Western Australian

Industrial Gazette

PUBLISHED BY AUTHORITY

Sub-Part 7 WEDNESDAY 28 JUNE, 2006 Vol. 86—Part 1

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

86 W.A.I.G.

CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

INDUSTRIAL APPEAL COURT—Appeal against decision of Full Bench—

[2006] WASCA 49

JURISDICTION	:	WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT
CITATION	:	BHP BILLITON IRON ORE PTY LTD -v- CONSTRUCTION, FORESTRY, MINING & ENERGY UNION OF WORKERS & ANOR [2006] WASCA 49
CORAM	:	WHEELER J PULLIN J LE MIERE J
HEARD	:	1 & 2 NOVEMBER 2005
DELIVERED	:	29 MARCH 2006
FILE NO/S	:	IAC 5 of 2005
BETWEEN	:	BHP BILLITON IRON ORE PTY LTD Appellant AND CONSTRUCTION, FORESTRY, MINING & ENERGY UNION OF WORKERS First Respondent INTEGRATED GROUP LTD t/as INTEGRATED WORKFORCE Second Respondent
FILE NO/S	:	IAC 6 of 2005
BETWEEN	:	CONSTRUCTION, FORESTRY, MINING & ENERGY UNION OF WORKERS Appellant AND BHP BILLITON IRON ORE PTY LTD First Respondent INTEGRATED GROUP LTD t/as INTEGRATED WORKFORCE Second Respondent

ON APPEAL FROM:

Jurisdiction	:	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
Coram	:	SHARKEY P, BEECH CC, KENNER C
Citation	:	2005] WAIRC 01797
File No	:	FBA 36 of 2004

Catchwords:

Industrial law - Unfair refusal to employ - Denial of procedural fairness and right to be heard - Jurisdiction of Full Bench of Industrial Relations Commission - Validity of order to retrospectively employ - Whether contract of employment between worker and labour hire company client - Jurisdiction of Industrial Appeal Court - Construction of *Industrial Relations Act 1979* (WA) definitions of "employee" and "employer"

Legislation:

Drugs Poisons & Controlled Substances Act 1981 (Vic), s 73

Industrial Relations Act 1979 (WA), s 23A, s 26, s 35, s 39, s 44, s 49, s 90

Labour Relations Reform Act 2002 (WA)

Long Service Leave Act 1958 (WA)

Result:

Appeal IAC 5 of 2005 allowed

Appeal IAC 6 of 2006 dismissed

Category: B

Representation:

IAC 5 of 2005

Counsel:

Appellant	:	Mr H J Dixon SC & Ms G A Archer
First Respondent	:	Mr S Crawshaw SC & Mr A Slevin
Second Respondent	:	Mr N D Ellery

Solicitors:

Appellant	:	Mallesons Stephen Jaques
First Respondent	:	Derek Schapper
Second Respondent	:	Corrs Chambers Westgarth

IAC 6 of 2005

Counsel:

Appellant	:	Mr S Crawshaw SC & Mr A Slevin
First Respondent	:	Mr H J Dixon SC & Ms G A Archer
Second Respondent	:	Mr N D Ellery

Solicitors:

Appellant	:	Derek Schapper
First Respondent	:	Mallesons Stephen Jaques
Second Respondent	:	Corrs Chambers Westgarth

Case(s) referred to in judgment(s):

Blackadder v Ramsey Butchering Services Pty Ltd (2005) 79 ALJR 975

Board of Management, Princess Margaret Hospital for Children v Hospital Salaried Officers Association of Western Australia (Union of Workers) (1975) WAIG 543

Hollis v Vabu Pty Ltd (2001) 207 CLR 21

Hope v Bathurst City Council (1980) 144 CLR 1

Monaco v Arnedo Pty Ltd, unreported; FCt SCt of WA; Library No 940481; 6 September 1994

Pantorno v The Queen (1989) 166 CLR 466

Personnel Contracting Pty Ltd t/as Tricord Personnel v Construction, Forestry, Mining and Energy Union of Workers [2004] WASCA 312

Re Australian Railways Union; Ex Parte Public Transport Corporation (1993) 117 ALR 17

RGC Mineral Sands v Construction, Mining, Energy, Timberyards, Sawmills, Woodworkers Union of Australia WA Branch (2000) 80 WAIG 2438

Seltsam Pty Ltd v Ghaleb [2005] NSWCA 208

Stead v State Government Insurance Commission (1986) 161 CLR 141

Stevens v Brodribb Sawmilling Co Pty Ltd (1986) 160 CLR 16

Tuite v Administrative Appeals Tribunal (1993) 40 FCR 483

United Construction Pty Ltd v Birighitti [2003] WASCA 24

Vetter v Lake Macquarie City Council (2001) 202 CLR 439

Williams v Bill Williams Pty Ltd [1971] 1 NSWLR 547

Case(s) also cited:

Allesch v Maunz (2000) 203 CLR 172

Alman v Unwin [1983] WAR 157

Australasian Meat Industry Employees' Union v Sunland Enterprises Pty Ltd (1988) 24 IR 467

Autodesk Inc v Dyason (No 2) (1993) 176 CLR 300

Brook Street Bureau v Dacas [2004] EWCA CIV 217

Building Workers' Industrial Union of Australia v Odco Pty Ltd (1991) 29 FCR 104

Burnie Port Authority v MUA (2000) 103 IR 153

Byrne v Australian Airlines Ltd (1995) 185 CLR 410

CFMEUW v Hanssen (2005) 85 WAIG 1264

Coal & Allied Operations Pty Ltd v The Australian Industrial Relations Commission (2000) 203 CLR 194

Collector of Customs v Agfa-Gevaert Ltd (1996) 186 CLR 389

Construction, Forestry, Mining & Energy Union (New South Wales Branch) v Newcrest Mining Ltd (2005) 139 IR 50

Construction, Forestry, Mining & Energy Union of Workers v Hanssen Pty Ltd (2000) WAIRC 00418

Craig v The State of South Australia (1995) 184 CLR 163

Damevski v Guidice (2003) 133 FCR 438

Doyle v Sydney Steel Co Ltd (1936) 56 CLR 545

Forstaff v The Chief Commissioner of State Revenue [2004] NSWSC 573

Kioa v West (1985) 159 CLR 550

Kwinana Construction Group Pty Ltd v Electrical Trades Union of Workers (1954) 34 WAIG 51

Linehan v Northwest Exports Pty Ltd (1981) 57 FLR 49

Massey v Crown Life Insurance Co [1978] 1 WLR 676

Mead v New England Seed Trader Pty Ltd [1972] 46 WCR (NSW) 113

Morgan v Kittochside Nominees Pty Ltd (2002) 117 IR 152

Narich Pty Ltd v Commissioner of Pay-roll Tax [1983] 2 NSWLR 597

Nguyen v ANT Contract Packers Pty Ltd (t/as ANT Personnel) (2003) 128 IR 241

Pitcher v Langford (1991) 23 NSWLR 142

R v Foster; Ex Parte The Commonwealth Life (Amalgamated) Assurances Ltd (1952) 85 CLR 138

Robe River Associates v Amalgamated Metal Workers & Shipwrights Union of Western Australia (1990) 70 WAIG 2083

Serco (Australia) Pty Ltd v Moreno (1996) 76 WAIG 937

Swift Placements Pty Ltd v Work Cover Authority of NSW (2000) 96 IR 69

The Roy Morgan Research Centre Pty Ltd v The Commissioner of State Revenue (1997) 37 ATR 528

1 **WHEELER J**: I have had the advantage of reading in draft the reasons for decision of Le Miere J. I agree with those reasons and have nothing to add.

2 **PULLIN J**: In my opinion, Commissioner Wood's decision to dismiss the application by the Union was correct. I have also concluded that the Full Bench erred in overturning the Commissioner's decision.

3 In relation to IAC 5 of 2005, I agree with Le Miere J that ground 1 should be dismissed for the reasons given by his Honour. I also agree that it is not necessary to say anything about ground 2.

4 As to ground 3, it is clear that the parties had agreed, at the hearing before the Full Bench, that if the ground of appeal alleging unfair refusal to employ was made out, that the matter should be remitted to the Commission for further hearing. The evidence of incidents which had occurred in mid-December 2004 and mid-February 2005 were material events which, if proven, might have led the Commission to the view that it was inappropriate for it to order that BHP Billiton Iron Ore Pty Ltd ("BHPB") employ Mr Brandis. The Full Bench denied BHPB the right to be heard in relation to whether the matter should be remitted to hear evidence concerning the incidents. In my opinion, the appropriate order is that the matter be remitted to the Commission to hear and determine whether BHPB should be ordered to employ Mr Brandis.

5 I agree that ground 4 in IAC 5 should succeed for the reasons given by Le Miere J and that par 2 of the order made by the Full Bench should be set aside.

6 I agree with Le Miere J that the appeal by the Union in IAC 6 should be dismissed for the reasons that he has given.

7 I agree with the orders proposed by Le Miere J.

LE MIERE J:

Introduction

8 Gregory Brandis was employed by BHP Billiton Iron Ore Pty Ltd ("BHPB") and its predecessors as a locomotive engine driver for approximately 22 years until 1999 when he was voluntarily made redundant. In 2001 Mr Brandis applied for employment with Integrated Group Ltd t/as Integrated Workforce ("IW") because he knew they were supplying contract drivers to BHPB. On 18 June 2001 IW presented to

Mr Brandis an Australian Workplace Agreement ("AWA") relating to employment with IW as a locomotive driver. Mr Brandis subsequently underwent a training course conducted by BHPB's training officer and then commenced work as a locomotive engine driver at BHPB's Headland yard and on the Newman mainline. Mr Brandis continued work as a

locomotive engine driver for BHPB until the hearing of his claim by the Western Australian Industrial Relations Commission ("the Commission") to which I will shortly refer.

9 After Mr Brandis had commenced employment with IW he applied for advertised positions with BHPB, as a direct employee, on four occasions, the last being on 24 January 2004. On that occasion he was short listed and went through a selection process but was not successful.

Dispute referred for hearing

10 On 10 June 2004 the Construction, Forestry Mining and Energy Union of Workers ("the Union") applied to the Commission for a conference pursuant to s 44 of the *Industrial Relations Act 1979* ("the Act"). The application was made on the following grounds:

> "[BHPB] unreasonably refuses to employ Greg Brandis as an engine driver. Brandis had previously worked as an engine driver for BHPB for some years and more recently and currently for some years as by way of a labour hire company. Brandis has recently applied for direct employment with [BHPB] which refuses to employ him."

11 IW was subsequently joined as a second respondent. The conference was unsuccessful and the Commission proceeded to hear and determine the dispute. The memorandum referring the dispute for hearing stated, among other things:

> "In January 2004 BHPB advertised for applications to be made to it for employment as rail transport technicians to drive locomotives on its railways in the Pilbara. Mr Brandis applied for one of these positions and underwent pre-employment interviews, psychological testing and reference checks. Mr Brandis' application was refused, as was the subsequent application by him.
>
> [The Union] alleges that:
>
> 1. during the time that Mr Brandis has been employed by [IW] to work at BHPB he has also been employed jointly by BHPB. This is by reason of the fact that throughout that time Mr Brandis has, in all material respects, been directed and supervised by BHPB; and
> 2. BHPB have unreasonably refused to employ Mr Brandis.
>
> [The Union] claims:
>
> 1. a declaration that Mr Brandis has been and is employed by BHPB as an engine driver; and
> 2. an order that BHPB employ Mr Brandis on the award."

Decision of Commissioner

12 The Commissioner stated that the key issues were whether it was unfair for BHPB to refuse to employ Mr Brandis and whether Mr Brandis was jointly employed by BHPB and IW. The Commissioner reviewed the evidence concerning BHPB's failure to employ Mr Brandis. The Commissioner stated that it could be assumed on the evidence that Mr Brandis had driven trains on the BHPB rail network for the previous three and more years without incident except for a breach of safety rules and regulations in August 2002. That incident resulted in a disciplinary enquiry which found that Mr Brandis had overridden the Automatic Train Protection System ("ATP") on ten occasions without authority, had gone past mode 3 whilst it was set at stop and had knowingly breached operating procedures. The enquiry found the incidents to amount to a very serious breach of BHPB rules, operating procedures and operating notices but that based on his previous good record and Mr Brandis' frank admission about what had occurred a formal warning and suspension of Mr Brandis' next tour from 16 September 2002 to 27 September 2002 would be an adequate consequence.

13 The Commissioner considered the evidence relating to the selection process arising from Mr Brandis' application of January 2004. The selection panel deemed Mr Brandis not suitable. Mr Brandis scored poorly on the psychometric tests and was unsupported by his referees. The Commissioner found that the selection panel was entitled to conclude as they did. The selection process itself was fair. The Commissioner stated that to make a case for unfair refusal to employ, the applicant has to pass a relatively high hurdle to warrant the intervention of the Commission so as to order the employer to recruit a particular person. It was not sufficient that Mr Brandis was an experienced and competent driver of long standing. The company was entitled to structure its work force according to its needs. The Commissioner found that BHPB had not unfairly or unreasonably refused to employ Mr Brandis.

14 The Commissioner then went on to consider the Union's case that Mr Brandis was jointly employed by BHPB and IW. The Commissioner made a number of findings. One finding was that Mr Brandis had an express contract of employment in the form of an AWA with IW. The Commissioner considered the submissions of the parties concerning joint employment and relevant authorities referred to the Commissioner. The Commissioner concluded that Mr Brandis and BHPB had not sought by their conduct to establish the necessary mutuality of obligation. The control exercised by BHPB over Mr Brandis must be seen in the light of the nature of Mr Brandis' employment, BHPB's rail system and the detailed obligations imposed upon them by the *Mines Safety and Inspection Act 1984* (WA). The Commissioner concluded that Mr Brandis had not formed an implied contract of service with BHPB. The Commissioner dismissed the Union's application.

Union appeal to Full Bench

15 The Union appealed from the decision of the Commissioner to the Full Bench. The first and second grounds of appeal were that the Commission ought to have held that there was a contract of employment between Mr Brandis and BHPB and IW jointly or alternatively with BHPB and that the Commission ought to have required BHPB to employ Mr Brandis on the award. The third ground of appeal was that the Commission erred in holding that the refusal of BHPB to employ Mr Brandis was not unfair. The Union sought in lieu of the orders of the Commission an order that BHPB employ Mr Brandis on a contract of employment to which the award applies.

16 BHPB applied to the Full Bench to adduce fresh evidence. In his reasons for decision the President said that the evidence sought to be adduced was contained in an affidavit sworn on 14 March 2005 by Mr Ritchie, BHPB's manager of employee relations. Mr Ritchie's evidence was that on or about 15 February 2005 IW ceased providing Mr Brandis' services to BHPB pursuant to its contract with BHPB and further that as and from 8 March 2005 Mr Brandis was no longer employed by IW. The President characterised that evidence as merely more evidence of acts by BHPB and IW purporting to be authorised by the contracts which they say exist and existed. Unilateral acts by IW after the matter was determined at first instance and sought to be used by BHPB and IW in affirmation of their cases was not a matter going to the merit of the proceedings at first instance. Those events, the President held, did not in any way falsify or affect the correctness or otherwise of the Commissioner's finding. Further, the evidence was not relevant to the question of remedy. For those reasons the President agreed with the other members of the Full Bench to dismiss the application to adduce that evidence.

17 The President reviewed the evidence and the findings of the Commission and the relevant law concerning whether there was an implied contract of employment between Mr Brandis and BHPB. The President concluded that Mr Brandis was, at all material times, an employee of BHPB by virtue of an implied contract between them. Alternatively, the President found that Mr Brandis was, at all material times, an employee jointly of BHPB and IW, with both parties responsible for the discharge of some obligations to him and to each other and the enjoyment of certain benefits due to the contract between them. The President then found that because that was so, Mr Brandis was not required to apply for permanent employment, being already a permanent or continuing employee.

18 The President went on to consider the appeal against the finding that the refusal to employ Mr Brandis was not unfair. The President noted that Mr Brandis was not selected for the position for three reasons. The first reason was that he had a poor safety record. The second reason was that his referees held poor or ambiguous opinions of him. Thirdly, the result of the psychometric test was unfavourable. The President found that it was unfair to refuse to employ Mr Brandis because of his safety record. The President found that it was wrong and unfair of BHPB to rely on the references as bases for refusal to employ Mr Brandis. The President found that the selection process was unfair in that it allowed a psychometric assessment to overrule the objective facts and constitute part of the reasons for refusing to employ him.

19 The President found that the Commissioner erred in holding that it was reasonably open to BHPB to come to the decision not to employ Mr Brandis because the reasons for refusing to employ him were without merit. The President found that the decision not to employ Mr Brandis was made ineptly or unfairly and an injustice was done to him. Alternatively, it was made with ill will for Mr Brandis, perhaps relating to his propensity to stand up for his rights. The President found that the Commissioner should have found that Mr Brandis was, applying par 26(1)(a) of the Act, and having regard to par 26(1)(c), treated unfairly and that such unfairness must be remedied. The exercise of the Commissioner's discretion miscarried because the Commissioner mistook the facts and allowed some irrelevant matters to guide him whilst not taking account of some relevant matters. The exercise of the Commissioner's discretion having miscarried, the Full Bench was entitled to substitute the exercise of its own discretion for the exercise of the discretion of the Commission at first instance.

20 The President found further and alternatively that Mr Brandis was, at all material times, an employee of BHPB and he therefore did not have to apply for a job which he already held, and the selection process was invalid and irrelevant to his employment situation.

21 The President found that the Full Bench should exercise its discretion to order that Mr Brandis continue to be employed as and from 7 May 2004 and declare that the award applied to Mr Brandis' employment at all material times. 7 May 2004 was the date when Mr Brandis' application for employment was refused.

22 Chief Commissioner Beech found that the Commissioner had not erred in holding that Mr Brandis was not employed by BHPB and did not consider that the grounds of appeal to that effect, that is grounds 1 and 2, had been made out. The Chief Commissioner stated that he had read in draft the reasons for decision of the President in relation to ground 3, that is that the Commission erred in holding that the refusal of BHPB to employ Brandis was not unfair, and agreed with the order proposed by the President.

23 Commissioner Kenner found that there was no contract of service between BHPB and Mr Brandis and did not uphold the grounds of appeal to the effect that there was. Commissioner Kenner then considered the ground of appeal that the Commissioner erred in holding that the refusal of BHPB to employ Mr Brandis was unfair. Kenner C found that the Commissioner had misdirected himself as to the proper question to be asked in relation to that issue. It was not whether on the facts the decision to not employ Mr Brandis was reasonably open, nor was there any necessity for a "relatively high hurdle" to be surmounted to persuade the Commission in favour of the appellant's claim. What was required was a consideration of whether, in all of the circumstances of the case, as a matter of equity, good conscience and the substantial merits of the case under par 26(1)(a) of the Act, it was industrially unfair for BHPB to refuse to employ Mr Brandis. Kenner C agreed with the reasons expressed by the President that in all of the circumstances of the case it was unfair for BHPB to refuse to employ Mr Brandis. In particular, Kenner C found BHPB's reliance upon the psychometric test undertaken by Mr Brandis and the psychological assessment was unfair.

24 The order made by the Full Bench was that the decision of the Commission be varied by deleting the order to dismiss the application and substituting the following declaration and order:

> "(1) That [BHPB] did unfairly refuse to employ Gregory James Brandis as a locomotive driver on a continuing and indefinite basis in position number V56084 rail transport technician, as and from 7 May 2004.
>
> (2) that [BHPB] do employ the said Gregory James Brandis in position number V56084 rail transport technician as and from 7 May 2004."

Appeals to this Court

25 There are two appeals to this Court. In IAC 5 of 2005 BHPB is the appellant, the Union is the first respondent and IW is the second respondent. In IAC 6 of 2005 the Union is the appellant, BHPB is the first respondent and IW is the second respondent. In each appeal IW adopted the submissions of BHPB.

26 In IAC 5 of 2005 BHPB advanced five grounds of appeal. I will consider those grounds of appeal before considering the appeal by the Union in IAC 6 of 2005.

Ground 1

27 Ground 1 is that the Full Bench determined the question of whether the Commission at first instance erred in respect of the claim that BHPB had unfairly refused to employ Mr Brandis and should be ordered to employ him on, amongst other things, an assumed and erroneous basis concerning the true legal relationship between:

> (a) Mr Brandis and IW;
>
> (b) BHPB and IW; and
>
> (c) BHPB and Mr Brandis,

which was not raised or relied upon by any party in the proceedings and in respect of which BHPB was denied procedural fairness and the right to be heard.

28 This ground arises from findings made by the President concerning the AWA or AWAs between Mr Brandis and IW and the services contract between BHPB and IW by which IW was to provide locomotive engine drivers as required by BHPB. Mr Dixon SC, senior counsel for BHPB, submitted, and Mr Crawshaw SC, senior counsel for the Union, conceded, that it was common ground between the parties before the Commission and before the Full Bench that at all material times there was an operative contract between BHPB and IW by which IW was to provide locomotive engine

drivers as required by BHPB and at all material times there was an operative AWA between Mr Brandis and IW. It was further submitted by Mr Dixon SC and conceded by Mr Crawshaw SC that the case was presented by the Union before the Commission and the Full Bench and was determined at first instance by the Commission on that basis.

29 BHPB submits that contrary to the position accepted by the Commission at first instance and the parties, the President assumed, or proceeded to deal with the appeal to the Full Bench on the basis that, the services contract between BHPB and IW did not remain on foot beyond the end of June 2001 and Mr Brandis' employment with IW was not the subject of an AWA until October 2002.

30 BHPB submits that those findings were assumptions and the reasoning of the President based upon them formed an integral and critical part of the decision by the President to make the declaration and order made by the Full Bench. BHPB submits that despite expressing their own views to the contrary on the contractual and employment arrangements between the parties Beech CC and Kenner C expressly concurred with the reasoning and conclusions of the President in relation to ground 3 of the appeal to the Full Bench, that is the ground that the Commission erred in holding that the refusal of the first respondent to employ Mr Brandis was not unfair. BHPB argues that the assumptions or conclusions arrived at by the President were never raised with the parties and hence BHPB was denied the right to be heard. On that basis BHPB submits that it was denied the right to be heard and its appeal to this Court is competent by reason of par 90(1)(c) of the Act.

31 To succeed on this ground of appeal BHPB must establish four propositions. The first is that the assumptions or conclusions of the President that the BHPB – IW services contract did not remain on foot beyond the end of June 2001 and that Mr Brandis' employment with IW was not the subject of an AWA until October 2002 materially affected the President's decision that at all material times Mr Brandis was employed by BHPB or alternatively by BHPB and IW jointly. The second is that BHPB was denied the right to be heard in relation to those assumptions or conclusions. The third is that the President's finding that at all material times Mr Brandis was employed by BHPB or alternatively by BHPB and IW jointly materially affected his decision that BHPB unfairly refused to employ Mr Brandis. The fourth is that the President's finding that Mr Brandis was at all material times employed by BHPB or jointly by BHPB and IW materially affected the decisions of Beech CC and Kenner C that BHPB unfairly refused to employ Mr Brandis.

Findings materially affected the President's decision on prior employment issue

32 As to the first proposition or step in the argument, I am satisfied that the findings of the President concerning the services contract and the AWAs materially affected the President's decision that at all material times Mr Brandis was employed by BHP or alternatively jointly by BHPB and IW (the prior employment issue).

BHPB was denied right to be heard

33 The second step is whether BHPB was denied the right to be heard in relation to those findings. Procedural fairness does not normally require a Judge to disclose his thinking processes or proposed conclusions. However, a party may be denied procedural fairness if a Judge departs from the basis upon which the case has been argued by the parties without notice to the parties.

34 The right to be heard includes a proper opportunity to present submissions seeking to persuade a court or tribunal that the evidence and inferences from it support or fail to support any fact necessary to be established. A restriction upon the opportunity afforded to one of the parties through their counsel to make submissions upon the facts that are said to be established by the evidence deprives a party of their right to be heard.

35 In ***Stead v State Government Insurance Commission*** (1986) 161 CLR 141, the plaintiff claimed damages for personal injury arising out of a motor vehicle accident. One of his claims was that the accident had caused a neurotic condition that had rendered him totally incapacitated for work. Dr Scanlon had given evidence on behalf of the defendant that there was no connection between the accident and the neurotic condition. In his closing address, the plaintiff's counsel submitted that the trial Judge should not accept the doctor's evidence. The Judge said: "I don't accept Dr Scanlon on that. You needn't go on as to that". Counsel did not then pursue the matter. When the trial Judge delivered judgment, he accepted the doctor's evidence on the point in question. The High Court found that by stopping the plaintiff's counsel from addressing on the topic of Dr Scanlon's evidence, the Judge had deprived the plaintiff of an opportunity of presenting argument on a vital issue in the case and the plaintiff had thereby been denied procedural fairness.

36 In ***Pantorno v The Queen*** (1989) 166 CLR 466 the accused pleaded guilty to a charge of possession of a drug of dependence. Paragraph 73(1)(b) of the *Drugs Poisons and Controlled Substances Act 1981* (Vic) prescribed a penalty for unlawful possession of a drug of dependence where the court is satisfied that the offence was not committed by the person for any purpose relating to trafficking in that drug, that penalty being less than the penalty prescribed by par (c) for unlawful possession of a drug of dependence in any other case. The accused's counsel told the Judge that the amount of the drug was very small and was for the accused's own use. He referred to par 73(1)(b) as prescribing the relevant penalty where it is not a traffickable [*sic*] amount, and said that the Crown "doesn't suggest for one moment that this is a trafficable amount". The prosecutor did not challenge this assertion and made no submissions about sentence. The Judge sentenced the accused under par 73(1)(c) on the basis that there was no evidence before him that the accused's possession of the drug was not for a purpose relating to trafficking. The High Court held that since the proceedings before the Judge had been conducted by the Crown and counsel for the accused on the footing that par 73(1)(b) applied it had not been open to the Judge to sentence under par 73(1)(c) without giving the accused's counsel an opportunity to show why the accused was not liable to the larger penalty prescribed by par 73(1)(c). At 473 Mason CJ and Brennan J said:

> "When the parties to an adversarial proceeding agree on a proposition of law and conduct their cases on that basis, their agreement does not bind the trial judge. If the judge determines the law to be different, he may apply the law as he determines it to be, but he must inform the parties of the view he has formed when that is necessary to give them an opportunity to address new issues arising from the judge's departure from the proposition of law on which the case was conducted. Otherwise both parties are taken by surprise …"

37 At 474 Mason CJ and Brennan J said:

> "Once it is accepted that the proceedings before the learned sentencing judge were conducted by the Crown and counsel for the applicant on the footing that s.73(1)(b) was the relevant provision of the statute, it follows that the judge was not entitled to sentence on the footing that s.73(1)(c) was the relevant provision without giving the applicant's counsel an opportunity to show why the applicant was not liable to the larger penalty prescribed by s.73(1)(c)."

38 The principle stated by Mason CJ and Brennan J in ***Pantorno v The Queen*** (*supra*) has been applied in many cases since including ***Monaco v Arnedo Pty Ltd***, unreported; FCt SCt of WA; Library No 940481; 6 September 1994, ***Tuite v Administrative Appeals Tribunal*** (1993) 40 FCR 483 and ***Seltsam Pty Ltd v Ghaleb*** [2005] NSWCA 208.

39 In this case, the President departed from the basis upon which the parties had conducted the case before the Commission at first instance and upon which the Commissioner had made his decision. The submissions of the parties

before the Full Bench were predicated upon the continued existence of the services contract after 30 June 2001 and upon Mr Brandis' employment with IW having been the subject of an AWA at all material times. If BHPB had appreciated that the President might depart from those assumptions then it may have made submissions that there was evidence that the services contract remained on foot after 30 June 2001 and that Mr Brandis' employment with IW was at all material times the subject of an AWA or that the Commission at first instance was entitled to proceed on that basis because the parties had conducted the case on that basis. Further, BHPB may have sought to persuade the President that the Full Bench should not, or was not entitled to, depart from the assumptions upon which the parties conducted the case at first instance and upon which the Commissioner had made his decision. BHPB was denied an opportunity to put its case in relation to those matters. By not alerting the parties to the possibility that he might depart from the basis upon which the parties had conducted the case, the President failed to afford them a reasonable opportunity to put what ever case they might have wished to put in the circumstances. BHPB was denied the right to be heard in relation to that matter.

Impugned findings did not materially affect the President's decision on unfairness of refusal to employ

40 Not every departure from the rules of natural justice will necessitate a decision being set aside. In this case, BHPB must establish that the findings by the President in relation to the services contract and the AWAs materially affected his conclusion that BHPB unfairly refused to employ Mr Brandis. This is the third essential step in BHPB's argument.

41 In his reasons for decision the President first dealt with grounds 1 and 2 of the appeal to the Full Bench, that is the grounds relating to the prior employment issue. The President commenced his consideration of ground 3, that is the unfair refusal to employ ground (that the Commission erred in holding that the refusal of BHPB to employ Mr Brandis was not unfair) at par 235 of his reasons. At par 245 the President said: "Of course, in considering this question, I put aside the fact that he was employed on a permanent basis". I take the President's statement that he put aside "the fact that he was employed on a permanent basis" to be a statement that in determining the question of whether BHPB had unfairly refused to employ Mr Brandis the President was putting aside his finding that at all material times BHPB had employed Mr Brandis as a permanent employee.

42 The President went on to consider the reasons given by the BHPB selection panel for not offering Mr Brandis permanent employment after his application. In par 282 the President found that the Commissioner at first instance erred in holding that it was reasonably open to BHPB to come to the decision not to employ Mr Brandis because BHPB's reasons for refusing to employ him were without merit. The President found that the selection system was unfair because Mr Brandis' application was rejected on invalid and implausible or improbable grounds. Further, the President found that the fact that Mr Brandis had worked on a continuing basis for the best part of three years and was deemed suitable to continue to work and to demonstrate the system to those who were selected instead of him was proof of a thorough unfairness of the process. The President found that the exercise of the Commissioner's discretion had miscarried because the Commissioner mistook the facts and allowed some irrelevant matters to guide him while not taking account of some relevant matters.

43 Mr Dixon SC submitted that the findings of the President concerning the services contract and the AWAs formed an integral and critical part of his decision to declare that BHPB unfairly refused to employ Mr Brandis and to order BHPB to do so. Mr Dixon pointed to a number of passages in the President's reasons for decision which he submitted demonstrated that the President had done so. In par 284, having held that the discretion of the Commissioner had miscarried the President said that the Full Bench should substitute the exercise of its discretion for the exercise of the discretion at first instance and that he would do so "relying on the findings which I say should have been made at first instance, as well as any other relevant unchallenged findings". Mr Dixon SC submitted that "the findings which I say should have been made at first instance" include the finding that at all material times Mr Brandis was employed by BHPB or jointly by BHPB and IW. I do not agree. The findings which the President says should have been made at first instance are a reference to his findings concerning BHPB's reasons for refusing to employ Mr Brandis following his application for employment in January 2004.

44 At par 285 the President went on to say: "further and alternatively, Mr Brandis was, at all material times, an employee of BHPB. He patently therefore did not have to apply for a job which he already held, and the selection process was simply invalid and irrelevant to his employment situation". That paragraph comes after the President had concluded that BHPB had unfairly refused to employ Mr Brandis and that the President would exercise his discretion in substitution for that of the Commission at first instance. The President said in par 285, in effect, that Mr Brandis' application for a job and the whole selection process was irrelevant because Mr Brandis was already employed by BHPB. That fact did not form part of the President's reasons for finding that BHPB had unfairly refused to employ Mr Brandis.

45 In par 286 the President concluded that "for all those reasons" the Union had established that the exercise of the discretion at first instance miscarried" and that "the selection process was invalid and Mr Brandis should never have been required to apply for a position which he already held, namely an ongoing and continuous position as a locomotive driver and employee of BHPB". The President was there in effect repeating his earlier finding that the exercise of the discretion at first instance had miscarried but in any event the President had found that Mr Brandis had been employed by BHPB at all material times.

46 Mr Dixon SC submitted that the President adopted from the outset of his reasons a mindset which cannot be separated from the overall reasoning and outcome in the judgment. Mr Dixon SC submitted that the President made reference to the time when Mr Brandis was "purportedly" employed by IW. I accept the submission of Mr Crawshaw SC that the use of the word "purported" reflects the fact that this was a live issue in the proceedings but was not stated as a reason for finding that there was an unfair refusal to employ.

47 Mr Dixon SC made reference to a number of other passages in the reasons for decision of the President which he submitted demonstrated that the President's findings concerning the services agreement and the AWAs formed an integral and critical part of his decision in relation to the unfair refusal to employ ground of appeal. I have read those passages carefully. After considering all of those passages in the context of the President's reasons as a whole I am not satisfied that the President's findings concerning the services contract and the AWAs materially affected his decision that BHPB unfairly refused to employ Mr Brandis.

Impugned findings did not materially affect decision of majority

48 There is a further reason why this ground of appeal does not succeed. BHPB must establish that the President's findings concerning the services contract and the AWA materially affected the decisions of Beech CC and Kenner C that BHPB unfairly refused to employ Mr Brandis.

49 Beech CC first considered the grounds of appeal that alleged the Commission erred in holding that there was not a contract of employment between Mr Brandis and BHPB. Beech CC undertook an extensive discussion and analysis of the facts and law relating to that issue and concluded, contrary to the conclusion of the President, that the Commission at first instance had not erred in holding that Mr Brandis was not employed by BHPB. At par 293 Beech CC noted that the

President had observed that the contract between IW and BHPB had expired. The Chief Commissioner stated: "The matter at first instance, and this appeal, have both been engaged on the implicit basis that the contract between IW and BHPB continued in existence".

50 Beech CC stated that in relation to ground 3, that is the ground that the Commission had erred in holding that the refusal of BHPB to employ Mr Brandis was not unfair, he had had the advantage of reading in draft form the reasons for decision of the President in relation to that ground and agreed with the order proposed by the President.

51 Kenner C also undertook a detailed discussion of grounds 1 and 2 of the appeal to the Full Bench and the facts and law relating to those grounds. Kenner C concluded that there was no contract of service on foot between BHPB and Mr Brandis. Kenner C then went on to consider ground 3. Kenner C stated that he agreed with the submissions of the Union that the Commissioner misdirected himself as to the proper question to be asked in relation to the unfair refusal to employ issue. Kenner C said that the issue was not whether on the facts as found, the decision to employ Mr Brandis was reasonably open, nor was there any necessity for a "relatively high hurdle" to be surmounted to persuade the Commission in favour of the appellant's claim. What was required was a consideration of whether, in all the circumstances, as a matter of equity, good conscience and the substantial merits of the case it was industrially unfair for BHPB to refuse to employ Mr Brandis. Kenner C went on to say that as to this ground he agreed with the reasons expressed by the President that in all of the circumstances it was unfair for BHPB to refuse to employ Mr Brandis. In particular, Kenner C referred to the evidence as to the psychologist's report.

