessments, not only for the Applicant but others, are dated 1st of June which indicates they may have been produced on the morning. In my view that is not indicative of anything sinister because the rating schemes are quite different in both the documents. The rating schemes for the assessments are about quantity of times someone does something. There are a series of questions about that, and the performance review, or the "trainee evaluation criteria" as they were called during the proceedings, are qualitative, and the facilitators were asked to judge on qualitative grounds.

16 In any event, the facilitators were asked to conduct a review. They did, and they did it against the criteria. They were asked to rate out of 5. Only facilitators, and I accept the evidence of the Respondent on this, who had direct supervision of the particular trainee were allowed to vote, if I can call it that, about each trainee. Those votes or allocations of points were added, and by simple average a rating was reached. That was done for each trainee, and a ranking was eventually decided. When those rankings were compared the Applicant was rated second-last, and he was told this.

17 The Respondent's clear position is that it was a fortuitous result of the application of a process which was designed to be as fair as is practicable in the circumstances. The only reason the Applicant was not offered a job was there were not enough positions. If there had have been sufficient positions, he would have been offered one because he was competent.

18 The result was conveyed to him. Mr Hahn's evidence about following events is that the Applicant is a married man with a family and a mortgage and Mr Hahn did not want to see him out of work. So the Respondent offered the Applicant a further 2 weeks. Mr Hahn looked around to try and find him further alternate work until he secured alternative employment. He was successful in doing that and offered 3 months, but in the meantime the Applicant had found other work, and the final contract of 2 weeks, whether evidenced in writing or not, expired by effluxion of time on the 26th August 2004. As a matter of law the only conclusion one can reach is that the relationship of the parties finished at that time and that means there was no dismissal.

19 Section 29 of *the Act* creates a right for an employee to make application of this nature if there are two conditions precedent. That is the Applicant was employed and the contract of employment was brought to an end by dismissal. The first condition, that is that the Applicant was employed, is met, but the second condition is not. He was not dismissed, and therefore the application is unable to proceed past that point. However, I may be wrong about that, and if I am wrong, I intend to examine the fairness or otherwise of the process that the Respondent engaged upon to make the selection.

20 The starting point is the evaluation criteria which are shown in Exhibit 8. These cover matters such as attitude, attendance, sick leave or unexplained absence, teamwork orientation, class work performance, quality, early submission of assignments by due date, classroom contributions, practical work performance, housekeeping, problem solving skills, whether the candidate is an independent thinker, company standards - that is whether the candidate pays attention to those, the key performance indicators which are applied in the area in which he works, his attitude to safety, his potential for promotion. There are ten separate criteria which are the basis of the selection process. There is a scoring matrix of 1-5 with some hints, I suspect, given to the facilitators as to what a particular attitude or requirement ought to score insofar as points are concerned.

21 Mr Hahn created a situation by scheduling the meeting when this assessment took place at 6 am on the 1st of June where every facilitator who had been involved with each of the trainees was on the site and was able to take part in the process. He ensured, and I accept the evidence of both he and Mr Peake on this, that only those with direct supervisory knowledge of the individual trainee was allowed to cast a vote or assign points under the ten heads of assessment. There were other people present like Mr Obal at the meeting, and it is likely that Mr Obal or others may have made comments about the Applicant or others, but I accept that the essential voting process was undertaken by the direct supervisors. They cast a vote and a simple arithmetical average was made, in the Applicant's case, by three people and he received the ranking which appears in Exhibit 8. When those numbers were added up, they did not place him compared with all of the trainees, and there was twenty altogether, where he would be offered a position. There were seven positions in Area 4, he rated number eight. He was very close to getting a position, but on the assessment he did not get there.

22 The issue is whether the assessment was a fair one. What an employer has to do in a circumstance like this is demonstrate that it has made a reasonable attempt to be fair. It is not for the Commission to be a surrogate manager of the Respondent and come along later and say, "I would have given Mr …… a higher mark." There is no basis in law for that, and there is no basis for the Commission to assume the management role of the company. (See *Robe River Iron Associates v CFMEUW (1989)* 69 WAIG 1027). What it has to do is ensure that the process has been fair. Anyway you examine this process it was a fair one. It has not been a process which was designed to create a detriment to anybody. It was designed in an honest attempt, and I say that having assessed the evidence, to fairly decide who should be offered a position. Mr Hahn was clear to the people who made this assessment that they better do it carefully because this was crucial importance to the people concerned. This was the difference between having a permanent job and not having a job with the Respondent at all, and he made it clear to the facilitators that he wanted the thing done properly. On any assessment of the evidence one would have to conclude that a reasonable attempt was made to conduct a proper assessment between the competing trainees.

23 I conclude on the basis of that analysis that even if I am wrong and there was a contract of employment, and that the action of the Respondent was, somehow to create a constructive dismissal, it did not. The criteria for constructive dismissal are not met in this case; that is, did the person have nowhere else to go, did he go or was he pushed? There is no question that those concepts have been breached by the Respondent in this case. (*Attorney General v Western Australian Prison Officers' Union of Workers (1995)* 75 WAIG 3166)

24 I therefore find the Applicant has not made out his case, and an order dismissing the matter will issue.

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**2005 WAIRC 01991**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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| **PARTIES** | PAUL CHARLES BARRON |
| | **APPLICANT** |
| | **-v-** |
| | WORSLEY ALUMINA PTY LTD |
| | **RESPONDENT** |
| **CORAM** | SENIOR COMMISSIONER J F GREGOR |
| **DATE** | THURSDAY, 7 JULY 2005 |
| **FILE NO/S** | APPL 1249 OF 2004 |
| **CITATION NO.** | 2005 WAIRC 01991 |

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| **Result** | Dismissed |
| **Representation** | |
| **Applicant** | Mr P.C. Barron appeared in person |
| **Respondent** | Ms M. Cash, of Counsel, appeared on behalf of the Respondent. |

*Order*

HAVING heard Mr Paul Charles Barron on his own behalf as the Applicant and Ms M. Cash, of Counsel, for the Respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act*, 1979 hereby orders:

THAT the application is hereby dismissed.

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

**2005 WAIRC 01089**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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| **PARTIES** | IVY BILOS |
| | **APPLICANT** |
| | **-v-** |
| | PADDINGTON GOLD PTY LTD |
| | **RESPONDENT** |
| **CORAM** | SENIOR COMMISSIONER J F GREGOR |
| **DATE** | FRIDAY 8TH APRIL 2005 |
| **FILE NO.** | APPL 1991 OF 2002 |
| **CITATION NO.** | 2005 WAIRC 01089 |

| | |
|---|---|
| **CatchWords** | **Termination of employment – unfair dismissal – find compensation – authorities applied – *Industrial Relations Act 1979 s23A* -** |
| **Result** | Compensation of $10, 536.00 awarded |
| **Representation** | |
| **Applicant** | Mr N. Whitehead (of Counsel) appeared on behalf of the Applicant |
| **Respondent** | Mr A. Cameron appeared on behalf of the Respondent |

*Reasons For Decision*

1 This is a matter which was originally determined by the Commission as constituted on the 14th April 2003 (2003) 83 WAIG 3126. The Applicant appealed to the Full Bench. An application by the Respondent to set the appeal aside was dismissed by the Full Bench on 19th April 2003 (2004) 84 WAIG 1008. The Full Bench Decision was appealed to the Industrial Appeal Court and it issued its Reasons on the 22nd November 2004 (2004) 84 WAIG 3759 wherein it remitted the matter to the Full Bench. On the 29th November 2004 (2004) 84 WAIG 3785 the Full Bench it issued a Decision referring the matter to the Commission as constituted to determine compensation.

2 In its Reasons for Decision of the 19th April and 29th November 2004 the Full Bench made findings which are of useful guidance to the Commission in the determination of compensation.

3 It should be recorded that by consent the parties have agreed that the correct name of the Respondent is Paddington Gold Pty Limited.

4 The Commission is bound to apply the law as stated by the Full Bench. In particular the Full Bench concluded that the parental leave policy was a term of contract. In dealing with compliance by the Respondent with its parental leave policy the Full Bench concluded that the term 'comparable in status' and 'equal pay' meant that the Respondent was bound to find a position for the Applicant comparable in status and pay even though the position no longer existed due to restructuring. The Full Bench found equal pay means that the position offered to her was required to be one paid at the same rate as the abolished position with no diminution of the amount, that is of the same dollar value. It has to be the same amount. The position offered to her at the time was an amount of $7,000.00 less, whether it was calculated at the same hourly rate or not. The Full Bench concluded the position/s offered to the Applicant were not positions of equal pay. If they were of equal pay there would be no diminution and there was such a diminution.

5 This finding in my respectful view is important for the task the Commission now faces in fixing compensation because when the Commission determines the amount of loss suffered by the Applicant the loss must be measured against the salary paid to her before she went on maternity leave and extant at the date of termination. The documents show that salary was $68,484.00 per year. Next the Commission needs to make findings as to what the Applicant was actually paid at termination. The evidence seems to indicate that there were various payments which included notice period of one month, better expressed as 4 weeks payment; 3 weeks salary for 1 year of service and an additional 9 weeks to make a total of 12 weeks for redundancy payment. It was common ground that there was a further 6 weeks received for maternity leave. This makes is a total of 22 weeks pay.

6 In his submissions Mr Whitehead, Counsel for the Applicant, says that the redundancy payment should not be taken into consideration because the letter given to the Applicant at the completion of her service on 5th November 2002 refers to a draft calculation of entitlements under the redundancy policy. He says that the Commission should conclude that means the redundancy payments were a clear part of the contract of employment and as such were a contractual benefit to which she was entitled, at date of termination. The redundancy payment should not be regarded as anything other than the contractual entitlement and therefore should not be used to reduce any compensation the Commission may determine.

7 It is also submitted that the Applicant has satisfied her obligation to mitigate her loss on the principles established in *Growers Market v Steven Backman* (1999) 79 WAIG 113.

8 The Respondent's Counsel Mr Cameron says that the payments that have been made and in the circumstances in which they have been made, amount to more than adequate compensation. He referred to the finding of the Commission at the first instance, unchallenged on appeal, that the redundancy payment of 12 weeks was more than generous given the length of the employment. He also claims that payments received for notice and for maternity leave total 10 weeks. There was a total payment of 22 weeks which was more than adequate and should extinguish any other payment that might be awarded for compensation.

9 This last issue of course depends upon the finding by the Commission of the amount of loss suffered by the Applicant. In this respect the Respondent's submits that there has been refusal by the Applicant to mitigate damages and this is manifest by her continual refusal to accept employment in a number of positions that were offered to her. She refused to accept jobs and continued to refuse to mitigate her loss.

10 The Commission was referred to the comments of the presiding Judge in the decision of the Industrial Appeal Court in *Dellys v Eelderslie Finance Corporation* (2002) 82 WAIG 1193 (*Dellys* Case). In particular the references in that decision to 'The amounts deducted include all payments made by the employer to the employee including payments for leave which is due as well as all remuneration earned by the employee in other employment'.

11 There is also an emphasis on the duty of the employee to mitigate and that the employee must 'act reasonably to mitigate the loss'. Where the employer has made payments to the employee in lieu of notice for severance the employer is entitled to have those payments credited to the quantification of liability to the employee arising from the dismissal. That is because the law requires all of such payments to be brought into account in any assessment of overall compensation (*Dellys* case).

12 The Commission heard from the parties on 23rd February 2005. Having listened to the Applicant, albeit by a poor quality video link, give evidence in the proceedings on 23rd February 2005 the Commission has heard nothing which would change its finding about the quality of her evidence as in my decision at first instance at paragraph 57.

13 What was able to be established from the evidence is that the Applicant, on the finding of the Full Bench, was dismissed constructively on the principles in *The Attorney v General for Western Australian v Western Australian Prison Officers' Union* (1995) 75 WAIG 3166. The Applicant was forced to take this action because the work which was offered to her following her return from confinement was not of equal value to the job she had before she went on her maternity leave. As I understand the decision this was because she had a contractual right to the money payments she was receiving before she went on leave and failure to pay her that money for any of the jobs offered to her was a repudiation of contract, a repudiation she did not accept hence when she resigned she was pushed, she did not jump.

14 The evidence indicates she was offered four jobs and later during the time in which the case was proceeding she was offered further employment which if she had taken, could on the evidence of the Respondent, have placed her in a position where she was earning the same or similar money to her original job. However the Applicant did not take up any of these jobs. It was suggested in proceedings in another jurisdiction that she indicated in a statement that no amount of money would cause her to work for the Respondent.

15 I do not put much weight on this suggestion from the bar table. What seems to be clear though is that soon after the Applicant finished work with the Respondent she bought a property for the purpose of running dog kennels. She indicated that she had enough of the mining industry and was going to move on to some other type of employment. It is clear in the interregnum between when she resigned and when she bought the property in December that there were opportunities for her to mitigate a loss either with the Respondent or with other employers in at least two other jobs. She found those jobs unsatisfactory because one possibly could have been a fly-in fly-out and it did not suit her; nevertheless she made a decision that she would not mitigate a loss by taking those jobs because she claimed her circumstances did not allow it.

16 I find there was no attempt by the Applicant to mitigate her loss until the time that she bought the property and started getting ready to trade as a dog kennel.

17 Mr Cameron submits that this duration of time destroys the causal link with the reasons for the Applicant being out of work, that is her dismissal, because she refused to mitigate until she was ready.

18 While assessments of compensation such as this can not be said to be made on a scientific basis the authorities give the Commission guidance as to how the process ought to be approached. See *Boganovic v Bayside Western Australia, FDR Pty Ltd v Gilmore* (1998) 78 WAIG 1099 and *Coles Myers Ltd v Coppin & Ors* (1993) 73 WAIG 1759; (1994) 11 WAR 20.

19 I find that, contrary to her obligation to do so, the Applicant did not mitigate her loss until December 2002 when she embarked upon her dog kennel project. I find that by this time even though she had decided to leave the mining industry, it would be fair that she should have had a reasonable amount of time to get that project up and running. That is at that time she was still suffering loss which she was attempting to mitigate. On the best information that the Commission can glean from the evidence it would be reasonable to conclude that from the time she bought the property to when it was producing reasonable income for her; albeit that level of income was not been established to the Commission; that she should have received compensation for that period. That the period can be reasonably divined from the evidence as to the 6 months.

20 The Commission against its finding of 6 months loss for compensation has to apply monies that have already been paid to the Applicant. I accept the submissions of Mr Cameron, for the Respondent, that money paid for redundancy was not part of the contract of employment. It was a payment offered by the Respondent in attempt to be fair about the situation. It should also be found that the Applicant received 6 weeks pay for parental leave which on the face of the policy she was not entitled and that makes a total of 18 weeks for which she has been paid. This should be offset against the 26 weeks that I found that the Applicant is entitled to compensation. I therefore find that she should be paid a further 8 weeks pay in compensation.

21 An order will issue requiring the Respondent to pay the Applicant $10,536.00 within 14 days of the date thereof.

22 Minute of Proposed Orders will issue accordingly.

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**2005 WAIRC 01190**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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| **PARTIES** | IVY BILOS |
| | **APPLICANT** |
| | **-v-** |
| | PADDINGTON GOLD PTY LTD |
| | **RESPONDENT** |
| **CORAM** | SENIOR COMMISSIONER J F GREGOR |
| **DATE** | WEDNESDAY 13TH APRIL 2005 |
| **FILE NO/S** | APPL 1991 OF 2002 |
| **CITATION NO.** | 2005 WAIRC 01190 |

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| **Result** | Compensation awarded |
| **Representation** | |
| **Applicant** | Mr N Whitehead (of Counsel) by leave |
| **Respondent** | Mr A Cameron, as Agent |

*Order*

HAVING heard Mr N Whitehead (of Counsel) on behalf of the Applicant and Mr A Cameron on behalf of the Respondent, the Commission, pursuant to the powers conferred in it under the *Industrial Relations Act, 1979*, hereby orders:

THAT Paddington Gold Pty Limited pay the Applicant $10,536.00 within 14 days of the date of this order.

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

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**2005 WAIRC 02201**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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| **PARTIES** | CONSTANTINOS BOULAZERIS |
| | **APPLICANT** |
| | **-v-** |
| | JOHN FRASER |
| | **RESPONDENT** |
| **CORAM** | SENIOR COMMISSIONER J F GREGOR |
| **HEARD** | MONDAY, 4 JULY 2005 |
| **DELIVERED** | FRIDAY 30TH JULY 2005 |
| **FILE NO.** | APPL 195 OF 2005 |
| **CITATION NO.** | 2005 WAIRC 02201 |

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| **CatchWords** | **Termination of employment-contractual entitlements-case already heard-*functus officio*.** |
| **Result** | Dismissed as Commission *functus officio* |
| **Representation** | |
| **Applicant** | Mr Constantinos Boulezaris in person |
| **Respondent** | No appearance for the Respondent |

*Decision*

1 This is an application under s29 of the *Industrial Relations Act* 1979 (the Act) by which Constantinos Boulazeris (the Applicant) seeks orders for outstanding benefits he says exists at the completion of contract of employment between him and John Fraser (the Respondent). The said contract came to an end in November 2004.

2 The allegation of the Applicant is that he worked for Mr Fraser crutching sheep, he had arrangements to be paid for that work and there is a sum of money at the completion the relationship unpaid.

3 In reply, the Respondent by its Notice of Answer, draws the attention of the Commission to another decision of the Commission in *Australian Workers Union Western Australian Branch Industrial Union of Workers v John Fraser* (CR114 of 2003) in (2004) 84WAIG 1234.

4 The Respondent's contention is that all the benefits and monies which rose out of the contract of employment were paid and that the decision of the Commission in CR114 of 2003 should bring an end to the dispute.

5 The Applicant appeared before the Commission on the 4th July 2005; there was no appearance on behalf of the Respondent. In his evidence the Applicant told the Commission that he was employed by the Respondent as a contractor some two years ago. His work involved crutching sheep, an occupation in which he was experienced. He gave some convoluted evidence about his work but it is fair to say that he claimed that he had crutched in excess of 7000 sheep and that the agreement made between him and the Respondent regarding pay had not been honoured. He said that the Respondent said that he would look after him and pay him top rates.

6 The Applicant could not produce any records of the work performed even though he said that such records did exist. In his evidence he said he did have records but he had left them away from the Commission. He told the Commission that he expected that in some circumstances that he would get double or more the rate per sheep due to its condition and that ultimately he had not been paid even though he had done all of the right things.

7 The facts in this matter are identical to the facts which are set out in the decision of Beech SC in CR 114 of 2003, issued on the 6th May 2004. (*ibid*) In a detailed decision the employment relationship was summarised as were the submissions put on behalf of the parties. The learned Commissioner concluded as follows; "Ultimately it is for Mr Boulazeris to show that he crutched the figures he claimed and on a balance of the evidence, he did not do so. The issues proven by the Union regarding some crutched sheep counting for more than one are made out but Mr Boulazeris cannot prove the numbers he crutched. Mr Boulazeris cannot even recall what he had been paid with any accuracy.

8 The same issues were dealt with by the Commission in CR114 of 2004 are raised again in these proceedings. The Commission cannot deal with a matter twice. That raises questions of double jeopardy. A Court having tried a matter and reached a conclusion cannot rescind the conclusion and retry the case. This is the principle of *functus officio* which binds this Commission as it does any Court.

9 For those reasons the Commission can no longer inquire into this matter. However I observe that even if such an inquiry was possible nothing that the Applicant has said in evidence established the onus that he carried to prove that he had a contract, the terms of that contract or whether that contract has been paid or not.

10 This application will have to be dismissed.

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**2005 WAIRC 02202**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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| **PARTIES** | MR CONSTANTINOS BOULAZERIS |
| | **APPLICANT** |
| | **-v-** |
| | MR JOHN FRASER |
| | **RESPONDENT** |
| **CORAM** | SENIOR COMMISSIONER J F GREGOR |
| **DATE** | FRIDAY 30TH JULY 2005 |
| **FILE NO/S** | APPL 195 OF 2005 |
| **CITATION NO.** | 2005 WAIRC 02202 |

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| **Result** | Dismissed |
| **Representation** | |
| **Applicant** | Mr C. Boulazeris on his own behalf |
| **Respondent** | No appearance |

*Order*

HAVING heard Mr C. Boulazeris on his own behalf and there being no appearance by the Respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby orders:

THAT the application is hereby dismissed.

[L.S.]

(Sgd.) J F GREGOR,
Senior Commissioner.

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**2005 WAIRC 02269**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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| **PARTIES** | RODNEY PAUL BROWN;<br>KELVIN P GADEKE |
| | **APPLICANT** |
| | **-v-** |
| | ALLISON PTY LTD T/AS SEAWEST MARINE SERVICES;<br>SEAWEST MARINE SERVICES |
| | **RESPONDENT** |
| **CORAM** | SENIOR COMMISSIONER J F GREGOR |
| **HEARD** | MONDAY, 25TH JULY 2005 AND TUESDAY, 26TH JULY 2005 |
| **DELIVERED** | FRIDAY, 5 AUGUST 2005 |
| **FILE NO.** | APPL 1063 OF 2004, APPL 1289 OF 2004 |
| **CITATION NO.** | 2005 WAIRC 02269 |

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|---|---|
| **CatchWords** | **Termination of employment-unfair dismissal-employer not immune from requirement to act fairly because decision to dismiss made by third party-Industrial Relations Act 1979.**. |
| **Result** | Compensation Awarded |
| **Representation** | |
| **Applicants** | Mr R. Brown appeared in person<br>Mr K. Gadeke appeared in person |
| **Respondent** | Mr R. Gifford, as Agent |

*Decision*

**Introduction**

1 These two applications were filed in the Commission, the first by Rodney Paul Brown on the 16th August 2004 and the second by Mr Kelvin Gadeke filed on the 5th October 2004.

2 Both the applications were heard in Karratha on the 26th and 27th of July 2005. The application concerning Mr Brown on the 26th and the application involving Mr Gadeke on the 27th of July 2005. The Commission has decided to publish the outcome of both applications in one Reasons for Decision because the under pinning facts of both are all but concurrent. There are separate facts and issues supporting the contentions of each of the Applications and the Commission will make separate findings concerning Mr Brown and Mr Gadeke.

3 Presenting the Decision in this way will provide a more coherent presentation because the underpinning events which lead to the terminations of both of these men arose from the same set of incidents and involved the same employer Seawest Marine Services (Seawest).

**Background**

4 The work that Seawest undertook is located in the Port of Dampier. A short background to the work will make what follows easier to understand. In December 2003 Rio Tinto the operator of Hamersley Iron (now known as Pilbara Iron) approved a $685m expansion of Hamerlsey's Dampier Port operations from a nominal capacity of 74 Mtpa to a 116 Mtpa. There had been a large amount of environmental, heritage and other approvals given which resulted that the work on the first stage (Stage 1) of the project began on January 2004. The Stage 1 of the work which was to expand the port to 95 Mtpa began and focused on Parker Point with some small works on East Intercourse Island. Relevantly for these proceedings the expansion activities at Parker Point which included a new rotary car dumper and rail track, new stockpile stackers, a reclaimer and a new screen house also involved the extension of the existing wharf to accommodate additional ship berths and dredging around Parker Point, channels and the creation of a sea wall and some land reclamation.

5 Prior to the upgrade, Parker Point had one ship loading facility that was dredged at 17.2 metres below chart datum and a berth capacity for vessels up to 180 thousand tonnes dead weight. There was a departure channel dredged at 17.3 metres which connects the berth to the main shipping channel.

6 Since 1965 when the port was opened Hamersley has undertaken various dredging campaigns. These have occurred on about 11 occasions culminating in dredging around the berths in the year 2000. The construction of the new berth at Parker Point was to involve dredging to the existing berth pocket at Parker Point wharf and the creation of a new berth pocket on the south side of the wharf. A new swing basin and departure channel was to be dredged to provide navigable waters for the southern berth. In addition a new approach channel was to be dredged to the northern-east of Parker Point to allow larger ships to enter the berth when unloaded. Additional dredging was to remove siltation in the existing shipping channel and departure channel from Parker Point. The aim or the upgrade was to increase the ship loading capacity from one berth of vessels up to 180 thousand tonnes dwt to two berths catering for vessels up to 22 thousand dwt.

7 To do this work Hamersley Iron sought contractors and according to the evidence given to the Commission in the first part of the contract, work was awarded to Ballast Ham, a Dutch dredging company. (Sometimes described in these Reasons as the Principal dredging contractor). The evidence indicates that Ballast Ham was awarded a 3 month contract in Stage 1. As to the details of any rollover contracts the Commission has no information before it. Suffice to say that when Seawest became involved in the activities and it did so on the basis that its contract with Ballast Ham would last for 3 months.

**Nature of Seawest Contract**

8 The nature of the contract held by Seawest is important for these proceedings. According to the evidence the contract was to provide manning for a vessel which provided support to the cutter/suction dredge to be operated by Ballast Ham. The vessel is known as a MultiCat and carried the name and identification of the Ham 1406 (the 1406). The peculiarities of the 1406 are also important. It is a vessel that mounts a crane with a capacity of lifting up to 32 tonnes. It can move anchors; transport bulk liquids and provide a broad range of assistance to the main dredging operation. The arrangement that Seawest had with Ballast Ham, as far as can be ascertained from the evidence, was that Ballast Ham would advise Seawest of its recruit requirement for the 1406 and from time to time Seawest would fill those requirements by supplying a proposed list of qualified persons to Ballast Ham and on approval those persons would be hired. The duties Seawest demanded of the employees found expression in a document known as Standing Orders Dredging (Exhibit G1).

9 This document provided that crews operating and maintaining the 1406 would remain at all times 'employees' of Seawest. That they would carry out orders and directions of Ballast Ham for the purpose of the services being provided as long as those do not require the contravention of any law or any order or regulation made under the law of the Commonwealth of Australia or the State of Western Australia. There was a proviso that the Launch Master, a position of relevance in these proceedings, has a right at all times, to ensure the safety of the vessel and its passengers and determine the desired composition, weight or storage of any cargo to be carried on the vessel, the suitability of weather conditions, vessel speed and the method and locality of any boarding or landing operations.

10 The standing orders also provide rules concerning Occupational Health and Safety, vessel maintenance and housekeeping and reporting procedures. These too are of interest in these proceedings.

11 The reporting provisions provide for a log to be kept on board to record the daily operation of the vessel and a number of specific report forms; for instance, an incident/accident report form, a passenger indemnity form and a job safety analysis. These forms were required to be completed as necessary. The master was to ensure that the management of Seawest was kept informed of anything that he considered not in its interest or which could effect its operations.

12 There was also present a document which is captioned 'Code of Conduct' (exhibit G2). This document was referred to during the proceedings as being a guide how employees should operate. It will not be included in full here but suffice to say that the document is less a code of conduct than a series of instructions about what Seawest will tolerate from its employees. The failure to fulfil the requirements was covered by the threat of termination.

**The Evidence of Master Rodney Brown**

13 The work on which Seawest was involved as far as can be ascertained on the evidence commenced in July or August 2004. One of the persons engaged early in the project was Rodney Brown the Applicant in Application 1063 of 2004. Mr Brown is a qualified master and was appointed in that position fulltime for the duration of the project. Fulltime needs to be understood for the purposes of these proceedings. The terms and conditions of employment are covered by the Award of the Australian Industrial Relations Commission known as the *Maritime Industry Dredging Award 1988.* Part A; General Provisions, applied to the operations.

14 Of particular interest to these Reasons for Decision is the style of employment. The award provides that for every day worked a day of leave is created so that workers under the award were on an even time off swing. In this case the swing was to be five weeks. Mr Brown was employed on the basis that he would work such a swing and he was an employee that would continue to be engaged under that arrangement. The award provides how wages are to be paid and they are paid on an aggregate basis. There is nothing in the award however that prevents short term engagements which, according to the evidence, is a method of engagement regularly used in the dredging industry because of the particular requirements of the work.

15 However the evidence is, Mr Brown was first engaged on a fulltime basis. As it transpired Mr Brown worked the first swing but he became quite concerned about the approach to safety that was being adopted by the Principal dredging contractor. He was so concerned about it's conduct that in due course he reached the conclusion that he did not wish to be associated fulltime with such an approach because he thought it was unsafe. Mr Brown described the Principal dredging contractor as 'cowboys.'

16 Mr Brown had, and has, a very good relationship with Mr Leslie the Operations Manager of Seawest. Mr Leslie also gave evidence in these proceedings. It is clear from the evidence the way it was given and the interplay between them that both men are respectful of each other, but at the same time blunt and forthcoming with their opinions.

17 It is not surprising therefore that Mr Brown was forthcoming in the opinions he expressed to Mr Leslie about why he would not continue as a fulltime worker however he did say that if Mr Leslie ran into problems from time to time he would make himself available to work on a short term basis. This was a not an unusual arrangement in the dredging industry.

18 At this stage one needs to say something about Mr Brown's competence. It is clear that Mr Leslie engaged him because he thought he was the best man for the job. He had worked with him on many occasions before. Mr Leslie was happy that Mr Brown was a thorough and safety conscious master who would do the job in the best way possible. He was a person who was imaginative and would be able to get the best out of the 1406. Particularly given the nature of the vessel and its multi function capacity.

19 Part of the multi purpose activities engaged upon by the 1406 was moving petroleum products to and from the dredge. From time to time up to 100 thousand litres of diesel would be taken to the dredge. At other times sump oil was discharged from the dredge to the 1406. This sump oil was moved in fabric containers containing 1000 litres and up to 15 of these which are contained in steel frames would be put aboard the 1406 to be taken ashore. This oil which had been used in the sumps of the engines on the dredge was therefore contaminated and was not a petroleum product which is easy to clean if a spill occurs. It was alleged in the proceedings that most of these transfers were occurring during the hours of darkness.

20 Mr Brown had completed his contract of employment with Seawest and as predicted within a short time he was asked to come back and take command of the 1406 for a nine day period. This was sometime late in July 2004. It was nearing the end of that 9 day period that Mr Brown appeared for duty to take command of the 1406 for a 12 hour day shift. This meant that the shift started in hours of darkness. Mr Brown took over the vessel and saw that there were 10,000 litres of sump oil on the deck. He was told to offload the oil at a wharf. He said he would not because it is contrary to harbour regulation which prohibits such work unless the Harbour Master has approved the transfer of petroleum products in hours of darkness. Later during daylight Mr Brown transferred the oil from the 1406 and empty containers were placed back on board.

21 Later in that day Mr Brown was questioned by representatives of the Principal dredging contractor about his refusal to transfer the sump oil containers in the hours of darkness. It should be noted that at all times the Principal dredging contractor had a representative on board the bridge of the 1406. Also present when Mr Brown was asked the question concerning his refusal by the Safety Officer for the Principal contractor was Mr Kelvin Gadeke the Applicant in Application 1289 of 2004. Mr Gadeke was the engineer on board the vessel. I will say more about Mr Gadeke when I finish this summary of events effecting Mr Brown.

22 There was a conversation witnessed by Mr Gadeke and not denied by any other witnesses between Mr Brown and the Safety Officer which went along the lines that the Safety Officer claimed that the Harbour Master had given permission for the transfer of petroleum products during hours of darkness. Mr Brown was surprised at this particularly because of the potential environmental damage that a spillage of such product would cause. He indicated in his evidence that a spillage of diesel was bad enough because the diesel would evaporate but a spillage of heavy sump oil, contaminated as it was, particularly at night could be disastrous for the port. He therefore thought it his duty as a master, because he carried personal responsibility under the relevant legislation for environmental damage, that he contact the Harbour Master to check whether special approval had been given to the Principal dredging contractor He told the Safety Officer that he would do so. The Safety Officer asked him not to, however Mr Brown made the call then and there from the bridge of the 1406. He was told by the Harbour Master in no uncertain terms that no authority had been given. He communicated this to the Safety Officer who then spoke to the Harbour Master and according to Mr Brown and Mr Gadeke his conduct was such that he too was told in no uncertain terms that no authority had been given.

23 Later in the day there was another conversation. The Safety Officer having left the vessel returned and told Mr Brown that the Principal dredging contractor had clarified the matters with the Harbour Master. It is now 'Ok that you can shift the sump oil in hours of darkness but you cannot shift the distillate'. Mr Brown was quite stunned by this information because in his opinion if any approval had been given it is more likely to be given to transfer the less obvious pollutant, the distillate. He therefore said that he would ring the Harbour Master again. The Safety Officer tried to stop him or at least discourage him from doing so, but Mr Brown would not be discouraged. He rang the Harbour Master and was again told in no uncertain terms that no authority had been given. Again he handed the telephone to the Safety Officer who again according to Mr Brown was told by the Harbour Master in no uncertain terms that no authority had been given.

24 This conduct on behalf of the Principal dredging contractor confirmed Mr Brown's feelings about its attitude to safety and environmental protection. He therefore decided he would not continue to work on the project after he finished his 9 day arrangement with Seawest. He left the vessel at the completion of the nine days.

25 Mr Brown was next called by Mr Leslie on or about the 23rd July 2004. It was on that day that the current skipper decided that he would leave employment with Seawest. Seawest were asked by the Principal dredging contractor to replace him. Mr Leslie's mind turned to Mr Brown and he spoke to an officer from the Principal dredging contractor and suggested that Rod Brown come back to finish off the swing. He was told that Mr Brown was not wanted back and that he was a 'shit stirrer.'

26 Mr Leslie then rang Peter Prince who apparently was a senior person in the Principal dredging contractor and discussed Mr Brown with him. Mr Prince finally agreed that Mr Leslie could employ Mr Brown if he did not 'stir.'

27 Mr Leslie then contacted Mr Brown and offered him employment. Mr Leslie asserts that was for a couple of days because another skipper could be brought up from Perth during that time. Mr Brown is adamant that he was offered an engagement till the end of the swing to have been worked by the outgoing skipper which would be the 10th August 2004 that is a period of 13 days. I will make findings on the balance of probabilities who was right and wrong about the duration of the engagement later in these Reasons.

28 The next day Mr Leslie rang Mr Brown again. This was after he had another conversation with Peter Prince during which he was told that the Principal dredging contractor now did not want Mr Brown back under any circumstances. Mr Leslie passed on to Mr Brown that he could not put him on because Mr Prince did not want him back. Mr Brown was very upset and indicted that he would take action for unfair dismissal.

29 The proceeding is sufficient recitation of facts involving Mr Brown. Before I make findings concerning Mr Brown I will deal with the situation involving Kelvin Gadeke.

**The Evidence of Kelvin Gadeke**

30 It should be said at this time that both of the Applicants represented themselves in these proceedings and the Commission assisted them as best it could, within the proper limits, to put whatever they wanted before the Commission. It must be said too that they did not need much assistance because they were thoroughly prepared to argue their cases, particularly Mr Gadeke.

31 Mr Gadeke told the Commission that he started work on the 23rd of June 2004 working under the Award, 5 weeks on and 5 weeks off. On the13th July 2004 he started 5 weeks off. It was around this time or slightly before that he had witnessed the conversation between Master Brown and the Safety Officer of the Principal dredging contractor on the bridge of the 1406.

32 I need to comment upon Seawest's opinion of Mr Gadeke as an employee at this stage before I continue the summary of events. Mr Gadeke was regarded by Mr Leslie as a thoroughly competent engineer. He worked well with Master Brown and he was qualified by certificate across a range of work. Not only as an engineer but as a crane driver which allowed him to be very flexible with the work that he could do for Seawest and this was to their benefit. Mr Gadeke was an employee who even though did not have the long experience in dredging that Mr Brown enjoyed, was still a very experience mariner and was ideally by qualification and attitude suited for work on the 1406.

33 On the 23rd August 2004 Mr Leslie rang Mr Gadeke to confirm his availability to start the swing on the 2nd September 2004. After that because he had work Mr Gadeke turned down an offer of employment with another company Transfield Worley offshore. Around this time he was aware that Mr Brown had made an unfair dismissal claim and he provided to him a statement supporting Mr Brown's contentions about what happened in the discussion with the Safety Officer that was witnessed by Mr Gadeke.

34 Mr Gadeke was to start a work soon after the 2nd September 2004. However, Mr Leslie received advice from the Principal dredging contractor that Mr Gadeke was only to be employed for one shift. He rang Mr Gadeke who was unhappy about the news. This news was given less than an hour before he was due to start work. Mr Gadeke told Mr Leslie that he had forgone another job and that he did not have any accrued leave left and therefore needed some sort of additional payment if he was not to have any work other than the one shift that was offered to him. Mr Leslie's diary (ExhibitG2) recalls that he rang Mr Prince back and explained to him about the five days and it was agreed this could be paid to Mr Gadeke.

35 This is important because the interpretation put on this payment by Seawest is that the 5 days was in effect notice of termination as provided in the Award and because it was paid Seawest had no ongoing obligation to Mr Gadeke.

36 The next event involving Mr Gadeke occurred on the 15th September 2004 which was about the time that Mr Gadeke would be starting a new swing. Mr Leslie was told by Peter Prince when he presented the incoming crewlist they would not have Mr Gadeke back on the 1406 because the dredge crews did not like him. Mr Leslie told Mr Gadeke he was given the names of the people that the Principal dredging company wanted back and that his name was not on the list.

37 The final conversation that Mr Leslie and Mr Gadeke had was on the 16th September 2004 and Mr Gadeke made an enquiry about why he had not been picked up and Mr Leslie said that he had not been dismissed and that he just was not picked up and that is how the system worked.

38 The foregoing is a sufficient summary of the facts in this matter. Over the two days of hearing much more was put to the Commission but I have extracted from that voluminous evidence what I understand to be the fundamental contentions of the parties.

**Witness Credibility Findings**

39 I need to make findings about witness credibility. Concerning Master Rodney Brown. He is a very competent man albeit given to be verbose of statement. However, there is nothing in his evidence that would indicate that he is not a truthful person and told the story from the best of his memory. He is a credible witness and I find he is a witness of truth.

40 I say the same about Mr Gadeke. He seems to be an honest working person. He did not guild the lily in his evidence. He presented as a person truly dismayed by the type of treatment that he had been given but that dismay did not turn to any embellishment of his story. I find too he is a truthful person and his evidence should be given weight.

41 The evidence on behalf of the Seawest was given by Mr Leslie. He too seems to be a forthright person. He did not attempt to hide any facts from the Commission as far as can be ascertained. He has a different view of what should happen but he made honest admissions about the type of employment relationship which was used in the dredging industry and in particular in this case. He is a person whose evidence should also be given weight.

42 The witness credibility not in question I turn to analyse the events and facts in this matter.

**Analysis and Conclusions**

43 There are findings which can be made and are open to be made concerning Mr Brown. First of all I accept his evidence that he was appointed fulltime, if one can categorised the employment in that way, and his intention was to stay for the life of the contract for however long Seawest had it; but he left because he was uncomfortable about the approach to safety of the Principal dredging contractor. I find that Mr Brown was a thoroughly competent mariner of long experience in the dredging industry who would know when things were not right or wrong and in particular knew what his obligations are as a master and that includes his legal obligations about which he was well aware.

44 Mr Brown, as he promised, undertook fill-in jobs if they can be categorised in that way, for Seawest and one of those involved a nine day engagement during which the incident occurred where Mr Brown was concerned about the transport of a potential dangerous cargo, from an environmental point of view, in the hours of darkness contrary to the port rules. I accept his story, corroborated by the evidence of Mr Gadeke, that there was an attempt made by the Principal dredging contractor's Safety Officer to mislead Mr Brown to conduct an operation which was potentially environmentally unsafe if not illegal by lying to him about the approvals the Principal dredging contractor alleged they held from the Harbour Master. The Principal dredging contractor did not have such approval. It is useful at this stage to include a contemporary instruction from the Harbour Master which sets out the rules as they were;

**PORT OF DAMPIER**
**MARINE NOTICE**

**Number: 018/2004** **Date: 3rd August 2004**

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**BUNKERING & SHIP TO SHIP TRANSFERS OF FUELS AND WASTE OILS WITHIN PORT LIMITS**

Effective immediately, all vessels are to comply with the following bunkering and oil transfer procedures whilst within port limits.

- As per Port Authorities Regulations 2001, Schedule 1 Provisions for particular port authorities 45 (1 – 2 – 3) page 75.
- Vessel Masters must request permission to carry out "**Bunkering Operations**" from the Harbour Master via "Dampier Port Communications", prior to commencing operations at a wharf or from another vessel, i.e: ship to ship transfer.
- Vessel Masters must report start and finish times to Dampier Port Communications.

- Masters must not transfer sludge or waste oil during the hours of darkness without the Harbour Masters permission. Permission will not be granted unless it is deemed to be an emergency.
- Failure to comply with the above regulations and requirements may incur a fine of $5,000 for each offence.

(Dampier Port Authority)

45 I find Mr Brown was within his rights and acted in accordance with Marine Notice 018/2004 and his duty and obligations as Master of the 1406 when he made direct contact with the Harbour Master to check for himself what approvals had been given.

46 Mr Brown then finished the engagement.

47 When the next engagement arose I find that he was told, by Mr Leslie, that he would not be engaged because he was a stirrer.

48 It is argued by Seawest that 'the stirring' did not relate to the incidents involving the transfer of petroleum products at night and that the Commission should regard the refusal of the Principal dredging contractor to allow Mr Brown to be engaged as an exercise of its right to decide who it wanted working on its vessels. I reject this contention and find the evidence is such that the Commission can do nothing other than conclude that the failure to continue with offer of employment to Mr Brown was clearly related to his attitude to transfer of the sump oil and the exercise of his legal obligation to ensure that the appropriate authorisation had been issued to allow the transfer to be made. This in the face of lies by the Principal dredging contractor's servant to the contrary.

49 It must be remembered that Mr Leslie pleaded with Mr Prince to allow Mr Brown to start.

50 That plea was successful one day and reversed the next. There was no direct evidence to say why it was reversed. The circumstantial evidence was that Mr Prince was told by higher authority in the Principal dredging contractor that Mr Brown should not be allowed to work on the 1406.

51 I find that there was a contract between the parties extant at that stage. There had been an offer and acceptance of work. I find on the balance of probabilities that the offer was more likely to be for the balance of the departing skipper's swing that is 13 days and not 3 days as asserted by Mr Leslie.

52 The case of Mr Brown raises important issues of fairness. It cannot be fair, that an employee, who is competent, skilled and justifiably brings to the attention of empowered authorities a potentially dangerous action, can be refused employment because of that conduct. If it can be said to be fair, and it cannot, it means that employees who are prepared to break the law or bend it can force workers to acquiesce to their suggestions and if they do not they will not be employed. Even though Seawest was not the architect of these behaviours, it was the messenger of the Principal dredging contractor. It was grossly unfair of the Principal dredging contractor to deny Master Brown work because he wanted to work safely. It was by transmission grossly unfair for Seawest to not do anything about that. In other words to be the tame vassal of Principal dredging contractor and abandon its duty to act fairly to its employees.

53 In my view there is no breach of Seawest's so called code of conduct. Mr Brown's responsibilities under the laws governing the port outweighed his responsibility to Seawest. In any event Mr Brown and Mr Leslie did discuss Mr Brown's action in going straight to the Harbour Master and while Mr Leslie expressed his displeasure but he did not discipline Mr Brown for it either at the time or later. So if there was a breach of a Seawest's standing orders, there was no action taken on it.

54 In all the circumstances, I find the dismissal of Mr Brown was unfair. I now turn to the conclusions and findings concerning Kelvin Gadeke.

55 I find that Mr Gadekes vice as far as the Principal dredging contractor was concerned was that he heard a conversation between Master Brown and the Safety Officer of the Principal dredging contractor and later recorded his impressions of that conversation in the form of a statement to assist Mr Brown in his unfair dismissal application. It is open to conclude that everything that has happened to Mr Gadeke happened because he provided assistance to Mr Brown.

56 It was Mr Gadekes duty to provide that record of what happened if it would help a body such as this Commission or any other court or tribunal for that matter to establish the truth of the events in a dispute between the two parties. That was the whole purpose of the statement, to assist Mr Brown to establish his case.

57 It must be wrong that a person be punished for that by a refusal to employ in a way that it happened to Mr Gadeke. In so far as Mr Gadeke's employment relationship is concerned I find that he commenced on the basis that he would be engaged till the end of the contract. There was no break in the continuity if one can call it that by Mr Gadeke asking for leave to be paid to assist him when his promised engagement was reduced to the one shift.

58 Mr Gadeke's evidence is that what he asked for was if he could have leave paid. Mr Leslie has interpreted that as notice because Clause 8 (3) of the Dredging Award provides for notice to be paid in the sum of 5 days. In my view that is a convenient revision of the history. I find that on the balance of probability the story offered by Kelvin Gadeke is more likely to be true and is supported in his contentions by Exhibit K4 which is his pay advice. When examined, that pay advice which was issued on the 15th September 2004, after working the one shift provides for 6 days leave. In short it provides for one days pay plus the one day paid leave in accordance of the Award and also 5 days stand down pay. There is a notation put on the pay advice by the pay mistress at the time which is entirely consistent with Mr Gadeke's evidence on the matter. I find in that respect his evidence is corroborated and on the balance of probabilities that the payments made to him were not for payment in lieu of notice but for stand down pay.

59 This means that when he was denied a start in the next set of shift because he was an unsuitable person according to Seawest's Principal that he was still an employee.

60 I do not intend to examine that he should have been paid in the interregnum that might be a matter to be dealt with elsewhere. It is open to find that he has been denied the commencement of another shift that he was otherwise entitled to start apart from the fact that he was told that he was unsuitable person and the strong circumstantial evidence is that he was unsuitable because he gave a declaration in support of his Master.

**Remedy**

61 There is no question of reinstatement in these cases. The contract is finished as far as I can ascertain. One needs to then look at compensation.

62 I will deal first with Mr Brown. I indicated earlier in these Reasons for Decision that I accept that he understood that his engagement when the skipper left before his swing finished was for the balance of the swing. On the dates which are before the Commission that happens to be 13 days which is the same amount of time that Mr Brown says that he offered.

63 Mr Leslie says that is not correct and that it was only 3 days but this is based upon the fact that another skipper was brought up within that time. In my opinion this cannot displace from the original understanding between Mr Leslie and Mr Brown. I therefore find that Mr Brown's loss is to be assessed as 13 days at the rates prescribed for 13 days as a Master under the Dredging Award and an order will issue that Mr Brown be paid that amount.

*64* Insofar as compensation is concerned for Mr Gadeke as I have indicated previously reinstatement is not an option. If Mr Gadeke's contract was continuous and I find that it was, he would have been engaged for another swing. This would not have exceeded the length of the contract but would have been close to the end of it. I therefore find he should be compensated for the amount of time that he has lost, that is 5 weeks less the 5 days stand down pay that he received in accordance with the pay advice. Therefore Mr Gadeke should receive the 5 weeks less 5 working days pay for compensation as if he had worked the time under the provision of the *Maritime Dredging Industry Award 1988 (Commonwealth).*

65 Orders will issue to give effect to these Reasons and the Decision will be issued simultaneously in Perth and Karratha. Finally I need to say that the events in this case indicate attitudes to employment which would be more suitable in the bad days of the casual pickups of Maritime workers in the early Australian Maritime Industry. They indicate that people can lose their jobs if they insist upon proper application of the environmental and safety laws. If that is so and the evidence seems to indicate that it is, that is to be abhorred in modern Australian society. It is clearly a circumstance for which tribunals such as this were created to examine and on the proper application of the laws of evidence make findings about whether such claims are true or not and if they are true to give relief to the person who has been injured.

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**2005 WAIRC 02320**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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|---|---|
| **PARTIES** | RODNEY PAUL BROWN |
| | **APPLICANT** |
| | **-v-** |
| | ALLISON PTY LTD T/AS SEAWEST MARINE SERVICES |
| | **RESPONDENT** |
| **CORAM** | SENIOR COMMISSIONER J F GREGOR |
| **DATE** | FRIDAY, 12 AUGUST 2005 |
| **FILE NO/S** | APPL 1063 OF 2004 |
| **CITATION NO.** | 2005 WAIRC 02320 |

**Result** Compensation awarded

*Order*

HAVING heard Mr R Brown in person and Mr R Gifford on behalf of the Respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby orders:

1. THAT Rodney Paul Brown was unfairly dismissed.
2. THAT reinstatement would be unavailing.
3. THAT the Respondent pay Rodney Paul Brown compensation for 13 days as if he had worked these days under the terms of the Marine Industry Dredging Award 1988 (Commonwealth).

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

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**2005 WAIRC 02321**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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|---|---|
| **PARTIES** | KELVIN P GADEKE |
| | **APPLICANT** |
| | **-v-** |
| | SEAWEST MARINE SERVICES |
| | **RESPONDENT** |
| **CORAM** | SENIOR COMMISSIONER J F GREGOR |
| **DATE** | FRIDAY, 12 AUGUST 2005 |
| **FILE NO/S** | APPL 1289 OF 2004 |
| **CITATION NO.** | 2005 WAIRC 02321 |

**Result** Compensation awarded

*Order*

HAVING heard Mr K Gadeke in person and Mr R Gifford on behalf of the Respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby orders:

1. THAT Kelvin P Gadeke was unfairly dismissed.
2. THAT reinstatement would be unavailing.
3. THAT the Respondent pay Kelvin P Gadeke compensation for 5 weeks less 5 days as if he had worked that time under the terms of the Marine Industry Dredging Award 1988 (Commonwealth).

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

**2005 WAIRC 01877**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

| | |
|---|---|
| **PARTIES** | RAFAEL CRUZ |
| | **APPLICANT** |
| | **-v-** |
| | KFC |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER J H SMITH |
| **DATE** | MONDAY, 27 JUNE 2005 |
| **FILE NO.** | APPL 259 OF 2005 |
| **CITATION NO.** | 2005 WAIRC 01877 |

| | |
|---|---|
| **CatchWords** | Termination of employment - Harsh, oppressive and unfair dismissal - Acceptance and referral out of time - Application referred outside of 28 day time limit - Application granted - *Industrial Relations Act 1979* (WA) s 29(1)(b)(i), (2) and (3). |
| **Result** | Order made to extend time to file an application |
| **Representation** | |
| **Applicant** | In person |
| **Respondent** | No appearance |

*Reasons for Decision*

1 This is an application under s 29(3) of the *Industrial Relations Act 1979* ("the Act"), for an extension of time for filing an application under s 29(1)(b)(i) of the Act by Rafael Cruz ("the Applicant"), to claim that he has been harshly, oppressively or unfairly dismissed by KFC ("the Respondent") on 28 January 2005. The application was filed by the Applicant on 9 March 2005. The application was filed 12 days out of time.

2 The Applicant was employed by the Respondent as a cleaner. The Applicant commenced employment with the Respondent on 12 March 2001. He was required to clean the KFC and Hungry Jack's shops which co-join each other in William Street, Perth. The Applicant was employed as a permanent part-time employee.

3 In his application the Applicant says his employment was terminated on 4 February 2005. When the Applicant gave evidence he testified that that was the date on which he was paid but in fact he was informed on 28 January 2005 not to report to work because his employment had been terminated.

4 The Applicant gave brief evidence about the circumstances of his termination. The Applicant testified that on Tuesday, 25 January 2005 he was due to commence his shift at 4.00pm. Prior to going to work he felt ill so he telephoned one of the managers, Tristan, who is a Hungry Jack's Manager. He informed Tristan he was sick and would be ten minutes late. The Applicant testified that Tristan informed him that that would be all right. About half and hour after the Applicant arrived at work to commence his shift at 4.10pm the KFC Manager, Nicole spoke to him, told him he was late, asked what was wrong with him and yelled at him. She provided him with a third warning letter to sign. The Applicant testified that he was not provided with a copy of the warning letter but the warning letter stated that if he was late for work he had to provide reasons why he was late. The Applicant said that Nicole gave him no opportunity to explain.

5 The Applicant worked on Wednesday, 26 January 2005. Whilst on duty he was informed by other employees that his name had been removed from the roster. As a result of this information the Applicant looked at the roster and saw that his name had been crossed off. He said he was unable to speak to any of the managers on duty that day about his name being removed from the roster because it was Australia Day and they were very busy. He did however speak to one of his supervisors, Jan, who told him that they did not know what had happened and he explained to Jan that he had an argument with Nicole on the previous day. The Applicant was next rostered to work on 28 January 2005 at 4.00pm, which was his birthday. Prior to 4.00pm on that day the Applicant telephoned one of the managers, Rick to inform Rick that he would report to work at 4.00pm and Rick told him not to come in because he (the Applicant) had been terminated.

6 After 28 January 2005 the Applicant says that he made an attempt to speak to the Respondent's State Manager, but he received no response. He did however speak to some of the Respondent's managers about the possibility of being placed in another position. About a week after his employment was terminated Rick told him that they may have another position for him in the kitchen. In the middle of February 2005 he made an appointment to see another manager whose name is Marie. When he arrived he found that Marie no longer worked for the Respondent and he spoke to another manager, Angie who told him that he was "a bit too old to work in the kitchen". The Applicant then concluded that it was unlikely that the Respondent was going to re-employ him and consequently he filed the application for unfair dismissal on 9 March 2005.

**Conclusion**

7 Having considered the evidence given by the Applicant I reached the view that I should exercise my discretion to grant the application to extend time to file an application for unfair dismissal. Applying the principles set out by the Industrial Appeal Court in *Malik v Paul Albert, Director General, Department of Education of Western Australia* (2004) 84 WAIG 683, I am satisfied that the Applicant has provided an acceptable explanation for the delay in making his claim, which makes it equitable to extend the time for filing the application. I am satisfied that the Applicant took steps to contest the termination within the 28 day period. In particular the Applicant took steps to challenge his termination and to seek re-employment. There is no issue of prejudice to the Respondent raised if the claim is to proceed. Whilst the Respondent did not appear to oppose the application for an extension of time, it did file a Notice of Answer and Counter Proposal on 15 April 2005. Whilst the Respondent challenges the merits of the Applicant's substantive claim in its Notice of Answer and Counter Proposal it does not raise any issue of prejudice or raise any grounds to oppose an order granting an extension of time. Having heard brief evidence by the Applicant as to the circumstances of the termination of his employment, I am satisfied that it cannot be said that the Applicant's claim has no merit whatsoever. In the circumstances I determined that I would grant the application and accordingly I will make an order to extend time.

**2005 WAIRC 02132**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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| **PARTIES** | RAFAEL CRUZ |
| | **APPLICANT** |
| | **-v-** |
| | KFC |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER J H SMITH |
| **DATE** | FRIDAY, 22 JULY 2005 |
| **FILE NO/S** | APPL 259 OF 2005 |
| **CITATION NO.** | 2005 WAIRC 02132 |

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| **Result** | Order made to extend time to file an application |
| **Representation** | |
| **Applicant** | In person |
| **Respondent** | No appearance |

*Order*

HAVING HEARD Mr Rafael Cruz on his own behalf the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act* 1979, hereby order:

THAT the application to accept the application out of time be and is hereby granted.

[L.S.]

(Sgd.) J H SMITH,
Commissioner.

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**2005 WAIRC 01954**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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| **PARTIES** | NATASHA BREE DUNCAN |
| | **APPLICANT** |
| | **-v-** |
| | WOOD DOG INVESTMENTS PTY LTD |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER S M MAYMAN |
| **DATE** | FRIDAY, 1 JULY 2005 |
| **FILE NO.** | APPL 238 OF 2005 |
| **CITATION NO.** | 2005 WAIRC 01954 |

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| **CatchWords** | Contractual benefits claim – Entitlements claimed under contract of employment – Principles – Application dismissed - *Industrial Relations Act 1979* (WA) s29(1)(b)(ii) |
| **Result** | Application for contractual benefits dismissed |
| **Representation** | |
| **Applicant** | Ms N Duncan (on her own behalf) |
| **Respondent** | Mr C Boyle (of counsel) |

*Reasons for Decision*

1 This is an application by Ms Natasha Duncan filed under s29(1)(b)(ii) of the *Industrial Relations Act 1979* ("the Act") claiming benefits are due under her contract of employment with Wood Dog Investments Pty Ltd ("the employer").

2 Ms Duncan claims outstanding contractual entitlements are owed for additional hours worked. The amount claimed by Ms Duncan is $3,746. The employer opposes the claim in its entirety.

**Legal Issues**

3 The Commission considers that a claim of this nature, that is, a claim for breach of a contract of employment, the ability to make the claim, the nature of the claim and indeed, the remedies available, are provided for under s29(1)(b)(ii). In the decision of the Full Bench in *Hot Copper Australia Ltd v David Saab* (2001) 81 WAIG 2704 at 2707 His Honour the President, outlined the matters pertaining to the exercise of the Commission's jurisdiction pursuant to s29(1)(b)(ii). A relevant section of that decision reads as follows:

"The limitations (and/or conditions precedent to the exercise of jurisdiction and/or power) include the following –

(a) The claim must relate to an 'industrial matter', as defined in s7 of the Act.

(b) The claim must be made by an 'employee', as defined in s7 of the Act.

(c) The benefit claimed must be a contractual benefit, i.e. the claimant must be entitled to the claim under his/her contract of service.

(d) The subject contract must be a contract of service.

(e) The benefit must not arise under an award or order of the Commission.

(f) The benefit must have been denied by the employer.

(see also the discussion of the nature of s29(1)(b)(ii) claims in *Ahern v AFTPI* 79 WAIG 1867 (FB))."

4 In this matter the only point at issue is whether the payment for additional hours worked is a contractual entitlement/benefit under Ms Duncan's contract of service. In this respect the evidence was critical.

**Applicant's Evidence**

5 Ms Duncan submitted in evidence that she responded to a newspaper advertisement for a job as a café manager for Caffissimo ("the employer"), in Fremantle. The employer and Ms Duncan walked through the premises and was then offered and accepted the position. Over the following days, together at the employer's house, Ms Duncan discussed the terms of the contract of employment. On the evidence of Ms Duncan, no agreement was reached regarding payment for additional hours worked.

6 On 15 September 2004 Ms Duncan signed a contract of employment and commenced conducting interviews for new staff.

7 Several weeks later, on the evidence of Ms Duncan, additional hours were being worked. On some occasions the total hours worked each day was up to fifteen.

*8* Ms Duncan led evidence that on 10 December 2004 a discussion took place with the employer relating to additional hours being worked without payment. The employer requested Ms Duncan to fill out a timesheet and advise she would be paid for those hours. On her evidence, that was the point at which the employer agreed to make payment for additional hours.

9 The following Tuesday, (14 December 2004), Ms Duncan received a phone call from the employer and they met at his request in a café in Scarborough where she was informed that her services would no longer be required and was terminated. At this point Ms Duncan informed the employer that all of the hours she had worked over and above 40 should be paid in accordance with the agreement reached the previous week. Once again, Ms Duncan was requested to write down the hours of overtime she believed had been worked and the employer would look over them and consider them. It was Ms Duncan's view that she would be paid for the hours.

10 On her evidence, Ms Duncan worked out an initial estimate of additional hours worked and also had conversations with the employer following the delivery of that estimate, advising that it was an estimate and she was being lenient as she wanted the matter concluded as quickly as possible. Ms Duncan tendered in evidence a document identifying, on a week by week basis, the additional hours worked. (*Exhibit D1*). There was no response from the employer and phone calls made by Ms Duncan were not returned. Ms Duncan rang the employer's house and his mobile and left messages. Eventually he did return her calls and informed Ms Duncan the papers were still being reviewed and it was not appropriate to comment.

11 In cross-examination Ms Duncan confirmed that her employment commenced on 20 September 2004, some five days after the date indicated on her application.

12 Additionally, in cross-examination Ms Duncan confirmed that the agreement reached with the employer on 10 December 2004 to commence writing timesheets for payment for additional hours related to a prospective arrangement. At that same meeting Ms Duncan confirmed there was no hourly rate nor ordinary hours of work determined. Further, at the meeting in the subsequent week where Ms Duncan's employment was terminated, she confirmed in cross-examination that no hourly rate had been agreed to for additional hours worked and no ordinary hours of work had been agreed, but the employer did agree to pay whatever overtime was being claimed.

**Respondent's evidence and submissions**

13 The employer submits that the sole basis of Ms Duncan's claim to pay for additional hours worked arises from an oral agreement purported to be reached on 14 December 2004, following the employee's termination. The employer submits the written employment agreement (*Exhibit W3*) is the only agreement between the parties in respect of Ms Duncan's employment. That agreement, in the Respondent's view, provides for an annual packaged salary.

14 The employer, in submissions, refutes there was any oral agreement formed with Ms Duncan which varied the terms of her employment contract on 10 December 2004, or at any other time. Any requests by Ms Duncan to fill out timesheets was simply to investigate the merits of the complaint that she was working too many hours.

15 Even if an agreement was reached on 14 December 2004, in the employer's submissions, it would not be enforceable under s29(1)(b)(ii) of the Act because any such agreement would not be a "contract of employment". Further, the agreement Ms Duncan says was reached with the employer lacks certainty in that no ordinary hours were agreed, no hourly rate was agreed and the basis on which the employer is said to have agreed to pay for additional hours is missing.

16 Mr Gadgeiro, Director of the employer company, submitted in evidence the employment contract with Ms Duncan (Exhibit W3).

17 In cross-examination Mr Gadgeiro refuted that any agreement had been reached with Ms Duncan regarding the payment for additional hours. He did agree that he had required Ms Duncan to start recording hours worked to allow for consideration of the number of hours being worked. His concern was that Ms Duncan was going to burn out and accordingly she was asked to record the hours worked on a timesheet so together with the employer the total number of hours could be looked at. In Mr Gadgeiro's mind:

> "There was never any agreement to pay because in my mind you're (referred to Ms Duncan) employed as a manager on a salary package, on a contract." (*Extract from transcript, page 19*)

18 A number of authorities were submitted by the employer in support of the submission that payment for hours over and above minimum hours worked was never determined as a contractual entitlement with Ms Duncan.

19 In concluding, the employer submits that the application is unmeritorious, misconceived and vexatious and that the Commission ought exercise its discretion under s27(1)(c) of the Act and order that Ms Duncan pay the employer for his lost time in defending this matter. In evidence Mr Gadgeiro led that in preparing the payroll advice, meeting with lawyers and going through the documentation involved, some twenty hours of his time had been expended. It was submitted the monetary value of those hours would be $19 per hour, some twenty hours in total.