52 Each of Beech CC and Kenner C delivered separate reasons for decision in which they reached a conclusion different from that of the President concerning the prior employment issue. In agreeing with the reasons of the President concerning the unfair refusal to employ issue they must have understood that the President's finding on the prior employment issue was not part of his reasons for finding that BHPB had unfairly refused to employ Mr Brandis or alternatively they must have agreed with the reasons of the President on the unfair refusal to employ issue excluding the President's findings concerning the prior employment issue. To conclude otherwise would be to conclude that each of the Commissioners separately arrived at the inconsistent and self contradictory conclusion that they agreed that BHPB had unfairly refused to employ Mr Brandis in part because BHPB at all material times employed Mr Brandis when they had found that that was not so. The court should only attribute such an irrational conclusion to each of the Commissioners if their reasons for decision compelled that finding. To the contrary, the natural and ordinary reading of their reasons for decision is, as I have said, that in relation to the unfair refusal to employ ground of appeal they agreed with the reasons of the President which reasons did not include his Honour's findings concerning the prior employment issue or if they did then Beech CC and Kenner C did not agree with those parts of the President's reasons.

53 For the reasons stated, ground 1 of the appeal does not succeed.

Ground 2

54 Senior counsel for BHPB submitted, in effect, that ground 2 was included in the grounds of appeal in response to the appeal by the Union and it was not pressed. It is not necessary to say anything further about ground 2.

Ground 3

55 Ground 3 is that the Full Bench, having found that the Commissioner erred in respect of the question of whether BHPB had unfairly refused to employ Mr Brandis and should be ordered to employ him, failed or refused to remit the matter to the Commissioner to decide the issue in light of fresh evidence which BHPB wished to adduce and the Full Bench failed to give BHPB an opportunity to adduce that evidence before proceeding to decide the matter itself and thereby denied BHPB procedural fairness and the right to be heard.

Background to ground 3

56 The hearing of the appeal to the Full Bench proceeded on 13 and 14 December 2004 and was then adjourned part heard. The hearing of the appeal recommenced on 15 March 2005. In the meantime, on 14 March 2005, BHPB had filed a notice of application. The application was in two parts. The first part was an application for leave to lead fresh evidence to the effect that from or about 15 February 2005 IW ceased providing the services of Mr Brandis to BHPB pursuant to its contract with BHPB, that with effect from 8 March 2005 Mr Brandis was no longer employed by IW and by reason of those matters IW would no longer be providing the services of Mr Brandis to BHPB. The second part of the application was that in the event that the Full Bench determined that there was an appealable error at first instance in respect of the Union's claim for an order that BHPB employ Mr Brandis, the case should be remitted to the Commissioner for further hearing and determination and to hear further evidence. That further evidence was evidence of two matters. The first was the further evidence sought to be led before the Full Bench, that is that IW had ceased providing the services of Mr Brandis to BHPB and Mr Brandis was no longer employed by IW. The second matter was evidence of incidents which occurred in mid-December 2004 and mid-February 2005 whilst Mr Brandis was operating locomotives on BHPB's rail system which evidence BHPB wished to rely on in further opposition to an order that it be required to employ Mr Brandis in circumstances where it had made an assessment as to his unsuitability for employment with BHPB.

57 At the resumed hearing of the appeal on 15 March 2005 the notice of application was brought before the Full Bench and the Full Bench determined that the application should be then dealt with. Mr Dixon SC, commenced his submissions in support of the application. Counsel for the Union, Mr Schapper, interrupted Mr Dixon and made submissions concerning par 3 of the notice of application, that is the application that in the event the Full Bench found there was error at first instance the case should be remitted to the Commission at first instance for further hearing and determination and to hear the further evidence. Mr Schapper submitted:

> "I've got no difficulty with saying that if the Full Bench finds error in respect of Commissioner Wood in respect of our claim that they should be ordered to employ him, that should go back and the subsequent allegations or allegations of subsequent events should be the subject of further hearing and we will deal with that."

58 The President then asked Mr Dixon SC whether he was assisted by Mr Schapper's submission. Mr Dixon SC said that he was and proceeded with his submissions. Those submissions dealt principally with the proposed fresh evidence concerning Mr Brandis no longer being employed by IW and his services no longer being provided to BHPB. Mr Dixon SC said that BHPB agreed with the Union that in the event that the Commission found error on the part of Commissioner Wood the matter should be remitted to Commissioner Wood. Mr Schapper then made submissions, including a submission that if the appeal was to be upheld in respect of the unfair refusal to employ claim the matter should be remitted to the Commissioner at first instance so that the subsequent matters could be ventilated. The Full Bench then stated that its decision was: "We dismiss the application on behalf of [BHPB] to adduce fresh evidence". The Full Bench stated that it would deliver its reasons later.

59 The Full Bench delivered its reasons for dismissing the application to adduce fresh evidence in the course of its reasons for decision in the substantive appeal. At par 66 the President stated that BHPB had made application to adduce fresh evidence. The evidence sought to be adduced was contained in the affidavit of Mr Ritchie. His evidence was that

on or about 15 February 2005 IW ceased providing Mr Brandis' services to BHPB pursuant to its contract with BHPB and further that as and from 8 March 2005 Mr Brandis was no longer employed by IW. At par 71 the President said that the evidence was merely more evidence of acts by the respondents purporting to be authorised by the contracts which they say exist and existed. At par 72 the President said that unilateral acts by IW after the matter was determined at first instance and sought to be used by the respondents in affirmation of their cases was not a matter going to the merit of the proceedings at first instance on the appeal. Those events did not in any way falsify or affect the correctness or otherwise of the Commissioner's finding. The evidence was not relevant to the question of remedy. For those reasons the President dismissed the application to adduce that evidence.

60 BHPB sought to raise the matter of remittal at the speaking to the minutes. BHPB proposed that the reasons for decision of the Full Bench should be given effect to by orders in the following terms:

1. that [BHPB] did unfairly refuse to employ Gregory James Brandis as a locomotive driver as and from 7 May 2004.
2. that the matter be remitted to Commissioner Wood for further hearing and determination.

61 After the speaking to the minutes the Full Bench delivered supplementary reasons for decision. In those reasons the President said that the submission by BHPB that the proposed order be amended was not competent because it was not a matter to be raised on a speaking to the minutes. Further, the submissions made represented a calling into question of part of the decision made by the Full Bench or otherwise were incompetent as an attempt to achieve a calling into question of a decision of the Commission expressed in a minute in accordance with the reasons given. Further, insofar as there was an attempt to adduce evidence already rejected, that was incompetent. Beech CC said that the decision of the Full Bench was to not to suspend and remit the decision and accordingly what was submitted by BHPB was outside the purpose of a speaking to the minutes and asked the Full Bench to do what it did not have power to do in the absence of a reopening of the matter. Beech CC went on to make observations that he had considerable difficulties seeing how alleged events in December 2004 or February 2005 could be relevant to whether or not BHPB should be now required to employ Mr Brandis from 7 May 2004. Kenner C generally agreed with the reasons of the President and added that with the application by BHPB to adduce fresh evidence having been refused by the Full Bench it was then too late to re-agitate those issues once again.

BHPB's argument

62 BHPB submits that the Full Bench denied it the right to be heard when, in the re-exercise of the discretionary judgment it decided whether BHPB's refusal was unfair and whether the orders the Union sought should be made. BHPB submits that whilst the Full Bench dismissed BHPB's application to adduce fresh evidence it did not consider BHPB's application or submission that, if the Full Bench found error, it should remit the matter to the Commission for further hearing. Further, BHPB submits, that having given no indication it would not adopt the course agreed by the parties in relation to remitting the matter to the Commission, the Full Bench proceeded to decide the matter for itself but denied the parties the right to be heard as to why, on the basis of events which occurred after the hearing at first instance, no order to employ or otherwise should be made. It was essential that, before the Full Bench decided to order that BHPB employ someone who had been involved in a further safety incident on its rail system, it give BHPB the opportunity to be heard as to the appropriateness of such an order.

Determination of issues and the right to be heard

63 I have already referred to ***Pantorno v The Queen*** (*supra*). Mason CJ and Brennan J there held that when the parties to an adversarial proceeding agree on a proposition of law and conduct their cases on that basis and the Judge determines the law to be different, he must inform the parties of the view he has formed when that is necessary to give them an opportunity to address new issues arising from the Judge's departure from the proposition of law on which the case was conducted. The same principle should apply when the parties conduct an appeal on the basis that if one ground of appeal is determined in favour of the appellant then the matter should be remitted to the original decision maker for further hearing.

64 ***Re Australian Railways Union; Ex Parte Public Transport Corporation*** (1993) 117 ALR 17 concerned a final award made by the Australian Industrial Relations Commission ("AIRC"). The relief granted by the AIRC was not the relief sought by any of the parties to the application which was before it. The parties had sought only an interim award. The Full Court of the High Court in a joint judgment pointed out that one aspect of the duty to act judicially is the duty to hear a party and to allow him or her a reasonable opportunity to present his or her case and, coupled with that duty, is the duty to consider the case put. Their Honours held that the parties were not given a reasonable opportunity to put whatever case they may have wished to put in opposition to the course eventually taken by the AIRC, that is the issue of a final award. Before making the final award, the AIRC ought to have alerted the parties to the possibility that it might do so, in order to afford them a reasonable opportunity to put whatever case they might have wished to put in the circumstances.

BHPB was not given a hearing on the remittal issue

65 In this case, the parties before the Full Bench were agreed that if the unfair refusal to employ ground of appeal was made out the matter should be remitted to the Commission for further hearing. The Full Bench gave no indication that it was not going to act on that basis. Indeed, the manner in which the notice of application was dealt with by the Full Bench during the hearing of the appeal would lead a reasonable person in the position of BHPB to believe that the Full Bench would, if the relevant ground of appeal was made out, remit the matter for hearing by the Commission or at least would not take a different course without alerting the parties that it might do so and give them an opportunity to put their case for remittal.

66 The Full Bench did not give the parties that opportunity. The submissions made by BHPB at the speaking to the minutes did not amount to such an opportunity. The Full Bench rejected those submissions on the ground that the submission was not competent because it was not a matter to be raised on a speaking to the minutes as prescribed by s 35 of the Act.

67 The Union submits that BHPB had no right to be heard by the calling of further evidence in the appeal itself or by remittal if the appeal was upheld. Section 49(4) of the Act provides that the appeal shall be determined on the evidence and matters raised in the proceedings at first instance. It was submitted that this means the appeal proceeding itself is an appeal in the strict sense in which the appeal Tribunal's function is simply to determine whether the decision in question is right or wrong on the evidence and the law as it stood when the decision at first instance was made.

68 That is not an answer to the point presently under consideration. The relevant part of BHPB's application was not that the Full Bench should hear the further evidence concerning the safety issue. BHPB had submitted that the Full Bench should remit the matter to Commissioner Wood for further hearing and determination and to hear the further evidence.

69 The Union submits that whilst subsection 49(5) of the Act confers on the Full Bench a discretion to remit the case to the Commission for further hearing and determination subsection 49(6a) constrains the exercise of the discretion by

providing that the Full Bench is not to remit a case to the Commission unless it considers that it is unable to make its own decision on the merits of the case because of lack of evidence or for other good reason. The Union submitted that BHPB never sought to meet the provisions of subsection 49(6a) until the speaking to the minutes. The answer to that submission is that BHPB did not make any such submissions because the hearing of the appeal proceeded on the basis that if the relevant ground of appeal was made out the case would be remitted to the Commissioner for further hearing and determination. By not alerting BHPB to the possibility that the Full Bench might not act in accordance with the course agreed by the parties the Full Bench denied BHPB the right to put its case that the case be remitted to the Commission including its case that that course was not precluded by the provisions of subsection 49(6a). That is, BHPB was denied the right to be heard in relation to that issue.

Full Bench decision not to be remit should be set aside

70 Not every departure from the rules of procedural fairness will entitle the aggrieved party to a new hearing. By way of illustration, if all that happened at a trial was that a party was denied the opportunity of making submissions on a question of law, when, in the opinion of the appellate court, the question of law must clearly be answered unfavourably to the aggrieved party, it would be futile to order a new trial: ***Stead v SGIC*** (1986) 161 CLR 141 per the Court at 145.

71 The court will not undertake the task of considering whether the observance of the hearing rule would have made no difference to the final decision if determining whether observance of procedural fairness would have made no difference to the final outcome involves assessing the merits of the decision. There will be rare cases where a court can properly say, without judging the merits, that observance of procedural fairness could not possibly have made a difference. One example discussed in ***Stead v SGIC*** (*supra*) is where a decision-maker denies a party the opportunity to make submissions on a question of law that must be answered unfavourably to that party. Another example is where a hearing is denied in making a decision that the decision-maker is bound in law to make.

72 The Union submits, in effect, that if the Full Bench had given BHPB an opportunity to make submissions that if the unfair refusal to employ ground of appeal succeeded the case should be remitted to the Commissioner for further hearing and determination, nevertheless its decision would have been no different. That is because the Full Bench does not have power to receive further evidence on appeal and may only remit the case to the Commission for further hearing and determination if it considers that it is unable to make its own decision on the merits of the case because of lack of evidence or for other good reason.

73 Even if the Full Bench does not have the power to receive further evidence on appeal, a question it is not necessary to determine in the course of this appeal, that is no reason to deny BHPB relief on this ground of the appeal. As I have said, BHPB's application to the Full Bench was that, if the unfair refusal to employ ground succeeded the case should be remitted to the Commission for further hearing and determination not that the Full Bench should itself receive further evidence in relation to the safety issue.

74 The Full Bench has power to suspend the operation of the decision appealed from and to remit the case to the Commission for further hearing and determination if it considers that it is unable to make its own decision on the merits of the case because of lack of evidence or for other good reason. There was good reason to remit the case to the Commission for further hearing and determination. The Full Bench found that the Commission at first instance had erred. In those circumstances the Full Bench must either itself exercise the discretion whether to order BHPB to employ Mr Brandis and on what terms or remit the case to the Commissioner to exercise that discretion. The Commissioner had not exercised the discretion because the Commissioner had found that BHPB had not unfairly or unreasonably refused to employ Mr Brandis. Furthermore, BHPB wished to lead evidence of incidents which occurred in mid-December 2004 in mid-February 2005 which BHPB submitted raised safety issues and made it inappropriate for the Commission to order that BHPB employ Mr Brandis. Importantly, BHPB and the Union agreed before the Full Bench that if the Full Bench found that the Commissioner had erred then the case should be remitted to the Commissioner and the allegations concerning the breach of safety issues in December 2004 and February 2005 should be the subject of further hearing before the Commissioner.

75 In all the circumstances the Full Bench, having found that the Commissioner erred in not finding that BHPB had unfairly or unreasonably refused to employ Mr Brandis, should have remitted the case to the Commissioner to further hear and determine whether it should order BHPB to employ Mr Brandis.

Appropriate order

76 Subsection 90(3) of the Act provides that this Court may confirm, reverse, vary, amend, rescind, set aside, or quash the decision the subject of appeal and may remit the matter to the Full Bench for further hearing and determination according to law. The appropriate course in this case is to vary the decision of the Full Bench by substituting an order that the case be remitted to Commissioner Wood for further hearing and determination in lieu of order 2 made by the Full Bench. The parties before the Full Bench agreed that that course should be followed. Furthermore, remitting the case to the Commissioner would enable the Commissioner to consider receiving the further evidence concerning the safety issue and, if it receives the evidence, to test the evidence by cross-examination and make the necessary findings of fact. That is a course more appropriately undertaken by the Commissioner, whether or not the Full Bench has power to receive further evidence on appeal. Finally, the President has now retired and the case could not be remitted to the same Full Bench that made the decision appealed from.

Ground 4

77 Ground 4 is that the Full Bench exceeded its jurisdiction or power by ordering BHPB to employ Mr Brandis as and from 7 May 2004.

78 A refusal by an employer in an industry to employ a person may be an industrial matter even though that person is not employed by the employer and had never been employed by that employer in the past. Further, an employer may be obliged when seeking to employ a person in a vacancy to make an offer of employment to a particular person: ***RGC Mineral Sands v Construction, Mining, Energy, Timberyards, Sawmills, Woodworkers Union of Australia WA Branch*** (2000) 80 WAIG 2438 at 2445 per Parker J. The effect of s 23(1) of the Act is that the Commission has power to "deal with" the industrial matter constituted by the refusal to employ a person. Once the jurisdiction of the Commission is enlivened it has the power to make an order to "deal with" the industrial matter. Any order made by the Commission must be sufficiently related to the jurisdictional fact enlivening the Commission's jurisdiction, that is the refusal of the employer to employ the person: see ***RGC Mineral Sands v CFMEU*** (*supra*) per Parker J. An order to employ a person is sufficiently related to the industrial matter constituted by a refusal to employ that person so as to be within the power of the Commission to deal with that industrial matter.

79 In ***Board of Management, Princess Margaret Hospital for Children v Hospital Salaried Officers Association of Western Australia (Union of Workers)*** (1975) WAIG 543, Burt J (as he then was) expressed the opinion that the Commission in Court Session had no jurisdiction to "reinstate" the contract of employment. His Honour continued:

"I am not sure what an order in those terms means, and what its effect would be, and in particular what effect it would have upon the worker who was not of course a party to the proceedings. The order should in my opinion be an order directed to the employer … requiring it upon the worker presenting himself for work at a particular place and time, to engage and so to employ the worker on the agreed terms and in the agreed vocation."

80 Section 23A(3) of the Act empowers the Commission to order an employer to reinstate an unfairly dismissed employee to the employee's former position on conditions at least as favourable as the conditions on which the employee was employed immediately before dismissal.

81 The Act does not expressly confer upon the Commission the power to order an employer to "reinstate" a person it has unfairly refused to employ. Indeed, it could not. The power "to reinstate" in the context of an employee unfairly dismissed means that the employment situation, as it existed immediately before the termination, must be restored. It requires restoration of the terms and conditions of the employment in the broadest sense of those terms: ***Blackadder v Ramsey Butchering Services Pty Ltd*** (2005) 79 ALJR 975 per McHugh J at [14]. There was no contract of employment between BHPB and Mr Brandis prior to the decision of the Commission at first instance. That is, there was no employment situation to be reinstated.

82 An order to employ should generally take the form of the order referred to by Burt J in the ***Princess Margaret Hospital*** case, that is, an order directed to the employer requiring it upon the worker presenting himself for work at a particular place and time to engage and so to employ the worker on the agreed or specified terms and in the specified position. The question is whether the Commission has power to order an employer to employ a person as and from a date preceding the order.

83 An order that an employer employ a person as and from a date preceding the order is truly retrospective. Such an order changes the rights and obligations of the employer and the person to be employed with effect prior to the making of the order. The courts have frequently declared that, in the absence of some clear statement to the contrary, an Act will be assumed not to have retrospective operation. Similarly, in the absence of some clear statement to the contrary, an Act will be assumed not to confer upon a court or tribunal the power to make orders that have retrospective operation. However, there is nothing preventing the Western Australian Parliament from making laws having retrospective operation or conferring upon the Commission the power to make orders with retrospective operation.

84 The Union submits that the power to order that BHPB retrospectively employ Mr Brandis is to be found in s 39 of the Act. Subsection 39(3) of the Act provides that the Commission may, by its award, give retrospective effect to the whole or any part of the award, amongst other circumstances, if, in the opinion of the Commission, there are special circumstances which make it fair and right so to do.

85 The order made by the Full Bench was an order varying the decision of the Commissioner. The order that could have been made by the Commission is an order under s 44 of the Act. Subsection 44(13) provides that s 39 applies, with such modifications as are necessary, to an order made under s 44.

86 The effect of subsection 44(13) together with subsection 39(3) of the Act is to expressly confer upon the Commission the power to give retrospective effect to an order made under s 44. An order that an employer employ a person it has refused to employ is an order that may be made under s 44. There is nothing in s 44 of the Act or other relevant provisions of the Act that requires subsection 44(13) to be construed so as not to confer upon the Commission the power to order that an employer employ a person as and from a date preceding the date of the order. To the contrary, upon its proper construction subsection 44(13) together with subsection 39(3) confers that power upon the Commission.

87 That is not the end of this ground of appeal. The Union concedes that the order of the Full Bench was beyond power for a different reason. Subsection 39(3) of the Act provides that the Commission may give retrospective effect to an award if in the opinion of the Commission there are special circumstances which make it fair and right to do so but not beyond the date upon which the application leading to the making of the award was lodged in the Commission. The application to the Commission was made on 10 June 2004. Hence, subsection 39(3) did not, in any event, empower the Commission to give effect to its order as from 7 May 2004.

88 The Commission erred in law in the construction or interpretation of subsection 44(13) and subsection 39(3) of the Act in the course of making the decision appealed against. It is a necessary implication from the fact that the Commission gave retrospective effect to its order beyond the date upon which the application was lodged that it construed or interpreted the statutory provisions as conferring upon the Commission the power to give retrospective effect to its order beyond the date upon which the application leading to the making of the order was lodged in the Commission. This ground of appeal is competent by reason of par 90(1)(b) of the Act.

89 Furthermore, the Commission is only empowered to give retrospective effect to an award if in its opinion there are special circumstances which make it fair and right so to do. The Full Bench did not find that there were special circumstances which made it fair and right to give retrospective effect to its order.

90 Further, no party before the Commission or the Full Bench submitted that the Commission or the Full Bench should give retrospective effect to its order. The issue was never raised before the Commission or the Full Bench. By making the retrospective order in circumstances where the matter was not raised at first instance or on appeal, the Full Bench denied BHPB the right to be heard in relation to that matter. BHPB did not allege that it had been denied the right to be heard in relation to that matter in its grounds of appeal. However, the Union concedes that the retrospective order was beyond power and must be quashed. The fact that no party sought the retrospective order and that it was not raised at first instance or on appeal is relevant to the order that this Court should now make.

91 The retrospective order made by the Full Bench must be set aside. That much is conceded by the Union. If ground 4 of the appeal alone succeeds then the appropriate order would be to vary the order of the Full Bench so as to remove the retrospective element from its order. It would not be appropriate to remit to the Full Bench for further hearing the question whether the order should have retrospective effect because no party had sought such an order and the matter had never been raised at first instance or on appeal before the Full Bench.

Ground 5

92 Ground 5 is not pressed by BHPB.

IAC 6

93 In IAC 6 of 2005 the Union appeals from the decision of the Full Bench on the ground that the Full Bench erred in holding that Mr Brandis was not employed under a contract of employment with BHPB and should have held that a contract of employment existed between Mr Brandis and BHPB.

Jurisdiction

94 The jurisdiction of this Court is prescribed by subsection 90(1) of the Act:

"Subject to this section, an appeal lies to the Court in the manner prescribed from any decision of the President, the Full Bench, or the Commission in Court Session –

(a) on the ground that the decision is in excess of jurisdiction in that the matter the subject of the decision is not an industrial matter;

(b) erroneous in law in that there has been an error in the construction or interpretation of any Act, regulation, award, industrial agreement or order in the course of making the decision appealed against; or

(c) on the ground that the appellant has been denied the right to be heard,

but upon no other ground."

95 The ground of appeal stated in the Union's notice of appeal is that the Full Bench erred in holding that Mr Brandis was not employed under a contract of employment with BHPB and that the Full Bench should have held that a contract of employment existed between Brandis and BHPB. That ground of appeal does not on its face disclose a ground falling within subsection 90(1) of the Act. In the course of argument the Union submitted that the appeal falls within par (a) and par (b) of subsection 90(1) of the Act.

Section 90(1)(a)

96 The appeal does not fall within par 90(1)(a). That ground is that the subject of the decision is not on an industrial matter, that is, is not with respect to an industrial matter: see ***Personnel Contracting Pty Ltd t/as Tricord Personnel v Construction, Forestry, Mining and Energy Union of Workers*** [2004] WASCA 312.

97 Before it was amended by the *Industrial Relations Reform Act 2002* s 90 of the Act provided that an appeal lies to the court, on the ground, amongst other things, that the decision is in excess of jurisdiction. The amendment by the *Industrial Relations Reform Act 2002* narrowed that ground of appeal to appeals on the ground that the decision is in excess of jurisdiction in that the matter the subject of the decision is not on an industrial matter. A ground that the decision is in excess of jurisdiction is not within par 90(1)(a) if the ground is not that the matter the subject of the decision is not on an industrial matter. In this case the matter that is the subject of the Full Bench decision is the refusal of BHPB to employ Mr Brandis. That is clearly an industrial matter and the Union appeal does not assert otherwise. The Union appears to submit that the matter the subject of the Full Bench decision is the employment relationship between BHPB and Mr Brandis. The Union appeals on the ground that the relationship at all material times was an employment relationship. That is, the ground of the Union appeal is not that the matter the subject of the Full Bench decision is not on an industrial matter. The Union appeal does not fall within par 90(1)(a).

Section 90(1)(b)

98 Before the amendment to s 90 of the Act by the *Industrial Relations Reform Act 2002* subsection 90(1) permitted an appeal to the court on the ground that the decision is erroneous in law. The ground is now limited to the ground that the decision is erroneous in law in that there has been an error in the construction or interpretation of (relevantly) any Act in the course of making the decision appealed against.

99 The Union submits that the appeal falls within par 90(1)(b) because the majority of the Full Bench wrongly construed the provisions of the Act relating to "employer" and "employee" by wrongly determining that the statutory criteria were not satisfied. The Union submits that the majority erred by not applying all of the indicia of the employment relationship and by finding that those statutory definitions were not satisfied for the reasons found by the majority, that is merely because the alleged "employee" had entered into a *bona fide* written agreement with a labour hire firm, had never been paid directly by the alleged "employer" and/or had applied for employment with the alleged "employer".

100 The Union submits that the proposition that this raises an error envisaged by par 90(1)(b) is consistent with the decision in ***United Construction Pty Ltd v Birighitti*** [2003] WASCA 24.

101 In ***United Construction*** (*supra*) Hasluck J held that the issue at the outset was whether the respondent could be characterised as an employee within the meaning of the *Long Service Leave Act* during the relevant period. His Honour said that the term "employee" could not be regarded simply as a term with an ordinary meaning and the term as it is used in the *Long Service Leave Act* is a technical legal term which should be characterised as a question of law. It was not possible to resolve that question of law without being conscious of and giving proper weight to the way in which the term employee was defined and used in the *Long Service Leave Act.* His Honour held that the Industrial Appeal Court had jurisdiction to deal with the appeal upon the basis that it was an appeal against a decision which was said to be erroneous in law in that there had been an error in the interpretation of the *Long Service Leave Act.* Scott J held that the Industrial Appeal Court had jurisdiction to entertain the appeal because the issue in the appeal turned upon the definition of "employee" in the *Long Service Leave Act* and was therefore a question of construction or interpretation of that Act. Anderson J found that the appeal was incompetent because the decision of the Full Bench involved no matter of construction or interpretation.

102 In ***Personnel Contracting v CFMEU*** the Court found that the appeal was competent within par 90(1)(a) of the Act. Heenan J alone went on to consider whether the appeal was competent under par 90(1)(b) of the Act. His Honour considered that the appeal was competent under that paragraph on the basis that the determination of whether or not the workers were employees and the appellant was an employer involved the determination and application of the meaning of those terms as they are employed in the Act especially in relation to the conduct of a labour hire agency. His Honour acknowledged that the common law concepts of employer and employee are adopted and applied by the language of the Act but considered that that does not mean that a determination of whether or not an individual is an employee or an employer does not involve the proper interpretation of the statute.

103 Some grounds of appeal asserting that the Full Bench erred in law in finding that a person was not an employee of another person may be on the ground that there has been an error in the construction or interpretation of the words "employee" or "employer" in the Act. ***United Construction*** and ***Personnel Contracting*** were held by the majority in the former and by Heenan J in the latter to be such cases. However, not all appeals on the ground that the Full Bench erred in finding that a person was not an employee are appeals on the ground that there has been an error in the construction or interpretation of "employee", "employer" or "industrial matter" in the Act.

104 In ***Vetter v Lake Macquarie City Council*** (2001) 202 CLR 439, Gleeson CJ, Gummow and Callinan JJ observed (at [451]), by reference to ***Williams v Bill Williams Pty Ltd*** [1971] 1 NSWLR 547 and to ***Hope v Bathurst City Council*** (1980) 144 CLR 1, that where different conclusions are reasonably possible to the question whether a statutory expression applies to primary facts, the determination of which is the correct conclusion is a question of fact. If only one answer is reasonably open, the question is one of law.

105 Where a court must determine whether a person is an employee then other than where the relationship is dependent solely upon the true construction of a written document, the task the court is engaged upon is the application of

the law to the facts before it in the individual case. It involves a question of law only when the law requires that a certain answer be given because the facts permit only one answer. Where a decision either way is fairly open, depending on the view taken, it is treated as a decision of fact, able to be impugned only if in the process of determination the decision-maker misdirects himself: ***Hope v Bathurst City Council*** (*supra*).

106 If the Commission does make an error of law in the course of deciding whether a person is an employee that error will not necessarily be appealable under par 90(1)(b) of the Act. The error will only be appealable if the error was in the construction or interpretation of any Act, regulation, award, industrial agreement or order.

107 An appealable question of law might arise where the conclusion of the Commission is so clearly untenable as to amount to an error of law; proper application of the law requires a different answer. That will be the position only where the evidence admits of only one reasonable conclusion. It does not matter whether this Court considers that it would have reached a different conclusion. What matters is whether the decision under appeal was a permissible option. Where only one conclusion is reasonably open and the Full Bench reaches a different conclusion it may be open to infer that the Full Bench misunderstood the statutory criteria and thereby erred in law in the construction or interpretation of the Act.

108 However, it is not necessary to decide whether an appeal on the ground that the proper application of the law requires a different decision from that of the Commission raises an appealable error of law. That is because there is evidence upon which the Full Bench could properly find that there was no contract of employment between BHPB and Mr Brandis. That evidence included the AWA(s) between Mr Brandis and IW, the services contract between IW and BHPB, the absence of any promise by, or obligation of, BHPB to pay Mr Brandis and the manner in which BHPB and Mr Brandis conducted themselves towards each other.

109 Appealable questions of law may arise from the reasoning of the Full Bench on the way to its ultimate conclusion. If the Full Bench were, for example, to misinterpret the provisions of the Act, defining "employee" or "employer" in the course of deciding that Mr Brandis was not employed under a contract of employment with BHPB that would be an error of law in the construction or interpretation of the Act and would be appealable under par 90(1)(b).

110 An appeal cannot be made, however, on the ground that there has been an error in the construction or the interpretation of the Act where the Full Bench has merely applied law which it has correctly understood to the facts of an individual case. It is for the Full Bench to weigh the relevant facts in the light of the applicable law.

111 The Union must establish that the majority made an error of law in the construction or interpretation of the provisions of the Act relating to the meaning of "employer" or "employee" in the course of making the decision that Mr Brandis was not employed by BHPB. The latter requirement necessitates that the error in construction or interpretation must have materially affected the majority's decision.

The Union case on the prior employment issue

112 The Union case proceeds on the basis that Mr Brandis was an employee of BHPB according to ordinary concepts. The Union case is that whether or not there was a contract of employment between BHPB and Mr Brandis is to be determined by determining whether Mr Brandis was an employee of BHPB at common law. The Union submits that the errors made by each of Beech CC and Kenner C were in not applying or properly applying, the common law "indicia" test to determine whether there is a contract of service.

113 The Union submits that the correct approach to deciding the question of the existence of an employment relationship is to have regard to the "totality of the relationship" – see ***Hollis v Vabu Pty Ltd*** (2001) 207 CLR 21 at 33, [24]; ***Stevens v Brodribb Sawmilling Co Pty Ltd*** (1986) 160 CLR 16 at 29***; Personnel Contracting Pty Ltd v CFMEU*** (*supra*) at [28] per Steytler J at [99] – [100] per Simmonds J.

114 In ***Hollis v Vabu*** (*supra*) and ***Steven v Brodribb Sawmilling Co Pty Ltd*** (*supra*) the High Court set out the common law principles for distinguishing between an employee and a contractor. These principles do not embody a definition of employment as such. They rely instead on a test which involves the consideration of a number of established factors or indicia, some of which are characteristic of a contract of service and others of which suggest a non-employment relationship. The task of the court which must assess the employment status of a worker is to consider the parties' relationship in light of each of these indicia and to determine, on balance, into which legal category the relationship falls. The exercise is not a mechanical one. Rather it is a matter of obtaining the overall picture from the accumulation of detail.

Errors allegedly made by Beech CC

115 The Union submits that Beech CC decided that no employment relationship existed between Mr Brandis and BHPB because there was an application for employment to BHPB by Mr Brandis and a refusal by BHPB of employment. The Union submits that a possible subsidiary reason of Beech CC for his decision was the provision in the AWA for payment by IW to Mr Brandis and the absence of direct payment from BHPB to Mr Brandis. The Union submits that Beech CC did not adopt an approach of deciding the question of employment by balancing all the indicia of the employment relationship with the matters that he gave as reasons for finding against the employment relationship.

116 Beech CC construed the definitions of "employee" and "employer" in the Act to involve the common law concepts of "employee" and "employer". The Union does not submit that the Chief Commissioner thereby made any error. To the contrary, the Union submits that the definitions of "employee" and "employer" in the Act involve the common law concepts of "employee" and "employer".

117 Beech CC said that he would conclude that if there was a contract between them, the conduct of Mr Brandis and BHPB resulted in the contract being one of service and not for services. However, the Chief Commissioner said the issue was whether there was a contract at all between Mr Brandis and BHPB.

118 Beech CC found that there was no contract of employment between BHPB and Mr Brandis for two reasons. The first was that, objectively viewed, there was no intention on the part of Mr Brandis and BHPB to enter into a contract at all. The conduct of Mr Brandis in applying to be employed by BHPB and of BHPB in refusing Mr Brandis' employment was inconsistent with a common intention to create the relationship of employer and employee between them whilst Mr Brandis worked pursuant to the tripartite relationship between himself, IW and BHPB.

119 Secondly, the necessary mutuality of obligation did not exist between BHPB and IW in that there was no promise by, or obligation upon, BHPB to pay Mr Brandis. Beech CC noted that the Commission at first instance had found that the mutuality of obligation necessary for the implication of a contract of service between Mr Brandis and BHPB did not exist. Beech CC held that the Commission was correct to so find. The mutuality of obligation did not exist because BHPB had no obligation to pay Mr Brandis if IW failed to do so. There was no promise of payment to Mr Brandis by BHPB.

120 It is not for this Court to determine whether or not Beech CC arrived at the correct finding. The appeal is confined to an error of law in the construction or interpretation of (relevantly) any Act in the course of making the

decision appealed against. The Union has not demonstrated that Beech CC misconstrued the provisions of the Act relating to the meaning of "employer" and "employee".

Errors allegedly made by Kenner C

121 The Union submits that Kenner C emphasised the question of payment by IW to Mr Brandis, that the written arrangements were *bona fide* and that Mr Brandis applied for employment with BHPB. The Union submits that Kenner C did not adopt an approach of deciding the question of employment by balancing all the indicia of the employment relationship.

122 Kenner C said that for the Union to succeed in establishing a contract of employment between BHPB and Mr Brandis, two steps were required to be satisfied. The first step is to establish that there existed between BHPB and Mr Brandis, at material times, a contract, the second step having established the existence of a contractual relationship, is then to establish that that relationship had the character of employment and not some other character.

123 Kenner C found that there was no contract between BHPB and Mr Brandis because the essential requirement of mutuality of obligation, and in particular the obligation on BHPB to provide consideration in the form of remuneration paid to Mr Brandis for his services rendered, was not made out. Kenner C considered that it was essential to establish a contractual relationship between BHPB and Mr Brandis to point to an enforceable legal right to payment of wages for work performed as between Mr Brandis and BHPB.

124 Kenner C considered whether a contract might be implied between BHPB and Mr Brandis from their conduct. The Commissioner considered relevant matters including the extent of control exercised by BHPB over Mr Brandis. The Commissioner found that given all of the evidence and in particular the detailed contractual arrangements entered into between the parties a contract between BHPB and Mr Brandis should not be implied. The Commissioner considered, amongst other things, that Mr Brandis' own conduct was inconsistent with the existence of such a contract.

125 Kenner C construed the definitions of "employee" and "employer" in the Act to involve the common law concepts of "employee" and "employer". He did not misdirect himself as to the proper interpretation or construction of the provisions of the Act defining "employee" or "employer".

126 For the reasons stated, the Union appeal is not made out.

Conclusion

127 For the reasons stated, I would allow appeal IAC 5 of 2005 and vary the decision of the Full Bench by deleting par (2) of the order of the Full Bench and substituting an order that the case be remitted to Commissioner Wood for further hearing and determination. I would dismiss appeal IAC 6 of 2005.

[2006] WASCA 49 (S)

JURISDICTION	:	WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT
CITATION	:	BHP BILLITON IRON ORE PTY LTD -v- CONSTRUCTION, FORESTRY, MINING & ENERGY UNION OF WORKERS & ANOR [2006] WASCA 49 (S)
CORAM	:	WHEELER J
		PULLIN J
		LE MIERE J
HEARD	:	1 & 2 NOVEMBER 2005, 7 APRIL 2006
DELIVERED	:	29 MARCH 2006
SUPPLEMENTARY DECISION	:	17 MAY 2006
FILE NO/S	:	IAC 5 of 2005
BETWEEN	:	BHP BILLITON IRON ORE PTY LTD
		Appellant
		AND
		CONSTRUCTION, FORESTRY, MINING & ENERGY UNION OF WORKERS
		First Respondent
		INTEGRATED GROUP LTD t/as INTEGRATED WORKFORCE
		Second Respondent
FILE NO/S	:	IAC 6 of 2005
BETWEEN	:	CONSTRUCTION, FORESTRY, MINING & ENERGY UNION OF WORKERS
		Appellant
		AND
		BHP BILLITON IRON ORE PTY LTD
		First Respondent
		INTEGRATED GROUP LTD t/as INTEGRATED WORKFORCE
		Second Respondent

Catchwords:

Industrial law - *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) - Jurisdiction of Industrial Appeal Court

Legislation:

Acts Interpretation Act 1901 (Cth), s 8

Industrial Relations Act 1979 (WA), s 8, s 23, s 27, s 49, s 90(3)

Workplace Relations Act 1996 (Cth), s 4(1), s 6, s 16(1)

Workplace Relations Amendment (Work Choices) Act 2005 (Cth)

Workplace Relations Regulations 2006 (Cth), reg 4.55(1)

Result:

Orders made

Category: B

Representation:

IAC 5 of 2005

Counsel:

Appellant	:	Mr H J Dixon SC & Ms G A Archer
First Respondent	:	Mr S Crawshaw SC, Mr A Slevin & Mr D H Schapper
Second Respondent	:	Mr N D Ellery & Mr R L Hooker

Solicitors:

Appellant	:	Mallesons Stephen Jaques
First Respondent	:	Derek Schapper
Second Respondent	:	Corrs Chambers Westgarth

IAC 6 of 2005

Counsel:

Appellant	:	Mr S Crawshaw SC, Mr A Slevin & Mr D H Schapper
First Respondent	:	Mr H J Dixon SC & Ms G A Archer
Second Respondent	:	Mr N D Ellery & Mr R L Hooker

Solicitors:

Appellant	:	Derek Schapper
First Respondent	:	Mallesons Stephen Jaques
Second Respondent	:	Corrs Chambers Westgarth

Case(s) referred to in judgment(s):

BHP Billiton Iron Ore Pty Ltd v Construction, Forestry, Mining & Energy Union of Workers & Anor [2006] WASCA 49

CFMEU v Hanssen [2005] 85 WAIG 1264

Commissioner of Inland Revenue v Maple & Co (Paris) Ltd [1908] AC 22

Maxwell v Murphy (1956) 96 CLR 261

Oceanic Life Ltd & Anor v Chief Commissioner of Stamp Duties (1999) 168 ALR 211

Case(s) also cited:

Allesch v Maunz (2000) 203 CLR 172

Anthony Hordern & Sons Ltd v The Amalgamated Clothing & Allied Trades Union of Australia (1932) 47 CLR 1

Attorney-General (WA) v Marquet (2003) 217 CLR 545

Australian Boot Trade Employes Federation v Whybrow & Co (1910) 10 CLR 266

Beaumont v Yeomans (1934) 34 SR (NSW) 562

CDJ v VAJ (1998) 197 CLR 172

City of Geraldton v Cooling (2000) 101 IR 233

Colley v Futurebrand FHA Pty Ltd (2005) 63 NSWLR 291

David Grant & Co Pty Ltd v Westpac Banking Corp (1995) 184 CLR 265

Donovan v Repatriation Commission (1985) 58 ALR 634

Downey v Trans Waste Pty Ltd (1991) 172 CLR 167

Esber v The Commonwealth (1992) 174 CLR 430

Health Inspectors Association v Fremantle (1953) 76 CAR 32

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

PMT Partners Pty Ltd (In Liquidation) v Australian National Parks & Wildlife Service (1995) 184 CLR 301

Robe River Iron Associates v FEDFU (1987) 67 WAIG 315

Rodway v The Queen (1990) 169 CLR 515

Worrall v Commercial Banking Company of Sydney Ltd (1917) 24 CLR 28

1 **WHEELER J**: On 29 March 2006, this Court delivered reasons in this matter (***BHP Billiton Iron Ore Pty Ltd v Construction, Forestry, Mining & Energy Union of Workers & Anor*** [2006] WASCA 49). On that day, counsel for the first respondent submitted that the Court was, however, unable to make any orders because of the recent amendments to the *Workplace Relations Act 1996* (Cth) by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth). I refer to the principal Commonwealth Act, as amended, as the "WRA". On 7 April, the Court made directions for further submissions from the parties, which have now been received.

2 The first respondent's submissions were broadly as follows. Section 16(1) of the WRA now provides:

> "(1) This Act is intended to apply to the exclusion of all of the following laws of a State or Territory so far as they would otherwise apply in relation to an employee or employer:
>
> (a) a State or Territory industrial law …"

3 It is submitted that the *Industrial Relations Act 1979* (WA) is included in the definition of a State or Territory industrial law, and by s 6 of the WRA "employer" means "a constitutional corporation, so far as it employs, or usually employs, an individual". The simple submission is that, although there are certain exclusions from the scope of s 16(1), none applies to this case, so that the whole of the *Industrial Relations Act*, including Pt IV, is from 27 March 2006, excluded insofar as those provisions would otherwise apply in relation to the appellant. This Court is entirely a creature of that Act and the appellant's appeal is a statutory right created under the *Industrial Relations Act*. As a result of the exclusion, pursuant to s 16 of the WRA, it is submitted that all those provisions which create a Court and empower it to deal with the appellant's appeal are, by force of that provision, excluded. It is therefore submitted that the appellant cannot move for judgment and the Court cannot make any order in respect of the appeal.

4 In the alternative, the first respondent submits that the order which the Court considered should be made, that the case be remitted to Commissioner Wood for further hearing and determination, cannot be made, or would be futile. That is, as I understand it, because it is submitted that the power of the Commissioner which would be exercised on a remitter arises from s 23 and s 27 of the *Industrial Relations Act*, and those provisions are themselves excluded by reason of the WRA.

5 There are a number of arguments which were directed to the submissions of the first respondent by the appellant and by the second respondent. In my view, it is necessary to deal only with one of them.

6 The appellant accepts that, were it not for the effect of certain other provisions of the WRA which modify the effect of s 16(1), that section would have the effect of preventing this Court from making any orders in relation to the appellant. However, the appellant submits that there are certain exceptions from the scope of s 16(1) which are relevant for the purposes of the present appeal. I deal only with one exception.

7 By way of legislative context, the appellant refers to the well-known common law presumption that legislation is not to be construed as taking away existing rights, unless the contrary intention is shown with reasonable certainty (***Maxwell v Murphy*** (1956) 96 CLR 261 at 267). It points out that the filing of an appeal, pursuant to s 90 of the *Industrial Relations Act*, gave rise to a legally enforceable right in the appellant to have this Court hear and determine the appeal according to law. That right would, of course, ordinarily extend to having this Court make such orders as it considered appropriate pursuant to the *Industrial Relations Act*, including the exercise by this Court as appropriate of the powers conferred, pursuant to s 90(3) of the *Industrial Relations Act*, to "confirm, reverse, vary, amend ... or quash the decision the subject of appeal and [to] remit the matter to ... the Commission ... for further hearing and determination according to law".

8 Not only are the accrued rights, pursuant to s 90 of the *Industrial Relations Act*, not excluded by s 16(1) of the WRA, the appellant submits, but the WRA expressly preserves them. Section 16(2)(b) of the WRA provides that s 16(1) does not apply to a law of a State that is prescribed by the *Workplace Regulations 2006* ("the regulations") as a law to which that subsection does not apply. The appellant then refers to reg 4.55 of the regulations which relevantly provides:

> "(1) Subject to sub-regulation (2), ... subsection 16(1) of the Act does not apply to a law of a State or Territory that allows or *otherwise relates to* an appeal to a State industrial authority against a decision to make or vary a State award ... " (Emphasis supplied)

9 By reason of s 4(1) of the WRA, the decision of Commissioner Wood at first instance was a "State award". Sub-regulation (1) of reg 4.55 ceases to apply six months after the commencement of the WRA, so that the *Industrial Relations Act* is not excluded in its operation, it is submitted, until six months after 27 March 2006, being the relevant date of commencement.

10 A "State industrial authority", referred to in reg 4.55, relevantly means a board or court of conciliation or arbitration, or tribunal, body or persons, having authority under a State Act to exercise any power of conciliation or arbitration in relation to industrial disputes within the limits of the State. The first respondent submits that the Full Bench of the Western Australian Industrial Relations Commission is not a State industrial authority when exercising jurisdiction pursuant to s 49 of the *Industrial Relations Act*. However, in my view, this submission must be rejected.

11 A perusal of the *Industrial Relations Act* reveals a variety of powers directed to conciliation and arbitration in relation to industrial disputes within the limits of the State (and see ***CFMEU v Hanssen*** [2005] 85 WAIG 1264 at [39]). The body constituted by the Act is the Western Australian Industrial Relations Commission (see s 8). The Full Bench is not a separate entity; rather, the "Full Bench" is defined as "the Commission constituted as provided by section 15(1)" (see s 7(1)). The definition in s 4(1) of the WRA, to which I have referred, identifies a State industrial authority by reference to its creation as a body having authority under a State Act, to exercise particular powers, regardless of whether those powers are being exercised at the relevant time; that is, the WRA looks to the body as a whole, and not to the powers the body is exercising on any particular occasion. The Full Bench is one aspect of a body to which s 4(1) of the WRA refers.

12 Even if s 4(1) of the WRA required attention to be directed to the particular powers which the Full Bench is able to exercise, pursuant to s 49 of the *Industrial Relations Act*, the Full Bench has powers not only to dismiss or uphold an appeal, or to remit it for further consideration, but also to vary a decision so as to make an order "in terms which could have been awarded by the Commission that gave that decision" (s 49(6)); that is, as is often the case with appellate bodies, the Full Bench has power to exercise those powers which could have been exercised at first instance.

13 Returning, then, to reg 4.55, the width of the expression "relates to" has often been noted. In ***Oceanic Life Ltd & Anor v Chief Commissioner of Stamp Duties*** (1999) 168 ALR 211, Fitzgerald JA collected at [56] a number of observations upon the expression "relating to", which is relevantly identical. In ***Commissioner of Inland Revenue v Maple & Co (Paris) Ltd*** [1908] AC 22 at 26, Lord MacNaghten observed that "there is no expression more general or far-reaching" than the phrase "relating to". It is necessary, therefore, to look to the statutory context and purpose in order to give content to the expression "relates to" in reg 4.55.

14 That context, as I have noted, includes the common law presumption against the removal of vested rights, including rights to appeal, and a statutory context in which s 8 of *Acts Interpretation Act 1901* (Cth) expressly preserves such rights in the case of a Commonwealth Act being repealed by a later Commonwealth Act. In my view, the expression "relates to" in reg 4.55 should be understood as providing that s 16(1) does not apply to the *Industrial Relations Act* to the extent that the latter Act permits this Court to review, upon the grounds set out in s 90 of that Act, the correctness of a decision of the Full Bench of the Western Australian Industrial Relations Commission. The power conferred by s 90 includes the power to determine whether there was error in the decision of the Full Bench and, where there is error, to make such orders as should have been made by it. This Court, therefore, has power to make orders on the appeal, notwithstanding s 16(1) of the WRA.

15 So far as the remitter to Commissioner Wood is concerned, it should be observed that it is a normal and usual incident of appellate jurisdiction that an appellate court has power to remit matters to a decision-maker at first instance, where appropriate. The orders proposed by this Court include an order of that kind, varying the orders of the Full Bench by providing that the matter be remitted to Commissioner Wood. Although, once the matter is remitted, the powers which Commissioner Wood would be exercising would be those powers which the *Industrial Relations Act* directly confers upon the Commission, the powers would be exercised pursuant to, and for giving proper effect to, the orders of the Full Bench, as varied by this Court, pursuant to s 90 of the *Industrial Relations Act*. That section is, as I have already explained, a law of the kind referred to in reg 4.55. This Court is, in effect, providing the order which should have been made on the original appeal from Commissioner Wood.

16 In my view, the exception which reg 4.55 provides must be understood as having operation not only in relation to the formal orders of this Court, which plainly "relate to" the appeal to the Full Bench, but also in relation to whatever provisions in the State law may be necessary to give effect to those orders. To hold otherwise would give rise to the absurd result that this Court could, by reason of reg 4.55, order a remitter which would be incapable of being given any effect. For that reason, I would conclude that the partial exclusion of the *Industrial Relations Act*, pursuant to s 16(1) of the WRA and regulations, does not operate so as to exclude the powers which would fall to be exercised by Commissioner Wood pursuant to the orders proposed by this Court.

Conclusion

17 Notwithstanding s 16(1) of the WRA, it is open to the Court to make the orders described in [127] of the reasons for decision [2006] WASCA 49. I would therefore make those orders.

18 **PULLIN J**: I have read the draft reasons prepared by Wheeler JA. I agree with those reasons and have nothing to add.

19 **LE MIERE J**: On 29 March 2006 this Court delivered its reasons for decision in this matter: ***BHP Billiton Iron Ore Pty Ltd v Construction, Forestry, Mining & Energy Union of Workers & Anor*** [2006] WASCA 49. The first respondent submitted that by reason of the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) ("*Work Choices Act*") coming into effect on 27 March 2006, this Court cannot now make any order on this appeal. The first respondent submitted that Sch 1, s 9 of the *Work Choices Act* provides that the *Workplace Relations Act 1996* (Cth) (the "WRA") is intended to apply to the exclusion of specified laws of a State or Territory. The first respondent submitted that the specified laws include the *Industrial Relations Act 1979* (WA) ("the Act"), under which the appeal is brought and under which this Court is constituted. The first respondent submits that by reason of those matters this Court cannot now make any order on this appeal.

20 The first respondent submits, in the alternative, that if this Court has power to make orders on the appeal the Western Australian Industrial Relations Commission ("the Commission") does not have jurisdiction to further hear the matter and hence this Court should not make an order varying the order of the Full Bench so as to remit the matter to the Commission for further hearing. That is because s 16(1) of the WRA excludes the jurisdiction of the Commission by excluding the Act in so far as it would otherwise apply in relation to the appellant and the respondents.

21 I have had the advantage of reading in draft the reasons of Wheeler J. I respectfully agree with her Honour that this Court does have the power to make orders on the appeal, notwithstanding s 16(1) of the WRA for the reasons given by her Honour. However, I have the misfortune to differ from her Honour in relation to the jurisdiction of the Commission to further hear the matter and its power to make further orders after the order of the Full Bench is varied so as to remit the matter to the Commission for further hearing.

22 The jurisdiction and power of the Commission to hear and determine the remitted matter derives not from the order of this Court but from the provisions of the Act, and in particular s 23 of the Act which confers on the Commission jurisdiction to enquire into and deal with any industrial matter. The Commission has such jurisdiction as is vested in it by laws made by the Parliament of Western Australia. The jurisdiction of the Commission to enquire into and deal with the industrial matter constituted by the dispute between the appellant and the first respondent has been removed by the *Work Choices Act*. This Court cannot confer on the Commission jurisdiction which does not exist independently of the order of the Court any more than this Court can confer jurisdiction on any other body.

23 The appellant submits that the Commission has jurisdiction to further hear the matter on remittal and to make orders by reason of the *Workplace Relations Regulations 2006* (Cth), reg 4.55(1) which provides:

> "Subject to subregulation (2) for paragraphs 16(2)(b) of the [Workplace Relations] Act, subsection 16(1) of the Act does not apply to a law of a State or Territory that allows or otherwise relates to an appeal to a State industrial authority against a decision to make or vary a State award, including a decision under which an employer, employee or industrial association becomes bound or ceases to be bound by the State award."

24 Section 23 of the Act is not a law that allows or otherwise relates to an appeal to a State industrial authority against the decision to make or vary a State award. As such, s 16(2)(b) and reg 4.55(1) do not prevent the application of s 16(1) of the WRA to s 23 of the Act. Rather, s 16(1) of the WRA excludes s 23 of the Act in so far as it would otherwise confer jurisdiction and power on the Commission to enquire into and deal with the industrial matter between the appellant and the first respondent.

Conclusion

25 If the Commission does not have jurisdiction to further hear the matter then this Court should not vary the order of the Full Bench so as to provide for the matter to be remitted to the Commission for further hearing. This Court should consider whether to remit the matter to the Full Bench for further hearing and determination according to law or whether to vary the decision of the Full Bench in some other way. However, as the majority of the Court have concluded that it is open to the Court to make the orders described in par 127 of the reasons for decision in [2006] WASCA 49, it is not necessary for me to consider the orders which the Court should make if the Commission does not have the jurisdiction or power to further deal with the matter on remittal.

2006 WAIRC 04367

APPEAL AGAINST THE DECISION OF THE FULL BENCH IN MATTER FBA 36/04 GIVEN ON 28/06/05

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES	BHP IRON ORE PTY LTD
	APPLICANT
	-v-
	INTEGRATED GROUP LTD T/AS INTEGRATED WORKFORCE, THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS
	RESPONDENT
CORAM	WHEELER JA
	PULLIN JA
	LE MIERE AJA
DATE	WEDNESDAY, 17 MAY 2006
FILE NO/S	IAC 5 OF 2005
CITATION NO.	2006 WAIRC 04367

Result	Appeal allowed. Decision of Full Bench varied.
Representation	
Appellant	Mr P D Quinlan (of Counsel)
Respondent	Ms J Boots (of Counsel)

Order

Having heard Mr P D Quinlan (of Counsel) on behalf of the Appellant and Ms J Boots on behalf of the Respondents THE COURT HEREBY ORDERS THAT:

The Appeal is allowed.

The decision of the Full Bench is varied by deleting paragraph (2) of the Order of the Full Bench in FBA matter number 36 of 2004 and substituting an Order that the case be remitted to Commissioner Wood for further hearing and determination.

(Sgd.) J A SPURLING,
[L.S.] Clerk of Court.

2006 WAIRC 04368

AN APPEAL AGAINST A DECISION HANDED DOWN ON THE 28 JUNE 2005 BY THE FULL BENCH OF THE WAIRC IN FBA 36 OF 2004

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS
	APPELLANT
	-v-
	BHP BILLITON IRON ORE PTY LTD, INTEGRATED GROUP LTD T/AS INTEGRATED WORKFORCE
	RESPONDENT
CORAM	WHEELER JA
	PULLIN JA
	LE MIERE AJA
DATE	WEDNESDAY, 17 MAY 2006
FILE NO/S	IAC 6 OF 2005
CITATION NO.	2006 WAIRC 04368

Result	Appeal dismissed
Representation	
Applicant	Mr P D Quinlan (of Counsel)
Respondent	Ms J Boots (of Counsel)

Order

Having heard Mr P D Quinlan (of Counsel) for the Appellant and Ms J Boots (of Counsel) for the Respondents THE COURT HEREBY ORDERS THAT:

The Appeal is dismissed

(Sgd.) J A SPURLING,
[L.S.] Clerk of Court.

FULL BENCH—Appeals against decision of Commission—

2006 WAIRC 04239

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BHP BILLITON IRON ORE PTY LTD
	APPELLANT
	-and-
	THE AUSTRALIAN WORKERS' UNION, WESTERN AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS; THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING & KINDRED INDUSTRIES UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH; THE 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; THE TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH
	RESPONDENTS
FILE NO.	FBA 27 OF 2005

PARTIES	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING & KINDRED INDUSTRIES UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH; THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS; THE COMMUNICATIONS, ELECTRICAL, ELECTRONIC, INFORMATION, POSTAL, PLUMBING AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING AND ELECTRICAL DIVISION, WA BRANCH; THE AUSTRALIAN WORKERS' UNION, WESTERN AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS; THE TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH
	APPLICANTS
	-and-
	BHP BILLITON IRON ORE PTY LTD
	RESPONDENT
CORAM	FULL BENCH THE HONOURABLE M T RITTER, ACTING PRESIDENT CHIEF COMMISSIONER A R BEECH COMMISSIONER P E SCOTT
HEARD	TUESDAY, 28 MARCH 2006
DELIVERED	WEDNESDAY, 26 APRIL 2006
FILE NO.	FBA 1 OF 2006
CITATION NO.	2006 WAIRC 04239

CatchWords	Industrial Law (WA) - Appeals against decision of a single Commissioner - Dispute as to how entitlements were to be acquitted - Interpretation of award clauses sought - Alleged failure by Commission to interpret award - Alleged failure to give ordinary, unambiguous meaning of words - Alleged error by use of extrinsic materials in interpretation - Parties bound by cases as argued - Filing of appeal out of time - Leave sought to extend time in which to file appeal - Appeals dismissed - *Industrial Relations Act* 1979 (WA) (as amended), s26(1)(a), s27(1)(n), s35, s40, s46, s46(1)(a), s46(1)(b), s49, s49(4) - *Industrial Relations Commission Regulations* 2005, r38, r52 - *Workplace Agreements Act* 1993 (WA) - *Interpretation Act* 1984 (WA), s61
Decision	Appeal No FBA 27 of 2005 dismissed Application for leave to appeal out of time granted and appeal No FBA 1 of 2006 dismissed
Appearances	
Appellant/Respondent	Mr A D Lucev (of Counsel), by leave, and with him Ms C Fitz Gibbon (of Counsel), by leave
Respondents/Applicants	Mr D H Schapper (of Counsel), by leave

Reasons for Decision

THE ACTING PRESIDENT:

Introduction

1 There are two appeals before the Full Bench. Both are instituted pursuant to s49 of the *Industrial Relations Act* 1979 (as amended) (*the Act*). For the sake of convenience I will refer to the appellant in FBA 27/2005 and respondent in FBA 1/2006 as BHPB and the respondents in FBA 27/2005 and applicants in FBA 1/2006 as the unions.

2 Both appeals arise out of orders made on 2 December 2005. These orders were made in the determination of applications 569/2005 and 570/2005. Applications 569 and 570/2005 were both initiated by BHPB. The applications were

heard and determined by the Commission together. Appeal FBA 27/2005 is against the orders made in application 569/2005; whereas appeal FBA 1/2006 is against the orders made in application 570/2005.

3 Both applications which were before the Commission sought an interpretation and/or a variation of clauses 12 and 15 of the *Iron Ore Production and Processing (BHP Billiton Iron Ore Pty Ltd) Award* 2002 (the award). These clauses dealt with annual leave and sick leave respectively. The applications were made consequent upon a dispute between BHPB and the unions about the rate at which locomotive drivers would acquit their entitlements for annual leave and sick leave under the award.

4 These applications were also heard together with application 1324/2004 which was initiated by the Construction, Forestry, Mining and Energy Union of Workers (the CFMEU), which was one of the unions who was a respondent to applications 569 and 570/2005.

5 Application 1324/2004 was an application made pursuant to s40 of *the Act* to vary the award. The application said that it sought amendment to the award to provide for greater clarity or to deal with situations not presently covered by the award. This application covered matters such as hours of work, payment of roster change allowance, the taking of crib breaks and the rate at which the taking of annual leave shall be calculated. By letter dated 26 April 2005 the CFMEU amended application 1324/2004. Insofar as is relevant, the CFMEU did not seek to proceed with the claim as to variation of the award with respect to the calculation of the taking of annual leave.

6 Applications 569 and 570/2005 were filed by BHPB on 2 June 2005.

The Applications before the Commission

7 The grounds on which application 569/2005 was made were set out in schedule 2 to the application. This provided as follows:-

> "*1. The applicant seeks an interpretation of clauses 12(5) and 15(1) of the Iron Ore Production and Processing (BHP Billiton Iron Ore Pty Ltd) Award 2002 (No. A2 of 2001) (**Award**).*
>
> *2. The facts giving rise to this application are that:*
>
> *(a) The parties to this application are parties to the Award.*
>
> *(b) On 19 July 2002 the Commission in Court Session made the Award, in respect of which:*
>
> *(i) clause 12(5) provides that:*
>
> *Locomotive drivers required to work shiftwork shall be entitled to annual leave at the rate of 288.8 hours per annum.*
>
> *(ii) clause 15(1) provides that:*
>
> *An employee shall be entitled to payment for non-attendance of work on the grounds of personal ill health for 80 hours for each year of service.*
>
> *(c) On 1 September 2004 the Commission in Court Session in application 1246 of 2003 varied the Award to provide, amongst other things, that:*
>
> *The ordinary hours of locomotive drivers shall be an average of 96 hours per fortnight worked in shifts of 12 hours on a continuous shift basis.*
>
> *(d) The applicant has sought to deduct annual leave and sick leave taken by locomotive drivers at the rate of 11.55 hours per shift of leave taken.*
>
> *(e) The fourth respondent has disputed the deduction of annual leave and sick leave taken by locomotive drivers at the rate of 11.55 hours per shift of leave taken.*
>
> *3 The applicant claims a declaration that on the proper construction of clause 12(5):*
>
> *(a) locomotive drivers are entitled to annual leave at the rate of 288.8 hours per annum; and*
>
> *(b) that annual leave is to be deducted at the rate of 11.55 hours per shift of leave taken.*
>
> *4 The applicant claims a declaration that on the proper construction of clause 15(1):*
>
> *(a) locomotive drivers are entitled to sick leave at the rate of 80 hours per annum; and*
>
> *(b) that sick leave is to be deducted at the rate of 11.55 hours per shift of leave taken.*
>
> *5 The applicant seeks to have this application heard and determined in conjunction with application 1324 of 2004.*"

8 On 27 June 2005 the unions filed an answer to application 569/2005. The answer was that:-

> "*[T]he respondents say on the proper interpretation of the Award it does not prescribe the rate per shift of leave taken at which annual or sick leave shall be deducted.*"

9 During closing submissions at the hearing of the applications, the unions were granted leave to amend their answer in application 569/2005 to add the following:-

> *"Alternatively, it does so at the rate of 9.5, or it does so using a divisor of 9.5.*"

10 The grounds on which application 570/2005 was made was set out in schedules to the application as follows:-

> "*Schedule 2*
>
> *1 The applicant has sought an interpretation of clauses 12(5) and 15(1) of the Iron Ore Production and Processing (BHP Billiton Iron Ore Pty Ltd) Award 2002 (No. A2 of 2001) (Award).*
>
> *2 In the event that the Western Australian Industrial Relations Commission declares that on the proper construction of:*
>
> *(a) clause 12(5):*
>
> *(i) locomotive drivers are not entitled to annual leave at the rate of 288.8 hours per annum; and/or*

(ii) that annual leave is not to be deducted at the rate of 11.55 hours per shift of leave taken,

(b) clause 15(1):

(i) locomotive drivers are not entitled to sick leave at the rate of 80 hours per annum; and/or

(ii) that sick leave is not to be deducted at the rate of 11.55 hours per shift of leave taken,

the applicant seeks to vary the Award as follows.

3 In relation to clause 12(5) of the Award by inserting the following underlined words:

Locomotive drivers required to work shiftwork shall be entitled to annual leave at the rate of 288.8 hours per annum. Annual leave will be deducted for locomotive drivers from their annual leave entitlement at the rate of 11.55 hours for each shift of annual leave taken.

4 In relation to clause 15 of the Award by inserting a new clause 15(13) as follows:

Sick leave will be deducted for locomotive drivers from their sick leave entitlement at the rate of 11.55 hours for each shift of sick leave taken.

5 The applicant seeks to have this application heard and determined in conjunction with application 1324 of 2004."

"*Schedule 3*

1. The grounds to this application are that:

(a) On 19 July 2002 the Commission in Court Session made the Award, in respect of which

(i) clause 12(5) provides that:

Locomotive drivers required to work shiftwork shall be entitled to annual leave at the rate of 288.8 hours per annum.

(ii) clause 15(1) provides that:

An employee shall be entitled to payment for non-attendance of work on the grounds of personal ill health for 80 hours for each year of service.

(b) On 1 September 2004 the Commission in Court Session in application 1246 of 2003 varied the Award to provide, amongst other things, that:

The ordinary hours of locomotive drivers shall be an average of 96 hours per fortnight worked in shifts of 12 hours on a continuous shift basis.

(c) As a result of that variation to the Award the applicant notified the fourth respondent that annual leave and sick leave for locomotive drivers would be deducted on the basis of 11.55 hours per shift.

(d) There is currently a dispute between the applicant and the fourth respondent as to what basis annual leave and sick leave for locomotive drivers is to be deducted."

11 The unions also filed an answer to application 570/2005 on 27 June 2005. The answer was as follows:-

"*[I]n relation to paragraphs 3 and 4 of Schedule 2 of the application the respondents agree that those provisions should be inserted but, in each case, substituting 9.5 for 11.55. The respondents say that the figure of 9.5 is that which maintains the amount of leave at the same level, both absolute and relative, as those entitlements existed prior to the applicant's unilateral alteration from 7.6 to 11.55. The figure of 11.55 results in a reduction, both absolute and relative, in the amount of leave to which the employees in question would receive.*"

12 Although application 569/2005 did not specify the section of *the Act* under which it was made, it is reasonably clear that it must have been made under s46 of *the Act*. This is so despite the fact that the application did not in its terms comply with regulation 52 of the *Industrial Relations Commission Regulations* 2005 in that it did not include a statement of "*the question to which an answer is desired*" by the application. (This omission was remediable under regulation 38). During the hearing the Commission certainly took the application to be one made under s46 of *the Act*. This was without the demur of the parties. There is also no other section of *the Act* under which an application for an interpretation of the award could have been made.

13 S46 of *the Act* provides as follows:-

"*(1) At any time while an award is in force under this Act the Commission may, on the application of any employer, organisation, or association bound by the award —*

(a) declare the true interpretation of the award; and

(b) where that declaration so requires, by order vary any provision of the award for the purpose of remedying any defect therein or of giving fuller effect thereto.

(2) A declaration under this section may be made in the Commission's reasons for decision but shall be made in the form of an order if, within 7 days of the handing down of the Commission's reasons for decision, any organisation, association, or employer bound by the award so requests.

(3) Subject to this Act, a declaration made under this section is binding on all courts and all persons with respect to the matter the subject of the declaration.

(4) Section 35 does not apply to or in relation to this section unless an order is made under subsection (1)(b) or under subsection (2).

*(5) In this section "**award**" includes an order, including a General Order, made by the Commission under any provision of this Act other than this section and an industrial agreement.*"

The Orders Made

14 The three applications were heard together from 8-10 August 2005. Reasons for decision were published on 11 October 2005. A single set of reasons was published in the determination of each of the three applications before the Commission. A minute

of proposed orders was drawn up by the Commission and published pursuant to s35 of *the Act*. There was then a speaking to the minute on 28 October 2005. As stated earlier, on 2 December 2005 the Commission published its order in the determination of application 569/2005. The relevant parts of the order are as follows:-

> "*NOW THEREFORE having heard Mr A D Lucev, of counsel on behalf of the applicant and Mr D H Schapper, of counsel, on behalf of the respondents, the Commission, pursuant to the powers conferred on it under section 46 of the Industrial Relations Act, 1979, hereby:*
>
> *1) DECLARES that the true interpretation of the entitlement of locomotive drivers under the Iron Ore Production & Processing (BHP Billiton Iron Ore Pty Ltd) Award 2002 (the Award) is:*
>
> *a) Annual Leave under Clause 12(5) of the Award is to be reduced at the rate of 9.5 hours for each 12 hour shift of Annual Leave taken; and*
>
> *b) Sick Leave under Clause 15(1) of the Award is to be reduced at the rate of 9.5 hours for each 12 hour shift of sick leave taken.*
>
> *2) ORDERS that to give fuller effect to the Award, the Award be varied in accordance with the attached schedule with effect on and from 3 October 2004.*
>
> *SCHEDULE*
>
> *1.* ***Clause 12 – Annual Leave: Delete subclause (5) of this Clause and insert in lieu thereof the following:***
>
> *(5) Locomotive drivers required to work shiftwork shall be entitled to annual leave at the rate of 288.8 hours per annum. Annual leave will be deducted for locomotive drivers from their annual leave entitlement at the rate of 9.5 hours for each shift of annual leave taken.*
>
> *2.* ***Clause 15 – Sick Leave: Insert a new subclause (13) as follows:***
>
> *(13) Sick leave will be deducted for locomotive drivers from their sick leave entitlement at the rate of 9.5 hours for each shift of sick leave taken.*"

15 An order was also issued on 2 December 2005 dismissing application 570/2005. As will be seen, this application was dismissed on the basis that it had been made redundant by the orders made in the determination of application 569/2005.