**Conclusions and findings**

20 I have had the benefit of listening to each witness in these proceedings. I find their evidence to be open and honestly given. It is always open to a Commissioner in these circumstances to believe part of what a witness has said and to reject another part of that evidence. Support for that proposition is found in Industrial Appeals Court, *Cousins v YMCA of Perth* [2001] 82 WAIG 5 at para 43. In the case of the evidence given by Ms Duncan I consider that greater emphasis ought be given to the discussion that she had with Mr Gadgeiro on 10 December and subsequently 14 December 2004 regarding payment for additional hours worked.

21 The Commission finds that Ms Duncan's contract was never varied to include payment for additional hours worked even though I find that there was an undertaking by the employer to consider the matter.

22 Even if there was an agreement reached on the 14th the matter then becomes irrelevant because the employment relationship at that point was at an end and therefore s29(1)(b)(i) for the purposes for seeking an outstanding contractual entitlement under the Act cannot succeed.

23 I accept that Ms Duncan was employed as a café manager with the employer between 15 November and 14 December 2004. I accept also that she was employed under a contract of employment reached verbally, and subsequently reflected in a written contract between herself and the employer.

24 I accept also that Ms Duncan demonstrated clearly that additional hours were worked during her period of employment.

25 The onus is on Ms Duncan to prove that her claims, in this case payment for additional hours worked, are benefits to which she is entitled under her contract of employment. Furthermore, it is for the Commission to determine the terms of the contract and to ascertain whether the claim constitutes a benefit denied under such a contract, having regard to the obligations of the Commission to act according to equity, good conscience and the substantial merits of the case (see *Belo Fisheries v Froggett* (1983) 63 WAIG 2394). It is my view that Ms Duncan has not made out her claim that she has been denied payment due to her under her contract of employment, specifically for additional hours worked.

26 I have considered the submissions of the employer with respect to payment for costs. The authority often followed in the Commission is that of *Denise Brailey v Mendex Pty Ltd t/a Mair and Co Maylands* (1992) 73 WAIG 26 and costs are not awarded in this jurisdiction unless there are exceptional circumstances. The Full Bench of the Commission has asserted that the power of the Commission to order costs is to be exercised with a good degree of restraint and for the Commission to make an order awarding costs is considered to be rare. In the Commission's view there is nothing unusual about these proceedings. The facts were not complex and the determination turned on the evidence of Ms Duncan and the employer. There was nothing exceptional to warrant an order for costs and I find accordingly.

27 For all of the reasons expressed above the Commission dismisses Ms Duncan's claim for denied contractual benefit and also dismisses the employer's application for costs.

28 An order will now issue dismissing the applications for denied contractual benefits and for costs.

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**2005 WAIRC 02097**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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| **PARTIES** | NATASHA BREE DUNCAN |
| | **APPLICANT** |
| | **-v-** |
| | WOOD DOG INVESTMENTS PTY LTD |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER S M MAYMAN |
| **DATE** | TUESDAY, 19 JULY 2005 |
| **FILE NO** | APPL 238 OF 2005 |
| **CITATION NO.** | 2005 WAIRC 02097 |

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| **Result** | Application dismissed |
| **Representation** | |
| **Applicant** | Ms N Duncan |
| **Respondent** | Mr C Boyle (of counsel) |

*Order*

HAVING heard Ms N Duncan on her own behalf and Mr C Boyle (of counsel) on behalf of the Respondent, and, having given my reasons for decision, the Commission pursuant to the powers conferred on it by the *Industrial Relations Act 1979* hereby orders:

THAT the claim for denied contractual benefits be and is hereby dismissed; and

THAT the application for costs be dismissed.

(Sgd.) S M MAYMAN,
[L.S.] Commissioner.

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**2005 WAIRC 01852**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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| **PARTIES** | BEVERLEY EDMUNDS |
| | **APPLICANT** |
| | **-v-** |
| | TRUSTY STEP AUSTRALIA T/A SUBWAY BUNBURY HOMEMAKER CENTRE |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER S J KENNER |
| **DATE** | WEDNESDAY, 22 JUNE 2005 |
| **FILE NO.** | APPL 319 OF 2005 |
| **CITATION NO.** | 2005 WAIRC 01852 |

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|---|---|
| **Catchwords** | Industrial law - Whether employee legal practitioner employed by union able to represent applicant in proceedings - Commission satisfied that representative a legal practitoner and certificated practitioner as defined engaging in legal practice - Representative entitled to continue to act for and appear on behalf of applicant - Declaration issued - *Industrial Relations Act 1979* (WA) s 7, s 26, s 29(1)(b)(ii), s 31 - *Industrial Relations Commission Regulations 1985* reg 88(4) - *Legal Practice Act* (WA)*2003* s 3, s 4, s 45, s 47. |
| **Result** | Declaration issued |
| **Representation** | |
| **Applicant** | Ms K Scoble of counsel |
| **Respondent** | Ms J Auerbach of counsel |

*Reasons for Decision*

1 The substantive claim is one brought by the applicant against the respondent, alleging that the respondent has denied the applicant a contractual benefit. These proceedings have been brought pursuant to s 29(1)(b)(ii) of the Industrial Relations Act 1979 ("the Act"). The substantive application is listed for hearing before the Commission in Busselton on 28 June 2005.

2 By a notice of answer and counter proposal filed on 7 June 2005, the solicitors for the respondent have not only taken issue with the substantive claim filed by the applicant, but have also challenged the ability of Ms Scoble, an employee legal practitioner employed by the Construction, Forestry, Mining and Energy Union of Workers ("the CFMEUW"), to represent the applicant in these proceedings. Given the proximity of the hearing the parties were directed by the Commission to file written submissions in relation to this issue, by Friday 17 June 2005, which they have done.

**Contentions of Parties**

3 In summary, the respondent's solicitor Ms Auerbach submitted that Ms Scoble, as an employee of the CFMEUW, was not able to continue to act on behalf of the applicant because she did not satisfy the requirements imposed upon her by the Legal Practice Act 2003 ("the LPA"). The submission was that as it is common ground that Ms Scoble is a "certificated practitioner" for the purposes of s 3 of the LPA, and for present purposes is "engaging in legal practice" as in s 4 of the LPA, as an employee of the CFMEUW, which is not an incorporated legal practice or a partnership, she does not satisfy the requirements of the LPA.

4 Alternatively, it is also submitted that the applicant is not a member of or eligible to be a member of the CFMEUW and for this reason also, Ms Scoble cannot continue to act on the applicant's behalf.

5 In response, Ms Scoble submitted that she is a "certificated practitioner" for the purposes of s 3 of the LPA, and has current professional indemnity insurance as a sole practitioner, provided by Law Mutual, which complies with the requirements of Part 14 of the LPA. Ms Scoble took issue with various assertions made by counsel for the respondent that she was not complying with the LPA and furthermore said that a number of provisions of the LPA cited by the respondent have no application to her practice. It is also submitted, contrary to the assertions by the respondent, that the applicant is a member of the CFMEUW. Ms Scoble also said that in any event, pursuant to s 26 of the Act, as a matter of equity and conscience she should be permitted to continue to represent the applicant in these proceedings. Alternatively, the submission was that the CFMEUW could simply file a Warrant to Appear as Agent under Regulation 88(4) of the Industrial Relations Commission Regulations 1985, in any event.

**Consideration**

6 There are disputed matters of fact arising on the submissions. In the absence of evidence adduced by either the applicant or respondent, the Commission is not able to resolve those disputed issues and expressly refrains from saying anything further about those matters.

7 The starting point in dealing with this preliminary issue is the application filed. The application is one brought by the applicant in her own right as an individual pursuant to s 29(1)(b)(ii) of the Act. The particulars of the application allege that the applicant has been denied certain contractual benefits by way of bonus payments. Therefore, pursuant to s 29(1)(b) the applicant, alleging to be a former employee of the respondent, has referred that industrial matter to the Commission.

8 Section 31 of the Act deals with representation of parties to proceedings before this Commission. Relevantly, s 31 provides as follows:

> ***"31. Representation of parties to proceedings***
>
> *(1) Any party to proceedings before the Commission, and any other person or body permitted by or under this Act to intervene or be heard in proceedings before the Commission, may appear —*
>
> *(a) in person;*
>
> *(b) by an agent; or*
>
> *(c) where —*
>
> *(i) that party, person or body, or any of the other parties, persons or bodies permitted to intervene or be heard, is the Council, the Chamber, the Mines and Metals Association, the Minister or the Minister of the Commonwealth administering the Department of the Commonwealth that has the administration of the Commonwealth Act; or*
>
> *(ii) the proceedings are in respect of a claim referred to the Commission under section 29(1)(b) or involve the hearing and determination of an application under section 44(7)(a)(iii); or*
>
> *(iii) all parties to the proceedings expressly consent to legal practitioners appearing and being heard in the proceedings; or*
>
> *(iv) the Commission, under subsection (4), allows legal practitioners to appear and be heard in the proceedings,*
>
> *by a legal practitioner.*
>
> *(2) An organisation or association shall be deemed to have appeared in person if it is represented by its secretary or by any officer of the organisation or association.*

> *(3) A person or body appearing by a legal practitioner or agent is bound by the acts of that legal practitioner or agent.*
>
> *(4) Where a question of law is raised or argued or is likely in the opinion of the Commission to be raised or argued in proceedings before the Commission, the Commission may allow legal practitioners to appear and be heard.*
>
> *(5) The Commission may make regulations prescribing the manner in which authorisation of any agent is to be given, either generally or for a particular case.*
>
> *(6) A person who is not a legal practitioner within the meaning of this Act but engages in the practice of the law in a place outside the State shall not appear as an agent in proceedings before the Commission."*

9 It can be seen from s 31(1)(c)(ii), that in applications of the present kind, a party to such proceedings may be represented by a legal practitioner who may appear before the Commission as of right without leave.

10 By s 7 of the Act, "legal practitioner" is defined as follows:

> ***"legal practitioner"*** *means a certificated practitioner within the meaning of the Legal Practice Act 2003;"*

11 Therefore, a person who is a "legal practitioner", as defined, is able pursuant to s 31 of the Act, to appear on behalf of a party to proceedings in respect of a claim referred to the Commission under s 29(1)(b) of the Act.

12 The legislation in this State regulating the practice of law is the LPA. The LPA replaced the Legal Practitioner's Act 1893 and came into effect in January 2005. By s 3 of the LPA "legal practitioner" is defined to mean:

> ***"legal practitioner"*** *means a person —*
>
> *(a) who is admitted as a legal practitioner, whose name is on the Roll of Practitioners and who is not a disqualified person; or*
>
> *(b) who is an interstate practitioner who practises in this State;"*

13 Furthermore, "certificated practitioner" under s 3 of the LPA is defined as follows:

> ***"certificated practitioner"*** *means —*
>
> *(a) a legal practitioner who holds a current practice certificate; or*
>
> *(b) an interstate practitioner who practises in this State;"*

14 As the Commission has already observed, it is common ground that Ms Scoble is a "certificated practitioner" for the purposes of the above definition. Prima facie therefore, she is a legal practitioner as defined in s 7 of the Act. It would also appear to be the case that in acting on behalf of the applicant in these proceedings, Ms Scoble is engaging in legal practice as that is defined in s 4 of the LPA.

15 In my opinion, this matter is to be resolved based upon the relevant provisions of the Act. Ms Scoble is not an industrial agent for the purposes of s 112A of the Act, and moreover, as a legal practitioner, cannot act as an agent, as an agent is a separately identified class of persons as prescribed in the Act and the Regulations authorised to appear in the Commission: *Re An Application by the Civil Service Association of Western Australia (Incorporated)* (2003) 83 WAIG 1403.

16 As a legal practitioner and moreover as a "certificated practitioner" for the purposes of the LPA, Ms Scoble is an officer of the Supreme Court of Western Australia and is subject to the LPA in connection with engaging in legal practice in this State. In my opinion, the existence of a current practice certificate issued by the Legal Practice Board under Part 5 of the LPA to a legal practitioner is, prima facie, evidence of an entitlement of that legal practitioner to engage in legal practice in this State. Ms Scoble, meeting those requirements, is, as I have noted above, a person who is a "legal practitioner" as defined in s 7 of the Act, and is therefore, prima facie, entitled to appear as of right, on behalf of a person in respect of a claim referred to the Commission pursuant to s 29(1)(b) of the Act. The present circumstances are materially distinguishable to those before the Commission in *Hospital Salaried Officers Association of Western Australia (Union of Workers) v Anglican Homes (Inc)* (2004) 84 WAIG 1469, referred to by the respondent. In that case the capacity of a lay industrial officer employed by one Union, to act as agent on behalf of another Union, was in issue. The terms of section 112A of the Act, precluding a person carrying on a business as an industrial agent, unless registered as such, arose for consideration.

17 In the present circumstances in my opinion, it is not open for the Commission to go behind the prima facie entitlement of Ms Scoble, as a certificated practitioner under the LPA and accordingly being a legal practitioner for the purposes of s 7 of the Act, to appear before this Commission in proceedings of this kind. The assertions raised by the solicitors for the respondent, including some of which are serious assertions, as to non-compliance with the LPA, seem to me to give rise to other matters concerning compliance with the LPA, properly the province of the Legal Practice Board constituted pursuant to Part 2 of the LPA.

18 On the basis of what is before the Commission in relation to this preliminary issue, I cannot conclude otherwise than Ms Scoble is entitled to continue to act for and appear on behalf of the applicant in these proceedings.

19 As to the alternative submission by counsel for the respondent regarding the applicant's membership of the CFMEUW, given that the proceedings have been commenced by the applicant herself as a former alleged employee of the respondent, the question of eligibility for membership of the CFMEUW in my opinion, does not arise. This is not a case in which proceedings have been commenced by an organisation under ss 29(1)(a)(ii) or 44(7)(a)(i) of the Act, which would attract consideration of the issues dealt with by the Commission as presently constituted in *The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australian Branch v Monadelphous Group of Companies* (2000) 80 WAIG 611.

20 Furthermore, whilst not the subject of submissions on this occasion, it is in my opinion, very strongly arguable that the CFMEUW, subject to compliance with the requirements of the LPA, could be regarded as an "incorporated legal practice" for the purposes of Division 2 of Part 6 of the LPA. By s 45 of the LPA, a certificated practitioner is able to engage in legal practice in any form of business structure including that of a corporation. By s 3 of the LPA "corporation" is defined to mean a number of things including "an industrial organisation incorporated under a law of the Commonwealth or a State". It is indisputable that the CFMEUW is an organisation incorporated under the Act, and by s 60 of the Act, is a body corporate for the purposes there set out.

21 From the terms of s 47 of the LPA, it is plain in my view that a registered organisation under the Act, which is a corporation for the purposes of Part 6 of the LPA, may provide legal services in this State, regardless of whether or not it provides other services. If it does so, by s 47(1) of the LPA it is deemed to be an incorporated legal practice. Therefore, an organisation

registered under the Act, as a corporation as defined under the LPA, which provides legal services in this State may employ legal practitioners and those legal practitioners, who are certificated practitioners under the LPA, are permitted by the LPA to engage in legal practice as employees of that incorporated legal practice.

22 A declaration that Ms Scoble is entitled to continue to act for and appear on behalf of the applicant will be made.

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**2005 WAIRC 01921**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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| **PARTIES** | BEVERLEY EDMUNDS |
| | **APPLICANT** |
| | **-v-** |
| | TRUSTY STEP AUSTRALIA T/A SUBWAY BUNBURY HOMEMAKER CENTRE |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER S J KENNER |
| **DATE** | WEDNESDAY, 29 JUNE 2005 |
| **FILE NO.** | APPL 319 OF 2005 |
| **CITATION NO.** | 2005 WAIRC 01921 |

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| **Result** | Declaration issued |
| **Representation** | |
| **Applicant** | Ms K Scoble of counsel |
| **Respondent** | Ms J Auerbach of counsel |

*Declaration*

HAVING heard Ms K Scoble of counsel on behalf of the applicant and Ms J Auerbach of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, ("the Act") hereby declares–

THAT Ms K Scoble, being a legal practitioner as defined in s 7 of the Act, is entitled to continue to act for and appear on behalf of the applicant in the herein proceedings.

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

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**2005 WAIRC 02267**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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| **PARTIES** | ZOLTAN FRED FARKAS |
| | **APPLICANT** |
| | **-v-** |
| | ABACUS CALCULATORS (WA) PTY LTD |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER S J KENNER |
| **HEARD** | WEDNESDAY, 25 MAY 2005 |
| **DELIVERED** | FRIDAY, 5 AUGUST 2005 |
| **FILE NO.** | APPL 584 OF 2004 |
| **CITATION NO.** | 2005 WAIRC 02267 |

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| **Catchwords** | Termination of employment - Harsh, oppressive and unfair dismissal and denied contractual benefits - Failure by applicant to perform in accordance with obligations under Agreement over a lengthy period - Principles applied - Applicant not harshly, oppressively and unfairly dismissed - Whether applicant underpaid bonus payments - Adjustment of bonus by respondent for applicant's share of stock loss and inadequate performance assessments - Whether adjustments appropriate - Applicant underpaid bonus where adjustment made for stock loss - Application upheld in part - Order issued - *Industrial Relations Act 1979* (WA) s 29(1)(b)(i), s 29(1)(b)(ii), s 26(1)(a), s 26(1)(c). |
| **Result** | Order issued |
| **Representation** | |
| **Applicant** | Mr K Trainer as agent |
| **Respondent** | Mr D Johnston as agent |

*Reasons for Decision*

1 The present application is one brought pursuant to s 29(1)(b)(i) and (ii) of the Industrial Relations Act 1979 ("the Act"). The applicant alleges that on or about 7 April 2004 he was harshly, oppressively and unfairly dismissed by the respondent. Additionally, the applicant claims he has been denied contractual benefits by way of outstanding bonus payments in the sum of $2,600.00

**Facts**

2 The applicant commenced employment with the respondent as a sales person on or about 13 January 2003. The respondent is engaged in the industry of the sale of computer products through various retail outlets. The applicant initially commenced at the respondent's Osborne Park store but shortly thereafter transferred to the Morley store. The applicant also spent a period of time at the respondent's larger store in Cannington from in or about December 2003 to about February 2004, although there was some conjecture on the evidence about the precise period at that particular store.

3 As a sales representative, the applicant was offered and he accepted a contract of employment which included a bonus system. The obligations and benefits of such a system were set out in a document entitled "Sales Rep's Assessment" ("the Agreement") which set out in some detail, the performance requirements of sales representatives employed by the respondent participating in this arrangement. A copy of this Sales Rep's Assessment, signed by the applicant was tendered as exhibit A1. The terms of this document are important for the purposes of both limbs of the applicant's claim. The bonus system was not simply based upon financial performance, but also upon overall work performance in a number of detailed criteria set out in the Agreement. These matters included sales budgets; displays; in store signage; staff presentation; stock levels; dusting; stock movement; complaints; training sessions; trade nights; product knowledge; staff attitude; telephone manner; telephone sales ability; administration procedures; staff punctuality; stock pricing; store organisation; sales ability; tidiness and organisation; following company directives; stock losses; and misrepresentation.

4 The essence of this Agreement was that employees were required to meet a minimum gross profit of $13,500 per month beyond which, certain bonus payments would apply. However, in order to receive bonuses under the Agreement, sales staff were also required to achieve at least a 75 per cent performance evaluation, undertaken monthly against the above criteria specified in the Agreement. For employees who received a performance evaluation of between 75 per cent and 100 per cent, their bonus calculation would be that percentage of the available bonus depending upon the gross profit achieved in excess of $13,500 per month. Employees achieving less than the 75 per cent evaluation score would not receive a bonus. The Agreement further provided that if sales representatives did not achieve the minimum gross profit per month performance required, then following warnings, they may be liable to termination of their employment.

5 The applicant testified that he worked at the Morley store until about January 2004 when he transferred to the Cannington store. He said that he had one meeting with the respondent's general manager of retail Mr Botwright, in March 2004, when he was counselled about his sales target performance and other matters. A written record of this was tendered as exhibit A2. It was the applicant's evidence that these matters related to his period of time at the Morley store. Exhibit A2 refers to poor sales performance; some carelessness by the applicant in the performance of his duties; failure to perform tasks as directed; attending late for work and a reminder of the applicant's obligations under the Agreement.

6 The applicant said that when he moved to the Cannington store, there was no issue taken with his performance. At least none that he could recall in evidence. The applicant testified that whilst at this store, he did achieve some improvement in his sales target performance. Following a period at the Cannington store, the applicant moved back to the Morley store he thought, at about the end of February or early March 2004. Mr Botwright was then located at this store and the applicant reported directly to him. A copy of the applicant's sales performance in terms of gross profit by month was tendered as exhibit A6. This document shows that in the period from March 2003 up to and including April 2004, the applicant achieved the minimum gross profit of $13,500 per month on only three occasions over that 13 month period.

7 According to the applicant's testimony, the only discussions he had with Mr Botwright, apart from that leading to exhibit A2, were general discussions about improving his sales performance. On or about 7 April 2004, the applicant testified he was called into Mr Botwright's office and told by him his employment was being terminated and was given a letter of the same date, tendered as exhibit A4. A number of matters are referred to in this letter. As to staff presentation, the applicant said he considered his presentation to be above the standard required and only wore a T-shirt to work on one occasion. In relation to trade nights, he was not aware of the allegation that he failed to attend a trade night as specified. In relation to staff attitude, the applicant denied any knowledge of this matter. There was reference to a complaint made by a customer arising from events on 3 April following the purchase of a faulty cartridge. The applicant said it was company policy to not give refunds and the customer became agitated and he requested she leave the store. As to punctuality, the applicant denied he attended work late and testified that he always attended about 30 minutes prior to the store opening and sometimes stayed behind if required. As to the tidiness of his work area, the applicant denied that he was responsible for this matter. The applicant did admit however, that on occasions he had made some errors in relation to the invoicing of goods but not significantly so.

8 The applicant was paid two weeks salary in lieu of notice and left the store that day. He immediately sought alternative employment and commenced in another position in July 2004. He testified that he was seeking compensation for his period of unemployment.

9 As to bonuses, the applicant said that by exhibit A6, he achieved his minimum gross monthly sales qualified for bonus payments in August 2003, and in January and February 2004. As noted above, these were the only three months that the applicant achieved the minimum sales performance figure. According to the applicant, he did not receive all of his bonus payment for August 2003, because of deductions made against all staff for missing stock and in relation to January and February 2004, because of poor performance evaluations in accordance with the Agreement.

10 As is often the case in matters of this kind, the respondent's evidence as to the applicant's period of employment was in contrast to the applicant's testimony.

11 Mr Dowley was employed by the respondent between April 2003 and October 2004. He was the store manager at Cannington from January 2004. Mr Dowley gave evidence about the monthly performance evaluation process and how gross profit and bonuses were calculated. He testified that the end of month gross profit figures were adjusted for both stock losses and for sales by finance transactions. In the case of the latter, a ten percent reduction of gross profit figures was made to allow for finance deals. In the case of rentals, there was an increase in the gross profit figure plus a bonus retail voucher was given to employees.

12 Mr Dowley gave evidence about two performance evaluations he did for the applicant on 1 February and 2 March 2004, both of which were tendered as exhibit R2. Both performance evaluations were unsatisfactory in relation to the applicant's performance, save for product knowledge, which was acknowledged to be good. Additionally, Mr Dowley testified that the applicant was continually late for product training which commenced generally at 8.15am in the store, 30 minutes prior to the

store opening time. This was stressed as an important part of sales training for staff. I note that this is also referred to in the Agreement. Furthermore, Mr Dowley testified that he often found the applicant argumentative in his dealings with him and was reluctant to accept constructive criticism. According to Mr Dowley, being the largest store of the respondent, capacity to achieve high sales figures was substantial and the applicant did not achieve anywhere near the sales figures of other sales persons at the Cannington store. Overall, Mr Dowley was of the view that the applicant really did not wish to sell and that he would not achieve the required results in his store. Ultimately, he recommended that the applicant be transferred to the Morley store as it was, in Mr Dowley's view, more suitable for him and would be closer to his home.

13 Mr Botwright has many years sales management experience. His evidence was that the assessment of sales persons' performance was not simply based on gross sales but also on all round performance in the various areas set out in the Agreement. He testified that by agreeing to participate in the bonus remuneration system and signing the Agreement, the applicant committed to its requirements. Mr Botwright testified in relation to stock takings and stock variances and how the respondent allocated responsibility for stock losses amongst all employees in a particular store, which would then affect the payment of any bonuses for that month. In the case of Cannington, there was a significant stock loss of some $14,000 which impacted on bonus payments. There was also some significant stock loss at the Morley store in June and September 2003 which affected the applicant's bonus payments. According to Mr Botwright, for the August 2003 period, the applicant was in fact paid a bonus that he was not strictly entitled to, because of an error in calculations for a previous period.

14 When the applicant moved from Cannington to the Morley store, Mr Botwright assumed direct supervision of him. Mr Botwright performed the applicant's April 2004 performance evaluation tendered as exhibit R7. His evidence was he was very disappointed with the applicant's review, not just in terms of sales but his overall work performance as set out in the review. His evidence was the applicant's demeanour had changed and he did not appear to be interested in receiving assistance. Additionally, Mr Botwright testified that the applicant became disruptive in the store by making derogatory comments about the respondent to other employees. The evidence of Mr Botwright was that after his meeting with the applicant in March 2004 where the applicant committed to improving all aspects of his performance, none was being demonstrated. The comments section in exhibit R7 read as follows:

> *"Zolton after signing an agreement on 25/3/04 where you clearly indicated you would improve your performance in all areas of responsibility I am at my witts (sic) end, yesterday you were sick, but failed to inform anyone of your whereabouts, as I have instructed you on numerous occasions to do so, I feel you have not made the slightest effort to improve on any issues. Unfortunately I have no alternative but to issue you with this final warning and if an immediate improvement is not seen, your employment with Abacus will be immediately terminated."*

15 The applicant refused to sign this document.

16 About a week later on 7 April 2004, Mr Botwright testified that no change had been seen in the applicant's performance or attitude and he issued him with the letter as exhibit A4, terminating his employment.

**Consideration**

**Unfair Dismissal Claim**

17 Whilst there was some attack on the credibility of Mr Dowley's evidence overall, I am satisfied that all witnesses who testified in this matter did so to the best of their recollection and I found overall their evidence to be credible. Whilst the applicant could not recall discussing the content of the performance evaluations with Mr Dowley, I am satisfied they were performed consistent with the respondent's practice. In any event, the content of these performance evaluations were generally consistent with that performed by Mr Botwright in April 2004.

18 The principles to apply in determining whether a dismissal is harsh, oppressive and unfair are well settled. In matters such as these that the test as to whether a dismissal is harsh, oppressive or unfair is whether the right of the employer to dismiss an employee has been exercised so harshly or oppressively such as to constitute an abuse of that right: *Miles v Federated Miscellaneous Workers Union of Australia, Industrial Union of Workers, Western Australian Branch* (1985) 65 WAIG 385.

19 Additionally, in assessing a claim such as the present matter, it is not the province of the Commission to assume the role of the manager, but to consider the dismissal objectively and in accordance with the obligations imposed on the Commission pursuant to ss 26(1)(a) and 26(1)(c) of the Act. Moreover, in objectively assessing the circumstances of the case, the practical realities of the workplace need to be considered and a commonsense approach to the application of the statutory provisions should be adopted: *Gibson v Bosmac* (1995) 60 IR 1.

20 In this matter, it is important to observe that the applicant, by entering into the Agreement, committed to its terms and in particular, the performance obligations specified by the respondent. In particular, I note the minimum performance obligations in relation to sales budgets in the Agreement. As set out above, the evidence was the applicant did not meet the minimum sales targets for most of his employment with the respondent. Save for the first few months of training on only three of ten months did the applicant achieve the required minimum gross profit figure. Despite this, the applicant's employment was not terminated, as it could have been, pursuant to the express terms of the Agreement, to which the applicant committed. Furthermore, I accept on all of the evidence, that there were serious issues raised by the respondent in relation to important aspects of the applicant's overall performance, not just sales. I am far from persuaded that the applicant did not have reasonable notice of these issues in particular, given the terms of exhibit A2, which fairly and squarely raised significant matters of performance for the applicant to address. Whilst the agent for the Applicant sought to attack the conclusions reached by Mr Botwright following the performance review of April 2004, in terms of those matters being known at the time of termination of the applicant's employment, that does not detract from the fact that the applicant had consistently failed to perform in accordance with his obligations under the Agreement over a lengthy period of time. On one view of the evidence in this matter, it seemed that the respondent had carried the applicant in employment for a lengthy period of time, in circumstances where it could have insisted upon strict performance of the terms of the Agreement and terminated the applicant's employment considerably earlier than it did. In my opinion, as a matter of equity and good conscience, the applicant cannot now complain that he has been unfairly dealt with in all of these circumstances.

21 I find therefore that the applicant's dismissal was not harsh, oppressive or unfair.

**Bonus Claims**

22 In my view, at least in part, the applicant is on stronger ground relation to these claims.

23 Pursuant to the Agreement, the applicant was entitled to a ten percent bonus for gross sales profits between $13,500 and $18,500. I am satisfied that these bonuses were an entitlement that the applicant had under his contract of employment with the respondent: *Hotcopper v Saab* (2001) 81 WAIG 2704. For the month of August 2003, according to exhibit A6, the applicant achieved a gross sales profit figure of $17,929. The respondent, in purported reliance upon cl 22 of the Agreement, dealing with loss of stock, adjusted the applicant's bonus payment by reducing it by his share of the stock loss. In my opinion,

the respondent was not permitted to do this, unless it was established that the applicant was responsible for the stock loss either through his negligence or failure to follow the respondent's established procedures. The plain language of clause 22 of the Agreement does not permit a simple allocation of loss to all employees, irrespective of the cause of the loss. Accordingly, I am satisfied that the applicant has been underpaid his bonus for the month of August 2003. By exhibit A8, the applicant received a bonus payment of $1,278.78. He should have received a bonus payment of $1,792.90 leaving a shortfall of $514.12. The applicant has been denied this as a contractual benefit and I find accordingly.

24 As to the applicant's claims for bonuses for January and February 2004, I am not satisfied the applicant has made out these claims. Whilst the agent for the applicant sought to attack the assessments undertaken by Mr Dowley of the applicant for these months, as an experienced store manager, the Commission has no basis to go behind those assessments. I am not satisfied that they were actuated by any malice or improper motive. Furthermore, as I have noted above, the applicant's performance assessments for January and February 2004, were not inconsistent with the assessment performed by Mr Botwright in April 2004, evidencing a continuing trend of inadequate performance in a number of significant areas. Consistent with the terms of the Agreement, to which the applicant submitted, he was required to achieve at least 75 per cent of the performance evaluation factors, before being entitled to any bonus payment, regardless of an actual sales performance gross profit figure. On that basis alone, in my view, the applicant had no entitlement to performance bonuses for the two months claimed and those claims are refused.

25 An order will issue giving effect to the Commission's finding that the applicant was denied a contractual benefit by way of an under payment of his performance bonuses for August 2003 but otherwise the applicant's claims will be dismissed.

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**2005 WAIRC 02268**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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| **PARTIES** | ZOLTAN FRED FARKAS |
| | **APPLICANT** |
| | **-v-** |
| | ABACUS CALCULATORS (WA) PTY LTD |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER S J KENNER |
| **DATE** | FRIDAY, 5 AUGUST 2005 |
| **FILE NO/S** | APPL 584 OF 2004 |
| **CITATION NO.** | 2005 WAIRC 02268 |

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| **Result** | Order issued |
| **Representation** | |
| **Applicant** | Mr K Trainer as agent |
| **Respondent** | Mr D Johnston as agent |

*Order*

HAVING heard Mr K Trainer as agent on behalf of the applicant and Mr D Johnston as agent on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders –

(1) THAT the respondent pay to the applicant the sum of $514.12 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.

(2) THAT otherwise the application be and is hereby dismissed.

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

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**2005 WAIRC 02216**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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|---|---|
| **PARTIES** | KYLIE JAMES |
| | **APPLICANT** |
| | **-v-** |
| | CELESTE CORPORATION PTY LTD TRADING AS JIFFY FOODS |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER S J KENNER |
| **HEARD** | 10 MARCH 2005 |
| **DELIVERED** | TUESDAY, 2 AUGUST 2005 |
| **FILE NO.** | APPL 720 OF 2004 |
| **CITATION NO.** | 2005 WAIRC 02216 |

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| **Catchwords** | Industrial law - Termination of employment – Harsh, oppressive and unfair dismissal – Whether applicant an employee or independent contractor of respondent – Written agreement between the parties defining the relationship as principal and independent contractor - Principles applied – Applicant held to be an independent contractor of respondent - Commission lacks jurisdiction - Application dismissed – *Industrial Relations Act 1979* (WA) s 7, S 29(1)(b)(i), s 29(1)(b)(ii). |
| **Result** | Order issued |
| **Representation** | |
| **Applicant** | Mr T Borgeest of counsel |
| **Respondent** | Mr T Offer of counsel |

*Reasons for Decision*

1 The applicant's claim is one made pursuant to s 29(1)(b)(i) and (ii) of the Industrial Relations Act 1979 ("the Act") for orders pursuant to s 23A of the Act. The applicant alleges that she was harshly, oppressively and unfairly dismissed by the respondent and seeks compensation for loss. Additionally, the applicant in her particulars of claim originally filed, also sought contractual benefits by way of unpaid wages however this claim was not pursued on the hearing of the matter.

2 The respondent employer not only denied the applicant's claims, but also averred that it was never the applicant's employer as she was at all material times an independent contractor. It was that latter issue that was the focus of the parties' submissions and evidence in the proceedings.

**Factual Background**

3 There was little controversy on the essential facts. The applicant was first employed by the previous owner of the respondent in 2000 for about one year as a driver. She was engaged to sell food products on designated routes in food vans supplied by the then employer. She was required to sell a variety of items including sandwiches, pies, rolls, drinks, cigarettes and other "tuck shop" supplies. The applicant had a designated route and she was paid as a casual employee. She was required to both load and clean the van on a daily basis. The applicant left her then employer to pursue other opportunities.

4 In March 2004, the applicant responded to an advertisement placed in the newspaper by the respondent for drivers. She attended an interview with a number of other people at which the arrangements in place for sales van operators were discussed and illustrated. The applicant was informed that the arrangements had changed from 2000 when she was employed by the then operator of the business. It was explained to the applicant that there would be a period of five days training during which she would be paid a rate of $80 per day, only payable if the full five days was completed and these monies were payable after the operator had successfully completed a period of three months with the respondent.

5 The applicant outlined the work she performed over this period. She was assigned a vehicle which was then stocked with the respondent's food product. There was a designated route assigned which was set out on a "running card" which specified certain times and locations for sale of the products from the sales van. The applicant was to purchase product from the respondent and then to sell it to customers with a mark up, and the difference between the sale price and operating expenses, including purchase of the product and sales van costs, was retained by the applicant. Stock purchases were available to the applicant from the respondent on a 30 day credit basis. It was the driver's responsibility to decide whether any credit was to be given to customers or not.

6 Having completed the five day training period, the applicant then entered into a formal written agreement ("the Agreement") with the respondent which set out in some detail, the nature of the relationship between the applicant and the respondent and the terms and conditions of the engagement. The Agreement specified at cl 5 that the relationship of the parties was to be that of principal and independent contractor and not that of employer and employee, agent and principal, franchisee and franchisor, or any other relationship. The Agreement also specified in some detail matters such as:

(A) the grant by the respondent to the applicant of a non-exclusive right to service a specified geographical area for food sales;

(B) the entitlement of the applicant to all proceeds of sales less costs and expenses of operating the sales van and product purchases;

(C) an obligation by the applicant to attend sites specified by customers;

(D) an obligation on the applicant to abide by the terms of an "Operations Manual" and other "lawful directions" by the respondent;

(E) no provision for goodwill to the applicant;

(F) provisions as to operation of the sales van including rental to be paid by the applicant to the respondent and insurance obligations on the applicant in relation to the sales van;

(G) all operating costs of the sales van to be paid by the applicant;

(H) all costs and repairs for insurance excesses to be paid by the applicant in respect of the sales van;

(I) the sales van operator to be responsible for stock takes and product shortages;

(J) a power of delegation by which the applicant could delegate the operation of the sales van to a replacement driver without recourse to the respondent;

(K) no obligation on the applicant to wear any uniform but to present in a tidy manner;

(L) the applicant was responsible for all income tax, superannuation, annual leave, sick leave, maintenance of taxation records, and lodgement of business activity statements with the Australian Taxation Office;

(M) the applicant was required to hold personal accident, public and product liability insurance cover;

(N) the applicant provided a general indemnity to the respondent in respect of any claims, demands, costs, expenses, injury, loss, damages or liability arising from the performance of the services;

(O) either the applicant or respondent could terminate the Agreement immediately upon written notice; and

(P) both the applicant and the respondent to be responsible for any goods and services tax applicable to items supplied to each other.

7 It was common ground that the preparation of paperwork such as order forms, tax invoices containing product sales and the like, were generated by the respondent. It was the respondent's evidence that this was performed as a convenience to assist the applicant in the running of her sales van however the applicant could undertake this independently if she wished to.

8 Pursuant to the Agreement, the applicant was entitled to a guaranteed profit amount of $135 per day then after a period of approximately three months, Mr Barnett, the principal of the respondent, testified that it was expected that a driver would have their van in profit with revenue of approximately $5000 per week. Over this figure, the applicant and respondent shared profit from food sales on a 50/50 share basis.

9 The applicant testified that at the time she commenced with the respondent there was no doubt in her mind as to the basis of her engagement as a contractor. She regarded the operation of the van and the customers as "hers" and she registered for goods and services tax purposes as her own business with an Australian Business Number. The applicant said there were occasions when she was unable to drive because of illness and she arranged a relief driver from the respondent or obtained her own replacement from elsewhere. In terms of food purchases from the respondent, the applicant testified that she purchased food products from the respondent, paid goods and services tax on it and claimed that tax back. She then sold the food products to customers at recommended prices however, conceded that she was free to charge whatever price she liked for those goods. Goods and services tax was charged to customers as a part of the product's sale, which tax was then declared.

10 In terms of her round, the applicant testified that she was able to and did add customers to her round from time to time and there was no need to obtain any permission from the respondent for this. She also changed times of her delivery route to servicing customers and said that her "supervisor", called "Jan", was not able to tell her where to go, what to sell, what to wear or what to do. If the applicant did add a customer to her territory however, there was an additional bonus payment made to her for this. Additionally, if a customer of the applicant's in her territory became uneconomic it was a decision for her to stop servicing that customer. Generally, the applicant testified that she sought advice from "Jan" as to the conduct of her round but said that she could not tell her how to run "her business".

11 In terms of the obligation to drive the sales van, Mr Barnett testified that it was no problem for contractors to provide their own vehicle if they wished to, and for contractors to engage as many other drivers as they wished to as long as the customers were being serviced. Mr Barnett did not see any primary obligation on the sales van operator to be the sole operator of the vehicle.

12 As to the arrangement coming to an end, the applicant testified that her last day was 30 April 2004. She commenced as usual at approximately 5.45am and set up for her round that day. As she was preparing to leave the depot, "Jan" advised her that she would have someone to assist on the vehicle that day as a part of the initial three-month review period. At the end of the day, after a review of stocks and sales, "Jan" informed her that the sales performance on the van was inadequate and the arrangement was terminated. This was confirmed in a letter dated 30 April 2004 to the applicant from Mr Barnett.

**Consideration**

13 Whether the applicant was an employee or an independent contractor, is a question of mixed fact and law. It is an essential ingredient of a claim brought pursuant to s 29(1)(b) of the Act, that the applicant be an employee as defined in s 7 of the Act. The relevant principles in relation to determining whether a person is an employee or an independent contractor are now well settled. In cases of this kind, the Commission needs to consider the totality of the circumstances of the relationship between the applicant and the respondent, in order to determine the proper characterisation of it: *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16; *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21; *United Construction Pty Ltd v Birighitti* [2003] WASCA 24; *Personnel Contracting Pty Ltd t/as Tricord Personnel v The Construction Forestry Mining and Energy Union of Workers* [2000] WASCA 312.

14 In circumstances such as the present, where the parties have committed their arrangements to writing as in the Agreement, and defined their relationship as principal and independent contractor, this will be a matter given weight although not conclusive: *Australian Mutual Provident Society v Allen* (1978) 52 ALJR 407; *Massey v Crown Life Insurance Co* [1978] 2 All ER 576. The characterisation of the relationship in an agreement will be significant where the relationship is otherwise ambiguous however, it is also trite to observe, that the truth of a relationship cannot be disguised by the attachment of a label to it. In *Tricord,* the Industrial Appeal Court considered that the parties' characterisation of their relationship in a written agreement was a matter of significance, in circumstances where it was not a sham, and where the other "indicia" were inconclusive, taken in their totality.

15 The characterisation of an arrangement as being one of employment or of independent contractor status, is not an easy matter. This is because there are no hard and fast rules as to the application of various "indicia". Each case will turn entirely on its own circumstances and the weight to be attached to certain "indicia" will also vary, depending upon the presence or absence of others. For present purposes, it appears that the most appropriate way of the analysing the relationship is to consider each relevant indicia as they arise on the facts of this case.

**Control**

16 A classic indicator of employment or otherwise is the presence or absence of not only actual control, but the right to exercise it.

17 Issues of control in the present context, relate to both the actual operation of the sales van by the applicant, and any residual rights of the respondent to control the arrangements between it and the applicant. The Agreement contains a number of features that indicate a degree of control by the respondent over the conduct of the applicant in her operation of the sales van. The Agreement provides in the recitals, for distribution of products from sales vans on regular routes, which are within territories as determined by the respondent. The products that the applicant was to sell to customers from the sales van are in the Agreement, to be supplied by the respondent, on its authorisation. This is specified in clauses 1.1 (c) and (d). References to the regular routes and sales territory are contained in recital B and cl 1.1 (f) of the Agreement. Furthermore, the purchasing of products from the respondent and the conditions attaching thereto, are specified also in cl 2.3.

18 In terms of calling on customers, by cl 2.4, the respondent retains the right to withdraw the "subsidy" payment payable under the Agreement, if the applicant did not make calls on customers and at the times specified on the route within the territory. Furthermore, by cl 2.6 of the Agreement, the applicant was required to "abide by the terms of the Operations Manual provided by Celeste, and any other lawful directions made by Celeste, as if each were repeated herein expressly." The Operations Manual so described, was not tendered in evidence. However, tendered as exhibit A10, were various documents including a "cleaning schedule", and two other documents described as "morning duties" and "afternoon duties" which prescribed the manner and regularity of cleaning the sales van, and a step-by-step procedure for tasks to be performed by the applicant in the morning before leaving the yard, and similarly, a step-by-step procedure for the applicant to perform on her return to the yard at the end of a working day. These procedures set out with considerable particularity, as to what was to be done and how it was to be performed. Additionally, by cl 2.5, the "performance" of the applicant in relation to sales was linked to guaranteed payments to be made to the applicant under the Agreement.

19 By cl 3.4, the applicant was required to purchase product from the respondent to stock her sales van. There was no apparent ability under the Agreement for the applicant to source stock from elsewhere.

20 In terms of the stocks of product, sale proceeds and revenue, by cl's 4.1 - 4.3, procedures were set out for stock takes, stock shortages, how sale proceeds are to be dealt with and the use of payment summaries setting out revenue, expenses and net proceeds owing to the applicant. Indeed, it was common ground, that the applicant utilised the respondent for all administration in relation to the operation of her sales van. This included all invoices for goods purchased and sold, expenses reconciliations, payments and the like. I also note whilst drivers were given the option to self insure, the applicant elected to insure with the respondent under its group personal accident and illness cover.

21 Also tendered as a part of exhibit A1, were various documents including one headed "Sales Van Operators Information". This form as well as providing the applicant's personal and banking details, specified that the respondent would withhold GST and deduct withholding tax for the applicant. Furthermore, under the heading "Induction Information", was reference to "start and finishing times being specified by your Supervisor", and requirements in relation to "absenteeism". I will deal with this matter further when considering the issue of delegation. However, this provision specified problems where "operators take days off". In the event of being unable to attend on a day, the applicant was required to make alternative arrangements for a driver, and if this could not be done, was required to contact the office by 5.30am on any given day.

22 By cl 4.5, the applicant was not required to wear any particular uniform, but was required to present herself in a neat tidy and professional manner.

23 Balanced against these factors, was the applicant's evidence that she did not consider she needed permission to change times to attend on customers nor where she would need to change her route. Also, is the applicant's evidence that her "supervisor" did not play any role in telling her what to do or how to perform on any given day.

24 Finally, in relation to control, I note the terms of cl 6 of the Agreement that provide the right of termination of the contract by either party, without notice in writing. In this case, the services of the applicant were dispensed with as I have noted above, on the basis that the applicant was not financially performing.

25 On all of the evidence in this matter, it seems that the respondent exercised a substantial degree of actual control over the applicant's activities, and additionally, reserved to itself the right to control various matters pursuant to the terms of the Agreement. I consider these elements of control as being relevant and taken together, would tend to point away from an independent contractor relationship and more towards employment.

**Manner of Remuneration**

26 The applicant was remunerated by way of sale proceeds less costs of sale. The applicant was not paid a wage salary although I note that during the training period the applicant was paid a daily rate of $80 per day. Furthermore, during the applicant's period of "probation", as set out in exhibit A3 and cl 1.1(a) of the Agreement, the applicant was entitled to a subsidy at the rate of $135 per day for three months, in the event certain sales performance was not reached. There are therefore elements of both payment of remuneration by time and by results in this arrangement. However, the predominant mode of remuneration was essentially payment by results. I conclude therefore that ultimately this matter tends towards independence.

**Provision of Equipment**

27 The applicant was not required to provide any equipment or "tools of trade" in the performance of her duties. The sales van was provided and maintained by the respondent, albeit by the terms of the Agreement, the applicant paid a fee for this which was deducted from her gross product sales. The applicant paid a fee of $20.00 per day for the use of the van in the nature of rental. It is difficult to determine on the evidence whether this fee represented the true commercial cost of the purchase and fit out of such a vehicle so as to be a true substitute for the provision of such capital equipment, however it would seem to me to be doubtful whether it would be. However, the payment of such a fee tends to point towards a commercial relationship that would be unusual in employment and therefore I cannot discount this aspect of the relationship.

**Delegation**

28 In my opinion, taken in context, both the Agreement and other evidence before the Commission, was suggestive that it was intended that the applicant operate the sales van in the normal course. However by cl 4.4, there was a right of delegation in that the Agreement specified that nothing in it was to be taken to oblige the applicant personally to drive a sales van. Moreover there was no obligation on the applicant to engage a relief driver who was acceptable to the respondent, as long as that person had the requisite licenses. The evidence was that there were occasions where the applicant did need to engage a substitute driver and paid that person a fee. In my view this is a factor in favour of independence, given that contracts of service generally require personal performance. In cases where the right of delegation has been found to exist, it has been considered a matter of some significance: *Australian Air Express Pty Limited v Langford* [2005] NSWCA 96.

**Obligation to Work**

29 This in part is dealt with immediately above. In my view, taking the evidence in its totality, save for a circumstance where the applicant was simply not able to drive on a particular day, and was required to obtain a substitute or have one of the respondent's drivers perform the tasks, the applicant was required to undertake her driving duties from day to day. The Agreement specified that she was to service customers as specified and at the time specified as cl 2.4 made plain. The respondent reserved unto itself, the right to impose a financial penalty, in the event this did not occur. In my opinion, this is strongly suggestive of an obligation to work, save for the specific circumstances of absences, dealt with above. This is not a case where as in some of the labour hire cases, there was no obligation on a worker to accept a particular assignment on any given day, such as in *Tricord.* In this case there was the clear expectation that the applicant would work and provide the service to the customers.

**Hours of Work**

30 The applicant testified that she regularly attended work between 5.30 - 5.45am and was required to leave the yard by 7.30am to call on her first customer. I also note the reference to "start and finished times" referred to in the document entitled "Sales Van Operators Information" tendered as a part of exhibit A1. These were required to be advised by the applicant's supervisor. No doubt on the evidence, the commencement and completion times of the applicant were largely dictated by the times of customer visits on her regular route, which could be changed by her in consultation with the customers. There was no evidence that the applicant's supervisor did actually specify any such times and hence I regard this indicia as tending towards independence.

**Taxation, Insurance and Leave Entitlements**

31 Pursuant to the Agreement, the applicant was not entitled to any annual leave or sick leave or payment for public holidays. Furthermore, she was required to be responsible for her own taxation and insurance arrangements, however as set out above, utilised the administration arrangements provided by the respondent for these purposes. The presence of withholding tax and payment of GST etc, along with the absence of leave arrangements and obligations to arrange insurance, tend to point in the direction of independent contractor status.

**A Separate Business**

32 A relevant consideration, as dealt with in *Vabu*, is whether the applicant was undertaking a business enterprise on her own behalf or rather, was undertaking duties on behalf of the respondent's business. A part of the consideration of this matter, is whether the applicant had independence in the conduct of her operations, and is allied ultimately to the indicia of control. The applicant did not provide any particular skilled labour in the operation of her sales van, and the Agreement specified that she would not be entitled to any goodwill either from servicing customers or from the conduct of the respondent's business generally. Furthermore, the applicant had no real opportunity to conduct any business for anyone other than the respondent, given the method of operation, the identity of the sales van as emblazoned with the "Jiffy Foods" logos and colouring, and the express terms of the Agreement, in relation to obtaining product for sale etc.

33 Additionally, it is also not insignificant to note that in reality, the applicant was not presented to the world at large as undertaking her own business, as she clearly was an emanation of the business of the respondent. Whilst the possession of an ABN is indicative of a business structure, it is not determinative. The issue of the ratio of expenses to income is also to be considered: *Australian Mutual Provident Society v Chaplin* (1978) 52 ALJR 407; *Brodribb Sawmilling Co Pty Ltd v Gray and Stevens* (1984) VR 321; *Barro Group Pty Ltd v Fraser and Anor* (1985) VR 577. On its face, by exhibit A9, it would seem that the ratio of expenses to income in the applicant's case was quite substantial. The applicant's remuneration was payable from sales revenue less cost of sales including product purchases and sales van expenses. The "round subsidy" somewhat complicated this picture, however I am satisfied that the cost of sales was a significant factor and taken in isolation, this would be a factor tending to point towards independence.

**Integration**

34 As I have already indicated above, the applicant was in reality, an emanation of the respondent's business as "Jiffy Foods" and did not present to the world at large as operating the business of her own account. The sales van was clearly identified as being that of the respondent, and whilst there was no requirement to wear a uniform as such, as in Vabu, the absence of this factor, given the clear identity of the sales van and undoubtedly, its recognition by customers, is not particularly significant. In addition, is the fact that on the evidence, the applicant utilised all of the respondent's administration for processing of stock purchases; stock lists; price lists; and sales invoices all of which were generally identified as belonging to the respondent with its logo or name printed on them. Whilst this did not extend to the applicant's tax invoice for payment, all of these documents were prepared by the respondent on behalf of the applicant. All the applicant really had to do was to attend for duty, obtain stock, drive the van and sell products to customers. The rest of the operation was undertaken solely by the respondent. This factor may be suggestive of employment.

**The Agreement**

35 It is the case that where the parties have expressly agreed their relationship is to be one of principal and independent contractor, then that is to be given weight in assessing the totality of the relationship, unless any such agreements are a sham. Furthermore, the significance of a description of principal and independent contractor, where such is not a sham, may carry considerable weight where other indicia are inconclusive as to the true character of the relationship, as was the case in *Tricord.*

36 In this matter, the relationship of the parties is dealt with in cl 5, specifically cl 5.1. It provides that the relationship between the applicant and the respondent was to be that of "independent contractors." On all of the evidence, I am not persuaded that such provision was a sham in the sense that the parties may not have intended to mean what they said. However, even in that case, the presence of such a provision in the Agreement is not by any means conclusive, in particular where there are other provisions in the Agreement that I have dealt with above, that tend to point away from independence, such as provisions conferring rights of control over the applicant. However in this case, I am persuaded on balance that the relevant factors lead to a result which is somewhat ambiguous, in which event, cl 5 of the Agreement should be regarded as the best evidence of the true nature of the relationship between the parties.

37 Having regard to all of the foregoing, I am of the view that the applicant was at all material times, an independent contractor to the respondent and not an employee of the respondent. Her claim is beyond the jurisdiction of the Commission and it must therefore be dismissed.

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**2005 WAIRC 02215**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

| | |
|---|---|
| **PARTIES** | KYLIE JAMES |
| | **APPLICANT** |
| | **-v-** |
| | CELESTE CORPORATION PTY LTD TRADING AS JIFFY FOODS |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER S J KENNER |
| **DATE** | TUESDAY, 2 AUGUST 2005 |
| **FILE NO/S** | APPL 720 OF 2004 |
| **CITATION NO.** | 2005 WAIRC 02215 |

| | |
|---|---|
| **Result** | Application dismissed |
| **Representation** | |
| **Applicant** | Mr T Borgeest of counsel |
| **Respondent** | Mr T Offer of counsel |

*Order*

HAVING heard Mr T Borgeest of counsel on behalf of the applicant and Mr T Offer 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,
[L.S.] Commissioner.

**2005 WAIRC 02106**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

| | |
|---|---|
| **PARTIES** | ANTHONY KELLY |
| | **APPLICANT** |
| | **-v-** |
| | THE WESTERN AUSTRALIAN TURF CLUB |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER J H SMITH |
| **HEARD** | FRIDAY, 27 MAY 2005 |
| **DELIVERED** | WEDNESDAY, 20 JULY 2005 |
| **FILE NO.** | APPL 788 OF 2004 |
| **CITATION NO.** | 2005 WAIRC 02106 |

| | |
|---|---|
| **CatchWords** | Termination of employment - Harsh, oppressive and unfair dismissal - Position made redundant - Alternative position not offered - Principles applied - Dismissal unfair - Application for costs allowed - Industrial Relations Act 1979 (WA) s 27(1)(c), s 29(1)(b)(i); Minimum Conditions Employment Act 1993 (WA) s 41. |
| **Result** | Declaration made dismissal unfair. Respondent ordered to pay the Applicant $15,609.18 (gross) as compensation and $400 in costs |
| **Representation** | |
| **Applicant** | Mr S Kemp (of counsel) |
| **Respondent** | Mr C Stanley (as agent) |

*Reasons for Decision*

1 Anthony Kelly ("the Applicant") claims he was harshly, oppressively and unfairly dismissed on 19 May 2004 by The Western Australian Turf Club ("the Respondent"). The Applicant's claim is made under s 29(1)(b)(i) of the *Industrial Relations Act 1979* ("the Act"). The Applicant in his application also claims he has been denied outstanding contractual benefits. However, at the outset of the hearing of this matter, the Applicant's counsel informed the Commission that the claim for contractual benefits was not being pursued by the Applicant.

**Background**

2 In late 2003 as the result of Government legislation some of the functions of the Respondent were transferred to Racing and Wagering Western Australia, a statutory authority, which was created in August 2003 to regulate racehorses, trotters and greyhounds. This resulted in a loss of 50% of the Respondent's staff as the stewards and investigators employed by the Respondent were transferred to the new statutory authority. As a result of the transfer of functions, the Respondent determined that it would restructure its entire organisation which included its Food & Beverage Sales and Operations Department, its Marketing and Sponsorship Department and other departments such as its Finance Department.

3 The Applicant was employed by the Respondent as General Manager of Food and Beverage Sales and Operations from 2 October 2001 until late February 2004. From 1 March 2004 his position was restructured and he became the General Manager of Food and Beverage. Prior to the restructure the Applicant was one of seven Executives who reported to the Respondent's Chief Executive Officer ("the CEO") who in turn reported to the Respondent's Committee. At the time of the termination of the Applicant's employment his total salary package was $91,970 per annum.

4 The Applicant was employed to lead the Food & Beverage Sales and Operations Department to provide all the food and beverages to the Respondent's clients at race events including management of events. Exhibit 1 page 7 shows that prior to 1 March 2004 the Applicant headed a large department in which a number of middle managers reported to him. Part of the department was the business development arm which was headed by Business Development Manager of Food & Beverage Sales. The second part was restaurant management headed by the Executive Chef Operations. The third part was an amalgamation of the HR Coordinator of Food & Beverage Operations in relation to which the Function Coordinator Operations, Purchasing Officer and Beverage Coordinator Operations all reported directly to the Applicant. After the restructure on 1 March 2004, the Applicant was no longer responsible for the first branch and the Applicant ceased to report directly to the CEO and reported to another Executive, the Racecourse Operations Manager, Mr Grant Laidlaw.

5 The decision was made to restructure the Food & Beverage Department at the meeting of the Respondent's Committee held on 20 January 2004. In Exhibit 1, pages 43-44 it was recorded at 5.11 that the Committee resolved:

> "5.11 REVIEW OF BUSINESS AND ORGANISATION STRUCTURE
>
> The Chairman reported that the Working Party had met with management on a number of occasions to review the Club's business and organisation structure. Under the current structure, six managers report to the Chief Executive for their respective departments including Food and Beverage, which operates as an independent business. In order to improve efficiency and internal communications, it was necessary for the Club's activities to be more integrated and to operate as one business.
>
> Accordingly, it was recommended that the Food and Beverage Department become part of the Racecourse Operations Department under the Racecourse Operations Manager and that the IT Department be responsible to the Finance and Administration Manager.
>
> The Working Party will continue to meet with management to further the review of the business including the Club's Marketing and Sponsorship functions.
>
> After discussion, the recommended organisational changes WERE APPROVED."

6 Prior to making its decision a Sub-Committee on restructuring (the Working Party) of the Committee considered three reports and made recommendations to the Committee. The first was a report written by Mr Laidlaw dated 18 December 2003 in which Mr Laidlaw put forward a proposal that the Racecourse Operations Department should assume responsibility for aspects

of the preparation and presentation of the venues which would include presentation and maintenance of food and beverage outlets to which would bring the operational arm of the Food & Beverage Department under the control of Racecourse Operations. In his report Mr Laidlaw said:

"Food & Beverage (Operations)

This area is not currently under the control of Racecourse Operations however there are compelling reasons why this should change. These include:

- Integration of all F&B /Racecourse Operations maintenance budgets will remove current anomalies such as the budget for power being the responsibility of Racecourse Maintenance but the principal consumer being the F&B department. This will permit Racecourse Operations to manage total maintenance and utility costs and to introduce more financial control.
- Logical synergies exist between Food & Beverage and Racecourse Operations in relation to an integrated approach to race day and non- race day events. This integration will facilitate a 'seamless' operation. The re-alignment of responsibilities will promote better communication and the phasing out of the notion of an independent F&B operation.

…

Major Operational Recommendations

- Development and introduction of performance benchmarks for each department and incentive scheme based on achievement of benchmarks.
- Integration of F&B Operations with Racecourse Operations to promote more focussed management and cost controls.
- Business Development Co-ordinator to report directly to the Marketing Manager.
- Investigation into the cost of automating turnstiles and gates. Cost benefit analysis of automation against reduction in labour cost of attendants. The Racing and Wagering Manager has made preliminary investigations."

(Exhibit 1, pages 55-56)

7 Among other recommendations Mr Laidlaw recommended the integration of Food & Beverage Operations with Racecourse Operations to promote more focussed management and cost controls. He also recommended that the Business Development Co-ordinator report directly to the Marketing Manager. It appears from the minutes of the Committee meeting on 20 January 2004 that Mr Laidlaw's proposal was adopted.

8 The second report which was before the Sub-Committee prior to the Committee making its decision on 20 January 2004 dealt with a number of issues including Racecourse Operations – Food & Beverage and Event Management. The report by the Respondent's Acting Chief Executive Officer, Mr Rodney McPherson, was headed "Western Australian Turf Club Structure Review December 2004". In his report Mr McPherson was critical of the Food & Beverage and Event Management Department and the Applicant. In particular he stated:

"Racecourse Operations – Food & Beverage and Event Management

The existing structure indicates that communication and integration of the various requirements of each department are lacking. Too often each area of responsibility is either unaware or reluctant to assist each other in the processes involved in ensuring the success of all aspects of the race meeting or events. As the Food & Beverage Department has been seen as a separate 'business unit' it appears that they choose, and have been allowed to, run things as they see fit without due consultation to the supporting departments. Perhaps this is a result of the hotel/function management environment from which Anthony comes where this type of business is the prime revenue stream, without due recognition to the core business o [sic] running race meetings. This is not to seek to blame anyone but to point out the difficulties currently being experienced in conducting an integrated business. This results in a disjointed approach to the coordination of meetings and events.

However, not all the blame can be leveled [sic] at this department. It also seems that the Racecourse Maintenance Department need to play their role in the staging of these events and sometimes lack the cooperation required to complete the tasks in the most efficient manner. They also need to be aware of and appreciate the objectives and customer focus of the Food & Beverage Dept., [sic] There needs to be recognition that the Food & Beverage Dept are RCM's biggest customer and though internal, their actions have a direct effect on the end user.

By rearranging the structure to say, bring the Food & Beverage Dept under the control of Racecourse Operations as well, this should allow greater communication and control of the operations of both departments allowing seamless transition between the sales and strategic event and/or race meeting management processes."

(Exhibit 1, page 52)

9 The third report put before the Sub-Committee was the report by Mr Glenn Assan, Manager of Racing and Wagering dated 6 January 2004. Mr Assan was later transferred to Racing and Wagering Western Australia. In his report Mr Assan was very critical of the Food & Beverage Department. He made similar recommendations to Mr Laidlaw in his report. In Exhibit 1, page 48 Mr Assan stated:

"FOOD & BEVERAGE

…

Without out [sic] detailing particular issues, it is evident that immediate changes are necessary within this department.

In general, staff has a scant regard in following procedural guidelines, there is no consultation with racecourse operations, continual conflict with marketing and staff members suffer from having a 'superiority' complex.

One factor that cannot be assessed, is the time spent by other departments in terms of 'quick fixing' F&B errors. The disturbing factor is that when these errors or omissions occur, the outcome or the cost of the 'fix' increases, thus impacting on Club revenue."

10 Mr Assan then went on to address the conflicts that he perceived the Food & Beverage Department had with Marketing and Racecourse Services. He too recommended that the Food & Beverage Department be totally restructured, and the Department divided between Sales and Marketing and Racecourse Operations. He was also critical of some of the components of finance of accounting aspects of the Food & Beverage Department. In particular he said:

"Due to the heavy subsidisation by other departments – in particular racecourse operations services, it is difficult to accurately assess the department's actual performance. The accuracy of allocated revenues and expenses over specified areas within the Food & Beverage P&L is questionable.