16 On 16 December 2005 the Commission issued an order varying clause 11(4) of the award, but otherwise dismissing application 1324/2004 ((2005) 86 WAIG 65).

The Hearing before the Commission

17 In my opinion, in order to determine the appeals, it is necessary to have regard to the way in which the hearing before the Commissioner was conducted.

18 As stated by the Commission in paragraph [22] of its reasons for decision, the applications before the Commission:-

> "… *should be seen in the context of the recent Commission in Court decisions which established the Iron Ore Production & Processing (BHP Billiton Iron Ore Pty Ltd) Award 2002 (AFMEPKIU v BHP Iron Ore Limited & Others 82 WAIG 2033 , AFMEPKIU & Others v BHP Iron Ore Limited & Others 82 WAIG 2048 , AFMEPKIU & Others v BHP Iron Ore Limited & Others 82 WAIG 2060, AFMEPKIU & Others v BHP Iron Ore Limited & Others 82 WAIG 2066). Of relevance also is the 6% case (AFMEPKIU & Others v BHP Billiton Iron Ore Pty Ltd & Other 83 WAIG 1672, AFMEPKIU & Others v BHP Billiton Iron Ore Pty Ltd & Another 83 WAIG 1689, AFMEPKIU & Others v BHP Billiton Iron Ore Pty Ltd & Another 83 WAIG 1690); and the decisions that dealt with a range of amendments and further pay increases to that award (CFMEU & Others v BHP Billiton Iron Ore and AFMEPKIU & Others v BHP Billiton Iron Ore Pty Ltd & Another 84 WAIG 3219, CFMEU & Others v BHP Billiton Iron Ore Pty Ltd and AFMEPKIU & Others v BHP Billiton Iron Ore Pty Ltd & Another 84 WAIG 3249).*"

19 At the hearing, the unions presented a joint case. They presented their case first, followed by BHPB. After opening the unions' case, which will be referred to further shortly, counsel for the unions called three witnesses, Mr Warren Johncock, Mr Mark Thomas and Mr Daniel Connors. Each of the witnesses had provided witness statements which were received by the Commission as exhibits. Mr Johncock was the convenor of the CMFEU, Port Hedland Lodge and a locomotive driver employed by BHPB. Mr Thomas was also a locomotive driver employed by BHPB, and Mr Connors was employed by BHPB as a mine worker at the Finucane Island site.

20 BHPB's counsel called as witnesses Mr Leigh Cook, Mr Keith Ritchie and Mr Leslie Punter. Again each of these witnesses had filed witness statements which became exhibits at the hearing. Mr Cook was the manager of the Finucane Island site for BHPB; Mr Ritchie was the manager of employee relations in Perth for BHPB; and Mr Punter was the supervisor for rail transport with BHPB at Port Hedland. At the time of giving his evidence he was also acting as the superintendent of rail operations in place of a Mr Geoff Jolly.

21 In opening the unions' case about the annual leave issue, counsel referred to the dispute as involving a "*sleight of hand*" being attempted by BHPB. Counsel said that since at least 1990 locomotive drivers employed by BHPB in its Pilbara operations had received 7.6 weeks annual leave. It was submitted that BHPB was now attempting to reduce the annual leave to 6.1 weeks per year.

22 Counsel explained the unions' position by reference to a document headed "*Union's Leave Calculations*" which became exhibit A4 at the hearing. This set out a number of calculations by which the determination of the locomotive drivers' annual leave entitlements had been made and which had led to 7.6 weeks annual leave. This was despite the fact that there had been variations in the number of hours and shifts worked by the locomotive drivers. There had been variations made in 1993 when 12 hour shifts were worked and then in 1999 when the locomotives were operated on a driver only operation (DOO) basis of 10 hour shifts and a 50 hour week. This shift basis lasted until September 2004 when after the decision by the Commission in Court Session in application 1246/2003 ((2004) 84 WAIG 3219), the locomotive drivers worked 12 hour shifts on a 48 hour week. Up to that period of time, counsel submitted, the annual leave was always 7.6 weeks. This amount of annual leave was achieved by using a divisor which reduced the remaining entitlement to annual leave by a certain amount per shift. BHPB changed this divisor following the Commission in Court Session decision in September 2004 when the entitlement to annual

leave remained at 288.8 hours and when 12 hour shifts on an average 48 hour week were to be worked. BHPB then used a divisor of 11.55, which as set out earlier, led to an effective reduction from 7.6 to 6.1 weeks annual leave per year. The effect of the submission on behalf of the unions was that this reduction was not justified by the amendments to the award made by the Commission in Court Session in September 2004.

23 Counsel for the unions submitted that it was the divisor that one uses which determines the total length of annual leave. It was submitted that 288.8 hours does "*not mean anything independently of the divisor one uses*" (T 20). Counsel also submitted that there was no basis in the award for the use of a divisor of 11.55 as argued for by BHPB.

24 Evidence about the way in which leave entitlements had been historically provided was given by Mr Johncock.

25 In opening the case for BHPB, counsel said that the unions' position in the applications before the Commission was an attempt to "*roll back*" award prescriptions to a time prior to the making of the award in 2002. With respect to the annual leave issue, counsel said:-

> *"Annual leave provisions need to be interpreted, Commissioner, according to their terms and you'll have seen, no doubt, in the papers that have been filed that over the years there have been various prescriptions with respect to annual leave in this operation. Sometimes it's hours, sometimes it's shifts. In other awards of the Commission sometimes it's weeks, and what annual leave is is time off from work according to the prescription in the award. And in this particular case it's hours …*" (T 102)

26 Relevantly, counsel did not submit that the Commission would be making an error of law if it determined the annual leave entitlement issue by reference to the previous arrangements which had been in place, as had been submitted by counsel for the unions.

27 Counsel then submitted:-

> "*The Commission in Court Session has swept away all the previous entitlements with respect to shifts … and said there is an entitlement to 288.8 hours of annual leave. If you get 4 weeks' annual leave, you get 4 weeks' annual leave. If you get 30 shifts you get 30 shifts off work. If you get 288.8 hours' annual leave then you get 288.8 hours off work.*
>
> *The union's position is to provide them with 360 hours off work which is, quite clearly, inconsistent with the provisions in the award and a significant departure from what the Commission in Court Session looking at the terms and conditions of locomotive drivers as a package has awarded, and also a significant discrepancy between the conditions in this respect of AWA drivers and locomotive drivers, a discrepancy which the Commission in Court Session was at pains to minimise and at pains to ensure that, so far as was possible, those conditions lined up.*" (T 102-103)

28 The reference to AWA drivers is a reference to those locomotive drivers employed by BHPB on their Pilbara operations who are employed pursuant to Australian Workplace Agreements and not covered by the award.

29 Counsel for BHPB then submitted that the correct divisor is one which leads to the locomotive drivers taking 288.8 hours and not 360 hours which the unions' divisor would result in.

30 The witness statement of Mr Ritchie, which was tendered as exhibit R9, contained the following:-

> "*34 As a result of the decision of the Commission in Court Session in application 1246 of 2003, the Award locomotive drivers' shift system was to change so that they were to work 12 hour shifts with their ordinary hours being reduced from 100 hours per fortnight to an average of 96 hours per fortnight. They were also to be on the same system of work and working condition as the AWA drivers as far as was possible.*
>
> *Accordingly, following the variation to the 2002 Award in application 1246 of 2003, the Award locomotive drivers moved to a 12 hour continuous shift system on the same basis as the site based AWA drivers (6 on, 5 off, 6 on, 4 off).*
>
> *35 The Award locomotive drivers also gained the Award entitlements of the other Award 12 hour shiftworkers including clause 11(12)(B) of the 2002 Award.*
>
> *36 However, the Award locomotive drivers had an entitlement to 288.8 hours of annual leave, as opposed to the entitlement of 228 hours of annual leave for the other Award 12 hour shift workers.*
>
> *37 The AWA drivers also have an entitlement to 288.8 hours of annual leave. When the WPA/AWA drivers moved onto 12 hour shifts I am informed that their annual leave was deducted at the rate of 11.55 hours for each shift of leave taken (equating to approximately 25 shifts of annual leave). This is what their annual leave is currently deducted at for each shift of leave taken.*
>
> *38 As part of the process of moving the Award locomotive drivers onto 12 hour shifts, in accordance with the reasons of the Commission in Court Session in application 1246 of 2003 that the Award locomotive drivers should be on the same system of work as far as possible, the Company put the Award locomotive drivers on the same deduction rate as the AWA drivers (instead of deducting at the rate of 12 hours per shift of leave taken). Subsequently in September 2004 the Company informed the CFMEUW that the locomotive drivers annual leave would be deducted on the same basis as the AWA drivers, making their leave entitlements the same as the AWA drivers.*
>
> *[**refer: Attachment "KGR5" - Letter to Mr Johncock dated 29 September 2004**]*."

31 The reference to WPA drivers in these paragraphs is a reference to drivers who had been engaged by BHPB pursuant to a Workplace Agreement as provided for under the former *Workplace Agreements Act* 1993 (WA).

32 When cross-examined as to why BHPB contended the relevant divisor was 11.55 on a 12 hour shift, Mr Ritchie explained that "*Mathematically 12 hours gives 24.06 as an annual leave entitlement. The 11.55 divisor gives 25 shifts*". (T 109)

33 A little later Mr Ritchie confirmed that the use of 11.55 as a divisor was based upon the decision of the Commission in Court Session in application 1246/2003. Mr Ritchie said there was "*nothing in that decision which specifically says that, but the*

Commission in Court's decision in the reasons for the decision talk about as far as possible there should be an alignment" between the employment conditions of the AWA and award locomotive drivers (T 112). Counsel for BHPB then submitted that it was paragraphs [185]-[189] of the decision to which Mr Ritchie was referring. These paragraphs were quoted in the reasons of the Commission and they are as follows (see (2004) 84 WAIG 3219 at 3234/5):-

> "*185. We recognise that there cannot be equality between the two groups of employees because of matters such as the ability to change shift systems, having an all inclusive salary, a finish-the-job component, having that salary as well as the other conditions determined by BHPB, participation in the incentive programme, administrative savings associated with not being required to keep detailed timekeeping, recording and payments systems both for time worked and allowances, lack of limitation with not having a rigid classification structure, compliance with all workplace practices, policies and procedures as determined by BHPB and as amended from time to time even if these are inconsistent with the award.*
>
> *186. However the award removed such a wide ranging number of the restrictions which previously existed that the significant differences in remuneration between award and AWA employees was also removed other than for the approximate buffer in wage rates to compensate for detriment or loss of entitlements elsewhere stipulated in the overall award conditions.*
>
> *187. We also recognise that historically there has been a difference in the leave entitlements of traditional staff and wages employees at BHPB. Traditional staff, employed as management, professional, administration and support staff, do not perform the same or similar work as wages employees. Although AWA employees are staff for the purposes of their employment with BHPB they are employees who perform similar work to award employees pursuant to an individual contract of employment with BHPB. The previous distinction between staff employment and wages employment is therefore less distinct. The distinction between traditional staff and award employees may have changed little, if at all. However, that distinction does apply to the work performed by AWA employees and award employees. As a matter of merit, therefore, if BHPB extends leave provisions to employees performing a certain kind of work it is difficult for the Commission to conclude as a matter of fairness in the workplace that award employees should be excluded merely because they are employed pursuant to an award. The instrument of employment, being either award or AWA/WPA, does not of itself produce such a significant difference in the manner of performance of work, and in some of the examples referred to in these Reasons, no difference at all given the integration of AWA and award employees within shifts, to justify a significant difference in conditions of employment.*
>
> *188. We also consider that there may be an administrative benefit to BHPB in having one set of leave provisions applicable to the workforce.*
>
> *189. It is not open to the unions, however, to seek to claim leave provisions extended to AWA employees on the basis of the performance of the same or similar work and also to claim different leave provisions from those applicable to AWA employees. If the notion of like employees performing the same or similar work receiving the same or similar remuneration is to be given credence, it will result in the granting of the unions' claim to the extent that leave provisions applicable to the majority of BHPB employees be extended to the minority under the award. Not to grant the claim will emphasise the "them and us" distinction which in many respects the award hopefully reduced. It is compatible with the efficiencies which BHPB is entitled to from the award.*"

34 It is noted that as stated by the Commissioner at first instance the claims made in application 1246/2003 did not concern the quantum of annual leave for locomotive drivers or the divisor to be used in calculating their annual leave. There were however a number of other claims for leave for award employees to align them with leave provisions enjoyed by staff members. These provisions included maternity, paternity, adoption, jury duty, compassionate, military service and community service volunteers leave. (See reasons at first instance at paragraph [27]).

35 BHPB presented their closing submissions first. When BHPB's counsel commenced his submissions on the issue of annual leave/sick leave, the unions' counsel sought the amendment to the answer to application 569/2005 which I have referred to earlier. The application to amend was opposed by BHPB, asserting that they were prejudiced and unable to respond to the answer if it were to be amended. This argument was countered by submissions by counsel for the unions.

36 The Commissioner then referred to applications 569 and 570/2005 and s46(1)(b) of *the Act*. The Commissioner then said:-

> "*My query is simply I'm not quite sure why there's, in fact, two applications before me, when it would seem that arising from the interpretation issue the Commission is at liberty to make a declaration and to vary the award to give effect to whatever the proper interpretation may, in fact, be.*" (T 196-197)

37 The response to this question by BHPB's counsel was as follows:-

> "*I can answer that, Commissioner. The reason that two applications were made was because it's not unknown for courts and tribunals to make the declaration but then not necessarily make the variation order. So it was made out of an abundance of caution, and it may well be that in relation to the interpretation application, if you're with us on it, that you make the declaration and vary in which case you don't need to do anything in respect of 570. It may be that on 569 you simply make the interpretation, and in 570 make the actual variation. It probably doesn't matter either way, but it was done out of an abundance of caution to prevent a situation where we ended up with some - - some form of hiatus, because that hasn't - - that's a situation which is not unknown in applications before courts and tribunals on interpretation or declaration applications.*" (T 197)

38 When asked by the Commissioner if he wanted to respond, counsel for the unions said that this:-

> "*… highlights the absurdity of the objection to the proposed amendment, that if you, on the interpretation application 569, decide that the proper interpretation of the award is not 11.55 but 9.5, you can vary the award on that application to put in 9.5. So what's the point of opposing it?*" (T 197)

39 The Commissioner said that he would grant leave to amend the answer. The Commissioner then said:-

> "*Can I also say to you that, really, my approach to this, so that you're not at all ambushed by how I deal with this is that 569 is, in effect, the real application and that being you want an interpretation about whether it should be 11.55 or 9.5 as a divisor to get to the amount of annual leave and arising from 569, depending on what decision I make there will be an order to vary the award to make clear it being A or B, and in that sense then in my mind 570 would become redundant and be dismissed not for any other reason other than it's been dealt with in 569. I think that's the appropriate way to deal with it. Unless there is submission to the contrary that's how I would seek to act.*" (T 197)

40 Counsel for BHPB then said "*if that's the way you propose to deal with it, Commissioner, that's fine.*" (T 197)

41 Counsel reiterated that application 570/2005 had been made out of an "*abundance of caution*". The Commissioner said that he understood that and said "*and it needs a conclusion, and it shall have one through 569*". Counsel for the unions did not make any submissions in response to the issue raised.

42 Counsel for BHPB then proceeded to make his submissions about the annual leave/sick leave issue. Counsel said the starting point was the new award and application 1246/2003. Counsel said reference should be made to the new award because that award established an entitlement to 288.8 hours annual leave rather than leave based on shifts, weeks or days. Reference was made to application 1246/2003 because it was that application which converted the shift arrangement to a 12 hour shift arrangement. (T 198)

43 Counsel then referred to the evidence of Mr Ritchie about application 1246/2003 causing steps to be taken to align the divisor for locomotive drivers to the divisor applying to the remainder of BHPB's 12 hour shift workforce. Counsel then referred to paragraphs [185]-[189] of the decision in application 1246/2003. Counsel then submitted that the issue was not:-

> "*a question of history because the new award swept away the history … It is, and it's the uncontroverted evidence, that everyone else in the business working 12-hour shifts has an 11.55 hour divisor, and we say that it would be inappropriate to treat the locomotive drivers differently as a matter of equity.*" (T 198-199)

44 The balance of the submissions made by counsel for BHPB about the annual leave/sick leave issue were summarised by the Commissioner in paragraphs [41]-[46]. There was no criticism of this summary in the appeals. The paragraphs are as follows, noting that the reference to the applicant in the Commissioner's reasons is a reference to the unions:-

> "*41 Mr Lucev submitted as a matter of interpretation that the Commission chose to express annual leave in clause 12 in terms of hours per annum (ie 288.8 hours). If the Commission in Court [Session] had meant to provide a number of shifts away from work they would have said so. Similarly if the Commission in Court [Session] meant to provide a number of weeks or days of work they would have said so.*
>
> *42 Mr Lucev submitted that the problem with the calculations of the applicant in Exhibit A4 is that it is an entirely artificial and historical construct which following the introduction of the new award no longer applies. Prior to the new award, calculation of annual leave included a number of components and people played around with them from time to time. On the evidence in this application included in those components are 8 days in lieu which are the so called personal days off. Those personal days off have not been included in the new award. To grant this application would be to give back an entitlement of 8 personal days off. It would be to give back an entitlement to annual leave for Saturdays and Sundays which now form part of normal ordinary hours. It is to give back an entitlement for the 20th shift on the basis of 38 hour week arrangement. Clearly the 38 hour week arrangement was swept away with the new award if not before. The Commission in Court [Session] considered all these issues in coming to the view about an annual leave entitlement of 288.8 hours.*
>
> *43 Mr Lucev submitted that the evidence in respect of Goldsworthy is confusing. Mr Ritchie's evidence is that at Goldsworthy there was an entitlement to 228 hours of annual leave with a divisor of 9.5 which would have produced 24 shifts. With the divisor of 11.55 this meant 288.8 hours in current terms. If 30 shifts of annual leave were to be suggested as being the case at Goldsworthy, then the divisor would need to have been 7.6 to arrive at an entitlement of 228 hours. The only reason that 38 shifts of leave were provided at Goldsworthy was for the historical aggregation of public holidays, Sundays, 38 hour weeks, etc. These were swept away in the Commission in Court decision.*
>
> *44 In addition at Exhibit R3 Tab 1 (clause 14, page 1489) the entitlement was expressed historically in terms of rostered shifts to 30 days annual leave for employees engaged in continuous shift; this applied not just to locomotive drivers. In clause 3(a) there appeared an additional 8 rostered shifts of leave per annum, public holidays, work in excess of public holidays, public holidays during annual leave, working on the 20th shift. That instrument expressed it clearly in terms of rostered shifts not hours. Therefore the correct interpretation lent weight why these issues is hours of work and not shifts of work which is the current position.*
>
> *45 It is Mr Ritchie's evidence also [Exhibit R9, attachment KGR4] that for 12 hour shifts leave was to occur at the rate of 228 hours per annum, equating to 19 shifts of leave, and that for sick leave it was 76 ordinary hours per annum equating to 6.3 shifts.*
>
> *46 Mr Lucev submitted that if there is some suggestion that the 11.55 divisor might adversely affect current employees and, for example, provide a negative leave balance to some employees, it may be avoided by applying a future implementation date for the divisor. Alternatively, if the Commission is concerned about a disadvantage for the present drivers, then those drivers might be quarantined from the change. Under this suggestion new drivers on the award would attain the same leave arrangements with the same divisor as other employees.*"

45 Counsel for BHPB concluded his submissions on the issue by saying that:-

"*… as a matter of good conscience which the Commission's required to exercise, that that entitlement on the basis of that divisor could not stand in perpetuity, and as a matter of equity versus the remainder of the workforce, both award and AWA, that the divisor ought to be and is 11.55.*" (T 204)

46 It should be noted that at no time did counsel submit to the Commissioner that as a matter of law he would be in error in considering the earlier leave entitlements and how they had been applied in practice in determining the applications before him.

47 Counsel for the unions commenced his submissions on the annual leave/sick leave issue by saying that the position of BHPB was to cut the longstanding leave entitlements of locomotive drivers (T 259). Counsel referred to the evidence that locomotive drivers at BHPB, whether originating from the Goldsworthy line or the Newman line, had since at least 1988 been entitled to 7.6 weeks annual leave. Counsel submitted this was the uncontradicted evidence of Mr Johncock and Mr Punter. Counsel submitted that this entitlement had "*survived and existed through a myriad of changes to unregistered agreements, registered agreements, and the award that applies*". (T 260).

48 Counsel then referred to some of the historical arrangements. Counsel then submitted that the question was, on an interpretation claim, what did the parties mean when they in effect by consent inserted a provision of 288.8 hours annual leave into the award. Counsel referred to the position of BHPB that one should not look to the past because it was all swept away by the 2001/2002 series of decisions. In contrast, counsel for the unions said that to find out what the parties meant by providing for 288.8 hours annual leave, you do have to look to the past, because 288.8 hours came from the past. He then submitted that when one looked at the past one found an entitlement to 7.6 weeks annual leave.

49 Counsel then referred to the calculations that had been made by the unions and contained in exhibit A4. Counsel took the Commission through these calculations. These submissions and the balance of the submissions by counsel for the unions on the annual leave/sick leave issue were summarised by the Commissioner in his reasons at paragraphs [54]-[59], in a way which has not been subject to criticism during the appeals. These reasons are as follows:-

54 … Mr Schapper referred to the union's calculations at Exhibit A4. The divisor used in the 12-hour shift at Goldsworthy, prior to the driver only operation, was 9.5. If one were to use a divisor of 7.6 then under the 288.8 hours annual leave this would provide for 38 shifts of leave. If a divisor of 10 was used then it would translate to 28 shifts, which would be 6 weeks leave because 10 shifts are worked in a fortnight. Mr Schapper then went on to submit as follows:

> *"So it's clear from that that by using the divisor of 7.6 for a 50-hour week, 288 hours translates into the same length of leave as 288 hours of leave for a 38-hour week. It works out to be exactly the same for a 48-hour week at 6 on - - 6 on/5 off, 6 on/4 off, 288 hours of leave using a divisor of 9.5. That's the third example which is spread over both pages in A4. 288 divided by 9.5 as the divisor is 30.4 shifts, and over the 6/5, 6/4, 6/5 and so on, that's 53.4 days which is 7.6 weeks" (Transcript p.263).*

55 Mr Schapper submitted that what is constant is the weeks. The conversion of hours to weeks is constant. This is kept constant by adjusting the divisor. In the 12-hour shift system you adopt the 9.5 divisor to keep 288 hours at 7.6 weeks. What the parties meant then by putting 288.8 hours into the award was that it would be 7.6 weeks.

56 Mr Schapper submitted that the origin of the 288.8 hours proves that it results in 7.6 weeks. Exhibit R3, document 1, the Newman part 2 of the award as at 1991 in clause 14 - annual leave states:

> *"Employees engaged as continuous shift employees shall ….. be entitled to 30 rostered shifts of annual leave."*

But then employees get an additional 8 rostered shifts of leave per annum making it 38 shifts. 38 shifts times 7.6 hours is 288.8 hours. This arrangement continued right through to the new award. Mr Schapper submitted that in application 1246 of 2003 Mr Ireland gave evidence that award employees enjoy almost 8 weeks of annual leave per annum which is considerably more than AWA and WPA drivers. This evidence being some two years after the 2002 award was made. In this case the company was saying in their evidence that 288.8 hours means 7.6 weeks.

57 At paragraph 316 of the decision the Commission records:

> *"Mr Dixon submitted that the union claim, of 12-hour shifts over a 42 hour period, will not create efficiencies. He said, "it will still require separate schedules of work or rosters."*

And

> *"The AWA drivers work an average of 48 hours, they can be required to work more hours (eg to fill in for "grey days"), their rates include an element for overtime (i.e. the finish-the-job component), they can be brought forward or laid back without penalty and their annual leave entitlements are less than award drivers."*

58 The company did not at that time say to the Commission that if the Commission were to award the claim for 12 hour shifts or a 42 hour week then there should be a reduction in the annual leave entitlements for employees. Mr Schapper submitted that comments of the Commission at paragraphs 187 to 189 in matter 1246 of 2003 should be seen in the context of the union's claim for a variety of leave provisions that were enjoyed by AWA drivers. In that context the Commission said:

> *"It is not open to the unions, however, to seek to claim leave provisions extended to AWA employees on the basis of the performance of the same or similar work and also to claim different leave provisions from those applicable to AWA employees" (Paragraph 189).*

59 The union at that time was not claiming annual leave. The annual leave had been agreed earlier at 288.8 hours. These comments of the Commission are no basis for Mr Ritchie to conclude that the annual leave

entitlements of award and AWA employees needed to be equated. Mr Schapper submitted that the two bases upon which the Commission chose to introduce 12-hour shifts were to create fairness by an equal spread of work and get rid of the hostile roster for award drivers. It was not to equate Award with AWA drivers. Mr Schapper submitted that in relation to the other various leave provisions including the amount of sick leave, the company did not extend those provisions to the award drivers. He submitted that there is internal contradiction in the company's own case and they use the divisor 11.55 not 12 (i.e.12-hour shifts). So the company's proposition is the employee gets 25 shifts at 12 hours being 300 hours of annual leave not 288.8."

50 Counsel for BHPB made submissions in reply to the submissions made by counsel for the unions. During these submissions it was again not asserted by counsel that the Commissioner would be in error, as a matter of law, if he had regard to the historical agreements and arrangements which counsel for the unions had referred to.

The Commissioner's Reasons

51 In the Commissioner's reasons for decision he set out his understanding of what counsel for BHPB had said was the justification for making both applications 569 and 570/2005, at paragraph [18]. There he said that counsel had explained the applications had been made to ensure that the Commission ordered a variation to the award to express the interpretation which the Commission found appropriate in relation to the annual leave divisor issue.

52 As has been indicated by my earlier reasons, the Commissioner in his reasons set out at length the closing submissions which had been made by counsel about the annual leave/sick leave issue.

53 The Commissioner's consideration and determination of this issue occurred at paragraphs [82]-[94] of his reasons for decision. This part of the reasons commenced with a reference to that part of the calculations contained in exhibit A4 which showed that the effect of a divisor of 11.55 would reduce an employee's leave from an absence of 7.6 weeks to 6.1 weeks. There was then reference to the evidence of Mr Johncock about the different shift arrangements he had worked since 1988 and to the fact that he had always enjoyed just under eight weeks in annual leave.

54 The Commissioner then referred to the evidence of Mr Ritchie, under cross-examination, as to the justification to move to the annual leave divisor of 11.55. Reference was made to the evidence of Mr Ritchie under cross-examination to the effect that historically, annual leave in terms of weeks had remained the same up until September 2004. The Commissioner then quoted clauses 12(3)-(5) of the award at paragraph [87] of his reasons. These are as follows:-

> "*(3) Employees working on shiftwork shall be entitled to annual leave at the rate of 228 hours per annum.*
>
> *(4) Track crew employees working on shiftwork at Redmont, Newman and Port Hedland shall be entitled to annual leave at the rate of 228 hours per annum.*
>
> *(5) Locomotive drivers required to work shiftwork shall be entitled to annual leave at the rate of 288.8 hours per annum.*"

55 The Commissioner then said that he did not need to canvass the evidence on the issue any further. He said it was clear from the evidence that Mr Ritchie considered the intent of the decision of the Commission in Court Session in application 1246/2003 to be that award and AWA drivers should enjoy the same annual leave conditions, and to achieve this a divisor of 11.55 had to be applied. The Commissioner referred to the uncontested evidence of Mr Johncock, reinforced by the evidence of Mr Ritchie under cross-examination, that for some considerable period of time, irrespective of the shift length worked, locomotive drivers under the award enjoyed 7.6 weeks of leave. The Commissioner said at paragraph [89] of his reasons:-

> "*The calculations provided by the applicant display that it has been the divisor which has changed but the practical effect of the amount of leave in weeks to be taken has remained unaltered. This practice continued after the 2002 award was established. It would seem then that but for the wording in paragraphs 185 to 189 of the Commission's decision, the annual leave in weeks available to engine drivers under the award would have been left at 7.6 weeks.*"

56 The Commissioner then said at paragraph [90] of his reasons:-

> "*The award of course is expressed in hours per annum (i.e. 288.8 hours) and provides a quantum for locomotive drivers which are different from that of other employees. This is not a matter of interpretation whereby the terms expressed in the award can be interpreted without resort to the practice that has been adopted in the workplace, and indeed without resorting to the history of the change. The provision on its face may appear clear and unambiguous, but equally obvious from the evidence is how that translates in effect is not clear and unambiguous.*"

57 The Commissioner then said that his difficulty with the position taken by BHPB was that the quantum of annual leave for engine drivers under the award was never a claim before the Commission in application 1246/2003 and was never considered by the Commission. The Commissioner also said that there was no evidence led in that application which could have alerted the Commission to a reduction in effect of 1.5 weeks in leave entitlement; or the effect 12 hour shifts had generally on annual leave. The Commissioner said that paragraphs [185]-[189] of the decision of the Commission in Court Session, of which the Commissioner was a part, could not be taken to mean that the annual leave available to locomotive drivers under the award should be equated to AWA drivers. The Commissioner at paragraph [92] said he could not:-

> "*… say in all good conscience that those passages, taken in the context of the decision, lead one to conclude that the Commission considered and decided to amend the annual leave provision for engine drivers and reduce it in effect by 1.5 weeks per annum. Having weighed the evidence and arguments presented by the parties I consider the divisor for annual leave for engine drivers should be 9.5 as per the applicant's submission*."

58 The Commissioner then said he understood that whilst operationally award and AWA drivers work a similar shift pattern there will continue to be differences in conditions. The Commissioner noted that this would include the quantum of annual leave and sick leave enjoyed and which could be accessed.

59 The Commissioner then said at paragraph [94]:-

> "*The claim then is to insert the appropriate divisor in clause 12(5) for annual leave and in a new subclause 15(13) for sick leave. This affects only locomotive drivers and not other employees on shift work. I assume from how the*

> *parties have approached this matter that the variation to sick leave clause is required. I have no evidence as to whether the sick leave quantum has been reduced. I have simply assumed that what needs to apply to one condition should be applied to the other condition of employment, given the submissions of the parties.*"

60 The Commissioner then said that he would make an order to amend the award, in terms of the order which was ultimately made.

Ground 1 – FBA 27/2005

61 This ground pleads the Commission erred in law in failing to interpret clauses 12(5) and 15(1) of the award at all, as the application required under s46(1)(a) of *the Act*. The particulars to this ground are that the Commission did not interpret the award, but simply determined to vary the award.

62 In my opinion, this ground cannot succeed.

63 The first order made by the Commission in application 569/2005 was to declare the true interpretation of the award. The second order made was to vary the award in accordance with the schedule attached to the orders. In making the orders the Commission complied with s46 of *the Act* by making a declaration as to the true interpretation of the award and then varying the award for the purpose of giving a fuller effect to the award as stated in s46(1)(b) of *the Act*.

64 It is correct that, as pointed out by BHPB, at paragraph [19] of his reasons the Commissioner listed the annual leave/sick leave issue as one of the "*amendments to be arbitrated*". In my opinion, however, this was simply an unfortunate slip of language. Paragraphs [18], [44], [54] and [90] for example, as well as the orders made by the Commission indicate the Commissioner understood he was engaged in the exercise of interpreting the clauses of the award. BHPB also criticised the use of the expression, the "*claim then is to insert the appropriate divisor*" in paragraph [94] of his reasons. It should be noted though that this was what *was* claimed, after the interpretation issue was resolved. That issue was by this stage of the reasons resolved by the earlier paragraph [92] of the Commissioner's reasons where he said that he accepted the unions' submissions that the divisor should be 9.5. The submissions made by the unions, as set out earlier by the Commissioner, were submissions about interpretation.

65 In other, alternative grounds of appeal, BHPB criticised the way in which the Commissioner went about the task of interpreting the clauses of the award. In my opinion, this is a sounder basis upon which to mount the appeal. Contrary to the assertions made in this ground of appeal, an interpretation of the award was provided by the orders made.

66 In my opinion, this ground of appeal is not established.

Ground 2 – FBA 27/2005

67 In this ground it is pleaded that in the alternative to ground 1, the Commission erred in interpreting clauses 12(5) and 15(1) of the award by failing to give the words used in those clauses their ordinary unambiguous meaning. In particulars to this ground it is asserted that the Commission failed to give any meaning to the phrase "*hours of leave*" in the clauses. It is also asserted that the Commission treated this phrase as if it were "*weeks of leave*", contrary to its ordinary unambiguous meaning. It is also asserted that (presumably by virtue of the interpretation made by the Commission), the entitlement to leave is increased significantly beyond 288.8 hours annual leave and 80 hours sick leave.

68 It is correct that the Commissioner did not approach the task of interpreting the relevant clauses in an orthodox fashion. The Commissioner did not seek to ascertain the meaning of the clauses by giving the words used their ordinary meaning in the context of the award as a whole. The question however is whether, in the particular circumstances of this case, this has led to an appealable error.

69 In my opinion, this issue and the ground as a whole needs to be considered in the context of the application which was before the Commission, and the way in which the parties presented their cases at the hearing.

70 Application 569/2005 sought an interpretation of clauses 12(5) and 15(1) of the award. The schedule to the application set out the facts giving rise to it. This stated that the parties were in dispute about BHPB deducting annual leave and sick leave taken by locomotive drivers at the rate of 11.55 hours per shift of leave taken. The declarations sought by the application were that on the proper construction of the relevant clauses, locomotive drivers were entitled to annual leave at the rate of 288.8 hours per annum and sick leave at the rate of 80 hours per annum, and that the leave was to be deducted at the rate of 11.55 hours per shift of leave taken. There were, therefore, with respect to both annual leave and sick leave, two declarations which were sought by BHPB. One was as to the annual entitlement to leave. The second was as to the rate at which the taking of shifts of annual or sick leave would be deducted from the annual entitlement. The answer of the unions, as amended during the course of the hearing, was that on the proper interpretation of the award it did not prescribe the rate per shift of leave taken at which annual or sick leave was deducted; and, alternatively, it does so at the rate of 9.5, or it does so using a divisor of 9.5.

71 The hearing of the application was complicated by being heard together with applications 570/2005 and 1324/2004. The way in which application 569/2005 was heard, tended to collapse the two issues referred to in the application, into one; being the rate at which the annual entitlement was to be deducted. This was to some extent understandable given there was no dispute about what the award actually said in terms of the number of hours of annual entitlement.