Actual reported net profit generated from Tentland is also dubious."

11 Consequently, Mr Assan recommended that all components of finance including the dismantling of loans accounts be transferred to the Finance and Administration Department. When a copy of Mr Assan's report was provided to the Applicant's solicitors a copy of another document was attached to Mr Assan's report headed "Potential Annual Wage Savings" which identified that a number of positions in the Respondent's organisation could be made redundant including the Applicant's position and the Business Development Manager's position.

12 Although the Applicant acknowledges there was a change in his role from 1 March 2004, he says that the decision to make his position as a Manager of Food & Beverage on 19 May 2004 redundant and the consequent termination of his employment on that date was harsh, oppressive and unfair on the grounds that:

(a) There was no genuine redundancy of his position;

(b) The Respondent failed to consult with the Applicant about the alleged redundancy as required by the Minimum Conditions of Employment Act 1984 ("the MCE Act") or at all:

(c) The Applicant had been given an assurance on 19 February 2004 and on 18 March 2004 that his employment was secure and no further restructuring would affect his position;

(d) The Applicant was excluded from the workplace during his notice period without any valid reason and without consideration of the effect that this would have on his future employment prospects.

13 Alternatively the Applicant says that even if the decision which was made by the Respondent to terminate his employment on grounds that his position had been made redundant was genuine, his termination was harsh, oppressive or unfair because at the time the decision was made to abolish his position the Respondent had created the position of Functions Manager which was an alternative position which he was qualified to hold and he would have accepted if offered to him.

14 The Respondent says that the decision to make the Applicant's position redundant was genuine and the decision made by the Respondent was a proper exercise of its management prerogative. The Respondent says that the Applicant was informed as soon as reasonably practicable after the decision was taken to make his position redundant and it complied with the provisions of s 41 of the MCE Act. In addition the Respondent says that the position of Functions Manager had not been created at the time the Applicant's employment was terminated.

**The Applicant's Evidence**

15 In mid 2003 the Applicant had a discussion with the Chief Executive Officer of the Respondent about restructuring of the Respondent's business. He said that all seven executives who reported to the CEO were present at a meeting in July 2003 when the CEO put forward a revised organisational chart and asked for ideas from each of the executives as to how a restructure could be effected. The Applicant put forward a document to the CEO. The CEO's employment was later terminated. The Applicant heard nothing about his proposal until sometime in January 2004 after the Perth Cup when he was informed by Mr McPherson that his department was going to be restructured and that the restructure would take effect from 1 March 2004. The decision to restructure meant that the Business Development Manager's work and the sales and marketing people who worked in the Food & Beverage Department would be transferred to the Marketing and Sales Department. He was also informed at that time that he would be required to report to Mr Laidlaw. The Applicant testified that he was not asked for any input into a decision and was not aware of any of the matters considered, or any of the reports in part set out in paragraphs 6 to 11 of these reasons for decision and discussions held by the Committee of the Respondent when they made this decision.

16 After the Applicant was notified of the decision to restructure his department he met with Mr McPherson on 6 February 2004. He testified that he was opposed to certain elements of the restructuring but said he knew the club with its change in responsibilities would have to take a new direction. He made notes of the meeting (see Exhibit 1, page 39). In his notes he recorded that he agreed with the decision that his department be merged with racecourse operations as it would be a "one stop department" for the management and delivery of events. He also recorded that it was hopeful that through the merger some positive inroads could be made into the current culture. However, the Applicant made it plain in his notes that he was critical of the new proposed structure. He recorded that the contribution from the department since he (the Applicant) had held the position as head of the department had in dollar terms increased considerably and he criticised the decision to change a "winning team". He also put forward a view that the event coordinators require support and decision making capacity at a senior level on a daily basis which meant that there was a need for a manager to be knowledgeable and available for issues of support and input from him (the Applicant) to get up and running.

17 The Applicant testified that at the meeting on 6 February 2004 he asked whether his position was being terminated or whether he was to be made redundant and Mr McPherson told him, "No." The Applicant says he later met with the Chairman of the Respondent's Committee, Mr Van Heemst and Mr McPherson some time before 1 March 2004 in which he discussed the same issues he had raised with Mr McPherson on 6 February 2004. The Applicant testified that the Chairman told him he would take his (the Applicant's) concerns on board but they were unlikely to make any changes.

18 When cross-examined it was put to the Applicant that he was aware that there was a restructuring Sub-Committee in place in late 2003 which was headed by Mr Van Heemst. The Applicant says he was informed at a later stage that there was a management restructuring Committee, but qualified his response by saying that the Respondent has many Sub-Committees. It was also put to him that his notes of 6 February 2004 showed that he had input into the restructure to which the Applicant replied that he was not certain about that as there were a number of documents which were provided to him through the discovery process including the reports about restructuring his department which he had not seen until the day before the hearing. In particular the Applicant had not seen a copy of a report written by Mr Laidlaw on 18 December 2003, a report written by Mr McPherson which appears to be dated 5 January 2004 and a report written by the Manager of Racing and Wagering, Mr Glenn Assan, dated 6 January 2004.

19 It was also suggested to the Applicant when he was cross-examined that he should have been applying for other jobs after January 2004 because a large part of his responsibilities had been removed and given to Mr Laidlaw. The Applicant disagreed and said it was a particularly busy period and although the reporting "lines" required him to report "on paper" to Mr Laidlaw, he was in reality still responsible for the day-to-day management of food & beverage operations. He, however, agreed that after the restructure was effected that he had to submit invoices to Mr Laidlaw over a certain amount for approval and that he did not have the ability to solely approve contracts. The Applicant, however, said that it was his opinion that Mr Laidlaw simply co-signed the contracts, not that he had to submit the contracts to Mr Laidlaw for approval. It was then put to the Applicant whether he had applied for other positions during that time and he said, "No." He conceded however that he had

many offers for work during his employment with the Respondent, but said that he enjoyed his job, the industry and that he did not wish to change employment. It was not put to him however, nor did the Applicant give evidence that he had been offered any jobs from the beginning of January 2004 to 19 May 2004.

20 During the hearing it emerged that the Business Development Manager, Ms Kelly Flavel, was made redundant on 18 March 2004. The Applicant testified that on 18 March 2004 he met with Mr McPherson as there were people in his department who were concerned about their positions and he asked Mr McPherson whether he (the Applicant) was going to be retrenched or terminated and again was told, "No, there will not be any more retrenchments or redundancies."

21 It is common ground that nothing was said to the Applicant about being made redundant until he was called to a meeting with Mr Laidlaw on 19 May 2004. At that meeting he was told that his position had been made redundant, his employment was being terminated and he was to cease work immediately. The Applicant was given the following letter:

> "Dear Anthony
>
> Termination of Employment
>
> I regret to advise that your employment with The Western Australian Turf Club has been terminated. Termination is effective from today, Wednesday, 19 May 2004.
>
> As discussed your position was made redundant as a result of the Club's restructure. It was determined by Committee, after careful consideration of the number of current jobs required to meet the Club's future needs, that there was no longer a requirement for the position of General Manager – Food and Beverage to be performed by any person. I confirm that to minimise the effect of the redundancy upon you the Club offers you the opportunity to utilise the services of an outplacement agency for a period of one month.
>
> A cheque for $15,161.98 is enclosed. Please see attached document for details of the payment.
>
> We thank you for your service with the Club and wish you every success in your future endeavours.
>
> Yours sincerely
>
> (Signed)
>
> GRANT LAIDLAW
>
> RACECOURSE OPERATIONS MANAGER"

(Exhibit 1, page 27)

22 Attached to the letter was a document containing a final pay calculation in which the amount of $15,161.98 was broken up into various components. This amount was calculated by adjusting his salary to 19 May 2004 as he had already been paid until 31 May 2004. The amount included payment for one month's pay in lieu of notice, six weeks' severance (redundancy) pay and payment of 29.6 hours annual leave. The Applicant testified that there was no discussion with him at the meeting about the impact of the decision on him or any of the matters set out in s 41 of the MCE Act. However, he conceded when cross-examined that he was informed that he could use the services of external consultants for a month to assist him to obtain work, which he later took up. The Applicant asked to clear his appointments in his diary and was told to finish immediately. Arrangements were made for the Applicant to return to the Respondent's premises a few days later to pick up his personal belongings. When he arrived at the Respondent's premises a security guard met him and let him in. He said it was very embarrassing to be asked to leave immediately, that he felt like a criminal as it suggested misconduct of some sort that could damage his reputation in the market place. The Applicant agreed, however, when cross-examined that the terms of his written contract of employment allowed the Respondent in the event of termination to give him one month's notice or pay him in lieu of notice.

23 Shortly after his employment was terminated the Applicant saw a job advertised in The West Australian newspaper for a Functions Manager with the Respondent. The advertisement stated that applications closed at 4.30pm on 11 June 2004. The Applicant said that he was not told about the position of Functions Manager by Mr Laidlaw, nor was there any discussion about the prospect of any other positions with the Respondent. The Applicant gave uncontradicted evidence that had he been offered the position of Functions Manager he would have taken it, as senior positions in the market in Western Australia do not come up very often and he would have taken the job rather than being unemployed. The Applicant referred to the key responsibilities set out in the advertisement for Functions Manager (Exhibit 1, page 20) and the Position Job Description for the position (Exhibit 1, 21-24) and said in relation to these duties, that all the duties set out in the Position Job Description were all duties that he was performing prior to being made redundant or he had in his career performed. He said that his department from an operational sense could not be performed without a manager.

24 The Applicant said he knew it would take him some time to find another position. He finally did so in Melbourne and commenced employment on 27 September 2004 in a position where he now earns more than he did whilst he was employed by the Respondent. He is separated from his wife who still resides in Perth with his 13 year old son. It was also put to the Applicant when cross-examined that after his employment was terminated that he was not available for work at all times because he went on a holiday to Ireland. The Applicant said that the holiday was pre-arranged prior to the termination of his employment and whilst he was on the holiday he was contactable for work and he sought work whilst on holiday in places such as Vietnam, Dubai and across Australia.

**The Respondent's Evidence**

25 Mr McPherson was the Acting Chief Executive Officer of the Respondent from late 2003 until sometime after the Applicant's employment was terminated. Prior to acting as CEO and after he ceased acting as CEO he held and now holds the position of Finance and Administration Manager and he is a member of the Executive. Mr McPherson testified that at the time the Racing and Wagering Western Australian Authority was created the Respondent decided it needed to take on a "more corporate" profile and reflect a good corporate structure so the Committee formed a Sub-Committee on restructuring in late 2003. Mr McPherson was a member of the Sub-Committee and attended each meeting as he was the acting CEO but did not have a vote. The Sub-Committee was comprised of Mr Van Heemst, Mr Dawes, Mr Donovan and Mr Carter. Mr McPherson testified that each one of the Executives including Mr Kelly was asked for their input by the Sub-Committee into how the restructure of the Respondent's organisation could be achieved. Mr McPherson says that each one of the Executives was called before the Sub-Committee to answer questions and that when decisions were made by the Sub-Committee or Committee about restructuring those decisions were discussed at the weekly meetings of the Executive attended by the Applicant. Mr McPherson testified that the Sub-Committee did not keep minutes of any of its meetings but it met almost weekly after 20 January 2004.

26 Mr McPherson said that the "Working Party" referred to in the Committee minutes dated 20 January 2004 was the Sub-Committee formed to consider the restructuring the Respondent's organisation.

27 Mr McPherson says that each of the members of the Executive had the opportunity to put their proposals for the restructure of the Respondent's organisation prior to any decisions being made. When cross-examined he agreed that the three reports had been put before the Sub-Committee prior to the Committee making the decision on 20 January 2004.

28 After the decision was made by the Committee, Mr McPherson met with the Applicant on 6 February 2004. Mr McPherson agreed the Applicant asked whether he was going to be retrenched and Mr McPherson told him that at that point retrenchments or redundancies had not been put on the table of the Sub-Committee. Mr McPherson says that he did not recall speaking to the Applicant on 18 March 2004 about redundancies and retrenchment. He, however, maintained that it was not his decision to make the Applicant redundant. Consequently he says he was unable to give the Applicant any assurances about the security of his employment. Mr McPherson, however, agreed that the decision to make the Applicant's position redundant and to dismiss the Applicant was ultimately discussed by the Respondent's restructuring Sub-Committee.

29 When asked whether the document headed "Potential Annual Wage Savings" formed part of Mr Assan's report, Mr McPherson said he did not believe so but he could not be convinced that it was or it was not. He recalled seeing the document "at some stage" and that could have been in January 2004 but he did not know whether it had formed a part of Mr Assan's report dated 6 January 2004. When Mr McPherson was reminded of his evidence about the conversation he had with the Applicant on 6 February 2004 about retrenchment, Mr McPherson then said he doubted whether the document headed "Potential Annual Wage Savings" which forecasted making the Applicant's position redundant formed part of Mr Assan's report. He then "re-evaluated" what was set out in the document and testified the document was not attached to Mr Assan's report and he would not have seen it in January or prior to speaking to the Applicant on 6 February 2004.

30 On 30 April 2004, Mr Laidlaw completed a report which was provided to the restructuring Sub-Committee about a week later and then to the Respondent's Committee on 11 May 2004. The minutes do not record specifically that Mr McPherson was present at the meeting of the Committee on 11 May 2004 when the decision was made to adopt Mr Laidlaw's report. I do not draw the inference he was there because the minutes record that the Applicant attended the Committee meeting, yet it is common ground that he was not present when Mr Laidlaw's report was considered by the Committee. Further, Mr McPherson did not give evidence that he was there when the report was adopted.

31 In Mr Laidlaw's report headed "Proposed Re-structure of Food & Beverage Operations" (Exhibit 1, pages 34-36), Mr Laidlaw addressed a number of issues relating to underperformance by the Food & Beverage Department. In Exhibit 1, page 34 he stated:

> "The general consensus amongst Committee and Executive appears to be that the F&B Department is underperforming in the fundamental provision of Food and Beverage services. This is typified in a range of ways including:
>
> - Staff do not appear to have been given any formal customer service training.
> - Procedures that are in place are not followed, or there are no procedures in some cases.
> - There is a lack of 'hands-on' assistance and supervision of staff.
> - There are incidents of expenses being coded to incorrect General Ledger codes to hide 'poor results' or budget blowouts.
> - Some expenses e.g. Legal costs are being spread out over many months and accrued to prevent the full extent of the cost showing on monthly Profit & Loss sheets."

32 He then went on to say under the heading "Proposal":

> "A number of management issues have already been addressed through:
>
> - Revised purchase order authority level.
> - Greater scrutiny of departmental and personal expenses.
> - Full transparency of all financial reports.
>
> It is my opinion however that the existing management structure within the F&B department needs to be changed at the highest level. The issue relates to the role of the General Manager-Food & Beverage. Originally tasked with increasing business through a sales focus and ensuring that the service delivery requirements were maintained at the highest level, it appears that this has not been carried out satisfactorily with more time being spent on areas outside the parameters of the role.
>
> I believe that the F&B Department needs a flatter structure with a more operationally and customer service focussed individual providing overarching support across the Food & Beverage units albeit at a lower level of seniority.
>
> The position could encompass management of special events, race day and non-race day events & functions, but in a more practical 'hands-on' management role."
>
> (Exhibit 1, pages 34-35)

33 Mr Laidlaw recommended in his report that the Applicant's position be made redundant which would render savings of at least $30,000 per annum on salaries alone (excluding on-costs). Mr Laidlaw stated in his report the appointment of a Special Events and Functions Manager would be a more operations focussed managerial role to provide essential back up to current staff (i.e. to work behind the bar) in times of need and the role should include a far greater emphasis on getting the basics right including:

> "• Emphasis on staff training
> - Ensuring quality service standards are met at all times
> - Actively appraising and performance managing staff
> - Implementing procedures and protocols to ensure integrity"
>
> (Exhibit 1, page 35)

34 Mr Laidlaw also addressed his concerns in the report about the "integrity" of procedures in place in the Food & Beverage Department and was very critical of the system of internal stocktaking. He informed the Sub-Committee and Committee through his report that an independent surveillance operation had recently been carried out which uncovered a range of alleged matters including significant discrepancies in till balances, lack of procedures and beverages provided to persons free of charge. He was also critical of the fact that there was no General Ledger code to account for refunds or discounts provided to customers as a result of poor service. In conclusion he recommended that the current food and beverage culture be improved and poor work practices be overhauled by making the following changes to the management and delivery of services in the Food & Beverage Department:

"• Acknowledge that General Manager – Food & Beverage position is redundant

- Appoint a 'hands-on' Special Events & Functions Manager to address the fundamental service delivery and customer service issues.
- Emphasis on ongoing training of F&B staff.
- Adoption of relevant procedures and methodologies to ensure integrity.
- Regular audit of stock levels and inventories to be carried out by independent third parties."

(Exhibit 1, page 36)

35 Mr McPherson maintained in his evidence that the position of "Special Events and Functions Manager" which was ultimately accepted by the Executive on 11 May 2004 (Exhibit 1, page 33) was an existing position held by Ms Gillespie with some added responsibilities. He testified prior to the report being accepted by the Committee Ms Gillespie held the position of Functions Supervisor or Coordinator. In the proposed restructure put to the Committee Mr Laidlaw recommended the retention of the position of Functions Supervisor. Mr McPherson maintained in his evidence that Ms Gillespie was going to assume a minor change of responsibilities. He then testified that there was no intention at the time Mr Laidlaw's report was accepted to create a Functions Manager's position at a salary of $60,000 per annum despite the fact that that would have been the cost savings (as outlined in the report) of replacing the Applicant's position with the position of a Special Events and Functions Manager. Mr McPherson maintained that the new role was to be a reclassified role and was not a new position. When questioned further, he equivocated and said that he did not remember whether the report intended to appoint someone new or a change in role or responsibilities. It is notable that his evidence is not supported by the Respondent's organisational structure depicted at pages 7 and 3 of Exhibit 1 which clearly show that prior to the restructure the position of Functions Coordinator was an existing position and it was maintained in the new structure as a Functions Supervisor position.

36 When questioned in cross-examination at some length Mr McPherson was vague in relation to the rationale behind the proposed restructure put forth by Mr Laidlaw and he said that he did not recall whether it was intended to employ someone new or to re-jig the responsibilities of Ms Gillespie's position. He did however concede that the position of Ms Gillespie of Functions Supervisor and Coordinator were similar.

37 It was put to Mr McPherson in cross-examination that the real reason for the restructure was that the Respondent was concerned about the Applicant's performance, integrity and managing the department. Mr McPherson denied that to be the case. He testified that he had no concerns about the Applicant's performance and that the problems and inefficiencies in the Department had been inherited by the Applicant from past practices as the Department was always seen as a separate business unit. In particular he said there was a perceived lack of integration from the Racecourse Operations Department and the Sales and Marketing Department with the Food & Beverage Department and a lack of communication from both sides.

38 Mr Laidlaw testified that the restructuring Sub-Committee was formed in December 2003 or in early January 2004. He says its brief was to speak to each department's manager and to report to the Committee. He said that the Sub-Committee meetings were "ad hoc" and that they met on average about once a month whereas the meetings of the Executive were held weekly. He says that he can recall that the Applicant attended one or two meetings of the Respondent's restructuring Sub-Committee. Mr Laidlaw was not, however, a member of the restructuring Sub-Committee, nor did he give evidence about the number of times, if any, he attended meetings of the Sub-Committee. He said that the Food & Beverage and Marketing Department was an independent department who had their own bank account, an accounting package and operated independently from the rest of the organisation. He also testified that he thought the Applicant had provided a number of papers to the Respondent's Committee and the Chairman but the Sub-Committee made it clear that they wanted to integrate the Food & Beverage Department with the rest of the Club. In relation to his (Mr Laidlaw's) report dated 18 December 2003, he said that his report was referred to the Committee by the restructuring Sub-Committee. He was later informed that the Committee had determined that it would split the Food & Beverage Marketing Department and bring the Food & Beverage Department under Racecourse Operations and move the marketing functions to the Marketing Department. Mr Laidlaw says the changes that were made to the Applicant's role as a result of the Committee's decision on 20 January 2004 dramatically diminished the Applicant's responsibilities as he lost the marketing and sales functions, and budgeting and approvals of expenditure all became his (Mr Laidlaw's) responsibilities.

39 Mr Laidlaw says that he spent a number of months reviewing each department and he was concerned about lack of customer service and lack of training in the Food & Beverage Department. He decided that the Applicant's role as Manager did not add any value to the Club and what was needed was a 'hands-on' manager who could provide training and jump behind the bar if that was required. He said that such a role would not justify the salary level paid to the Applicant. The role he had in mind should carry with it a salary of $45,000 per annum. Mr Laidlaw says that he wanted to move the focus away from top heavy administration to a "hands-on" operations approach so he recommended engagement of a Special Events and Functions Manager and the making of the Applicant's position redundant. He agreed that his recommendations were approved by the Committee but he says he did not proceed with the creation of the position outlined in his report to the Committee. He testified that after the Committee made the decision to make the Applicant's position redundant and he terminated the Applicant's employment, he consulted with the Applicant's middle line managers who reported to him, that is, the Executive Chef, the Beverage Coordinator and the Functions Coordinator (transcript page 58). Mr Laidlaw testified that each of the persons who held those positions convinced him that they were "top heavy" and needed "support from beneath" and not another manager that they reported to. Further they convinced him they could carry out additional responsibility without employing and engaging an additional person. He later corrected his testimony and said that he had these discussions prior to terminating the Applicant's employment (transcript page 59). He determined that he would not proceed with the appointment of a Special Events and Functions Manager that had been approved by the Committee and he created the position of Functions Manager and offered that position to the Functions Supervisor, Ms Gillespie, after the Applicant's employment had been terminated. Ms Gillespie declined the position as she had found an alternative position with another organisation. On 25 May 2004, Ms Gillespie resigned and a few days later Mr Laidlaw advertised the position and initially allocated a salary of $45,000 per annum. Mr Laidlaw was unable to attract a person of the calibre they desired so they readvertised the position at $60,000 per annum and the position was filled in early July 2004.

40 Mr Laidlaw in his evidence did not dispute that the documents contained within Exhibit 1 at pages 20-24 set out the roles and functions of the Functions Manager position.

41 Mr Laidlaw maintained that after the Committee's decision he looked for alternatives for the Applicant but there were none. He gave no details about this. He then attempted to correct his evidence and said that he did not have the discussion with the three managers until after the Applicant's employment was terminated. He also maintained that at the time he terminated the Applicant's employment the position of Special Events and Functions Manager did not exist and the position of Functions Manager "had been offered to Ms Gillespie". If Ms Gillespie had taken the position she would have received a pay increase of

about $10,000 per annum. When cross-examined he said the position of Functions Manager would have been an "elevated" role for Ms Gillespie. He later said in his evidence that in fact the Functions Manager position was not created until after Ms Gillespie had completed her period of notice.

42 Mr Laidlaw conceded that he did not discuss his report dated 30 April 2004 with the Applicant because if the Committee did not accept his report it would have been difficult to maintain his existing working relationship with the Applicant if the report had been rejected.

43 Mr Laidlaw disagreed with Mr McPherson in relation to Ms Gillespie's position. He said that she was a Functions Coordinator not a Functions Supervisor. He says those two positions were different. The Functions Supervisor and Beverage Supervisor positions were casual which were converted into full-time positions in the new structure whereby those two positions would provide hands-on customer service training. The Functions Manager position was a new position which was created at the same time as increased responsibilities were given to the Beverage Coordinator and the Executive Chef.

44 Mr Laidlaw also maintained in his evidence that Mr Assan's report could not be regarded seriously by the Sub-Committee or the Committee. He denied that he had concerns with the Applicant's performance. He said the Applicant was a good manager. He also said the problems with the Food & Beverage Department were historical. He said the department had been run as a separate entity and there were a number of matters that he (Mr Laidlaw) wanted to change in relation to the running of the department. In particular he gave directions to the Applicant once he (Mr Laidlaw) became the manager of the department, that all invoices above the amount of $500.00 must be approved by him because he wanted to attain knowledge of purchases and to have control over items purchased. He said these directions brought the Applicant's position into line with other managers under his (Mr Laidlaw's) control.

45 Mr Laidlaw conceded that the Applicant would have been qualified to hold the position of Functions Manager.

46 In relation to the discussions Mr Laidlaw had with the Applicant on the day he informed him his employment was to be terminated, Mr Laidlaw testified that he was familiar with the provisions of s 41 of the MCE Act. He said that he did discuss with the Applicant options about his future, in particular, about outplacement services. He said he can see that he did not have any discussions about alternative employment because he was of the opinion that no positions were available. Mr Laidlaw maintained in his evidence that he took steps to minimise the "significant effect" by taking steps to enable the Applicant to leave immediately so as to avoid the embarrassment of facing other people in the Respondent's organisation once it was known that he had been retrenched. Mr Laidlaw said that when the document headed "Potential Annual Wage Savings" was put to the Sub-Committee on restructuring it was met with "some amusement". Mr Laidlaw did not, however, explain what he meant by this comment. He testified however that this document was produced by Mr Assan and provided to the restructuring Sub-Committee sometime after January 2004.

47 Mr Laidlaw also testified that he did not have any problem with performance of the Applicant and that the problems with performance of the Applicant's department were historical. He, however, when pressed in cross-examination conceded that he thought the Applicant's department was underperforming, that the Applicant as General Manager was responsible for his department and he had not carried out some areas of his tasks satisfactorily. In particular Mr Laidlaw said that the Applicant spent a lot of time on sales and marketing when there was a separate department to carry out that work.

48 Mr Laidlaw denied that it was inevitable at the time the Committee made its decision to restructure the Food & Beverage Department on 20 January 2004 that the Applicant's position would become redundant but he then was unable to say how this could have been avoided.

**Submissions**

49 The Respondent says that the Applicant has failed to satisfy the onus on him to show that his termination was harsh, oppressive or unfair. To the contrary the evidence shows that the decision to terminate the Applicant's employment was the result of a genuine restructure.

50 The Respondent also says that there were no alternative positions that could have been offered to the Applicant. In particular the position of Functions Manager only became available after Ms Gillespie resigned which was six days after the Applicant's employment was terminated. Had Ms Gillespie not resigned the position of Functions Manager would not have been available.

51 It is contended on behalf of the Applicant that the evidence given by Mr McPherson and Mr Laidlaw should not be accepted as the documents put before the restructuring Sub-Committee and the Committee show the Applicant was dismissed because of concerns about his performance, honesty and integrity. In particular the documents show they had real concerns about his management style, his ability to manage the department and proper accounting. When all the circumstances are considered the Applicant says his dismissal was disguised as a redundancy.

52 The Applicant says the fact that the Sub-Committee did not keep a record of its meetings or recommendations indicates it did nothing but rubber stamp the reports put to the Committee. The Applicant says that it is highly improbable that the Respondent would have genuinely restructured the Food & Beverage Department by making the Applicant's position redundant without seeking any input from the Applicant and the Managers working in the department. It is contended on his behalf that if there was a genuine restructure there would have been considerable discussion about the structure and the policies and procedures of the department.

**Credibility**

53 A written submission was made on behalf of the Applicant:

3. The evidence of the 2 witnesses called by the Respondent, Messrs McPherson and Laidlaw, was to the effect that:
   (a) Although they are members of the management team, the decision was taken by the Committee of the Respondent upon the recommendation of the restructuring Sub-Committee;
   (b) They were not parties to that decision and could not elaborate on the reasons of the Committee beyond what appears in the minutes that appear in the bundle of documents (pages 43 and 31 of Exhibit 1);
   (c) That the 4 members of the Sub-Committee, including the Chairman of the respondent, Mr Van Heemst, are still members of the Respondent's Committee.
4. There is no evidence to the effect that the 4 members of the Sub-Committee, including the Chairman of the Respondent, Mr Van Heemst, could not be called to give evidence.
5. The evidence led by the Respondent does not identify the matters considered by the Committee in reaching the decision.

6. It is not clear what matters were considered by the Committee on 20 January 2004 in reaching the decision to adopt recommended organisational changes (see point 5.11 on page 45 of Exhibit 1) but it is reasonable to infer that the report by Mr Assan (see pages 46 to 51) was an important part of that decision (his "immediate recommendation" (page 48) is in fact adopted) and, accordingly, that the decision was based on Mr Assan's concerns that the Applicant was not a competent manager. The further inference is that the decision was motivated by the Committee's concern about the Applicant's performance as a manager.

7. The evidence is that, in reaching the decision on 11 May 2004, the Committee approved the report of Mr Laidlaw dated 30 April 2004 (pages 34 to 36 of Exhibit 1). The reasonable inference is that, in deciding to proceed with the recommended restructuring and the termination of Applicant's employment, the Committee only considered and shared the concerns of Mr Laidlaw that are set out in the report, namely that the Applicant was not a competent manager and was running his department in a manner that raised concerns about his honesty. The further inference is that the decision was based on the Applicant's performance and misconduct (dishonesty) and was not a genuine redundancy.

8. The Respondent could have called one or more members of the Committee who made the decision to tell the Commission why the Committee reached the decision and to rebut the reasonable inference from the documentary evidence that Applicant's dismissal was motivated by issues other than the genuine redundancy of his position.

9. Any inference favourable to the Applicant that can reasonably be drawn from the evidence before the Commission should more confidently be drawn when the Respondent fails to call an available witness able to put the true complexion on the facts.

> *"Unless a party's failure to give evidence be explained, it may lead rationally to an inference that his evidence would not be helpful to his case".*
>
> *Jones v Dunkel* (1959) 101 CLR 298

10. An inference should be drawn against the Respondent to the effect that it did not call any member of the restructuring Sub-Committee or the Committee because it was aware that any evidence they might give would not support the contention that the Applicant's position was genuinely redundant and that his dismissal was not based on issues of poor performance and misconduct (dishonesty).

11. This confirms the inference that the Applicant says should be made on the documentary evidence and his contention that his dismissal was not a genuine redundancy.

54 In reply the Respondent says:

> Mr Laidlaw is, and was, the executive with responsibility for Racecourse Operations and also management of the Food and Beverage area to whom Mr. Kelly reported.
>
> Mr Laidlaw was the author of the document at pages 34, 35 and 36 of Exhibit 1, which he personally presented to the full Committee of the Turf Club, recommending restructure in a particular manner.
>
> Mr Laidlaw was personally involved in both the recommendations and discussions with the Committee, which approved his recommendations for restructuring (Exhibit 1 page 33, at 5.10).
>
> Mr Laidlaw was clearly able to, and gave direct evidence, of the nature of those discussions with the Committee, and the reasons for such organisational change. He was able to do so because of his personal involvement and intimate knowledge of the issues.
>
> Both Mr Laidlaw and Mr McPherson, the Acting Chief Executive, were in attendance at the Committee meeting of 11th May 2004 where Mr Laidlaw discussed his recommendations and obtained approval to proceed. (Mr McPherson's presence is noted in the minutes of meeting).
>
> Mr Laidlaw (and Mr McPherson) was quite capable of giving evidence and being cross examined relating to any discussions or considerations of other matters that arose as is suggested by the Applicant.

There is no evidence introduced by the Applicant that the decision of the Committee to approve Mr Laidlaw's recommendation was influenced by any such aspects as surmised by the Applicant.

55 Having heard the evidence given by the Applicant, Mr McPherson and Mr Laidlaw and observed each of them carefully I prefer the evidence given by the Applicant to the evidence given by Mr McPherson and Mr Laidlaw. The Applicant was not shaken when cross-examined and he gave his evidence honestly without embellishment. Despite the fact Mr McPherson attended every restructuring Sub-Committee meeting he gave vague evidence about the matters considered by the Sub-Committee in relation to the restructure of the Food & Beverage Department, the position held by Ms Gillespie and the creation of the position of Functions Manager. Further he gave vague and contradictory evidence about the first three reports considered by the restructuring Sub-Committee. In particular I did not find his evidence about the document titled "Potential Annual Wage Savings" (Exhibit 1, page 51) satisfactory. When Mr Laidlaw gave his evidence it became clear that this document was prepared by Mr Assan. Mr McPherson tailored his evidence about this document. After it was put to him that if the document was before the restructuring Sub-Committee in January 2004, the fact that it forecasted the Applicant's position being made redundant was inconsistent with his evidence that he told the Applicant on 6 February 2004 that retrenchments or redundancies had not been put on the table of the Sub-Committee.

56 As to Mr Laidlaw, I did not find his evidence to be credible in some material respects. Firstly, he was not a member of the restructuring Sub-Committee, nor did he give evidence of how many meetings of the restructuring Sub-Committee he attended yet he made a clear statement the Applicant attended two meetings. Secondly, I do not accept his evidence that there was no alternative position within the Respondent's business that could have been offered to the Applicant on 19 May 2004. On 11 May 2004, the Committee approved the creation of a new position that the Applicant was qualified to hold at a salary package of $60,000 per annum. In my opinion, it is immaterial whether that position was titled Special Events and Function Manager or Functions Manager or whether the Executive Chef and Beverage Co-ordinator reported to that position or not. Clearly the Position Job Description for the position of Functions Manager was a management/administrative position. For example, in the section titled "Position Summary" it is stated the position entails:

"• Management of the catering function operations on both race day and non race day events at Ascot and Belmont Park Racecourses.

• Ensure compliance with health and hygiene regulations.

- Recruitment, selection of catering full-time operational staff."

(Exhibit 1, page 21)

57 The Position Job Description sets out a very comprehensive list of key result areas and competency profile. There is nothing in the document which supports Mr Laidlaw's contention that the role was intended to be a "hands-on" behind the bar role. Further his contention that the position of Functions Manager was not created until after Ms Gillespie had completed her period of notice was contrived and inconsistent with his evidence that he offered Ms Gillespie this position on or before 25 May 2005. In addition I did not find his evidence about the discussions he had with the middle managers of the Food & Beverage Department about the creation of new position to be satisfactory.

58 The Applicant argues that the Commission should draw an adverse finding against the Respondent as it failed to call Mr Assan or any members of the restructuring Sub-Committee to give evidence. Pursuant to the principles enunciated by the High Court in *Jones v Dunkel* (op cit) where there is one person who could have given evidence to refute the opposing party's evidence and that person has not been called by the other party, a court is entitled to draw the inference that that person's evidence would not have assisted the Respondent's case. The Respondent, however, makes a similar submission against the Applicant in relation to Mr Assan. I do not think that the inference can be drawn against either party in respect of Mr Assan as it was open to either party to call Mr Assan as he no longer is employed by the Respondent. The inference can, however, be drawn against the Respondent in relation to the members of the restructuring Sub-Committee and the Committee in general.

**Conclusion**

59 It is well established that employer's legal rights must be exercised in such a way that the right is not harshly or oppressively against an employee (see the discussion in *Miles, Rose and Crown Hiring Services trading as The Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous W.A. Branch* (1985) 65 WAIG 385 at 386 and 387 in relation to the legal right of an employer to dismiss an employee). It is also well established that an employer has the prerogative to organise their business in the way they see fit and the Commission should not interfere in such a decision unless the decision can be said to be industrially unfair (see *Amalgamated Metal Workers and Shipwrights Union of Western Australia and the Operative Painters and Decorators Union of Australia, West Australian Branch Union of Workers v Australian Shipbuilding Industry (WA) Pty Ltd* (1987) 67 WAIG 733). However, as the Commission in Court Session in *The Federated Engine Drivers' and Firemen's Union of Workers of Western Australia v Robe River Iron Associates* (1986) 67 WAIG 763 at 766: "Managerial prerogative is not a sword which can be wielded in wanton disregard of the industrial consequences nor is it a shield to hide behind. An employer has a responsibility to manage fairly."

60 Whilst I do draw the *Jones v Dunkel* (op cit) inference in respect of the members of the Sub-Committee and the Committee, I have had regard to the matters stated in the four reports. I do not accept that even if Mr McPherson and Mr Laidlaw were present at the meetings when the Committee made their decisions in respect of this matter on 20 January 2004 and 11 May 2004 that their evidence of this fact assists the Respondent. Mr McPherson did not give evidence that he was at either meeting. Mr Laidlaw simply said that when a report is put before the Committee the manager who prepared the report is asked to come in to the Committee meeting and speak to the report. He says he reports to the Committee every month. The Committee minutes, however, record that the Applicant and Mr McPherson attended the Committee meeting on 20 January 2004 and 11 May 2004. The minutes do not record that Mr Laidlaw was present at either meeting. Mr Laidlaw says that he could recall being told at the Committee meeting on 20 January 2004 that his report has been accepted. He, however, did not give any evidence about the deliberations of the Committee on 20 January 2004 or 11 May 2004.

61 When each of the four reports is read carefully it is plain that the reason why the Applicant's employment was terminated was because of his alleged poor performance. I am satisfied that it was on the "table" for discussion by the restructuring Sub-Committee that the Applicant's position be made redundant prior to 6 February 2004 and that Mr McPherson deliberately misled the Applicant when he spoke to him on 6 February 2004 and again on 18 March 2004. In doing so the Respondent clearly and deliberately breached s 41 of the MCE Act. It is, however, conceded on behalf of the Applicant that he is unable to prove any loss from this breach of s 41 of the MCE Act in early 2004.

62 Having considered all the evidence I am satisfied that the Applicant has proved that the decision by the Committee to make his position redundant on 11 May 2004 was not genuine. The only evidence before the Commission in relation to the deliberations and decision made by the Committee on 11 May 2004, is the report of Mr Laidlaw (Exhibit 1 pages 34-36*)* and the minutes of the Committee meeting on 11 May 2004 which records:

> "A report from the Racecourse Operations Manager on the performance of the Food and Beverages Department and a proposed restructure of the Department WAS NOTED.
>
> The matter was discussed and the proposed restructure of the Food and Beverage Department WAS APPROVED."

63 As no evidence is before the Commission as to what was discussed by the Committee on 11 May 2004, the only evidence before the Commission is Mr Laidlaw's report. I draw the inference that the members of the Committee and the Sub-Committee could not have assisted the Respondent's case. In light of this inference I assess the report on its terms. The report is plainly critical of the Applicant's performance. In particular, Mr Laidlaw says that the Applicant had not carried out his duties satisfactorily. On this premise, Mr Laidlaw recommended that the Applicant's position be abolished. Whilst the report recommends a more operations focussed managerial role the basis for the recommendation is the performance of the Applicant and the performance of the Applicant's department under the direction of the Applicant.

64 The Respondent failed to accord the Applicant procedural fairness in that he was given no opportunity to respond to the issues raised in the report about his performance. None of the issues raised in any of the four reports were raised with him. Consequently, he was not given any opportunity to address any of these issues. A dismissal for poor performance will usually be unfair unless adequate warning has previously been given to the employee that his or her performance is not satisfactory (see *Margio v Fremantle Arts Centre Press* (1990) 70 WAIG 2559). Where no chance is given to an employee to improve their performance, the failure to do so not only constitutes procedural unfairness but substantive unfairness (see *DVG Morley City Hyundai v Fabbri* (2002) 82 WAIRG 3195).

65 If I have wrongly concluded that the decision to make the Applicant's position redundant was not genuine, then I find the failure to offer him the position of Functions Manager was unfair. When informing the Applicant that his position had been made redundant there is an obligation under s 41 of the MCE Act to inform the Applicant of any other employment available with his existing employer (see *Garbett v Midland Brick Company Pty Ltd* (2003) 83 WAIG 893 (IAC) at [94] and [97]; *Hooker v The Owners of Strata Plan 5679 Kashmir* (2003) 83 WAIG 3948 (FB) and *Budget Airconditioning v Penn* (2004) 84 WAIG 2171 (FB) at [57],[58], [88] and [90]). I do not accept that the position of Functions Manager was Ms Gillespie's position. In my opinion it was not only a breach of s 41 of the MCE Act not to offer the position to him but it was unfair not to do so. The Applicant was qualified to carry out all of the duties of the position and gave uncontradicted evidence that he

would have taken the position if offered to him. On that basis, I am satisfied that the Applicant suffered a loss as a result of the Respondent failing to comply with s 41 of the MCE Act and the Respondent's unfair decision when terminating him not to offer the position to him.

**Quantum**

66 Reinstatement is not practical as the Applicant is now employed in another position in the eastern States. In assessing the Applicant's loss on the basis of my finding that the decision to make the Applicant's position redundant was not genuine, compensation should be assessed on the basis that the Applicant suffered a loss of income from 19 May 2004 until 27 September 2004, of $91,970 per annum as his loss caused by the unfair dismissal was the loss of the position of General Manager. If a five day working week calculation is used, he would have been entitled to have been paid $353.73 per day for 92 days, which is an amount of $32,543.16 (gross). From that amount must be deducted the amount he was paid on termination which was $16,933.98 (gross) which results in a loss of $15,609.18 (gross).

67 If the quantum of his loss is assessed on the basis that the decision to make his position redundant was genuine and he should have been offered the position of Functions Manager, it is contended on behalf of the Applicant that there is no reason why if the Applicant had accepted the alternative position he would not have been paid one month's pay in lieu of notice and six weeks' redundancy pay. So it argued that in assessing the 18 weeks and 2 days he was unemployed, he would have been paid 10.33 weeks (being one month's pay at 4.33 weeks and six weeks' redundancy pay) at his previous rate of pay. Then he would have been paid 7.667 weeks plus 2 days at $60,000 per annum which is $1,153.85 per week or $230.77 per day which comes to a total loss of $9,307.76. I do not accept that the Applicant's loss can be properly assessed on that basis. Pursuant to express terms of the Applicant's contract of employment he was entitled to one month's notice or one month's pay in lieu of notice of the termination of his executive position at the option of the Respondent. Consequently, I would make no deduction of payment of notice in assessing his loss. If the Applicant had been offered and accepted the position of Function Manager on Wednesday, 19 May 2004, I accept he would have been paid at his rate of pay under his existing contract of employment for one month which would have been until Friday, 18 June 2004. If a five day working week method of calculation is used, he would have been entitled to be paid $230.77 per day for 70 days (being from 21 June 2004 to 24 September 2004 inclusive) which is an amount of $16,153.90. I do not agree that it can be assumed the Respondent would still have paid him an ex gratia payment of six weeks' redundancy pay so I have deducted that amount (being $10,611.92) and the amount paid as annual leave (being $1,311.32) which equates his loss in this basis as $4,230.66.

68 In light of my finding that his loss should have been assessed on the basis that the decision to make the position of General Manager redundant was not genuine, I will make an order that reinstatement is impracticable and order the Respondent to pay the Applicant $15,609.18 (gross) as compensation.

69 The Applicant also seeks an order for costs in the amount of $400.00 being the cost of him travelling by air from Melbourne to Perth to attend the hearing.

70 Pursuant to s 27(1)(c) of the Act the Commission is empowered to "order any party to the matter to pay to any other party such costs and expenses including expenses of witnesses as are specified in the order, but so that no costs shall be allowed for the services of any legal practitioner, or agent". The test to be applied in awarding of costs under s 27(1)(c) of the Act is set out in *Brailey v Mendex Pty Ltd t/a Mair & Co Maylands* (1992) 73 WAIG 26 in which the Full Bench held at 27:

> "The question is what does the phrase "costs and expenses" mean? "Costs", as defined above, includes all of the expenses. No costs are allowed for the services of a legal practitioner or agent. Thus, the professional costs element is eliminated.
>
> …
>
> The application, too, must be determined under s 26 of the Act. However, part of that equity and good conscience includes what is settled law in industrial matters that costs ought not be awarded, except in extreme cases, (eg) where proceedings have been instituted without reasonable cause (see *Hospital and Benevolent Homes Award* (1983) AILR 409 where costs were awarded in a matter where the applicant terminated the proceedings after putting the respondent to the expense of defending without obtaining an order)."

71 In my opinion the Applicant's criticism of the defence of this matter is justified. This case warrants an order for costs as the Respondent's entire case in my opinion was without merit. Consequently the application for costs succeeds. I will make an order that the Respondent pay the Applicant $400 for costs incurred by him in travelling to Perth to attend the hearing.

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**2005 WAIRC 02136**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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| **PARTIES** | ANTHONY KELLY |
| | **APPLICANT** |
| | **-v-** |
| | THE WESTERN AUSTRALIAN TURF CLUB |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER J H SMITH |
| **DATE** | FRIDAY, 22 JULY 2005 |
| **FILE NO/S** | APPL 788 OF 2004 |
| **CITATION NO.** | 2005 WAIRC 02136 |

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| **Result** | Declaration made dismissal unfair. Respondent ordered to pay the Applicant $15,609.18 (gross) as compensation and $400 in costs |
| **Representation** | |
| **Applicant** | Mr S Kemp (of counsel) |
| **Respondent** | Mr C Stanley (as agent) |

*Order*

HAVING heard Mr Kemp, of counsel on behalf of the Applicant and Mr C Stanley, as agent on behalf of the Respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby:

(1) DECLARES that the Applicant was unfairly dismissed.

(2) ORDERS that the Respondent pay to the Applicant within 14 days of the date of this order the sum of $15,609.18 (gross) as compensation and $400 in costs.

(3) ORDERS that the application is otherwise hereby dismissed.

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

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**2005 WAIRC 02064**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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|---|---|
| **PARTIES** | NIREN PRAKASH PHILLIP |
| | **APPLICANT** |
| | **-v-** |
| | CAVALIER ASSET PTY LTD TRADING AS VIC PARK MOTOR CITY |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER J H SMITH |
| **HEARD** | THURSDAY, 9 JUNE 2005 |
| **DELIVERED** | WEDNESDAY, 20 JULY 2005 |
| **FILE NO.** | APPL 469 OF 2005 |
| **CITATION NO.** | 2005 WAIRC 02064 |

| | |
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| **CatchWords** | Termination of employment - Harsh, oppressive and unfair dismissal - Application referred outside of 28 day time limit - Relevant principles applied - Application dismissed - *Industrial Relations Act 1979* (WA) s 23A(5); s 27(1)(a); s 29(1)(b)(i) and s 29(3); *Minimum Conditions of Employment Act 1993* s 41; and *Metal Trades (General) Award 1966* clause 32A(11) |
| **Result** | Section 29(1)(b)(i) application dismissed |
| **Representation** | |
| **Applicant** | In person |
| **Respondent** | Mr G T Miller (as agent) |

*Reasons for Decision*

1 This is an application under s 29(3) of the *Industrial Relations Act 1979* ("the Act") for an extension in time for filing an application under s 29(1)(b)(i) of the Act by Niren Prakash Phillip ("the Applicant") that he has been harshly, oppressively or unfairly dismissed by Cavalier Asset Pty Ltd trading as Vic Park Motor City ("the Respondent") on 11 February 2005.

2 The Commission's file records that the Applicant filed his application on 5 May 2005. The time for bringing an application under s 29(1)(b)(i) of the Act, expired on Friday, 11 March 2005. It follows, therefore, that the application was filed 55 days out of time.

3 The Applicant is a qualified motor mechanic. He was employed by the Respondent from 1 July 2003 until 11 February 2005 to carry out repairs and maintenance on all vehicles sold by the Respondent who operated two car yards, Vic Park Motor City and Welshpool Car Sales. At the time his employment came to an end he was the only person employed in the workshop.

4 The Applicant testified that about ten days prior to 11 February 2005 one of the directors of the Respondent, Daniel Grant told him that they could no longer afford to pay him, that his employment was going to be terminated and gave him four weeks' notice. Mr Grant also told him that if he wished he could leave at anytime. Mr Grant also put to him if he did not wish to seek other employment he could takeover the workshop and pay $250.00 (a month or a week) in rent. Mr Grant explained that the Respondent would provide the Applicant with all of their mechanical work and he (the Applicant) could carry out mechanical work for other clients. The Applicant thought about the proposal and requested a meeting with both directors of the company which took place on 8 February 2005. At the meeting the Applicant asked why the decision had been made to terminate his employment and he was informed that the Respondent could no longer afford to continue to pay his wages because the workshop was not making any money. The Applicant declined the offer to lease the workshop and told the directors that he would leave on 11 February 2005. He also told them there were two jobs that he would be unable to complete by 11 February 2005 and that was work on two Camrys. He suggested to the directors that they get someone else to do the work because he would not be there. They told him to take the vehicles apart and they would get someone else to complete the work.

5 The Applicant testified in his witness statement (*Exhibit 1*) that the excuse given by the Respondent that the workshop was not making money was unsubstantiated, inaccurate and an unfair determination. When asked what was the basis for this statement, he said that it was his opinion that as the whole yard was making money, it could not be said that the workshop was not making money. However, when questioned further about this statement it became apparent that the Applicant's opinion was not soundly based on any material or information in his possession about the financial viability of the Respondent's workshop or car yards.

6 The Applicant also said in his witness statement that after his employment was terminated, he found out that the Respondent was engaging others to do the work he used to carry out, which established the excuse given for his dismissal was without reason. When asked about this particular statement, the Applicant said that the day after his employment was terminated he

went into the Respondent's premises to complete work on an exhaust and pick up his tools. Further, he says that when he went to pick up a few of his belongings there was a mobile mechanic working at the Respondent's premises. He also said that two weeks prior to the date of hearing for the application for an extension of time he received a telephone call from someone employed by REPCO who asked him what was wrong with a particular vehicle owned by the Respondent, the Applicant told the person that he did not know because he had not worked for the Respondent for almost two months. Consequently, the Applicant argues that the Respondent still had mechanical work that he could have carried out after his (the Applicant's) employment was terminated.

7 After the Applicant chose not to work out his period of notice, the Applicant contacted CentreLink two weeks after his employment came to an end. He was advised by CentreLink to contact Wageline and he did so within one or two weeks after receiving advice from CentreLink. Wageline directed him to the Employment Law Centre. The Applicant said that he had some difficulty obtaining an appointment with the Employment Law Centre because they are open for limited hours. He says that at the beginning of April he eventually contacted the Employment Law Centre and obtained an appointment on 26 April 2005. At the appointment on 26 April 2005 he was informed that the time limit on bringing an application for unfair dismissal was 28 days. He was initially given the wrong form to fill in. After he was given the correct form, he later filed the application in the Commission on 5 May 2005.

8 The Applicant testified that he has been unemployed since his employment with the Respondent came to an end. When cross-examined he agreed that motor mechanics are in short supply but says it is difficult to him to obtain work because he has a bad back. He also testified that he gave up looking for employment as a motor mechanic because every time he went for a job interview and when he told prospective employers that he had made a claim for workers' compensation in the past they would say that they would let him know. So he says that he gave up looking for work after two weeks and went to social security. He also agreed that he had declined casual work with REPCO but said that he had done so because he had started a computer course to become a service coordinator.

9 The Applicant says that the termination of employment was unfair because he has lost his livelihood and no action was taken to discuss the likely effects of the Respondent's decision with him. The Applicant seeks to remedy his dismissal which he says was unfair and he be paid outstanding contractual benefits. In relation to the Applicant's claim for unfair dismissal, he argues that pursuant to the provisions of the *Minimum Conditions of Employment Act 1993* ("the MCE Act") the Respondent failed to discuss with him the likely effects on him of the decision to make him redundant and the measures that could have been taken to minimise the significant effect upon him.

10 Daniel Grant testified that he is director and part owner of the Respondent. He says the workshop was not making money so they tried to implement measures to improve its profitability. The first measure they tried was to charge $50.00 an hour of the Applicant's time to every car. That was unprofitable so they employed another mechanic and attempted to undertake service work. That was unsuccessful so they terminated the employment of the second motor mechanic (some time prior to the termination of the Applicant's employment). At the end of the day the directors decided that it would be better to outsource their mechanical work, which would mean at the time the work was carried out, the work would cost them extra but overall would be more cost effective as the Respondent was unable to generate sufficient work through the workshop to employ the Applicant. Mr Grant says that it was obvious they still need to use a mechanic but they could not utilise the services of a mechanic full-time as it was not financially viable.

11 Mr Grant says that when he informed the Applicant that they were going to close the workshop, he did not say definitely that it would be closed in a month. It is plain from his evidence that the Respondent did not intend to close the workshop in a shorter period. He says that he discussed with the Applicant the option of the Applicant taking over the workshop to run his own business for a monthly fee of $250.00. He also suggested to the Applicant that if he did not wish to work from the Respondent's workshop he could work from home. Mr Grant says it would have been open to the Applicant to invoice the Respondent for their mechanical work on the basis of whatever he (the Applicant) felt was fair. Mr Grant says he also told the Applicant that if he did not wish to takeover the workshop he could finish the jobs waiting to be done and in the meantime he could look for another job as they did not mind him taking time off to seek other employment. Mr Grant testified that some time after the Applicant resigned he contacted a mechanic at REPCO to obtain work for the Applicant but was later informed that the Applicant did not turn up.

12 At the time the Applicant's employment came to an end the Respondent owned two car yards. Mr Grant said, however, that the Welshpool Car Sales yard was not going particularly well so they closed that yard two weeks after the Applicant left. Mr Grant also said that they later leased the mechanical workshop to a paint and panel shop. When cross-examined, it was put to Mr Grant that there was insufficient equipment in the workshop for the Applicant to work fast enough to be productive to make the workshop viable. Mr Grant denied this to be the case and said that there was some discussion about the purchase of an outside hoist whilst the Applicant was employed and he (Mr Grant) had given the Applicant approval to source that equipment.

**Legal Principles**

13 In *Malik v Paul Albert, Director General, Department of Education of Western Australia* (2004) 84 WAIG 683, Heenan J with whom Steytler J agreed held at [74] that the principles enunciated by Marshall J in *Brodie-Hanns v MTV Publishing Ltd* (1995) 67 IR 298, should be applied when the Commission is considering whether to accept a referral of a claim for unfair dismissal out of time under s 29(3) of the Act. Marshall J in *Brodie-Hanns v MTV Publishing Ltd* (op cit) set out these principles when considering whether to extend time to bring an application as follows:–

> "1. Special circumstances are not necessary but the Court must be positively satisfied that the prescribed period should be extended. The prima facie position is that the time limit should be complied with unless there is an acceptable explanation of the delay which makes it equitable to so extend.
>
> 2. Action taken by the applicant to contest the termination, other than applying under the Act will be relevant. It will show that the decision to terminate is actively contested. It may favour the granting of an extension of time.
>
> 3. Prejudice to the respondent including prejudice caused by delay will go against the granting of an extension of time.
>
> 4. The mere absence of prejudice to the respondent is an insufficient basis to grant an extension of time.
>
> 5. The merits of the substantive application may be taken into account in determining whether to grant an extension of time.
>
> 6. Consideration of fairness as between the applicant and other persons in a like position are relevant to the exercise of the Court's discretion."

14 In relation to fairness, Heenan J in *Malik v Paul Albert, Director General, Department of Education of Western Australia* (op cit) after citing the forementioned principles went on to observe:–

> "I accept that the concept of fairness is central to a decision whether or not to accept an application under s 29 which is out of time but, with all respect, I cannot accept the submission which was put in this case that it is fairness to the applicant which is either the sole or principal concern. Fairness in this situation involves fairness to all, obviously to the applicant and to his or her former employer, but also to the public interest and to the due and efficient administration of the jurisdiction of the Commission which should not be burdened with unmeritorious stale claims."

15 Whilst the merits of the Applicant's claim may or may not be relevant, Steytler J at [25], in *Malik v Paul Albert, Director General, Department of Education of Western Australia* (op cit), observed:–

> "The Commissioner is empowered to accept a late referral if it would be 'unfair' not to do so and, while an assessment of the merits 'in a fairly rough and ready way' (see *Jackamarra v Krakouer* (1998) 195 CLR 516 at [9]) will often be an important consideration, there is nothing in the words of s 29(3) which imports any obligation, on the part of an applicant, to establish any degree of merit (and it should not be overlooked, in this regard, that the Commission is given broad powers to dismiss a matter summarily under s 27(1)(a) of the Act). It is, of course, difficult to imagine that it would ever be unfair to an applicant to deny him or her the right to lodge a referral out of time where it was positively shown that the applicant had no prospect of success."

**Conclusion**

16 Having considered all of the evidence, I am of the opinion that I should not exercise my discretion to grant the application to extend time to file an application for unfair dismissal out of time. While special circumstances are not necessary, I am not positively satisfied that the prescribed period should be extended. Whilst the Applicant has given evidence which could be regarded as an acceptable explanation for the delay in bringing the application, I am not satisfied that the Applicant's claim that he was unfairly, harshly or oppressively dismissed has any merit.

17 It is well established that an employer has the prerogative to organise the business in the way they see fit and the Commission should not interfere in such a decision unless the decision can be said to be industrially unfair (*Amalgamated Metal Workers and Shipwrights Union of Western Australia and the Operative Painters and Decorators Union of Australia, West Australian Branch, Union of Workers v Australian and Shipbuilding Industry (WA) Pty Ltd* (1987) 67 WAIG 733. Whilst the Applicant may regard the decision of the Respondent to close its mechanical workshop as unfair, there is nothing in the Applicant's evidence at its highest on which an inference could be drawn that the action of the Respondent was industrially unfair. Further, the Applicant's argument that the Respondent breached s 41 of the MCE Act or that he suffered a loss as a result of a breach of the MCE Act is week. The Applicant concedes that the option to lease the business was discussed with him, and he did not have to work out his period of notice. Further, even if the Applicant was able to prove that the Respondent breached s 41 of the MCE Act, the Applicant must prove that he suffered a loss as a result of the Respondent's failure to comply with s 41 of the MCE Act.

18 Reinstatement is not sought by the Applicant. Further, reinstatement is plainly not practicable as the Respondent has leased the space formerly used as the Respondent's mechanical workshop. As to compensation, it is now clear for the purposes of the Act that a redundancy term cannot be implied into a contract of employment or into an award (see *Dellys v Elderslie Finance Corporation Ltd* (2002) 82 WAIG 1193). In the Applicant's application he states that the Respondent employed 8 employees at the time his employment was terminated. Pursuant to clause 32A(11) of the *Metal Trades (General) Award 1966* the Applicant was not entitled to be paid a redundancy payment as the Respondent employed less than 15 employees. Where there is no provision in an award or term of a contract which provides for redundancy there is no entitlement to a redundancy payment (see *Epath WA Pty Ltd v Adriansz* (2003) 83 WAIG 3048). Even if the Applicant was able to establish that the employer had not complied with the requirements of s 41 of the MCE Act, in order to be awarded compensation, the Applicant would have to show that he suffered "a loss" within the meaning of s 23A(5) of the Act, that is he must show that he was deprived of something to which he was lawfully entitled. In this matter I am not satisfied that the Applicant would be able to establish that he suffered any compensable loss even if he was able to prove the termination of his employment was unfair. Further, it is doubtful that he has taken adequate steps to mitigate his loss.

19 For the reasons set out above I will make an order dismissing the Applicant's claim under s 29(1)(b)(i) of the Act.

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**2005 WAIRC 02067**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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|---|---|
| **PARTIES** | NIREN PRAKASH PHILLIP |
| | **APPLICANT** |
| | **-v-** |
| | CAVALIER ASSET PTY LTD TRADING AS VIC PARK MOTOR CITY |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER J H SMITH |
| **DATE** | WEDNESDAY, 20 JULY 2005 |
| **FILE NO/S** | APPL 469 OF 2005 |
| **CITATION NO.** | 2005 WAIRC 02067 |

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| **Result** | Section 29(1)(b)(i) application dismissed |
| **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 s 29(1)(b)(i) application be and is hereby dismissed.

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

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**2005 WAIRC 02314**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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| **PARTIES** | GARY RAYMOND RAFFERTY |
| | **APPLICANT** |
| | **-v-** |
| | ACEWAY NOMINEES PTY LTD T/AS CITY TOYOTA |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER J H SMITH |
| **HEARD** | MONDAY, 13 JUNE 2005 AND TUESDAY, 14 JUNE 2005 |
| **DELIVERED** | FRIDAY, 12 AUGUST 2005 |
| **FILE NO.** | APPL 1179 OF 2004 |
| **CITATION NO.** | 2005 WAIRC 02314 |

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| **CatchWords** | Termination of employment - Harsh, oppressive and unfair dismissal - Whether employee resigned or was dismissed - Turns on own facts - *Industrial Relations Act 1979* (WA) s 29(1)(b)(i). |
| **Result** | Application dismissed |
| **Representation** | |
| **Applicant** | Mr C S Fayle (as agent) |
| **Respondent** | Mr P T Arns (of counsel) |

*Reasons for Decision*

1 This is an application by Gary Raymond Rafferty ("the Applicant") under s 29(1)(b)(i) of the *Industrial Relations Act 1979* ("the Act") for orders pursuant to s 23 of the Act. The Applicant claims that he was dismissed after he was accused of gross misconduct by Aceway Nominees Pty Ltd t/as City Toyota ("the Respondent") on 18 August 2004.

2 The Respondent says that the Applicant was not dismissed, that he gave his resignation freely and voluntarily after he was counselled about inappropriate work practices and a number of performance issues.

**Background**

3 The Applicant was employed by the Respondent as its Financial Controller from 22 April 2003 until 18 August 2004. The Applicant holds a diploma of accounting and has been employed in the motor vehicle industry since 1979. Except for a brief period when he worked overseas, since 1987 he has been employed as a financial controller/accountant.

4 The Respondent is a relatively large organisation and employs over 80 staff. The Applicant was a senior manager with the Respondent and was in charge of the accounts of the business and four administration staff. The Applicant was paid a salary of $70,000 per annum and provided with a fully maintained motor vehicle, a mobile telephone and a fuel card to the value of $300 a month.

5 The Applicant gave evidence on this matter on his own behalf. The Respondent called two witnesses. The first was Mr Wayne Smith who is the Respondent's General Manager and Dealer Principal. The Respondent also called a computer engineer, Ms Robyn Edwards, to give evidence on its behalf.

6 Prior to 18 August 2004, the Applicant had problems with pornographic "pop-ups" on his computer screen. The Applicant says the computer used by him became innocently infected by a virus after he opened a personal email which purported to relate to his bank account. The Applicant says that his employment was terminated on that day by Mr Smith shortly after his computer was "cleaned" by Ms Edwards. The Applicant says that Mr Smith told him that the administration staff were threatening to resign en masse because they were sick and tired of him (the Applicant) playing cards on the computer and looking at pornographic sites. The Applicant says that in that conversation and during a subsequent conversation that occurred on the same evening at the Applicant's house Mr Smith made it plain to him that he was dismissed.

7 The Respondent says that at all material times Mr Smith had no intention of terminating the Applicant's employment but simply sought to address with the Applicant a number of issues. These issues included complaints from administration staff that the Applicant used the computer provided to him to access pornographic websites and played card games on the computer during office hours. The Respondent says that the Applicant was embarrassed about these matters being raised and did not wish to return to work to face the administration staff. The Respondent also says the Applicant sought and negotiated the terms of his resignation with Mr Smith.

**The Applicant's Evidence**

8 The Applicant testified that when he first commenced employment for the Respondent in 2003, he found that the Respondent's accounts were in a state of chaos, the accountant's office had papers and files strewn everywhere and some accounts had not been reconciled for up to two years or accounts had not been reconciled correctly. Consequently, the validity of the accounts could not be ascertained. The Applicant says that profits were greatly overstated because expenses were shown in liability accounts and asset accounts were grossly overstated. The Applicant also says that he found some matters were not being dealt with "legally". In particular, he testified that the Respondent receives a rebate cheque from Fortron each month. The practice was to place the cheque into a reserve account from which another cheque was drawn, cashed at the bank and distributed to the directors according to their percentage of profits. The Applicant raised the propriety of this practice and the practice ceased shortly after the appointment of Mr Smith as General Manager.

9 During the first eight months the Applicant was employed by the Respondent he worked seven days a week, at all hours of the day and night. Sometimes he would go into work at 1:00 o'clock or 2:00 o'clock in the morning. He worked on Saturdays, Sundays and public holidays to get the accounts in order to reflect the true financial position of the company. By January 2004, the Applicant ceased to work long hours as by that time he says he had brought the Respondent's accounts up-to-date.

10 Part of the Applicant's job each month was to input the Respondent's monthly accounts on the Toyota internet site. The Applicant testified that when he first started work with the Respondent, they were always late inputting the accounts onto the Toyota website. He says to input the figures they had to alter the figures to agree with the Toyota system which resulted in manipulation of the real figures. By January 2004, he was able to get the accounts up-to-date and they were able to submit the monthly financial reports to Toyota within the timeframe required by Toyota.

11 The Applicant testified that in early August 2004, whilst he was walking to the used car manager's office to locate some paperwork, he walked past the salesmen's desk and saw two salesmen and the finance manager crowded around a salesman's computer. They asked him to look at what was on the screen. The Applicant ignored their request and went to look for the paperwork in the used car manager's office. When he walked past the salesmen's desk about a minute later, he was asked again to look and he did so. He observed they were looking at a hardcore pornography site which depicted bestiality. The Applicant said that this computer screen was visible to other staff. In particular, the salesmen's desk was about 10 feet from the receptionist's desk. Behind the receptionist's desk was Mr Smith's office, which was near to where the administration staff were located. The Applicant claims that Mr Smith would have been able to see from his desk what was "going on". The Applicant says, however, that he did not report this incident to Mr Smith.

12 At about the same time this incident occurred, the Respondent received a payroll tax return. The Applicant reviewed the return and saw a debit amount of $5,560. He asked the payroll officer, Ms Jodie Kersley, to investigate this amount. Shortly thereafter, she reported to him the figures were correct. He told her that he did not accept they were correct, that there was something not quite right and to find out what it was. The Applicant later ascertained that a cheque for the payroll tax had been drawn and the $5,560 debit had been paid. The Applicant then made enquiries with the State Revenue Department and spoke with a woman in the Payroll Tax Department and ascertained that the amount of $5,560 should have been a credit rather than a debit, which resulted in an amount of $11,000 being returned to the Respondent from the State Revenue Department. On Monday, 16 August 2004, the Applicant informed Mr Smith that he had saved the company $11,000 and asked whether the Respondent would "shout" lunch for him and the woman who assisted him at the State Revenue Department. Mr Smith agreed.

13 On Tuesday, 17 August 2004, a "pop-up" came up in the middle of the screen of the Applicant's computer. It had no icons and he could not delete it by using "control-alt-delete", so he called Ms Edwards to come into the office to remove the "pop-ups". He says that at approximately at 2:00 pm on 18 August 2004, Ms Edwards came into his office and spent two and a half hours cleaning his computer and reinstalling the programs. He says that Ms Edwards had difficulty deleting a virus called "Trojan" or "Backdoor Bob". He claims that she left his office about 4:15 or 4:30 pm. This was not the first time the Applicant had "pop-ups" removed from his computer. He testified that the first time an unwanted "pop-up" occurred was when he went into his personal email site to see if there were any messages and he found a message which said something like "Your account is overdue". The Applicant said that he was not sure so he opened the account and from then on pornographic "pop-ups" popped up unannounced on his computer screen and he could not remove them. He says that prior to 18 August 2005, on four or five occasions, Ms Edwards or one of her colleagues had attempted to remove the virus, which caused the "pop-ups" from the computer used by him. The Applicant agreed when cross-examined that on one occasion one of the administration staff, Ms Granger, came into his office whilst there was a "pop-up" on his computer screen and he said to her, "Have a look at this crap! I can't get rid of it."

14 The Applicant maintained in his evidence that he had not at any time accessed pornographic websites when using the computer at work. He, however, agreed when cross-examined that he had accessed sites that may be deemed inappropriate, in particular, he had accessed "model sites" which showed well-known models clothed in swimwear or clothes. When cross-examined, a copy of an internet site called "Maria's Fantasies" was shown to the Applicant. It was put to the Applicant that access to this site had been identified from the computer used by him and he was asked whether that was the type of material that was popping up on his screen. The Applicant said that it could be but he did not recognise the name "Maria's Fantasies". It was also put to the Applicant that the rebuild of his computer was completed by Ms Edwards on 18 August 2004 at 10:00 am, and that an examination of the computer by Ms Edwards on 11 October 2004, showed that the Applicant had accessed the "Maria's Fantasies" site after the computer was rebuilt and prior to 5:00 pm on 18 August 2004. In response the Applicant said that he could not recall accessing the site. When he was re-examined he said that he did not deliberately go into this site.

15 At about 5:00 pm on 18 August 2004, as the Applicant was walking towards the reception desk Mr Smith saw him and asked if he could see him in his (the Applicant's) office. The Applicant returned to his office with Mr Smith. They sat down and Mr Smith said to him, "We are at a moment of crisis." The Applicant looked at Mr Smith and said, "I don't understand, what crisis? What do you mean?" The Applicant says Mr Smith told him that the administration staff were threatening to resign en masse because of him (the Applicant). The Applicant says he said in response, "I still don't understand, what have I done, I've done nothing to those girls, I have been more than nice to them and fair and have covered their backsides on many occasions. I do not understand what I have done." When asked in examination in chief about his relationship with the administration staff who reported to him, he testified that they were uncooperative, resentful and sometimes hostile. Mr Smith told him that the administration staff were sick and tired of him (the Applicant) playing cards on the computer and looking at pornographic sites. The Applicant told Mr Smith that he agreed that he played card games on the company computer but said that he did not do so in company time. He says that because of the excessively long hours he worked he rarely took a lunch hour, so during the day he took 10 to 15 minute breaks from time to time to play cards to relax. The Applicant told Mr Smith that he had never ever looked at pornographic sites. The Applicant says that Mr Smith then told him that it would not be in the company's interest if the administration staff resigned and therefore, he (the Applicant) had to go. About 10 to 15 minutes after the meeting commenced, a salesman came into the Applicant's office and advised Mr Smith that clients had arrived who wanted to see him (Mr Smith). The Applicant and Mr Smith agreed to continue their discussion at the Applicant's home.

16 The Applicant testified that when Mr Smith left his office he felt stunned and he could not believe that he was being sacked after he had worked so hard for the Respondent. The Applicant says that he had put his heart and soul into the company and he had taken the accounts from the mess that they were in to a proper set of accounts that were fully reconciled and could be verified by auditors.

17 Mr Smith arrived at the Applicant's home at about 6:30 pm. The Applicant offered Mr Smith a beer. Mr Smith accepted and they sat down and talked. The Applicant says that Mr Smith reiterated what he had said earlier and the Applicant told Mr Smith that he swore on his son's life that he had never accessed a pornographic website. The Applicant says he told Mr Smith that the pornographic site "pop-ups" were unannounced on his computer and Mr Smith told him that he had the same problem, that he has to get rid of about 100 a week himself. The Applicant says he told Mr Smith that the situation was bizarre, was wrong and he did not deserve to be treated in this manner. The Applicant says that Mr Smith nodded and the

Applicant then said, "This is not looking good for me, is it?" and Mr Smith replied, "No, that is why I am here." The Applicant says that Mr Smith then reiterated that he (the Applicant) was no longer working for the company. When cross-examined the Applicant conceded that the meeting was friendly and that they shared two beers each during the course of the discussion, which lasted about one and a half hours. The Applicant says that he is not embittered towards Mr Smith personally. He sees Mr Smith as a messenger from Mr Hirniak (who is one of the directors of the Respondent). It was put to the Applicant in cross-examination that during the discussions in the Applicant's office and at his home that Mr Smith tried to impress upon him (the Applicant) that it was time for him "to lift his game" as there was a perception in the workplace that he was not doing the job he was paid to do because the staff were seeing him using his computer mouse which gave the perception that he was involved in activities other than work. Whilst the Applicant agreed that employees could have formed that impression as the computer mouse was not used to enter data into the business related computer programs; he denied that Mr Smith had told him he had to lift his game. It was also put to the Applicant that Mr Smith had no intention of dismissing him (the Applicant) and that all Mr Smith was trying to do was to counsel him. The Applicant denied that that was the case. It was then put to the Applicant that he had resigned voluntarily and asked Mr Smith to discuss with the Respondent's directors an appropriate severance package. The Applicant also denied that such a discussion had occurred. The Applicant, however, conceded that prior to 18 August 2004 his use of the computer to play games had been raised with him by Mr Smith. The Applicant also agreed when cross-examined that he had stopped working long hours by January 2004, as by that time he had cleared most of the problems that had been occurring and all accounts had been reconciled. He also agreed that Mr Smith had counselled him about not using his (the Applicant's) own personal credit card to pay company accounts to earn Frequent Flyer or bonus points.

18 The Applicant says that after Mr Smith left his home that evening, he (the Applicant) sat trying to decipher what had happened.

19 The following morning, Mr Smith telephoned the Applicant and enquired about what he (the Applicant) thought would be a fair and reasonable payout. The Applicant says he told Mr Smith that he was too stunned to think about it and he wanted to have a meeting with his accusers to find out what was going on, that is, a meeting with the staff who had said that they were going to resign en masse. During the conversation on Thursday, 19 August 2004, the Applicant asked Mr Smith whether the lunch he had planned for the following day with the woman from the State Revenue Department was still on and Mr Smith said that he would still pay for the lunch. Mr Smith also told him he could keep the vehicle for a month and that he (Mr Smith) would talk to Mr Haywood about an appropriate package when Mr Haywood returned from Greece on the following Monday.

20 On the following Monday, Mr Smith telephoned the Applicant and told him he would be paid four weeks' pay and allowed the use of the company vehicle and fuel allowance of $300 per month until such time that he (the Applicant) was going on a holiday which was in about four weeks' time. The Applicant was also allowed to keep the Respondent's mobile telephone for that period. He said, however, that he did not use the mobile telephone after 18 August 2004.

21 The Applicant requested a separation certificate. On Tuesday, 24 August 2004, Mr Smith came to the Applicant's home and gave him a separation certificate which stated that the Applicant had voluntarily ceased his employment with the Respondent. The Applicant says that when he read the separation certificate he told Mr Smith, "This is not what happened." The Applicant says that because the separation certificate inaccurately stated he resigned, he was denied access to unemployment benefits for several weeks. Mr Smith also provided the Applicant with a pay information sheet which stated that four weeks' pay had been directly credited to the Applicant's nominated bank account.

22 Whilst the Applicant still had possession of the Respondent's motor vehicle, he lost the keys to the Respondent's vehicle. He telephoned Mr Smith and obtained a spare set of keys. About two weeks later the car was stolen from the Applicant's home after he came back from shopping. It appears clear from the Applicant's evidence that the person who stole the car also stole a set of keys. The Applicant telephoned Mr Smith and informed him that the car had been stolen. Sometime later the vehicle was recovered by the police. The Applicant went to the police holding yard prior to the vehicle being returned to the Respondent and told a tow truck driver that the keys were in the vehicle. However, when the vehicle was returned to the Respondent by the police the vehicle was returned without keys. The Applicant returned to the holding yard after a conciliation conference was convened by the Commission in November 2004 and was able to identify the keys to the vehicle at the holding yard. The keys were then returned to the Respondent.

23 After the Applicant's employment was terminated, he found alternative employment and commenced work with his new employer on 15 December 2004. He is now paid $60,000 per annum but he is not provided with a company vehicle, mobile phone or any other benefits. He testified that there is no probability that his annual salary will be increased in the near future. The Applicant says that during the four months he was unemployed the only income he received was $190 a week in unemployment benefits. The Applicant claims that he has suffered an injury as a result of the termination of employment. He says that the circumstances of his dismissal left him humiliated as his professional standards were questioned. Further, he was injured because he was denied the opportunity to work out a period of notice.

**The Respondent's Evidence**

24 Mr Wayne Smith has been employed by the Respondent for 13 years. He became the Respondent's General Manager a few months after the Applicant commenced his employment. Mr Smith holds a Bachelor of Commerce with a double major in accounting and finance. He also has a finance broker's licence, a salesman's licence and yard manager's licence for the motor industry.

25 Mr Smith explained that the Respondent is one of 12 Toyota franchisees in Western Australia. Each franchisee operates independently of each other. Toyota WA is the wholesaler or distributor of Toyota vehicles. They import vehicles from Japan or from Melbourne for the franchisees to sell. Pursuant to an agreement the franchisees have with Toyota, each franchisee in Australia is required to report certain information to Toyota Australia who in turn reports to Toyota in Japan. Pursuant to their agreement, the Respondent has to meet certain goals and criteria. If they are not a profitable dealer group they could lose their franchise. As part of their obligations to Toyota, the Respondent is required to provide a profit and loss balance sheet to Toyota online each month which enables Toyota to review the financial performance of the Respondent. Mr Smith said that if monthly balance sheets are provided to Toyota later than 10 working days after the close of the month, there are adverse consequences, in that "black marks" are placed against the Respondent's name by Toyota. Ultimately, if sufficient "black marks" are obtained, the retention of the franchise could be at risk.

26 Mr Smith testified that prior to 18 August 2004, he had had a few very quick conversations with the Applicant over a three to four month period about a number of issues relating to his performance. Mr Smith says that whenever he addressed any issues with the Applicant, the Applicant always said it was another staff member's fault, they were under resourced or the staff were incompetent. Mr Smith testified that one of those issues related to ongoing complaints from members of the Respondent's staff about the Applicant playing cards during office hours. As a result of these complaints, Mr Smith says it got to the point where he sought to catch the Applicant out. On one occasion he saw the Applicant playing cards and counselled him about it. He told the Applicant, "I know that you used to come in Saturdays and Sundays and stay back and, if necessary, come in early. I understand that but the staff do not see that. They are here for their set hours from 8 to 4 and that is all they see. So what you do during those hours is important. Once they have gone, if that is what you need to do, then you can do it. You can play

cards". In relation to other issues, Mr Smith testified that whilst he (Mr Smith) was on holidays the Applicant used his own personal credit card to pay company bills to obtain Frequent Flyer points. He challenged the Applicant about this and the Applicant told him that he thought he was owed something and that was why he did it. Mr Smith said that he told the Applicant not to do it again but subsequently the Applicant used his personal credit card again. Mr Smith also said that other matters were raised about the failure to compete bank reconciliations. In December 2003, a $80,000 BAS cheque was misplaced by the receptionist when she took the mail to the post office. Because the accounts were not reconciled the fact that the BAS cheque had not been banked was not picked up. As a result the Respondent was issued with a winding up petition in early 2004 for an unpaid BAS debt. Mr Smith said that if the relevant records had been reconciled this would not have occurred. Mr Smith says that he often had discussions with the Applicant about his workload and as a result of these discussions in January 2004, Mr Smith arranged for an additional staff member to be employed to assist with the workload of the administration department so that the Applicant had four employees to assist him

27 In relation to the events that occurred on 18 August 2004, Mr Smith testified that on Tuesday, 17 August 2004, one of the administration staff came into Mr Smith's office and threatened to resign. He says that this was the second time this person had threatened to resign. On this particular day, she told him she wanted to resign because she had seen pornographic material on the Applicant's computer. Mr Smith says he talked her out of resigning because she is a valuable employee. Mr Smith says that prior to that day he had spoken to the Respondent's directors about putting some action in place to lift the standard of the Applicant's performance. Mr Smith testified that this complaint by the staff member brought everything to a head, in particular the complaint indicated to him (Mr Smith) that the Applicant's performance was not changing and he needed to address a number of issues. On the morning of 18 August 2004, Mr Smith sought advice from a solicitor, Mr Arns from Arns and Associates, about how to do that. Mr Smith says that Mr Arns advised him (Mr Smith) that he needed to stress to the Applicant how critical the situation was and to outline exactly what matters were wrong and how each performance issue was going to be addressed. In accordance with Mr Arns' instructions, Mr Smith says he listed all of the issues which needed to be addressed, including the issues relating the use of the Applicant's personal credit card to pay the Respondent's accounts and the BAS statement.

28 When Mr Smith returned to the office after seeing Mr Arns that morning he intended to speak to the Applicant but he was unable to do so as the Applicant's computer was being rebuilt so he (Mr Smith) decided to talk to the Applicant at the end of the day. Mr Smith spoke to the Applicant about 5:00 pm in the Applicant's office. Mr Smith says they spoke for about 45 minutes. He told the Applicant that he had a crisis that had to be addressed and attempted to explain to the Applicant how critical the situation was. He told the Applicant the staff were unhappy, they wanted to walk out en masse and "We have a situation that needs to be resolved." Mr Smith says that at no time did he ever say to the Applicant, "It is you or the staff" or words like that. He says that he had clear instructions from Mr Arns that the way forward was to address each of the issues he (Mr Smith) had with the Applicant's performance and put in place a plan to address those issues. In accordance with what he had discussed with Mr Arns, Mr Smith raised each issue that he thought needed to be addressed. The first issue he raised was playing cards on the computer. Mr Smith testified that the Applicant initially denied that he had played cards during office hours but Mr Smith reminded him that he had observed him (the Applicant) doing so. That issue was quickly put aside. Mr Smith then raised the issue of pornographic material on the computer and Mr Smith says the Applicant responded by swearing on his son's life that he did not enter such websites. Mr Smith told him that access had been going on over a long period of time, that not only had the Applicant's staff reported it to him (Mr Smith) but sales staff had seen such material on his computer. Mr Smith says that the Applicant kept coming back to the pornographic material and kept saying that he would not and did not ever go into those websites. Mr Smith says that the discussion was friendly but the Applicant seemed bewildered and miffed because the staff thought that he was looking at these websites and they had brought the matter to the attention of Mr Smith rather than to him (the Applicant). About 5:45 pm, friends of Mr Smith arrived to purchase a vehicle. They had an appointment for 6:00 pm but they had arrived early. Mr Smith then said to the Applicant, "What do you want to do now? They are here. Do you want to continue this discussion at your house or do you want to come and talk early tomorrow morning?" The Applicant told Mr Smith said that he would prefer if Mr Smith came to his house that evening so he gave Mr Smith his address of his home and his telephone number.

29 Mr Smith says when he arrived at the Applicant's house at about 7:00 pm, the Applicant offered him a beer. They started talking about things other than work and then they began discussing the issues raised at the earlier meeting. Mr Smith said that they talked about a lot of issues - Toyota finance audits, Toyota finance rates and about stock checks. Mr Smith says he discussed these issues because the Respondent was at that time on a four week cycle on their floor plan which meant they had restrictions on their cashflow. This was unacceptable. Mr Smith says because of this restriction on cashflow, he had removed the responsibility from the Applicant for completing audits. Mr Smith says that as they talked, the Applicant kept coming back to the issue about the pornographic material as his (the Applicant's) key issue. Mr Smith said that the Applicant was obviously very good (at his work), had a lot of industry experience and he (Mr Smith) had a lot of faith in the Applicant but Mr Smith said he thought that the Applicant had difficulty keeping up with changing technologies. After about 90 minutes of discussion, Mr Smith says that the Applicant told him that he "could not face them" and that he did not want to go back (to work). Mr Smith testified that he was surprised at the Applicant's attitude, that he expected the Applicant would have fought for his position and would not have given up. The Applicant told him that he deserved fair compensation. Mr Smith had not been briefed on compensation, so he told the Applicant that he would have to discuss the matter with the Respondent's directors and he asked the Applicant what he thought was "fair" but the Applicant did not put any proposition to him.

30 The following morning the Applicant did not report for work. Mr Smith telephoned the Applicant at home and told him he was not able to speak to Mr Haywood until the following Monday because Mr Haywood was in Greece. He then said to the Applicant, "I assume you're still comfortable with your decision last night as you've not fronted for work. I honestly thought that you would be here first thing this morning." The Applicant told him he had not changed his mind and agreed to wait until next Monday to discuss compensation.

31 On the following Monday, Mr Smith spoke to Mr Haywood and obtained instructions to offer the Applicant one month's pay. Mr Smith made this offer to the Applicant and the Applicant told him that he was happy to accept. Mr Smith also told the Applicant he could have the car until he went on holidays. The Applicant telephoned Mr Smith the following day and asked for a separation certificate. On Wednesday, 25 August 2004, Mr Smith visited the Applicant at his home, gave him the separation certificate together with his personal belongings which had been left by the Applicant at the office. He also gave the Applicant a copy of a payslip stating the amount which was going to be paid into the Applicant's account on Thursday. He asked the Applicant whether he wanted a cheque straight away and the Applicant said that he was happy to wait until Thursday for payment.

32 Sometime later Mr Smith received a telephone call from the Applicant to say that he had misplaced the keys to the Respondent's vehicle. Mr Smith informed the Applicant that he would provide him with the second set of keys to the vehicle but asked for the other set of keys to be returned as soon as they were found because they had no other set of programmable keys. Mr Smith was later informed that the car had been stolen. When he spoke to the Applicant about that, he asked the

Applicant what he was going to do without a car for a couple of days and the Applicant informed him he would borrow his son's car. Subsequently, the car was recovered without any keys. At the conciliation conference before the Commission Mr Smith raised the issue of the keys with the Applicant and sometime after that the keys were returned.

33 When cross-examined, it was put to Mr Smith that if the Respondent was concerned about pornographic sites being viewed on employees' computers, the Respondent should take steps to block such material from the computer system. In response, Mr Smith said that when the Respondent first obtained access to the internet they restricted access to websites and emails. However, they were unable to communicate with Toyota with restricted access. He also said that as the Applicant was second in charge in the company, he (Mr Smith) thought he should be able to have complete trust in the Applicant to use the computer allocated to him appropriately. It was also put to Mr Smith that two to three weeks prior to the Applicant's employment coming to an end the Applicant had witnessed graphic pornographic material being viewed by other employees on a computer screen. Mr Smith said that he did not know about that but in early January 2004, the Applicant reported to him that a number of sales employees had viewed pornographic material. Mr Smith says following that report he counselled the employees in question about their conduct and to his knowledge there had not been any repetition of that conduct.

34 When it was put to Mr Smith that the monthly financial reports submitted to Toyota by the Applicant during his employment with the Respondent had been completed on time since January 2004 (except in June 2004 when there was no input), Mr Smith said that he could not comment on the state of the accounts when the Applicant first commenced work because he was not the General Manager at that time. However, he agreed that when the Applicant took over the accounts were not perfect, that reconciliations had not been completed and he agreed that profits had been overestimated. Mr Smith also said that in January 2004, the Respondent employed an extra staff member to assist the Applicant. Mr Smith testified that the Respondent was reporting on time to Toyota prior to the Applicant being employed by the Respondent. Further, he said that if there were any problems with data being inputted in the monthly reports it would have been caused by data being wrongly inputted into the wrong location. He denied that the figures were fudged. In addition, he said that since the Applicant has ceased to be employed by the Respondent and they have operated with one less administrative staff, the Respondent has had no difficulty reporting to Toyota each month within the time frame required by Toyota.

35 When cross-examined, Mr Smith was asked why did he agree to paying for a lunch for the Applicant two days after the Applicant had allegedly resigned if his performance was so poor. In response Mr Smith said that the Applicant had done his job and he did not take that many perks so he had agreed to pay for the lunch. Further, he (Mr Smith) had committed to paying for the lunch before 18 August 2004 and that the resignation by the Applicant was amicable.

36 Ms Robyn Edwards testified that she is self-employed and has subcontracted to Unetix Pty Ltd to carry out work on computer systems for a number of companies including the Respondent's business for a number of years. Ms Edwards has a diploma of electronic engineering, is a certified Microsoft professional, a certified Linux administrator and a certified Citrix administrator. She sets up and maintains the Respondent's computers, including its networking and internet connections.

37 Ms Edward testified that the problem with the Applicant's computer was not a virus but Malware which is also known as Adware. She said that the Respondent's computer system runs an antivirus system which is the leader in antivirus software but Malware is not detected by antivirus software due to a legal challenge by the creators of the Malware software. The creators claim the software is not a virus. She testified that Adware has to be installed by the user. She explained that the user may not know that they are installing the Adware as it is imbedded in other software or other sites on a website. A user downloads the Adware when a window pops up and says to the user, "To view this site better, you will need to load 'X, Y and Z'." If the user loads "X, Y and Z", they are loaded plus a dozen other programs. Ms Edwards says that Adware is not imbedded in legitimate sites, such as the Australian Taxation Office. She said Adware is installed when reviewing a related website, such as a sexually related site that has illegal software on it. Ms Edwards made it plain in her evidence that the type of Adware that she located on the Applicant's computer on and prior to 18 August 2004 usually only comes from sexually related sites. Once a machine is infected by Adware, the computer is linked to other dubious websites which send Adware "pop-ups" from those other websites. She says the only guaranteed way of fixing the problem is to "blow the machine away" and reload all the programs. By this, I understand that all programs on the computer have to be removed and uninfected programs reloaded.

38 Ms Edwards said that Adware is not usually attached to email, that an unsolicited email is different to a website infection and that whilst dubious material is often sent in email such as "spam", the email does not create Adware unless you open a website containing Adware in the email.

39 Ms Edwards says that she was called out to deal with Adware on the computer used by the Applicant whilst he was employed by the Respondent on three occasions. The first occasion she removed the Adware from the machine, the registry and relevant files. However, within a short period of time the Adware had reappeared. She attended the Respondent's office again and removed the Adware. On two other occasions other engineers attended the Respondent's office to remove the Adware from the machine used by the Applicant because she was not available. Finally, as a result of a telephone conversation from the Applicant, Ms Edwards attended the Respondent's premises on 18 August 2004 to clean and reload the operating system and all the programs onto the computer used by the Applicant. Ms Edwards testified that the computer used by the Applicant was a stand alone machine. By this, I understand that the infection of the Adware removed by her only affected the machine used by the Applicant.

40 Ms Edwards said that the date stamp on the computer stated the job was completed at 10:00 am by her on 18 August 2004. When it was put to her in cross-examination that she may have been mistaken about the time, she said that part of the reloading of the machine was to reset the internal clock in the computer. She says that the clock was accurate to within 10 minutes and she had no reason to believe that the time would not have been set accurately that day.

41 Ms Edwards said that the Adware contained on the Applicant's computer was a typical pornographic "pop-up" which is usually downloaded by a user when they visit a site that is linked to a pornographic site. She says that she told the Applicant how the "pop-ups" had come onto his computer and the Applicant's reply was, "I don't know how they got there. I did not go into these sites, I didn't do this." When the Applicant's evidence that the infection of the "pop-ups" came about because he opened an email saying "overdue account" was recounted to Ms Edwards, she said that spam are unsolicited emails which have no relevance to web pages unless you happen to open a web page on a spam email, which requires a physical click on the web page entry. Further, she said that you are unlikely to be directed to a site containing sexual material if you log onto a site such as BankWest. She says it is only companies that have dubious connections and hidden agendas that run Adware which takes a user to pornographic sites and the only time you ever get reverted to a porn website is by logging onto a website of a similar ilk.

42 On 11 October 2004, Ms Edwards was called to the Respondent's premises to analyse the computer which had been used by the Applicant. On that occasion Ms Edwards spent one and a half hours looking for visits to pornographic or sexually related websites. Ms Edwards went through the computer's cache files and ascertained that on 18 August 2004 after the machine was

rebuilt at 10:00 am and prior to 5:00 pm there were several visits to what she described as a light/medium pornographic and lingerie websites. She said that these websites could be described as fetish sites and sites relating to sexually orientated matching services. She also examined the computer for websites visited after 18 August 2004 and found that no unrelated business websites had been visited except the Neil Diamond fan club. She found no "pop-ups" or Adware on the computer.

43 When asked in cross-examination whether she had dealt with any other Adware or spam problems on the Respondent's computers, Ms Edwards said one or two computers had loaded "smilie" icons which had to be removed. She said that "smilie" icons were also a version of Malware. She was also asked if a person logged into a website containing bestiality would that generate "pop-ups" and Ms Edwards said, "No, a pop-up is generated by the action of the user of the computer by responding to the command 'To view this site, click OKAY'. If the user clicks on OKAY, the Adware software is loaded." She testified that not all hardcore websites have Adware and "pop-ups" associated with them.

**Credibility**

44 Whether the Applicant gave his resignation freely or was dismissed by Mr Smith is an issue of fact which turns solely on whether I accept the evidence given by the Applicant or Mr Smith. The credibility of Ms Edwards was not substantially challenged by the Applicant's agent.

45 Having observed the witnesses carefully, I did not find the Applicant to be a truthful witness. His evidence in relation to some matters was materially contradicted by the evidence given by Ms Edwards. The Applicant maintained in his evidence that Ms Edwards finished cleaning his computer at about 4:15 pm or 4:30 pm on 18 August 2004. Ms Edwards' evidence not only establishes that she finished rebuilding the computer at 10:00 am but also her examination, on 11 October 2004, of the computer in question showed that the Applicant visited a number of sexually related websites from 10:00 am to 5:00 pm on 18 August 2004. The Applicant was evasive when he was asked whether he had accessed "Maria's Fantasies" website after the computer was cleaned by Ms Edwards. Ms Edwards' evidence that she told the Applicant how his machine came to be infected by the Adware was not challenged in cross-examination. Clearly the Applicant was aware of how his machine came to be infected, yet he continued to access dubious sites. Further, I did not find the Applicant's evidence about how the computer used by him came to be infected with Adware satisfactory. Ms Edwards' uncontradicted evidence establishes that the computer used by the Applicant could only have been infected if he visited a sexually orientated website and not through a visit to an email or website relating to the Applicant's banking records. I also did not find the Applicant's evidence that the computer used by Mr Smith was also infected by "pop-ups" satisfactory. Firstly, this allegation was not put to Mr Smith when he was cross-examined. Secondly, Ms Edwards gave uncontradicted evidence that the only Adware that she has removed from the Respondent's computers other than from the machine used by the Applicant were "smilie" icons.

46 I found Mr Smith to be a reliable and truthful witness. He did not embellish his evidence, nor was he shaken when cross-examined. Consequently, I accept the evidence of Mr Smith and reject the evidence given by the Applicant where their evidence departs.

**Conclusion**

47 In light of my findings in relation to credibility, I find the Applicant was not dismissed by the Respondent and find that he freely and voluntarily tendered his resignation and negotiated a termination payment and I will make an order that the application be dismissed.

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**2005 WAIRC 02315**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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| **PARTIES** | GARY RAYMOND RAFFERTY |
| | **APPLICANT** |
| | **-v-** |
| | ACEWAY NOMINEES PTY LTD T/AS CITY TOYOTA |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER J H SMITH |
| **DATE** | FRIDAY, 12 AUGUST 2005 |
| **FILE NO/S** | APPL 1179 OF 2004 |
| **CITATION NO.** | 2005 WAIRC 02315 |

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| **Result** | Application dismissed |
| **Representation** | |
| **Applicant** | Mr C S Fayle (as agent) |
| **Respondent** | Mr P T Arns (of counsel) |

*Order*

HAVING heard Mr Fayle, as agent on behalf of the Applicant and Mr Arns, of counsel on behalf of the Respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT the application be and is hereby dismissed.

(Sgd.) J H SMITH,
Commissioner.

[L.S.]

**2005 WAIRC 01929**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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| **PARTIES** | CHRISTOPHER LESLIE REMEDIOS |
| | **APPLICANT** |
| | **-v-** |
| | OCEANEERING AUSTRALIA PTY LTD |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER S M MAYMAN |
| **DATE** | WEDNESDAY, 29 JUNE 2005 |
| **FILE NO.** | APPL 364 OF 2005 |
| **CITATION NO.** | 2005 WAIRC 01929 |

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| **CatchWords** | Industrial law (WA) – Termination of employment – Harsh, oppressive or unfair dismissal – *Industrial Relations Act 1979* s.29AA – Prescribed amount – Salary above prescribed amount as per s.29AA(3) – Employee continuously employed by an employer for a period of less than 12 months – *Industrial Relations (General) Regulations 1997* Part 3, Regulation 5 – Salary above prescribed amount when calculated as per r.5(2)(c) – Commission prevented from determining claim – Application dismissed. |
| **Result** | Order issued dismissing application. |
| **Representation** | |
| **Applicant** | Mr C Remedios (on his own behalf) |
| **Respondent** | Mr S Scott (as agent) |

*Reasons for Decision*

1 This is an application made on 6 April 2005 pursuant to s29(1)(b)(i) of the *Industrial Relations Act 1979* ("the Act"). Mr Remedios ("the applicant") asserts that Oceaneering Australia Pty Ltd ("the respondent") has harshly, oppressively and unfairly dismissed him from his employment.

2 The respondent opposed the claim and further, raised a preliminary matter maintaining that the Commission does not have jurisdiction to hear and determine the substantive claim as the applicant's rate of remuneration was $112,350 per annum, therefore exceeding the amount prescribed by s29AA.

**Background**

3 The applicant commenced full time employment with the respondent on 30 August 2004, as an Operations Technician on an offshore facility. The applicant's employment was terminated, effective as of 23 March 2005.

4 The applicant was engaged on a roster consisting of a cycle of 18 weeks (3 weeks on duty, 3 weeks off duty, 3 weeks on duty, 3 weeks off duty, 2 weeks on duty and 4 weeks off duty). Each day of standard duty consisted of 12 hours of rostered work. The applicant was not paid by the hour, he was paid a rate of remuneration. The rate was divided equally into 12 parts and paid monthly.

**Respondent's submissions**

5 The respondent submits that the relevant section for determination of this matter is, in accordance s29AA(3) of the Act, as the applicant was not employed under an industrial instrument as defined. It was agreed between the parties that the instrument of employment was an Australian Workplace Agreement ("the AWA") approved by the Office of Employment Advocate on 1 September 2004 number A301208630. The AWA was tabled in evidence (*Exhibit S2*).

6 The respondent submitted that the rate of remuneration received by the applicant was reflected in Clause 3 of Attachment 1 of the terms and conditions of employment, (*Exhibit S2)*. That clause reads as follows:

> "Remuneration
>
> The Total Remuneration Package for this position will be Aud.$115,500 per annum made up of:
>
> - Base Salary (including Field Operations Allowance) $105,000; plus
> - Superannuation Employer Contribution $ 10,500;
>
> (equal to 10% of Base Salary)
>
> Out of your Total Remuneration Package you can choose to contribute via salary sacrifice additional monies into superannuation.
>
> The Total Remuneration Package will be deemed full compensation for the hours necessary for you to fulfil your duties. The rate of remuneration contains a component in recognition of public holidays, annual leave, severance payments and time spent travelling to and from the facility. No additional payments of any kind will be made.
>
> Payments may be deducted for any day or part day that you are not ready, willing and available to carry out duties in accordance with this contract."

7 Subsequent to his initial employment the applicant's rate of remuneration was reviewed and he received a 7% increase. An adjustment to that increase was made to 1 January 2005 and the applicant was advised of the increase by way of correspondence from the respondent (*Exhibit S3)*. The respondent adjusted the annual remuneration, submitted at the outset as received by the applicant from $112,350 to $109,548.03. The lesser amount, the respondent submitted, was determined in accordance with the formula prescribed in r5 of the *Industrial Relations (General) Regulations 1997* ("the regulations"). Given the applicant was employed for less than 12 months, the total amount received (less eligible termination payment) was $62,127.24.

8 The respondent submitted that the field allowance (as referred to in the Remuneration clause) ought be included in the prescribed amount, given that the value of such an allowance is not specified in the conditions of employment (*Exhibit S2*) or Clause 10.4 of the AWA. That clause reads as follows:

"10.4 Your rate of pay is in full compensation for:

10.4.1 The rostered hours of work;

10.4.2 The roster cycle pattern which includes provision for annual leave;

10.4.3 The time in which the work is performed;

10.4.4 Additional hours performed at your usual place of employment;

10.4.5 The conditions under which the work is performed;

10.4.6 The location of the place of employment;

10.4.7 Travel to and from the worksite;

10.4.8 Public holidays falling on days on which you are not rostered to work; and

10.4.9 Public holidays worked."

The respondent submitted that to distinguish between the words "salary" and "allowances" and therefore exclude the field operations allowance received by the applicant as per the principles reflected in *Patrick Joseph O'Sullivan v Cook's Construction* (2003) 83 WAIG 2860, was not appropriate. Given that Clause 10.4 of the AWA does not apply any form of quantum to the allowances, the rate of remuneration received by the applicant does not fall below the prescribed amount.

9 Accordingly, the respondent maintains that the applicant's rate of remuneration is in excess of the prescribed amount and the Commission lacks jurisdiction to proceed in respect of the substantive claim.

**Applicant's submissions**

10 The applicant submitted that the annual rate of remuneration received when commencing with the respondent was $105,000 per annum in accordance with the terms and conditions of employment as signed (Exhibit S2).

11 Further, it was submitted that the prescribed amount as defined was not relevant given s27.3 of the AWA applying to his employment. This provisions referred to a disputes resolution procedure which allowed an issue between the parties to proceed to the Australian Industrial Relations Commission in circumstances where an issue was unresolved. The procedure as specified reads follows:

"27.1 Should any issue or dispute arise between you and the company in relation to your employment you and your supervisor need to discuss the issues and attempt to reach resolution. These discussions should take place as quickly as possible.

27.2 If these discussions do not resolve the issue, either you or the supervisor may refer the issue to the company's Managing Director. The Managing Director will discuss the dispute with you within seven days or such other time as is agreed.

27.3 If the issue relates to a condition of this Agreement, and it is still not resolved after discussions with the Managing Director, you or the company may refer the issue for private mediation or to the Australian Industrial Relations Commission for conciliation and arbitration.

27.4 The continuation of normal work will not prejudice the outcome of the issue resolution process.

27.5 At any stage of the process you may seek the assistance of another employee or personal representative. That representative may be present at all or part of the ensuing discussions, at your option.

27.6 Any Company Supervisor involved in the resolution of this issue may elect to have another Company representative or external advisor present during any discussions with you.

27.7 In this process the term 'issue' includes any dispute or any difficulty between the parties."

(*Extract from Exhibit S2)*

The applicant relies on this clause for submitting that regardless of his rate of remuneration he is entitled to bring the matter before the Australian Industrial Relations Commission.

12 The applicant further submitted that he had yet to complete one year with the respondent and therefore the remuneration earned to date was $62,127.24, less than the amount as prescribed in s29A(3). Given the remuneration received to date was below the prescribed amount the Commission therefore had jurisdiction to hear and determine the substantive matter.

**Findings and conclusions**

13 Regulation 6 of the regulations specifies the current prescribed amount referred to in s29AA as $99,700 per annum.

14 It is the Commission's view that the principle issue to be considered in this matter is whether the applicant's remuneration in the period prior to the termination of his employment exceeded the prescribed amount for the purposes of s29AA of the Act. Relevantly s29AA provides as follows:

"(3) The Commission must not determine a claim of harsh, oppressive or unfair dismissal from employment if:

(a) An industrial instrument does not apply to the employment of the employer;

(b) The employee's contract of employment provides for a salary exceeding the prescribed amount.

(4) …

(5) In this section

'prescribed amount' means:

(a) $90,000 per annum; or

(b) the salary specified, or worked out in a manner specified, in regulations made by the Governor for the purposes of this section."

Additionally, the terms of r5 of the regulations are also relevant and read as follows:

**"5. Prescribed amount — section 29AA**

(1) For the purposes of paragraph (b) of the definition of "prescribed amount" in section 29AA(5) of the Act the specified salary is $90 000, or that amount as affected by indexation in accordance with regulation 6.

(2) For the purposes of paragraph (b) of the definition of "prescribed amount" in section 29AA(5) of the Act the salary provided for in an employee's contract of employment is to be worked out as follows —

(a)…

(b)…

(c) for an employee who was continuously employed by an employer for a period less than 12 months immediately before the dismissal or claim — the amount worked out using the formula —

$$\frac{\text{remuneration received} \times 365}{\text{days employed}}$$

15 It is common ground between the parties and I so find that an industrial instrument as defined under the Act did not apply to the employment of the applicant. It therefore remains for the Commission to determine whether the remuneration received by the applicant when applied in accordance with r5 of the regulations exceeded the prescribed amount. In determining this question the Commission has considered the definition of "remuneration" as having been interpreted broadly in a number of decisions of both the Commission and the Full Bench. Relevant is the finding of His Honour The President in the Full Bench decision *Ramsay Bogunovich v Bayside Western Australia Pty Ltd* (1998) 78 WAIG 8, at 10, where it was held that remuneration is to be regarded as being "wider in meaning than 'wages or salary'".

16 In determining the definition of salary in the context of s29AA, the definition of "prescribed amount" and the contract of employment applying to the applicant at the time of his termination, I find that without any prescription as to quantum for any or all of the allowances contained in the applicant's contract of employment including the AWA (Exhibit S3) the Commission is unable to do anything other than determine that the rate to be applied to r5(c) in applying the formula is the total rate received, inclusive of the field allowance, overtime allowance, travel to and from the facility amongst others. To assist in the determination of the remuneration in the context of s29AA the Commission asked the parties to submit written submissions following the hearing of the matter. Neither parties' submissions assisted in assessing how the remuneration is structured with respect to the quantum of allowances. The Commission is therefore restricted to considering the total rate.

17 I have had regard for the question of onus in this matter in that where a respondent raises a preliminary issue relating to jurisdiction then the onus is on the respondent to raise the matter. Once raised, the onus is on the applicant to prove the contrary, in this case, that the Commission does have the jurisdiction to hear and determine the substantive matter, *Springdale Comfort Pty Ltd t/a Dalfield Homes v Building Trades Association of Unions of Western Australia (Association of Workers)* (1986) 67 WAIG 325. The Commission finds that the applicant has not discharged the onus in this regard.

18 The applicant relied on the dispute settlement procedure prescribed under the AWA applying to his employment which allowed for an issue to be referred to the Australian Industrial Relations Commission. The Commission finds that this clause cannot be utilised for the purposes of overriding provisions of the Act and allowing for access to the Western Australian Industrial Relations Commission.

19 It was uncontested that the applicant was employed for a period of less than 12 months by the respondent and the provisions of r5(2)(c) of the regulations apply. Given the applicant was employed on 30 August 2004 and terminated effective 24 March 2005, a total of 207 days applies to his employment.

20 In applying the formula prescribed by r5(c) and multiplying the remuneration received ($62,127.24) by 365 and dividing it by the days employed (207), I find that the prescribed amount for the purposes of s29AA(5) of the Act is $109,538.02.

21 The prescribed amount for the purposes of s29AA is, therefore, exceeded and the Commission lacks jurisdiction to hear and determine the substantive matter.

22 An order will now issue dismissing the application.

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**2005 WAIRC 02083**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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| **PARTIES** | CHRISTOPHER LESLIE REMEDIOS, **APPLICANT** |
| | **-v-** |
| | OCEANEERING AUSTRALIA PTY LTD **RESPONDENT** |
| **CORAM** | COMMISSIONER S M MAYMAN |
| **DATE** | TUESDAY, 19 JULY 2005 |
| **FILE NO** | APPL 364 OF 2005 |
| **CITATION NO.** | 2005 WAIRC 02083 |

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| **Result** | Application dismissed for want of jurisdiction |
| **Representation** | |
| **Applicant** | Mr C Remedios (on his own behalf) |
| **Respondent** | Mr S Scott (as agent) |

*Order*

HAVING heard Mr C Remedios on his own behalf and Mr S Scott on behalf of the respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act* 1979, hereby orders;

THAT this application be, and is hereby dismissed.

(Sgd.) S M MAYMAN,
Commissioner.

[L.S.]

**2003 WAIRC 09899**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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| **PARTIES** | CHRISTOPHER RICHARD THORNTON |
| | **APPLICANT** |
| | **-v-** |
| | SKYCHARM PTY LTD ACN 099 576 217 |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER S J KENNER |
| **DATE** | FRIDAY, 13 JUNE 2003 |
| **FILE NO** | APPLICATION 400 OF 2003 |
| **CITATION NO.** | 2003 WAIRC 09899 |

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| **Catchwords** | Industrial law (WA) – Termination of employment – Harsh, oppressive and unfair dismissal – Acceptance of referral out of time – Application referred outside of 28 day time limit – Relevant principles to be applied – Commission satisfied applying principles that discretion should be exercised – Acceptance of referral out of time granted – *Industrial Relations Act 1979* (WA) s 29(1)(b)(i), s 29(2) & s 29(3) |
| **Result** | Order issued |
| **Representation** | |
| **Applicant** | Mr C Thornton on his own behalf |
| **Respondent** | Mr K Grant |

*Reasons for Decision*

*(Ex Tempore)*

1 The substantive application in this matter is one brought by Christopher Richard Thornton against Skycharm, by which it is alleged that the applicant was harshly, oppressively or unfairly dismissed on or about 20 February 2003 from his position as a service station customer service attendant console operator. It is common ground that the applicant was employed at the Ampol Willetton service station, in Willetton, Western Australia.

2 For the purposes of these proceedings evidence was given by both the applicant and also Mr Grant, a director of the respondent. The Commission is only going to, in brief summary form outline the nature of that evidence.

3 The applicant testified that he was employed on or about 2 December 2002 as a console operator by the respondent. He was employed to work approximately 32 hours per week, and it is common ground, was paid at the rate of some $12.00 per hour. The events leading to the present proceedings are unfortunate to say the least. It is common ground that the applicant, on 24 January 2003, was the subject of a hold-up at the petrol station whereby two persons presented at the premises of the respondent armed with, it appears, a large knife and iron bar, threatened the applicant, and received moneys as a consequence of that incident.

4 The applicant testified, understandably, and I might add at this stage Mr Grant of the respondent quite freely acknowledged the trauma that the applicant would have suffered, that he spent some 14 days after the incident off work, during which time evidence was given that, the applicant visited a medical practitioner and was treated for stress and anxiety and, additionally, undertook some counselling.

5 The evidence also was, from the applicant, that thereafter he returned to work, worked for a period of time, but expressed concerns about being restored to the night shift at the Willetton store because of ongoing anxiety attacks, and his trauma, which he was then still suffering.

6 As a consequence of those various events, some weeks later, for reasons which will become apparent, no doubt, in due course, the applicant felt compelled to tender his resignation on 20 February 2003. Tendered in evidence by the applicant was a bundle of documents including his resignation of 20 February 2003. That letter, addressed to Mr Grant of the respondent, refers to the applicant's emotional stress caused by the hold-up, to which the Commission has referred, and difficulties faced in changing his working hours. The applicant refers to his decision as having no other choice but to tender his resignation, effective from 20 February 2003. Reference is also made in those documents to a workers compensation claim which, according to the evidence before the Commission at this stage is somewhat controversial in terms of the time which it took for various documents to pass between the applicant and the respondent and the respondent's insurer, although the Commission does not need to make any determination in relation to those issues for the purposes of determining the present application to extend time.

7 The long and short of the matter is that the applicant asserts in his evidence, despite requests to on-site management of the respondent that he be given alternative shifts to night shift at the Willetton store he felt he was in no alternative position but to resign because those requests were met either with no response or no adequate response, in the applicant's eyes.

8 The applicant testified that at all material times he was more than willing to accommodate the employer by way of alternative shift arrangements to train up employees or to work at another location. Simply put, the applicant said his anxiety state was such that he could not return to the night shift at the Willetton store. His evidence also was that by reason of a lack of contact from the management's representatives of the respondent following him raising these issues, and his view that they were unreceptive to his requests, he felt he had no alternative but to tender his resignation. As I have already observed he did so on 20 February 2003.

9 The applicant, in cross-examination, did not assert that the employer itself was an unsafe employer but, rather, he felt unsafe working night shift at the particular station in Willetton, for the reasons which he advanced in evidence. He also reaffirmed in cross-examination that he was experiencing a considerable degree of emotional stress, which the Commission must say is understandable in the circumstances which the applicant faced on the evening of the hold-up.

10 Nonetheless, the applicant now says that he brings this application some eight days out of time. He explains the delay by reason of the fact that he was negotiating with Centrelink to receive a separation certificate in order for him to receive unemployment benefits, and also pursuing his workers compensation claim. Indeed, his evidence was that he commenced

these proceedings to, in his words, expedite the process of receiving his separation certificate and also to challenge what he considered to be grievances arising from the termination of his employment.

11 The Commission observes in passing that the applicant also commenced proceedings in the Australian Industrial Relations Commission alleging that his dismissal was unfair, at about the same time he commenced these proceedings. It is common ground, however, that that application was dismissed for want of jurisdiction by reason of the fact of the applicant having been employed on a probationary period for three months.

12 The Commission also heard evidence from Mr Grant, the director of the respondent. His evidence was, however, that he was not directly involved in the circumstances of the applicant at Willetton, or the arrangements leading to the termination of the applicant's employment; rather that was dealt with most directly by the on-site management representatives, who the Commission understands were a Bindi and Francis.

13 Mr Grant opposed the application and said in his view there was no substantive grounds for the Commission granting an extension of time, and therefore this application ought, in short, be refused. At all times Mr Grant said that the respondent was a safe employer and had a proper, documented procedure for dealing with matters such as these, and that procedure was met on this particular occasion.

14 In terms of the relevant principles in matters of this kind, I refer to the decision of the Commission as presently constituted in the matter of *Azzalini v Perth In-flight Catering* (2002) 82 WAIG 2992, in particular my observations at pars 27 and 28 of that decision in relation to what I consider to be the relevant factors. The first factor that is relevant to observe is the length of the delay. In this case the applicant's claim was some eight days outside of the 28 day time limit for commencing these proceedings. In my view that is not an inordinate period of time, but it is a factor to be considered by the Commission.

15 Secondly, the explanation for the delay. The applicant, as I have observed, testified in evidence that he was progressing a Centrelink claim for benefits, and also a workers compensation claim. He advised the Commission in evidence that he was not aware of the 28 day time limit until such time as he lodged an application for a waiver of the $50.00 filing fee and it was at that time that he became aware that his substantive application was out of time and he would need to persuade the Commission that it ought be accepted outside of the 28 day time limit.

16 I merely observe at this stage there was no evidence that the applicant was aware of the 28 day time limit, and it is not a case where the applicant was acting on legal advice or advice from an industrial agent as to his circumstances. It is the case, however, that the application was brought outside of the 28 day time limit.

17 The third factor is steps taken, if any, by an applicant to evidence non-acceptance of the termination of the employment, and that it would be contested. There is no direct evidence in relation to that. However, the Commission notes correspondence passing between the applicant and the respondent following the applicant's resignation of 20 February 2003, in particular a letter from Mr Grant to the applicant dated 21 February 2003 and, secondly, a reply from the applicant to Mr Grant of 27 February 2003 attaching a two page somewhat detailed statement as to his position in terms of the circumstances that he faced.

18 In my view, that document, whilst not directly challenging the termination of the employment, certainly provides some flavour to the application that the applicant has now brought in this Commission.

19 The next factor is whether the merits of the application are such that there is a sufficiently arguable case. The applicant faces two hurdles in this respect. Firstly, he must satisfy the Commission that he was dismissed as a matter of fact and as a matter of law and, secondly, if he was dismissed, that dismissal was harsh, oppressive or unfair.

20 As I have already observed, the applicant tendered his resignation on 20 February 2003 but asserts that he had no real alternative but to do so and was forced to do so by reason of, effectively, the non-response of the management's representatives to his requests at the time.

21 The issue is whether there is an arguable case at this stage. The issue is not the substantive merits of the case and whether the applicant would succeed or not. It is not without some oscillation, having considered what limited evidence there is before the Commission at this stage, that I have formed the view that there is at least an arguable case which ought be put to the Commission as to, firstly, whether the applicant was dismissed or not, as a matter of law and, secondly, whether that dismissal was harsh, oppressive or unfair.

22 I should add that that determination does not, as I just observed, indicate any assessment of the ultimate outcome of the case of either the applicant or the respondent, that is, whether it would succeed or whether it would fail.

23 For all of those reasons, the Commission is prepared to exercise its discretion to extend time for the purposes of bringing these proceedings pursuant to s 29(2) and s 29(3) of *Industrial Relations Act 1979* (WA) ("the Act"). The matter will be referred to a Deputy Industrial Registrar for conciliation under s 32 of the Act, and an order will issue to that effect in due course.

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**2003 WAIRC 08523**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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| **PARTIES** | CHRISTOPHER RICHARD THORNTON |
| | **APPLICANT** |
| | **-v-** |
| | SKYCHARM PTY LTD ACN 099 576 217 |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER S J KENNER |
| **DATE** | FRIDAY, 13 JUNE 2003 |
| **FILE NO** | APPLICATION 400 OF 2003 |
| **CITATION NO.** | 2003 WAIRC 08523 |

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|---|---|
| **Result** | Extension of time granted |
| **Representation** | |
| **Applicant** | Mr C Thornton on his own behalf |
| **Respondent** | Mr K Grant |

*Order*

HAVING heard Mr C Thornton on his own behalf and Mr K Grant on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the referral of the herein application be and is hereby accepted out of time.

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

**2005 WAIRC 02280**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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|---|---|
| **PARTIES** | CHRISTOPHER RICHARD THORNTON |
| | **APPLICANT** |
| | **-v-** |
| | SKYCHARM PTY LTD ACN 099 576 217 |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER S J KENNER |
| **DATE** | MONDAY, 8 AUGUST 2005 |
| **FILE NO/S** | APPL 400 OF 2003 |
| **CITATION NO.** | 2005 WAIRC 02280 |

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| **Result** | Application dismissed for want of prosecution |
| **Representation** | |
| **Applicant** | No appearance |
| **Respondent** | No appearance |

*Order*

THERE being no appearance on behalf of the applicant and no compulsion for the respondent to attend the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby dismissed for want of prosecution.

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

**2005 WAIRC 02107**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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|---|---|
| **PARTIES** | ELIZABETH ANNE TRENT |
| | **APPLICANT** |
| | **-v-** |
| | GROBAG AUSTRALIA NEW ZEALAND PTY LTD |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER J L HARRISON |
| **DATE** | THURSDAY, 21 JULY 2005 |
| **FILE NO.** | APPL 116 OF 2005 |
| **CITATION NO.** | 2005 WAIRC 02107 |

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|---|---|
| **Catchwords** | Termination of employment - Harsh, oppressive and unfair dismissal - Whether application to amend name of respondent should be granted - Relevant principles applied - Commission satisfied that discretion should be exercised - Application to amend name of respondent granted – Acceptance of referral out of time - Application referred outside of 28 day time limit - Relevant principles to be applied - Commission satisfied applying principles that discretion should be exercised - Acceptance of referral out of time granted - *Industrial Relations Act 1979* (WA) s 6(c), 26(1), 27 and 29(1)(b)(i),(2)&(3) |
| **Result** | Application to amend name of respondent granted. Application to accept applicant's claim which was lodged out of time granted. |
| **Representation** | |
| **Applicant** | Mr K Trainer (as agent) |
| **Respondent** | Mr M Vallence (as agent) |

*Reasons for Decision*

1 On 2 February 2005 Elizabeth Trent ("the applicant") referred an application to the Commission pursuant to s29(1)(b)(i) of the *Industrial Relations Act 1979* ("the Act") claiming that she was harshly, oppressively and unfairly dismissed on 13 December 2004 by Tim and Megan Caporn, Gro-Group ("the respondent").

Preliminary Issue

2 At the outset of the proceedings the applicant sought leave to delete Tim and Megan Caporn, Gro-Group as the respondent and substitute it with Grobag Australia New Zealand Pty Ltd. The Respondent opposed leave being granted to amend the name of the respondent and argued that as this application did not name the correct respondent this application should be dismissed.

3 The applicant gave evidence that she named Tim and Megan Caporn, Gro-Group as her employer as she believed her employer to be Gro-Group and because she understood that Tim and Megan Caporn were in charge of Gro-group when she was terminated. The applicant stated that she understood Gro-Group was her employer as she was advised by Ms Megan Caporn or Ms Julie De Silva in November 2004 that her employer had become part of the Gro-Group group of companies and she used the name Gro-Group when answering the telephone. The applicant stated that she was aware that her previous employer was Baby Sleepers Pty Ltd.

4 The applicant stated that she did not understand the legal differentiation between Gro-Group and Grobag Australia New Zealand Pty Ltd which she now understood was her employer from mid 2004. The applicant stated that when she was required to name her employer on Form 1 she reviewed the letterhead of her termination letter and she understood from this letter that Gro-Group was her employer (see Exhibit A2).

5 Ms Barbara Grealy gave evidence that she understood the applicant was employed by Gro-Group when she was terminated.

6 Ms Caporn gave evidence that Tim and Megan Caporn, Gro-Group was never the applicant's employer. Ms Caporn stated that Gro-Group is a trading name and part of Grobag Australia New Zealand Pty Ltd and that at all times since the middle of 2004 the applicant was employed by Grobag Australia New Zealand Pty Ltd.

7 Ms Caporn maintained that the applicant was aware from 1 July 2004 that her new employer was Grobag Australia New Zealand Pty Ltd as the applicant assisted with the respondent's change of name to Grobag Australia New Zealand Pty Ltd and this change was reflected in a number of documents that the applicant used, including emails, newsletters, sales order forms and a fax sheet. In addition, on 15 December 2004 the applicant was given a letter confirming the correct name of her employer (Exhibit A2). Ms Caporn stated that after the respondent came under the umbrella of the Gro-Group at the end of November 2004 she understood the applicant was answering telephones referring to Grobag.

Submissions

8 The applicant submits that no application was made to alter the name of the respondent prior to the hearing as this specific issue was listed for hearing and determination before the Commission. The applicant maintains that she was confused about the correct name of the respondent as the applicant's letter of termination referred to Gro-Group on its letterhead and the respondent is not properly listed on the letterhead of this letter.

9 As emails generated by the applicant during the course of her employment refer to the applicant sending emails on behalf of Gro-Group this gives credibility to the applicant's evidence that she used the word Gro-Group when answering the respondent's phone and that the applicant understood that Gro-Group was her employer. Ms Grealy also gave evidence that she assisted the applicant with her application and that she understood the applicant's employer was Gro-Group as at the end of 2004.

10 The applicant maintains that the Commission should take into account that the applicant was not represented when she filled out Form 1 and that even though the applicant relied on Ms Grealy to assist her to fill out Form 1 she was not experienced in dealing with unfair termination applications. The applicant therefore maintains that even though the respondent was not correctly named and that the applicant made a mistake when she referred to Tim and Megan Caporn, Gro-Group as her employer the Commission should remedy this misdescription and substitute the true name of the respondent.

11 The respondent maintains that the Commission should not exercise its discretion to change the name of the respondent. The respondent argues that there was ample evidence demonstrating that the applicant should have been aware of the true name of her employer. The applicant's letter of termination, dated 15 December 2004, expressly refers to the applicant being employed by Grobag Australia New Zealand Pty Ltd, the applicant was instructed to answer the telephone using the respondent's name and day to day documentation used by the respondent refers to Grobag Australia New Zealand Pty Ltd. Furthermore, no effort was made by the applicant to seek leave to alter the respondent's name prior to the hearing even though the applicant was well aware prior to the hearing that the respondent had been incorrectly named.

**Findings and Conclusions**

12 The Commission has discretion under s27(1)(l) and (m) of the Act to issue an order amending the name of a respondent (see *Parveen Kaur Rai v Dogrin Pty Ltd* (2000) 80 WAIG 1375 and *Clint Edwards v PG Dorn, R Princi & M Tolich trading as Naval Base Garden Supplies and Civil and Earthmoving Contractors of Kwinana Pty Ltd* (2003) 83 WAIG 445). Further, the Commission is to act with the minimum of legal form and technicality (see s6(c) and s26(1)(a) of the Act) when dealing with industrial matters.

13 It is my view that given the circumstances of this case, Tim and Megan Caporn, Gro-Group should be deleted as the respondent and replaced with the correct name of the respondent Grobag Australia New Zealand Pty Ltd.

14 Even though no application was made by the applicant to identify the correct name of the respondent until the hearing it is my view that this is only one factor to consider when exercising discretion in relation to this issue. In any event, I accept the applicant's argument that once this issue was listed to be dealt with by the Commission any such application would have been redundant.

15 I find that the applicant filled out Form1 to the best of her ability and made a genuine mistake when she named Tim and Megan Caporn, Gro-Group as the respondent.

16 In considering whether or not the applicant ought to have known the true name of her employer I accept the applicant's evidence that when she filled out Form 1 she understood that Gro-Group was her employer and that she was directing her application to Tim and Megan Caporn as she understood they were in charge of the respondent's operations. I take into account the applicant's direct evidence that she referred to Gro-Group when she answered telephone calls for the respondent and the email address used by the applicant when working for the respondent refers to Gro-Group (see Exhibit A1). I find that the applicant went to some effort to ensure Form 1 was correctly filled out as she sought assistance from her support person Ms Grealy in this regard, who also understood that Gro-Group was the applicant's employer. I note that the applicant's letter of termination (Exhibit A2) refers to Gro-Group on its letterhead with a sub-heading of Gro-group Australia New Zealand Pty Ltd and that the website address referred to on this letter is www.gro-group.com.au. Even though there is reference in this letter to

the applicant being employed by Grobag Australia New Zealand Pty Ltd the trademark Gro-Group appears at the bottom of the letter and there is also reference to Grobag Australia New Zealand Pty Ltd trading as Gro-Group Australia New Zealand. Given the range of entities listed on the applicant's letter of termination it is therefore not surprising that the applicant was unclear about the true name of her employer notwithstanding the direct reference in this letter to the name of the applicant's employer. I find it is plausible that the applicant understood Tim and Megan Caporn to be in charge of the respondent's operations as the applicant gave evidence that both Tim and Megan Caporn were involved in the disciplinary process involving the applicant prior to her termination.