72 In my opinion, the Commissioner correctly identified the nature of the issue the parties wanted him to determine when during closing submissions he said, as I have referred to earlier, that the "*real application*" was that the parties "*want an interpretation about whether it should be 11.55 or 9.5 as a divisor to get to the amount of annual leave*" (T 197). Neither counsel expressed any disagreement with this proposition by the Commission at the time. This was of course not surprising given the approach of the parties at the hearing.

73 The reasons of the Commissioner reflected the dispute between the parties, the nature of the hearing and the arguments of the parties before him. As stated, there was no argument about what the award said as to the number of hours the employees were entitled to per annum for annual leave and sick leave. The argument was about, in effect, what this meant. More specifically, the dispute was about how these entitlements were to be acquitted in terms of the divisor to be used for the taking of a shift of annual leave or sick leave.

74 The case for BHPB was that the divisor was 11.55, so that for annual leave, the employees were entitled to 25 shifts of leave per annum. This would equate to a total number of 300 hours of annual leave each year; made up of 25 shifts of 12 hours. BHPB did not therefore seek for the Commission to interpret the entitlement to 288.8 hours of leave to mean there was an entitlement to 288.8 hours of leave; instead BHPB argued it meant an entitlement in effect to some 11.2 hours more than that. Given the way the shifts were worked, this equated to approximately 6.1 weeks of annual leave.

75 By contrast, the unions' position was that a divisor of 9.5 should be used for each shift of annual leave taken; leading to 30.4 shifts of leave, or 364.8 hours of leave. Given the way in which the shifts were worked, this equated to approximately 7.6 weeks of annual leave.

76 Given that this was the position of the parties at the hearing, I do not think that the Commissioner erred in how he approached the resolution of the interpretation application.

77 Put slightly differently, it may be said that of the two issues for "*interpretation*", being the annual entitlement and the rate of acquittal, only the former was mentioned in the award. The award was silent as to the latter. It was, however, the latter which was the key issue for the parties and, given the terms of application 569/2005 and the arguments of the parties at the hearing, the Commissioner was justified in approaching the issue in the manner reflected in his reasons.

78 Furthermore, the case for BHPB was *not* that the 11.55 hours divisor was justified on the basis of what the award said; but on what it understood was the intent of the reasons of the Commission in Court Session in deciding application 1246/2003, suggesting an alignment of leave conditions for AWA and award employees. The 11.55 hours divisor was used as this was the divisor applied to the comparable AWA employees who were entitled to 288.8 hours of annual leave. BHPB argued that the 2002 award and the Commission in Court Session decision had swept away the relevance of the industrial agreements which the unions had relied upon to support their case.

79 The case for the unions was that the 9.5 hours divisor should be used to maintain the long standing practice of providing 7.6 weeks of annual leave per year. The unions argued that by use of an appropriate divisor, 7.6 weeks of leave per year had been provided to the employees, despite the terms of the various agreements and awards, from 1988 to September 2004. They submitted that the Commission in Court Session decision in 1246/2003 had not intended to have the effect of diminishing the annual leave enjoyed from, in effect, 7.6 weeks to 6.1 weeks per year.

80 Again, given these arguments of the parties, I do not think that the Commission erred in the way it approached and decided the annual leave interpretation issue.

81 In *Amcor Limited v The Construction, Forestry, Mining and Energy Union and Others* (2005) 214 ALR 56, Kirby J at [96] and Callinan J at [129], quoted with approval from the reasons of Madgwick J in *Kucks v CSR Ltd* (1996) 66 IR 182 at 184, where His Honour made the following observations about the interpretation of an award.

> "*It is trite that narrow or pedantic approaches to the interpretation of an award are misplaced. The search is for the meaning intended by the framer(s) of the document, bearing in mind that such framer(s) were likely of a practical bent of mind: they may well have been more concerned with expressing an intention in ways likely to have been understood in the context of the relevant industry and industrial relations environment than with legal niceties or jargon. Thus, for example, it is justifiable to read the award to give effect to its evident purposes, having regard to such context, despite mere inconsistencies or infelicities of expression which might tend to some other reading. And meanings which avoid inconvenience or injustice may reasonably be strained for. For reasons such as these, expressions which have been held in the case of other instruments to have been used to mean particular things may sensibly and properly be held to mean something else in the document at hand.*"

82 In my opinion, the approach to the issue of interpretation by the Commissioner was not inconsistent with the approach described and was therefore not in error.

83 To not dissimilar effect to the reasons of Madgwick J in *Kucks*, are the observations made by Kennedy J in *Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union of Western Australia and Others* (1987) 67 WAIG 1097 at 1100 where His Honour said:-

> "*It is not in issue that, as Mr Stone for the respondent contended, in interpreting an award or industrial agreement the words used are to be given their "ordinary common sense English meaning" or their "ordinary and natural meaning". Allowance must be made for the fact that the award or industrial agreement may have been drafted by industrial rather than necessarily by skilled draftsmen, so that there should not be "too literal adherence" placed on the strict technical meaning of words, but that the matter should be viewed broadly to give the agreement a meaning consistent with the intention of the draftsman. Subject to this, the rules to be applied in interpreting an industrial agreement are those applied in the interpretation of statutes, deeds or other documents.*"

84 It should also be remembered that, as stated in the joint reasons of the High Court in *University of Wollongong and Others v Metwally (No 2)* (1985) 59 ALJR 481 at 483:-

> "*It is elementary that a party is bound by the conduct of his case. Except in the most exceptional circumstances, it would be contrary to all principle to allow a party, after a case had been decided against him, to raise a new argument which, whether deliberately or by inadvertence, he failed to put during the hearing when he had an opportunity to do so.*"

85 The sentiments of these observations are reflected in s49(4) of *the Act*, although it is unnecessary for the purposes of this appeal to determine the exact scope of that subsection. In arguing this appeal, BHPB is attempting in some instances to argue a case quite different to that argued before the Commission at first instance. As reference to the arguments above indicates that is so with respect to this ground. BHPB did not contend at first instance that 288.8 hours of annual leave should be construed according to its ordinary meaning to entitle employees to what the award said; 288.8 hours. Following a literal approach, the taking of a shift of leave of 12 hours would reduce the annual leave entitlement by that number of hours, not 11.55 hours as argued for by BHPB, having regard to the factors it said supported such an interpretation. For these reasons, I do not accept the argument of BHPB that the Commissioner erred in taking the approach he did.

86 As stated by four members of the High Court in joint reasons in *Coulton v Holcombe* (1986) 162 CLR 1 at 7:-

> "*It is fundamental to the due administration of justice that the substantial issues between the parties are ordinarily settled at the trial. If it were not so the main arena for the settlement of disputes would move from the court of first instance to the appellate court, tending to reduce the proceedings in the former court to little more than a preliminary skirmish.*"

87 Ordinarily, it is not just to allow a party to argue an application differently on appeal from the way in which it was argued at first instance. In my opinion, this ordinary practice should be followed in this instance, for the reasons indicated earlier.

88 The first particular to this ground is that the Commission failed to give any meaning to the phrase "*hours of leave*" in clauses 12(5) and 15(1) of the award. In my opinion, this particular cannot be sustained. The Commission did give meaning to the phrase "*hours of leave*", but did so by reference to the arguments of the parties for the need for a divisor to provide greater clarity as to the meaning of the expression in the context of the award.

89 The second particular is that the Commission treated the phrase "*hours of leave*" in the relevant clauses of the award as if they were weeks of leave, contrary to the ordinary unambiguous meaning. Again, I do not think that this argument can be sustained having regard to the reasons for decision of the Commissioner and the arguments made by the parties at first instance.

90 The third particular asserts that the entitlement to leave is significantly increased beyond 288.8 hours annual leave and 80 hours sick leave by the Commission's interpretation as to the necessity for a 9.5 hour divisor in construing the clauses of the award. The first point I would make about this particular is that the effect of the Commissioner's interpretation of the clauses was to maintain, rather than increase, what the Commissioner understood to be the annual leave entitlement. The Commissioner found that it was not the intention of the Commission in Court Session in deciding application 1246/2003 to decrease by 1.5 weeks the effective amount of annual leave enjoyed by the locomotive drivers. Secondly, by the use of the divisor of 9.5 hours, the Commissioner has interpreted the award so that the relevant employees, on the current shift arrangements, have an entitlement to be absent from work in the taking of annual leave and sick leave for in excess of 288.8 hours for annual leave and 80 hours for sick leave. With respect to annual leave, I think the decision of the Commissioner was justified, having regard to the application which was made to the Commission, the cases presented by the parties at first instance and the considerations the Commissioner had regard to in his reasons. With respect to sick leave, I will defer consideration of this issue to ground 6.

91 I would not uphold this ground of appeal.

Ground 3 – FBA 27/2005

92 This ground pleads that, in the alternative to ground 1, the Commission erred in using extrinsic evidence in interpreting clauses 12(5) and 15(1) of the award when there was no right or need to do so because of the ordinary unambiguous meaning of those clauses. In particulars to this ground, it asserts that the Commission relied on the history of various awards and agreements preceding the award to interpret the clauses and that the Commission also relied on the history of the award to interpret the clauses.

93 The particulars to this ground are an accurate description of what the Commission did in interpreting the clauses of the award. Again, the more important question is whether, in the circumstances of this case, the Commissioner erred in so doing. As to this issue, the observations made with respect to ground 2 above about the application which was before the Commission and the way in which it was argued by the parties are relevant. Again, in my opinion, it is important to note that the issue which was in dispute was the rate at which leave should be deducted and this was not referred to in the award.

94 As argued by BHPB on the appeal, it is correct that ordinarily it would be in error to use extrinsic evidence to interpret the clauses of an award unless they were ambiguous. (See for example the *Robe River Iron Associates* case cited earlier at 1098 and 1102/3 and *Norwest Beef Industries Limited and Another v AMIEU* (1984) 64 WAIG 2124 at 2127 and 2133.) It is also correct that, as paragraph [90] of the reasons of the Commissioner demonstrates, he did not attempt to determine the meaning of the words and see whether they were ambiguous before having regard to the history of industrial agreements and awards as an interpretive aid. In many cases this would demonstrate error.

95 In this case, however, both parties specifically sought to rely on materials and information outside the terms of the award to support the interpretation they argued for. This has largely been set out earlier in these reasons. BHPB, for example, supported the interpretation of the clauses of the award that they argued for by reference to the terms and purpose of the award, the reasons of the Commission in Court Session in determining application 1246/2003 and the divisor used for other employees working 12 hour shifts. The unions supported their case by reference to earlier awards and agreements and the practice which had continued after the implementation of the award and prior to the Commission in Court Session decision in application 1246/2003 on 1 September 2004. There was no objection made by either party to the other party relying on these facts and circumstances as part of their submissions before the Commission at first instance. Neither party submitted that the Commissioner would be making an error of law in having regard to these materials and information in determining the interpretation issue.

96 It is correct, as pointed out by BHPB on the appeal, that the previous awards and agreements were relevant to the variation application, 570/2005, and therefore there was no basis upon which there could be an objection to the Commission receiving information about the previous awards, agreements and practices. There was not before the Commission at first instance however any attempt to separate the evidence which was relevant to the issues of interpretation as opposed to variation. All of the information was before the Commission, without objection, and arguments were made by both parties, without objection, as to the relevance of these materials and information to the question of interpretation, not variation.

97 As set out with respect to ground 2, BHPB should ordinarily be bound by the case presented before the Commission at first instance. In this instance, I do not think it would be appropriate to allow BHPB to mount an argument diametrically opposed to the case which it presented before the Commission at first instance and the case which the unions mounted without objection. The interpretation which BHPB argued was the correct interpretation was by reference to materials such as the reasons accompanying the award, the reasons of the Commission in Court Session in deciding application 1246/2003 and the way in which BHPB determined the annual leave entitlements of non award AWA employees. In my opinion, BHPB does not have justifiable cause for complaint on the basis that the Commission decided the case against them by having regard to extrinsic materials including, but not limited to, those which BHPB relied upon.

98 I would not uphold this ground of appeal.

Ground 4 – FBA 27/2005

99 This ground is pleaded as an alternative to grounds 1, 2 and 3. It asserts that, if there was ambiguity in the ordinary meaning of the words used in the clauses of the award, the Commission erred in taking into account wrong and irrelevant considerations when interpreting the clauses.

100 The first particular to this ground is that the Commissioner relied on the irrelevant history of various awards and agreements preceding the award to interpret clauses 12(5) and 15(1) of the award. In their written submissions, BHPB repeat the submissions they made earlier about the asserted error in taking into account the history of awards and agreements preceding the award. For the reasons set out earlier with respect to grounds 2 and 3, I do not think in the particular circumstances of this case, that the Commission erred in taking into account this history. It was relevant for the unions to rely upon this history to refute the argument of BHPB that there had been a change to annual leave entitlements effected by the award and the Commission in Court Session decision and reasons in application 1246/2003.

101 The second particular is that the Commission wrongly treated annual leave as if there was a previous entitlement to 7.6 weeks annual leave, when leave was not expressed in terms of weeks. In my opinion, the Commission was conscious of the fact that leave had not been expressed in terms of weeks under the award. For example, at paragraph [90] which I have quoted earlier, the Commissioner referred to the award being expressed in hours per annum. In paragraph [89], the Commissioner referred to the fact that, for some considerable time, irrespective of the length of shift worked, engine drivers under the award had enjoyed 7.6 weeks of leave. This was not disputed by Mr Ritchie at the hearing, as the Commissioner noted. I am not satisfied that this particular has been made out.

102 The third particular relied on is that the position with respect to annual leave under clause 12(5) of the award was not determinative of the proper interpretation of sick leave under clause 15(1) of the award. I will deal with this particular when considering ground 6.

103 I do not think this ground has been established.

Ground 5 – FBA 27/2005

104 Again, this ground is expressed as an alternative to grounds 1, 2 and 3. The ground asserts that, if there was ambiguity in the ordinary meaning of the words used in clauses 12(5) and 15(1) of the award, the Commission erred in failing to take into account relevant considerations when interpreting clauses 12(5) and 15(1) of the award. The particulars set out to the ground do not refer to so much "*considerations*" but to pieces of evidence and arguments.

105 The second particular can be dealt with shortly. This particular is that the provision for leave is made in hours and not weeks. This issue has been referred to with respect to ground 4. In my opinion, it cannot be established that the Commission did not take into account that the provision for leave was made in hours and not weeks. This was expressly referred to by the Commissioner in his reasons; for example at paragraph [90].

106 The first particular is that the Commissioner failed to take into account as a relevant consideration the annual leave divisors for other employees, including employees working 12 hour shifts. This is a reference to the non award employees with respect to whom BHPB had applied a divisor of 11.55 to their 288.8 hours of annual leave entitlement. It is arguable that this was not, contrary to the assertion made in the ground, a "*relevant consideration*" in interpreting the clauses of the award. That is, what the annual leave divisor was for people not engaged under the award may not be relevant to determining the proper meaning of the clauses of the award. This point was not, however, taken at first instance.

107 Perhaps more importantly, however, is that it is clear that the Commission did take into account the annual leave divisor for the other employees working 12 hour shifts, not subject to the award. This was specifically referred to in paragraph [88] of the reasons of the Commissioner. It is also implicit in what the Commissioner said at paragraph [93] of his reasons. It was also referred to specifically in the Commission's discussions of the submissions made by BHPB, in for example paragraphs [39] and [40] of the reasons.

108 I would not uphold this ground of appeal.

Ground 6 – FBA 27/2005

109 This ground is pleaded in terms of an alternative to ground 5. The ground asserts that, if there was ambiguity in the ordinary meaning of the words used in the relevant clauses of the award and, if the Commission was entitled to take into account the history of various awards and agreements between the parties preceding the award, then the Commission erred in failing to take into account relevant considerations when interpreting clauses 12(5) and 15(1) of the award. The "*particulars*" to this ground refer to the sick leave entitlement under the 12 hour shift arrangement under the *BHP Iron Ore Enterprise Bargaining Agreement* (EBA I) and also the provision for leave was made in hours and shifts and not weeks. I do not think it is necessary to refer again to the fact that the Commissioner understood the provision for leave was made in hours and not weeks.

110 The particular in relation to the sick leave entitlement requires separate consideration. With reference to ground 4, BHPB argued that the Commission considered the sick leave interpretation issue without actually interpreting the words of the clause and giving them their ordinary meaning. As stated earlier when referring to the reasons of the Commissioner, the Commissioner in his reasons at paragraph [94] assumed that the same considerations applied with respect to the interpretation of the sick leave clause as for annual leave. This ground asserts in effect that there were separate issues which needed to be taken into account with respect to the sick leave clause.

111 In its submissions on the appeal, BHPB took the Full Bench to the evidence contained in the witness statement of Mr Ritchie at paragraph [28] which referred to attachment KGR4 which was an excerpt from EBA I which was registered with the Commission on 14 July 1993. Mr Ritchie stated that, as part of this agreement, the company introduced a 12 hour shift system. With respect to sick leave, the agreement set out an entitlement to sick leave of 76 ordinary hours per annum, equating to 6.3 shifts at 12 hours per day. The annual leave was there expressed as being currently accrued at 228 hours per annum in the case of continuous shift workers. The agreement said the accrual rate had remained the same so that 19 shifts of annual leave was now taken instead of 30. The agreement said however that this gave the same lapsed time off work.

112 This evidence was referred to by counsel for BHPB in his closing submissions at the hearing (T 202). Counsel said, by reference to the statement of Mr Ritchie, that:-

> "*In terms of sick leave, and this is significant, the maximum entitlement at that stage was 76, it's now 80, which equates to 6.3 shifts at 12 hours per day, and so it's calculated there, effectively to reduce the number of shifts which an employee was away from work on the basis of introduction of 12-hour shifts.*"

113 Precisely what the significance was, and whether there was a significant distinction at this point between sick leave and annual leave entitlements was not elaborated upon by counsel.

114 This submission of counsel for BHPB was referred to in the reasons of the Commissioner at paragraph [45], which I have earlier quoted.

115 It is also relevant that counsel for BHPB did not contend that, if the Commissioner decided the divisor was 9.5 with respect to annual leave, some different divisor was appropriate for sick leave. The case for BHPB was that both the annual leave and sick leave clauses in the award should be interpreted so that the divisor was 11.55.

116 The reasons of the Commission do reflect that no separate consideration was given to the sick leave claim. The Commissioner makes this plain in paragraph [94] of his reasons which I have earlier quoted. This aspect of the reasons was discussed by the Commissioner with counsel at the speaking to the minute of orders on 28 October 2005. The Commissioner asked the following question of counsel and received answers as follows (T 12, Mr Lilburne then appearing for BHPB):-

> "*Wood C* *In respect to the sick leave provision, and it's just a query, I've assumed – as I've indicated in the decision – from the way matters have been traversed by the parties that the sick leave applies, the divisor applies to sick leave like it applies to the annual leave provision and has no broader consequence than the matters I was dealing with which were engine driver's leave credits. In other words by effecting this clause I'm not having any broader impact. And why I say it Mr Lilburne is because the issue of sick leave, the application was made, the sick leave wasn't treated in any great sense in the submission (sic) or in evidence and both parties have basically put it to me as if, "Yes. This is -– you make the change to one you need to make it to the other," and I followed that path and just as an abundance of caution I'm now asking the question, that that's the intent that you both seek?*
>
> *Mr Schapper That's the case from our point of view, sir. Yes.*
>
> *Wood C* *All right.*
>
> *Mr Lilburne* *Sir, the company's application in 569 and 570 were for both annual leave and sick leave, sir, so that's appropriate.*
>
> *Wood C* *All right. Well, I'm just being cautious.*"

117 In his submissions on the appeal, counsel for the unions also referred to a payslip of Mr Johncock which was in evidence before the Commission which showed the same divisor had been used for determining both annual leave and sick leave entitlements by BHPB in May 1998 and December 2004.

118 Given that this was not referred to by the Commissioner in his reasons, I do not know that it assumes much significance other than perhaps to demonstrate another basis upon which the Commissioner could have based his assumption that there had been and should continue to be similar treatment of the annual leave and sick leave entitlements.

119 Given that the Commissioner did mention the reference to sick leave entitlements under EBA I in its discussion of BHPB's submissions, the failure of counsel for BHPB to submit with any clarity what impact this should have on any separate treatment of the sick leave interpretation to that of annual leave, the lack of any suggestion that there should be a separate divisor for sick leave if the Commission found against BHPB on the annual leave divisor point and the discussion which occurred at the speaking to the minute, I am not satisfied that this particular has been established. I also, for similar reasons, would not uphold grounds 2 and 4 insofar as they refer to the orders made with respect to the sick leave entitlement clause of the award; clause 15(1).

120 The second particular to this ground also refers to the Commission failing to take into account that the leave entitlement for sick leave was expressed in hours and not shifts. Having regard to the reasons as a whole, I do not think that it can be established that this was a "*consideration*" the Commission failed to have regard to or affected the orders made by the Commission in any materially errant fashion.

Ground 7 – FBA 27/2005

121 This ground pleads that, in the alternative to grounds 1 to 6, the Commission erred in varying the award by failing to take into account relevant considerations. The particulars to this ground repeated four points taken with respect to earlier grounds of appeal. These points were:-

(a) The annual leave divisors for other employees including employees working 12 hour shifts.

(b) The provision for leave is made in hours and not weeks.

(c) The sick leave entitlement under the 12 hour shift arrangement under EBA I.

(d) The entitlement to leave is increased significantly beyond 288.8 hours annual leave and 80 hours sick leave.

122 The written submissions of BHPB in support of this ground also referred back to submissions made with respect to earlier grounds. The same approach was effectively taken in oral submissions. For the reasons set out earlier, I do not think that any of the particulars to this ground are established with respect to the exercise by the Commission of its jurisdiction to interpret and subsequently vary the award. In my opinion, it cannot be established that the Commission failed to take into account any of the "*relevant considerations*" specified in this ground.

Ground 8 – FBA 27/2005

123 This ground pleads that, in the alternative to ground 7, the Commission erred in varying the award in that it failed to act according to equity and the substantial merits of the case, contrary to s26(1)(a) of *the Act*. The particulars to this ground repeat the particulars to ground 7. In my opinion, this ground does not raise any separate issues to ground 7 and is not substantiated for the same reasons as given for ground 7.

Disposition of FBA 27/2005

124 For the reasons set out above, in my opinion none of the grounds of appeal are established and, accordingly, appeal FBA 27/2005 should be dismissed.

FBA 1/2006

125 The notice of appeal in FBA 1/2006 was filed on 4 January 2006. This was outside the time limited for the institution of an appeal, being within 21 days of the decision against which the appeal was brought, as specified in s49(3) of *the Act*. The last date for the filing of the notice of appeal was Friday, 23 December 2005. (See s61 of the *Interpretation Act* 1984.) The time limited for the institution of an appeal may be extended by order of the Commission pursuant to s27(1)(n) of *the Act*. The unions sought such an order by filing a notice of application to the Full Bench for leave to extend the time within which to file the notice of appeal in FBA 1/2006. This notice was also filed on 4 January 2006. As stated earlier, the appeal in FBA 1/2006 was against the orders made by the Commission in dismissing application 570/2005. A schedule to the notice of application for an extension of time within which to file the notice of appeal set out the grounds upon which the application was made. These are as follows:-

> "*Applications 569 and 570 of 2005 were interlocking applications made by the respondent in connection with the rate at which annual and sick leave is taken by locomotive drivers employed by it.*
>
> *The applications were heard together with common evidence and submissions.*
>
> *Application 570 of 2005 was expressed to be necessary in the event that the Commission came to a particular view of the matters raised in application 569 of 2005. The decision of the Commission in 569 of 2005 was favourable to the applicants and the matter resolved within the terms of that application. Application 570 of 2005 was dismissed.*
>
> *The respondent filed appeal FBA 27 of 2005 against the decision in 569 of 2005 on 22 December 2005. That notice of appeal came to the notice of the applicants' solicitor on 3 January 2006.*
>
> *In consequence, and only in consequence, of the matters raised on FBA 27 of 2005 and the manner in which those matters were raised and dealt with in 569 and 570 of 2005 the applicants now wish to appeal against the decision in 570 of 2005.*
>
> *Having regard to the above, necessarily, time for filing an appeal against the decision in 570 of 2005 has expired.*
>
> *In order to ensure that the integrity and essence of the Commission's decision in each of the applications 569 and 570 of 2005 is preserved, an extension of time within which to file the appeal is required.*"

126 This application was opposed by BHPB. I am not satisfied that BHPB has suffered any prejudice as a result of the delay in the filing of the notice of appeal. The delay in the filing of the notice of appeal was not long and encompassed a period including the Christmas/New Year holidays. Also, the appeal against the orders made in application 569/2005 was not filed until 22 December 2005 and there was no purpose in the unions appealing against the orders made in application 570/2005 until they received the notice of appeal against the orders made in application 569/2005. In all of these circumstances, I would grant leave to extend time as sought.

127 In my opinion, however, the Full Bench should not do other than dismiss the appeal. The first reason for this is that, having not allowed the appeal by BHPB in FBA 27/2005, it is unnecessary to determine this appeal. Counsel for the unions urged the Full Bench to take the course of considering and determining this appeal in any event, in case there was an appeal to the Industrial Appeal Court against any dismissal by the Full Bench of appeal FBA 27/2005. In my opinion, it is not appropriate to determine the appeal on this speculative basis on this occasion.

128 In any event, there are difficulties with the single ground of appeal. The ground is that:-

> "*Having found that the rate at which annual leave and sick leave is to be taken by locomotive drivers is or ought to be 9.5 hours per shift, the Commission erred in failing to give effect to its decision in that it should have, but did not, vary the award pursuant to its powers under section 40 of the Act, there being no good reason not to do so.*"

129 The ground argues that the Commission erred in not varying the award pursuant to its powers under s40 of *the Act*, there being no good reason not to do so. I do not accept this proposition. Due to the fact that the Commission had decided to make a variation to the award, as ultimately sought by the unions, in its determination of application 569/2005, it would have been pointless to make a variation to the award to the same effect in a purported exercise of the powers under s40 of *the Act* and in determining application 570/2005.

130 The unions also argued, as set out in paragraph [40] of their written submissions:-

> "*If for some reason, the Full Bench finds that the terms of s46 did not permit the Commission at first instance to vary the award then, for the same reasons of merit as found by the Commission at first instance, the same variation should be effected under s40 by upholding this appeal and making the order sought.*"

131 There are problems with this contention in my opinion. If the Full Bench decided that s46 of *the* Act did not permit the variation made by the Commission this would involve a decision that the variation made did not give fuller effect to the award, as specified in s46(1)(b) of *the Act* and as determined by the Commissioner. This would occur if the Full Bench decided the Commissioner had erred in concluding that the clauses were properly interpreted to include a divisor of 9.5. To make a determination about award variation on merit, on appeal in this case, involves in my opinion some complexities which are best not determined when it is unnecessary to do so to resolve the issues between the parties. One issue, for example, as referred to in submissions by BHPB, provided as directed after the hearing of the appeal, is whether BHPB would be denied procedural

fairness given that the Commissioner (at T 197) indicated he was, in the circumstances, going to dismiss application 570/2005; and if so whether this could or should be corrected on appeal.

132 In my opinion, for the reasons given, it is appropriate in the circumstances to dismiss appeal FBA 1/2006.

CHIEF COMMISSIONER A R BEECH:

133 I have had the advantage of reading in draft form the decision of his Honour. I agree for the reasons he has given that both appeals should be dismissed and I have nothing to add.

COMMISSIONER P E SCOTT:

134 I have had the benefit of reading the draft Reasons for Decision of the Honourable Acting President. I agree with the disposition of the appeals in the manner he has determined. However I take a slightly different approach to reaching the same conclusions. This is particularly with respect to appeal FBA 27 of 2005.

135 I do not intend reciting the history, reasons for decision or aspects of the appeals already set out in the Acting President's Reasons for Decision. However, they demonstrate that there were three applications before the learned Commissioner at first instance: Application No. 1324 of 2004, the CFMEU's application to vary the award pursuant to s.40 of the Industrial Relations Act 1979; Application No. 569 of 2005, BHPB's application for an interpretation pursuant to s.46, and Application No. 570 of 2005, BHPB's application for an amendment to the award pursuant to s.40, consequent upon the interpretation to be applied in Application No. 569 of 2005.

136 The parties, in effect, sought to roll all three applications in to the one determination. They were in dispute as to the divisors to be applied for acquitting annual leave and sick leave. Each put forward the answer they asserted would arise from an examination of the history, practice and merits of the case. They argued the case not as a traditional interpretation but as a dispute as to merit. Neither party properly addressed the issue as if the first step in the process was an interpretation of the award by reference to the traditional and well established method of examining the ordinary meaning to be attributed to the words. They did not seek to do that exercise initially by reference only to those words and without reference to extrinsic materials. Their approach was quite contrary to that. (*Norwest Beef Industries Limited and Another v AMIEU (1984) 64 WAIG 2124 at 2127 and 2133)*

137 Prior to the conclusion of the hearing, the learned Commissioner indicated the approach he intended to take, of providing an answer to the dispute between the parties. He identified that:

> *"569 is, in effect, the real application and that being you want an interpretation about whether it <u>should be</u> 11.55 or 9.5 as a divisor to get to the amount of annual leave and arising from 569, depending on what decision I make there will be an order to vary the award to make clear it being A or B, and in that sense then in my mind 570 would become redundant and be dismissed not for any other reason other than it's been dealt with in 569. I think that's the appropriate way to deal with it. Unless there is submission to the contrary that's how I would seek to act."*
>
> (Transcript 197) (my underlining)

138 There was no submission to the contrary. Neither party demurred. They wanted an answer to what the divisor *should be*, not what it was according to a strict interpretation. The learned Commissioner's Reasons for Decision do not demonstrate that he applied the traditional and well established approach to interpretation. He was not really asked to do so. While the decision, being a declaration in 569 of 2005, purports to declare the true meaning of the award, this does not reflect the exercise undertaken in the Reasons for Decision, nor does it reflect the manner in which the matter was argued. In reality, whilst purporting to declare the true meaning, the order reflects the decision made on the merits as if it were dealing with an application to amend the award. As the learned Commissioner said at transcript 197, Application "*570 would become redundant and be dismissed not for any other reason than its being dealt with in 569*."

139 It seems to me that if the learned Commissioner erred it was in utilising Application 569 of 2005 as the vehicle to resolve the dispute between the parties. That application, being made pursuant to s.46 requires a particular approach, yet that was not the approach taken by the parties or the Commission. To be strictly technically correct, Application 570 of 2005 would have been the appropriate vehicle to reflect the approach taken by the parties and the Commissioner – ie of resolving the dispute on its merits.

140 However, given the approach taken by the parties, the Commissioner's clear indication of his intended approach, and that the application for interpretation and the amendment were heard together, to complain on appeal that the approach was wrong would be pedantic and overly technical.

141 The Industrial Relations Act 1979 is established to prevent and resolve disputes between parties. (s.6 – Objects) The Commission is required to act according to equity, good conscience and substantial merits of the case without regard to technicalities and legal forms (s.26(1)(a)). While it must be acknowledged that s.26 sets out the general approach to be taken, it is not license to do all things necessary to resolve the dispute without regard to the limits of jurisdiction and power. However, as the Honourable Acting President concluded, it would be unjust to uphold an appeal on the basis the Commission at first instance took an approach which was accepted by the parties for the resolution of the dispute, after the parties had conducted their cases in a manner which clearly led to the Commissioner's approach. The learned Commissioner answered the dispute between the parties in the way they sought him to do.

142 Accordingly, while it is reasonable to conclude on the face of the Reasons for Decision and the Orders of the learned Commissioner in making the Declaration he did in 569 of 2005 and dismissing 570 of 2005 that he did not take a traditional approach to 569 of 2005 as an application for interpretation, he collapsed the two applications into one. If anything, of the two applications he chose the wrong vehicle. However in all of the circumstances, the parties ought be bound by the conduct of their cases. (*University of Wollongong and Os v Metwally (No.2) 59 ALJR 481 at 483*) The Decision ought not be overturned.

143 As to those grounds of appeal relating to the divisor for the annual leave and sick leave entitlements, I agree with the Reasons for Decision of His Honour, except to the extent that His Honour deals with those grounds by reference to interpretation. I would deal with them, in the manner which the parties and the Commissioner at first instance did, by reference to history and in terms of merit and equity.

2006 WAIRC 04083

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BHP BILLITON IRON ORE PTY LTD
	APPELLANT
	-and-
	THE AUSTRALIAN WORKERS' UNION, WESTERN AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS; THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING & KINDRED INDUSTRIES UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH; THE COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING & ELECTRICAL DIVISION, WESTERN AUSTRALIAN BRANCH; THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS; THE TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH
	RESPONDENTS
FILE NO/S	FBA 27 OF 2005

PARTIES	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING & KINDRED INDUSTRIES UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH, THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS; THE COMMUNICATIONS, ELECTRICAL. ELECTRONIC, INFORMATION, POSTAL, PLUMBING AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING AND ELECTRICAL DIVISION, WESTERN AUSTRALIAN BRANCH; THE AUSTRALIAN WORKERS' UNION, WESTERN AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS; THE TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH
	APPLICANTS
	-and-
	BHP BILLITON IRON ORE PTY LTD
	RESPONDENT
CORAM	FULL BENCH THE HONOURABLE M T RITTER, ACTING PRESIDENT CHIEF COMMISSIONER A R BEECH COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 29 MARCH 2006
FILE NO/S	FBA 1 OF 2006
CITATION NO.	2006 WAIRC 04083

Decision	Order and Directions
Appearances	
Appellant/Respondent	Mr A D Lucev (of Counsel), by leave and with him Ms C Fitz Gibbon (of Counsel), by leave
Respondents/Applicants	Mr D H Schapper (of Counsel), by leave

Order and Directions

This matter having come on for hearing before the Full Bench on 28 March 2006, and having heard Mr A D Lucev (of Counsel), by leave and with him Ms C Fitz Gibbon (of Counsel), by leave, on behalf of the appellant in FBA 27 of 2005, and having heard Mr D H Schapper (of Counsel), by leave on behalf of the respondents in FBA 27 of 2005, it is this day, 29 March 2006, ordered and directed that:-

(1) The appellant in FBA 27 of 2005 is to file in the Registry of the Commission and serve upon the respondents further written submissions on the matters discussed with the Full Bench at the hearing by 4.00pm on 31 March 2006.

(2) The respondents in FBA 27 of 2005 are to file in the Registry of the Commission and serve upon the appellant any written submissions in response to the appellant's submissions by 4.00pm on 5 April 2006.

By the Full Bench

(Sgd.) M T RITTER,
Acting President.

[L.S.]

2006 WAIRC 04240

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES BHP BILLITON IRON ORE PTY LTD

APPELLANT

-and-

THE AUSTRALIAN WORKERS' UNION, WESTERN AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS; THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING & KINDRED INDUSTRIES UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH; THE 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; THE TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH

RESPONDENTS

CORAM FULL BENCH
THE HONOURABLE M T RITTER, ACTING PRESIDENT
CHIEF COMMISSIONER A R BEECH
COMMISSIONER P E SCOTT

DATE WEDNESDAY, 26 APRIL 2006

FILE NO/S FBA 27 OF 2005

CITATION NO. 2006 WAIRC 04240

Decision Appeal dismissed

Appearances

Appellant Mr A D Lucev (of Counsel), by leave, and with him Ms C Fitz Gibbon (of Counsel), by leave

Respondents Mr D H Schapper (of Counsel), by leave

Order

This matter having come on for hearing before the Full Bench on 28 March 2006, and having heard Mr A D Lucev (of Counsel), by leave, and with him Ms C Fitz Gibbon (of Counsel), by leave, on behalf of the appellant, and Mr D H Schapper (of Counsel), by leave, on behalf of the respondents, and the reasons for decision having been delivered on 26 April 2006, it is this day, 26 April 2006, ordered that appeal No FBA 27 of 2005 is dismissed.

By the Full Bench

[L.S.] (Sgd.) M T RITTER,
Acting President.

2006 WAIRC 04264

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING & KINDRED INDUSTRIES UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH; THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS; THE COMMUNICATIONS, ELECTRICAL, ELECTRONIC, INFORMATION, POSTAL, PLUMBING AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING AND ELECTRICAL DIVISION, WA BRANCH; THE AUSTRALIAN WORKERS' UNION, WESTERN AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS; THE TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH

APPLICANTS

-and-

BHP BILLITON IRON ORE PTY LTD

RESPONDENT

CORAM FULL BENCH
THE HONOURABLE M T RITTER, ACTING PRESIDENT
CHIEF COMMISSIONER A R BEECH
COMMISSIONER P E SCOTT

DATE MONDAY, 1 MAY 2006

FILE NO/S FBA 1 OF 2006

CITATION NO. 2006 WAIRC 04264

Decision Application for leave to appeal out of time granted and the appeal dismissed.

Appearances

Applicants Mr D H Schapper (of Counsel), by leave

Respondent Mr A D Lucev (of Counsel), by leave, and with him Ms C Fitz Gibbon (of Counsel), by leave

Order

This matter having come on for hearing before the Full Bench on 28 March 2006, and having heard Mr D H Schapper (of Counsel), by leave, on behalf of the applicants, and Mr A D Lucev (of Counsel), by leave, and with him Ms C Fitz Gibbon (of Counsel), by leave, on behalf of the respondent, and the reasons for decision having been delivered on 26 April 2006, it is this day, 1 May 2006, ordered as follows:-

(1) The application filed by the applicants on 4 January 2006, for leave to extend the time in which to file the notice of appeal is granted.

(2) The appeal is dismissed.

By the Full Bench
(Sgd.) M T RITTER,
Acting President.

[L.S.]

2006 WAIRC 04463

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CRAIG LEONARD HORNSBY
	APPELLANT
	-and-
	ELDERS LIMITED
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE M T RITTER, ACTING PRESIDENT
	COMMISSIONER S J KENNER
	COMMISSIONER S WOOD
HEARD	THURSDAY, 18 MAY 2006
DELIVERED	TUESDAY, 6 JUNE 2006
FILE NO.	FBA 9 OF 2006
CITATION NO.	2006 WAIRC 04463

CatchWords	Industrial Law (WA) – Appeal against decision of the Commission – Summary dismissal - Alleged unfair dismissal - Application for order under s29 of the *Industrial Relations Act* 1979 (as amended) in respect of a claim for harsh, oppressive or unfair dismissal - Appeal against exercise of discretion - Lawful and reasonable directions of employer - Employee failing to attend work as directed - Appeal dismissed - *Industrial Relations Act* 1979 (as amended), s29, s49
Decision	Appeal dismissed
Appearances	
Appellant	Mr A Atkinson (of Counsel), by leave
Respondent	Mr A Cameron (of Counsel), by leave

Reasons for Decision

THE FULL BENCH:

The Procedural Background

1 This is an appeal pursuant to s49 of the *Industrial Relations Act* 1979 (WA) (as amended) (*the Act*). The appeal is against a decision of the Commission given on 24 February 2006. The decision was to dismiss the appellant's application to the Commission made under s29 of *the Act*. The application, when filed on 9 June 2005, sought an order in respect of a claim for harsh, oppressive or unfair dismissal. An amended notice of application was filed on 13 September 2005. This application sought orders in respect of a claim for both harsh, oppressive or unfair dismissal and outstanding contractual benefits. During the hearing of the application, however, the Commission was advised that the claim for outstanding contractual benefits had been resolved so that the parties only required a determination of the application for an order in respect of the claim for harsh, oppressive or unfair dismissal.

2 This claim was made with respect to the appellant's dismissal from his employment with the respondent on 16 May 2005. The appellant had been employed as a real estate sales representative. His employment had commenced on 15 September 2003 pursuant to a written contract of employment.

3 The application was heard on 5 and 6 December 2005. The hearing was adjourned on 6 December 2005 on the basis that the respondent wished to lead some additional evidence. It appears however that the parties resolved the need to call the additional evidence and the respondent simply filed by consent an additional exhibit. The parties then filed written closing submissions. A decision on the application then stood reserved until the order dismissing the application was published on 24 February 2006. On the same date, the Commission published its reasons for decision. The notice of appeal to the Full Bench was filed on 16 March 2006.

The Appellant's Dismissal

4 The dismissal of the appellant was a summary dismissal in that he was not provided with notice or the payment of an appropriate sum in lieu of notice. The reasons for the summary dismissal were contained in a letter to the appellant dated 12 May 2005 which was signed on behalf of the respondent by Mr Tom Marron. Mr Marron was the Manager of the respondent's office in Albany where the appellant had been employed. The letter was an exhibit at the hearing of the application and, omitting formal parts, is in the following terms:-

"*Please be advised that due to your deliberate actions in refusing to reimburse the company for monies owed to it in relation to support provided to you by the provision of a Personal Assistant, which you agreed to do and have done until recently as well as your continued refusal to follow a legitimate management directive to attend for work in Albany, the Management of Elders Real Estate WA P/L have been left with no alternative but to terminate your employment as a real estate sales person with the company with immediate effect.*

The company confirms that there was an agreed business arrangement in place, confirmed by Management, whereby the Company appointed a Personal Assistant to assist you drive your own sales on the basis that Elders would subscribe to all Uniforms, Annual Share Issue, Holiday Pay, Superannuation and advance the base salary for Sarah Dunet. In exchange for this support you agreed to reimburse the Company for Sarah's base salary only. The company would issue you with a Tax Invoice for the salary component and you agreed to reimburse the company for this amount as and when required.

Despite numerous requests from Management both verbally and in writing you have refused to honour that agreement and reimburse the company the costs associated with Sarah's employment with you.

Additionally your attitude to Management in its attempt to resolve this matter has been less than acceptable.

This has resulted in a direct breach of your obligations to the Company.

The company also originally enrolled you in the current Real Estate Licensees Course in Perth. This offer was subsequently rescinded and confirmed to you both verbally and in writing due to your non-payment of the outstanding monies relating to Sarah's employment for you.

However you chose to ignore these instructions and attend the Course without the Company sanction or notification to Management that you would not be attending work in Albany on Monday 9th May 2005.

You also confirmed to Ray Armstrong that you were aware that your enrolment in the Course had been placed on hold pending the resolution of the above matter and yet you still advised that you were attending the Course without company approval to do so.

On Monday 9th May at 6pm, Ray Armstrong the Licensee of the Albany Branch instructed you to return to the Office in Albany the following day and recommence your normal duties. He advised you that failure to do so could result in your dismissal. On Tuesday the 10th May we were advised that you had not returned to the Office but actually remained at the Course in direct contravention of the directive given to you from Management.

By your actions, firstly, you have blatantly ignored a legitimate management instruction to return to work secondly, you have abandoned your position as a salesperson for the company and finally you have committed a serious breach of your employment that has left us with no option but to terminate your employment forthwith.

You are hereby required to return all keys and company Listing files to the Albany Office with immediate effect. Any monies owing to you will be paid up to time of dismissal only.

Should you have any further issues in relation to the action taken then please contact the undersigned."

The Hearing

5 At the hearing, the appellant gave evidence in support of his application. He also called evidence from his accountant, Mr Richard Hudson. This evidence was directed to the issue of whether it was lawful for the respondent to deduct the amount of the wages for the appellant's personal assistant (Ms Dunnet) from outstanding commissions owed to the appellant. This had become an issue between the appellant and the respondent. The parties had agreed that the appellant would reimburse the respondent for their payment of Ms Dunnet's wages, but were in dispute about how this would be achieved. The appellant wanted the amount to be deducted from his commission payments. The respondent maintained this was unlawful or against company policy. It issued the appellant with invoices for the cost of Ms Dunnet's wages and wanted the appellant to pay the invoiced amount.

6 The respondent led evidence by Mr Peter Storch, Mr Raymond Armstrong, Mr Marron and Ms Dunnet. Mr Storch was the real estate manager for the respondent. As part of that role, Mr Storch was responsible for the overall profit of the real estate business in the Elders Western Australia Group. This included matters relating to recruitment, employed staff, attending key clients and assessing financial figures. Mr Armstrong was, at material times, the licensee for the respondent's Albany office. We have already referred to the positions held by Mr Marron and Ms Dunnet with the respondent. Ms Dunnet had been employed by the respondent as the appellant's personal assistant from January 2005. On 3 May 2005, she gave notice of her resignation from this position as of 13 May 2005. Her letter of resignation (to the appellant) advised that she had accepted a position as a sales representative with the respondent.

7 The appellant's case at the hearing was summarised in paragraph [17] of the Commission's reasons for decision. The appellant did not criticise this summary during the appeal and it may be relied upon as accurately, although not comprehensively, setting out the appellant's case at first instance. The paragraph was as follows:-

"*The Applicant's case, in brief, is that his termination which is said to be summary can be traced back to Elders dissatisfaction with him not making a payment in the manner it required for costs involved with the employment of his personal assistant. The Applicant says Elders were unreasonable in this respect in that it had maintained to deduct the payment from commission payments was unlawful, when it was clearly not in the opinion of the Applicant's Accountant. In any event Elders had used that method of deduction when the first personal assistant was employed. The Applicant had made every effort to explain to Elders that the payments were not unlawful and he believed he resolved that issue with them on 6th May 2005. By Elders then withholding consent to attend the TAFE Tri-annual certificate course can only have been intended to compel the Applicant to make the payment in the manner preferred by Elders. Once that issue was resolved on 6th May 2005 there was no basis to withhold the consent. In any event the requirement by Elders that the Applicant leave the course and come back to Albany overnight was unlawful and unreasonable because it required prolonged driving after hours until the early hours of the morning. This means that on the test to be applied in Undercliffe Nursing Home v Federated Miscellaneous Workers Union (1985) 65 WAIG 385 the decision to dismiss was harsh, oppressive and unfair.*"

The Facts in Greater Detail

8 To understand the grounds of appeal, it is necessary to elaborate upon the facts summarised in the paragraph just quoted from the Commission's reasons. The reference to the appellant's "*first personal assistant*" is a reference to a Ms Jessica Clapp who had been employed by the respondent as the appellant's personal assistant. She was employed for a six week period commencing in March 2004. It had been agreed between the appellant and Mr Marron that Ms Clapp's wages, superannuation and other employment costs would be borne by the respondent, but that the appellant would repay to the respondent the amount of Ms Clapp's wages. The repayment was to be achieved by deducting the amount of Ms Clapp's wages from the commission payments to be made to the appellant by the respondent. This in fact occurred during the short duration of Ms Clapp's employment. The appellant's employment by the respondent was remunerated on a commission only basis. He was paid 45% of the commissions earned by the respondent on real estate listed and sold by the appellant.

9 After Ms Clapp's resignation, the appellant did not have a personal assistant for the remainder of 2004. His evidence was however that he went to see Mr Marron in November 2004 for approval to employ another personal assistant. The appellant's evidence was that Mr Marron agreed to this as long as it was on the same terms and conditions under which Ms Clapp had been employed. It should be noted that Mr Marron, when he gave his evidence, did not agree that this had occurred. In his evidence-in-chief, Mr Marron said that he only recalled having "*the original discussion*" about a personal assistant. By this he meant the discussion which led to the employment of Ms Clapp. Mr Marron's evidence-in-chief was that he did not know about the appointment of Ms Dunnet until his attention was drawn to an advertisement in the newspaper, after he had been away during the Christmas 2004 period. Mr Marron said he then went to see the appellant. Mr Marron said that the appellant informed him that he had already interviewed somebody for the position and appointed Ms Dunnet. Mr Marron said that this occurred on about 4 or 5 January 2005. Mr Marron said there were difficulties occasioned by the appointment because there had been a staff freeze and he referred the matter to Mr Storch. Under cross-examination, Mr Marron said he did not recall having a conversation with the appellant about the terms of employment of Ms Dunnet. Mr Marron reiterated his lack of knowledge of the appointment in his re-examination.

10 The appellant's evidence was that, after Ms Dunnet had commenced her employment, he received telephone calls about this from Mr Armstrong. Mr Armstrong was unhappy about Ms Dunnet's employment. In particular, he was unhappy about the respondent having to pay for Ms Dunnet's annual leave loading, superannuation, payroll tax and workers' compensation. He sent an email to the appellant dated 19 January 2005 requesting that the appellant reimburse the respondent not only for Ms Dunnet's wages but also for the payment of her annual leave loading, superannuation, payroll tax, workers' compensation and annual issue of Futuris shares. The appellant's evidence was that he did not agree with this. He sent an email to Mr Armstrong on 28 January 2005 stating that Ms Dunnet was employed as a replacement for Ms Clapp and under the same terms and conditions as approved by Mr Marron on 30 November 2004. The email said that, as far as the appellant was concerned, Ms Dunnet was working on the same terms as Ms Clapp. The appellant said that the next development was that he had a discussion with Mr Storch in February 2005 when Mr Storch came to Albany for a branch meeting.

11 Mr Armstrong's evidence was that he became involved after the appellant appointed Ms Dunnet to the position and that the respondent had to "*accept that that was done and negotiate a package which was consistent with the Elders policy as well*" (T116). This answer was given in explanation of the sending of the email dated 19 January 2005.

12 The appellant's evidence was that, at his meeting with Mr Storch in February 2005, it was agreed that the respondent would employ Ms Dunnet on the same basis as Ms Clapp. That is, that the appellant would in effect pay Ms Dunnet's wages and the respondent would pay her additional employment costs.

13 Mr Storch's evidence differed from this. He said that he got involved in the dispute at Albany regarding the employment of Ms Dunnet because "*it was a saga that was dragging on*" (T72). Mr Storch said that he spoke to the appellant on 2 February 2005 about the employment of Ms Dunnet. Mr Storch said that he and the appellant agreed that the respondent would pay Ms Dunnet her wages and that the appellant would "*reimburse us each month by the way of a tax invoice*" (T72). Mr Storch also said that he agreed with the appellant that the respondent would pay for Ms Dunnet's company uniform, annual leave and superannuation. Mr Storch said that the appellant informed him that Ms Dunnet was working 30 hours per week at $16.00 per hour. Mr Storch said he made a note of the details of the agreement in his diary, a copy of which was exhibited at the hearing. Mr Storch said in his evidence that he told the appellant that, due to tax implications, Ms Dunnet could not be paid as per the previous arrangement and that the respondent would be issuing him with a tax invoice each month and that the respondent would require payment by him on the issue of that tax invoice. Mr Storch said that the appellant did not disagree with this method of repayment.

14 Mr Storch also said that, in December 2004, he had received a telephone call from the Adelaide head office of the respondent to the effect that the respondent was paying a lady in Bunbury an advance against commissions. Mr Storch said he was told this had serious taxation implications "*and the Elders system couldn't handle that and her words were to me that that action has to be stopped immediately otherwise people's jobs could be at risk*" (T74). Mr Storch said he made some enquiries as a result of this information and then proceeded to write out a procedures manual on 16 December 2004. The issue of not making an advance against commissions was one of the items which was mentioned in the procedures manual that was to be sent to all sales people. Mr Storch's evidence was that the system of reimbursement for Ms Dunnet's wages which was being sought by the appellant would have involved advances against commission and was therefore contrary to the policy he had written (T74). Mr Storch said that, after his meeting with the appellant in February 2005, he then issued instructions for a contract of employment to be drawn up for Ms Dunnet.

15 According to the appellant's evidence, the next relevant event was that, in April 2005, he received a tax invoice from the respondent. It was sent to him by Ms Therese Healy who was the office manager of the respondent in Perth. The tax invoice was dated 29 March 2005 and was for "*Sara Dunnet – 60 hours per f/night @ $16.00 per hour*". The invoice contained an amount of $2,080.00 for each of January, February and March, making up a total of $6,240.00. The appellant's evidence was that he did not do anything about the invoice immediately after receiving it and he received a telephone call from Ms Healy about two weeks later asking for payment. The appellant said he asked how the payment had been calculated because it was different to his calculations. He asked whether there was a GST component and whether the amount had been deducted from

his "*gross salary*". The appellant said Ms Healy told him it was "*illegal to deduct it from the gross salary. She said that the amount was correct and I had to pay it*" (T25). The appellant said that was the end of the conversation.

16 The appellant also gave evidence about his acceptance by TAFE WA for enrolment in the Diploma in Property (Real Estate) course to commence in May 2005. The course was also referred to as the Triannual Certificate. The appellant said he received a letter from TAFE WA dated 21 April 2005 advising that he had secured a position for the course. At this time, the appellant had not been approved to attend the course by the respondent. The course involved a total of 35 days' classroom attendance over a period of some seven months with the first five days commencing on Monday, 9 May 2005.

17 The appellant said he discussed his participation in the course with Mr Storch when he attended the Albany branch meeting in late April 2005. The appellant said Mr Storch agreed he could attend at the course because of his good work performance and the desire of the respondent to expand within the Albany area. The appellant said that, at the meeting, Mr Storch also asked him about the outstanding invoice for Ms Dunnet's wages. The appellant said he told Mr Storch this was meant to have been deducted from his commission account. The appellant said Mr Storch told him it was illegal. The appellant said he told Mr Storch he needed to talk to his accountant and Mr Storch in turn asked the appellant to get back to him by 5.00pm that day. The appellant said he spoke to his accountant's office that day but the accountant was still away on holidays.

18 With respect to the Triannual Certificate course, the appellant's evidence was that Mr Storch agreed the respondent would cover the costs of the course and accommodation in Perth.

19 The appellant said he spoke to his accountant the following Monday and his accountant agreed to discuss the payment of wages issue with Mr Storch. The appellant said his accountant indicated that the deduction of Ms Dunnet's wages from his commission was not a problem. The next day, the appellant spoke to Mr Storch and asked whether he had spoken to the appellant's accountant. The appellant said Mr Storch said he did not want to speak to his accountant but that the appellant had to pay the amount of the invoice because it was illegal to deduct it from his commission account. The appellant said he told Mr Storch that his accountant was happy to explain how it could be done but this did not resolve the matter.

20 The appellant then received another tax invoice from the respondent dated 30 April 2005 in the amount of $8,320.00, made up of four amounts for $2,080.00 for the wages of Ms Dunnet from January to April 2005.

21 The appellant also said that he spoke to Mr Armstrong who said he would speak to the appellant's accountant and see whether the repayment of wages issue could be resolved. The appellant then said that he later spoke to his accountant who had spoken to Mr Armstrong and Mr Geoff Piper (who was referred to as the commercial manager or accountant of the respondent) and Mr Piper had told the appellant's accountant that "*it was no longer an issue as they had transferred Sara Dunnet away from me*" (T31). This was a reference to the resignation of Ms Dunnet as the appellant's personal assistant and her re-employment by the respondent as a sales representative.

22 The appellant gave evidence of other conversations with Mr Storch and Mr Armstrong regarding the repayment of Ms Dunnet's wages. The appellant said that Mr Storch and Mr Armstrong maintained that repayment of the wages could not take place by way of deduction from the appellant's commissions, whereas the appellant said that this could be achieved and emphasised his accountant's view that this was so.

23 The appellant said that, on the Thursday before the commencement of the Triannual Certificate course on Monday 9 May 2005, he was advised by Mr Armstrong on the telephone that because of the non repayment of Ms Dunnet's wages, Mr Storch was "*considering putting the course on hold*" (T34). The appellant said that the next day he spoke to Mr Armstrong to see whether he had been able to sort matters out with Mr Piper but the matter was not resolved on that day.

24 The appellant also said that, on the Friday (6 May 2005) he received a telephone call from Mr Atkins at TAFE who said that the respondent had asked for their cheque to be refunded. The appellant explained to Mr Atkins that he had an issue with the respondent which he was hoping to sort out and that, if they had withdrawn the funds to cover for payment of the course, the appellant would "*cover it in the meantime*" (T35). The appellant's position, as he explained in his evidence therefore was that, when he departed Albany to Perth for attendance at the course on Sunday 8 May 2005, he had not been specifically advised by the respondent that his permission to attend the course had been withdrawn. The appellant also gave evidence that he had decided to pay for his own accommodation in Perth. This was because he decided not to share accommodation with a Mr Treeby, another sales representative of the respondent attending the course (T50).

25 Mr Storch's evidence was that at the April 2005 Albany branch meeting, he requested the appellant to pay the outstanding invoice for Ms Dunnet's wages. Subsequently, he sent an email to Mr Armstrong with a copy to Mr Marron on 1 May 2005. The email was to the effect that, if the appellant had not paid the invoice by cheque by 5.00pm the following day, then the respondent would stop paying Ms Dunnet's wages. The email referred to the appellant's request to take the amount owing out of his commissions but said that "*legally we have been told it can't be done that way*". The email also referred to two unsuccessful attempts by Mr Storch to speak with the appellant about the matter by telephone. The email also said the offer for the appellant to attend the Triannual Certificate course would be reviewed if the appellant did not comply with company policy.

26 Mr Storch said that two or three days after sending the email, he did speak to the appellant on the telephone, as did Ms Healy. However, the telephone call did not resolve the issue. Furthermore, Mr Storch received an oral and email complaint from Ms Healy about the appellant's attitude to her on the telephone. Mr Storch in turn sent an email to Mr Marron requesting he counsel the appellant over the matter.

27 Additionally in the afternoon of 4 May 2005, Mr Storch caused Ms Healy to send an email from himself to the appellant saying that, due to the dispute over the monies owing in relation to Ms Dunnet, the respondent was withdrawing their sponsorship of the appellant's application to do the Triannual Certificate course. The appellant's evidence was that he did not receive this email, nor was he advised of its contents by Ms Dunnet who was able to access emails sent to the appellant.

28 Mr Storch also said he spoke to Mr Armstrong and gave Mr Armstrong the job of discussing with the appellant that the (repayment) matter was very serious and the appellant was not to attend the course. Mr Storch also said he told Mr Armstrong about the email he sent to the appellant advising of the withdrawal of sponsorship for the course. Mr Storch said that he was not involved in any other communications with the appellant about the withdrawal of his sponsorship for the course.

29 Mr Armstrong's evidence confirmed that he was advised by Mr Storch that the appellant was not to attend at the course. Mr Armstrong said that he telephoned the appellant and instructed him that he was not to attend at the course until there was resolution of the issue in relation to the payment of Ms Dunnet's wages. Mr Armstrong said he told the appellant that he was to remain in Albany until the issue was resolved. In his evidence, the appellant had denied that this conversation occurred.

30 Mr Armstrong said in his evidence that on the morning of Monday 9 May 2005 he telephoned the Albany office to see if the appellant was there. He was then advised by a staff member that the appellant had gone to Perth to attend at the Triannual Certificate course. Mr Armstrong said he then left messages for the appellant to telephone him. The messages were left on the appellant's mobile telephone and also with Mr Atkins, the course registrar. Mr Armstrong said he left a couple more telephone messages for the appellant throughout the day and also emailed him to confirm his instructions not to attend the course.

31 Mr Armstrong said that he was telephoned back by the appellant at 5.40pm that afternoon. Both the appellant and Mr Armstrong in their evidence agreed that, in this conversation, Mr Armstrong told the appellant not to continue to attend the course but that he should return to work in Albany the next day. The appellant's evidence was that Mr Armstrong said he should be at work the next day or be dismissed. The appellant said he told Mr Armstrong this was workplace harassment. He also said that he wanted to speak to his lawyer about the matter, Mr Armstrong said that he should do that and that this was the end of the conversation. The appellant said he made an appointment to see his solicitor at 4.00pm the next day. In his evidence-in-chief, the appellant said he took Mr Armstrong's instruction to mean that he should return to Albany that night when it was not safe to do so and therefore he did not comply with this direction. During his cross-examination however, the appellant conceded Mr Armstrong said he could see his lawyer in Perth. This would necessitate staying in Perth Monday night and therefore the appellant accepted the instruction was not to return to Albany until the next day.

32 It is common ground that the appellant did see his solicitors the next day and they sent a letter to the respondent about what had occurred with respect to the repayment of Ms Dunnet's wages and the withdrawal of support for the appellant to attend at the Triannual Certificate course. The respondent did not reply to this letter prior to the dismissal of the appellant from his employment.

33 The appellant did not, as directed by Mr Armstrong, return to the Albany office the next day. In fact, he remained at the Triannual Certificate course for the rest of the week and then attended to his "*home opens*" over the weekend in Albany. The following Monday he was spoken to by Mr Marron and advised of his summary dismissal. He was provided with the letter of dismissal dated 12 May 2005.

34 The letter from the appellant's solicitors to the respondent dated 10 May 2005 referred to the "*unresolved*" issue of the repayment of Ms Dunnet's wages. The appellant argued on the appeal however that this issue was "*objectively resolved on 6 May 2005*". Accordingly, there was no reason why the respondent should have withdrawn its support for the Triannual Certificate course and required the appellant to attend at the Albany office for work on 10 May 2005. This submission was made on the basis of evidence of events which occurred on 6 May 2005. These events were not known of by the appellant prior to his dismissal. The submission was also supported by evidence given by Mr Storch during cross-examination at the hearing.

35 The events on 6 May 2005 concerned an exchange of emails between Mr Armstrong and Mr Piper. At 10.11am, Mr Armstrong sent Mr Piper an email asking whether the respondent could proceed to deduct "*fees for Ms Dunnet from the appellant*". The email said the appellant had "*called this morning to ask if all sorted out*". Mr Piper replied by an email at 10.26am. The email said that the "*deal has been terminated with the resignation of Sara to become a sales person. If this is the case and we are not replacing her (as I am led to believe) and in the interests of getting it resolved and us all getting on with more productive things…then yes…I don't really care, let's get the money and move on*". This email was replied to by Mr Armstrong at 12.03pm. The email said that the appellant "*still owes us the money so my question to you is how do we arrange to collect the money from Hornsby. This is what Richard Hudson and you were to resolve.*" There was no evidence about Mr Piper's response to this email.

36 Mr Armstrong was cross-examined about the contents of the emails. Mr Armstrong was asked whether he would agree that the issue was resolved as at the time of Mr Piper sending his email on 6 May 2005. Mr Armstrong answered "*No*". Mr Armstrong said that Mr Piper was the state accountant and the email contained his opinion. Mr Armstrong said that within "*our organisation that doesn't mean that we go ahead and do that. I have to seek advice from payroll in Adelaide. We have to seek advice from HR in Adelaide in relation to is that legal to do that. So there was nothing resolved at this point in time. That was only his opinion that I sought.*" (T125) Mr Armstrong also said that, if the matter had been resolved, he would not have asked the appellant to return to Albany. Later, Mr Armstrong said that it was not his position to make the judgement on whether Mr Piper's opinion resolved the matter. Mr Armstrong said that it would have been Mr Storch's position to do that. Mr Armstrong said that the matter was not resolved on Friday, 6 May 2005 and that things were still "*up in the air*" (T128). Although further cross-examined on the matter, Mr Armstrong's answers remained to the same effect. Mr Armstrong's opinion that the emails did not resolve the matter was confirmed in his re-examination.

37 Mr Storch was also cross-examined about the contents of the emails on 6 May 2005. In considering this evidence, however, it is important to note that Mr Storch was not aware of the contents of these emails at the time. In his cross-examination, Mr Storch confirmed that the reason for withdrawal of the sponsorship of the appellant to attend the Triannual Certificate course was because of the non-payment for Ms Dunnet's wages. Mr Storch also agreed that, if the issue of the payment had been resolved, there would have been no purpose at all to withdraw the sponsorship. He agreed that he would have then let the appellant participate in the Triannual Certificate course. Mr Storch said that, on 6 May 2005, he was on his way back from Carnarvon and that he arrived back in Perth at about 5.00pm. Mr Storch said that he did not return to his office on the evening of 6 May 2005 but he did attend at the office on 9 May 2005, prior to travelling to Margaret River. Mr Storch said he could assume that he saw the emails on 9 May 2005 but could not categorically say that he did (T109). Mr Storch was taken through the content of the emails. Mr Storch was asked whether it was clear that the issue had been resolved at 10.26am on Friday, 6 May 2005, the time of Mr Piper's email. Mr Storch answered that "*you'd have to ask Geoff Piper what he really meant by that, but you could assume that, yes.*" (T110) Mr Storch then said that he would read Mr Piper's email as saying that "*the amount should be deducted from the commissions and let's move on*" (T110).

38 Mr Storch was then asked: "*So the issue of the payment of Sara's wage cost has at that stage been resolved, has it not?*" Mr Storch said, "*You'd assume so, yes.*" Mr Storch then agreed that there was no reason why the appellant should not have gone on the Triannual Certificate course as soon as the issue regarding repayment was resolved. Mr Storch was then asked whether "*at 10.26 when this email was sent, there is no reason at all to stop Mr Hornsby from doing his Triannual which you had earlier authorised him to do some couple of weeks or so earlier*". Mr Storch answered, "*That's correct.*" (T111)

39 This issue was not explored with Mr Storch in his re-examination. It is also relevant to note that the cross-examination of Mr Storch did not involve questions about the authority of Mr Piper and/or Mr Armstrong to decide that the issue involving repayment for Ms Dunnet's wages was resolved on 6 May 2005. There was therefore no evidence different from Mr Armstrong's evidence that he did not have the authority to regard the matter as resolved, in the absence of confirmation from Mr Storch.

The Commission's Reasons

40 The reasons for decision of the Commission at first instance were structured in the following way. The reasons commenced with a brief introduction stating the nature of the application. There then followed what was described as a chronology of events. This set out in narrative form the sequence of relevant events. It did not do so in any great detail because the Commission expressed its view at paragraph [3] of the reasons that "*this matter revolved down to a central and simple issue*". This was, as the Commission later stated in paragraph [23] of the reasons, "*whether the order by Elders for the applicant to return to Albany was a lawful one*". As part of the chronology of events, the Commission quoted part of the letter sent from the appellant's solicitor to the respondent, their reply dated 19 May 2005 and the letter from the respondent to the appellant advising of his dismissal from employment.

41 Paragraph [16] of the reasons of the Commission said "*the preceding summary is sufficient to give the flavour of the evidence before the Commission*".

42 The next section of the reasons was headed "*Analysis and Findings*". From what is contained in this section of the reasons however, it does not contain the Commission's findings but instead a summary of the arguments made to the Commission by the appellant and respondent. We have already quoted paragraph [17] of the reasons which summarised the appellant's case. Paragraphs [18] to [22] of the reasons, in our opinion, summarised the respondent's case. There was some discussion during the hearing of the appeal as to whether some of paragraphs [18]-[22] contained findings made by the Commission. We do not think this is the preferable construction of these paragraphs. They include expressions such as "*Elders say*", "*Elders assert*", when describing some of the propositions which are contained in these paragraphs. This, together with the overall structure of this section of the reasons and the reasons as a whole, leads us to conclude that the paragraphs do not contain findings made by the Commission.

43 The final section of the reasons is headed "*Conclusion*". The Commission's conclusion, including its factual findings, were succinctly stated in the five paragraphs constituting this section of the reasons. We have already quoted the relevant part of paragraph [23]. Paragraphs [24]-[27] are as follows:-

> "*24 It is open to find on the evidence even though the Applicant may have thought the question of payments with Elders had been resolved Elders did not. As far as they were concerned there was a substantial sum of money outstanding and they wanted to collect it from the Applicant. Their advice at the time was they could not deduct it from his commission and at least they did not want to deduct it from his commission. Whether they were right in adopting that position is not germane to the resolution of this issue. The Applicant says he thought he had a deal with his local Manager about how the money was to be deducted. Even if he did it was made clear later by more senior members of Elders that there was no such deal and that if such an arrangement had been made it was now countermanded. This was some time before the Applicant left to go on his course, he knew that Elders wanted him to pay the cost of the personal assistant and they were not prepared to deduct it from his commission. They simply wanted to give him an invoice for the account and for him to pay his debt. This would not seem to be unreasonable.*
>
> *25 The Applicant attended the course, he knew full well when he left that Elders were unhappy about the situation to the extent where he admitted that he knew he would have to pay for his own accommodation. The Applicant attended the course contrary to instructions and he ignored a direction to return to Albany to work.*
>
> *26 The suggestion that he would be required to drive overnight and then work all the next day and so therefore it was an unreasonable request is just not credible on the evidence, what the evidence seems to indicate and I prefer the evidence of Elders in this respect is the Applicant was told to come back to Albany to commence work. He did not do so and he was in fundamental breach of his contract of employment by that action. It is fundamental to the contract that the Applicant present for work and do the work for which he has contracted. There is not the opportunity for an employee in such circumstances to decide when he will or will not work. If there had been consent to fund a course in Perth this had been withdrawn because of another dispute between the Applicant and Elders. This time about the method of payment for the personal assistant.*
>
> *27 It cannot be said in these circumstances that to dismiss is unfair. The Applicant has not discharged the onus of proof that there has been unfairness on the Undercliffe test and the application will be dismissed.*"

44 The reference to the "*Undercliffe test*" in paragraph [27] is a reference back to the citation of the Industrial Appeal Court decision of *Undercliffe Nursing Home v Federated Miscellaneous Workers Union* (1985) 65 WAIG 385, contained in paragraph [17] which had been quoted earlier in these reasons.

The Appeal

45 The schedule to the notice of appeal contains five grounds of appeal. These will be referred to below.

46 The written outline of submissions which was filed by the appellant prior to the hearing of the appeal did not, with any specificity, refer to the grounds of appeal or attempt to relate the points made in the written submissions to the grounds of the

appeal. As explained to counsel for the appellant during the hearing, this limited the persuasiveness of the written submissions. The appellant's counsel attempted to rectify this, to an extent, during his oral submissions.