17 I find that the applicant had limited knowledge about the necessity to identify the correct legal entity as her employer and that she was not familiar with the ramifications of not naming the correct respondent.

18 I find that as Gro-Group is linked with Grobag Australia New Zealand Pty Ltd (see Exhibit A2), this adds weight to allowing the application to amend the respondent's name.

19 It is my view that the detriment to the applicant in not allowing the application is far greater than the detriment to the respondent as the applicant will experience difficulties pursuing her claim against the respondent if the respondent is not correctly named.

20 In the circumstances it is my view that it is appropriate that the Commission's discretion be exercised in the applicant's favour and an order will issue deleting Tim and Megan Caporn, Gro-Group as the respondent and replacing it with Grobag Australia New Zealand Pty Ltd.

21 Section 29(2) of the Act requires that applications pursuant to s29(1)(b)(i) of the Act be lodged within 28 days after the day on which an employee is terminated. As this application was lodged on 2 February 2005 it is 22 days out of the required timeframe for lodging a claim of this nature.

22 Section 29(3) of the Act reads as follows:

> "(3) The Commission may accept a referral by an employee under subsection (1)(b)(i) that is out of time if the Commission considers that it would be unfair not to do so."

23 In reaching a decision in this matter as to whether it would be unfair not to accept this application out of time I take into account the relevant factors outlined in the Industrial Appeal Court decision in *Malik v Paul Albert, Director General, Department of Education of Western Australia* (2004) 84 WAIG 683 at 686, as follows:

> "1. Special circumstances are not necessary but the Court must be positively satisfied that the prescribed period should be extended. The prima facie position is that the time limit should be complied with unless there is an acceptable explanation of the delay which makes it equitable to so extend.
>
> 2. Action taken by the applicant to contest the termination, other than applying under the Act will be relevant. It will show that the decision to terminate is actively contested. It may favour the granting of an extension of time.
>
> 3. Prejudice to the respondent including prejudice caused by delay will go against the granting of an extension of time.
>
> 4. The mere absence of prejudice to the respondent is an insufficient basis to grant an extension of time.
>
> 5. The merits of the substantive application may be taken into account in determining whether to grant an extension of time.
>
> 6. Consideration of fairness as between the applicant and other persons in a like position are relevant to the exercise of the Court's discretion."

24 When considering the issue of fairness Heenan, J further observed in *Malik v Paul Albert, Director General, Department of Education of Western Australia* (op cit) the following:

> "I accept that the concept of fairness is central to a decision whether or not to accept an application under s 29 which is out of time but, with all respect, I cannot accept the submission which was put in this case that it is fairness to the applicant which is either the sole or principal concern. Fairness in this situation involves fairness to all, obviously to the applicant and to his or her former employer, but also to the public interest and to the due and efficient administration of the jurisdiction of the Commission which should not be burdened with unmeritorious stale claims."

25 In applying these guidelines I am mindful that there is a 28 day timeframe to lodge an application and the Commission's discretion in relation to a matter of this nature should not be exercised unless it would be unfair not to do so.

Background

26 The applicant commenced employment with Baby Sleepers Pty Ltd as a Customer Care Officer on 3 January 2004. On 1 July 2004 the applicant ceased employment with Baby Sleepers Pty Ltd and the applicant became employed by Grobag Australia New Zealand Pty Ltd. The applicant initially worked from home until the applicant's then employer opened its current premises in May 2004. The applicant's duties included answering the telephone and dealing with sales and enquiries. The applicant was required to open the respondent's office each day. The applicant was employed on a full time basis working 38 hours per week and from time to time the applicant worked weekends. The applicant obtained her position through an agency called PEP Employment Services ("PEP") and as the applicant has a hearing disability she was assisted throughout her employment by an employment consultant, Ms Grealy, who is employed by PEP.

27 There were no issues raised about the applicant's performance or behaviour until October and November 2004. Although the applicant was confused about her termination date it became clear at the hearing that the applicant was terminated on 14 December 2004 at a meeting attended by the applicant and Tim and Megan Caporn. The following day a further meeting was held about the applicant's employment with the respondent and was attended by the applicant, Ms Grealy, Tim and Megan Caporn and Ms De Silva.

Applicant's evidence

28 The applicant gave evidence that she was unaware that the respondent had serious concerns about her performance and behaviour until she was terminated on 14 December 2004. The applicant stated that throughout her employment with the respondent Ms Grealy regularly visited her and the respondent to monitor her progress. The applicant stated that she loved her job and often worked additional hours over and above those required of her. The applicant stated that even though her normal hours were between 7.00am to 2.30 or 3.00pm the applicant understood her hours were flexible as she often did not have a lunch break as no-one was available to relieve her. The applicant conceded that sometimes she commenced work after 7.00am but she understood she had the flexibility to do this as she had no designated lunch break. The applicant stated that the issue of arriving late to work was raised with her once in the middle of November 2004.

29 The applicant stated that even though she was not formally counselled about her performance or for taking smoking breaks she conceded that the respondent spoke to her once about taking smoking breaks. The applicant stated that she usually took two five minute smoking breaks each day because she did not have a designated lunch break and she stated that she may have taken other smoking breaks from time to time depending on her stress levels.

30 The applicant stated that she was booked to travel to the United Kingdom on a holiday commencing on 16 December 2004 and that she had booked this holiday in February 2004 and the respondent was aware of her travel plans. The applicant stated that the days prior to this date was a busy period for her.

31 The applicant stated that on three occasions in the period immediately prior to her termination she took time off for personal reasons. The applicant stated that she attended an urgent dental appointment, a hair appointment and a beauty therapy appointment and the applicant stated she had to attend these appointments during work time as she could not get appointments at any other time. The applicant stated that she had approval from Mr Caporn for the dental appointment and advised Ms De Silva about taking time off for the other two appointments. The applicant stated that she made up the time she took off.

32 The applicant stated that on 14 December 2004 she spent time handing-over her work to a person called Dixie who was to be her replacement whilst she was on leave. The applicant stated that after spending some time with Dixie the applicant went home because she was tired. The applicant stated that after she returned to the respondent's office that day she was asked to attend a meeting with Tim and Megan Caporn at approximately 11.30am. The applicant stated that during this meeting she was terminated and told to leave the respondent's premises.

33 The applicant stated that when she and Ms Grealy met with Tim and Megan Caporn the following day the respondent raised a number of issues about her behaviour and performance for the first time and the applicant claimed she was treated in a harsh and derogatory manner during this meeting. The applicant stated that she sought reinstatement but the respondent refused this request.

34 The applicant stated that she had no time to lodge this application immediately after she was terminated as she left for the United Kingdom on 16 December 2004. The applicant stated that whilst she was in the United Kingdom she contacted Ms Grealy about her termination and was advised to wait until she returned from her trip to lodge this application and when the applicant returned to Perth on 18 January 2005 she telephoned Ms Grealy about lodging this application. The applicant claimed that she and Ms Grealy were unable to contact the Employment Law Centre for assistance until around 26 January 2005 and that it only became clear to her at this time that there was a timeframe within which to lodge this application. The applicant then spent a day trying to download a Form 1 on her computer but was unsuccessful. The following day the applicant visited the Commission, obtained a Form 1 and faxed the form to Ms Grealy on Friday 28 January 2005 for checking as she wanted to fill the form out correctly. Ms Grealy responded on 31 January 2005 and the applicant then lodged this application on Wednesday 2 February 2005.

35 The applicant stated that she was not in a fit state emotionally to lodge her application immediately after she was terminated as she was very distressed and the applicant stated that she was too upset to tell the respondent that she would be contesting her termination at the time she was terminated.

36 Under cross-examination the applicant agreed that after contacting Mr Caporn on 12 December 2004 seeking permission to commence work late the following day she was told to start at 7.00am and the applicant stated that the following day she arrived at work at approximately 8.15am and left work early. The applicant stated that the respondent sent her one email and she had one discussion with the respondent about arriving late to work. The applicant understood that there were no time sheets recording the hours she worked. The applicant stated that she was aware that the respondent had an entry and exit security system but she was unaware that records were kept of access times.

37 Ms Grealy places people with disabilities in employment and monitors them on an ongoing basis until an employee is declared an independent worker. Ms Grealy stated that this process takes approximately 18 months. Ms Grealy stated that the applicant was enthusiastic, she liked the environment within which she worked and she was very happy working with the respondent.

38 Ms Grealy stated that even though the respondent had a number of opportunities to raise concerns with her about the applicant's behaviour and performance it did not do so. Ms Grealy stated that at the beginning of November 2004 she approached the respondent about writing an article for a newsletter about the respondent's employment of the applicant and Ms Grealy stated that at the time the respondent gave positive feedback about the applicant.

39 Ms Grealy stated that the applicant was very upset when she contacted her after she was terminated. Ms Grealy confirmed that she met with the respondent the following day and she asked that the applicant be reinstated. Ms Grealy stated that initially the respondent had concerns about her attendance at this meeting. Ms Grealy stated that Tim and Megan Caporn were hostile towards the applicant, the atmosphere was negative and the applicant was not given any real opportunity to respond to the issues and accusations raised about her which included the applicant being late for work, taking smoking breaks and the applicant's "heart apparently not being in her work". Ms Grealy stated that the respondent confirmed that it had not put anything in writing to the applicant about its concerns.

40 Ms Grealy stated that subsequent to the applicant's termination she was very stressed and therefore incapable of lodging this application. Ms Grealy confirmed that she assisted the applicant in seeking advice about lodging an unfair dismissal claim from the Sussex Law Centre and then the Employment Law Centre, which was difficult to contact.

41 Ms Grealy stated that it was usual for employers to contact her if there were any difficulties with an employee and that she normally attended as a support person to assist an employee when they experienced difficulties.

Respondent's evidence

42 Ms Caporn gave evidence in chief by way of a Statutory Declaration (Exhibit R1). Ms Caporn is one of the respondent's directors along with her sister Ms De Silva and two other directors who reside in the United Kingdom. Ms Caporn confirmed that Mr Caporn assists with the management of the respondent's operations. Ms Caporn stated that she was happy with the applicant's performance until October and November 2004 when she became aware that the applicant had left work on several occasions to attend to personal business without seeking authorisation from herself or any other management representative. Ms Caporn stated that the applicant attended a dental appointment on 24 November 2004 and she claimed that despite the applicant undertaking to return to the office after this appointment she did not do so. Ms Caporn stated that she had a meeting with the applicant on 30 November 2004 and the applicant was instructed that she was not to undertake personal business during working time. Notwithstanding this instruction on or about 1 December 2004 the applicant left the office to attend a hair appointment. Ms Caporn stated that she then met with the applicant and advised her that it was not appropriate to schedule personal appointments during work time. Ms Caporn stated that she was aware that on 8 December 2004 the applicant left the office prior to her usual finishing time to attend a personal appointment and Ms Caporn again met with the applicant to advise her that it was unacceptable for her to leave work prior to her usual finish time. Ms Caporn stated that after the applicant arrived late for work on 25 November 2004 Mr Caporn counselled her about notifying the respondent about absences.

43 Ms Caporn stated that the applicant failed to maintain a tally of incoming phone records and a record of the work performed by her and that this issue was raised with the applicant on a number of occasions. Ms Caporn gave evidence that the applicant was also counselled about taking smoking breaks and the applicant was instructed to only take breaks during her designated break times and to cease taking a break when she felt like it. Ms Caporn maintained that these instructions were confirmed in a job description provided to the applicant in October/November 2004 (see Exhibit R1 annexure 23).

44 Ms Caporn stated that subsequent to the applicant's termination on 14 December 2004 the respondent reviewed the security details for entry to the respondent's office and stated that these records showed that the applicant commenced work late on a number of occasions (see Exhibit R1 annexure 22). Ms Caporn understood that the applicant was instructed to commence work at 7.00am each day.

45 Ms Caporn stated that on 12 December 2004 both she and Mr Caporn were contacted by the applicant who requested permission to commence work late on Monday 13 December 2004. Ms Caporn stated that on both occasions the applicant was told that she was required to start at 7.00am as Monday was a busy day and as it was close to Christmas, the following week would therefore be a very busy week for the respondent. The applicant was also reminded that she was required to complete a hand-over to her replacement. Ms Caporn stated that even though the applicant was told to commence work at 7.00am she did not arrive at work on time the following day.

46 Ms Caporn understood that on 14 December 2004 the applicant advised Dixie during her hand-over that she was going home and she left the respondent's premises without authorisation. Once Ms Caporn found out about this she contacted the applicant and required her to return to the respondent's office and after the applicant returned to the office Ms Caporn discussed the applicant's behaviour with Mr Caporn and Ms De Silva. At the meeting held with the applicant later that morning the applicant admitted that she had arrived late for work on Monday 13 December 2004 and had left work on Tuesday 14 December 2004 without notifying the respondent. Ms Caporn stated that as the applicant was unable to provide a satisfactory explanation for her behaviour and did not raise anything in mitigation, the respondent decided to terminate the applicant's employment forthwith on the basis that the applicant had wilfully disobeyed a lawful direction to attend work on time and as a result the respondent had no trust in the applicant being at work on time in the future. The applicant was then advised that she could attend the respondent's office the following day to collect her personal effects and termination payment.

47 Ms Caporn stated that subsequent to 15 December 2004 the respondent was not advised by the applicant or by Ms Grealy that the applicant would be contesting her termination and the first time that she was aware of this application was when it was served on her. Ms Caporn stated that the respondent would suffer prejudice if this matter continued because both she and Mr Caporn have relocated to Sydney and the respondent would incur additional expenses.

48 Under cross-examination Ms Caporn confirmed that the applicant's replacement, Dixie, was Ms Caporn's mother. By way of clarification Ms Caporn stated that even though her mother was involved with the respondent's operations she had no authority over the respondent's employees.

49 Ms Caporn confirmed that during the meeting with the applicant on 14 December 2004 the applicant was unhappy and distressed and was genuinely remorseful. Ms Caporn stated that she understood that the applicant was able to take lunch breaks as there was a roster in place to facilitate this. Ms Caporn stated that no records were kept of the hours worked by the applicant and agreed that the applicant had some flexibility in the hours she worked. Ms Caporn was aware that the applicant worked more hours on some days than others.

Submissions

50 The applicant maintains that there is merit to her claim and that special circumstances existed in relation to her employment which the respondent did not take into account. The applicant had a disability which was should have been taken into account and the applicant had a special relationship with Ms Grealy who was integral to the applicant's employment.

51 The applicant maintains the issues raised by the respondent which led to the applicant's termination arose over a short period of time and cognisance should be had of the applicant's previous period of good performance.

52 The applicant maintains that she was denied procedural fairness given the manner of her termination. The applicant was not warned that she was going to be terminated, she was not given sufficient time to properly respond to the accusations against her and alternatives to termination were not canvassed nor were the applicant's personal circumstances taken into account. Furthermore, no consideration was given by the respondent to the applicant's genuine remorse.

53 The applicant disputes the evidence that she was counselled about the respondent's concerns and as the applicant had some flexibility with her working arrangements the respondent cannot rely on its argument that the applicant took unauthorised time off.

54 The applicant therefore maintains that she has an arguable case.

55 The applicant maintains that as she was terminated two days prior to commencing leave and travelling overseas this impacted on her ability to lodge the application within the required timeframe and after the applicant returned to Australia on 18 January 2005, the applicant took immediate steps to lodge this application. It was not the applicant's fault that she had difficulty obtaining advice and accessing a copy of Form 1 and there was some delay in having Ms Grealy assist the applicant to fill out this form. The applicant maintains that the delay in lodging this application will result in little if any prejudice to the respondent as a substantial statutory declaration has already been completed by Ms Caporn (see Exhibit R1).

56 The respondent maintains that the applicant did not have an acceptable explanation for the delay in lodging this application. The respondent argues that the applicant could have accessed and lodged Form 1 whilst she was overseas and that after the applicant returned to Australia it took 15 days to lodge this application, which was a lengthy period. Furthermore, the applicant was given advice to lodge her application as quickly as possible soon after returning to Australia and did not do so. The respondent maintains that in any event Ms Grealy should have been aware of the timeframe for lodging this application.

57 Apart from the applicant requesting her job back on 15 December 2004 there was no indication that she would be contesting her termination. The respondent argues that it will be prejudiced if this application is allowed as the respondent's head office and Tim and Megan Caporn have now relocated to Sydney.

58 The respondent argues that the applicant's claim has no reasonable prospect of success. Ms Caporn gave evidence demonstrating that the respondent had ongoing concerns about the applicant's performance and behaviour and that the applicant was counselled about these issues. On 12 December 2004 on two occasions the applicant was given a direction to commence work at 7.00am the following day and did not do so and the applicant left the respondent's premises without authorisation on 14 December 2004. As the applicant failed to comply with a directive given to her by the respondent and as the respondent had additional concerns about the applicant's performance and behaviour the respondent argues that it was open for the respondent to terminate the applicant by a payment in lieu of notice. The respondent argues that it followed a fair process when terminating the applicant and that the applicant was given a proper opportunity to respond to the allegations against her.

59 The respondent therefore argues that the Commission should not exercise its discretion to accept this application which has been lodged outside the 28 day time limit as prescribed by the Act.

**Findings and Conclusions**

60 On the evidence currently before me it could well be the case that there is merit to the applicant's claim that she was unfairly terminated. I accept that the respondent had concerns about the applicant's actions on 13 and 14 December 2004 in particular the fact that she did not commence work at the time she was instructed to attend on 13 December 2004. I also accept, however that it does not appear that the applicant was advised that the failure to attend work on time on that date could result in her employment being in jeopardy and even though the respondent was aware the applicant occasionally commenced work late there was no evidence that the applicant was disciplined in any formal way about this issue. Further, it was not in contest that the applicant had some flexibility in relation to the hours that she worked even though it is unclear at this point how flexible the applicant was allowed to be in relation to start times. It also appears that the applicant had an arrangement whereby she was able to take time off for additional hours worked and make up these hours at some other time and it was not in dispute that the applicant did not always work set hours and occasionally worked weekends. I also note that the applicant readily conceded that she should not have left the respondent's premises on 14 December 2004 and she was remorseful about her actions in this regard and the applicant gave evidence that she advised Dixie of her absence and she returned to the respondent's premises once requested by Ms Caporn.

61 Even though a number of other concerns were raised by the respondent and the respondent claimed that the applicant was counselled about these issues, given the conflict in evidence between the applicant and Ms Caporn about this issue and the lack of supporting documentation, I am unable to take these issues very far at this point. I also note that the applicant maintains that she advised Ms De Silva about taking time off and there was no evidence, apart from hearsay, to support the respondent's claim that a number of concerns were raised with the applicant prior to her termination.

62 It may be that the sudden and unexpected way in which the applicant was terminated resulted in the applicant being denied procedural fairness and the investigation conducted by the respondent into its concerns about the applicant appears to have been cursory given the timeframe used by the respondent in deciding on the applicant's termination. I also note that as the applicant has a disability and was given support in her role by Ms Grealy it may well have been appropriate to involve Ms Grealy in any disciplinary proceedings concerning the applicant.

63 On the evidence currently before me it is therefore my view that the applicant has an arguable case that she was unfairly terminated.

64 I find that the applicant has an acceptable reason for the delay in lodging this application which was lodged 22 days out of the required timeframe. I accept that the applicant left for the United Kingdom on 16 December 2004, two days after she was terminated and one day after she met with the respondent seeking re-instatement. It would therefore have been very difficult for the applicant to lodge her application during this timeframe. I find that the applicant was particularly distressed when she was terminated which would have made it difficult for her to organise the lodgement of this application prior to leaving on her holiday. Even though the respondent argued that the applicant should have lodged this application whilst overseas I find that there would have been logistical issues that would have made this very difficult for the applicant. I accept that the applicant was unaware that there was a timeframe for lodging her application until she returned to Australia on 18 January 2005 and I find that the applicant took immediate steps to obtain advice about lodging an unfair termination application once she returned to Australia. I accept the applicant's evidence as confirmed by Ms Grealy that upon her return to Australia she had difficulty obtaining legal advice and I find that once the applicant obtained the Form 1 and had her application reviewed by Ms Grealy the applicant lodged the application as quickly as possible.

65 Even though there is a delay of 22 days in lodging this application, which is significant, and the applicant did not indicate to the respondent that she intended to contest her termination prior to lodging this application, I take into account that the respondent was aware that the applicant would be overseas until 18 January 2005 and the respondent was also aware that the applicant was very distressed by her termination. I accept that there is a disadvantage to the respondent as its head office and one of its directors has now re-located to Sydney, however, the respondent's office continues to operate in Perth and this difficulty would exist even if this application was lodged within the required timeframe.

66 When balancing the above findings and taking into account the relevant factors to consider in an application of this nature I find that it would be unfair in all of the circumstances not to accept this application. In reaching this view I take into account that I have found that there was an acceptable reason for the delay in lodging this application and that there is sufficient to establish that the applicant has an arguable case. It is therefore my view that in all the circumstances it would be unfair for the Commission not to exercise its discretion to grant an extension of time within which to file this application. For these reasons an extension of time in order to lodge this application is granted.

67 An order will issue to that effect.

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**2005 WAIRC 02164**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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|---|---|
| **PARTIES** | ELIZABETH ANNE TRENT |
| | **APPLICANT** |
| | **-v-** |
| | GROBAG AUSTRALIA NEW ZEALAND PTY LTD |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER J L HARRISON |
| **DATE** | MONDAY, 1 AUGUST 2005 |
| **FILE NO/S** | APPL 116 OF 2005 |
| **CITATION NO.** | 2005 WAIRC 02164 |

| | |
|---|---|
| **Result** | Application to amend name of respondent granted. Application to accept applicant's claim which was lodged out of time granted. |

*Order*

HAVING heard Mr K Trainer as agent on behalf of the applicant and Mr M Vallence as agent on behalf of the Respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

1) THAT the name of the respondent be deleted and that Grobag Australia New Zealand Pty Ltd be substituted in lieu thereof.

2) THAT the application to accept the application out of time be and is hereby granted.

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

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**2005 WAIRC 02160**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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|---|---|
| **PARTIES** | CLINTON TURLEY |
| | **APPLICANT** |
| | **-v-** |
| | MIAS BAKERY PTY LTD |
| | **RESPONDENT** |
| **CORAM** | SENIOR COMMISSIONER J F GREGOR |
| **HEARD** | MONDAY, 27 JUNE 2005 |
| **DELIVERED** | WEDNESDAY 27TH JULY 2005 |
| **FILE NO.** | APPL 264 OF 2005 |
| **CITATION NO.** | 2005 WAIRC 02160 |

| | |
|---|---|
| **CatchWords** | **Termination of employment – unfair dismissal – probationary employment – principles applied – *Industrial Relations Act* 1979.** |
| **Result** | Dismissed |
| **Representation** | |
| **Applicant** | Mr C. Fayle appeared as Agent |
| **Respondent** | Mr S. O'Hehir, appeared as Agent |

*Reasons for Decision*

**Application**

1 Clinton Turley (the Applicant) applied to the Commission on the 10th March 2005 for orders pursuant to s23A of the Industrial Relations Act, 1979 (the Act) arising from what he describes as a harsh oppressive and unfair dismissal from employment with Mias Bakery Pty Ltd (the Respondent).

**Applicant's Version**

2 The Applicant's story as articulated in his evidence and from the submissions of Mr Fayle, his Advocate, is that he was employed initially on or about the 28th November 2004 having submitted an application for probationary employment on the 22nd November 2004. He says after the first week of employment he was told that his status had changed from being a casual probationer to a permanent full time employee. He became aware of this because he approached the management after he received his first pay having noted that the rate was for a full time employee and not a casual. In January 2005 the Applicant had an accident at work when he was struck by a piece of machinery. Although he did not stop work immediately he later went off sick. In due course he was cleared to work and returned on light duties. On his return he says he was abused by a Supervisor and told he should leave. This abuse was couched in offensive language.

3 The Applicant thereafter left the employ of the Respondent. He attempted to seek further work. There were issues relating to his workers compensation which have still not been resolved.

4 Mr Fayle says that the Applicant had been employed in November 2004 and even though the application form notes there was a period of probation this was in the understanding of the Applicant on casual wages and attached to it one day's notice. According to Mr Fayle one day's notice is only to be given in rare cases and this gives a good guide as to the proper categorisation of his employment. The Applicant asked for clarification and was told by the General Manager that he was a full time employee. Further Mr Fayle argues that the Applicant was paid as a baker when in fact he did the work of a dough maker so that if there was probation it was probation in the classification of baker not dough maker. Therefore it was wrong to categorise him as being an under performer when he was working on what was in effect higher duties.

5 The difficulties of the relationship were compounded by a personality clash between the Applicant and his Supervisor who according to Mr Fayle did not make any real effort to train the Applicant. That was an obligation the employer had if the Applicant was on a 3 month probationary period. In short there was a person employed doing higher duties under a 3 month probationary period. He effectively trained another member of staff on a machine on work that he was allegedly unable to perform himself.

6 Even though he did take time off that was due to family responsibilities due to the death of his father-in-law. However when he did return to work on light duties he was abused and told to leave. There is no evidence that he was ever properly counselled on his performance nor is there any evidence that he was properly trained. This was an obligation of the employer during any probationary period which Mr Fayle says was not applicable in the case.

7 The Applicant seeks compensation and does not seek reinstatement.

**Respondent's Version**

8 The story on behalf of the Respondent is that the relationship originated from a conversation between the principal of the Respondent, Mr Mias and the Applicant who was known to Mr Mias as a manger of a bakery adjacent to the premises of the

Respondent. The Applicant approached Mr Mias in the car park and mentioned that he was looking for work and at the suggestion of Mr Mias he put in a written application on the 22nd November 2004. He signed the application form which is before the Commission (Exhibit 01).

9 The application form is captioned as an 'Application For Probationary Employment'. The first paragraph is as follows;

> *"It is Company policy that a probationary period of 3 months is a condition of your employment. It is agreed that only 1 days notice is required if the employment is to be terminated for any reason during a probationary period".*

The Applicant signed the form and took part in an induction during which it was made clear to him that the probationary period applied to him and was for 3 months.

10 He commenced work on the 28th November 2004 and as time passed it became clear to the Respondent the Applicant was not suited to the job. He did not appear to be happy with the entry level telling the then General Manager of the Respondent's business that he aspired to the General Manager's job. Further, the Applicant made a number of mistakes. These were expensive to the company and reported through the shift reporting system.

11 The Applicant was injured at work but it took some 3 weeks before he filed a claim. In fact there was no formal notice given by the Applicant to the Respondent that he had been injured until he submitted compensation claim forms in February 2005. This was after he had been told the employment would not continue at the completion of probation.

12 The injury and workers compensation claim had no bearing at all on the Respondent's decision not to offer him a permanent position because at the time the Applicant was told by Mr Mias that the Respondent would not proceed with the employment relationship after the probationary period, it did not even know there was a workers compensation claim. Further, the incident that the Applicant says took place between him and the Supervisor Mr Barry Goldsborough also predates the knowledge of the Respondent that there was workers compensation claim so the issues were unrelated

13 The evidence of Mr Mias was that on 11th November 2004 he met with the Applicant and advised him he would not be offered permanent employment, that he will not be required to report to work for the duration of the probationary period and he was paid out the balance of that period. In short the Applicant was initially employed on a probationary period and remained in that status until a time of termination. He did not prove to be suitable for the position and the Respondent ended the employment and paid out the balance of the probation period as it is obliged to do.

**Witness Evidence**

14 The Commission heard evidence from the Applicant. He gave his evidence in an open and honest way but there were clear differences between his story about his understanding of his initial employment status in his examination in chief and cross examination. In fact in his cross examination he said a form of words from which it is open to conclude that the reason that he formed the conclusion that he was not a casual anymore was his own interpretation of the events and did not arise from anything the employer had said to him.

15 The Applicant called Mr Vincent Fryer to give evidence in his support. Mr Fryer appears to be a credible witness however his evidence was not supportive of the Applicant. He said that he was told "up front" that there was a 3 month probationary period. It was made quite clear that where the Respondent employed people they were placed on probation. If they were a good baker they stayed if they were able to do the job. Mr Fryer also gave evidence that he did not regard himself as being a pupil of the Applicant. In effect they worked side by side. Mr Fryer was able to draw the conclusion that the Applicant did know what he was doing at least the fundamentals of it. However he did not regard himself as being under the guidance and direction of the Applicant.

16 The Commission heard evidence from Mr C.W. Mias who is the principal of the Respondent which is a family company of which he is the Managing Director. He has been involved in the baking industry for many years and has been Managing Director for the last five years. He knew the Applicant because of the Applicant's role as a General Manager of the bakery business adjacent to the Respondent's premises. They had professional dealings with each other from time to time and when he approached him for work, Mr Mias referred him through the company system knowing that he would have to complete an employment form as everyone else does and knowing that there is a probationary period of 3 months.

17 Mr Mias told the Commission that he kept in touch with the Applicant's performance through reports from his Supervisors and was concerned at those reports that the Applicant was not performing well. He eventually acted on those reports and told the Applicant that he would not be retained at the end of his probationary period. He knew the Applicant had been sick and that he had family difficulties but he was unaware of the compensation claim until later.

18 The evidence was also given on behalf of the Respondent by Mr Leo Kostarellas. Mr Kostarellas is the General Manger of the Respondent's business. It is his 34th year in bakery roles running bakeries in all aspects even though he is not a qualified baker. He gave evidence that intending employees fill in an application form prior to interview and induction and if they are successful on a work test they are employed on probation. The Applicant had applied for a position as a baker but it was suggested to him because of his experience in the industry he would be placed as a baker with the intent and purpose later that he became a dough maker. The Applicant had some difficulties operating the machinery production line for the Respondent and from the 28th November 2004 he attempted to do the work. Mr Kostarellas introduced the Applicant to the appropriate people including Mr Wade Reibey to take him through the induction process. Also during the relationship he acted as a mediator between the Applicant and the Supervisor with whom he was having difficulties and tried to take them through their problems. In Mr Kostarellas's opinion the Applicant wanted to work where he wanted to work and not where his Supervisor wished him to. There was a personality conflict which started from day one and evolved from that time. That was one of the issues in his mind when he had discussed the Applicant with Mr Mias. The outcome of the discussion was he asked the Applicant to give him an indication whether he wished to stay with the Respondent through his probationary period and gave him till the end of the week to come and tell him so. Mr Kostarellas thought that he resolved the problem as far as he could and he was greeted with words to the effect from the Applicant that he would not stay if he could not get Mr Kostarellas job.

19 Mr Kostarellas had a number of people complaining about the Applicant's work quality, he raised those issues with the Applicant who pleaded that he needed to learn. Mr Kostarellas made it clear that he was being trained and he could not run the plant by himself until he was. The Applicant kept asking for time but time was costing money but the relationship did not evolve. Mr Kostarellas never told the Applicant that he was no longer a casual and was full time nor did he know about the accident until a couple of weeks after it happened. There was no incident report completed. The first he knew was when the Applicant had to have light duties. In Mr Kostarellas view the Applicant was not suited for the work. He appeared as though he was trying to be disruptive and all in all the experience was a disappointment to him.

**The Law**

20 This case evolves around the concepts of probationary employment. In industrial law, probationary employment has a clear meaning. That meaning has been clearly explained by the Full Bench of this Commission in East Kimberley Aboriginal

Medical Service v The Australian Nursing Federation, Industrial Union of Workers Perth (2000) 80 WAIG 3155 at 3158 (FB). At page 3158 the Full Bench said this in paragraph 49:-

"Again, the following principles apply

(a) The employer, throughout the period of probation, retains the right to see whether he/she wants the employee or not in his/her employment.

(b) (i) The employer is entitled to consider the employee as if the employee was still at first interview with the following modifications in this case.

(ii) There was an identifiable contract of employment for a period, indeed, a fixed term, including a period of probation of three months. This advances the matter beyond a notional first interview situation.

(c) Probation is an extension of the selection process, a period of learning and a time for attention, assessment and adjustment to standards of performance and conduct. (Inherent in that is that it is a time for teaching, training and counselling.)

(d) (i) However, a probationary employee knows that he/she is on trial and that he/she must establish his/her suitability for the post. The employer, on his side, must give the employee a proper opportunity to prove him/herself, but he/she reserves the right to determine the employment with appropriate notice provided he has reason for so doing ( see Sommerville v Brinzz Pty Ltd Clerk Vehicle Repair Industry [1994]SAIR Comm 8 (31 January 1994), citing Re J M Hamblin v London Borough of Ealing ( 1975) IRLR 354 and see Hutchinson v Cable Sands (WA) Pty Ltd(FB)(op cit)).

(ii) Further, an employee on probation can expect to be counselled and informed that she/he is not meeting the required standards of performance, to be given reasonable training in this respect, and to be warned of the possible consequences of a failure to improve. Provided this is done, an employee who is on probation would have little cause to complain if a decision was taken during the course of or at the end of a probationary period to terminate the employment (see Sommerville v Brinzz Clerk Vehicle Repair Industry (op cit), citing Hull v F F Seeley Nominees Pty Ltd (1988) 55 SAIR 550 at 562).

(e) (i) Consonant with those principles, a probationary employee is able to seek reinstatement, but an employer is entitled to terminate a probationary employee more easily, e.g. length of service is not a factor generally, because probationary employment is for a finite period and, in that period, assessment, training and acquisition of skills and demonstration of ability can occur. In addition, any genuine question of compatibility between employer, employee and other employees can be assessed. (This is not a comprehensive inventory of such matters.)

(ii) However, probation is not a licence for harsh, oppressive, capricious, arbitrary or unfair treatment of a probationer (see Hutchinson v Cable Sands (WA) Pty Ltd (FB)(op cit) and the cases cited therein)."

**Analysis and Conclusions**

21 I need to apply the facts to the law. It is clear that the employer through the period probationary retains the right to view the work and conclude whether he wants the employee or not in his employment. During this time the employer is entitled to consider the relationship as if the employee is still at first interview but with modifications.

22 In this case there was identifiable fixed term, that is, for 3 months. The employer on the evidence, and I so find, did treat the probationary as its extension of selection process and a period of learning. Mr Kostarellas, whose evidence I accept, gave powerful evidence in this respect. I reject the argument that asking the Applicant to work as a dough maker worked to his prejudice. I do not accept the evidence of the Applicant that somehow he thought that he was not in a probationary period anymore. His evidence is equivocal whereas the evidence of the Respondent is not. The Applicant seemed to be anxious to conclude that the probationary period somehow evaporated a very short time after he started and that clearly is not so on the evidence. The employer did give the Applicant the opportunity to prove himself and when the employer decided that the relationship would not work he did what was appropriate and paid out the balance of the contractual period. The Applicant in this case was told that he was not meeting the standards by Mr Kostarellas. I accept Mr Kostarellas evidence in this respect in preference to the evidence of the Respondent. To the extent that it can be, that evidence is corroborated by the evidence of Mr Mias who was receiving feedback about what was happening with the Applicant as an employee.

23 It is hard to see that there has not been a fair go all around as is postulated in the *Undercliffe Nursing Home v Federated Miscellaneous Workers Union (1985)* 65 WAIG 385. The Applicant was clearly on a probationary engagement. That engagement was never changed and I reject the Applicant's argument that it was. The Respondent did all that was necessary to assist the Applicant to stay but that was not successful and it was decided because of the cost of training was so high that the relationship should be brought to an end. This coupled with the obvious personality conflicts between the Applicant and his immediate workmates made his continued employment untenable. The Commission will dismiss the claim and an order accordingly will issue.

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**2005 WAIRC 02159**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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| **PARTIES** | CLINTON TURLEY |
| | **APPLICANT** |
| | **-v-** |
| | MIAS BAKERY PTY LTD |
| | **RESPONDENT** |
| **CORAM** | SENIOR COMMISSIONER J F GREGOR |
| **DATE** | WEDNESDAY, 27 JULY 2005 |
| **FILE NO/S** | APPL 264 OF 2005 |
| **CITATION NO.** | 2005 WAIRC 02159 |

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| **Result** | Dismissed |
| **Representation** | |
| **Applicant** | Mr C Fayle, appeared as Agent |
| **Respondent** | Mr S O'Hehir, appeared as Agent |

*Order*

HAVING heard Mr C Fayle, as Agent, appeared on behalf of the Applicant and Mr S O'Hehir as Agent, for the Respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby orders:

THAT the application be dismissed.

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

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**2005 WAIRC 02288**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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| **PARTIES** | MARIO RENE WADE |
| | **APPLICANT** |
| | **-v-** |
| | TRU-BLUE HIRE AUSTRALIA PTY LTD |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER J L HARRISON |
| **DATE** | TUESDAY, 9 AUGUST 2005 |
| **FILE NO.** | APPL 475 OF 2005 |
| **CITATION NO.** | 2005 WAIRC 02288 |

| | |
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| **Catchwords** | Termination of employment - Harsh, oppressive and unfair dismissal - Acceptance of referral out of time - Application referred outside of 28 day time limit - Relevant principles to be applied - Commission satisfied applying principles that discretion should not be exercised - Acceptance of referral out of time not granted - Industrial Relations Act 1979 (WA) s 29(1)(b)(i),(2)&(3) |
| **Result** | Application to accept applicant's claim which was lodged out of time granted |
| **Representation** | |
| **Applicant** | Mr M Wade on his own behalf |
| **Respondent** | Mr A Dungey (of counsel) |

*Reasons for Decision*

1 On 3 May 2005 Mario Rene Wade ("the applicant") lodged an application in the Commission pursuant to s29(1)(b)(i) and (ii) of the *Industrial Relations Act 1979* ("the Act") claiming that he was harshly, oppressively and unfairly dismissed on 17 March 2005 by True-Blue Hire Australia Pty Ltd ("the respondent"). The applicant's claim is outside of the timeframe for lodging this application and the respondent opposes the Commission accepting this application.

2 Section 29(2) of the Act requires that applications pursuant to s29(1)(b)(i) of the Act be lodged within 28 days after the day on which an employee is terminated. As this application was lodged on 3 May 2005 it is 19 days out of the required timeframe for lodging a claim of this nature.

3 The matter was listed for hearing to allow the parties to put submissions and give evidence as to whether or not this application should be accepted under s29(3) of the Act. Section 29(3) of the Act reads as follows:

> "(3) The Commission may accept a referral by an employee under subsection (1)(b)(i) that is out of time if the Commission considers that it would be unfair not to do so."

4 In reaching a decision in this matter as to whether it would be unfair not to accept this application out of time I take into account the relevant factors outlined in the Industrial Appeal Court decision in *Malik v Paul Albert, Director General, Department of Education of Western Australia* (2004) 84 WAIG 683 at 686, as follows:

> "1. Special circumstances are not necessary but the Court must be positively satisfied that the prescribed period should be extended. The prima facie position is that the time limit should be complied with unless there is an acceptable explanation of the delay which makes it equitable to so extend.
>
> 2. Action taken by the applicant to contest the termination, other than applying under the Act will be relevant. It will show that the decision to terminate is actively contested. It may favour the granting of an extension of time.
>
> 3. Prejudice to the respondent including prejudice caused by delay will go against the granting of an extension of time.
>
> 4. The mere absence of prejudice to the respondent is an insufficient basis to grant an extension of time.
>
> 5. The merits of the substantive application may be taken into account in determining whether to grant an extension of time.
>
> 6. Consideration of fairness as between the applicant and other persons in a like position are relevant to the exercise of the Court's discretion."

5 When considering the issue of fairness, Heenan J further observed in *Malik v Paul Albert, Director General, Department of Education of Western Australia* (op cit) the following:

> "I accept that the concept of fairness is central to a decision whether or not to accept an application under s 29 which is out of time but, with all respect, I cannot accept the submission which was put in this case that it is fairness to the applicant which is either the sole or principal concern. Fairness in this situation involves fairness to all, obviously to the applicant and to his or her former employer, but also to the public interest and to the due and efficient administration of the jurisdiction of the Commission which should not be burdened with unmeritorious stale claims."

6 In applying these guidelines I am mindful that there is a 28 day timeframe to lodge an application and the Commission's discretion in relation to a matter of this nature should not be exercised unless it would be unfair not to do so.

Background

7 It was not in contest that the applicant commenced employment with the respondent as a diesel mechanic on 10 October 2004, working 56 hours per week, and that he was terminated on or about 17 March 2005. Attached to this application is a copy of the applicant's pay advice for the period 10 March 2005 to 23 March 2005 which confirms that the applicant was paid outstanding annual leave at termination and even though the respondent's representative understood that the applicant was paid one week's pay in lieu of notice the applicant maintains this payment was not made and this amount is not reflected on the applicant's final pay slip.

Applicant's evidence

8 The applicant gave evidence that when he commenced employment with the respondent he was paid a flat rate of $22.00 per hour and he was provided with a vehicle for work and private use as part of his remuneration package. The applicant stated that a vehicle was allocated to him approximately two weeks after he commenced employment as the vehicle was being used by the person he was replacing during this period. The applicant stated that the terms of his contract of employment with the respondent were agreed verbally and he had no written contract of employment. The applicant stated that he had personal problems throughout his employment and that his supervisor Mr Ron Bugeja was aware of his situation.

9 The applicant stated that he attended work as normal on Thursday, 17 March 2005 and that during the day he was called into the office by Mr Bugeja. The applicant was told by Mr Bugeja that the respondent's General Manager in Perth had decided that all of the respondent's vehicles, including the applicant's vehicle, were to remain in the respondent's yard after hours from that day onwards. The applicant stated that no reason was given to him for this decision. The applicant stated that he endeavoured to negotiate the retention of his vehicle and offered to personally insure the respondent's vehicle but Mr Bugeja stated that the issue was not negotiable. The applicant then asked for a pay rise in lieu of having a vehicle and Mr Bugeja told him that this was not possible. The applicant stated that as he was upset by this decision he advised Mr Bugeja that he would consider his position and advise him at the end of that day whether or not he would remain working with the respondent. At approximately 4.30pm Mr Bugeja approached the applicant and advised him that the respondent's General Manager had told Mr Bugeja to tell the applicant that he could pack up his tools and go. The applicant responded by saying "that is an unfair dismissal", he told Mr Bugeja that he had not resigned and indicated to him that he would return to work as usual the following day. Mr Bugeja responded by telling him not to come in to work and if he did so, police officers would be called. In response the applicant again told Mr Bugeja that he believed his termination was unfair and that he would take the matter further. The applicant stated that he was upset as he had not been given any warnings about his performance or behaviour and he had never been terminated before. The applicant was given his final pay the following day but as there was no pay advice with this payment he asked Mr Bugeja that the details of his final pay be sent to him.

10 The applicant said he was experiencing financial difficulties at the time of his dismissal and the applicant stated that as he could not remain in Kalgoorlie living with his father after he was terminated he moved to Perth to live with his mother the following week. After the applicant left Kalgoorlie he contacted the respondent seeking a copy of his last payslip and a separation certificate detailing the reasons for his termination and the applicant gave Mr Bugeja his contact details and the applicant was advised that the respondent's Perth office would send this information. The applicant then sought information about lodging an unfair termination application and the applicant conceded that he was advised that he had a set timeframe within which to file an application, however, the applicant stated that he delayed lodging this application as he understood he needed the details of his final pay before he could finalise his application and that he did not receive a copy of his final payslip until 14 April 2005.

11 The applicant stated that approximately two weeks after he was terminated he started a new job in Perth, earning less than what he was earning in Kalgoorlie.

12 The applicant stated that he had to arrange for a friend to pick up the application form from the Commission as he had difficulty obtaining an application form because he was working a significant distance from the city and from where he was living. The applicant stated that he could not access an application form on line.

13 The applicant stated that he contacted Legal Aid about lodging his application.

14 The applicant stated that as he required assistance filling out his application form as he wanted to fill the application out correctly, this also delayed the lodgement of his application.

15 The applicant stated that he sent Form 1 to the Commission on 29 April 2005.

16 Under cross-examination the applicant stated that he did not tell Mr Bugeja when he was terminated that he would lodge an application in the Commission but he maintained that he did tell the respondent that he would contest his dismissal and that he believed his dismissal was unfair. The applicant stated that he did not approach a lawyer for advice in Kalgoorlie as he believed it would be too expensive and he had financial difficulties at the time and the applicant gave evidence that he did not contact any agencies for assistance in Kalgoorlie as he was busy relocating to Perth. The applicant stated that he looked in newspapers for work in Kalgoorlie prior to leaving for Perth and he made an informal inquiry with his former employer. The applicant stated that there was a limited range of jobs that he could apply for in Kalgoorlie because of issues concerning his past.

17 The applicant stated that because he started a new job soon after coming to Perth it was difficult for him to obtain a copy of Form 1 as he was not in a position to use his new employer's resources.

18 The applicant stated that it was important for him to relocate to Perth for family support.

19 The respondent did not call any evidence.

Submissions

20 The applicant maintained that there was an acceptable reason for the delay in lodging his application as he had to relocate to Perth and obtain alternative employment given his financial problems and the applicant argued that he had logistical difficulties obtaining the application form and it took some time to fill out the form because he needed to obtain advice and

assistance. The applicant also understood that he needed his final payslip before filing this application because he was concerned that he had not been reimbursed the correct annual leave entitlements due to him and he believed that he was not paid any notice and he wanted these issues dealt with as part of his claim. The applicant maintained that the respondent had no reason for terminating him as the provision of a vehicle was part of his remuneration package and there was no offer to pay him any money in lieu of the provision of the vehicle when the vehicle was taken away from him.

21 The respondent maintains that the applicant did not give an acceptable explanation for the delay in lodging his application and the applicant did not give any satisfactory reasons for not obtaining legal advice about his termination nor did the applicant do anything in the week after he was terminated about contesting his termination. The respondent also argues that the applicant could have remained in Kalgoorlie and obtained employment where the labour market was buoyant and not suffered any loss of income. The applicant's evidence about being unaware of the time limit was vague and when he was advised that there was a time limit he should have acted expeditiously in lodging the application. Even though the delay was not a lengthy period it was nevertheless significant.

**Findings and Conclusions**

22 Even though some of the evidence given by the applicant was confusing in parts I accept the general thrust of the evidence given by the applicant as it is my view that he gave his evidence honestly and to the best of his recollection.

23 It is my view that there could well be merit to the applicant's claim. On the evidence currently before me I accept that the applicant ceased employment at the respondent's initiative and therefore the applicant was terminated and I accept that the applicant was terminated without notice nor was a payment made to the applicant in lieu of notice. I also accept that the applicant had good reason to be upset with the respondent on the day he was terminated because it appears that the respondent unilaterally varied its contractual arrangement with the applicant in relation to the provision of a vehicle to the applicant and I accept the applicant's evidence that he had not been given any warnings throughout his employment with the respondent. In the circumstances I find that the applicant has an arguable case.

24 Even though this application was lodged 19 days out of the required timeframe I accept the applicant's reasons for the delay in lodging this application. I accept the applicant's evidence that due to personal and financial issues he relocated from Kalgoorlie to Perth and this impacted on his ability to obtain advice and information about lodging this application. I also accept that as the applicant obtained employment in Perth soon after being terminated, and at a location some distance from the city, and as he was working lengthy hours this made the logistics of obtaining a copy of Form 1 and filling it out correctly within a prompt timeframe difficult. I accept that this added to the delay in lodging this application. I also accept the applicant's evidence that he believed that he needed to have his final payslip before he could lodge this application which is reflected in the applicant's claim for denied contractual benefits in addition to unfair termination, and as he had to wait some time for his pay slip this further delayed his application. I accept that once the applicant obtained the application form by arranging for a friend to pick up a copy of Form 1 the applicant then filled out the form after obtaining relevant information and assistance. I accept the applicant's evidence that he sent Form 1 to the Commission on or about 29 April 2005, which is 15 days outside the 28 day period as he was unable to lodge this personally, and that the necessity to post his application further delayed the lodgement of his application by four days as it was not received by the Commission until 3 May 2005.

25 It was not in contest that immediately after his termination the applicant advised the respondent that he would be contesting his termination and that he was unhappy about his treatment. I accept that there may be some prejudice to the respondent given the effluxion of time between the applicant's termination and this application being lodged, however, as I have found that the applicant expressly told the respondent that he would be contesting his termination this application should not be a surprise to the respondent.

26 When balancing the above findings and when taking into account the relevant factors to consider in an application of this nature it is my view that in all of the circumstances of this case it would be unfair not to accept this application. In reaching this view I take into account that I have found that there was an acceptable reason for the delay in lodging this application and there is sufficient to establish that the applicant has an arguable case. Even though the respondent may be prejudiced to some extent in allowing this application which was lodged outside of the required timeframe, I balance this against the prejudice to the applicant in not allowing this application. In all of the circumstances it is therefore my view that it would be unfair for the Commission not to exercise its discretion to grant an extension of time within which to file this application. For these reasons an extension of time in order to lodge this application is granted.

27 An order will issue to that effect.

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**2005 WAIRC 02337**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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| **PARTIES** | MARIO RENE WADE<br>**APPLICANT**<br>**-v-**<br>TRU-BLUE HIRE AUSTRALIA PTY LTD<br>**RESPONDENT** |
| **CORAM** | COMMISSIONER J L HARRISON |
| **DATE** | FRIDAY, 12 AUGUST 2005 |
| **FILE NO/S** | APPL 475 OF 2005 |
| **CITATION NO.** | 2005 WAIRC 02337 |

**Result** Application to accept applicant's claim which was lodged out of time granted

*Order*

HAVING heard Mr M Wade on his own behalf and Mr A Dungey of counsel on behalf of the Respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the application to accept the application out of time be and is hereby granted.

(Sgd.) J L HARRISON,
Commissioner.

[L.S.]

**2004 WAIRC 13401**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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|---|---|
| **PARTIES** | ALLAN GEORGE WESTREN |
| | **APPLICANT** |
| | **-v-** |
| | RETYRE SERVICES (WA) PTY LTD TRADING AS MILLER'S TYRE SERVICE WA |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER S J KENNER |
| **DATE** | TUESDAY, 26 OCTOBER 2004 |
| **FILE NO.** | APPL 1287 OF 2004 |
| **CITATION NO.** | 2004 WAIRC 13401 |

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| **Catchwords** | Industrial law - Termination of employment - Harsh, oppressive and unfair dismissal - Acceptance of referral out of time - Application referred outside of 28 day time limit - Relevant principles to be applied - Commission satisfied applying principles that discretion should be exercised - Acceptance referral out of time granted - Industrial Relations Act 1979 (WA) s 29(1)(b)(i), s 29(2) & s 29(3) |
| **Result** | Application accepted out of time |
| **Representation** | |
| **Applicant** | Ms J Bates as agent |
| **Respondent** | Mr G Miller as agent |

*Reasons for Decision*
*(Ex Tempore)*

1 The substantive application is one by Allan George Westren against Retyre Services (WA) Pty Limited trading as Miller's Tyre Service (WA). The substantive claim is one brought by the applicant alleging that on or about 31 August 2004 he was harshly, oppressively and unfairly dismissed from his position as a supervisor at the respondent's business.

2 The applicant gave evidence on his own behalf in relation to his claim, which the Commission must consider now whether it will exercise discretion under s 29(3) to accept the application out of time, it having been filed more than 28 days beyond the date of the applicant's termination of employment.

3 The applicant testified that he has been employed with the respondent business since in or about 1984. The respondent business has been acquired by other businesses over a period of time. Most recently some two years ago the business was acquired by Mr Benetti, who also testified before the Commission. The applicant informed the Commission that he worked as a supervisor in the passenger car tyre section of the business; the other section of the business being in the truck tyre area.

4 His evidence was that on 31 August he was informed by the manager of the respondent's business, Mr Casson that he was to be made redundant. His evidence was that this was the first he formally heard that his fate was to be so; however, he did testify that in his view it was apparent that the business that he was working in, or that part of the business rather, was suffering financially for some time prior to that. The applicant's evidence was that he was planning on taking some annual leave from on or about 2 September 2004.

5 It is common ground that the applicant left the employment that day, that being 31 August 2004. The applicant's evidence is there was no discussion with him about alternatives, but however he raised with Mr Casson the existence of other positions in the truck tyre side of the business, because in his view there were opportunities which he was not availed of.

6 The applicant testified as to why the application was filed some week or thereabouts out of time. His evidence was that in the week after the termination of his employment he obtained alternative employment at a remote mine location in the Northwest of this state. Before travelling to that location he obtained some advice from a government agency within about two days of the termination of his employment, and his evidence was that he was informed he may have a case, and he needed to complete the requisite notice of application and file that claim, and it seems the applicant was aware that there was a time limit of some 28 days, although in evidence he informed the Commission he was not sure whether that was 28 days from the date of the termination of his employment or from when he received the notice of application papers.

7 In any event, regardless of that the applicant testified that there was delay because there were errors in the forms that he signed. They had to be re-completed and sent back to Perth from the remote location where he was then employed, which led to the delay in the filing of the application. That issue was not contested by the respondent employer.

8 The position of the respondent employer simply is that for financial reasons the business needed to restructure and the passenger tyre section needed to close because it was not financially viable. The evidence of Mr Benetti is that immediately the decision was taken to close that side of the business Mr Casson was instructed to inform the employees, in particular the applicant, of that decision, which took place on 31 August 2004.

9 There seems to have been a decision taken by both Mr Benetti and Mr Casson on Mr Benetti's evidence that a judgment was made by the respondent that the applicant did not possess the requisite skills to work in the other section of the business, although it seems on the evidence there was no direct discussion with the applicant about those matters or any other alternatives that he may be availed of possibly within the respondent's business generally. I find accordingly.

10 I turn to my consideration of the matter and apply the principles established in Malik v Department of Education and Training (2004) 84 WAIG 683, a decision of the Industrial Appeal Court in this jurisdiction, in particular the observations of Heenan J at para 74, where the principles in Brodie-Hanns v MTV Publishing Ltd (1995) 67 IR 298 were adopted and applied by the Industrial Appeal Court.

11 Having considered those factors I have reached the following conclusions. I consider on the evidence that the applicant has a reasonable explanation for the delay in filing the application, which is a relatively short delay of some days only. But given the applicant's residency at the time in a remote mining location, and mistakes which he freely admitted were

made in the paperwork, I am not persuaded that is an unreasonable or unacceptable explanation for the delay, and as I have already indicated, that has not been challenged by the respondent employer.

12 I accept, however, that at some stage at least the applicant was made aware that there was a 28 day time limit within which proceedings ought to be commenced, although, as I have said, there is some doubt as to the applicant's understanding precisely as to what that meant.

13 The applicant's evidence also was that he informed Mr Casson that he was not happy with his redundancy, and he expressed that view on the day that he was dismissed on 31 August. There is no evidence however that subsequent to that time, apart from the commencement of these proceedings, that view was expressed more formally to the respondent.

14 Fourthly, there is no evidence of any prejudice to the respondent by any granting of the application before the Commission, although I observe an absence of prejudice to the respondent is not of itself a sufficient basis to grant an extension of time.

15 I come to the merits. In my opinion on the merits, given the terms of the *Minimum Conditions of Employment Act 1993* (WA), which would apply to the applicant's employment, regardless of whether he was governed by an award or not, I am satisfied there may well be some issues as to whether that legislation was complied with in this case, and in that sense there is some issue that might need to be explored in a substantive hearing of the matter.

16 I consider in those circumstances that, given all of the situation presented before the Commission this morning, but in particular the reason for the delay and the length of the delay, it would be unfair not to accept the application out of time and therefore the Commission will make the following orders: that the application be and is hereby accepted out of time; secondly, that the application will be referred to a Deputy Registrar for conciliation pursuant to the delegated powers under s 32 of the *Industrial Relations Act 1979* (WA).

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**2004 WAIRC 13203**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

| | |
|---|---|
| **PARTIES** | ALLAN GEORGE WESTREN |
| | **APPLICANT** |
| | **-v-** |
| | RETYRE SERVICES (WA) PTY LTD TRADING AS MILLER'S TYRE SERVICE WA |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER S J KENNER |
| **DATE** | TUESDAY, 2 NOVEMBER 2004 |
| **FILE NO/S** | APPL 1287 OF 2004 |
| **CITATION NO.** | 2004 WAIRC 13203 |

| | |
|---|---|
| **Result** | Application accepted out of time |
| **Representation** | |
| **Applicant** | Ms J Bates as agent |
| **Respondent** | Mr G Miller as agent |

*Order*

HAVING heard Ms J Bates as agent on behalf of the applicant and Mr G 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 referral of the herein application be and is hereby accepted out of time.