47 In determining the appeal, it should be remembered that the decision by the Commission that the appellant was not unfairly dismissed was a discretionary decision. It involved an evaluative judgment by the Commission of the circumstances leading to the dismissal and the decision to dismiss. There are limits to the circumstances in which an appeal against such a discretionary decision may be allowed. These limits are partly due to the nature of a discretionary decision, involving a decision making process in which no one consideration and no combination of considerations is necessarily determinative of the result, so that the decision maker is allowed some latitude as to the choice of decision to be made (see *Coal and Allied Operations Pty Ltd v AIRC and Others* (2000) 203 CLR 194 per Gleeson CJ, Gaudron and Hayne JJ at paragraph [19]).

48 The limits upon appellate intervention were described in the following way by Dixon, Evatt and McTiernan JJ in *House v The King* (1936) 55 CLR 499 at 504-505 in a passage which has been cited and quoted in numerous decisions of the Full Bench:-

> "*The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.*"

49 Given the basis upon which the present appeal has been argued, it is also appropriate to bear in mind the observations made by Stephen J in *Gronow v Gronow* (1979) 144 CLR 513 at 519-520 as follows:-

> "*The constant emphasis of the cases is that before reversal an appellate court must be well satisfied that the primary judge was plainly wrong, his decision being no proper exercise of his judicial discretion. While authority teaches that error in the proper weight to be given to particular matters may justify reversal on appeal, it is also well established that it is never enough that an appellate court, left to itself, would have arrived at a different conclusion. When no error of law or mistake of fact is present, to arrive at a different conclusion which does not of itself justify reversal can be due to little else but a difference of view as to weight: it follows that disagreement only on matters of weight by no means necessarily justifies a reversal of the trial judge. Because of this and because the assessment of weight is particularly liable to be affected by seeing and hearing the parties, which only the trial judge can do, an appellate court should be slow to overturn a primary judge's discretionary decision on grounds which only involve conflicting assessments of matters of weight.*"

50 It is appropriate to first consider the ground of appeal which was numbered 5. This was the ground upon which most reliance was placed upon by the appellant in his submissions.

Ground 5

51 Ground 5 was in the following terms:-

> "*5. The learned Senior Commissioner erred at law or in fact in failing to take into account alternatively failing to give due weight to the evidence of:*
>
> *5.1 the applicant and the respondent's witness Mr Storch to the effect that the applicant was authorised by the respondent to attend the TAFE course;*
>
> *5.2 the respondent's witness Mr Storch to the effect that the only reason why the respondent withdrew consent for the applicant to attend the TAFE course and ordered the applicant to return to Albany was to force the applicant to pay the personal assistant's wage cost directly as opposed to the respondent deducting the same from the applicant's commission payments;*
>
> *5.3 the applicant and the respondent's witness Mr Storch to the effect that the applicant agreed with the respondent, inter alia, that the respondent would deduct the wage cost of the applicant's personal assistant from the applicant's commission payments;*
>
> *5.4 the applicant and the respondent's witness Mr Storch to the effect that the respondent refused to deduct the wages of the applicant's personal assistant of the respondent from the applicant's commission payments on the grounds that such was unlawful;*
>
> *5.5 the expert evidence of Richard Hudson to the effect that the deduction of the wage cost of the applicant's personal assistant from the applicant's commission payments was not unlawful;*
>
> *5.6 the applicant and the respondent's witness Mr Storch to the effect that the wage cost of the applicant's personal assistant was deducted by the respondent from the applicant's commission payments on or about 18 May 2005 some two days after the applicant was summarily dismissed;*
>
> *5.7 the respondent's witness Mr Storch to the effect that that the issue of the payment of the wage cost of the applicant's personal assistant was resolved as at 6 May 2005 prior to the applicant leaving Albany to attend the TAFE course in Perth; and*
>
> *5.8 the respondent's witness Mr Storch to the effect that given the matters set out in paragraph 5.7, there was no reason why the applicant should have been ordered to return to Albany and that the applicant should have been allowed to continue the TAPE course in Perth.*"

52 With respect to **ground 5.1**, the Commission did take into account the evidence relevant to whether the appellant was authorised to attend the Triannual Certificate course. In paragraph [25] of its reasons, the Commission said the appellant

"*attended the course contrary to instructions and he ignored a direction to return to Albany to work*:" In paragraph [26], the Commission said that, if "*there had been consent to fund a course in Perth this had been withdrawn because of another dispute between the applicant and Elders*".

53 The reference to the evidence of Mr Storch in ground 5.1 appears to be a reference to that evidence of Mr Storch about the contents of the emails on 6 May 2005 which we have earlier set out. The appellant relied upon this evidence to submit that the dispute about the repayment of Ms Dunnet's wages had been "*objectively resolved*". Accordingly, it was argued there was no reason why the appellant should be directed by Mr Armstrong not to attend at the course and to direct him to return to Albany to work the next day was "*capricious*". In our opinion, this submission overstates the effect of the evidence contained in the emails on 6 May 2005 and that of Mr Storch about them.

54 The evidence of Mr Armstrong, which was not qualified by any other evidence at the hearing, was that neither he nor Mr Piper had the authority to decide that the issue of repayment was resolved, as a result of the sending by Mr Piper of his email to Mr Armstrong on 6 May 2005. Mr Storch was the person who had this authority. There was no evidence that Mr Storch made a decision on 6 May 2005 that the issue was resolved. Indeed, the previous decision made by Mr Storch to withdraw the authority for the appellant to attend at the Triannual Certificate course and his instruction to Mr Armstrong to carry this into effect, still remained. In these circumstances, it cannot be said that the instruction by Mr Armstrong to the appellant that he no longer had the permission of the respondent to attend at the Triannual Certificate course and that he should return to work at Albany, was capricious.

55 In our opinion, the most that can be said about Mr Storch's evidence about the content of the emails on 6 May 2005 was that it suggested that Mr Storch's opinion, well after the event, was that, as a result of these emails, the dispute about repayment of Ms Dunnet's wages was capable of resolution. There was not however any "*objective resolution*" of the issue on 6 May 2005 as argued by the appellant. Additionally, although counsel for the appellant sought to qualify it somewhat, there was also the letter of 10 May 2005 from the appellant's solicitors to the respondent, referred to above, which described the dispute in relation to the payment of the personal assistant as being "*unresolved*" as at that time.

56 The fact remains that the appellant was instructed by Mr Armstrong on 9 May 2005 in clear and unambiguous terms to return to Albany to work on 10 May 2005 or face dismissal. The instruction by Mr Armstrong to return to Albany to work on 10 May 2005 was lawful. In these circumstances, we did not think the Commission erred in concluding as it did.

57 The appellant initially submitted that to entitle the respondent to summarily dismiss the appellant, the instruction to return to work in Albany not only had to be a lawful instruction but needed to be lawful and reasonable. This submission was made by reference to decisions such as *Pastrycooks Employees, Biscuit Makers Employees and Flour and Sugar Goods Workers Union (NSW) v Gartrell White (No 3)* (1990) 35 IR 70. The submission overlooked the effect of the decision of the Industrial Appeal Court in *Nydegger v Tredways Shoestore South Hedland* (1997) 77 WAIG 1381. In that case, an employee wanted to take leave to visit a relative in Europe. The employee did not have an entitlement to leave and a request to take unpaid leave was denied by the employer. The employee took the leave and on return from leave was summarily dismissed. It was argued before the Industrial Appeal Court that the Commission had erred in failing to consider whether the direction not to go on leave was reasonable. The Industrial Appeal Court did not accept this submission. The main reasons for decision of the Court were written by Scott J. Kennedy J stated that he agreed with the reasons of Scott J and added some observations of his own. Franklyn J agreed with the reasons of Scott J as qualified by those of Kennedy J. Kennedy J at page 1381 said that the appellant "*took that leave in direct breach of her contract of service and in the knowledge that her employer had not been prepared to waive its entitlement to the benefit of her services in accordance with her contract. In those circumstances the reasonableness of any direction did not really arise*".

58 Scott J referred to the authorities which had been relied upon to support the proposition that a direction to an employee by an employer must be both lawful and reasonable before the employer can demand compliance. Scott J said that these cases were distinguishable in that they referred to issues of whether the employee had "*breached the operational requirements of his employment*" (page 1384). This was contrasted with the situation before the Court where the issue was whether "*the appellant had refused to comply with her contract of service*" (page 1384). That is, there is a distinction between an employer's insistence that an employee carry out the basic requirement of attending for work as opposed to some direction about how aspects of their employment, when at work, should be carried out.

59 During the course of the hearing, counsel for the appellant seemed to accept that the effect of the Industrial Appeal Court decision in *Nydegger* was that it was not relevant in this particular case to have considered whether the direction to return to work was both lawful and reasonable.

60 Also, in the written contract of employment of the appellant, there was an express term requiring him to "*in all respects diligently obey and observe all lawful directions of the company and of its board of directors*". The direction made to the appellant to return to work on Tuesday, 10 May 2005 was a lawful direction made by Mr Armstrong on behalf of the respondent. In our opinion, there was no appealable error in the terms suggested in ground 5.1.

61 With respect to **ground 5.2**, we do not accept that the Commission did not take into account the evidence of Mr Storch about the reason why consent was withdrawn for the appellant to attend the Triannual Certificate course. In paragraph [26] of its reasons, the Commission specifically referred to the reason why consent was withdrawn in that it was "*about the method of payment for the personal assistant*". Additionally, we do not think that the Commission failed to place adequate weight on this evidence so that there was appealable error. In our opinion it was open to the Commission to find that, despite this evidence, the decision to dismiss the appellant was not in all the circumstances unfair. The circumstances include that the appellant, contrary to instructions, not only continued to attend at the course on 10 May 2005 but for the three days thereafter, making a total of four days unauthorised absence from work. Additionally, it could be argued that, by his actions, the appellant evinced an intention to not be bound by his contract of employment in the future by absenting himself from work for the whole of the course, which over the seven months comprised 35 days.

62 **Ground 5.3** asserts that there was evidence from Mr Storch to the effect that the appellant agreed with the respondent that the respondent would deduct the amount of Ms Dunnet's wages from the appellant's commission payments. There was no such evidence from Mr Storch. If this ground refers to the evidence of Mr Storch about the emails dated 6 May 2005, it suffers

from the difficulties referred to with respect to ground 5.1 above. The evidence did not disclose that any such agreement had been reached between the appellant and the respondent prior to the time of Mr Armstrong directing the appellant to return to work on 10 May 2005.

63 **Ground 5.4** refers to the evidence that the respondent refused to deduct the wages of Ms Dunnet from the appellant's commission payments on the grounds that it considered to do so would be unlawful. The Commission specifically referred to this point in paragraph [24] of its reasons. The Commission then said that, whether the respondent was "*right in adopting that position is not germane to the resolution*" of the application. In our opinion, the Commission was not in error in making this observation. This is because, for whatever reason, the issue about repayment was not resolved as at 9 May 2005 when Mr Armstrong told the appellant to return to work the following day. It was the appellant's failure to return to work when so directed and for the three days thereafter which led to the dismissal from employment. In our opinion, the Commission was not in error in focusing upon these events and determining the appellant's dismissal was not unfair. The appellant had no authority to take four days' leave of absence from his employment and was warned that, if he remained away from his employment, he faced dismissal. For the Commission to then conclude that the dismissal was not unfair cannot be shown to be erroneous in our opinion.

64 **Ground 5.5** refers to the so called "*expert evidence*" of Mr Hudson to the effect that what the appellant had proposed concerning the deduction of Ms Dunnet's wage costs was not unlawful. In our opinion, this does not take the matter any further than ground 5.4 and does not lead to a conclusion that the Commission made an appealable error.

65 **Ground 5.6** refers to evidence that the cost of Ms Dunnet's wages was in fact deducted by the respondent from the commission payment made to the appellant on or about 18 May 2005. It was common ground at the hearing that this had occurred. In his re-examination, Mr Storch explained why this occurred and why it was not contrary to the policy of the respondent which had led to Mr Storch refusing to authorise the repayment of Ms Dunnet's wages from commissions to be paid to the appellant, whilst he was still employed. This evidence at T112-113 was as follows:-

> "MR CAMERON: *And it's been suggested by my learned friend that on the face of it, to deduct against commission doesn't necessarily involve an advance against commission. Could you explain to the Commission why it is as the company sees it that there is an advance against commission involved in this system?*
>
> MR STORCH: *If there's no commissions due or payable to the person then I was instructed that we cannot give advances against commission.*
>
> MR CAMERON: *And even with a good salesman, would it be the case that there would be times when there is no money in the commission account that was sitting there for the purposes of such payments?*
>
> MR STORCH: *I can't say categorically with Mr Hornsby but, yes, that would be the case in a number of people.*
>
> MR CAMERON: *Well, given that that would be the case in a number of people, did that cause your head office to issue an instruction regarding this matter?*
>
> MR STORCH: *Exactly.*
>
> MR CAMERON: *And did they advise you they have a policy regarding this matter?*
>
> MR STORCH: *Yes, I was advised that we cannot do it.*
>
> MR CAMERON: *And with the final deduction that was made from the commission, did that involve any advance of commission, or was that commission already accrued and sitting there in the account?*
>
> MR STORCH: *There was an amount of moneys there that was enough to pay for the moneys owed.*"

66 The evidence about the deduction of the cost of Ms Dunnet's wages from the commission payment made to the appellant on 18 May 2005 was not specifically referred to in the reasons for decision of the Commission. This could well have been because of the Commission's view about the central issue which determined the application, being the lawfulness of the direction to return to work. In our opinion, the Commission's lack of specific reference to this evidence did not lead to appealable error. What occurred on 18 May 2005 did not change the state of play as at 9 May 2005 and throughout the rest of that week when the appellant did not attend work, in breach of his requirement to do so.

67 The contents of **grounds 5.7** and **5.8** do not add to the issues which were considered with respect to ground 5.1.

68 In our opinion, when one has regard to the contents of ground 5, both individually and cumulatively, they do not lead to a conclusion that the Commission committed an appealable error. We would not uphold this ground.

Ground 1

69 In this ground, it was asserted that the Commission had erred in holding the case turned on the simple proposition of whether the order by the respondent for the appellant to return to Albany was a lawful one. During argument, the appellant's counsel conceded that this ground did not raise any issue independent to that of ground 5. In other words, it was conceded that if ground 5 did not succeed, then ground 1 could not succeed. On this basis, it is not necessary to further consider this ground, which for reasons expressed above with respect to ground 5, should not be upheld.

Ground 2

70 This ground asserted the Commission erred in holding that whether the respondent was right in adopting the position that it could not or would not deduct the wages cost of the appellant's personal assistant from his commission payments was not germane to the resolution of the hearing. We have dealt with this contention with respect to ground 5.4 above. In our opinion, this ground does not raise any separate issue. The ground also asserted that whether the respondent's position was right was highly relevant to the issue of whether the appellant's dismissal was harsh on the basis of the matters set out in ground 5. These matters have also been considered with respect to ground 5 above and do not need further discussion. In our opinion ground 2 cannot be upheld.

Ground 3

71 Ground 3 asserted the Commission was in error in holding that the respondent was permitted to unilaterally vary any agreement reached between the appellant and the respondent which was to the effect that the respondent would deduct the wages cost of Ms Dunnet from the appellant's commission.

72 This ground is based on part of paragraph [24] of the Commission's reasons where the Commission said:-

> "*The Applicant says he thought he had a deal with his local Manager about how the money was to be deducted. Even if he did it was made clear later by more senior members of Elders that there was no such deal and that if such an arrangement had been made it was now countermanded.*"

73 In our opinion, in these sentences the Commission did not make a finding that the respondent was permitted to unilaterally vary any agreement reached. Instead, the Commission was simply relating the facts as they had occurred, from the perspective of the respondent. This is that, if any previous agreement had been reached, it was, as a matter of fact, now countermanded. In our opinion, the Commission did not descend to make a finding as to whether or not the respondent was entitled to unilaterally vary any such agreement as a matter of law.

74 Ground 3 also asserted that, on the evidence of the appellant and Mr Storch, an agreement was made and in all the circumstances amounted to a contract between the appellant and the respondent. We have earlier set out the evidence of Mr Storch about what he says was agreed with the appellant in February 2005. This did not amount to an agreement in the terms referred to by the appellant in this ground. Therefore, one of the assertions upon which this ground is based is fallacious.

75 The appellant also submitted the Commission erred in failing to determine whether he and Mr Marron had made an agreement in November 2004 about how the personal assistant's wages would be repaid. As set out earlier, the appellant's evidence was that it was then agreed that repayment would be made by the deduction of the amount of the wages from the appellant's commission payments. The appellant argued that, if such an agreement was reached, it would be a binding collateral contract. This contract, it was argued, had been breached by the respondent when they refused to facilitate the repayment in this fashion. Also, insisting that the appellant pay the tax invoices would have been in breach of the contract. The appellant argued that because his failure to pay the tax invoices was the reason for the respondent withdrawing its permission for him to attend the Triannual Certificate course, if the request that he pay the tax invoices was in breach of contract, then this coloured the instruction to cease attending the course and the dismissal based on his failure to follow this instruction and attend for work.

76 In our opinion the failure of the Commission to determine whether the asserted contract existed did not involve appealable error. It was accepted by the appellant's counsel during the appeal hearing that the appellant had no contractual entitlement to attend at the Triannual Certificate course. He required the permission of his employer to attend. It was also accepted that this permission could be withdrawn without reason. If this is so, then it cannot in our opinion be presently material that the reason for the withdrawal of the permission could have been because of the refusal of the respondent to act in accordance with the suggested collateral contract. This circumstance was, in our opinion, unrelated to the lawfulness of the withdrawal of permission to attend the course and the direction to return to work. It was the appellant's failure to follow this lawful direction, when he remained absent from his employment for a further four days, that resulted in his dismissal. The Commission focused upon this in determining whether the dismissal was unfair. In our opinion there was no appealable error in adopting this approach.

77 We would also note that, even if the Commission accepted the appellant's evidence about the agreement with Mr Marron in November 2004, there was also an issue about whether this agreement was consensually varied by the appellant and Mr Storch in February 2005. This was the effect of Mr Storch's evidence about the February 2005 meeting. If the Commission accepted Mr Storch's evidence, then this would undermine the argument of the appellant we have just set out. This issue was also not determined by the Commission, but for the same reasons as just indicated this involves no appealable error.

78 In our opinion, this ground cannot be upheld.

Ground 4

79 This ground asserted the Commission erred in holding the issue of the reimbursement of the wages cost of Ms Dunnet was not resolved as at 6 May 2005 on the grounds that, as far as Mr Armstrong was concerned, the money was still owing. The ground asserted that Mr Armstrong's subjective assessment of the issue was irrelevant. It was also asserted that, on the basis of the emails on 6 May 2005 and the evidence of Mr Storch, the issue was resolved as at 6 May 2005.

80 The latter part of the ground has been dealt with in our discussion of ground 5.1 as set out above.

81 With respect to the first part of the ground, it is based upon part of paragraph [21] of the Commission's reasons. In this paragraph the Commission said:-

> "*The argument between the Applicant and Elders over the payments for his personal assistant was not resolved as he asserts. Mr Armstrong in Exhibit A25 which is an email of 6th May 2005 makes it clear that the money was still owing as far as he was concerned.*"

82 As set out earlier, it is our opinion that, in paragraphs [18] to [22], the Commission is not setting out its findings of fact but is merely relating the arguments made on behalf of the respondent. During argument, the appellant's counsel accepted that, if this was so, then there was no foundation for ground 4. In our opinion therefore ground 4 cannot be upheld.

Conclusion

83 In our opinion, for the reasons stated none of the grounds of appeal can be upheld and the appeal should be dismissed.

2006 WAIRC 04465

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CRAIG LEONARD HORNSBY
	APPELLANT
	-and-
	ELDERS LIMITED
	RESPONDENT
CORAM	FULL BENCH THE HONOURABLE M T RITTER, ACTING PRESIDENT COMMISSIONER S J KENNER COMMISSIONER S WOOD
DATE	TUESDAY, 6 JUNE 2006
FILE NO/S	FBA 9 OF 2006
CITATION NO.	2006 WAIRC 04465

Decision	Appeal dismissed
Appearances	
Appellant	Mr A Atkinson (of Counsel), by leave
Respondent	Mr A Cameron (of Counsel), by leave

Order

This matter having come on for hearing before the Full Bench on 18 May 2006, and having heard Mr A Atkinson (of Counsel), by leave, on behalf of the appellant, and Mr A Cameron (of Counsel), by leave, on behalf of the respondent, and reasons for decision having been delivered on 6 June 2006, it is this day, 6 June 2006, ordered that appeal No FBA 9 of 2006 is dismissed.

By the Full Bench

[L.S.] (Sgd.) M T RITTER,
Acting President.

2006 WAIRC 04110

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SEALANES (1985) PTY LTD
	APPELLANT
	-and-
	JOHN FRANCIS FOLEY AND JOHN ANTHONY BUKTENICA
	RESPONDENTS
CORAM	FULL BENCH THE HONOURABLE M T RITTER, ACTING PRESIDENT SENIOR COMMISSIONER J F GREGOR COMMISSIONER J H SMITH
HEARD	MONDAY, 13 MARCH 2006
DELIVERED	TUESDAY, 4 APRIL 2006
FILE NO.	FBA 22 OF 2005, FBA 23 OF 2005
CITATION NO.	2006 WAIRC 04110

CatchWords	Industrial Law (WA) - Appeals against decision of the Commission - Alleged unfair dismissals - Appellate review of factual findings - Meaning of redundancy - Unfair dismissal in case of redundancy - Credibility of witness - Mitigation of loss and relevance to order under s23A of the *Industrial Relations Act* 1979 (as amended) - *Industrial Relations Act* 1979 (as amended), s23A, s23A(1), (3), (4), (5), (5)(b), (6), (7), (7)(a), (8), (9)-(12), s29, s49, s49(4) - *Minimum Conditions of Employment Act* 1993 (WA), s41, s43, Part 5
Decision	Appeals upheld in part, orders to be varied as later published
Appearances	
Appellant	Mr J Blackburn (of Counsel), by leave
Respondents	Ms J Boots (of Counsel), by leave

Reasons for Decision

THE FULL BENCH:

The Appeals

1 Before the Full Bench are two appeals which have been instituted under s49 of the *Industrial Relations Act* 1979 (WA) (as amended) (*the Act*). The appeals were heard together. The appeals are against orders made by the Commission on 18 November 2005. The orders were made following a hearing of the applications made by Mr Buktenica and Mr Foley for orders pursuant to s23A of *the Act*, in consequence of their alleged harsh, oppressive or unfair dismissals from employment by the appellant.

2 Separate applications were made by Mr Buktenica and Mr Foley, but the hearing of the applications occurred together as the applications had similar facts. The hearing seemed to proceed on the assumption that all of the evidence given at the hearing was admissible both to the applications of Mr Buktenica and Mr Foley.

3 The orders made on 18 November 2005 were that the Commission:-

> "*1 DECLARES THAT the respondent harshly, oppressively and unfairly dismissed John Anthony Buktenica and John Francis Foley on 11 November 2004.*
>
> *2 ORDERS that the respondent shall reinstate Mr Buktenica and Mr Foley in its employment, to their former positions, as if their contracts of employment had not been terminated on 11 November 2004, within seven (7) days of the date of this order.*
>
> *3 ORDERS that the respondent re-instates Mr Buktenica's and Mr Foley's accrued entitlements and that their service with the respondent be regarded as continuous for all purposes including long service leave.*
>
> *4 ORDERS that the respondent shall pay Mr Buktenica and Mr Foley, within 14 days of the date of this order, an amount of money in respect of all of the remuneration lost by them by reason of the termination of their contracts of employment as if they had worked continuously in the employment of the respondent between 11 November 2004 and the date they are reinstated, less the following amounts:*
>
> *a) any income earned by Mr Buktenica or Mr Foley in the period from 11 November 2004 to the date they are reinstated;*
>
> *b) any payments made by the respondent to Mr Buktenica and Mr Foley in lieu of any accrued but untaken entitlements to annual leave and long service leave on or about 11 November 2004;*
>
> *c) any payments made by the respondent to Mr Buktenica and Mr Foley in lieu of notice on or about 11 November 2004; and*
>
> *d) any payments made by the respondent to Mr Buktenica and Mr Foley in lieu of redundancy payments on or about 11 November 2004.*
>
> *5 THAT liberty to apply is reserved to the parties to this order in relation to (4) above.*"

4 Appropriately, separate notices of appeal were filed against the orders made respectively about Mr Buktenica and Mr Foley. Attached to the notices of appeal were grounds of appeal. The grounds of appeal numbered 11 for the Foley appeal and 10 for the Buktenica appeal. The first 10 grounds of appeal in the Foley appeal were identical to the Buktenica appeal. The additional ground 11 in the Foley appeal relates to a factual finding made about whether Mr Foley mitigated his loss after a certain date. The identical, 10 grounds of appeal are, in some instances, very lengthy, due to the "*particulars*" provided, and it is unnecessary to set out the grounds of appeal in full.

Factual Background

5 The case for Mr Buktenica and Mr Foley was that, essentially, there had been no adequate reason for their dismissal from their employment with the appellant on 11 November 2004. Although, at the time of their dismissal, both were informed the dismissal was on the basis of a redundancy, they argued there was no genuine redundancy. Additionally, they both asserted that their dismissal was linked to their membership of the Shop, Distributive and Allied Employees' Association of Western Australia (the union) and their activities as part of that union to seek an enterprise order from the Commission to cover the employment of employees of the appellant who had not signed an Australian Workplace Agreement (AWA).

6 The business operations of the appellant were not summarised with any precision in the evidence given at first instance. It seems, however, that the appellant is involved in the wholesale and retail food industry. Part of its operations include a shipping service, trucking transport, a wholesale warehouse, dry goods store, and retail shop. Within the wholesale warehouse, there is a freezer and meat section. The freezer section operates a day and night shift.

7 The witnesses who gave evidence for the respondents were Mr Buktenica, Mr Foley and Mr Luke Woodfin who is employed as freezer hand on day shift for the appellant. Witnesses who gave evidence for the appellant were Mr Lance Power who was the appellant's human resources and quality assurance manager from 10 March 2003 to 1 July 2005; Mr Robert Thompson who had worked as a trainer/assessor with Jobs West for three years up to 3 August 2005 and who had worked at the appellant's premises for approximately 18 months; Mr Dean O'Brien, the leading hand in the meat section, reporting to a Mr Da Silva; Mr Bruce Jeffery, the supervisor of the freezer section of the appellant and Ms Megan Osborne who has worked for the appellant as a storeperson for two and a half years in the freezer section.

8 Prior to his dismissal, Mr Buktenica worked as a full-time permanent employee for the appellant. He commenced his employment as a truck driver in December 1993 and, approximately 12 months later, was transferred to work as a freezer storeperson on the night shift. Mr Buktenica worked in this position until September/October 2003, when he was transferred to the day shift in the freezer section. He remained in this position until the termination of his employment.

9 Mr Foley was employed on a full-time basis with the appellant from 28 October 1996. For most of his employment, Mr Foley had worked in the freezer section but, approximately 12 months prior to his dismissal, he had been transferred to the meat section.

10 The conditions of employment of Mr Buktenica and Mr Foley at the time of their termination of employment was subject to the terms of the *Shop and Warehouse (Wholesale and Retail Establishments) State Award* 1977 (No R32 of 1976) (the award).

11 The case of the appellant at first instance was primarily given through the evidence of Mr Power. Essentially, the appellant argued that both Mr Buktenica and Mr Foley were dismissed on the basis of a genuine redundancy and that the reason Mr Buktenica and Mr Foley were dismissed from employment had nothing to do with their union membership or activities. The position of the appellant was encapsulated in the following summary of Mr Power's evidence, provided in paragraphs [68] – [72] of the reasons of the Commission. (These paragraphs of the Commissioner's reasons were not subject to any criticism in the hearing of the appeal). The reference to Mr Pozzi is a reference to the former chief executive officer of the appellant who ceased working for the appellant in February 2005. Reference to Ms Paino is a reference to the appellant's former legal counsel who was, at the time of hearing, their chief executive officer. Mr Raffaele was the appellant's warehouse manager.

> "*68 Mr Power stated that in 2004 Sam Paino negotiated to buy his brother's interest in the respondent's operations and that as a result Sam Paino took on significant borrowings to pay out Victor Paino. Once it became clear that a significant debt would arise as a result of this transaction Mr Power stated that Mr Pozzi was asked in May 2004 to look at cost cutting measures. Mr Power stated that this was not the first instruction that was given by the respondent to reduce costs as the respondent's Board of Directors had given Mr Pozzi an instruction in late June or early July 2003 to reduce wages and overtime by 10 percent if possible. In May 2004 Mr Power stated that Mr Pozzi prepared a list of persons whose positions could be made redundant after Mr Power and Mr Pozzi had discussions with a range of managers and supervisors. Mr Power stated that this list did not include anyone from the warehouse section as he had been working closely with Mr Raffaele for some time to reduce costs in this area by altering the hours worked by employees.*
>
> *69 Mr Power stated that as a result of the May 2004 review a number of redundancies were effected. Mr Power stated that three positions in the respondent's accounting section were made redundant and the employees concerned were advised of this and were able to find alternative employment. Mr Power stated that when Victor Paino and his two sons left they were not replaced. Mr Power stated that Victor Paino's personal assistant was offered and transferred into an alternative position, two other administrative employees one of whom was 65 years old and the other who had 23 years of service were also made redundant and a third person left prior to their position being made redundant. Mr Power stated that the respondent's David Jones operations were closed in late August early September 2004 and that the relevant employees were made redundant except for one casual employee who transferred to the respondent's retail shop as a result of this closure. Mr Power stated that one maintenance employee was terminated in October 2004 and the work was outsourced. Mr Power stated that as two employees had recently left the dry stores area this section was left alone.*
>
> *70 Mr Power stated that he did not review the night shift in the freezer section because there were problems staffing the night shift in the past (for example one employee was transferred to the day shift in the freezer section after an altercation with another employee) and the night shift supervisor had told him the numbers required in this section were appropriate. Mr Power stated that it was not easy to find employees to work the night shift and Mr Power stated that the night shift was a delicate area and that it was not a good idea to meddle with it. Mr Power stated that when Mr Di Carlo and Mr Joe Piccininni had wanted to come off this night shift they were transferred to other sections.*
>
> *71 Mr Power stated that when he spoke to Mr Jeffrey and Mr Da Silva from the meat and freezer sections about whether or not any positions could be abolished he was advised by Mr Jeffrey that the day shift freezer section could lose one to one and a half persons. Mr Power stated that Mr Da Silva believed that the shipping dispatch numbers were correct and that the meat section could not afford to reduce employee numbers but Mr Power reminded Mr Da Silva that the meat section had coped with two full-time employees plus added assistance from time to time and Mr Power stated that he convinced Mr Da Silva that the meat section could probably operate with two full-time employees.*
>
> *72 Mr Power stated that as employee numbers could be reduced in these sections he was asked by Ms Paino to draw up a matrix of criteria to assess employees.*"

12 Mr Power gave evidence about the matrix which he developed and assessed with assistance from Mr Raffaele, Mr Jeffery, Mr Da Silva and Mr O'Brien. The items which were included in the matrix were included on the basis of what attributes these people would want for a new employee in their sections. They were not informed that Mr Power was developing a matrix to determine the person who should be made redundant in the meat and freezer sections. Indeed, none of the employees in these sections were informed of the intention to make an employee redundant until Mr Buktenica and Mr Foley were advised of their dismissal on 11 November 2004. The criteria which was included in the matrix was forklift ticket, forklift experience, date of employment, level of fitness, standard of skill – basic computer, transport and storage certificate III and promotion potential. Entries were made on the matrix for the three employees in the meat section and the nine full-time employees working in the day shift in the freezer section.

13 Mr Power completed the matrix on about 21 October 2004. When the matrix was completed, Mr Power said that it showed that Mr Buktenica and Mr Foley were the employees who should be dismissed. Mr Power discussed the matrix with Mr Pozzi at the end of October 2004 and it was agreed that Mr Buktenica and Mr Foley would be terminated when the consent for this course of action was obtained from Mr Sam Paino. This occurred a week later. Mr Power had said that Mr Pozzi was reluctant to dismiss Mr Buktenica and Mr Foley as they were union members and they would say they were being picked out for this reason. However, Mr Power was of the view and told Mr Pozzi that, as the respondents were identified for termination under the matrix, it would be unfair to other employees if the respondents were not terminated.

14 As stated, Mr Buktenica and Mr Foley were advised of the termination of their employment at separate meetings on 11 November 2004. The meetings were attended by Mr Power and Ms Paino. Mr Buktenica and Mr Foley were provided with letters of termination on that date. At the meetings, Ms Paino informed both Mr Buktenica and Mr Foley that their dismissals were not linked to their union membership or activities.

The Reasons of the Commissioner

15 In the reasons for decision of the Commissioner, there is a lengthy summary of the evidence of each of the witnesses. The grounds of appeal do not call into question this narration of the evidence. The grounds of appeal call into question, however, the approach of the Commission to the resolution of the applications and some of the factual findings made by the Commission.

16 Under the heading "*Findings and Conclusions*", the Commissioner at paragraphs [141] – [187] set out in detail, observations on the relevant law and facts, factual findings and conclusions. The following is a summary of those which are most material. (The paragraph number at the end of each point indicates the relevant paragraph number of the reasons of the Commissioner at first instance).