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

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# SECTION 29(1)(B)—Notation of—

| Parties | | File Number | Commissioner | Result |
|---|---|---|---|---|
| Adam Stock | Mark Stanton Shearing Services | APPL 625/2005 | Commissioner S J Kenner | Discontinued |
| Adele Elizabeth Sherring | Mitchell Corporation Pty Ltd | APPL 305/2005 | Commissioner S Wood | Discontinued |
| Alan Maynard | City Of Swan | APPL 951/2004 | Commissioner S J Kenner | Discontinued |
| Allan Budd | PJ's Roof & Wall Coatings | APPL 385/2005 | Commissioner S Wood | Discontinued |
| Allan George Westren | Miller's Tyre Service Pty Ltd | APPL 1287/2004 | Commissioner S J Kenner | Discontinued |
| Allan George Westren | Miller's Tyre Service Pty Ltd | APPL 1287/2004 | Commissioner S J Kenner | Discontinued |

| Parties | | File Number | Commissioner | Result |
|---|---|---|---|---|
| Allan Keith Shawyer | Kwik & Swift Co Pty Ltd | APPL 1377/2003 | Commissioner S J Kenner | Dismissed |
| Amanda Marie Barley | Eagle Group | APPL 368/2005 | Commissioner S M Mayman | Discontinued |
| Andrew Hudson | Travoli Pty Ltd, Trading As British Part & Service Centre | APPL 241/2005 | Commissioner S Wood | Discontinued |
| Andrew Starling | Complete Aviation Services | APPL 1206/2003 | Commissioner S J Kenner | Dismissed |
| Anthony Dennis Smith | NQ Rentals Australia Pty Ltd | APPL 1307/2004 | Commissioner S Wood | Discontinued |
| Anthony Joseph Somers | Fix Bikes | APPL 406/2005 | Senior Commissioner J F Gregor | Discontinued |
| Anthony Russell Woods | Highland Marketing (Foothills Development) | APPL 1445/2004 | Commissioner S J Kenner | Discontinued |
| Anton Joseph Guillaumier | Courier Net/Truck Net Pty Ltd | APPL 599/2004 | Commissioner J H Smith | Discontinued |
| Beverley Edmunds | Trusty Step Australia T/A Subway Bunbury Homemaker Centre, Subway Bunbury | APPL 319/2005 | Commissioner S J Kenner | Discontinued |
| Bradley John Helden | Emmanuel Education Group | APPL 398/2005 | Commissioner S Wood | Granted |
| Brenda Jean Duncan-Smith | Aurora Anti-Ageing Clinic | APPL 461/2005 | Commissioner S J Kenner | Discontinued |
| Brendan Wilson | The Chief Executive Officer, City of Swan | APPL 270/2004 | Commissioner S J Kenner | Discontinued |
| Brett Lawrence Desmond | Esperance Mobi Vac | APPL 1558/2004 | Senior Commissioner J F Gregor | Discontinued |
| Bronwen Milsom | Tempo Holidays Pty Ltd | APPL 459/2005 | Commissioner S Wood | Discontinued |
| Calvin Horace Beven | Nestle Australia Ltd | APPL 340/2005 | Senior Commissioner J F Gregor | Dismissed |
| Candy Smith | Egg O'mania Omleteers | APPL 485/2005 | Commissioner J L Harrison | Discontinued |
| Catherine Lea | Cherating Pty Ltd ACN 009 108 696 | APPL 1203/2003 | Commissioner S J Kenner | Dismissed |
| Chandanie Godwin | Aon Risk Services Australia Limited | APPL 1675/2004 | Commissioner J L Harrison | Discontinued |
| Claudia Green | The Independent Schools Salaried Officers' Association of Western Australia, Industrial Union of Workers | APPL 389/2005 | Commissioner J H Smith | Discontinued |
| Cosimo Comito | Xpresso Cafe Restaurant (formerly Flamenco's Tapas ) Co. J.Filardi and the Trustee for S & E Ohobrino F Trust and the Trustee for The Spragg F Trust | APPL 177/2005 | Commissioner S J Kenner | Discontinued |
| Courtney Victoria Claire Hodge | Valleygirl Fashions Pty Ltd | APPL 412/2005 | Commissioner J H Smith | Discontinued |
| Cristina Suzanne Masella-Blacl | Pinnacle Asset Pty Ltd ACN 105 835 989 T/as Leedervile Motors and Robin Mack Motors | APPL 855/2004 | Commissioner J L Harrison | Discontinued |
| Danae Julia Christie | Jim Meng Maco Collection Pty Ltd | APPL 496/2005 | Commissioner S Wood | Discontinued |
| Daniel Joseph Young | Pilbara Manganese, RCR Maintenance | APPL 579/2005 | Senior Commissioner J F Gregor | Discontinued |
| Darren Paul Naughton | Sphere Holdings Pty Ltd t/as Sphere PrintingSolutions | APPL 1076/2004 | Commissioner P E Scott | Discontinued |
| Darryl John Veale | WesTrac Pty Ltd | APPL 381/2005 | Commissioner P E Scott | Discontinued |

| Parties | | File Number | Commissioner | Result |
|---|---|---|---|---|
| Darryl Stone | Graham Major of Gecko Special Coatings | APPL 547/2005 | Commissioner S J Kenner | Discontinued |
| David Hughes | Sure Personnel | APPL 634/2005 | Chief Commissioner A R Beech | Discontinued |
| David John Russell | United Scrap Metal (WA) Pty Ltd ACN 090 056 041 | APPL 481/2005 | Commissioner S M Mayman | Discontinued |
| Deborah Gale Anson | Sky Star | APPL 1046/2004 | Commissioner J L Harrison | Discontinued |
| Denyse Pereira | Alsco Linen | APPL 403/2005 | Commissioner J H Smith | Discontinued |
| Derek Barnes | Icon Office Technology | APPL 1601/2004 | Commissioner S M Mayman | Discontinued |
| Diane Celia Poplar | Grandview Asset Pty Ltd | APPL 275/2005 | Commissioner S M Mayman | Discontinued |
| Didier Toubeau | Ciao Italia ABN: 43 878 234 570 | APPL 372/2005 | Commissioner S M Mayman | Discontinued |
| Donna Helen Massie | Australian Foods Co Pty Ltd, Australian Lifestyles Pty Ltd | APPL 924/2004 | Commissioner J H Smith | Discontinued |
| Eleanor Brianne Simpson | Shire of Yalgoo | APPL 490/2005 | Commissioner P E Scott | Dismissed |
| Elizabeth Ashford | Community Home Care Inc | APPL 1149/2004 | Senior Commissioner J F Gregor | Discontinued |
| Emily Harman | Desana Pty Ltd ACN 098 751 921 | APPL 682/2005 | Chief Commissioner A R Beech | Discontinued |
| Garnett Edward Elliott | Turkey Creek Roadhouse Canilla PTY LTD Dave Richman | APPL 699/2005 | Commissioner S Wood | Discontinued |
| George Edward Rudd | Cockburn Power Boats Association (Inc) | APPL 165/2005 | Commissioner S M Mayman | Discontinued |
| Glen Richard Devey | Fuchs Lubricants (Australasia) | APPL 635/2004 | Commissioner J L Harrison | Discontinued |
| Glenn Ross McLeod | Ships' Refuelers Pty Ltd t/as Stock Road Market Tavern | APPL 21/2005 | Commissioner S M Mayman | Discontinued |
| Greg Brett Allen | International Maritime Consultants | APPL 563/2005 | Commissioner S J Kenner | Discontinued |
| Hau Ying (Monica) Zhao | Churchill Knight Real Estate Agents | APPL 553/2005 | Commissioner S M Mayman | Discontinued |
| Haydn Charles Ledger | RSM Crane Sales & Hire Pty Ltd | APPL 333/2005 | Commissioner S M Mayman | Discontinued |
| Heather Joan Pritchard | Easy Rider Backpacker Tours | APPL 565/2005 | Commissioner S M Mayman | Discontinued |
| James Robert Porter | New Zealand Natural Ice Cream | APPL 939/2004 | Commissioner S Wood | Discontinued |
| Jamie William Unwin | Bodiam Pty Ltd | APPL 548/2005 | Senior Commissioner J F Gregor | Discontinued |
| Janet McCabe | Booteek Investments | APPL 1561/2004 | Senior Commissioner J F Gregor | Order Issued |
| Jason Quilligan | NR & NJ Gardiner & Sons Pty Ltd t/a Gardiner Transport | APPL 350/2005 | Commissioner P E Scott | Discontinued |
| Jennifer Lynn Wickham | Junebra Pty Ltd t/as Byford Vetinary Centre | APPL 1421/2004 | Chief Commissioner A R Beech | Discontinued |
| Jeremy Farmer | Edwin Raumati - Rawlina Station | APPL 317/2005 | Senior Commissioner J F Gregor | Dismissed |
| Joanne Gianatti | Pixifoto ( Photo Corporation of Australia ) | APPL 592/2005 | Commissioner S J Kenner | Discontinued |

| Parties | | File Number | Commissioner | Result |
|---|---|---|---|---|
| Jodie Parry | CPR Communications & Public Relations Pty Ltd | APPL 174/2005 | Commissioner J L Harrison | Discontinued |
| John Ernest Addison | Warp Group | APPL 657/2005 | Commissioner S Wood | Discontinued |
| John Eugene Skuratow | Albert Spagnolo | APPL 702/2005 | Chief Commissioner A R Beech | Discontinued |
| John Rodwell Green | Gould Transport Pty Ltd | APPL 343/2005 | Senior Commissioner J F Gregor | Discontinued |
| Jose Luis Gomez | Bradken Mineral Processing | APPL 1178/2004 | Commissioner J H Smith | Discontinued |
| Julie Diane Laird | The Chair, Community Midwifery WA Inc. | APPL 359/2005 | Commissioner S M Mayman | Discontinued |
| Julie Howell | Smiths Snackfoods | APPL 472/2005 | Commissioner S M Mayman | Discontinued |
| Karen Lee Dale | Westpoint Corporation Pty Ltd | APPL 78/2005 | Commissioner P E Scott | Dismissed |
| Kathryn Patricia Lynch | Avondale Assets Pty Ltd NPP Group | APPL 1499/2004 | Commissioner S M Mayman | Discontinued |
| Kaylene Larkman | Imdex Ltd (ACN 008 947 813) trading as ImdexMinerals | APPL 426/2004 | Commissioner S J Kenner | Discontinued |
| Kellie Lawson | Kue Hair Design | APPL 284/2005 | Commissioner P E Scott | Discontinued |
| Kenneth Taylor | CSC Australia Pty Ltd | APPL 358/2005 | Commissioner S Wood | Discontinued |
| Lalline M Cross | Dr SB Dimmitt Pty Ltd | APPL 232/2005 | Commissioner S J Kenner | Discontinued |
| Laurel Milich | Kalamunda Physiotherapy Centre | APPL 430/2005 | Commissioner P E Scott | Dismissed |
| Leigh Ann Hill | Silver Ridge Pty Ltd | APPL 1659/2004 | Commissioner S Wood | Discontinued |
| Leisa Stenton | Helen Burke T/As Beaches Cafe | APPL 308/2005 | Senior Commissioner J F Gregor | Discontinued |
| Leonard John Cutforth | Michael Trestrail of Midalia Steel - Wagin | APPL 360/2005 | Senior Commissioner J F Gregor | Discontinued |
| Lois Morris | South West Aboriginal Medical Service Aboriginal Corporation | APPL 415/2005 | Commissioner S J Kenner | Discontinued |
| Lorraine Gay Anthony | Hugh Smith, Managing Director, Computercorp | APPL 545/2005 | Commissioner J H Smith | Discontinued |
| Magnus Frisell | The Directors of Unimed Pty Ltd | APPL 1642/2004 | Commissioner J L Harrison | Discontinued |
| Marcus John Walker | Road Transport Training Authority | APPL 784/2002 | Senior Commissioner J F Gregor | Discontinued |
| Maria Fatima De Franca | Canon Foods Services Pty Ltd | APPL 220/2005 | Commissioner S M Mayman | Discontinued |
| Mark Trevor Andrews | Shaws Darwin Transport | APPL 288/2005 | Commissioner S M Mayman | Discontinued |
| Melinda Webb | Robbie Park - Stardust Group | APPL 511/2005 | Commissioner S M Mayman | Discontinued |
| Melissa Crowe | AJ Lyneham & AJ Lyneham & SJ Lyneham t/as AW Lyneham & Son | APPL 1129/2004 | Senior Commissioner J F Gregor | Discontinued |
| Mervyn A Thompson | BGC Plasterboard | APPL 392/2005 | Commissioner S M Mayman | Discontinued |
| Michael Joseph Connolly | F.P.A. Australia Pty Ltd T/A Ace Pac Packaging Supplies | APPL 320/2005 | Commissioner S M Mayman | Discontinued |
| Michael Roy Hale | QFL Photographics | APPL 387/2005 | Commissioner S M Mayman | Discontinued |

| Parties | | File Number | Commissioner | Result |
|---|---|---|---|---|
| Miss Susan Lorraine Hirt | Ross Human Directions Ltd | APPL 1522/2004 | Commissioner J H Smith | Discontinued |
| Mr Joseph Antonio Pinna | Overdimentional Transport Logistics | APPL 155/2005 | Chief Commissioner A R Beech | Discontinued |
| Mr Ken Keys | Plasdene Glass Pak Pty Ltd | APPL 1633/2004 | Senior Commissioner J F Gregor | Discontinued |
| Naomi Yvette Wallace | ATUL | APPL 1099/2004 | Commissioner P E Scott | Discontinued |
| Natalie Elizabeth Wood | Zest Health Club | APPL 417/2005 | Commissioner J L Harrison | Discontinued |
| Ngoc Yen Quach | Nagoya Sushi | APPL 405/2004 | Commissioner S J Kenner | Order Issued |
| Patricia Abbott | Aquila Earthmoving | APPL 178/2005 | Senior Commissioner J F Gregor | Discontinued |
| Paul Anthony Neil | John Richards (Richards Rock Breaking & Excavation) | APPL 551/2005 | Commissioner J L Harrison | Granted |
| Paul Nicholas Martin | Halfprice Pottery | APPL 499/2005 | Commissioner S J Kenner | Discontinued |
| Pauline Lola Johnson | Mr Allan Douglas | APPL 225/2005 | Commissioner S M Mayman | Discontinued |
| Penelope Jaye Bradford | Mount Lawley Golf Club (Inc) ABN 51 081 672 688 | APPL 1677/2004 | Commissioner J H Smith | Discontinued |
| Peter Bryan Lawrence | Ingersoll Rand Aust | APPL 1442/2004 | Senior Commissioner J F Gregor | Discontinued |
| Peter David Miller | Plantation Pulpwood Terminals Pty Ltd | APPL 666/2005 | Chief Commissioner A R Beech | Discontinued |
| Peter Rogers | The Principal Administrator Alexander Language Institute | APPL 759/2005 | Chief Commissioner A R Beech | Discontinued |
| Raymond Binns | CPM Unit Trust, ABN 612 102 710 19, t/a Custom Aluminium | APPL 665/2005 | Chief Commissioner A R Beech | Discontinued |
| Rennie McCullough | Linfoot Cleaning Services | APPL 354/2005 | Commissioner J L Harrison | Discontinued |
| Reokore Marquret Higginson | Michelle Sacs | APPL 567/2005 | Senior Commissioner J F Gregor | Discontinued |
| Rikki Lee Burnaby | Lemen Pty Ltd, Kathryn Jane Langridge and Michael Christopher Flaherty t/as Glitterati | APPL 1430/2004 | Commissioner J L Harrison | Discontinued |
| Robina Naomi Whittaker | Ross Morgan Mulberry Tree Child Care Centre | APPL 568/2005 | Commissioner S M Mayman | Discontinued |
| Rory John Halliwell | Jeyco (1992) Pty Ltd | APPL 984/2004 | Commissioner J L Harrison | Discontinued |
| Russell E Vitnell | Aspen Parks Property Management Ltd | APPL 388/2005 | Commissioner S J Kenner | Discontinued |
| Scott Ronald Ellis | Carlton and United Breweries Limited | APPL 592/2004 | Commissioner J H Smith | Discontinued |
| Sebastian John Greenfield | Cash Converters | APPL 468/2005 | Senior Commissioner J F Gregor | Discontinued |
| Shawn Zachary Olsen | Down to Earth Labour and Sales | APPL 367/2005 | Commissioner P E Scott | Discontinued |
| Tabitha G H Poole | Mr M Williams (Chief Executive Officer) C/- Shire of Mundaring | APPL 686/2005 | Commissioner S M Mayman | Discontinued |
| Thomas Loates | Transtate First National Real Estate Pty Ltd | APPL 380/2005 | Senior Commissioner J F Gregor | Discontinued |

| Parties | | File Number | Commissioner | Result |
|---|---|---|---|---|
| Titus Raphael | Baptist Care (David Buttfield Centre, Gwelup) | APPL 386/2005 | Commissioner J H Smith | Discontinued |
| Tony Rocco De Bellis | TC Drainage | APPL 237/2005 | Commissioner S M Mayman | Discontinued |
| Tristan Peter Perry | Readymix Emoleum Services Pty Limited | APPL 1526/2004 | Senior Commissioner J F Gregor | Discontinued |
| Trung Pham Ich Ong | (Nicholas Kailis) Kailis Bros Pty Ltd | APPL 409/2005 | Senior Commissioner J F Gregor | Discontinued |
| Vanessa Marie Mann | Maritana Dental Clinic | APPL 1465/2004 | Commissioner J L Harrison | Discontinued |
| Vicki June Winchester | James Lau - Lau Family Pty Ltd Lau Family Trust Chef's Delight | APPL 498/2005 | Commissioner P E Scott | Discontinued |

# CONFERENCES—Matters referred—

**2002 WAIRC 07290**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES** THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS AND OTHERS

**APPLICANTS**

**-v-**

BHP BILLITON IRON ORE LTD

**RESPONDENT**

**CORAM** COMMISSIONER S J KENNER
**DATE** TUESDAY, 24 DECEMBER 2002
**FILE NO/S** CR 199 OF 2002
**CITATION NO.** 2002 WAIRC 07290

**Result** Parties directed to confer
**Representation**
**Applicants** Mr M Llewellyn
**Respondent** Mr M Lundberg of counsel

*Reasons for Decision*

1. The issuance by the Commission in Court Session of the new Iron Ore Production and Processing (BHP Billiton Iron Ore Pty Ltd) Award 2002 ("the Award") on 19 July 2002 was, in many respects, a defining moment in the long history of industrial regulation at the respondent's various operations in the Pilbara in this State. The Award represents and was intended by the Commission in Court Session to represent, a sea change in industrial regulation for the applicants and the respondent.
2. It is against that background that the applicants bring the present application, referred for hearing and determination, pursuant to s 44(9) of the Industrial Relations Act 1979 ("the Act"). The issue between the parties is the decision by the respondent, to introduce a form of performance management, for employees covered by the Award. The memorandum of matters referred for hearing and determination is in the following terms:

*1. The respondent company proposes to introduce a system of performance management for employees employed under the Iron Ore Production and Processing (BHP Billiton Iron Ore Pty Ltd) Award 2002 ("the Award") ("the Program"), who have elected not to participate in the BHP Iron Ore Incentive Program which system includes:*

*(a) informing each individual employee of the minimum performance standards that the respondent company expects of him/her;*

*(b) granting to individual employees that right to take issue with the proposed minimum performance standards through the issue resolution process under the Award to their one up supervisor; and*

*(c) conducting six monthly reviews of the employees' performance against the minimum performance standards.*

*2. The respondent claims that, in principle, the introduction of the Program is reasonable.*

*3. The applicants claim that the in principle proposal to introduce the Program is unreasonable and that the Commission should prevent its introduction for the following reasons:*

*(a) the Program is in the same form as the individual employees' performance review system that was the subject of hearings by the Commission in Court Session leading to the making of the Award;*

*(b) the decision leading to the making of the Award gave the employees the choice whether to participate in the BHPBIO Incentive Program system by either accepting or rejecting the opportunity to participate in performance reviews;*

*(c) the respondent seeks to introduce the Program which they claim is to performance manage the workforce. This is to be done on an individual basis. The Program aims to set standards for each individual, including goals and behaviours. The minimum standards will move as they are met to meet the stretch goals; and*

*(d) the applicants claim the Program is in effect the same as that dealt with in the Award matter in the original decision and the further reasons for decision that resulted in clause 7 of the Award.*

3. The referral pursuant to s 44(9) of the Act follows several compulsory conferences, where conciliation was unavailing in the resolution of the dispute. At the conclusion of the most recent compulsory conference, the Commission advised the parties that it would deal with the "in principle" issue, as to whether the Commission should prevent the respondent introducing such a system for employees covered by the Award. It is that matter and that matter only, that these reasons deal with.

4. Mr Llewellyn represented the applicants. Mr Lundberg of counsel appeared on behalf of the respondent. Both parties presented comprehensive and carefully argued cases. Whilst in the normal course the applicants would proceed first, given the circumstances of the respondent's proposal, agreement was reached between the parties that the respondent put its case followed by the applicants.

**Contentions of the Parties**

5. The respondent submitted that it ought be able to proceed with its proposal for performance management of Award employees for a variety of reasons. It was submitted that performance management in one form or another, had always been a feature in the respondent's workplace. The respondent said that on and from the making of the Award by the Commission, the respondent was and is required to introduce and manage ongoing change in its workplace in light of the structural reform introduced by the Commission on the making of the Award. Furthermore, counsel for the respondent submitted that the proposed system, of informing Award employees of minimum performance expectations, was both fair and reasonable. It was also submitted that the proposed system is part of a lawful and reasonable direction, that employees covered by the Award participate in such a program.

6. As to the opposition mounted by the applicants, the respondent submitted that the proposed program is not the same and differs in material respects, from the terms of the respondent's Incentive Program ("IP"), applicable to staff and workplace agreement employees, and made available to employees covered by the Award, in cl 7(4) of the Award. The respondent strenuously denied that the Award performance management system ("APMS") was the same as the IP. Whilst submitting that some similarity exists, in that they both involve performance management processes, the respondent submitted that the distinction lies in the objectives and purposes of the IP and the APMS.

7. It was said that the APMS is intended to identify minimum performance standards, arising from the introduction of changes brought about by the Award, and the respondent's obligation to initiate and manage ongoing workplace change. On the other hand, it was said that the IP is very different in that it identifies individual goals and targets to be reached and involves the development of action plans to improve employee effectiveness. It was submitted that the IP is predominantly a positive incentive scheme, because it provides financial rewards for employees to meet and exceed specified targets.

8. As to its submissions that its proposal was reasonable, counsel for the respondent submitted that the APMS is intended :

*(A) to be objective, transparent and fair;*

*(B) to overcome the deficiencies which may exist in the present ad-hoc approach to performance management of Award employees;*

*(C) to make employees aware of the minimum performance standards they are expected to achieve;*

*(D) to allow employees to utilise the issue resolution process under the Award; and*

*(E) to develop consistent performance measures and standards by requiring supervisors to meet with their superintendents and other supervisors before such matters are set and determined.*

9. Consistent with the objectives of the proposed program, the respondent also said that it would be providing internal and external training to supervision to ensure that they properly understand and effectively implement and apply the APMS.

10. It was also submitted by the respondent that the Commission should not interfere with the introduction of APMS, because it involves the exercise of a managerial prerogative to advise employees of minimum performance standards, and at this stage at least, there is no demonstrated oppression or unfairness, warranting the intervention of the Commission: *AMWU v RRIA* (1987) 67 WAIG 2. Furthermore, counsel for the respondent submitted that the applicants' concerns at this stage were premature, because at this time, it was the intention of the APMS, to only involve initial discussions between employees and supervision, about the setting of minimum performance standards. There would be no review of employee performance by supervision, for at least six months from that stage.

11. Mr Llewellyn on behalf of the applicant, made a number of submissions in opposition to the respondent's proposal. It was submitted that the APMS was simply in effect, the IP by another name. The applicants said that the respondent has proposed the introduction of APMS, because it did not receive a sufficient number of elections by Award employees, in accordance with cl 7(4), of the Award. It was said therefore, that the respondent had to now introduce the proposed system, to achieve the same result. In short, Mr Llewellyn submitted that this is a case of "the same horse by another name".

**The Evidence**

12. Quite extensive evidence was led by the parties in this matter. I intend to only refer to that part of the evidence, going to the "in principle" question as to whether the APMS should be prevented from being introduced by order of the Commission. I have however had regard to all of the evidence led, both oral and documentary. There was much evidence going to what may or may not have been planned to occur, immediately after the Award was made. I note however, that it is what is before the Commission by way of the proposed system that is particularly important.

13. Evidence was adduced on behalf of the respondent, from Mr Jeffrey Stockden, the respondent's vice-president human resources. In his witness statement, tendered as exhibit R2, Mr Stockden set out the basis of the APMS as follows:

*6. BHPIO proposes to introduce a system of performance management for its employees who are employed under the Iron Ore Production and Processing (BHP Billiton Iron Ore Pty Ltd) Award 2002 (the Award). As the Vice-President for Human Resources of BHPBIO, I have been directly involved in this proposal. Although*

*performance management principles have always been applied by BHPBIO to its employees, the proposed system of performance management is aimed at formalising performance management, ensuring Award employees are made aware of the minimum standards of work performance expected of each of them, and providing for regular follow up discussions.*

*7. Supervisor guidelines have now been prepared by BHPBIO for the award performance management system. Annexed to this statement and marked "A" is a copy of the guidelines. It is intended that these guidelines will be distributed to BHPBIO supervisors to explain the system and the processes involved. The company's Human Resources staff will also provide workshops for each of the company's Departments and its supervisors to discuss the system with supervisors directly and to ascertain if any skills training is required. Additionally, all supervisors will participate in a competency based leadership development program conducted through the Australian Institute of Management using the Applicable Training System (which has been developed by the Chamber of Minerals and Energy).*

*8. The company has also prepared a Performance Planner document which will be used to set performance expectations in the key performance areas of safety, environment, work performance, training and conduct. Annexed to this statement and marked "B" is a copy of the Performance Planner. The Performance Planner is to be used by the company's supervisors at the initial one on one discussion with each employee. This discussion will be an information session, not a counselling or disciplinary meeting.*

*9. At that initial discussion, the employee will be informed of the minimum performance standards expected of him or her, and specific examples and standards discussed in the meeting are to be noted in the Comments box. The Performance Planner document permits an employee to comment on any matter raised during the discussion and for those comments to be recorded. A copy of the form will be given to the employee and a copy will be filed with the site Human Resources department.*

*10. The proposed system has been developed as a result of the significant Award regulation changes which have been introduced by the WA Industrial Relations Commission this year. In particular, on 19 July 2002 the Commission in Court Session made orders rescinding the 1984 award and the various formal and informal industrial agreements which applied to the company, and prescribing the Award.*

*12. The concept of a performance management system for award employees (as distinct from the Incentive Program) was made known to BHPBIO employees following the prescription of the Award. In addition, BHPBIO's Manager Human Resources at its Newman site, Mr Dick Keddie, wrote to Mr Will Tracey of the AWU on the 31 July 2002 regarding the proposal. Annexed to this statement and marked "C" is a copy of Mr Keddie's letter.*

*13. Further, BHPBIO referred to the proposed system of award performance management in its "Our Workplace" publication. Annexed to this statement and marked "D" is a copy of Our Workplace dated 2 August 2002. Annexed to this statement and marked "E" is a copy of Our Workplace dated 28 August 2002. This publication is made available to all of BHPBIO's employees at its work sites in Port Hedland (both Nelson Point and Finucane Island) and Newman.*

*14. BHPBIO's Human Resources staff also conducted information sessions with the company's supervisors in October 2002, during which the draft Performance Planner was discussed with supervisors and feedback obtained.*

14. Mr Stockden also dealt with the respondent's view of the benefit of the proposed system as follows:

*15. In my opinion, the introduction of the system of award performance management is reasonable. My opinion in this respect is based on amongst other things the following matters:*

*(a) The Commission in Court Session, through the prescription of the Award in July 2002, has made statements that the company must introduce and manage the change it needs to introduce in the structurally reformed regulated workplace. The company is, as a result of the new Award, implementing processes to facilitate the cultural change.*

*(b) It is proper for an employer to ensure employees are made aware of, and understand, the company's expectations as to their performance.*

*(c) The proposed system is intended to be objective (to the extent to which such systems can be), transparent and fair.*

*(d) The proposed system is intended to overcome the deficiencies which may exist in the present ad-hoc approach to performance management of Award employees.*

*(e) The proposed system will allow employees to utilise the issue resolution process under the Award.*

*(f) The proposed system is intended to develop consistent performance measures and standards by requiring supervisors to meet with their superintendents and other supervisors before accountabilities, measures and standards are set.*

*(g) By providing appropriate training to its supervisors, BHPBIO is working to ensure that the proposed system is properly understood and effectively implemented and applied by those supervisors.*

*(h) BHPBIO is able to require its employees to comply with lawful and reasonable directions. The proposed system of award performance management is such a direction.*

15. As to the differences between the APMS and the IP, Mr Stockden gave evidence in chief as follows:

*19. Award free employees are eligible to participate in the BHP Iron Ore Incentive Program (as amended from time to time) ("the Incentive Program"). The amount that the award free employee receives under the Incentive Program is dependent upon BHPBIO's performance, the employee's department meeting its Performance Targets, and the employee's individual performance. Since the prescription of the Award on 19 July 2002, award employees have also been entitled to participate in the Incentive Program in accordance with the terms of clause 7(4) of the Award.*

*20. A performance appraisal is conducted for each of the participating employees for the purposes of the Incentive Program. This involves a review of the current year's performance as well setting goals for the next year.*

*21. As part of the performance review there are a set of forms the reviewer is required to fill out, which contain the goals and behaviours that each employee's performance is reviewed against. The performance review*

*document for 2001/2002 is annexed to this statement and marked "F". Annexed to this statement and marked "G" is a set of explanatory guidelines for the 2001/2002 Performance Review.*

*22. Once the supervisor completes the review with the employee, they then add their comments and remarks to the performance review. The next level of supervision also checks the performance review in order to ensure that it is fair and objective. The performance review is then returned to the employee to sign off on if they are satisfied with the outcome. If the employee has a problem with any of their comments they can take the performance review back to the person who conducted the review and progress it further if necessary.*

*23. Once the employee has signed off on the performance review it goes into the salary administration system in the Human Resources Department. The relevant manager then receives a budget, or pool of money, based on the department's and BHPBIO's performance. From this budget the manager then assigns an amount for each of the participating employees based on their performance review.*

*24. The Incentive program enables BHPBIO to review the performance of individual employees and to reward individual effort and achievement. The effort and achievement of individual employees is the key determinant of the amount of the incentive payment. Participating employees are able to direct their efforts to achieving the established goals in the knowledge that this will be recognised and rewarded by the company.*

16. As noted above, included amongst the annexures to Mr Stockden's witness statement, were documents relevant to both the APMS and the IP. These included a document entitled "Award Performance Management Supervisor Guidelines" and a "Performance Planner", setting out various performance standards in the broad areas of safety, environment, work performance, training and conduct. Also attached, were the "2001/2002 Performance Review" and "2001/2002 Performance Review Explanatory Guidelines" for the IP, all of which I have carefully considered.

17. Mr Stockden was extensively cross-examined, in particular on these documents. The thrust of the cross-examination, was to draw similarities between the APMS and the IP documents. Mr Stockden testified in cross-examination that under the IP, each individual employee has a minimum standard, a target and a stretch goal. He said that the levels of performance differ for each of the three areas. In contrast, the proposed APMS, only identifies minimum standards that are to be established in discussions between the employee and supervisor. Mr Stockden testified that the minimum standards may vary from department to department, and even individual to individual, depending upon the circumstances. Mr Stockden denied that the minimum standards are also set out in department plans.

18. In short, Mr Stockden testified that the purpose of the APMS was in part to educate the Award workforce on obligations arising under the Award whereas the IP has as its objective, encouraging superior performance and rewarding that performance with financial incentives.

19. Substantial cross examination took place in relation to minimum standards and whether they may move over time. Mr Stockden testified that the minimum standards are not "set in stone", in the sense that they may be adjusted over time to take into account changes in technology, and also changes in the operation of the department. This was the same for the IP however Mr Stockden said that these involve a combination of minimum, target and stretch goals.

20. As to areas of disagreement, Mr Stockden said that if employees disagreed with minimum standards set, they would have recourse to the issue resolution process under the Award. In an overall sense, Mr Stockden's evidence was that a part of the purpose of the APMS was to assist in a change in the culture in the workplace, following the making of the Award.

21. As to the presence of a union representative at the initial minimum standards setting meeting, Mr Stockden testified that this would simply not be practicable, in all of the circumstances, and that is why an earlier proposal by the applicants in this regard, was refused.

22. On behalf of the applicants, evidence was led from union officials including Mr Llewellyn, and Mr Tracey, of the Australian Workers Union, responsible for industrial matters at the respondent. Mr Tracey testified about his involvement on site from about mid July 2002, when Award employees were informing him of meetings at which supervision were referring to performance management of employees. Mr Tracey testified as to what he described as a campaign on site by the respondent, to have employees elect to participate in the IP, as provided for under the Award.

23. In addition, Mr Tracey referred to various copies of "Rock Solid", a publication of the "Pilbara Iron Ore Unions", dealing with this matter. Relevant copies of "Rock Solid" were tendered as exhibit A3. The general tenor of Mr Tracey's evidence was that employees were being told by supervision on site, that as they were going to be "performance managed" anyway, they may as well sign up to the IP and get the benefits. In this respect, reference was made to the respondent's on site publication "Our Workplace", copies of which were annexed to Mr Stockden's witness statement. Mr Tracey testified that these documents also reveal in the applicant's view, that the respondent was introducing APMS, because of the low participation rate by Award employees in the IP.

24. Additionally, Mr Tracey referred to a meeting between himself, Mr Kumeroa, a TWU official, and on site human resources management about the issue. Mr Tracey testified that the purpose of the meeting was to clarify what appeared to be misunderstandings about the operation of the IP. A letter dated 31 July 2002, to Mr Tracey, tendered as exhibit R3, confirmed that Award employees not electing to participate in the IP would not be subject to that program. The letter did say however, that the respondent would be initiating a process to advise Award employees of the requirements of the new Award, and the respondent's expectations as to future performance. Reference was also made in the letter, to follow up 6 monthly reviews to ensure requirements were met. The letter said that employees who did not meet requirements, would be counselled and disciplined accordingly.

25. The evidence from Mr Llewellyn also dealt with the respondent's proposal and in particular, a meeting that took place on or about 25 October 2002, involving representatives of both the applicants and the respondent. I do not find it necessary to consider in any detail, what was said at this meeting. Save to say that clearly, Mr Llewellyn expressed strong opposition in principle, to any performance management system for Award employees.

26. Evidence was also adduced from a number of employees including Mr White, Mr Cumbers, Mr Thomas, Mr Neil and Mr Kumeroa. All of the employee witnesses gave evidence about their attendance at briefing meetings conducted by management, following the making of the Award. The thrust of this evidence was that the employees in attending those meetings were either told or had the distinct impression, that if they did not elect to take part in the IP, a form of individual assessment would be implemented in any event. In particular, Mr Cumbers, who is also a convenor for the CFMEU, testified that in an Award briefing meeting with Mr Dunbar, one of the respondent's managers, he was told that if he did not elect to participate in the IP by the cut off date of 5 August 2002, he would be subject to individual assessment. Mr Cumbers however, said that he assumed this process would be the same as the IP, as Mr Dunbar did not say this. Generally, Mr Cumbers accepted that the respondent had the right to introduce changes in the workplace, as long as employees were not disadvantaged. This included the respondent's right to counsel employees in order for minimum performance standards to be met.

27. Mr Kumeroa gave evidence about attending Award briefing meetings in July 2002. Specifically, he referred to a briefing conducted by Mr Dunbar. Mr Kumeroa testified that Mr Dunbar referred to a requirement for Award employees to take part in some form of assessment, to meet expectations of the respondent, as a result of the new Award. It was Mr Kumeroa's evidence, that Mr Dunbar raised this as a separate issue, and did not discuss the IP, as applicable to workplace agreement employees.

28. Mr Kumeroa also gave evidence about the meeting with the respondent's site human resources management, Messrs Keddie and Lhose, referred to in Mr Tracey's evidence. Mr Kumeroa said that he and Mr Tracey raised the question of employee assessment and they were informed by Mr Keddie, that the process would not be the same unless employees elected to take part in the IP. However, Mr Keddie did inform Mr Kumeroa that the respondent would expect standards to be met for Award employees and referred to what had been done over the previous five or six years in relation to time keeping and attendances etc. Generally, Mr Kumeroa said in cross-examination, that he accepted the right of the respondent to implement change, as long as it was not unfair or oppressive. Similarly, he accepted the respondent's right to counsel employees for not meeting minimum standards, but said that depended upon what the standards were.

**Consideration**

29. The question before the Commission is whether, in principle, the Commission should prevent the respondent from introducing the APMS. In *AFMEPKIU v BHP Iron Ore Ltd & Others* (2001) 82 WAIG 2033, the Commission in Court Session decided, after an extensive case, that the Award should be made to cover the operations of the respondent, in substitution for all previous awards, industrial agreements, and other informal agreements. As I have said earlier in these reasons, the Award represented a sea change in industrial regulation at the respondent. In dealing with the requirement for change, in its conclusions, the Commission in Court Session said at pars 104 - 118 as follows:

> *104. We realise that a change in culture will not happen overnight. The new award must facilitate it. We consider that BHPIO's employees are equally prepared to contribute to BHPIO's future whether they are covered by the EBA or a WPA. The differences between them arise from the differences in their industrial regulation. The environment must be established whereby attitudes that reflect a commitment to business objectives are fostered. However that does not mean that we accept the award proposed by BHPIO in its entirety.*
>
> *105. The history of wage fixation has evolved over one and a half decades. It has moved from addressing the need to remove restrictive work practices in awards and inserting facilitative provisions and structural efficiency clauses to meet the needs of industry, to the negotiation of enterprise specific agreements to address the particular demands and productivity requirements of individual workplaces.*
>
> *106. Since the mid-1980's enterprise bargaining has been the focus of the industrial relationship at BHPIO's operations. With the failure to continue that process the spotlight returns to the award.*
>
> *107. The enterprise specific award must fulfil the dual requirements of protecting employees as a safety net and providing the employer with a structurally efficient framework within which efficiencies and productivity improvements can be pursued.*
>
> *108. It should reflect the developments under the process of structural reform that has been going on for the past fifteen years. The award cannot harbour inefficient work practices in the expectation that at some time in the future those matters may be addressed under another EBA.*
>
> *109. The wage fixing principles now recognises the particular nature of an enterprise specific award. Where agreement can be reached between parties the award can be varied under Principle 10 without recourse to the Commission in Court Session. In effect the enterprise award can be the EBA.*
>
> *110. With the restoration of the primacy of the enterprise award at BHPIO, wage rates must reflect the worth of work in a structurally efficient environment free from restrictive work practices. In the enterprise award it must effectively identify what would otherwise have been specified as the commitments to efficiency and productivity outcomes under an EBA. In this respect the wage rate must be commensurate with the scope of benefits the employer can achieve in managing the structurally efficient workplace.*
>
> *111. In the circumstances of BHPIO's operation, the productivity already achieved provides the benchmark.*
>
> *112. While award employment necessarily imposes some limitations in comparison with a totally unregulated environment, nevertheless the benefits in productivity outcomes and efficiencies and the ability to manage without the encumbrances inherent from the history of agreements and formal and informal arrangements, are significant.*
>
> *113. The challenge is for BHPIO to manage change in the structurally reformed regulated workplace.*
>
> *114. The worth of work has to a significant extent been established on what was offered to award employees to take up WPA's.*
>
> *115. The levels of efficiency, flexibility and productivity being realised presently must be the objective for those who will be employed under the award.*
>
> *116. We consider that an award should issue. The level of award prescription should be minimal. It should not afford an opportunity for the successive layers of negotiated working conditions to be held on to in the expectation of further concessions.*
>
> *117. It will be for BHPIO to introduce and manage the changes it needs to introduce. The changes to be made in the workplace should not be tested against limitations that go beyond the reasonableness of working within skill, competency, training and safety.*
>
> *118. Our objective is to provide an environment for change together with a stable industrial relationship between the parties.*

30. In further reasons for decision ((2002) 82 WAIG 2048), the Commission in Court Session dealt with its decision to introduce the Award, and specifically, made reference to the IP, as ultimately forming part of the Award. In dealing with the contentions of the parties, and its conclusions in relation to this issue, the Commission in Court Session said this:

> *79. While the unions seek the application of the incentive programme, they argue that the individual review aspect of the incentive programme ought to be excluded and the budgeted amount per employee given to each department ought to be required to be allocated to each award employee. If participation in the individual review process was seen as necessary, then supervisors should be subject to review by those whom they supervise as a condition of this process. The unions emphasize that payments made under the incentive programme are not a reward for participation of the individual but rather BHPIO and its department's performances. The review process inherent in the programme is simply the mechanism by which the award is*

*distributed (transcript p. 1083). The unions see the process, however, as a subjective process involving the employee's supervisor. The unions submit that supervisors are sensitive to BHPIO's preference for employees to be on workplace agreements and in a highly subjective process such as the one involved it may not be possible for supervisors to appraise award employees free of those influences.*

*80. BHPIO opposes the claim. It sees the incentive programme as a key element in its relationship with its dealings with its non-award employees, both traditional staff and workplace agreement employees. BHP believes that the scheme enhances performance and personal development of employees who participate in the scheme and that it is mutually beneficial both to BHPIO and to the employee concerned. Assessment may recognize additional responsibilities assumed by employees or additional tasks they may assume to expand their skills, experience and overall contribution. It allows negative performance issues to be addressed but overall it is a positive incentive scheme. It is significant that this can take place in the absence of any concern of a constraint imposed by award obligations. It was submitted that remaining under award regulation was incompatible with participation in such a scheme. BHPIO's overall contributions take into account the contribution by departments and also the individual employee's performance. Individual employees must be prepared and must participate in the process with a view to achieving the goals. Therefore, BHPIO does not seek to impose the obligation on unwilling participants because it will not work. Therefore, those employees who do not participate in the programme ought not to be entitled to the reward which comes from that participation.*

*81. The evidence of Mr Stockden from paragraph 43 onwards in his witness statement sets out the operation of the incentive programme in some detail. It has been operative since late 1999. BHPIO sees this system as giving it a direct role with each participating employee's performance and can reward individual effort and achievements. It sets goals and employees may direct their efforts to achieving them in the knowledge that it will be recognized and rewarded.*

*82. The Commission has given consideration to these issues in reaching the conclusion that it did that individual award employees may elect to participate in the incentive programme subject to them fulfilling all of the review requirements. We were persuaded to that conclusion by the nature of the incentive programme being to reward both its overall performance and also individual performance. We are quite persuaded by the evidence contained in the Chronicle references to which we were referred, and the various separate commendations from BHPIO to its EBA employees for work that was well performed, that employees under the award have not only contributed to BHPIO's performance but that individuals have similarly performed well notwithstanding their remuneration via the EBA. Simple fairness requires that the incentive programme be extended to employees under the EBA (see AFMEPKIU and Others v. Western Australian Mint (1996) 76 WAIG 1700).We do not accept that employment under the award is, of itself, incompatible with participation in such schemes. The important proviso is however, that as an individual's performance assessment is an integral part of the incentive programme we consider that an employee wishing to have the benefit of the incentive programme must commit to and accept the individual assessment process, which is an inherent part of it.*

*83. We appreciate from the evidence overall that the scale of individual performance may differ from employees who are employed by the award and those who are not.* ***However, it cannot be said that individual employees covered by the award are not committed to the productivity of BHPIO nor of their own individual performance. To so conclude would be inconsistent with the evidence before the Commission. If an employee has contributed to the overall performance of BHPIO and has performed well individually and has met targets set by BHPIO, there is simply no reason in merit why the benefits of the incentive programme should not be applied.*** *We recognize that the incentive programme should not be imposed on an employee who is simply unwilling to participate.*

*84. Correspondingly, the evidence referred to above suggests that there will be many employees who prefer to remain covered by the award, and with the opportunity to bargain collectively preserved to them, who nevertheless will perform well as individuals and will wish to participate on this basis in the incentive programme. While we are conscious that it is a condition of employment received by employees on workplace agreements, this condition of employment is not being awarded by the Commission merely for that reason. Indeed, it is inherent in our overall decision in this matter that the award structure should provide as far as possible for employees covered by the award to become as productive as employees of BHPIO* ***generally and if they contribute to the performance of BHPIO which warrants reward, they should be included. It is consistent with that reasoning for the Commission to provide access to the incentive programme on an individual basis to further encourage that to occur.*** *(My emphasis)*

31. Importantly for present purposes, in particular at par 83, the Commission recognised the IP as involving employees contributing to the overall performance of the respondent, and meeting targets set by it. Furthermore, the Commission rejected submissions by the respondent, that individual performance management was inconsistent with award regulation.

32. Equally importantly, the Commission, in its first reasons, recognised the importance of creating an environment such that employee attitudes reflect a commitment to the respondent's business objectives.

33. By the same token however, the Commission in Court Session also recognised the role played by the unions on behalf of employees of the respondent, members of or eligible to the members of those organisations party to the Award. In particular, the Commission in Court Session ((2002) 82 WAIG 2048) at 2053 said at par 47:

*47. In [127(c)] we required BHP to respect and observe collective bargaining rights. In doing so, we note that there was little direct evidence on the question of the rights of employees to belong to unions and to collectively bargain. We regard it as inherent in the making of the award to issue from these proceedings to which the unions are parties that employees to be covered by it are able to organise, become and remain union members, and to bargain collectively without hindrance. The freedom of association provisions contained in Part VIB of the Act recognise, at least in part, these principles in relation to union membership. The employees' rights to do so, and the rights of the unions to which they belong to represent their members and those who are potential members is to be recognised in the award.*

34. The Commission therefore required the respondent to respect and observe collective bargaining rights and in that context, express reference to this was made in the Award. Importantly also, at cl 23 – Issue Resolution Process, recognition is given to the role of union representation and assistance for employees raising and progressing an issue in accordance with this process. In that respect, in its further reasons for decision ((2002) 82 WAIG 2060), in relation to the proposed issue resolution process clause to be inserted into the Award, the Commission in Court Session observed:

*62. The principal difference between the parties in the proposed Clause is the proposal of the unions creating an entitlement to union representation and assistance at each stage of the procedure. BHPIO provides in its Clause 21.5 that nothing in the procedure shall be read so as to exclude an employee or employees having an employee representative including a shop steward of their choice or an official of an the union party to the award for which they are eligible for membership to represent them. The Commission considers it as appropriate that the entitlement to union representation and assistance be stated positively. Where the union representation is an employee then when that employee is representing another employee the employee shall do so without any loss of earnings.*

*63. BHPIO considers it important because of the s.72A proceedings and the evidence referred to in that decision that the award provide that the union official referred to be an official of a union with relevant eligibility. The unions assert that the logistics of union organisation in the Pilbara often means that unions may on an agreed basis have one official represent a number of unions on site. In the conclusion we have reached, provided that the union official is specifically authorised by a union party to the award to represent that union, the difficulties seen by the Commission in the s.72A proceedings ought to be avoided. The issue resolution process will provide accordingly.*

*64. Assistance does not, for the purposes of this clause, go beyond the direct assistance to an employee who raises an issue for resolution pursuant to Clause 23 of the award. It is consistent with this reasoning to provide that where more than one employee is part of the issue resolution process, there is a right for representation on a collective, rather than on an individual basis.*

35. From all of the foregoing, it is clear that the Commission, in making the new Award, intended major changes to be facilitated at the respondent's operations. Balanced with this, was the recognition that those employees covered by the Award, should be suitably rewarded for their contribution to the respondent's business to date, and for the future. Inherent in the Commission in Court Session's various reasons, and the Award itself, was an intention that the Award be the catalyst for a change in culture, more consistent with the respondent's business objectives. In conjunction with this, the Commission highlighted the challenge for the respondent in managing the introduction of ongoing workplace change. This is consistent with ensuring that the required levels of productivity, efficiency and competitiveness, are met. These processes will always of course, be balanced with the requirement for there to be industrial fairness exercised in the management of change

36. Within this overall theme, it was also held by the Commission in Court Session, as noted above, that performance management per se, is not inconsistent with award regulation. The Commission, in dealing with the IP, recognised and acknowledged its primary focus as rewarding individual performance that met targets established by the respondent. That is not the same proposition in concept, which is being advanced before the Commission in this matter. That is, in the proceedings leading to the making of the Award, the Commission accepted that the primary focus of the IP is as a positive reward program for performance beyond minimum expectations in relation to which, Award employees should be able to participate if they meet the objectives set by the respondent.

37. In my opinion, just as the respondent read too much into the decision of the Commission in Court Session when suggesting to it that the concept of employees' classifications had been totally abandoned, so too do the unions read too much into the reasons for decision, and the new Award, to suggest that the availability of the IP under the Award, and the reasons for it, totally preclude any consideration of other forms of minimum performance management. An employer, as an incident of the common law contract of employment, and indeed as a part of sound management, is entitled, and probably obliged, to articulate minimum performance standards, particularly where there may be subsequent reviews of that performance which may have negative consequences for an employee. For any employer to not first articulate what those minimum expectations are, and to then act on them, would be prima facie industrially unfair, on the authorities as they stand in this jurisdiction.

38. Given that the Commission in Court Session has stated that the respondent is to implement and manage change in the new award environment, and the Award is intended at least in part, to foster attitudes more aligned to business objectives, it seems to me that a system, however described, of articulating minimum expectations, as long as they are fairly set and are themselves reasonable, could not be regarded in my opinion, as industrially unfair. On the contrary, the setting of minimum standards, with appropriate safeguards, is in my view consistent with the matters that I have referred to above.

39. However, there must be appropriate checks and balances to ensure that employees have recourse to deal with disagreements or issues arising from the implementation of such a process, as assisted by their respective union representatives as may be required. Employees have this as a right under the Award. It seems to me that the terms of the issue resolution process prescribed in the Award, enable an employee, at all stages of any performance management process, to raise issues. It may well be for example, that a particular minimum standard proposed by the respondent for an employee, is unjust or unreasonable, given all of the circumstances. However it seems to me that it would be only once there has been proposed a minimum standard, that any issue resolution process could be usefully availed of.

40. Furthermore, if at the end of any review period, an employee has a grievance, then that employee, as assisted as a matter of right, by a relevant union representative, can pursue those matters through the issue resolution process and even to this Commission, if it became necessary.

41. Accordingly, in light of all of the foregoing, as a matter of the exercise of a discretion the Commission is not of the view that it ought interfere with the respondent's proposed introduction of the APMS, in principle.

42. The Commission expressly refrains from expressing any concluded view on the substantive aspects of the proposal. However, I merely observe that from the material before the Commission presently, at least some of the minimum standards proposed in the respective areas, would not appear to represent an extension of what would be expected as a part of day to day workforce management in any event. That is, a number of the proposed minimum standards would appear to represent what one would normally expect to be common place as a part of daily interaction between employees and supervision, albeit in a more formalised fashion.

43. Given however, that the Commission is determining only the in principle issue, and given the right of the applicants as parties to the Award, to participate in matters affecting their members and those eligible to be their members, in my view, the detail of the APMS is a matter which ought be concluded by further discussions between the parties. I should emphasise however, that the proposal is not about a bonus system. The proposal is about setting fair and reasonable minimum performance expectations, in an open and transparent manner, providing adequate safeguards to employees who may, at any stage of the process, feel aggrieved.

44. The Commission therefore directs the parties to confer in relation to the implementation of the APMS. The Commission will require the parties to report back to it by no later than 24 January 2003, as to their progress. This time frame has been proposed in view of the imminent Christmas and New Year period.

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**2005 WAIRC 02090**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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| **PARTIES** | THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS & OTHERS |
| | **APPLICANT** |
| | **-v-** |
| | BHP BILLITON IRON ORE LTD |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER S J KENNER |
| **DATE** | MONDAY, 18 JULY 2005 |
| **FILE NO/S** | CR 199 OF 2002 |
| **CITATION NO.** | 2005 WAIRC 02090 |

| | |
|---|---|
| **Result** | Application discontinued by leave |
| **Representation** | |
| **Applicant** | Mr G Trotter |
| **Respondent** | Mr R Lilburne of counsel |

*Order*

WHEREAS the applicant sought and was granted leave to discontinue the application, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued by leave.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

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# CONFERENCES—Notation of—

| Parties | | Commissioner/ Conference Number | Dates | Matter | Result |
|---|---|---|---|---|---|
| Australian Liquor, Hospitality and Miscellaneous Workers Union of Western Australian Branch | Coca-Cola Amatil (Aust) Pty Ltd | Kenner C C 169/2004 | N/A | The dismissal of a union member | Discontinued |
| Australian Liquor, Hospitality and Miscellaneous Workers Union of Western Australian Branch | Snugglepot Child Care Centre | Harrison C C 91/2004 | 11/05/2004 | Termination of member | Discontinued |
| Australian Liquor, Hospitality, Miscellaneous Worker's Union | Chubb Security | Harrison C C 105/2005 | 17/06/2005 | Dispute regarding movement of employee and decrease in wages | Discontinued |
| Australian Liquor, Hospitality, Miscellaneous Worker's Union | Department of Conservation and Land Management | Harrison C C 107/2005 | N/A | Dispute regarding the status of employment position | Discontinued |
| Australian Liquor, Hospitality, Miscellaneous Worker's Union | Management Committee - Treasure Island Child Care Centre | Harrison C C 243/2004 | 7/01/2005 | Unfair termination of union member | Discontinued |
| Australian Liquor, Hospitality, Miscellaneous Worker's Union | Mayne Health Centre | Scott C C 64/2005 | 4/05/2005 | A dispute regarding the alleged unfair dismissal of a union member | Concluded |
| Australian Liquor, Hospitality, Miscellaneous Worker's Union | Singleton Early Learning Centre | Harrison C C 109/2005 | 01/07/2005, 15/07/2005 | A dispute regarding alteration of starting time for a union employee | Discontinued |

| Parties | | Commissioner/ Conference Number | Dates | Matter | Result |
|---|---|---|---|---|---|
| Australian Municipal, Administrative, Clerical and Services Union of Employees, W.A. Clerical and Administrative Branch | Australian Liquor, Hospitality, Miscellaneous Worker's Union | Harrison C C 124/2005 | N/A | A dispute regarding alleged unfair dismissal of a union employee | Discontinued |
| Australian Municipal, Administrative, Clerical and Services Union of Employees, W.A. Clerical and Administrative Branch | Grove Stationery Supplies Pty Ltd | Kenner C CA 86/2005 | N/A | Dispute regarding proposed enterprises agreement | Discontinued |
| Australian Municipal, Administrative, Clerical and Services Union of Employees, W.A. Clerical and Administrative Branch | Grove Stationery Supplies Pty Ltd | Kenner C CB 86/2005 | N/A | Dispute regarding proposed enterprises agreement | Discontinued |
| Civil Service Association of Western Australia | Chief Executive Officer Disability Services Commission | Kenner C PSAC 5/2005 | N/A | Dispute regarding the intention to terminate employment of union member | Discontinued |
| Civil Service Association of Western Australia | Director General, Department of Agriculture | Scott C PSAC 3/2005 | N/A | Application for interim orders | Concluded |
| Civil Service Association of Western Australia | The Board Of The Western Australian Centre For Pathology And Medical Research (Pathcentre) | Scott C PSAC 17/2005 | 18/05/2005 | Dispute regarding non consultation about organisational change | Concluded |
| Communications, Electrical, Electronic, Energy,Information, Postal, Plumbing, and Allied Workers Union of Australia, Engineering & Electrical Div. | Langer Auto Group | Gregor SC CR 193/2004 | N/A | Dispute over termination of union member | Discontinued |
| Communications, Electrical, Electronic, Energy,Information, Postal, Plumbing, and Allied Workers Union of Australia, Engineering & Electrical Div. | Norsat Communications Pty Ltd | Gregor SC C 126/2005 | N/A | Dispute regarding contractual entitlements for union member | Settled |
| Health Services Union of Western Australia (Union of Workers) | Honourable Minister for Health in his incorporated capacity under section 7 of the Hospitals and Health Services Act (WA) as the hospitals formally comprised as the Board of the North Metropolitan Health Service | Scott C PSAC 23/2005 | N/A | Dispute regarding relocation of employee to Sir Charles Gardiner Hospital | Concluded |
| Health Services Union of Western Australia (Union of Workers) | The Director General, Department of Health | Scott C PSAC 25/2005 | 23/06/2005 | Dispute regarding reclassification of employment level of union member | Concluded |
| The Australian Workers' Union, Western Australian Branch, Industrial Union of Workers | BHP Billiton Iron Ore Pty Ltd | Wood C C 246/2004 | 23/12/2004, 10/06/2005 | Dispute regarding the dismissal of a union member | Concluded |
| The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch | AbiGroup Asset Services Pty Ltd trading as AbiSimon | Kenner C CR 87/2005 | N/A | Dispute regarding the area and scope of award in the workplace | Discontinued |

| Parties | | Commissioner/ Conference Number | Dates | Matter | Result |
|---|---|---|---|---|---|
| The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch | Impressions West | Gregor SC CR 16/2005 | N/A | Alleged unfair dismissal | Discontinued |
| The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch | Sims Metal Limited | Harrison C CR 12/2005 | N/A | Dispute regarding the termination of a union member | Discontinued |
| The Construction, Forestry, Mining and Energy Union of Workers | Penfolds Earthmoving Pty Ltd | Gregor SC CR 61/2005 | N/A | Jurisdiction/alleged unfair dismissal | Discontinued |
| The Construction, Forestry, Mining and Energy Union of Workers and Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch | BHP Billiton Iron Ore Pty Ltd | Gregor SC CR 238/2004 | N/A | Dispute regarding working on Christmas day | Discontinued |

# CORRECTIONS—

**2005 WAIRC 01926**

**AUSTRALIAN RED CROSS BLOOD SERVICE - WESTERN AUSTRALIA (ASU) ENTERPRISE AGREEMENT 2004**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES** AUSTRALIAN RED CROSS BLOOD SERVICE - WESTERN AUSTRALIA

**APPLICANT**

**-v-**

AUSTRALIAN SERVICES UNION, WEST AUSTRALIAN CLERICAL AND SERVICES BRANCH

**RESPONDENT**

**CORAM** COMMISSIONER P E SCOTT
**DATE** WEDNESDAY, 29 JUNE 2005
**FILE NO.** AG 82 OF 2005
**CITATION NO.** 2005 WAIRC 01926

**Result** Correction Order Issued

*Correction Order*

WHEREAS this is an application to register an industrial agreement pursuant to Section 41(2) of the Industrial Relations Act 1979; and

WHEREAS on the 17th day of May 2005, an Order in this application was deposited in the office of the Registrar; and

WHEREAS the reference to the title of the industrial agreement contained an error;

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

THAT the Order be corrected by substituting "Australian Red Cross Blood Service – Western Australia (ASU) Enterprise Agreement 2005" with "Australian Red Cross Blood Service – Western Australia (ASU) Enterprise Agreement 2004".

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

**2005 WAIRC 02112**

**HOSPITAL WORKERS (CLEANING CONTRACTORS - PRIVATE HOSPITALS) AWARD 1978**

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** | THURSDAY, 21 JULY 2005 |
| **FILE NO/S** | APPL 622 OF 2003 |
| **CITATION NO.** | 2005 WAIRC 02112 |

**Result** Correction Order

*Correction Order*

WHEREAS on 11 March 2005 an order in this matter was deposited in the Office of the Registrar;

AND WHEREAS on 19 July 2005 the Commission advised the parties' representatives that the order contained an error and provided the correction;

AND WHEREAS the parties' representatives agreed with the correction;

AND WHEREAS the parties' representatives 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 5 in the schedule to the Order issued by the Commission in Application 622 of 2003 on 11 March 2005 be replaced by Clause 5 in the attached schedule.

(Sgd.) A R BEECH,
[L.S.] Chief Commissioner.

SCHEDULE

**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 11th day of March 2005, 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:

$$\text{December 2003} \div \text{September 2002} \times 100 = 5.16\%$$

$$144.7 \div 137.6 \times 100 = 5.16\%$$

**2005 WAIRC 02200**

**SHARK BAY SALT AND GYPSUM (PRODUCTION AND PROCESSING) USELESS LOOP AWARD NO. A15 OF 1988**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

| | |
|---|---|
| **PARTIES** | THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS **APPLICANT** |
| | **-v-** |
| | SHARK BAY SALT JOINT VENTURE & OTHERS **RESPONDENT** |
| **CORAM** | COMMISSIONER S J KENNER |
| **DATE** | FRIDAY, 29 JULY 2005 |
| **FILE NO.** | APPLB 1437 OF 2002 |
| **CITATION NO.** | 2005 WAIRC 02200 |

| | |
|---|---|
| **Result** | Award varied. Order issued. |
| **Representation** | |
| **Applicant** | Mr G Trotter |
| **Respondent** | Mr K Dwyer as agent |

*Correction Order*

HAVING heard Mr G Trotter on behalf of the applicant and Mr K Dwyer as agent on behalf of the respondents, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 and by consent hereby orders –

THAT the Shark Bay Salt and Gypsum (Production and Processing) Useless Loop Award No. A15 of 1988 be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the date of this order.

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

SCHEDULE

**Clause 39. – Redundancy: Delete this clause and insert in lieu thereof the following:**

**39. – REDUNDANCY**

39.1 Termination of Employment

39.1.1 Statement of Employment

An employer shall, in the event of termination of employment, provide upon request to the employee who has been terminated a written statement specifying the period of employment and the classification or type of work performed by the employee.

39.1.2 Job Search entitlement

(a) During the period of notice of termination given by the employer an employee shall be allowed up to one day's time off without loss of pay during each week of notice for the purpose of seeking other employment. The time off shall be taken at times that are convenient to the employee after consultation with the employer.

(b) If the employee has been allowed paid leave for more than one day during the notice period for the purpose of seeking other employment, the employee shall, at the request of the employer, be required to produce proof of attendance at an interview or he or she shall not receive payment for the time absent. For this purpose a statutory declaration will be sufficient.

39.2 Introduction of Change

39.2.1 Employer's Duty to Notify

(a) Where an employer decides to introduce changes in production, program, organisation, structure or technology, that are likely to have significant effects on employees, the employer shall notify the employees who may be affected by the proposed changes and, if an employee nominates a union to represent him or her, the union nominated by the employee.

(b) "Significant effects" includes termination of employment, major changes in the composition, operation or size of the employer's workforce or in the skills required; the elimination or diminution of a job opportunity, a promotion opportunity or job tenure; the alteration of hours of work; the need for retraining or transfer of employees to other work or locations and the restructuring of jobs.

39.2.2 Employer's Duty to Consult over Change

(a) The employer shall consult the employees affected and, if an employee nominates a union to represent him or her, the union nominated by the employee, about the introduction of the changes, the effects the changes are likely to have on employees (including the number and categories of employees likely to be dismissed, and the time when, or the period over which, the employer intends to carry out the dismissals), and the ways to avoid or minimise the effects of the changes (e.g. by finding alternate employment).

(b) The consultation shall commence as soon as practicable after making the decision referred to in the "Employer's Duty to Notify" clause.

(c) For the purpose of such consultation the employer shall provide in writing to the employees concerned and, if an employee nominates a union to represent him or her, the union nominated by the employee, all relevant information about the changes including the nature of the changes proposed, the expected effects of the changes

on employees, and any other matters likely to affect employees, provided that any employer shall not be required to disclose confidential information, the disclosure of which would be adverse to the employer's interests.

39.3. Redundancy

39.3.1 Definition

Business includes trade, process, business or occupation and includes part of any such business.

Redundancy occurs where an employer has made a definite decision that the employer no longer wishes the job the employee has been doing done by anyone.

Transmission includes transfer, conveyance, assignment or succession whether by agreement or by operation of law and "transmitted" has a corresponding meaning.

Weeks' pay means the ordinary time rate of pay for the employee concerned. Provided that such rate shall exclude:

(a) Overtime;

(b) Penalty rates;

(c) Disability allowances;

(d) Shift allowances;

(e) Special rates;

(f) Fares and travelling time allowances;

(g) Bonuses; and

(h) Any other ancillary payments of a like nature.

39.3.2 Consultation Before Terminations

(a) Where an employer decides that the employer no longer wishes the job the employee has been doing to be done by anyone and that decision may lead to termination of employment, the employer shall consult the employee directly affected and if an employee nominates a union to represent him or her, the union nominated by the employee.

(b) The consultation shall take place as soon as is practicable after the employer has made a decision to which clause 39.3.2(a) applies and shall cover the reasons for the proposed terminations, measures to avoid or minimise the terminations and/or their adverse affects on the employees concerned.

(c) For the purpose of the consultation the employer shall, as soon as practicable, provide in writing to the employees concerned and if an employee nominates a union to represent him or her, the union nominated by the employee, all relevant information about the proposed terminations including the reasons for the proposed terminations, the number and categories of employees likely to be affected, the number of employees normally employed and the period over which the terminations are likely to be carried out. Provided that an employer shall not be required to disclose confidential information, the disclosure of which would be adverse to the employer's interests.

39.3.3 Transfer to lower paid duties

(a) Where an employee is transferred to lower paid duties by reason of redundancy the employee shall be entitled to the same period of notice of transfer as the employee would have been entitled to if the employee's employment had been terminated.

(b) The employer may, at the employer's option, make payment in lieu thereof of an amount equal to the difference between the former amounts the employer would have been liable to pay and the new lower amount the employer is liable to pay the employee for the number of weeks of notice still owing.

(c) The amounts must be worked out on the basis of:

(i) The ordinary working hours to be worked by the employee; and

(ii) The amounts payable to the employee for the hours including for example, allowances, loading and penalties; and

(iii) Any other amounts payable under the employee's contract of employment.

39.3.4 Severance Pay

(a) In addition to the period of notice prescribed for ordinary termination, an employee whose employment is terminated by reason of redundancy must be paid, subject to further order of the Commission, the following amount of severance pay in respect of a continuous period of service: Provided that the entitlement of any employee whose employment terminates on or before 1 February 2006 shall not exceed 8 weeks' pay.

| **Period of continuous service** | **Severance pay** |
|---|---|
| Less than 1 year | Nil |
| 1 year and less than 2 years | 4 weeks' pay |
| 2 years and less than 3 years | 6 weeks' pay |
| 3 years and less than 4 years | 7 weeks' pay |
| 4 years and less than 5 years | 8 weeks' pay |
| 5 years and less than 6 years | 10 weeks' pay |
| 6 years and less than 7 years | 11 weeks' pay |
| 7 years and less than 8 years | 13 weeks' pay |
| 8 years and less than 9 years | 14 weeks' pay |
| 9 years and less than 10 years | 16 weeks' pay |
| 10 years and over | 12 weeks' pay |

(b) Provided that the severance payments shall not exceed the amount which the employee would have earned if employment with the employer had proceeded to the employee's normal retirement date.

(c) For the purpose of this clause continuity of service shall not be broken on account of -

(i) Any interruption or termination of the employment by the employer if such interruption or termination has been made merely with the intention of avoiding the obligations of this clause in respect of leave of absence;

(ii) Any absence from work on account of leave granted by the employer; or

(iii) Any absence with reasonable cause, proof whereof shall be upon the employee;

Provided that in the calculation of continuous service any time in respect of which any employee is absent from work except time for which an employee is entitled to claim paid leave shall not count as time worked.

Service by the employee with a business which has been transmitted from one employer to another and the employee's service has been deemed continuous in accordance with clause 2(3) or (4) of the Long Service Leave Provisions published in Part 1 (January) of each volume of the Western Australian Industrial Gazette shall also constitute continuous service for the purpose of this clause.

39.3.5 Employee leaving during notice period

An employee whose employment is terminated by reason of redundancy may terminate his/her employment during the period of notice and, if so, will be entitled to the same benefits and payments under this clause had they remained with the employer until the expiry of such notice. However, in this circumstance the employee will not be entitled to payment in lieu of notice.

39.3.6 Alternative employment

(a) An employer, in a particular redundancy case, may make application to the Commission to have the severance payment prescribed varied if the employer obtains acceptable alternative employment for an employee.

(b) This subclause does not apply in circumstances involving transmission of business as set out in clause 39.3.8.

39.3.7 Transmission of business

(a) The provisions of clause 39.3 are not applicable where a business is before or after the date of this order, transmitted from an employer (in this subclause called "the transmittor") to another employer (in this subclause called "the transmittee"), in any of the following circumstances:

(i) Where the employee accepts employment with the transmittee which recognises the period of continuous service which the employee had with the transmittor and any prior transmittor to be continuous service of the employee with the transmittee; or

(ii) Where the employee rejects an offer of employment with the transmittee:

(aa) In which the terms and conditions are substantially similar and no less favourable, considered on an overall basis, than the terms and conditions applicable to the employee at the time of ceasing employment with the transmittor; and

(bb) Which recognises the period of continuous service which the employee had with the transmittor and any prior transmittor to be continuous service with the transmittee.

(b) The Commission may vary 39.3.8(a)(ii) if it is satisfied that this provision would operate unfairly in a particular case.

39.3.8 Notice to Centrelink

Where a decision has been made to terminate employees in the circumstances outlined in the "Consultation Before Terminations" clause, the employer shall notify Centrelink as soon as possible giving all relevant information about the proposed terminations, including a written statement of the reasons for the terminations, the number and categories of the employees likely to be affected, the number of employees normally employed and the period over which the terminations are intended to be carried out.

39.3.9 Employees exempted

(a) This clause does not apply:

(ii) Where employment is terminated as a consequence of serious misconduct that justifies dismissal without notice.

(ii) Except for clause 39.3.2, to employees with less than one year's service.

(iii) Except for clause 39.3.2, to probationary employees.

(iv) To apprentices.

(v) To trainees.

(vi) Except for clause 39.3.2, to employees engaged for a specific period of time or for a specified task or tasks; or

(vii) To casual employees.

39.3.10 Employers Exempted

Subject to an order of the Commission, in a particular redundancy case, subclause 39.3.5 shall not apply to employers who employ less than 15 employees.

39.3.11 Incapacity to pay

An employer or a group of employers, in a particular redundancy case, may make application to the Commission to have the severance payment prescribed varied on the basis of the employer's incapacity to pay.

# PROCEDURAL DIRECTIONS AND ORDERS—

**2004 WAIRC 13019**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

| | |
|---|---|
| **PARTIES** | KAYLENE LARKMAN |
| | **APPLICANT** |
| | **-v-** |
| | IMDEX LTD (ACN 008 947 813) TRADING AS IMDEX MINERALS |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER S J KENNER |
| **DATE** | TUESDAY, 12 OCTOBER 2004 |
| **FILE NO.** | APPL 426 OF 2004 |
| **CITATION NO.** | 2004 WAIRC 13019 |

| | |
|---|---|
| **Result** | Direction issued |
| **Representation** | |
| **Applicant** | Mr N Whitehead of counsel and with him Ms D Lazarou of counsel |
| **Respondent** | Mr E Nielsen of counsel |

*Direction*

HAVING heard Mr N Whitehead of counsel and with him Ms D Lazarou of counsel on behalf of the applicant and Mr E Nielsen of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby directs –

1. THAT the applicant has leave to amend her notice of application in the terms of the letter of 5 August 2004 from the applicant's solicitor to the respondent's solicitor, which is to be filed and served upon the respondent by 4pm 14 October 2004.
2. THAT the respondent has leave to file and serve an amended notice of answer and counterproposal by 4pm 19 October 2004.
3. THAT each party shall give an informal discovery by serving its list of documents by 4pm 22 October 2004.
4. THAT the hearing date of 1 November 2004 be and is hereby vacated.
5. THAT the matter be listed for hearing for two days.
6. THAT the parties have liberty to apply on short notice.

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

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**2004 WAIRC 13537**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

| | |
|---|---|
| **PARTIES** | ALAN MAYNARD |
| | **APPLICANT** |
| | **-v-** |
| | CITY OF SWAN |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER S J KENNER |
| **DATE** | MONDAY, 6 DECEMBER 2004 |
| **FILE NO.** | APPL 951 OF 2004 |
| **CITATION NO.** | 2004 WAIRC 13537 |

| | |
|---|---|
| **Result** | Direction issued |
| **Representation** | |
| **Applicant** | Mr K Trainer as agent |
| **Respondent** | Mr S White as agent |

*Direction*

HAVING heard Mr K Trainer as agent on behalf of the applicant and Mr S White as agent on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby directs –

1. THAT the parties file and serve upon one another an outline of the evidence to be adduced by each witness simultaneously and no later than 21 days prior to the date of hearing.
2. THAT the matter be listed for hearing for two days.

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

**2005 WAIRC 01644**

**IRON ORE PRODUCTION & PROCESSING (BHP BILLITON IRON ORE PTY LTD) AWARD 2002**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

| | |
|---|---|
| **PARTIES** | THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS |
| | **APPLICANT** |
| | **-v-** |
| | BHP BILLITON IRON ORE PTY LTD |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER S WOOD |
| **DATE** | MONDAY, 23 MAY 2005 |
| **FILE NO.** | APPL 1324 OF 2004 |
| **CITATION NO.** | 2005 WAIRC 01644 |

| | |
|---|---|
| **CatchWords** | Discovery - Application for leave to use documents discovered in other matter - Documents relating to safety - Leave granted - Industrial Relations Act 1979 (WA) s.27(1)(o) |
| **Result** | Direction issued |
| **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 The applicant seeks the leave of the Commission to use, in the hearing of application 1324 of 2004, documents relating to the Quince and Johansen incidents which were discovered by order in C 233 of 2004. These documents were referred to in correspondence of the respondent of 5 April 2005 as follows:

(a) Incident nos. 39721 and 40655 dated 18/03/04 - Quince (Track Maintenance Technician)
  (i) Incident report (x2)
  (ii) ICAM report
  (iii) Disciplinary notification letter

(b) Incident no. 39081 dated 01/04/04 - Johansen (Traffic Controller)
  (i) Incident report (x2)
  (ii) ICAM report
  (iii) ICAM notes
  (iv) Disciplinary report
  (v) Disciplinary notification letter (memorandum – Johansen)

2 I would grant leave to use the documents discovered in C 233 of 2004, in relation to the safety issues involving the Quince and Johansen incidents as identified, for the hearing in application 1324 of 2004.

3 The award amendments sought, in part, include the issue of timing of breaks for engine drivers. The timing of breaks may in part, involve a consideration of safety, comfort and convenience. The matters referred to then on their face may have relevance for the award variation. I am not persuaded that simply because the incidents involved a train controller and a Hi-rail driver that the incidents are stripped of sufficient relevance for the issue of breaks for engine drivers on the main line. It is not said that the incidents do not involve matters of fatigue.

4 As to the submissions concerning the order and the formal obligations about discovery, I consider there is sufficient in the submissions of the applicant to warrant leave to be granted. The issue of leave having been considered carefully. The order issued by the Commission in C 233 of 2004 on 17 March 2005 is not fixed in concrete. A subsequent order has since issued adding to the discovery sought. The order reinforces the normal obligations for discovery that must be maintained. The applicant recognised those obligations initially and again in making the application.

5 I would add that I am dealing with documents that relate to safety. Whilst I comprehend the respondent's submissions about the need and obligation to shut one's mind to other matters when dealing with documents of discovery in a specific matter or for a specific purpose, I am also aware that the respondent rightly encourages openness about safety issues. I can therefore not ascribe to these documents some sensitivity that could or should prejudice the respondent in any way.

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**2005 WAIRC 01650**

**IRON ORE PRODUCTION & PROCESSING (BHP BILLITON IRON ORE PTY LTD) AWARD 2002**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

| | |
|---|---|
| **PARTIES** | THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS |
| | **APPLICANT** |
| | **-v-** |
| | BHP BILLITON IRON ORE PTY LTD |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER S WOOD |
| **DATE** | MONDAY, 23 MAY 2005 |
| **FILE NO.** | APPL 1324 OF 2004 |
| **CITATION NO.** | 2005 WAIRC 01650 |

| | |
|---|---|
| **Result** | Direction issued |
| **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 directs:

(1) THAT leave be granted to the applicant to use the following documents relating to the Quince and Johansen incidents for the hearing of application 1324 of 2004:

(a) Incident nos. 39721 and 40655 dated 18/03/04 - Quince (Track Maintenance Technician)

(i) Incident report (x2)

(ii) ICAM report

(iii) Disciplinary notification letter

(b) Incident no. 39081 dated 01/04/04 - Johansen (Traffic Controller)

(i) Incident report (x2)

(ii) ICAM report

(iii) ICAM notes

(iv) Disciplinary report

(v) Disciplinary notification letter (memorandum – Johansen)

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

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**2005 WAIRC 02145**

**IRON ORE PRODUCTION & PROCESSING (BHP BILLITON IRON ORE PTY LTD) AWARD 2002**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES** THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS

**APPLICANT**

**-v-**

BHP BILLITON IRON ORE PTY LTD

**RESPONDENT**

**FILE NO** APPL 1324 OF 2004

**PARTIES** BHP BILLITON IRON ORE PTY LTD

**APPLICANT**

**-v-**

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

THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING & KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH

COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING AND ELECTRICAL DIVISION, WA BRANCH

THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS

TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH

**RESPONDENTS**

| | |
|---|---|
| **FILE NO** | APPL 569 OF 2005 |
| **PARTIES** | BHP BILLITON IRON ORE PTY LTD |
| | **APPLICANT** |
| | **-v-** |
| | THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS |
| | THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING & KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH |
| | COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING AND ELECTRICAL DIVISION, WA BRANCH |
| | THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS |
| | TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH |
| | **RESPONDENTS** |
| **FILE NO** | APPL 570 OF 2005 |
| **CORAM** | COMMISSIONER S WOOD |
| **DATE** | MONDAY, 25 JULY 2005 |
| **CITATION NO.** | 2005 WAIRC 02145 |

| | |
|---|---|
| **Result** | Applications consolidated for hearing |
| **Representation** | |
| **Applicant/** | |
| **Respondents** | Mr D Schapper, of counsel |
| **Respondent/** | |
| **Applicant** | Mr A Lucev, of counsel |

*Order*

WHEREAS Application 1324 of 2004 was filed in the Commission on 13 October 2004; and

WHEREAS Application 1324 of 2004 was listed for hearing on 25 May, 26 May, 27 May 2005 in Port Hedland; and

WHEREAS at that hearing the applicant was granted leave to amend the application to delete the claim in respect of accrual, and the respondent undertook to file application to determine this matter; and

WHEREAS at that hearing the Commission adjourned Application 1324 of 2004 and decided for efficiency to hear together that application and the application to be made concerning the matter of accrual; and

WHEREAS on 2 June 2005, Applications 569 of 2005 and 570 of 2005 were filed in the Commission; and

WHEREAS on 6 July 2005, application was made to the Commission to join Applications 569 of 2005 and 570 of 2005 to Application 1324 of 2004; and

HAVING HEARD Mr Lucev, of counsel, on behalf of BHP Billiton Iron Ore Pty Ltd and Mr D Schapper, of counsel on behalf of the AWU, AFMEPKIU, CEEEIPPU, CFMEU and TWU, the Commission pursuant to the powers conferred on it under section 27(1)(s) of the Industrial Relations Act 1979, hereby orders –

THAT Application 569 of 2005 and Application 570 of 2005 be consolidated with Application 1324 of 2004 for the purposes of hearing.

(Sgd.) S WOOD,
Commissioner.

[L.S.]

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**2005 WAIRC 02103**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

| | |
|---|---|
| **PARTIES** | DECLAN JOSEPH FINNEGAN |
| | **APPLICANT** |
| | **-v-** |
| | ABACUS CALCULATORS (WA) PTY LTD |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER J L HARRISON |
| **DATE** | WEDNESDAY, 20 JULY 2005 |
| **FILE NO/S** | APPL 1415 OF 2004 |
| **CITATION NO.** | 2005 WAIRC 02103 |

**Result** Application to adjourn hearing granted

*Order*

WHEREAS this is an application pursuant to s29(1)(b)(i) and (ii) of the Industrial Relations Act 1979; and

WHEREAS the application was set down for hearing and determination on 5 August 2005; and

WHEREAS by letter received in the Commission on 5 July 2005 the respondent's representative requested an adjournment of the hearing as one of its key witnesses was unavailable to attend the hearing as he was interstate and the respondent also had another matter before the Commission on 4 August 2005 and that two matters in the same week would place a considerable strain on the respondent's resources; and

WHEREAS on 7 July 2005 the Commission wrote to the applicant's representative by way of facsimile and requested that he advise the Commission in writing of the applicant's response to the request to adjourn the hearing by no later than 4.00pm 11 July 2005, however no advice was received; and

WHEREAS in deciding wether the Commission should exercise its discretion to grant the adjournment and whether a refusal to adjourn would result in a serious injustice to one party (*Myers v Myers* (1969) WAR 19), the Commission is of the view that an adjournment should be granted as the respondent has satisfied the Commission that it will suffer a disadvantage due to the unavailability of a key witness and that two matters before the Commission in the same week could place a considerable strain on the respondent's resources;

NOW THEREFORE the Commission pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, and in particular s27(1), hereby orders:

THAT the application to adjourn the hearing scheduled for 5 August 2005 be and is hereby granted.

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

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**2005 WAIRC 02052**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES** NIGEL PENFOLD

**APPLICANT**

**-v-**

STONEHOUSE NOMINEES PTY LTD AS TRUSTEE FOR THE STONEHOUSE FAMILY TRUST

**RESPONDENT**

**CORAM** COMMISSIONER J H SMITH
**DATE** THURSDAY, 14 JULY 2005
**FILE NO/S** APPL 1548 OF 2004
**CITATION NO.** 2005 WAIRC 02052

**Result** Respondent's name substituted
**Representation**
**Applicant** In person
**Respondent** Mr M J Stonehouse

*Order*

Having heard Mr N Penfold on his own behalf and Mr M J Stonehouse 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, Seacode Nominees Pty Ltd as trustee for the Stonehouse Family Trust.

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

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**2005 WAIRC 02191**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES** NATASHA LEE HICKMOTT

**APPLICANT**

**-v-**

VOLONA AND ASSOCIATES

**RESPONDENT**

**CORAM** COMMISSIONER J H SMITH
**DATE** THURSDAY, 28 JULY 2005
**FILE NO/S** APPL 29 OF 2005
**CITATION NO.** 2005 WAIRC 02191

| | |
|---|---|
| **Result** | Respondent's name substituted |
| **Representation** | |
| **Applicant** | In person |
| **Respondent** | Ms K N Carter |

*Order*

Having heard Ms N L Hickmott on her own behalf and Ms K N Carter 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, Volona Nominees Pty Ltd trading as Volona College.

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

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**2005 WAIRC 02140**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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|---|---|
| **PARTIES** | MR PETER TROODE |
| | **APPLICANT** |
| | **-v-** |
| | WESTERN AUSTRALIAN FOOTBALL COMMISSION |
| | **RESPONDENT** |
| **CORAM** | SENIOR COMMISSIONER J F GREGOR |
| **DATE** | MONDAY 25TH JULY 2005 |
| **FILE NO.** | APPL 171 OF 2005 |
| **CITATION NO.** | 2005 WAIRC 02140 |

| | |
|---|---|
| **Result** | Directions & Discovery Order |

*Order*

WHEREAS on 16th February 2005 Peter Troode (the Applicant) applied to the Commission for an order pursuant to the *Industrial Relations Act, 1979;* and

WHEREAS the matter is listed for hearing and determination for 15th and 16th days of August 2005; and

WHEREAS on 1st July 2005 Counsel for the Western Australian Football Commission (the Respondent) requested a programming conference; and

WHEREAS on 5th July 2005 the Commission convened a conference for 21st July 2005 and having heard from Counsel for the Applicant and Counsel for the Respondent it decided to issue an order:

1. Evidence in chief in this matter be adduced by way of witness statements and oral evidence under oath.
2. A copy of any documents referred to in any witness statement which a party intends to rely upon be annexed to the witness statement.
3. Evidence in chief other than that contained in the witness statements may only be adduced by leave of the Commission.
4. The Applicant files and serves any witness statements which it intends to rely upon on or before 1 August 2005.
5. The Respondent files and serves any witness statements which it intends to rely upon on or before 8 August 2005.
6. The parties give notice to each other of any witnesses which they require to attend at the hearing of this matter for the purpose of cross-examination on or before 10 August 2005.
7. The parties file and serve any outline of submissions and any list of authorities which they intend to rely upon on or before 10 August 2005.
8. Discovery shall be given by the Applicant and Respondent by close of business on 28th July 2005 and the Respondent's discovery shall include the following documents or classes of documents:
    a. Any documentation of meetings of the management of the Respondent (including agendas, minute and resolutions) at which any f the following matters were discussed:
        i. The restructure of the umpiring division of the Respondent; and
        ii. Any redundancies of employees of the Respondent occurring in the 12 month period prior to 21 January 2005 including the quantum of redundancy payments made.
    b. Any records of payout figures for staff made redundant in the 12 month period prior to 21 January 2005 including any internal documents pertaining to redundancy generated by the Respondent's accounting staff.
    c. The organisation chart showing the staff structure of the respondent after 21 January 2005.
9. The parties have liberty to apply.

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

1. Evidence in chief in this matter be adduced by way of witness statements and oral evidence under oath.
2. A copy of any documents referred to in any witness statement which a party intends to rely upon be annexed to the witness statement.
3. Evidence in chief other than that contained in the witness statements may only be adduced by leave of the Commission.
4. The Applicant files and serves any witness statements which it intends to rely upon on or before 1 August 2005.
5. The Respondent files and serves any witness statements which it intends to rely upon on or before 8 August 2005.
6. The parties give notice to each other of any witnesses which they require to attend at the hearing of this matter for the purpose of cross-examination on or before 10 August 2005.
7. The parties file and serve any outline of submissions and any list of authorities which they intend to rely upon on or before 10 August 2005.
8. Discovery shall be given by the Applicant and the Respondent by close of business on 28 July 2005 and the Respondent's discovery shall include the following documents or classes of documents:
    a. Any documentation of meetings of the management of the Respondent (including agendas, minute and resolutions) at which any f the following matters were discussed:
        i. The restructure of the umpiring division of the Respondent; and
        ii. Any redundancies of employees of the Respondent occurring in the 12 month period prior to 21 January 2005 including the quantum of redundancy payments made.
    b. Records of payout figures for staff made redundant in the 12 month period prior to 21 January 2005 including any internal documents pertaining to redundancy generated by the Respondent's accounting staff.
    c. The organisation chart showing the staff structure of the respondent after 21 January 2005.
9. The parties have liberty to apply.

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

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**2005 WAIRC 02234**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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|---|---|
| **PARTIES** | THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING & KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH<br>**APPLICANT**<br>**-v-**<br>BHP BILLITON IRON ORE PTY LTD<br>**RESPONDENT** |
| **CORAM** | COMMISSIONER S WOOD |
| **HEARD** | FRIDAY, 15 JULY 2005 |
| **DELIVERED** | WEDNESDAY, 3 AUGUST 2005 |
| **FILE NO.** | APPL 338 OF 2005 |
| **CITATION NO.** | 2005 WAIRC 02234 |

| | |
|---|---|
| **CatchWords** | Interlocutory application for discovery - Production of documents |
| **Result** | Order for discovery |
| **Representation** | |
| **Applicant** | Mr D Schapper of Counsel |
| **Respondent** | Mr R Lilburne of Counsel |

*Reasons for Decision*

1 The Commission convened in conference on 15 July 2005 to hear various interlocutory applications by the parties. The applicant has sought leave to use the documents discovered in application C 233 of 2004, concerning incidents involving Mr Quince (39721) and Mr Johansen (39081 and 39082), for the purposes of hearing application 338 of 2005. Application 338 of 2005 seeks to incorporate certain classifications of employees into the Award. The applicant says that the application is made, in part, so that employees in these classifications can obtain the award conditions for breaks. The applicant says that these employees have no entitlement to breaks at present and this is an unsafe practice. The documents which the applicant seeks to use, it is said, go to establishing this point.

2 The respondent says that breaks are not an issue to be determined in application 338 of 2005. The documents were discovered for a different purpose and, that Mr Quince's classification of employment is not relevant to this matter (he being a track maintenance employee). Further that Mr Johansen's issues are raised directly in application C 106 of 2005, which is also before me, and it would be prejudicial for the Commission as constituted to deal with that material in this application.

3 I do not perceive the circumstances or classification of Mr Quince to be relevant to this application. The circumstances of Mr Johansen as they may relate to breaks in work are relevant. The applicant's outline of submissions at paragraph 37, at least, makes this apparent. I am not persuaded that there is any matter of prejudice to be dealt with at this time. I would grant leave and order that the Johansen documents as discovered in C 233 of 2004 be able to be used by the applicant in this matter.

4 The applicant seeks also an explanation from the respondent, on the record, of what increases were recently paid to employees under workplace agreements and the basis of the increase. The respondent opposes this request and says it is irrelevant for the purposes of the application what increases were paid. The respondent has disclosed in its outline of submissions the salary and schedule of work for those drivers. The applicant says the question of whether those employees should be covered by the award turns partly on what they are paid currently. The applicant maintains that in any event those employees are covered by the award. I do not consider, past the material disclosed by the respondent, that discovery as sought is necessary. This matter, if it need be pursued further is more for cross-examination and submission.

5 The respondent seeks an order that the following information be provided by the applicants:

1. the number of current employees that are eligible for membership of each of the applicant unions in each of the proposed classifications; and
2. the number of financial members (who are currently employed by the respondent) that each of the applicant unions has in each of the proposed classifications.

The applicant opposes providing this information and says that the employees' membership status is irrelevant.

6 In forming a view on this question I have had regard to the decision of the Full Bench in Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Branch v The Western Australian Hotels and Hospitality Association and Burswood Resort Hotel and Others (1995) 75 WAIG 1801. In that decision the Honourable President stated at 1805:

> "The purpose of documentary discovery is to provide each party to an action with access before trial to the relevant documents in the hands of his opponent, so avoiding trial by ambush, saving costs and encouraging settlement in proper cases."

7 This application concerns adding classifications of employees to seek the protection and benefit of the award. The question of standing and eligibility is raised directly in the outline of submissions by the respondent. Whether the applicants are eligible to enrol members in these categories of employment is relevant and is a matter for submission. Whether the applicants actually have enrolled members, given the absence of these categories of employment from the award, may be a factor to be weighed in the Commission exercising its discretion. However, I do not need to determine that at this point. I do not consider it necessary to order disclosure of the material sought to ensure a just hearing of the application. The respondent is able to deal with the matter in cross-examination or submission. The essential question is the eligibility to enrol.

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**2005 WAIRC 02275**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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|---|---|
| **PARTIES** | THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING & KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH |
| | **APPLICANT** |
| | **-v-** |
| | BHP BILLITON IRON ORE PTY LTD |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER S WOOD |
| **DATE** | FRIDAY, 5 AUGUST 2005 |
| **FILE NO.** | APPL 338 OF 2005 |
| **CITATION NO.** | 2005 WAIRC 02275 |

| | |
|---|---|
| **Result** | Direction issued |
| **Representation** | |
| **Applicant** | Mr D Schapper of Counsel |
| **Respondent** | Mr R Lilburne of Counsel |

*Order*

HAVING heard Mr D Schapper of Counsel on behalf of the applicant and Mr R Lilburne of Counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby directs:

(1) THAT leave be granted to the applicant to use the following documents relating to the Johansen incidents for the hearing of application 338 of 2005:

(a) Incident no. 39081 dated 01/04/04

(i) Incident report

(ii) ICAM report

(iii) ICAM notes

(iv) Disciplinary report

(v) Disciplinary notification letter (memorandum – Johansen)

(b) Incident no. 39082 dated 04/04/04

(i) Incident report

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

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**2005 WAIRC 02188**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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|---|---|
| **PARTIES** | SHARON JON PRUDHAM |
| | **APPLICANT** |
| | **-v-** |
| | DIRECTOR DAWN WELLER, THE GRADUATE COLLEGE OF DANCE |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER J H SMITH |
| **DATE** | THURSDAY, 28 JULY 2005 |
| **FILE NO/S** | APPL 550 OF 2005 |
| **CITATION NO.** | 2005 WAIRC 02188 |

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|---|---|
| **Result** | Respondent substituted |
| **Representation** | |
| **Applicant** | Mr L Gandini (of counsel) |
| **Respondent** | Mr D Hilditch on behalf of the Respondent and<br>Ms R Mayhew and Ms M Rinaldi on behalf of the Director General, Department of Education and Training |

*Order*

Having heard Mr Gandini of counsel on behalf of the Applicant, Mr Hilditch on behalf of the Respondent and Ms Mayhew and Ms Rinaldi on behalf of the Director General, Department of Education and Training, 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, Director General, Department of Education and Training.

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

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**2005 WAIRC 02102**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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|---|---|
| **PARTIES** | SUZAN LEES |
| | **APPLICANT** |
| | **-v-** |
| | LITE'N'EASY |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER S M MAYMAN |
| **DATE** | TUESDAY, 19 JULY 2005 |
| **FILE NO/S** | APPL 572 OF 2005 |
| **CITATION NO.** | 2005 WAIRC 02102 |

| | |
|---|---|
| **Result** | Change of name of respondent |
| **Representation** | |
| **Applicant** | Mr K. Trainer (as agent) |
| **Respondent** | Ms M. Briggs |

*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 the matter was listed for conference on 28 June 2005;

AND WHEREAS the Commission was advised at the conference that the respondent had been incorrectly named in the application;

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 hereby order -

THAT the name of the respondent be deleted and replaced by G.D. Mitchell Pty Ltd trading as Lite n'Easy

(Sgd.) S M MAYMAN,
[L.S.] Commissioner.

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**2005 WAIRC 02266**

**ENQUIRE INTO DISCIPLINARY ACTION**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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|---|---|
| **PARTIES** | THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS **APPLICANT** |
| | **-v-** |
| | BHP BILLITON IRON ORE PTY LTD **RESPONDENT** |
| **CORAM** | COMMISSIONER S WOOD |
| **DATE** | THURSDAY, 4 AUGUST 2005 |
| **FILE NO** | C 233 OF 2004 |
| **CITATION NO.** | 2005 WAIRC 02266 |

| | |
|---|---|
| **Result** | Application C 233 of 2004 divided |
| **Representation** | |
| **Applicant** | Mr D Schapper of Counsel |
| **Respondent** | Mr R Lilburne of Counsel |

*Order*

HAVING heard Mr D Schapper of counsel on behalf of the applicant and Mr R Lilburne of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders:

(1) THAT application C 233 of 2004 be divided into two parts to be numbered C 233 of 2004 and C 233A of 2004 respectively;

(2) THAT application C 233A of 2004 be that part of application C 233 of 2004 that relates to two incidents concerning Mr Johncock;

(3) THAT application C 233 of 2004 be that part of application C 233 of 2004 which relates to the general issue of alleged discrimination in disciplinary action between award and non-award engine drivers.

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

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**2005 WAIRC 02289**

**DISPUTE REGARDING MOVEMENT OF EMPLOYEE AND DECREASE IN WAGES**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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|---|---|
| **PARTIES** | LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH **APPLICANT** |
| | **-v-** |
| | CHUBB SECURITY **RESPONDENT** |
| **CORAM** | COMMISSIONER J L HARRISON |
| **DATE** | TUESDAY, 9 AUGUST 2005 |
| **FILE NO/S** | C 105 OF 2005 |
| **CITATION NO.** | 2005 WAIRC 02289 |

| | |
|---|---|
| **Result** | Interim Order Cancelled |

*Order*

WHEREAS an interim order was made on 21 June 2005 in respect to this matter regarding the employment of Mr David Cordes, pending the outcome of conciliation and/or arbitration in relation to this application; and

WHEREAS on 21 July 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 1979, hereby orders:

THAT the Interim Order delivered in this matter on 21 June 2005 be and is hereby cancelled.

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

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**2005 WAIRC 02114**

**A DISPUTE REGARDING ALTERATION OF STARTING TIME FOR A UNION EMPLOYEE**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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|---|---|
| **PARTIES** | LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH |
| | **APPLICANT** |
| | **-v-** |
| | SINGLETON EARLY LEARNING CENTRE |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER J L HARRISON |
| **DATE** | THURSDAY, 21 JULY 2005 |
| **FILE NO/S** | C 109 OF 2005 |
| **CITATION NO.** | 2005 WAIRC 02114 |

**Result** Interim Order issued

*Order*

WHEREAS on 22 June 2005 the Liquor, Hospitality and Miscellaneous Union, Western Australian Branch ("the applicant") applied to the Commission for a conference pursuant to s44 of the *Industrial Relations Act 1979* ("the Act") in relation to Singleton Early Learning Centre ("the respondent") changing the starting time of one of its members, Ms Stephanie Oakes; and

WHEREAS the Commission convened a conference on 1 July 2005 for the purpose of conciliating between the parties in relation to the dispute; and

WHEREAS at the conclusion of that conference the parties were given time to hold further discussions with a view to the parties reaching agreement about the hours to be worked by Ms Oakes; and

WHEREAS on 15 July 2005 the Commission convened a further conference for the purpose of a report back by the parties; and

WHEREAS at the conclusion of this conference the parties remained in dispute over Ms Oakes' hours of work and the applicant sought an interim order pending the hearing and determination of this matter; and

WHEREAS the Commission advised the parties that the issue of whether or not an interim order should issue pending arbitration of the issues in dispute would be dealt with by way of written submissions; and

WHEREAS the applicant requested that the Commission issue the following interim order:

> "That the Respondent re-instate Ms Oakes to the conditions as she was employed at the time of engagement, namely her commencement and finish time remain at 8.30am to 5.00pm for the period between when a decision is made in this interim application and when the matter is finally determined"

WHEREAS the applicant argued the following in support of its claim that an interim order should issue:

> Ms Oakes has been working from 8.30am to 5.00pm shifts since the commencement of her employment at the Centre in September 2003 and in December 2004 she was advised that her then employer was merging with another entity and that few changes would occur notwithstanding this merger. On 30 March 2005 Ms Oakes was advised by the respondent that her start time had been changed to 8.00am. The applicant argues that this change is not acceptable as Ms Oakes takes her children to school prior to commencing work as no-one else can assist her in this task and an 8.00am start would mean dropping the children at school at a time when they would be unsupervised.
>
> The applicant argues that the damage to the applicant in not granting the interim order sought will outweigh any damage to the respondent as Ms Oakes has a responsibility to care for her children and the respondent is a large employer and therefore should have no difficulty meeting Ms Oakes' requirements. The applicant also argues that the issuance of the interim order sought is not irreversible and the applicant has lodged this application promptly.

WHEREAS the respondent argued the following in support of its claim that an interim order should not issue:

> The respondent operates five rotational as follows:
>
> 6.30am – 3.00pm
>
> 8.00am – 4.30pm
>
> 8.30am – 5.00pm
>
> 9.00am – 5.30pm
>
> 9.30am – 6.00pm
>
> The respondent maintains that due to its operational needs employees are required to undertake rotating shifts within the timeframes set out above. As the respondent employs a number of employees who like Ms Oakes have external commitments it is not possible to allow Ms Oakes to work a permanent 8.30am to 5.00pm shift.
>
> The respondent offered Ms Oakes the opportunity to work two rotating shifts one of which was the 8.30am to 5.00pm shift however this was unacceptable to Ms Oakes.
>
> The respondent argues that if the order sought is granted there will be detriment to other staff and children and parents at the Centre as tensions currently exist about Ms Oakes being inflexible in relation to her roster.

WHEREAS the Commission is of the view that the matter before it is an industrial matter as it relates to Ms Oakes' rights as an employee; and

WHEREAS the Commission is of the view that it has jurisdiction to issue an interim order pursuant to s 44(6) of the Act in particular under s 44(6)(bb)(i) 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

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 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 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 order should issue based on the following preliminary views:-

> I find that the balance of convenience in relation to whether or not an interim order should issue lies with the applicant in this instance as I accept that Ms Oakes will find it difficult to meet her family responsibilities if an interim order does not issue, I find that this application was lodged within a reasonable timeframe after this dispute arose and I find that the consequences of issuing an interim order are not irreversible.
>
> On the information currently before me, it is my view that an interim order should issue but not in the terms proposed by the applicant. I accept that Ms Oakes has issues with the proposed variations to her start time and the impact that this will have on her children arriving safely at school and I take into account the necessity for the respondent to have rotating shifts to meet the personal demands on all staff. In the circumstances I therefore propose to order that on an interim basis Ms Oakes work a rotating roster of 8.30am to 5.00pm one week and a roster of 9.00am to 5.30pm the alternate week.

NOW THEREFORE I the undersigned pursuant to the powers conferred on me under the *Industrial Relations Act 1979* hereby orders:-

> THAT in the week commencing 25 July 2005 Ms Oakes work a normal shift of 8.30am to 5.00pm and in the following week Ms Oakes is to work a 9.00am to 5.30pm shift and that this alternating roster remain in place until the issues in dispute between the parties have been heard and determined.

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

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**2005 WAIRC 02278**

**A DISPUTE REGARDING ALTERATION OF STARTING TIME FOR A UNION EMPLOYEE**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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|---|---|
| **PARTIES** | LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH |
| | **APPLICANT** |
| | **-v-** |
| | SINGLETON EARLY LEARNING CENTRE |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER J L HARRISON |
| **DATE** | MONDAY, 8 AUGUST 2005 |
| **FILE NO/S** | C 109 OF 2005 |
| **CITATION NO.** | 2005 WAIRC 02278 |

| | |
|---|---|
| **Result** | Interim order cancelled |

*Order*

WHEREAS an interim order was made on 21 July 2005 in respect to this matter regarding the start time of Ms Stephanie Oakes, pending the hearing and determination of the issues in dispute; and

WHEREAS on 27 July 2005 the Commission was advised by the applicant that it wished to withdraw the application and requested that the interim order be revoked; and

WHEREAS on 28 July 2005 the respondent consented to the interim order being cancelled as at the close of business 5 August 2005;

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

THAT the Interim Order delivered in this matter on 21 July 2005 be and is hereby cancelled.

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

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**2005 WAIRC 02193**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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|---|---|
| **PARTIES** | PUBLIC TRANSPORT AUTHORITY |
| | **APPLICANT** |
| | **-v-** |
| | THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER J H SMITH |
| **DATE** | THURSDAY, 28 JULY 2005 |
| **FILE NO/S** | C 134 OF 2005 |
| **CITATION NO.** | 2005 WAIRC 02193 |

| | |
|---|---|
| **Result** | Interim order made |
| **Representation** | |
| **Applicant** | Ms J Bishop |
| **Respondent** | Mr G Ferguson |

*Order*

WHEREAS the Applicant filed on 28 July 2005 an application for an order under s 44 of the *Industrial Relation Act 1979* ("the Act") that the Respondent refrain from taking any industrial action;

AND WHEREAS on 28 July 2005 the Commission convened a conference pursuant to s 44 of the Act;

AND WHEREAS the application states:

1. The PTA and ARTBIU delegates Rostering Committee met during June to formulate a roster for the new Thornlie line, which is due to open August 7.
2. A list of ten issues were raised and presented to the PTA on 21 June. These issues were addressed, where possible, and the roster revised to accommodate demands.
3. The revised draft roster was distributed on June 30 and feedback requested by July 8.
4. Further revisions to the roster were made as the result of feedback received from July 9 to July 23. While not all requests could be accommodated, the roster provided for a number of gains in areas such as double manning and fatigue management.
5. The roster was posted by July 25, as planned. This is to be implemented August 7, in time for the opening of Thornlie.
6. Further meetings were held between the parties on Monday July 25 and Wednesday July 27. The PTA agreed to further discussions for the next roster and EBA negotiations, but pointed out that this roster has been posted and will run for only five weeks before the new Smart Rider roster is to be introduced. The PTA offered to guarantee the pay rate would not fall below the EBA rate, regardless of the aggregation that was derived from the Thornlie roster, if that was a concern for employees.
7. The ARTBIU issued no official confirmation of acceptance of the roster, and an unauthorised flyer was distributed on Tuesday July 26. This advertised a stopwork meeting from 4pm on Friday July 29, at the ARTBIU office.
8. The PTA seeks WAIRC conciliation in this matter as industrial action affecting transit guard services at this time would have a serious impact on railway security. In the event of the issues remaining unresolved, the PTA seeks an Order preventing industrial action on Friday and thereafter on this issue.

AND WHEREAS a flyer from the Respondent was distributed to its members that states a meeting for all transit guards who wish to attend is to be held by the Respondent on 29 July 2005 at 1600 hrs;

AND WHEREAS at the conference, the Commission was informed by the Respondent:

1. The Rules of Union require that it consult with its members in relation to matters that result in changes to working patterns and conditions;
2. The Transit Guards' Sub-Branch of the Union wishes to have discussions with its members about the roster that is to come into effect on 7 August 2005 and to seek endorsement or rejection of that roster by its members;
3. Because Transit Guards do not have breaks in work in common the only proper means of consulting their members is to convene a mass meeting of members;
4. The Union has no intention of engaging in industrial action on 30 or 31 July 2005;
5. The meeting has been set at 1600 hrs on 29 July 2005 because that is the time that least disruption to services will occur and is a time when most transit guards will be able to attend the meeting outside their rostered hours of work as some transit guards finish their shift at 1400 hrs or 1500 hrs and others commence at 1800 hrs;

AND WHEREAS the Applicant informed the Commission at the conference that it opposed a meeting being convened by the Union at 1600 hrs on Friday, 29 July 2005, as that is a time of peak demand for services by the public;

AND WHEREAS at the conference the Commission requested that the Applicant consider allowing the Union to convene a meeting at a time the Applicant says will cause least disruption to services, the Applicant informed the Commission that it would agree to a meeting being convened by the transit guard sub-branch on 14 August 2005, at and between 1230 hrs to 1400 hrs, whereby any transit guards who attend who are rostered to work during that period will be paid;

AND WHEREAS having considered the submissions made by the parties, the Commission considers that:

(a) the Union should have an opportunity to consult with its members about the new roster;

(b) it is not satisfied that a meeting should be convened until after the new roster commences on 7 August 2005;

(c) if the Union wishes to convene a meeting with its members who are not at work at the time of the scheduled meeting on 29 July 2005, the Union should be free to do so;

(d) whilst recognising the rights of the Union to consult its members, the Commission is of the opinion that it is not in the public interest to hold a meeting of transit guards during their shift until Sunday 14 August 2005;

NOW pursuant to the powers vested in it pursuant to s 44 of the Act and having regard to the public interest and the interest of the parties the Commission hereby orders that whilst this order remains in force:

(a) the Respondent, its officers, agents, employees and members are not to take any industrial action;

(b) the Respondent, its officers, agents, employees and members are required to ensure that continuity of passenger train and security services are not disrupted;

(c) the Respondent, its officer, agents and employees are to inform their members who are transit guards that:

(i) if the meeting scheduled for 1600 hrs on 29 July 2005 proceeds that any transit guard who is rostered to work between 1600 hrs and 1730 hrs should not attend;

(ii) a meeting of all transit guards is to be scheduled on 14 August 2005, on and between 1230 hrs to 1400 hrs; and

(iii) any transit guard who is rostered to work on 14 August 2005 on and between 1230 hrs to 1400 hrs will be paid;

(d) the Respondent, its officers, agents and employees are required to take steps which are practicable to inform its members who are transit guards of this order and direct its members who are transit guards to comply with this order no later than 1300 hrs on 29 July 2005;

(e) the Applicant is to post a copy of the order at all places at which transit guards work by 2100 hrs on 28 July 2005;

(f) this order will remain in force until 2400 hrs on 15 August 2005;

(g) there be liberty to both parties to apply to vary this order on 24 hours notice.

(Sgd.) J H SMITH,
Commissioner.

[L.S.]

## ENTERPRISE BARGAINING AGREEMENT—Notation of—

| Agreement Name/Number | Date of Registration | Parties | | Commissioner | Result |
|---|---|---|---|---|---|
| Baguleys Container Yard Rouse Head WA Certified Agreement 2004 AG 83/2005 | 25/07/2005 | The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch | Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch, Baguley Engineering | Senior Commissioner J F Gregor | Agreement Registered |
| Congregation of The Missionary Oblates of the Most Holy and Immaculate Virgin Mary Non-Teaching Staff Enterprise Bargaining Agreement 2004 AG 101/2005 | 4/08/2005 | Independent Education Union of Western Australia, Union of Employees, The Australian Nursing Federation, Industrial Union of Workers Perth, Liquor, Hospitality and Miscellaneous Union, Western Australia | (Not applicable) | Commissioner J L Harrison | Agreement Registered |
| Congregation of the Presentation Sisters WA Inc Non-Teaching Staff Enterprise Bargaining Agreement 2004 AG 112/2005 | 4/08/2005 | Independent Education Union of Western Australia, Union of Employees, The Australian Nursing Federation, Industrial Union of Workers Perth, Liquor, Hospitality and Miscellaneous Union, Western Australia | (Not applicable) | Commissioner J L Harrison | Agreement Registered |

| Agreement Name/Number | Date of Registration | Parties | | Commissioner | Result |
|---|---|---|---|---|---|
| Department of Industry and Resources Agency Specific Agreement 2005 PSAAG 16/2005 | 14/07/2005 | Director General, Department of Industry and Resources, Civil Service Association of Western Australia | (Not applicable) | Commissioner P E Scott | Agreement Registered |
| Department of Racing, Gaming and Liquor Agency Specific Agreement 2005 PSAAG 17/2005 | 14/07/2005 | Director General, Department of Racing, Gaming and Liquor, Civil Service Association of Western Australia | (Not applicable) | Commissioner P E Scott | Agreement Registered |
| E.D. Oates Pty Ltd Brushware Manufacturing Enterprise Agreement2005 AG 124/2005 | 3/08/2005 | Liquor, Hospitality and Miscellaneous Union, Western Australian Branch | E.D. Oates Pty Ltd Brushware Manufacturing | Commissioner P E Scott | Agreement Registered |
| Electorate and Research Employees General Agreement 2005 PSAAG 19/2005 | 14/07/2005 | The Hon Speaker of the Legislative Assembly, The Hon President of the Legislative Council, Civil Service Association of Western Australia | (Not applicable) | Commissioner P E Scott | Agreement Registered |
| Fire and Emergency Services Authority of Western Australia Agency Specific Agreement 2005 PSAAG 14/2005 | 15/07/2005 | Chief Executive Officer Fire & Emergency ServicesAuthority, Civil Service Association of Western Australia | (Not applicable) | Commissioner J L Harrison | Agreement Registered |
| Goodman Fielder Baking Buttercup Bakery Malaga (WA) Breadroom, Distribution and Maintenance Enterprise Agreement 2005 AG 120/2005 | 5/08/2005 | Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch | The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch, Quality Bakers Australia Ltd t/as Buttercup Bakeries -Malaga WA | Commissioner J L Harrison | Agreement Registered |
| Huhtamaki Australia Limited - Western Australian Site Enterprise Agreement 2003 AG 55/2004 | 30/11/2004 | Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch | Huhtamaki Australia Limited, The Shop, Distributive and Allied Employees' Association of Western Australia | Commissioner J L Harrison | Agreement Registered |
| Institute of the Blessed Virgin Mary Non-Teaching Staff Enterprise Bargaining Agreement 2004 AG 104/2005 | 4/08/2005 | Independent Education Union of Western Australia, Union of Employees, The Australian Nursing Federation, Industrial Union of Workers Perth, Liquor, Hospitality and Miscellaneous Union, Western Australia | (Not applicable) | Commissioner J L Harrison | Agreement Registered |
| John XXIII College Council Inc Teaching Staff Enterprise Bargaining Agreement 2004 AG 106/2005 | 4/08/2005 | Independent Education Union of Western Australia, Union of Employees, The Australian Nursing Federation, Industrial Union of Workers Perth, Liquor, Hospitality and Miscellaneous Union, Western Australia | (Not applicable) | Commissioner J L Harrison | Agreement Registered |
| LHMU - Buttercup Bakeries Malaga (WA) Bakehouse EnterpriseAgreement 2005 AG 100/2005 | 3/08/2005 | Liquor, Hospitality and Miscellaneous Union, Western Australian Branch | Quality Bakers Australia Ltd t/as Buttercup Bakeries -Malaga WA | Commissioner P E Scott | Agreement Registered |

| Agreement Name/Number | Date of Registration | Parties | | Commissioner | Result |
|---|---|---|---|---|---|
| Maico Enterprise Bargaining Agreement 2005-2008 AG 85/2005 | 27/07/2005 | The Plumbers and Gasfitters Employees' Union of Australia, West Australian Branch, Industrial Union of Workers | Maico Pty Ltd | Senior Commissioner J F Gregor | Agreement Registered |
| Main Roads CSA Enterprise Bargaining Agreement 2005 PSAAG 15/2005 | 14/07/2005 | The Commissioner of Main Roads Western Australia | Civil Service Association of Western Australia | Commissioner P E Scott | Agreement Registered |
| Mercy Hospital Mount Lawley, Maintenance Staff Enterprise Bargaining Agreement 2004 AG 98/2005 | 18/07/2005 | Mercy Hospital | Communications, Electrical, Electronic,Energy,Information, Postal, Plumbing, and Allied Workers Union of Australia, Engineering & Electrical Div. | Senior Commissioner J F Gregor | Agreement Registered |
| Methodist Ladies' College (Enterprise Bargaining) Agreement 2005 AG 86/2005 | 18/07/2005 | Methodist Ladies' College, Independent Schools Salaried Officers' Association | (Not applicable) | Commissioner J L Harrison | Agreement Registered |
| Metropolitan Cemeteries Board Agency Specific Agreement 2005 PSAAG 18/2005 | 14/07/2005 | Chief Executive Officer, Metropolitan Cemeteries Board, Civil Service Association of Western Australia | (Not applicable) | Commissioner P E Scott | Agreement Registered |
| Norbertine Canons Incorporated Non-Teaching Staff Enterprise Bargaining Agreement 2004 AG 113/2005 | 4/08/2005 | Independent Education Union of Western Australia, Union of Employees, The Australian Nursing Federation, Industrial Union of Workers Perth, Liquor, Hospitality and Miscellaneous Union, Western Australia | (Not applicable) | Commissioner J L Harrison | Agreement Registered |
| Office of the Auditor General Agency Specific Agreement 2005 PSAAG 5/2005 | 24/03/2005 | The Auditor General, Office of the Auditor General, Civil Service Association of Western Australia Incorporated | (Not applicable) | Commissioner J L Harrison | Agreement Registered |
| Parent Controlled Education Association Norhtern Suberbs INc. Teaching Employees (Enterprise Bargaining) Agreement 2004 AG 103/2005 | 18/07/2005 | Parent Controlled Christian Education Association Northern Suberbs Inc, Independent Education Union of Western Australia, Union of Employees, Liquor, Hospitality and Miscellaneous Union, Western Australia | (Not applicable) | Commissioner J L Harrison | Agreement Registered |
| Rafferty's Contracting Services /CFMEUW Industrial Agreement 2002-2005 AG 89/2005 | N/A | The Construction, Forestry, Mining and Energy Union of Workers | James William Rafferty T/A Rafferty's ContractingServices | Senior Commissioner J F Gregor | Agreement Discontinued |
| Roman Catholic Archbishop of Perth Inc Non-Teaching Staff Enterprise Bargaining Agreement 2004 AG 115/2005 | 4/08/2005 | Independent Education Union of Western Australia, Union of Employees, The Australian Nursing Federation, Industrial Union of Workers Perth, Liquor, Hospitality and Miscellaneous Union, Western Australia | (Not applicable) | Commissioner J L Harrison | Agreement Registered |

| Agreement Name/Number | Date of Registration | Parties | | Commissioner | Result |
|---|---|---|---|---|---|
| Roman Catholic Bishop of Broome Inc Non-Teaching Staff Enterprise Bargaining Agreement 2004 AG 102/2005 | 4/08/2005 | Independent Education Union of Western Australia, Union of Employees, The Australian Nursing Federation, Industrial Union of Workers Perth, Liquor, Hospitality and Miscellaneous Union, Western Australia | (Not applicable) | Commissioner J L Harrison | Agreement Registered |
| Roman Catholic Bishop of Bunbury Inc Non-Teaching Staff Enterprise Bargaining Agreement 2004 AG 105/2005 | 4/08/2005 | Independent Education Union of Western Australia, Union of Employees, The Australian Nursing Federation, Industrial Union of Workers Perth, Liquor, Hospitality and Miscellaneous Union, Western Australia | (Not applicable) | Commissioner J L Harrison | Agreement Registered |
| Roman Catholic Bishop of Geraldton Non-Teaching Staff Enterprise Bargaining Agreement 2004 AG 110/2005 | 4/08/2005 | Independent Education Union of Western Australia, Union of Employees, The Australian Nursing Federation, Industrial Union of Workers Perth, Liquor, Hospitality and Miscellaneous Union, Western Australia | (Not applicable) | Commissioner J L Harrison | Agreement Registered |
| Servite College Council Inc Non-Teaching Staff Enterprise Bargaining Agreement 2004 AG 117/2005 | 4/08/2005 | Independent Education Union of Western Australia, Union of Employees, The Australian Nursing Federation, Industrial Union of Workers Perth, Liquor, Hospitality and Miscellaneous Union, Western Australia | (Not applicable) | Commissioner J L Harrison | Agreement Registered |
| Sisters of Mercy Perth (Amalgamated) Inc Non-Teaching Staff Enterprise Bargaining Agreement 2004 AG 116/2005 | 4/08/2005 | Independent Education Union of Western Australia, Union of Employees, The Australian Nursing Federation, Industrial Union of Workers Perth, Liquor, Hospitality and Miscellaneous Union, Western Australia | (Not applicable) | Commissioner J L Harrison | Agreement Registered |
| Sisters of Mercy West Perth Congregation Non-Teaching Staff Enterprise Bargaining Agreement 2004 AG 114/2005 | 4/08/2005 | Independent Education Union of Western Australia, Union of Employees, The Australian Nursing Federation, Industrial Union of Workers Perth, Liquor, Hospitality and Miscellaneous Union, Western Australia | (Not applicable) | Commissioner J L Harrison | Agreement Registered |
| Sisters of The Good Shepherd Inc Non-Teaching Staff Enterprise Bargaining Agreement 2004 AG 107/2005 | 4/08/2005 | Independent Education Union of Western Australia, Union of Employees, The Australian Nursing Federation, Industrial Union of Workers Perth, Liquor, Hospitality and Miscellaneous Union, Western Australia | (Not applicable) | Commissioner J L Harrison | Agreement Registered |

| Agreement Name/Number | Date of Registration | Parties | | Commissioner | Result |
|---|---|---|---|---|---|
| Sisters of The Holy Family of Nazareth Non-Teaching Staff Enterprise Bargaining Agreement 2004 AG 109/2005 | 4/08/2005 | Independent Education Union of Western Australia, Union of Employees, The Australian Nursing Federation, Industrial Union of Workers Perth, Liquor, Hospitality and Miscellaneous Union, Western Australia | (Not applicable) | Commissioner J L Harrison | Agreement Registered |
| The Children's Hospital Child Care Centre Association Inc Enterprise Bargaining Agreement 2004 AG 84/2005 | 3/08/2005 | Liquor, Hospitality and Miscellaneous Union, Western Australian Branch | The Children's Hospital Child Care Centre Association Inc. | Commissioner P E Scott | Agreement Registered |
| Trustees of the Christian Brothers in WA Inc Non-Teaching Staff Enterprise Bargaining Agreement 2004 AG 111/2005 | 4/08/2005 | Independent Education Union of Western Australia, Union of Employees, The Australian Nursing Federation, Industrial Union of Workers Perth, Liquor, Hospitality and Miscellaneous Union, Western Australia | (Not applicable) | Commissioner J L Harrison | Agreement Registered |
| Trustees of the Marist Brothers Southern Province Non-Teaching Staff Enterprise Bargaining Agreement 2004 AG 108/2005 | 4/08/2005 | Independent Education Union of Western Australia, Union of Employees, The Australian Nursing Federation, Industrial Union of Workers Perth, Liquor, Hospitality and Miscellaneous Union, Western Australia | (Not applicable) | Commissioner J L Harrison | Agreement Registered |

# INDUSTRIAL AGREEMENTS—BARGAINING—
# Matters dealt with—

**2005 WAIRC 02277**

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 AND THE 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** MONDAY, 8 AUGUST 2005
**FILE NO.** APPL 1228 OF 2003
**CITATION NO.** 2005 WAIRC 02277

**Catchwords** Enterprise order – Jurisdiction – Whether requirement to be a party to an Industrial Agreement before discretion can be exercised to issue Enterprise order – Industrial Agreement not a pre-condition to issuing Enterprise Order – Jurisdiction found – Matter remitted back from Full Bench for further hearing and determination in relation to wage rate in Enterprise Order – Wage rate found to be fair and reasonable – Industrial Relations Act 1979 (WA) s 6; s 27(1)(u); s 42 s 42D; s 42E; s 42F; s 42G; s 42I(1)(c)

| | |
|---|---|
| **Result** | Jurisdiction found. Order issued to reinstate the operation of the enterprise order that issued on 2 March 2004. |
| **Representation** | |
| **Applicant** | Mr T Pope (as agent) |
| **Respondent** | Mr T H F Caspersz (of counsel) and Ms L J Nickels (of counsel) |

*Reasons for Decision*

1 On 16 September 2004 the Full Bench suspended the operation of the enterprise order that issued on 2 March 2004 between the Shop, Distributive and Allied Employees' Association of Western Australia ("the SDA"), the Food Preservers' Union of Western Australia, Union of Workers ("the FPU"), the Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch ("the TWU") and Sealanes (1985) Pty Ltd and remitted the matter back to the Commission as currently constituted to hear and determine according to law and the reasons for decision of the Full Bench (see *Sealanes (1985) Pty Ltd v Shop, Distributive and Allied Employees' Association of Western Australia and Others* [2004] 84 WAIG 3158).

2 After the matter was remitted back to the Commission the applicants requested that further proceedings in relation to this matter be put on hold as they were having discussions with the respondent with a view to reaching a settlement. On 23 March 2005 the SDA advised the Commission that no agreement had been reached between the parties and requested that the matter be listed for hearing and determination. A conference was then held to deal with preliminary issues and the Commission advised the parties on 12 May 2005 that the matter would be set down for hearing and determination on 27 and 28 June 2005.

3 On 20 May 2005 the respondent wrote to the Commission claiming that the Commission lacked jurisdiction to deal with this application given its views on the meaning of s42I(1)(c) of the *Industrial Relations Act 1979* ("the Act"). As well as maintaining that the Commission had no power to deal with this matter the respondent argued that given the novelty of this section and other recently inserted provisions into the Act relating to the issuance of enterprise orders that it was in the public interest that this issue of statutory interpretation be referred to the Full Bench for determination pursuant to s27(1)(u) of the Act.

4 After considering the respondent's application, that with the consent of the President the Full Bench hear and determine the question of law raised by the respondent, the Commission informed the parties that the Commission was of the view that a referral pursuant to s27(1)(u) of the Act was not warranted in this instance and that reasons for reaching this conclusion would follow. I now elaborate on the reasons for reaching this conclusion. It is my view that the issue of interpretation raised by the respondent in relation to s42I(1)(c) of the Act is not of such significance that it should be referred, with the consent of the President, to the Full Bench for hearing and determination. It is the case that not all questions involving statutory interpretation, even when they involve recently inserted provisions of the Act, will be referred to the Full Bench for determination in all instances. Further, the Commission is frequently required to interpret provisions contained in the Act, including recent changes, and apply these provisions to a range of circumstances. Even though the sections of the Act relating to the issuance of enterprise orders is a recent addition to the Act, I find that in this instance the issue raised by the respondent, that is the interpretation of s42I(1)(c) within the context of Part II Division 2B of the Act and the provisions of the Act as a whole, is not of such novelty, significance or complexity that warrants referral to the President, and if acceptable to him, the Full Bench.

Jurisdiction

5 After considering the written submissions of the parties in relation to whether or not the Commission had jurisdiction to deal further with this application an order issued on 20 June 2005 that the Commission had jurisdiction to deal with this application and the parties were advised that reasons for decision would issue at a later date. A summary of the parties' submissions and my reasons for decision now follow.

Submissions

Respondent

6 As I apprehend the respondent's submissions, its position can be summarised as follows. The respondent submits that on a proper reading of the terms of s42I(1)(c) of the Act the proposed parties to an enterprise order must have been parties to an industrial agreement before the Commission can exercise its discretion to issue an enterprise order. The respondent argues that as the parties to the enterprise order being sought in this instance were not parties to any previous industrial agreement the Commission is therefore without jurisdiction to exercise its discretion to make any enterprise order. The respondent argues that given the terms of s42I(1)(c) the existence of an industrial agreement is a matter of jurisdictional fact before the Commission's discretion under section 42I(1)(c) is enlivened to make and include anything in an enterprise order (see *Corporation of the City of Enfield v Development Assessment Commissions* [2000] 199 CLR 135 at 148) and that as no prior industrial agreement was in existence between the proposed parties to the enterprise order the Commission is unable to issue any enterprise order in this instance.

7 Section 42I(1)(c) reads as follows:

> "the Commission may, upon an application under subsection (2), make an order (an **"enterprise order"**) —
>
> (c) providing for any matter that might otherwise be provided for in an industrial agreement to which the negotiating parties referred to in paragraph (a), or the initiating party and the person referred to in paragraph (b), were parties, irrespective of the provisions of any award, order or industrial agreement already in force; and"

The respondent maintains that when properly construing the words contained in this section the reference to the word "were" in s42I(1)(c) should be interpreted in the past tense and in this context the provision therefore requires that an industrial agreement must have been in place between the parties before the Commission can exercise its discretion to make an enterprise order.

8 The respondent submits that its interpretation of s42I(1)(c) is consistent with Part II Division 2B of the Act and a number of the objects of the Act. The respondent maintains that when Part II Division 2B of the Act is reviewed in its entirety there is no ambiguity about the sense in which the word "were" is used. The respondent argues that Part II Division 2B of the Act provides a mechanism to assist parties to reach agreement about terms and conditions of employment and that implicit in the provisions of this division of the Act is that when a party does not conclude an industrial agreement with another party it should not be forced to accept the terms of an enterprise order. The respondent specifically relies on s42E of the Act which

allows the Commission to assist parties to bargain and, except as provided in section 42G, the Commission cannot require a negotiating party to enter into an industrial agreement unless it is with the consent of the negotiating parties. The respondent argues that when s42E and s42G are read together the Commission cannot arbitrate matters to be included in an enterprise order during a bargaining period without the consent of the parties. Additionally, s42D requires the parties to bargain in good faith but does not require a negotiating party to agree on anything or to enter into an industrial agreement. The respondent therefore maintains that it would be inconsistent with s42D, s42E, s42F and s42G of the Act to construe s42I(1)(c) as giving the Commission the power to issue an enterprise order when nothing has previously been agreed between the negotiating parties. The respondent thus argues that if the Commission arbitrated all of the terms of an enterprise order under s42I(1) of the Act and binds a party which had no intention of entering into an industrial agreement this would offend a number of the provisions within this division of the Act.

9 The respondent argues that its interpretation of s42I(1)(c) is consistent with a number of the objects outlined in s6 of the Act including objects (aa) through to (ag) and in particular objects (ad) and (ae).

Applicants

10 The applicants contend that the Commission has jurisdiction to deal with this application. The applicants maintain that the provisions of Part II Division 2B of the Act detail the procedure to assist collective bargaining between negotiating parties and that where there is no agreement between the parties the Commission has the power to exercise its discretion and issue an enterprise order whether or not an industrial agreement previously existed between the negotiating parties. The applicants maintain that the provisions of Part II Division 2B of the Act provide that if collective bargaining between negotiating parties fails and an agreement cannot be reached the Commission may arbitrate the matter and issue an enterprise order and the only precondition to the making of an enterprise order is a situation where the parties cannot reach agreement.

11 The applicants argue that on a proper reading of the terms of s42I(1)(c) of the Act there is no limitation on the Commission issuing an enterprise order in this instance.

12 The applicants rely on the second reading speech of the Honourable Minister for Consumer and Employment Protection, Mr John Kobelke on 19 February 2002 when Part II Division 2B was incorporated into the Act, specifically that part of the speech which refers to the Commission's role when bargaining between negotiating parties fails and an agreement between the parties cannot be reached and the applicants maintain that as there is no reference in the Minister's speech to the necessity of the existence of an industrial agreement between the negotiating parties existing prior to bargaining commencing this supports its interpretation of s42I(1)(c).

**Findings and Conclusions**

13 After carefully considering the parties' submissions I conclude that on a proper reading of the provisions of s42I(1)(c) of the Act and when reviewing this section in the context of Part II Division 2B of the Act that the Commission is not precluded from dealing further with this application in this instance.

14 The provisions of Part II Division 2B of the Act provide a mechanism for bargaining to be initiated between parties with a view to reaching agreement, it details the Commission's powers to assist parties during the bargaining process and it gives the Commission power to exercise its discretion to issue an enterprise order if appropriate to do so if no agreement is reached between the parties.

15 Section 42I of the Act provides as follows:

> **"42I. Commission may make enterprise orders**
>
> (1) If —
>
> (a) the Commission declares under section 42H that bargaining has ended between negotiating parties; or
>
> (b) the person to whom a notice is given under section 42(1) does not respond to the notice within the prescribed period or responds with a refusal to bargain,
>
> the Commission may, upon an application under subsection (2), make an order (an **"enterprise order"**) —
>
> (c) providing for any matter that might otherwise be provided for in an industrial agreement to which the negotiating parties referred to in paragraph (a), or the initiating party and the person referred to in paragraph (b), were parties, irrespective of the provisions of any award, order or industrial agreement already in force; and
>
> (d) that the Commission considers is fair and reasonable in all of the circumstances.
>
> (2) An application for an enterprise order may be made —
>
> (a) where subsection (1)(a) applies —
>
> (i) if the negotiating party in respect of whom the declaration was made is not an organisation or association of employers, by the negotiating party; and
>
> (ii) if the negotiating party in respect of whom the declaration was made is an organisation or association of employers, by an employer who is a member of the negotiating party;
>
> and
>
> (b) where subsection (1)(b) applies —
>
> (i) if the initiating party is not an organisation or association of employers, by the initiating party;
>
> (ii) if the initiating party is an organisation or association of employers, by an employer who is a member of the initiating party.
>
> (3) An application for an enterprise order may be made —
>
> (a) where subsection (1)(a) applies, within 21 days after the making of the declaration; and
>
> (b) where subsection (1)(b) applies, within 21 days after the end of the prescribed period.
>
> (4) Without limiting section 32A, the Commission may exercise its powers of conciliation in relation to a matter even if an application for an enterprise order has been made in relation to the same matter."

16 Section 42I(1) of the Act provides that the Commission may exercise its discretion to issue an enterprise order once the Commission has declared that bargaining has ended between the negotiating parties or if a person to whom a notice is given under s42(1) does not respond to the notice or refuses to bargain.

17 Section 42I also provides that once the preconditions of s42I(1)(a) or (b) are met then, upon an application being made under subsection 2, the Commission may make an order for an enterprise order providing for any matter that otherwise may have been provided for in an industrial agreement to which the negotiating parties were parties and any matter that the Commission considers fair and reasonable in the circumstances as outlined in s42I(1)(c) and (d). It is my view that the provisions of s42I(1)(c) and (d) of the Act outline the parameters of what the Commission can include in an enterprise order and these sections provide that the Commission can make an enterprise order including any matter that might otherwise have been included in an industrial agreement to which the negotiating parties were parties and any other provisions that the Commission considers fair and reasonable once the pre-conditions of s42I(1)(a) and (b) are met. It is in this context that I find that the reference in s42I(1)(c) of the Act to the Commission being able to make an enterprise order providing for matters contained in an industrial agreement to which the negotiating parties were parties refers to the particular industrial matters that the Commission may consider to be included in an enterprise order when deciding which specific matters should be included in an enterprise order. Given this interpretation it follows and I find that the terms of s42I(1)(c) of the Act do not require that an industrial agreement must have been in place between the negotiating parties as a precondition to the Commission exercising its discretion to issue an enterprise order.

18 I reject the respondent's arguments that the terms of s42D, s42E and s42F lend weight to its interpretation of s42I(1)(c). These sections relate to the Commission's role in assisting parties to reach agreement about the terms of an industrial agreement which is a different process to deciding the terms of an enterprise order once negotiations between parties have been unsuccessful. Even though s42G of the Act enables the Commission to make orders in relation to negotiating parties when the negotiating parties agree to the Commission making an order as to specified matters on which agreement has not been reached, this section of the Act relates to circumstances where the negotiating parties have been able to reach agreement on some matters but not all matters.

19 I find that my interpretation of s42I(1)(c) is consistent with the provisions of s42 of the Act which deals with the initiation of bargaining for an industrial agreement which is the first step in the process towards the possible issuance of an enterprise order.

20 Section 42 of the Act reads as follows:

> "(1) Bargaining for an industrial agreement may be initiated by an organisation or association of employees, an employer or an organisation or association of employers giving to an intended party to the agreement a written notice that complies with subsection (3).
>
> …
>
> (4) If there is no applicable industrial agreement or enterprise order in force, bargaining may be initiated under subsection (1) at any time.
>
> (5) If there is an applicable industrial agreement or an applicable enterprise order in force, bargaining must not be initiated under subsection (1) earlier than 90 days before the nominal expiry date of the agreement or order."

There is no reference in this section to parties which initiate bargaining for an industrial agreement having to have been parties to a previous industrial agreement and the terms of s42(4) contemplate that the negotiating parties may not have been parties to an industrial agreement.

21 His Honour the President recently outlined the requirements on the Commission in relation to s42I(1) of the Act (see *Sealanes (1985) Pty Ltd and The Shop, Distributive and Allied Employees' Association of Western Australia and Others* [op cit]). At 3167 of this decision His Honour the President stated the following in relation to s42I(1)(c) of the Act:

> "The Commission is required by the provisions to do the following:-
>
> (a) Consider whether it should make an order providing for any matter that might otherwise be provided for in an industrial agreement to which the negotiating parties refer to in paragraph (a).
>
> (b) Consider whether to make an order, that is an enterprise order, providing for any matter that might otherwise be provided for in an industrial agreement to which the initiating party and the person to whom the notice was given under s42(1), namely Sealanes in this case, were parties.
>
> (c) The Commission is empowered to do so irrespective of the provisions of any award, order or industrial agreement already in force.
>
> (d) The Commission is further required to make an order that is fair and reasonable in all the circumstances. (It follows (see *Hanssen Pty Ltd v CFMEU* (FB) (op cit)), that if it is not fair and reasonable to make an order then the Commission does not make one). Further, it is a requirement that the Commission make an order which contains terms which are fair and reasonable in all of the circumstances."

In my view this summary of the requirements on the Commission under s42I(1)(c) of the Act supports the conclusion I have reached as there is no necessity that a prior industrial agreement between the parties be in existence as a pre-requisite to the Commission exercising its discretion to issue an enterprise order.

22 If there is any doubt as to the meaning and intent of legislation it is appropriate to review the intent of the legislators. I refer to the second reading speech of the Honourable Minister for Consumer and Employment Mr Kobelke on 19 February 2002 in relation to the changes to the Act incorporating the making of enterprise orders. There is no reference in this speech that an enterprise order can only issue if negotiating parties have already been successful in reaching agreement by consent on the terms of an industrial agreement. Further, in this speech Mr Kobelke stated the following:

> "When a party has refused to bargain, or when the commission has terminated bargaining, parties may apply to the commission to make an enterprise order. An enterprise order will be able to include all matters that were the subject of negotiation or that would normally appear in an industrial agreement, (my emphasis) subject to the usual constraints on the commission's jurisdiction. It will be limited to a maximum nominal term of two years."
>
> (Hansard 19 February 2002 Page 7515)

23 The Labour Relations Reform Bill 2002 Explanatory Memorandum (specifically paragraphs 108, 109, 122 and 123) confirms that an enterprise order can include matters that would normally be in an industrial agreement between negotiating parties and this memorandum does not refer to the necessity for the prior existence of an industrial agreement being a pre-condition to an enterprise order issuing. The relevant paragraphs of the Explanatory Memorandum read as follows:

"108. Bargaining will be initiated by the provision of a notice containing details about the proposed agreement such as the employees it will cover and its area of operation. A notice initiating bargaining will be able to be issued up to 90 days prior to the expiry of a current industrial agreement to allow the parties time to reach agreement prior to the nominal expiry date of the current agreement.

109. Where there is no industrial agreement, (my emphasis) good faith bargaining may commence at any time.

122. While the purpose of the good faith bargaining provisions is to provide all possible assistance to the parties to reach agreement without third party intervention, the Commission will be empowered on application to arbitrate an outcome in the form of an enterprise order where it ends bargaining. The Commission will also be empowered to arbitrate an outcome where a party has refused to bargain as prescribed, in which case the aggrieved party may apply to the Commission for an enterprise order. (my emphasis)

123. An enterprise order will be able to include all matters which were the subject of negotiation or that would normally appear in an industrial agreement, (my emphasis) subject to the usual constraints on the Commission's jurisdiction. It will be limited to a maximum nominal term of 2 years. Only a single employer will be allowed to be party to an enterprise order. Organisations of associations of employers will not be able to be a party to an enterprise order."

24 The Commission is bound to take into account the objects of the Act, including object 6(c) of the Act which reads as follows:

"(c) to provide means for preventing and settling industrial disputes not resolved by amicable agreement, including threatened, impending and probable industrial disputes, with the maximum of expedition and the minimum of legal form and technicality;"

In my view this object contemplates the Commission having the power to settle disputes and arbitrate matters that cannot be agreed between the parties or where a party to a dispute refuses to negotiate as was the case in this instance.

25 As I have found that the respondent has not demonstrated that the Commission lacks jurisdiction to deal with this application the respondent's application to dismiss this application for want of jurisdiction shall be and is hereby dismissed.

Terms of the Enterprise Order

26 In its reasons for decision that issued on 13 September 2004 the majority of the Full Bench held that there was insufficient detail in my initial reasons for decision as to why I had formed the view that a $100.00 per week increase in the wage rate of each employee the subject of the enterprise order should be included in the enterprise order nor were adequate reasons given as to whether or not the flexibilities contained in the enterprise order delivered real gains to the respondent in return for this wage increase. The majority of the Full Bench also stated that the extent to which the significant flexibilities included in the enterprise order are to be used by the appellant was a significant factor in evaluating whether or not the enterprise order was fair and reasonable in all of the circumstances.

27 After the operation of the enterprise order was suspended and this application was remitted back to the Commission the parties were invited to provide further submissions and evidence in relation to the issues raised by the Full Bench and did so on 27 June 2005.

Applicants' evidence

28 The applicants rely on a summary of hours worked by employees who were subject to the terms and conditions of the enterprise order, from 2 March 2004 to the end of June 2005 which was prepared by the respondent (Exhibits A1 and A2). The SDA's Assistant Secretary and an official of the FPU, Mr Martin Pritchard, maintained that these records demonstrate that the enterprise order delivered significant flexibilities and savings to the respondent. Mr Pritchard argues that Exhibits A1 and A2 confirm that after the enterprise order issued on 2 March 2004 employees worked a significant number of ordinary hours outside of the normal span of hours as provided for in the Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977 No R32 of 1976 ("the SDA Award"), the Food Industry (Food Manufacturing or Processing) Award No A20 of 1990 ("the FPU Award") and the Transport Workers (General) Award No 10 of 1961 ("the TWU Award") ("the Awards"). Mr Pritchard also maintained that the records confirm that significant financial gains were delivered to the respondent as a result of the shift patterns worked by employees.

29 Mr Pritchard tabled schedules prepared by the applicants which he maintained quantified the direct savings to the respondent arising from the enterprise order in relation to the hours worked by employees after the enterprise order issued. Mr Pritchard stated that these schedules quantify savings to the respondent as a result of a reduction in the shift allowance rate, savings due to the non-application of penalty rates when an employee works on a Saturday, and savings when employees commence work at 6.00am as opposed to a 6.30am Monday to Friday and a 7.00am start on Saturday for employees employed under the SDA Award (eight employees). Mr Pritchard also tabled a summary he prepared comparing flexibilities delivered under the enterprise order in relation to a number of clauses which he maintained were of benefit to the respondent when compared with the requirements of similar clauses contained in the Awards (Exhibit A3).

Applicants' submissions

30 The applicants submit that the enterprise order which issued on 2 March 2004 contained flexibilities which were intended to and did deliver significant financial benefits to the respondent (see Exhibits A1 and A2). The applicants argue that the enterprise order allows the respondent to require an employee to work up to 57 hours in any week at ordinary time pay rates without attracting overtime payments and the respondent can require an employee to work a maximum of 9.5 hours a day and be paid at ordinary time rates, compared to working 7.6 ordinary hours per day under the Awards, which results in up to an additional 21 hours of ordinary time available to the respondent per week. Additionally as these hours can be worked by employees Monday to Saturday without attracting overtime rates this can result in savings to the respondent of up to $213.75 per week per employee. The applicants argue that the 5% discount on shift loadings contained in the enterprise order is a gain to the respondent of between $28.00 and $42.00 per employee per week, depending on the employee's classification and the enterprise order provides that the 20% night shift loading only applies to hours actually worked which is a saving to the employer directly proportional to the hours not worked in a normal shift. As the enterprise order provides for the commencement of work at 6.00am and not 6.30am as provided for under the SDA Award this is an extra half hour of work available to the respondent which does not attract an overtime loading and a similar gain applies for one hour when an employee previously employed under the SDA Award, commences work at 6.00am on a Saturday. The applicants argue that the enterprise order provides for greater efficiency and flexibility as rosters can be fixed by agreement with employees compared with the requirement under the SDA Award that one month's notice is necessary to change an employee's roster. The applicants argue that the totality of these direct savings to the respondent is much greater than the $100.00 per week wage increase which was granted to each employee under the enterprise order.

31 In addition to direct savings delivered to the respondent under the enterprise order the applicants argue that there are other flexibilities contained in the enterprise order which are of benefit to the respondent, specifically Clause 12 - Performance and Development, Clause 6 – Sunday Work and Clause 8 – Part Time Employees.

32 The applicant maintains that the respondent requires the flexibilities specified in the enterprise order as they are also included in the Australian Workplace Agreement ("the AWA") in operation at the respondent's premises.

33 As a result of these direct and indirect savings which are available to the respondent under the enterprise order and were delivered to the respondent and used by it subsequent to the enterprise order issuing, the applicants argue that the $100.00 per week wage increase provided for in the enterprise order is fair and reasonable.

Respondent's submissions

34 The respondent did not call any evidence.

35 The respondent argues that there is no reason for the Commission to grant employees the subject of the enterprise order a wage increase of $100.00 per week and the respondent maintains that the Commission should take particular note of Mr Power's evidence, which was accepted by the Commission, that the flexibilities contained in the enterprise order were not going to be fully utilised by the respondent.

36 The respondent argues that when determining what is fair and reasonable to be included in an enterprise order the Commission should take into account the State Wage Fixing principles.

37 The respondent argues that immediate, significant and substantial productivity gains for the respondent must be available under the enterprise order to justify any wage increase and in this instance there was no evidence that there would be productivity returns to the respondent sufficient to justify the payment of $100.00 per week to each employee based on the evidence before the Commission at first instance, which is the only evidence the Commission can take into account when deciding this issue.

38 The respondent argues that it was open for the Commission to find on the evidence that the hours and overtime flexibilities contained in the enterprise order were not wanted by the respondent, there was no evidence of any significant or substantial productivity returns that would be delivered to the respondent from the flexibilities included in the enterprise order and there was no evidence that there would be any productivity gains to the respondent in the context of its operations. The respondent argues that as a result no wage increase should be granted to the employees the subject of the enterprise order.

39 The respondent maintains that when deciding on any wage increase the Commission should take into account that the respondent operates on a small profit margin, there are additional costs which accompany increased wages such as superannuation and workers' compensation costs and that an award of an extra $100.00 per week would create dissatisfaction in the respondent's workplace as the respondent would have to pay this increase to employees whose employment was governed by the terms of an AWA.

40 The respondent argues that when comparing a number of clauses in the enterprise order (specifically Clauses 2, 3, 4, 5, 6, 8, 11 and 18) with similar clauses in the Awards that the applicants' claim that these clauses in the enterprise order deliver flexibilities was not made out.

41 The respondent argues that in all of the circumstances it was not fair and reasonable to make any enterprise order or in the alternative, to provide a wage increase of an extra $100 per week or any wage increase at all.

**Findings and Conclusions**

42 I am required to determine whether or not a wage increase of $100.00 per week is an appropriate quantum to award employees covered by the enterprise order and a fair and reasonable amount in all of the circumstances of this case and in deciding whether or not this amount should be awarded to employees I am required to determine whether or not the terms of the enterprise order delivers real gains to the respondent which will be utilised by the respondent.

43 After considering the evidence and submissions of the parties at first instance I determined that it was appropriate to exercise my discretion to issue an enterprise order and that it was fair and reasonable to include a wage increase of $100.00 per week for each employee covered by the terms of the enterprise order. In reaching the decision I found that it was appropriate to issue an enterprise order after taking into account the respondent's financial position at the time, the fact that a substantial percentage of the respondent's workforce was covered by AWAs and I determined that the terms of the enterprise order did not offend the State Wage Fixing Principles. In determining that a wage increase of $100.00 was an appropriate quantum to be paid to each employee, I stated in my Reasons for Decision that I had reached this conclusion on the basis that the provisions of most of the clauses contained in the enterprise order were in the same or similar terms as the clauses of the AWA in place at the respondent's premises and that as a result of these common clauses the respondent had the benefit of a more efficient and productive workplace (see Clauses 1, 3, 4, 10, 11, 13, 14, 15, 16, and 17 of the enterprise order) and I concluded that the provisions of Clause 5 - Hours of Work delivered flexible working arrangements to the respondent which would provide direct financial advantages to the respondent and a comparison schedule was attached to my Reasons for Decision outlining the gains to the respondent given the inclusion of these flexibilities.

44 It is my view that after a further review of the evidence given when the case was first heard and when taking into account what is fair and reasonable in all of the circumstances it continues to be appropriate to award the employees the subject of the enterprise order a $100.00 per week wage increase in return for the gains delivered to the respondent under the terms of the enterprise order. I have reached this conclusion on the basis that there was a substantial amount of evidence before me at first instance confirming that the flexibilities and direct savings available to the respondent under the terms of the enterprise order, as well as a number of the clauses of the enterprise order being in common with the AWA, would deliver real and substantial gains to the respondent given the nature of its operations and the work patterns required of the respondent's employees sufficient to justify a wage increase of $100 per week per employee. I find that evidence was given at first instance confirming that the respondent would enjoy immediate and significant financial gains as a result of the flexibilities contained in Clause 5 – Hours of Work being delivered to the respondent. Specifically this clause provides that the respondent can roster employees for 9.5 hour shifts, the respondent can require employees to work ordinary hours between Monday to Saturday, this clause provides for a lower shift allowance rate to be paid to employees working night shift than is paid under the Awards and the respondent can require an employee to start earlier than the normal spread of hours under the SDA award without the payment of a penalty.

45 In the initial proceedings evidence was given confirming that the respondent operates a 24 hours per day operation, the respondent rostered employees to work both day and night shifts to cover this 24 hour period, the respondent's employees were often required to work outside of the normal span of 7.6 hours per day Monday to Friday or Tuesday to Saturday and evidence was also given that at the time of the hearing the respondent was incurring significant overtime costs when employees worked over 7.6 hours per day and on Saturdays and that the respondent was in the process of restructuring its operations in order to minimise these costs.

46 Even though Mr Power gave evidence, which I accepted, that the respondent would normally only require employees to work 38 hours each week he also gave evidence that the respondent operates 24 hours per day, in particular from Sunday night to Saturday morning, and that the respondent required that lengthy shifts be worked to cover these timeframes and that the respondent's employees worked as required. It is also the case, and I find, that the respondent's operations are not confined to employees working ordinary hours from Monday to Friday. Mr Power's evidence was as follows:

> "MR MOMBER: Now, the activities carried out by your workforce are what?---They receive goods, unload trucks. They store things away, both dry products and frozen products.
>
> Mm?---They pick and pack, day and night shift, 6 days a week. There's almost no work there on Sunday. We've got one only driver that works 4 hours on a Sunday. Most - - most of the activity is Monday to Friday with a small workforce on a Saturday, mainly drivers delivering, and also the - - the shop is a 7 day shop, retail outlet."
>
> (transcript p190a)

Mr Power confirmed that in the section relevant to this application the respondent had seven store employees working the night shift, seven working the freezer night shift, 19 store and 13 freezer employees working the day shift, 21 retail employees, 5 fish processors and 28 clerical employees (transcript p191). Mr Power stated that the respondent incurs overtime costs (transcript p191a) and that some employees work shifts over four days and others work five days a week, Monday to Friday or Tuesday to Saturday (transcript p 191a).

47 Mr Power gave evidence that the respondent had rosters in place whereby some employees worked ordinary hours over four days in order to save overtime costs and that employees were being asked to work ordinary hours over four days if they were not already doing so. Mr Power stated that a four day week was introduced "in June for some loading staff and some drivers ….. that all future staff that were employed would be employed on a 4 day a week basis …. therefore the spread of overtime would be in ordinary overtime (sic) hours and saving the company money" (transcript p196). Mr Power confirmed the respondent's desire to have drivers on a four day week as loaders had been employed under this arrangement (transcript p196).

48 Mr Power gave evidence that the respondent incurred overtime costs when employees worked on a Saturday and that the respondent needed employees to work on Saturdays. Mr Power stated the following about the hours worked by the respondent:

> "So you're happy to work people Monday to Friday, basically, with occasionally a bit of overtime on Saturday. Is that - - is that what you're saying?---No, I didn't say that. We - - we work people as required and if they work outside of ordinary hours then we pay them overtime. We pay them loads and we pay them overtime. We've got shifts - - we have a nightshift. We have Saturday work which is voluntary and it's called overtime."
>
> (transcript p225)

49 Evidence was given by the applicants and its members during the proceedings which in my view adds weight to my finding that the respondent would enjoy immediate and significant financial gains under the terms of the enterprise order, particularly Clause 5. Evidence was given by employees that they worked shifts in excess of 7.6 hours per shift and that in addition to working Monday to Friday that from time to time employees worked Saturdays and Sundays and specific evidence was given that employees worked regular shifts (both night and day) of around ten hours per shift, four or five days per week. Employees who were to work under the enterprise order gave evidence that they worked a substantial amount of overtime, often undertaking lengthy shifts of more than eight hours per day and that the hours worked were outside of the normal spread of ordinary hours Monday to Friday as provided for under the Awards.

50 Mr Buktenica gave evidence that for eight years he worked 10.5 hours per day, five days a week, from 11pm on a Sunday to 9.00am on Friday working 50 to 52.5 hours per week and that during this period he was paid penalty rates (transcript pp72-75). When Mr Buktenica moved to the day shift, at the direction of the respondent, he worked a shift commencing at 6.30am and he worked through to 4.30pm or 5.00pm. Mr Buktenica stated that at the time of the hearing he worked ten hours per day on the day shift (transcript p74).

51 Mr Di Carlo gave evidence that a colleague, Mr John Long worked on a Sunday and he confirmed that he does not work a regular Monday to Friday shift (transcript p81). Mr Di Carlo stated that he started his shift on a Sunday night at 10.30pm and finished on a Thursday at 7.00am. Mr Di Carlo gave evidence that he was being paid a shift allowance as at the date of hearing (transcript p81) and that he had worked the night shift for approximately three and a half to four years (transcript p82).

52 Mr Piccininni stated that he worked night shift and wanted to change to the day shift (transcript p69). Mr Piccininni gave evidence that he had worked the night shift for approximately two years (transcript p69) and stated that the respondent has Sunday shift workers (transcript p70).

53 Mr Anderson stated that the respondent recently asked him to work a four day shift of 9.5 hours per day which would amount to a drop in his income of up to 25% due to the loss of overtime payments and Mr Anderson confirmed that the respondent employs some employees on four day shifts (transcript pp84, 85 and 86a). Mr Anderson stated that he understood that the respondent wanted truck drivers to work a four day week to cut costs as the respondent had been paying drivers a substantial amount of overtime (transcript p87). Mr Anderson gave evidence that as he had stayed working on a five day shift the respondent had asked him to start two hours later in the day than normal to save the respondent money (transcript p87).

54 Mr Dawson confirmed that truck drivers at the respondent's premises were working ordinary hours over four days (transcript p138). Mr Dawson stated that during negotiations with the respondent prior to seeking this enterprise order the respondent told him that it wanted flexibility in the hours worked by employees, so it could have employees working on a Saturday due to the fluctuation in the respondent's work loads and to meet operational requirements (transcript p138).

55 Given the evidence as detailed above, which I accepted as being credible in the first instance and continue to do so, I find that at the time of the initial proceedings the respondent required its employees to work over 24 hours a day, Monday to Saturday and occasionally Sunday, employees regularly worked shifts of at least 9.5 hours per shift both on day and night shifts and employees had flexible start and finish times. Given these work patterns in existence at the respondent's premises at the time of the initial hearing I therefore conclude that the provisions of Clause 5 – Hours of Work of the enterprise order would deliver real and substantial direct savings to the respondent as at the date of the issuance of the enterprise order on 2 March 2004.

56 I find that the savings and flexibilities delivered to the respondent given the terms of the enterprise order in particular under Clause 5 – Hours of work were sufficient to warrant the payment of $100 per week to employees subject to the enterprise order. Clause 5 allows employees to work more than the usual amount of hours of work at ordinary time rates each day (7.6 hours under the Awards compared with 9.5) without incurring overtime penalties which the respondent previously paid to employees covered by the Awards. When an employee works a shift of 9.5 hours and works 38 ordinary hours per week there is a direct financial gain to the respondent in relation to the non-payment of a meal allowance on four days given the increased spread of ordinary hours. As employees can be required to work ordinary hours Monday to Saturday under the enterprise order, which is a departure from the requirement under the Awards of ordinary time being worked Monday to Friday, this

results in further savings to the respondent when an employee is required to work on a Saturday as 9.5 hours of ordinary time can be worked without attracting loadings or overtime payments. The variation to start times from 6.30am to 6.00am Monday to Friday and from 7.00am to 6.00am on Saturday as provided for under the SDA Award, which applied to eight employees under the enterprise order, results in a gain to the respondent as overtime loadings no longer apply when an employee starts at 6.00am and the reduction in the shift allowance when an employee works a night shift as well as the shift allowance applying only to hours worked results in direct economic gains to the respondent when an employee works a night shift. I have calculated these savings to the respondent under Clause 5 – Hours of Work of the enterprise order, compared to the payments required under the Awards in Attachments 1 to 3. It is my view that given the respondent's operational requirements to have employees working lengthy shifts (both day and night) Monday through to Saturday these attachments demonstrate that under the terms of the enterprise order there is a direct saving to the respondent of at least $90.00 per employee per week based on employees working shifts in excess of 7.6 hours per shift, employees starting and finishing shifts outside of the normal spread of hours Monday to Saturday as well as employees working their ordinary hours from Monday to Saturday. I also find that the respondent is saving around $30.00 per week for each storeperson and food processor who works the night shift. I have not factored in a shift loading saving for drivers as there was no evidence that drivers worked shifts.

57 In addition to the above direct financial savings to the respondent I find that the enterprise order contains a number of clauses which deliver more flexible working arrangements to the respondent than previously existed under the Awards and that as a result the respondent is able to operate in a more timely and cost efficient manner in order to meet its needs, which in my view results in further direct savings to the respondent. Some examples of these flexibilities included in the enterprise order leading to a more efficient and cost effective enterprise include:

(a) Greater flexibility in relation to notice of roster changes than provided for under the Awards. This is of particular value to the respondent given the respondent's necessity to have employees work as required.

(b) The respondent has greater flexibility in relation to specific days worked by employees as RDOs are by agreement under the enterprise order, as opposed to being set days under the SDA Award.

(c) The enterprise order enables the respondent to compel an employee to work on a Sunday, compared to Sunday work being voluntary under the SDA Award.

(d) Part-time employees may have their hours varied on one week's notice in the enterprise order as opposed to being entitled to work a minimum number of pre-arranged hours under the TWU Award.

58 I find that as a number of clauses included in the enterprise order are in substantially the same terms as most of the clauses contained in the AWA, which covered over 90% of the respondent's non-salaried employees at the time of the hearing, this delivers further direct savings to the respondent (specifically Clauses 1, 2, 4, 11-17). For example as a result of a number of terms of the enterprise order being in common with the AWA all employees now share common leave, superannuation, probation, performance and development, employment policies and procedures, and confidentiality provisions thus allowing the respondent to streamline its operations. The commonality in the terms of most of the clauses in the enterprise order and the AWA, as well as having fewer industrial instruments containing the most significant elements of all employees' contracts of employment as a result of the issuance of the enterprise order in my view enables the respondent to streamline its human resources management and administration operations thus delivering productivity and financial gains to the respondent. I also take into account that as the terms of the enterprise order are in similar terms to the AWA applying at the respondent's premises, which the respondent had input into, the clauses provided under the enterprise order would have been of value to the respondent.

59 Although there is no exact science when evaluating the benefit to the respondent of the provisions delivering the respondent greater flexibility and the existence of numerous common conditions of employment across the respondent's operations I conclude that these flexibilities and common provisions are significant as these provisions deliver administrative and productivity gains to the respondent and the respondent can manage its workforce in a more timely and therefore cost effective manner. In my view these provisions constitute further savings to the respondent in the order of at least $20.00 to $25.00 per week per employee.

60 In my previous decision I found that in all of the circumstances of the case that was argued before me that it was appropriate to issue an enterprise order to apply to the parties and that it was fair and reasonable in all of the circumstances that the employees the subject of the enterprise order be granted a wage increase of $100.00 per week and after a further review of the evidence initially given in these proceedings my views have not changed. After having reviewed the evidence given in these proceedings in more detail and after making a number of additional findings in relation to the respondent's working patterns and the direct and immediate savings delivered to the respondent as a result of the terms of the enterprise order it remains my view and I find that in all of the circumstances it is fair and reasonable that the enterprise order should issue in the same terms as set out previously and that it is fair and reasonable that a $100.00 per week wage increase per employee be delivered to employees who are subject to the enterprise order, along with other increases over the life of the agreement.

61 I have reviewed the hours worked by employees who were subject to the enterprise order after 2 March 2004 (Exhibits A1 and A2). Even though I have not used the nature of each employees working patterns contained in these records when reaching the conclusion that a $100.00 per week wage increase is appropriate to include in the enterprise order it is my view these records confirm that the hours and work patterns of employees the subject of the enterprise order did indeed deliver substantial and direct savings to the respondent. For example, the records confirm that employees under the SDA Award regularly commenced work prior to 6.30am, most employees consistently worked either day and/or night shifts in excess of eight hours per shift and a number of employees worked on a Saturday (see Exhibits A1 and A2).

62 An order will now issue reinstating the operation of the enterprise order which was delivered on 2 March 2004 as at the date of this order.

**Attachment 1**

SDA Award (8 employees)

Award – ordinary hours – 7.6 per day (excluding lunch break)

Enterprise order – ordinary hours – 9.5 based on 10 hour shifts with 0.5 hour off for lunch

(i) Monday to Friday roster (based on 4 day shift)

Hourly rate = $14.47 ($550 ÷ 38)

Saving – 2 hours not paid at time and a half rate x 4 days = 4 hours per week

4 x $14.47 = $57.89

– Non payment of 4 meal allowances as provided in Clause 12 of the award

4 x $ 9.30 = $37.20

**Total Saving: $95.09**

(ii) Saturday work (when employee rostered for ordinary hours)

Saving – Payment of double time after 12.00 noon

Shift – 6.00am to 2.00pm – 8 hour shift = 2 hours x $14.47

**Total Saving: $28.94**

Shift – 6.00am to 4.00pm – 10 hour shift = 4 hours x $14.47

**Total Saving: $57.88**

(iii) Extension of ordinary hours to 6.00am (from 6.30am) – Monday to Friday

Saving – 0.5 of an hour not paid at time and a half rate x 4 days = 1 hour per week

1 hour x $14.47

**Total Saving: $14.47**

(iv) Extension of ordinary hours to 6.00am (from 7.00am) – Saturday

Saving – 1 hour not paid at time and a half rate x 1 day = ½ an hour per week

0.5 hours x $14.47

**Total Saving: $7.24**

(v) Reduction in night shift loading from 25% to 20%

Saving – 9.5 hour shift, 4 days per week – 9.5 x $14.47 = $137.46 per day

$137.46 x 25% = $34.36

$137.46 x 20% = $27.49

Difference = $ 6.87 per day

Per week for a 4 day shift = 4 x $6.87

**Total Saving: $27.48**

**Attachment 2**

TWU Award (2 employees)

Award – ordinary hours – 7.6 per day (unless agreement by majority and excluding lunch break)

Enterprise order – ordinary hours – 9.5 based on 10 hour shifts with 0.5 hour off for lunch

(i) Monday to Friday roster (based on 4 day shift)

Hourly rate = $14.47 ($550 ÷ 38)

Saving – 2 hours not paid at time and a half rate x 4 days = 4 hours per week

4 x $14.47 = $57.89

– Non payment of 4 meal allowances as provided in Clause 5.6 of the award

4 x $ 7.30 = $29.20

**Total Saving: $87.09**

(ii) Saturday work (Clause 3.2 of the award)

Saving – Payment of time and a half for 2 hours and double time thereafter

Shift – 6.00am to 2.00pm – 8 hour shift = 13 hours x $14.47

**Total Saving: $188.11**

Shift – 6.00am to 4.00pm – 10 hour shift = 17 hours x $14.47

**Total Saving: $245.99**

(iii) Reduction in night shift loading from 30% to 20%

Saving – 9.5 hour shift, 4 days per week – 9.5 x $14.47 = $137.46 per day

$137.46 x 30% = $41.24

$137.46 x 20% = $27.49

Difference = $13.75 per day

Per week for a 4 day shift = 4 x $13.75

**Total Saving: $55.00**

**Attachment 3**

FPU Award (2 employees)

Award – ordinary hours – 7.6 per day (excluding lunch break)

Enterprise order – ordinary hours – 9.5 based on 10 hour shifts with 0.5 hour off for lunch

(i) Monday to Friday roster (based on 4 day shift)

Hourly rate = $14.47 ($550 ÷ 38)

Saving – 2 hours not paid at time and a half rate x 4 days = 4 hours per week

4 x $14.47 = $57.89

– Non payment of 4 meal allowances as provided in Clause 19 of the award

4 x $ 7.70 = $30.80

**Total Saving: $88.69**

(ii) Saturday work (Clause 14 of the award)

Saving – Payment of time and a half for 2 hours and double time thereafter

Shift – 6.00am to 2.00pm – 8 hour shift = 13 hours x $14.47

**Total Saving: $188.11**

Shift – 6.00am to 4.00pm – 10 hour shift = 17 hours x $14.47

**Total Saving: $245.99**

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**2005 WAIRC 02295**

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 AND THE TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH |
| | **APPLICANT** |
| | **-v-** |
| | SEALANES (1985) PTY LTD |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER J L HARRISON |
| **DATE** | WEDNESDAY, 10 AUGUST 2005 |
| **FILE NO/S** | APPL 1228 OF 2003 |
| **CITATION NO.** | 2005 WAIRC 02295 |

| | |
|---|---|
| **Result** | Order issued to reinstate the operation of the enterprise order that issued on 2 March 2004. |

*Order*

HAVING HEARD Mr T Pope as agent on behalf of the applicants and Mr T H F Caspersz of counsel and Ms L J Nickels 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 operation of the enterprise order that issued on 2 March 2004 be and is hereby reinstated from the date of this order.

(Sgd.) J L HARRISON,
Commissioner.

[L.S.]

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# JOINDER/CONCURRENCE OF PARTIES—Application for—

**2005 WAIRC 02055**

**RESTAURANT, TEAROOM AND CATERING WORKERS' AWARD, 1979 (NO R48 OF 1978)**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

| | |
|---|---|
| **PARTIES** | RESTAURANT AND CATERING INDUSTRY ASSOCIATION OF EMPLOYERS OF WESTERN AUSTRALIA INC |
| | **APPLICANT** |
| | **-v-** |
| | WESTERN AUSTRALIAN HOTELS AND HOSPITALITY ASSOCIATION INCORPORATED (UNION OF EMPLOYERS) AND OTHERS |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER J L HARRISON |
| **DATE** | FRIDAY, 15 JULY 2005 |
| **FILE NO.** | APPL 131 OF 2005 |
| **CITATION NO.** | 2005 WAIRC 02055 |

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| **Catchwords** | Application for Joinder to an Award – *Restaurant, Tearoom and Catering workers' Award, 1979 (No R48 of 1978)* – Application granted – *Industrial Relations Act (WA)* 1979 s38(2) |
| **Result** | Application for Joinder to Award granted |
| **Representation** | |
| **Applicant** | Mr O Moon (as agent) |
| **Respondents** | Ms S Howard (as agent) on behalf of the Western Australian Hotels and Hospitality Association Incorporated (Union of Employers) |

*Reasons for Decision*

*(Given extemporaneously at the conclusion of the proceedings, as edited by the Commissioner)*

1 On 4 February 2005 the Restaurant and Catering Industry Association of Employers of Western Australia Inc ("the applicant") applied to the Commission to be joined as a party to the *Restaurant, Tearoom and Catering Workers' Award, 1979 (No R48 of 1978)* ("the Award").

2 As this application was advertised in the *Western Australian Industrial Gazette* ("the Gazette") on 23 February 2005 (85 WAIG 705), and the applicant served this application on the relevant parties I am satisfied that the requirements under the *Industrial Relations Act 1979* ("the Act") relating to service and the publication of this application have been met.

3 I note for the record that the Liquor, Hospitality and Miscellaneous Union, Western Australian Branch ("the LHMU"), which is the union party to the Award and the Western Australian Hotels and Hospitality Association Incorporated (Union of Employers), which is a named respondent to the Award, do not object to this application. I also note there have been no other objections to this application from any of the other parties to the Award or any other interested person or entity.

4 The Commission has discretion to add an employer, organisation or association as a named party to an award under s38 of the Act. Section 38(2) of the Act states as follows:

> "(2) At any time after an award has been made the Commission may, by order made on the application of —
>
> (a) any employer who, in the opinion of the Commission, has a sufficient interest in the matter;
>
> (b) any organisation which is registered in respect of any calling mentioned in the award or in respect of any industry to which the award applies; or
>
> (c) any association on which any such organisation is represented,
>
> add as a named party to the award any employer, organisation or association."

5 It is not in contest that the applicant is registered as an organisation of employers under the Act and that the applicant is registered in relation to an industry to which the Award applies (see *Re an application by the Restaurant and Catering Industry Association of Employers of Western Australia Inc* [2004] 85 WAIG 32). When the Full Bench considered this application, whereby the applicant sought registration under the Act as its members were caught by the scope of the Award, it decided that it was appropriate to register the applicant as an organisation of employers under the Act.

6 The applicant's eligibility rule, in its relevant parts, reads as follows:

> "7.1 Members of the Association shall consist of Sole Traders, Business Partnerships and Corporations who are employers of labour in the "industry" as defined ……."

Industry is defined in rule 2.2 of the applicant's rules and reads as follows:

> "2.2 'Industry' means Licensed and Unlicensed Restaurants, Lunch Bars, and Coffee Lounges, Fast Food Outlets and Take Away, and Licensed and Unlicensed Caterers throughout the State of Western Australia, engaged in the preparation for consumption, serving, selling or supply of meals or foodstuffs and or services whether in conjunction with the sale and the serving or selling of liquor to the general public or any segment thereof as described under the Australian and New Zealand Industrial Classification Standard."

7 The Full Bench found that out of a total of 435 of the applicant's members approximately 330 are licensed restaurant employers which operate in the hospitality industry and the Full Bench recognised that the applicant's members were caught by Clause 4. - Scope of the Award.

8 During these proceedings Mr Moon, who appeared as agent on behalf of the applicant, confirmed that the applicant's eligibility rule, the definition of "industry" in the applicant's rules and the nature of the applicant's membership had not altered since the Full Bench decision issued on 8 December 2004 and Mr Moon's assertions were not contested at the hearing. I therefore find that the applicant is an organisation which is registered under the Act in respect to the industry to which the Award applies and that the applicant has employers as its members which are caught by the scope clause of the Award.

9 As I am satisfied that the applicant's members operate in the industry caught by the scope of the Award and that the applicant is registered as an organisation under the Act in relation to an industry to which the Award applies, it is my view that it is appropriate to add the applicant as a named party to the Award.

10 Even though the applicant requested at the hearing to be named as a respondent to the Award, s38 of the Act only gives the Commission the power to add an employer, organisation or association as a party to an award, if the Commission is satisfied that it is appropriate to do so. In the circumstances I will therefore order that the applicant be added as a named party to the Award.

11 A Minute of Proposed Order follows.

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**2005 WAIRC 02290**

**RESTAURANT, TEAROOM AND CATERING WORKERS' AWARD, 1979 (NO R48 OF 1978)**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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|---|---|
| **PARTIES** | RESTAURANT AND CATERING INDUSTRY ASSOCIATION OF EMPLOYERS OF WESTERN AUSTRALIA INC |
| | **APPLICANT** |
| | **-v-** |
| | WESTERN AUSTRALIAN HOTELS AND HOSPITALITY ASSOCIATION INCORPORATED AND OTHERS |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER J L HARRISON |
| **DATE** | TUESDAY, 9 AUGUST 2005 |
| **FILE NO/S** | APPL 131 OF 2005 |
| **CITATION NO.** | 2005 WAIRC 02290 |

**Result** Application for Joinder to Award granted

*Order*

WHEREAS on 15 July 2005 the Commission issued Reasons for Decision and a Minute of Proposed Order in this matter; and

WHEREAS on 4 August 2005 the Commission conducted a Speaking to the Minutes of Proposed Order; and

WHEREAS Ms Howard on behalf of the Western Australian Hotels and Hospitality Association Incorporated (Union of Employers) ("the WAHA") submitted that the reasons for decision did not outline the basis for the WAHA consenting to this application and stated that it consented to the application on the basis that it understood the applicant was seeking to become a respondent to the *Restaurant, Tearoom and Catering Workers' Award 1979 (No R48 of 1978)* ("the Award"); and

WHEREAS Mr Gill on behalf of the Liquor, Hospitality and Miscellaneous Union, Western Australian Branch ("the LHMU") stated that the LHMU did not have a position in relation to whether the applicant should be a named party or a respondent to the Award and that the LHMU did not object to the WAHA's position being acknowledged; and

WHEREAS Mr Moon who appeared on behalf of the applicant indicated the applicant was agreeable to detailing the basis upon which the WAHA consented to this application; and

WHEREAS the Commission reminded the parties that this application was made pursuant to s38 of the *Industrial Relations Act, 1979* to add the applicant as a named party to the Award; and

WHEREAS the Commission accepts that the WAHA consented to this application on the basis that the applicant was seeking to become a respondent to the Award;

NOW THEREFORE having heard Mr O Moon on behalf of the applicant and Ms S Howard on behalf of the Western Australian Hotels and Hospitality Association Incorporated (Union of Employers) and later Mr A Gill on behalf of the Liquor, Hospitality and Miscellaneous Union, Western Australian Branch, the Commission, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders:

1) THAT the Restaurant and Catering Industry Association of Employers of Western Australia Inc be added as a named party to the *Restaurant, Tearoom and Catering Workers' Award 1979 (No R48 of 1978)*.

2) THAT the *Restaurant, Tearoom and Catering Workers' Award 1979 (No R48 of 1978)* be varied in accordance with the following Schedule and that such variation shall have effect from 12 May 2005.

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

SCHEDULE

**1. Clause 2. - Arrangement: Delete this clause and insert the following in lieu thereof:**

1. Title
2. Arrangement
3. Area
4. Scope
5. Term
6. Definitions
7. Contract of Service
8. Hours
9. Additional Rates for Ordinary Hours
10. Overtime
10A. Translation of Casual Employees
11. Casual Employees
12. Part-Time Employees
13. Meal Breaks
14. Meal Money
15. Sick Leave
16. Bereavement Leave
17. Holidays
18. Annual Leave
19. Long Service Leave
20. Payment of Wages
20A. Translation of Full-Time and Part-Time Employees
21. Wages
21A. Minimum Wage - Adult Males & Females
22. Junior Employees
23. Apprentices
24. Option for Annualised Salary
25. Higher Duties

26. Uniforms and Laundering
27. Protective Clothing
28. Workers' Equipment
29. No Reductions
30. Board and/or Lodging
31. Travelling Facilities
32 Record
33. Roster
34. Change and Rest Rooms
35. First Aid Kit
36. Posting of Award and Union Notices
37. Superannuation
38. Over Award Payments
39. Under-Rate Workers
40. Prohibition of Contracting Out of Award
41. Breakdowns
42. Location Allowance
43. Parental Leave
44. National Training Wage
45. Enterprise Flexibility
46. Changes with Significant Effect and Redundancy
47. Right of Entry
48. Redundancy
49. Anti-Discrimination
50. No Extra Claims
51. Further Claims
52. Union Delegates and Meetings
53. Temporary Exemption Clause

Appendix - Resolution of Disputes Requirement
Schedule A - Named Parties
Schedule B - Respondents
Schedule C - Letter to Employees
Appendix - S 49B - Inspection of Records Requirements
Appendix – McDonald's Australia Limited Franchisees

**2. Schedule A – Named Union Party: Delete this title and schedule and insert the following in lieu thereof:**

SCHEDULE A - NAMED PARTIES

The Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch

Restaurant and Catering Industry Association of Employers of Western Australia Inc

# 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 NICHOLAS PAUL HASLUCK AM, a Judge of the Supreme Court of Western Australia, to be an Acting Ordinary Member of the Western Australian Industrial Appeal Court from 1 September until 30 September 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 25th day of July 2005.

ACTING CHIEF JUSTICE OF WESTERN AUSTRALIA

# 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 August until 30 September 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 25th day of July 2005.

ACTING CHIEF JUSTICE OF WESTERN AUSTRALIA

# NOTICES—Cancellation of Awards/Agreements/ Respondents—under Section 47—

**NOTICE**

**WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

TAKE NOTICE that the Commission acting pursuant to section 47 of *the Industrial Relations Act 1979* intends, by order, to strike out the following organisation as a respondent to the Electrical Contracting Industry Award R22 of 1978, namely:

Federation of Electrical Contractors Inc**.**

on the grounds that the named organisation is no longer carrying on business in the industry to which the award applies.

Any person who has sufficient interest in the matter may, within 30 days of the publication of this notice, object to the Commission making such order.

Please quote File No. Admin./2005/0127 on all correspondence.

Dated 9 August 2005.

(Sgd.) J.A. SPURLING,
Registrar.

**NOTICE**

**WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

TAKE NOTICE that the Commission acting pursuant to section 47 of *the Industrial Relations Act 1979* intends, by order, to cancel the following award, namely:

Public Service Allowances (Mortuary Staff) Award 1985;

on the grounds that there is no employee to whom the award applies.

Any person who has sufficient interest in the matter may, within 30 days of the publication of this notice, object to the Commission making such order.

Please quote File No. Admin./2005/0194 on all correspondence.

Dated 10 August 2005.

(Sgd.) J.A. SPURLING,
Registrar.

# PUBLIC SERVICE APPEAL BOARD—

**2005 WAIRC 02061**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES** THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INC

**APPELLANT**

**-v-**

DIRECTOR GENERAL, DEPARTMENT OF EDUCATION AND TRAINING

**RESPONDENT**

**CORAM** PUBLIC SERVICE APPEAL BOARD
**DATE** FRIDAY, 15 JULY 2005
**FILE NO** PSAB 3 OF 2005
**CITATION NO.** 2005 WAIRC 02061

**Result** Appeal to the Public Service Appeal Board withdrawn by leave

*Order*

WHEREAS this is an appeal pursuant to section 80I the Industrial Relations Act 1979; and

WHEREAS on the 7th day of July 2005, the Appellant filed a Notice of Discontinuance in respect of this appeal; and

NOW THEREFORE, the Public Service Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders:

THAT this appeal be, and is hereby withdrawn by leave.

(Sgd.) P E SCOTT,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

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**2005 WAIRC 02050**

**AGAINST THE DECISION TO DE-CLASSIFY FROM LEVEL 4 TO LEVEL 2 MADEON 8/10/2004**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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|---|---|
| **PARTIES** | PHILLIP GRAHAM CURTIS<br>**APPELLANT**<br>**-v-**<br>DIRECTOR GENERAL, DEPARTMENT OF JUSTICE<br>**RESPONDENT** |
| **CORAM** | PUBLIC SERVICE APPEAL BOARD<br>COMMISSIONER P E SCOTT – CHAIRMAN<br>MR C FLOATE – BOARD MEMBER<br>MR D HUSDELL – BOARD MEMBER |
| **DATE** | THURSDAY, 14 JULY 2005 |
| **FILE NO.** | PSAB 13 OF 2004 |
| **CITATION NO.** | 2005 WAIRC 02050 |

| | |
|---|---|
| **CatchWords** | Public Service Appeal Board – Appeal against decision to demote appellant after finding of substandard performance – Appellant agreed past performance was substandard – Relevant principles applied – Regard is had to employee's performance at the time substandard performance is alleged – No automatic right to return to previous classification if an employee addresses the causes which led to substandard performance – Employer's right to demote not exercised in a harsh or oppressive manner – Appeal dismissed – *Industrial Relations Act 1979* (WA) s 80I – *Public Sector Management Act 1994* (WA) s 79(1)&(3) |
| **Result** | Appeal dismissed |
| **Representation** | |
| **Applicant** | Ms S Thomas |
| **Respondent** | Mr K Trainer |

*Reasons for Decision*

COMMISSIONER P E SCOTT AND MR C FLOATE:

1 This is an appeal against the decision of the respondent to reduce Mr Curtis's classification from Level 4 to Level 2 made on 8 October 2004. The parties have agreed the following facts apply to this appeal:

"1. Mr Philip Curtis commenced employment with the Respondent on 14 February 1985 on a fixed term contract as a Level 1 officer in the Office of the Registrar General.

2. Following a series of fixed term contracts with the Respondent, Mr Curtis was offered a permanent appointment as a Level 1 officer with the Respondent in a letter dated 25 September 1986.

3. In a letter dated 9 April 1987 the Respondent confirmed Mr Curtis' permanent appointment effective from 25 September 1986.

4. The Respondent, In (sic) a letter dated 6 March 1991, advised Mr Curtis that he had been promoted to the position of Level 3 Trust Officer in the Public Trust Office effective from 7 February 1991.

5. In a letter dated 1 March 1994, the Respondent advised Mr Curtis that he had been promoted to the position of Level 4 Senior Trust Officer with the Public Trust Office effective from 19 November 1993.

a) The Level 4 Estate Manager is expected to handle the more complex estates.

b) A copy of the JDF is attached as "A".

6. Between 18 March 1994 and 9 February 2001, Mr Curtis performed higher duties in the position of Level 5 Manager in the Public Trust Office at various times accumulating a total of 83 weeks.

7. In April 2002 Mr Curtis' home was the subject of a violent home invasion in which he sustained knife wounds to the groin, back, nose and face requiring some time off work.

8. At the time Mr Curtis had been undertaking a help desk officer role in the implementation of Mate software as a special project.
   a) At a meeting on 11 October 2002, Ms Denise Fishwick in her role with the Mate implementation project raised concerns with Mr Curtis, in relation to his performance as a help desk officer.
   b) In a subsequent performance review, a number of concerns about Mr Curtis' performance of the duties were identified.
9. Subsequent to (8), in an e-mail to Mr Martin Gray, his immediate supervisor on the project, dated 5 December 2002, Mr Curtis requested and was returned to his normal duties.
10. On the night of 29th/30th December 2002 Mr Curtis was involved in a car accident where he sustained a head injury, broken pelvis and rib fractures.
11. Dr John Croser, Orthopaedic Surgeon, in a certificate dated 17 February 2003, advised the Respondent that Mr Curtis was fit to return to work from that date.
12. Mr Curtis' attempt to return to work was unsuccessful, he returned to hospital shortly afterwards and did not return to work again until 4 March 2003.
13. On 15 March 2003 Mr Steve Guthrie reported that Mr Curtis was "convinced that people were after him".
14. On 27 March 2003, Mr Steve Guthrie reported that Mr Curtis was again talking about concerns for his own safety.
15. On 17 April 2003 Mr Curtis attended an appointment with Dr Andrew Marsden as directed by the Respondent.
16. In a letter dated 22 April 2003 to the Respondent, Dr Marsden advised that Mr Curtis was fit to return to normal duties.
17. During 2003 Mr Curtis reported to work in an unfit state on 19 February, 27 March, 26 June, 4 July, 10 July, 29 July and 27 August and was instructed to return home.
18. Between 17 February 2003 and 20 August 2003 Mr Curtis was unable to demonstrate the performance expected of him as a Level 4 Estate Manager or other duties allocated to him.
   a) Mr Curtis made serious errors in performance of the duties including misfiling of documents, making payments of accounts from the wrong estate and providing wrong written information.
   b) Commencing no later than June 2003, Mr Curtis was not allocated or required to perform Level 4 Estate Manager duties.
   c) During the period referred to in (b) Mr Curtis was allocated duties ordinarily expected of officers classified Level 3 or Level 2
19. In a letter dated 20 August 2003, the Respondent notified Mr Curtis that it suspected that his performance as a Level 4 Estate Manager had been substandard in that he had been unable to attain or sustain a standard that a person may reasonably be expected to attain or sustain in the performance of the functions of his position. Concerns about Mr Curtis' performance included his capacity to:
   a) Administer the financial affairs of deceased persons and ensure compliance with all legislative, accounting and administrative obligations; and
   b) Ensure that all projects and activities are executed on time and to the required levels of quality and customer satisfaction.
   c) Maintain professional competence and knowledge and apply this expertise in research and the provision of advice and problem resolution.
20. In a letter dated 25 August 2003 provided to the Respondent, Perth Medical Centre confirmed that Mr Curtis had been receiving treatment for a personal illness since June 2003.
21. The personal illness referred to at (20) was later confirmed to be Hepatitis C.
22. On 29 August 2003, Mr Curtis responded to the allegations of substandard performance admitting that his performance was not of the required standard and relied on his personal and health issues in mitigation.
23. In a letter dated 16 October 2003, the Respondent advised Mr Curtis that an investigator, Mr Keith Dodd, had been appointed to undertake an investigation into whether or not his performance was substandard. In this same letter Mr Curtis was directed to attend an examination by an occupational health physician appointed by the Respondent.
24. In October 2003, Mr Curtis suffered a further home invasion where he was assaulted and hit about the legs.
25. On 15 December 2003, Mr Curtis attended an appointment with Dr Andrew Marsden as per the direction from the Respondent in the letter dated 16 October 2003.
26. On 16 December 2003, Mr Dodd interviewed Mr Curtis in relation to the investigation into his work performance.
   a) The observations of Mr Curtis' supervisors as to his behaviour and work performance were put to him.
   b) Mr Curtis admitted the accuracy of the observations including the examples of
      i. His errors in the performance of his duties
      ii. His inability to perform the duties of the position
      iii. His emotional state at work
      iv. His dishevelled appearance on occasions
      v. His conduct at work
27. In a letter dated 17 December 2003, Dr Marsden reported that Mr Curtis was fit to return to normal duties although he was taking medication for the management of depression
28. The Respondent advised Mr Curtis, in a letter, dated 30 April 2004, that following consideration of Mr Dodd's investigation the Respondent had formed the opinion that his performance was substandard and advised of its intention to reduce his classification level to Level 2. Mr Curtis was given until 14 May 2004 to respond.

29. In a letter dated 31 May 2004, Mr Curtis provided his response to the Respondent's intention to reduce his classification to Level 2.

30. In providing his response Mr Curtis, (sic) recognised that his performance had not been of the required standard but attributed this to the issues in his personal life and his ill-health. Mr Curtis asked the Respondent to consider two options:

    a) A performance improvement plan to closely monitor his performance at Level 4 to provide him with the opportunity to prove himself to the Respondent.

    b) A review of the decision to declassify him after monitoring of his performance at Level 2 for a set period of time.

31. In his response, dated 31 May 2004, Mr Curtis advised the Respondent that whilst he was now feeling well, he may be required to undergo prolonged drug therapy to resolve his Hepatitis infection.

32. In 2004 Mr Curtis was absent from work for health reasons for a period of some forty working days.

33. In a letter dated 8 October 2004, the Respondent advised Mr Curtis that despite satisfactory performance of the allocated lower level duties in the recent period, the decision had been made to reduce his classification level to the top increment level of Level 2, effective from that date.

34. On 15 September 2004 Mr Curtis commenced a six month treatment for chronic Hepatitis C infection."

(Statement of Agreed Facts)

2 The appellant was the only witness in this matter. He agrees that for a period of greater than 1 year, from at least June 2002 when he went to work on the help desk, his performance was not at a Level 4 standard. It is also clear from the evidence that his performance as a Level 4 Estate Manager was substandard between February and August 2003. He made serious errors in managing various estates. He attended work but was not fit to perform to the required level. He would attend in a dishevelled and dirty state. He was observed sleeping at his desk. He was given counselling and assistance by the respondent over a period of time. However, he says that:

1. His problem should have been addressed as a health issue, not a performance issue;
2. The lower level of performance was due to a series of health and personal issues including a car accident, a home invasion with associated post-traumatic stress, threats against him by outside parties, a second home invasion and his Hepatitis C infection.
3. Since recovering from the issues set out in 2. above, the appellant has taken steps to obviate the prospect of these issues re-emerging;
4. On 3 occasions, the appellant has sought an opportunity to prove to the respondent that he can perform the Level 4 position to a satisfactory standard, yet the respondent has rejected his requests.

3 This is a most unusual case. The appellant accepts that his performance was substandard for a period of time. However, he attributes his substandard performance to problems which he seems to suggest were beyond his control. He also says he has overcome those problems and now seeks an opportunity to recover his former level of classification.

4 Section 79(1) of the *Public Sector Management Act 1994* ("the PSM Act") defines a substandard performance as being:

> "For the purposes of this section, the performance of an employee is substandard if and only if the employee does not, in the performance of the functions that he or she is required to perform, attain or sustain a standard that a person may reasonably be expected to attain or sustain in the performance of those functions."

5 Subsection (3) of s.79 of the PSM Act provides that an employing authority may do one of a number of things in respect of one of its employees whose performance is substandard. Those options are withholding an increment, reducing the employee's level of classification or dismissal.

6 The appellant accepts that issues were raised with him about his performance and conduct. He accepts that his performance was substandard. However, it is also clear that the issues which led to his reduced level of performance were directly related to the company he kept and his own conduct outside of work. He had thought that for some time his drug abuse had not affected his work. However, ultimately it did. He also became involved with the wrong crowd which led to 2 home invasions and assaults. He contracted Hepatitis C.

7 The appellant accepts that he was drunk behind the wheel when he had a motor vehicle accident on the night of 29/morning of 30 December 2002. He returned to work on 17 February 2003 but says that he was sent home on a number of occasions because of his inability to perform and remain at work. He was suffering pain and the effects of his medication. The respondent offered his assistance to get him home on a number of occasions. The appellant returned to hospital in February 2003.

8 The appellant acknowledges that he told Dr Marsden when he visited him in April 2003 that he felt fine, yet it is clear and the appellant conceded that he was not well at all. He deliberately misled Dr Marsden so that Dr Marsden would give him a clear bill of health and the appellant could then return to work. His reason for wanting to return to work was not because he knew he was fit but because he could not afford to take time off work and he was running out of sick leave. He returned to work but his performance continued to be substandard.

9 Further, when the appellant visited Dr Marsden for a second time in December 2003, the appellant knew that he was suffering from Hepatitis C which was making him quite ill, but he did not tell Dr Marsden.

10 In all of these circumstances, we find that the appellant's performance was substandard. The reasons for the substandard performance were not simply that he was ill, albeit that he was ill. However, he suffered 2 home invasions in which he was injured, due to his own choices about the company he kept and the activities he engaged in. He had a car accident which resulted in serious injuries, while he was drunk-driving. He deliberately deceived his employer into believing he was fit to return to work when he was not. He did this by misleading Dr Marsden about how ill he was. He returned to work when he was incapable of doing his job to the required standard not because he was a dedicated employee but because he was concerned about the amount of sick leave he had, and the effect on his financial situation.

11 The respondent has not exercised its right to reduce the appellant's level of classification in a harsh or oppressive manner. The respondent considered the options available including the more severe penalty of termination of employment. He took account of the appellant's length of service and previous satisfactory performance in coming to the penalty of a reduction in classification level. In our view it was an appropriate action, commensurate with the standard of the appellant's performance.

12 Although the appellant might now have taken steps in his private life to address the cause of his problems which lead to the ill health, he did so belatedly. If he wishes to be returned to his former level of classification it is now up to him to demonstrate

by diligent application to his work that a return to his former level by way of promotion is appropriate. It was not harsh or unfair of the respondent to not give him another opportunity to prove himself at Level 4. He needs to prove himself at the lower level and apply to be promoted. The fact that an employee might have rectified the causes of his or her problems which led to the substandard performance does not provide for an automatic return to the previous classification.

13 Accordingly, at the conclusion of the hearing, in dealing with the respondent's argument that there was no case to answer, we agreed that the appeal ought to be dismissed.

MR D HUSDELL:

14 I have had the benefit of reading the Reasons for Decision of Commissioner Scott and Mr Floate. I agree that the appeal be dismissed and have nothing further to add.

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**2005 WAIRC 01702**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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| **PARTIES** | PHILLIP GRAHAM CURTIS |
| | **APPELLANT** |
| | **-v-** |
| | DIRECTOR GENERAL, DEPARTMENT OF JUSTICE |
| | **RESPONDENT** |
| **CORAM** | PUBLIC SERVICE APPEAL BOARD<br>COMMISSIONER P E SCOTT - CHAIRMAN<br>MR C FLOATE - BOARD MEMBER<br>MR D HUSDELL - BOARD MEMBER |
| **DATE** | MONDAY, 30 MAY 2005 |
| **FILE NO** | PSAB 13 OF 2004 |
| **CITATION NO.** | 2005 WAIRC 01702 |

**Result** Appeal dismissed

*Order*

HAVING heard Ms S Thomas as agent on behalf of the appellant and Mr K Trainer as agent on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders:

THAT this appeal be, and is hereby dismissed.

(Sgd.) P E SCOTT,
Commissioner,
[L.S.] For and On behalf of the
Public Service Appeal Board.

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# RECLASSIFICATION APPEALS—Notation of—

| File Number | Appellant | Respondent | Commissioner | Decision | Finalisation Date |
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| PSA 3 of 2004 | Rafic Said | Minister for Health in Right of the Metropolitan Health Service | Scott C. | Discontinued | 12/08/2005 |
| PSA 24 of 2004 | John Charles Doherty | Minister for Health in Right of the Metropolitan Health Service, East Metropolitan Health Service | Scott C. | Dismissed | 15/07/2005 |
| PSA 41 – PSA 42 and PSA 44 – PSA 47 of 2004 | Barbara Cutler, Elizabeth Anne Davies, Ranil Ratnayeke, Sandra Hunter, Sandra Handscomb and Zeta Binge | Equal Opportunity Commission | Scott C. | Granted | 16/08/2005 |
| PSA 48 of 2004 | Carmelina Condemi | Western Australian Police Service | Scott C. | Discontinued | 16/08/05 |
| PSA 2 of 2005 | Ian Robert Burns | Minister for Health in Right of the Metropolitan Health Service | Scott C. | Dismissed | 12/08/2005 |