(a) The Commissioner said Mr Buktenica, Mr Foley, Mr Woodfin and the appellant's witnesses, except for Mr Power, gave detailed, considered and plausible evidence. ([141])

(b) The Commissioner had concerns about the evidence given by Mr Power and formed the view that Mr Power tailored his evidence to suit the appellant's case. Parts of the evidence of Mr Power were unconvincing. Some of Mr Power's evidence was inconsistent with the evidence given by Mr O'Brien and Mr Jeffery and Mr Power's evidence about the assessments included in the matrix were doubted. The Commissioner had doubts about the veracity of the evidence given by Mr Power and treated his evidence with caution. ([142])

(c) Redundancy is itself a sufficient reason for dismissal (*Amalgamated Metal Workers and Shipwrights Union of Western Australia and Other v Australian Shipbuilding Industries (WA) Pty Ltd* (1987) 67 WAIG 733) and when an employer reduces its workforce due to an excess of employees reasonably required to perform the work available this constitutes a redundancy situation (*Gromark Packaging v Federated Miscellaneous Workers Union of Australia, WA Branch* (1992) 73 WAIG 220). Despite the requirement to accord procedural fairness, not every denial of procedural fairness will entitle an employee to a remedy. No injustice will result if after a review of all the circumstances of the termination it can be said that the employee could be justifiably dismissed (*Shire of Esperance v Mouritz* (1991) 71 WAIG 891); *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 430 per Brennan CJ, Dawson and Toohey JJ and at 466 per McHugh and Gummow JJ). ([143])

(d) The Commissioner was not convinced the appellant had labour in excess of the required number of employees, given the amount of work to be undertaken in the freezer and meat sections in the immediate period after the appellant terminated the respondents' employment and was of the view accordingly that the respondents were not terminated due to a genuine redundancy situation. ([144])

(e) In the alternative, the Commissioner found that, even if the respondents were surplus to the appellant's requirements in November 2004, the appellant had a range of options open to it to exercise in preference to terminating the respondents. ([144])

(f) The appellant had not demonstrated it had labour in excess of that required in the meat and freezer sections at the time it terminated the respondents as there was evidence that the appellant's workload in the meat and freezer sections in the period November 2004 through to January 2005 was no different to the appellant's normal increased workload at this time of the year and there was no evidence confirming that fewer employees were required by the appellant to work in these sections during this period. ([145])

(g) There was sufficient work for Mr Foley to undertake in the meat section until at least the end of January 2005. From November 2004 through to January 2005 three full-time employees were required to work in the appellant's meat section. Also, Mr Foley could have remained employed with the appellant through December 2004 to fill in for Mr O'Brien when he was on leave and required to be replaced. ([146])

(h) If the amount of work required to be undertaken declined in the meat section after January 2005 and three full-time employees were not required on a regular basis in this section, an alternative position would have become vacant in the freezer section into which Mr Foley could have transferred within a short period. ([147])

(i) The Commissioner had doubts about the appellant's claim that, as at November 2004, the freezer section could get by with fewer employees in this section during the busy period from November 2004 to January 2005 onwards. The freezer section had enough work for Mr Buktenica to undertake from November 2004 onwards as there was evidence that additional staff were required to work in this section during the period November 2004 through to January 2005. ([148])

(j) The Commissioner was of the view, therefore, that the appellant had not demonstrated there was insufficient work for Mr Buktenica to undertake in the freezer section as at November 2004 and that this section could get by with the equivalent of one less full-time employee at this time. Mr Buktenica was not excess to its requirements in November 2004. ([148])

(k) The appellant's summary of employees in the freezer section in the period after Mr Buktenica's termination (exhibit R3) demonstrates the appellant required close to 11 full-time employees after Mr Buktenica was terminated. As at May 2005, the records showed 11 employees were rostered to work in the freezer section which was the same number as at November 2004. Even though a Ms Snell commenced a period of sick leave in April 2005, she was designated as a permanent employee in this section and has since returned to work in the freezer section. The summary of employees working in the freezer section showed at the date of hearing the freezer section operated with one less employees and, as this time of year was not the appellant's busiest period, it would therefore be logical for the appellant not to have its full complement of employees in any event at this point in time. ([149])

(l) Although the respondents were terminated at a time when other employees ceased working with the appellant, a number of these employees were not terminated due to a redundancy situation, thereby bringing into doubt Mr Power's claim that the respondents were terminated at a time when a number of other employees were terminated due to a genuine redundancy situation. ([150])

(m) There was no dispute that the appellant incurred a significant debt as at October 2004 due to Sam Paino buying out Victor Paino's interest in the appellant and that the appellant sought to reduce the amount of money it spent on wages in the second half of 2004. ([150])

(n) The Commissioner doubted the terminations were based on a genuine redundancy because the Commissioner was not persuaded Mr Power's review of the appellant's meat and freezer sections which led to the respondents' terminations formed part of the appellant's rationalisation of its divisions in the latter part of 2004. The Commissioner made this finding by a reference to the letters of termination given to the respondents which did not refer to any restructuring in the freezer and meat sections. ([151])

(o) In support of the conclusion that the respondents were not terminated due to a genuine redundancy situation, the Commissioner found it highly probable that the respondents were terminated due to their ongoing efforts to have a collective agreement govern their conditions of employment. The Commissioner referred to the state of play regarding the attempts to obtain an enterprise order from the Commission and the appellant's response to this. ([152])

(p) Even if the appellant had demonstrated it was necessary to reduce employee numbers in the meat and freezer sections in November 2004, the respondents should have continued in employment as there were alternatives to the respondents being terminated that were open to the appellant to consider and should have been considered and given effect by the appellant. ([153])

(q) The respondents should have been given the opportunity to transfer to other sections if they were excess to requirements. This was the appellant's normal practice for dealing with vacancies or increased or diminished workloads. ([154])

(r) The appellant could and should have continued to employ the respondents pending a position becoming available in the freezer section because, at the time the respondents were terminated or soon after, positions became vacant in the freezer section to which the respondents could have been transferred. Even if no positions were available for the respondents as at November 2004, the appellant was aware of the high turnover of staff in the freezer section and should have continued to employ the respondents pending a position becoming vacant. This was an option which should have been considered instead of terminating the respondents' employment. The Commissioner referred to employees who had resigned subsequent to the termination of employment of Mr Foley and Mr Buktenica and, which would have, in her view, allowed them to have remained in employment. ([155])

(s) The respondents were treated unfairly compared with a number of the appellant's employees whose positions were genuinely targeted for redundancy as they were not given the same opportunity to transfer nor given any advance warning of their terminations. They were also not consulted on whether they would like to become casual employees, although at the time two casual employees who worked close to full-time hours were employed in the freezer section on the day shift. ([156])

(t) In any event, the respondents were unfairly terminated because the process used by the appellant to determine who should be made redundant in the meat and freezer sections was so fundamentally flawed that it could not be relied upon to select which employees in these sections should have been terminated. ([157])

(u) The selection of the respondents was not based on objective and unbiased criteria. There was an inappropriate range of criteria used to assess which employees should be identified for termination. The range of employees considered for redundancy was too limited as there was no logical reason for excluding the freezer night shift employees and the day shift casual employees who worked on a close to full-time basis in the freezer section. Furthermore, as Mr Foley had many years of experience in the freezer section, he should have been compared with employees in this section. ([158])

(v) The forklift and computing skills items in the matrix advantaged some employees in the meat and freezer sections as they spent a greater proportion of their time undertaking these duties and would therefore automatically be given better assessments. Additionally, as the appellant did not weight some of the criteria included in the matrix to take into account each employee's different roles to ensure that all employees were treated fairly, the assessments for those areas should be ignored. ([159])

(w) The appellant ignored the fact that some of the criteria included in the matrix were skills which were not essential to employees undertaking their work in both the meat and freezer sections and, as a result, some employees, particularly Mr Buktenica and Mr Foley, were disadvantaged. As examples, the Commissioner referred to the forklift and computer skills assessments and the undertaking of the transport and storage certificate. ([160])

(x) The range of criteria included in the appellant's matrix was too restricted and other relevant criteria should have been assessed. Mr O'Brien had given evidence that the criteria should have included good temperament for working in cold stores and good product knowledge and Mr Power acknowledged that safety should have been included in the matrix but was not. The respondents completed their own matrix for the purpose of the hearing and this matrix included additional relevant criteria including health and safety, product knowledge, punctuality, initiative and multi-skilling. These criteria were appropriate to include in the matrix and should have been included and assessed. ([161])

(y) Some of the criteria used by Mr Power to assess employees were incapable of assessment; assessment levels on the matrix were inconsistent; some criteria were not expressly assessed and some of the assessments given were questioned, given they were different to the assessments provided by Mr O'Brien and Mr Jeffery during the hearing. The Commissioner referred to examples relating to forklift experience, fitness, commencement date, promotional potential, length of service and the transport and storage certificate. ([162])

(z) The employees were not assessed in a consistent manner, as the evidence of Mr Power was employees were assessed as being "*poor*", "*fair*" and "*good*", but other assessment levels included in the matrix were "*excellent*" and "*inadequate*". ([163])

(aa) Many of the assessments contained in the matrix were unreliable because they did not reflect the assessments of Mr Jeffery and Mr O'Brien, as had been asserted by Mr Power. These differences were summarised by the Commissioner in a table. ([164])

(bb) It was implausible that Mr Foley was selected by the appellant as the most appropriate person for termination from the meat section in October 2004 as he had worked in this section for over a year and Mr Di Carlo had only worked in the meat section for approximately three weeks prior to the appellant deciding to choose Mr Foley for termination. A period of three weeks would be insufficient time for Mr Di Carlo to match Mr Foley's expertise and skill level. ([165])

(cc) Mr O'Brien had not been considered for redundancy by Mr Power which brought into question why his name was on the matrix. It was also unclear who assessed Mr Jeffery and Mr O'Brien. Additionally, the matrix was flawed because the two casual employees employed in the freezer section at the time the respondents were terminated, who worked close to full-time hours, were not included in the assessment as well as the seven full-time employees. It was appropriate to include all employees who worked both day and night shifts in the freezer and meat sections so a proper analysis could be undertaken of which employees were suitable for termination in both of these sections. ([166], [167])

(dd) *Garbett v Midland Brick Company Pty Ltd* (2003) 83 WAIG 893 (IAC) was cited by the Commissioner as authority for the proposition that, in a redundancy situation, the employee terminated is required to demonstrate that another employee should be terminated instead of them. The Commissioner concluded, however, that the process undertaken by the appellant which resulted in the respondents being chosen for redundancy was fundamentally flawed "*because of the incorporation of inappropriate selection criteria, some of which were incapable of assessment, the lack of inclusion of other relevant criteria, the lack of weighting for the criteria and because some of the assessments included in the matrix were inaccurate. Furthermore, the full range of relevant employees was also not included in the matrix as the night shift and casual employees were excluded from the matrix*". The Commissioner found the criteria included in the matrix and the assessments contained therein could not be relied upon and, in the circumstances, it was unnecessary for the respondents to demonstrate that other employees should have been terminated instead of them, using the appellant's matrix. ([168])

(ee) If it was necessary to identify specific employees for redundancy, the matrix prepared by the respondents would constituted a reasonable set of criteria which would need weighting, along with the inclusion of employees working in the freezer night shift and the casual employees working on the day shift in the freezer section. Under such a revised matrix, it was highly unlikely the respondents would be identified for termination. Although the assessments completed by the respondents on their matrix were fair and reasonable, no finding was made on which specific employees should have been terminated instead of the respondents as this matrix should have included night shift and casual employees in the freezer section. ([169])

(ff) In all of the circumstances, the respondents were unfairly selected for termination, given the flawed assessments and criteria in the appellant's matrix and because casuals and night shift freezer employees were not included. ([170])

(gg) The respondents were unlawfully terminated when the appellant failed to comply with the process that it was bound to follow under clause 51 of the award and the *Minimum Conditions of Employment Act* 1993 (the *MCE Act*) when effecting the respondents' terminations. ([171])

(hh) Clause 51 of the award was deliberately ignored so that the appellant could escape the scrutiny of its actions by the union and the respondents, and the canvassing of alternatives to termination prior to effecting the respondents' terminations. ([171])

(ii) Under clause 51 of the award, the appellant was required to hold discussions with the employees concerned and their union once it had made a decision that it no longer wished the job the respondents were doing to be done by anyone, and these discussions should have taken place as soon as practicable after the decision was made to terminate the respondents and these discussions should have covered the reasons for the proposed terminations, measures to minimise the terminations and measures to mitigate any adverse effects of the terminations on the employees concerned. The appellant was also required to provide in writing to the respondents as well as the union all relevant information about the proposed terminations, including the reasons for the proposed terminations, any process for choosing the respondents, and the period over which the terminations were likely to be carried out and, as part of these discussions, genuine alternative options such as transfer, redeployment and casual employment should have been considered and should have been made available to the respondents. ([171])

(jj) If these processes had been undertaken, alternative positions would have been found for the respondents and short term options apart from termination could have been identified for the respondents, pending a position becoming available in the freezer section, given the high rate of turnover of staff. ([171])

(kk) The respondents were treated unfairly as the appellant denied them access to retraining opportunities, as well as outplacement services which should have also been offered to the respondents, given their lengthy and committed service to the appellant and their ages. ([171])

(ll) The Commissioner referred to Part 5 of the *MCE Act* and s43 of that Act in particular, the contents of which were, by force of the *MCE Act*, implied into the contract of employment of each respondent. The Commissioner said a failure to comply with the mandatory requirements under this section is a factor to be taken into account in deciding whether a dismissal is unfair. ([172, 173])

(mm) Although the respondents were identified as early as 21 October 2004 for termination, they were not informed about the terminations until 11 November 2004, the date of their terminations. This was a substantial period of time for the appellant to adhere to the award and the *MCE Act* requirements and the appellant chose not to do so. The respondents were unable to access the entitlement contained in s43 of the *MCE Act* as they were terminated without notice and forewarning. This contributed to them being unfairly terminated. ([174], [175])

(nn) The respondents were treated unfairly as they were denied the opportunity to gain or improve the skills which the appellant believed were appropriate for its future operations. ([176])

(oo) Both respondents were unfairly terminated because the appellant failed to take into account each respondent's particular circumstances and their good and lengthy service to the appellant when it decided to effect their terminations. The respondents' age, alternative job prospects, and the extent of their service for the appellant should have been taken into account. ([177])

(pp) The respondents were denied procedural fairness, given the process adopted by the appellant in choosing the respondents for termination and the manner of their terminations. This contributed to the respondents being unfairly terminated. The appellant did not give the respondents any opportunity to review their assessments as the appellant withheld access to its matrix until the applications were lodged in the Commission. This was deliberately done, according to the evidence of Mr Power, so that the respondents could not contest the content of the matrix. Additionally, the respondents were terminated in a summary fashion and, as a result, had no opportunity to discuss alternatives to termination or the ways in which the impact of their terminations could be ameliorated. ([178])

(qq) The respondents were not given the opportunity to work out their notice and no reason was given for this not occurring. This also contributed to the unfair terminations of the respondents. ([179])

(rr) The respondents were terminated in perfunctory meetings which constituted callous treatment. ([179])

(ss) In all of the circumstances, the respondents were unfairly terminated as they were not afforded a fair go all round (*Undercliffe Nursing Home v Federated Miscellaneous Workers' Union of Australia, Hospital Service and Miscellaneous WA Branch* (1985) 65 WAIG 385). ([180])

(tt) The respondents were seeking reinstatement and the onus is on the appellant to establish that reinstatement or re-employment is impracticable. ([181] – [183])

(uu) The Commissioner referred to her finding that the respondents did not have to demonstrate that other employees should have been terminated instead of them. The Commissioner said the respondents should be reinstated to their former positions with the appellant as reinstatement is not impracticable. The appellant was about to commence its busiest period of the year and it was therefore the Commissioner's view that there would be work available for the respondents to undertake in their former sections if they were reinstated. Mr O'Brien and Mr Jeffery saw no impediment to the respondents' return to work when they gave their evidence. There were no performance issues of any substance with either respondent. ([184])

(vv) The Commissioner earlier quoted from the Full Bench decision of *Portilla v BHP Billiton Iron Ore Pty Ltd* (2005) 85 WAIG 3441. The Commissioner said (presumably on the basis of this authority) that, as the respondents were being reinstated, they were not required to demonstrate that they had mitigated their losses. If mitigation were to be taken into account, Mr Foley was found to have fully mitigated his loss and Mr Buktenica had failed to mitigate his loss. ([185])

17 The Commissioner then referred to the orders which would be made.

Appellate Intervention, Factual Finding

18 The conclusion of the Commissioner in both applications, that the respondents were unfairly dismissed, involved an evaluation of the facts and circumstances which gave rise to the dismissals. It was a discretionary judgment. It was a judgment which was guided by the legal principles which the Commissioner set out and purported to follow as well as the factual findings made by the Commissioner. The appeals challenge some of the Commissioner's expression and application of legal principles and findings of fact. Given the grounds of appeal, which will be referred to in detail later, to succeed in setting aside the orders made by the Commissioner for reinstatement, the appellant needs to establish that the conclusion of the Commissioner that the respondents were unfairly dismissed was tainted by the type of error described by the majority of the High Court in *House v The King* (1936) 55 CLR 499 at pages 504/505. This can include errors of law and errors of fact.

19 In considering challenges against the factual findings of Commissioners at first instance, the Full Bench in almost all cases conducts its appeals on the basis of the written record of the evidence which was before the Commission. This is clearly contemplated by s49(4) of *the Act*. In *Fox v Percy* (2003) 214 CLR 118, the High Court considered the nature and extent of appellate review of factual findings in the determination of such appeals. The observations made by the High Court have been recently considered and applied by the Court of Appeal of the Supreme Court of Western Australia in *Skinner v Broadbent* [2006] WASCA 2 and *Lackovic v Insurance Commission of Western Australia* [2006] WASCA 38.

20 Relevant to the present appeal, Gleeson CJ, Gummow and Kirby JJ in *Fox v Percy* said as follows:-

> "*[23] ….On the one hand, the appellate court is obliged to "give the judgment which in its opinion ought to have been given in the first instance" (**Dearman v Dearman (1908) 7 CLR 549 at 561 …**). On the other, it must, of necessity, observe the "natural limitations" that exist in the case of any appellate court proceeding wholly or substantially on the record (**Dearman v Dearman (1908) 7 CLR 549 at 561. See also Scott v Pauly (1917) 24 CLR 274 at 278-281**). These limitations include the disadvantage that the appellate court has when compared with the trial judge in respect of the evaluation of witnesses' credibility and of the "feeling" of a case which an appellate court, reading the transcript, cannot always fully share…*
>
> *[24] Nevertheless, mistakes, including serious mistakes, can occur at trial in the comprehension, recollection and evaluation of evidence. In part, it was to prevent and cure the miscarriages of justice that can arise from such mistakes that, in the nineteenth century, the general facility of appeal was introduced in England, and later in its colonies…*
>
> *[25] 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" (**Dearman v Dearman (1908) 7 CLR 549 at 564**, citing **The Glannibanta (1876) 1 PD 283 at 287).** In **Warren v Coombes (1979) 142 CLR 531 at 551**, the majority of this Court reiterated the rule that:*

> *"[I]n general an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by the findings of the trial judge. In deciding what is the proper inference to be drawn, the appellate court will give respect and weight to the conclusion of the trial judge but, once having reached its own conclusion, will not shrink from giving effect to it."*

*As this Court there said, that approach was "not only sound in law, but beneficial in ... operation" (**Warren v Coombes (1979) 142 CLR 531 at 551**. See also **Taylor v Johnson (1983) 151 CLR 422 at 426**; **Jovanovic v Rossi (1985) 58 ALR 519 at 522**; cf **Moran v McMahon (1985) 3 NSWLR 700 at 715-716**, per Priestley JA).*"

21 The above considerations apply in determining the grounds of appeal which are against factual findings of the Commissioner.

Redundancy and Unfair Dismissal

22 The appeals call into question what a redundancy is, as a matter of law and fact. They also call into question what an applicant has to establish to prove an unfair dismissal in a case of dismissal on the basis of redundancy.

23 A well known and often quoted statement of what a redundancy is was provided by Bray CJ in *R v Industrial Commission of South Australia; Ex parte Adelaide Milk Supply Co-operative Limited* (1977) 16 SASR 6 at 8, where His Honour said:-

> "*[T]he concept of redundancy in the context we are discussing seems to be simply this, that a job becomes redundant when the employer no longer desires to have it performed by anyone. A dismissal for redundancy seems to be a dismissal, not on account of any personal act or default of the employee dismissed or any consideration peculiar to him, but because the employer no longer wishes the job the employee has been doing to be done by anyone.*"

24 In *Quality Bakers of Australia v Goulding* (1995) 60 IR 327, Beazley J at 332-333 said:-

> "*A redundancy will arise where an employer has labour in excess of the requirements of the business; where the employer no longer wishes to have a particular job performed; or where the employer wishes to amalgamate jobs**: **R v Industrial Commission of South Australia; Ex parte Adelaide Milk Supply Co-operative Ltd (1977) 44 SAIR 1202** per Bray CJ at 1205; **Gromark Packaging v FMWU (1992) 46 IR 98**, per Franklyn J at 105. It is not necessary for the work to have disappeared altogether. As was said in **Bunnetts' case (Bunnett v Henderson's Federal Spring Works Pty Ltd)** (1989) AILR 356:*
>
> > *"Organisational restructuring may result in a position being abolished and the functions or some of them being given to another or split amongst others.*""

25 At page 333, Beazley J also stated:-

> "*An employer might decide to make certain positions redundant with the sole intention of increasing the profitability of an already profitable business. Such a decision would relate as much to the operational requirements of the business as would a decision as to redundancies taken in the case of a business which was in a parlous financial condition or when a certain type of work was no longer undertaken by the business.*"

26 Additionally, as indicated by Ryan J in *Jones v Department of Energy and Minerals* (1995) 60 IR 304 at 308, a redundancy may occur where an employer rearranges their organisational structure by breaking up the collection of functions, duties and responsibilities attached to a single position and distributes them among the holders of other positions, including newly created positions. His Honour said that what is "*critical for the purpose of identifying a redundancy is whether the holder of the former position has, after the re-organisation, any duties to discharge*". If not, then their position has become redundant.

27 In *Garbett v Midland Brick Company Pty Ltd*, EM Heenan J (with whom Parker J agreed) at paragraph [74] described the termination of employment on the basis of redundancy in the following way:-

> "*The need to terminate a contract of employment may arise because of some change in the nature of the employer's business, or a shift of business location, or some restructure genuinely considered by the employer to be necessary for the improvement or refinement of its business operations or for some other reason quite independent of the performance of the individual employee or employees. Terminations of employment for these reasons are often described as being because of redundancy, a term of somewhat variable meaning depending upon the context and circumstances.*"

28 His Honour at paragraph [76] referred to the *Bunnett* case in the same way as Beazley J did in *Quality Bakers*.

29 In our opinion, the above observations are all relevant to an understanding of the concept of a termination of employment on the basis of a redundancy.

30 As set out earlier, the Commissioner in this instance referred to a redundancy situation being constituted in circumstances where an employer reduces its workforce due to an excess of employees reasonably required to perform the work available. In our opinion, whilst this is one instance of when a redundancy can occur, it does not exclusively or comprehensively set out all such circumstances. As stated by Beazley J in *Quality Bakers* and referred to earlier, it is not necessary for the work which an employee was doing to have disappeared. What is required for a redundancy is that the employer no longer wishes anybody to be engaged to fulfil the position previously occupied; meaning the functions, duties and responsibilities of that position.

31 Issues of redundancy are often involved in applications to the Commission under s29 of *the Act* for a remedy under s23A. It should be remembered, however, that the jurisdiction to make an order under s23A of *the Act* is dependent upon the Commission making a determination that "*the dismissal of an employee was harsh, oppressive or unfair*" (s23A(1) of *the Act*). This is the issue for determination by the Commission. The issue is not whether the termination of employment occurred because of a genuine redundancy. In many cases, however, an employer may seek to defend an application asserting a harsh, oppressive or unfair dismissal on the basis that the dismissal occurred because of the justifiable reason of a genuine

redundancy. When such an issue is raised, and it is disputed, it will ordinarily be necessary for the Commission to resolve the issue. It is not the same issue, however, as whether there has been a harsh, oppressive or unfair dismissal.

32 In these appeals, it was argued by the appellant that, in considering an application for a remedy under s23A of *the Act*, in a situation where a dismissal has occurred because of a genuine redundancy, the dismissal cannot be found to be unfair unless the applicant establishes that one or more other employees were more appropriate than them for selection to be made redundant. This submission was made on the basis of observations by the Industrial Appeal Court in the decisions *AMWSU and Others v Australian Shipbuilding Industries (WA) Pty Ltd* (1987) 67 WAIG 733 and *Gromark Packaging v FMWU* (1992) 73 WAIG 220. The appellant also submitted that, whether a dismissal has occurred because of a redundancy is a finding of fact. Further, it was submitted that, if redundancy is found by the Commission, the remaining issue is whether the selection of the employee dismissed was unfair; the onus being on the party alleging unfairness to show, by specific comparison with other employees, that their selection was unfair. This was referred to as the "*comparative test*".

33 Although we agree that whether a dismissal has occurred because of redundancy involves findings of fact, we do not agree that the appellant's argument entirely represents the present law. It is true that there are observations by members of the Industrial Appeal Court in both the *ASI* and *Gromark Packaging* decisions which support the contentions made by the appellant. However, the following needs to be remembered about these decisions. The applications in both of them were for reinstatement. Secondly, there was no doubt that a dismissal because of redundancy had occurred. Thirdly, they did not involve the same legislative scheme and jurisdiction as that presently given to the Commission under *the Act*. Fourthly, they do not deal with the only circumstances in which a dismissal on grounds of redundancy can be found to be unfair.

34 Furthermore, in *Metals and Engineering Workers' Union - Western Australia v Newcrest Mining Limited* (1993) 73 WAIG 969, the Industrial Appeal Court indicated that the reach of the *ASI* and *Gromark Packaging* decisions was not as far as that argued for by the present appellant. It is noteworthy that the *Newcrest Mining* decision was delivered only a few months after the *Gromark Packaging* decision and that the court was constituted by two of the three justices constituting the court in the *Gromark Packaging* case (Franklyn and Nicholson JJ). In the *Newcrest Mining* decision, Rowland J (who had also sat as part of the court in the *ASI* case) gave the lead judgment which was agreed to by Franklyn and Nicholson JJ. On page 972, Rowland J said the following:-

> "*In the instant case, the appellant's seemed to suggest that the Full Bench held that the ASI case established as a matter of law that allegations of unfair dismissal in a redundancy case could only succeed if the employee established that others should have gone before him. In the ASI case, that was critical. It may well be critical in many cases, but I can find nothing in any of the judgments that indicates that it must, as a matter of law, apply in all cases.*"

35 In the same paragraph, Rowland J referred to the reasons of the Full Bench in *Newcrest Mining*, to the extent that unfairness in the process may well be a factor to be taken into account in deciding whether a dismissal was unfair. As Rowland J observed, the Full Bench had quoted with approval the comments of Kennedy J in *Shire of Esperance v Mouritz* (1991) 71 WAIG 891, in this regard. Rowland J stated that the Full Bench was not wrong in taking into account issues of unfairness of process in determining whether a dismissal is unfair. At page 973, Rowland J stated that, where there was no evidence led to indicate that there were others who should have been retrenched before the employees who complained of unfair dismissal, this was an important and relevant, if not dominant, consideration. The judgment indicates however that this is not the sole basis upon which an applicant may establish a dismissal was unfair.

36 The *Newcrest* decision was relied on to this effect by the Full Bench in *Jason Industries Ltd v Forest Products, Furnishing and Allied Industries, Industrial Union of Workers, WA Branch* [1993] 74 WAIG 32 at 37.

37 That the appellant's argument does not represent the law is also apparent from two more recent decisions of the Industrial Appeal Court, *FDR Pty Ltd v Gilmore* (1998) 80 IR 411 and *Garbett*, which we have cited earlier. In *Gilmore*, the Commissioner at first instance made a finding that the position of Mr Gilmore was abolished and that there was a true redundancy. Nevertheless, it made a finding that the dismissal was harsh, oppressive or unfair. The dismissal bore this character because of circumstances including the lack of consultation with Mr Gilmore before his dismissal; he was not given any work references; he was required to leave the premises immediately and was not given any reason for that requirement; company staff were circulated as to his dismissal by a memorandum which merely stated that he no longer worked for the company from a given date without saying that his position had become redundant and the manner of treatment of Mr Gilmore was without precedent in relation to staff being made redundant. When the matter came before the Industrial Appeal Court, Anderson J, with whom Kennedy and Franklyn JJ agreed, said at page 414 that these facts justified the finding of unfair dismissal and he was not persuaded the Full Bench had erred in dismissing this aspect of the employer's appeal. Clearly, therefore, the Industrial Appeal Court were endorsing a finding of unfair dismissal in a case of genuine redundancy where the applicant had not satisfied the so called "*comparative test*".

38 *Garbett* was referred to by the Commissioner at first instance in these appeals as "*authority confirming that in a redundancy situation the employee who is terminated due to a redundancy situation is required to demonstrate that another employee should be terminated instead of him or her*". ([168]) In our opinion, *Garbett* is not authority for this proposition. On the contrary, it confirms that the "*comparative test*" is not the only basis upon which an employee dismissed as a result of a genuine redundancy can establish that their dismissal was unfair.

39 EM Heenan J in *Garbett* said as follows:-

> "*75 … there may be genuine operational reasons rendering a particular employee redundant, which of themselves would justify an employer in terminating the employment of that individual employee, yet, because of the manner in which the termination was effected, the overall result can produce a harsh, oppressive or unfair dismissal has also long been recognised.* ***FDR Pty Ltd & Ors v Gilmore & Ors; Gilmore & Anor v Cecil Bros & Ors*** *(1998) 78 WAIG 1099 IAC, as already noted, is one example which recognises such a situation, notwithstanding that the case involved a bona fide redundancy, and also* ***Kenefick v Australian Submarine Corporation Pty Ltd*** *(No 2) (1996) 65 IR 366 (IRC of Aust).*
>
> …

> 77 *Other examples of harsh, unjust and unreasonable or oppressive dismissals, notwithstanding a genuine redundancy, have been found where the employee is provided with no meaningful information about the reasons for the termination and no discussions are held with him or her with regard to the termination -* ***Gibbs v City of Altona*** *(1992) 37 FCR 216; where there had been no exploration of possible alternatives with the applicant before the ultimate step of termination in order to remove the need for dismissal -* ***Gregory v Philip Morris Ltd*** *(1988) 80 ALR 455 at 473; where there is a failure to apply fair and objective selection criteria in determining which employee is to be made redundant -* ***Budget Couriers Equity Management v Beshara*** *(1993) 5 VIR 173; where there has been no proper investigation of the facts or consultation with the employee about those facts and their consequences -* ***Byrne & Frew v Australian Airlines Ltd*** *(1994) 47 FCR 300 per Beaumont and Heerey JJ at 63 and* ***Budget Couriers Equity Management v Beshara*** *(supra); and where there has been a failure to provide adequate notice -* ***Budget Couriers Equity Management v Beshara*** *(supra). In the category of cases where it is alleged the harsh, oppressive or unfair feature of the termination, notwithstanding a redundancy, is due to the employer's failure to apply fair and objective selection criteria in determining which employee is to be made redundant, the onus will be upon the employee to show that the selection criteria adopted were unfair:* ***Quality Bakers of Australia Ltd v Goulding; Wickham v Quality Bakers of Australia Ltd*** *(1995) 60 IR 327 per Beazley J at 337 and* ***Gromark Packaging v Federated Miscellaneous Workers Union of Australia, WA Branch*** *(supra).*"

40 In *Garbett*, the Industrial Appeal Court held that a termination of employment on the basis of redundancy could be unfair where the termination had occurred in breach of s41 of the *MCE Act*. As indicated in paragraph [100] in the reasons of EM Heenan J in *Garbett*, reinstatement may not always be practicable in a situation where there has been an unfair dismissal because of redundancy. This is a different question though to whether the dismissal was unfair. In a situation where reinstatement is impracticable, it will be necessary to consider whether the applicant can establish an entitlement to compensation under s23A of *the Act*.

Grounds 1 and 4

41 Ground 1 contended the Commissioner erred in fact in finding that the respondents' employment was not terminated due to a genuine redundancy situation. Ground 4 asserted the Commissioner erred in finding that it was "*highly probable*" that the respondents' employment was terminated because of their union activities.

42 As argued, Ground 1 included the contention that, not only did the Commissioner err in fact in finding that the respondents' employment was not terminated due to a genuine redundancy situation, but also that the Commissioner erred in not applying the correct test as to what is a redundancy. It was submitted that the test applied by the Commissioner was too narrow in that she considered only whether there was sufficient work available for the dismissed employees to have done, subsequent to their dismissal. We accept this argument of the appellant. We do so, having regard to findings (d), (f), (g) and (j) made by the Commissioner, which we have referred to earlier in paragraph [16]. It can be seen from these findings that the focus of the Commissioner's attention was whether the workload within the meat and freezer sections had diminished and whether there was work which Mr Buktenica and Mr Foley could have done within the sections if they had remained in employment.

43 In our respectful opinion, this is not an appropriate test of whether there was a redundancy in these applications. That correct question involved considering whether there was a restructure, such that the position of the employees no longer remained. The appellant argued at first instance that this had occurred because there had been a decision taken by management to reduce the number of full-time employees by one in both the meat and day freezer sections. The respondents' duties had been taken up by existing full-time and casual employees. The appellant's position was that this had occurred as a genuine cost cutting measure due to the financial difficulties of the appellant. There seemed to be no dispute at first instance as to the appellant's financial difficulties and therefore the desire to reduce costs. Indeed, finding (m) made by the Commissioner as referred to earlier in paragraph [16] was consistent with this.

44 With respect to the meat section, there was undisputed evidence that it operated with two full-time employees after Mr Foley's termination in November 2004 to and including the hearing dates. Mr O'Brien, whom the Commissioner accepted as a witness of truth, gave evidence that the meat section had operated satisfactorily with two full-time employees for the period from February 2002 to September 2004, excluding two periods of two and three weeks respectively. Mr O'Brien said that, when Mr Di Carlo joined him and Mr Foley in the meat section in September 2004, there were then three employees in the section. His view, however, was that a third person was not necessary. He said it was "*a two man job*" (T268). Mr O'Brien also said that, since Mr Foley had left, there had been just he and Mr Di Carlo in the meat section and that they had "*managed comfortably*" (T268). Mr O'Brien said that, when work in the meat section got busy, "*you just lift your work rate*" (T283). He also said that occasionally someone from the shipping section had come in to the meat section to give the two full-time employees there a hand (T283-284). Mr O'Brien said that his hours of work and work rate had not changed significantly since Mr Foley's departure (T285).

45 In our opinion, the evidence of Mr O'Brien confirmed that there was a genuine redundancy in the meat section. Prior to November 2004, there were three full-time employees. After Mr Foley's dismissal, there were two full-time employees who worked in that section supplemented, on occasions, by additional staff, including (from the evidence of Mr Power) casual employees.

46 The findings made by the Commissioner in paragraph [146] of her reasons were coloured by the application of an incorrect test of whether there was "*sufficient work for Mr Foley to*" do in the meat section. In this paragraph, the Commissioner made the finding "*that [t]he workload in this section was sufficient for three full-time employees as Mr Power gave evidence that the meat section required at least two full-time employees as well as additional employees who were transferred into this section from the shipping section to assist as necessary, and he stated that casual employees worked additional hours to assist with increased workloads…*" With respect, this evidence did not establish that three full-time employees were required. It simply established that three workers were required on some occasions within the meat section. The same may be said of Mr Woodfin's evidence which the Commissioner referred to; to the effect that three employees were required to work in the meat section during busy periods.

47 Accordingly, in our opinion, the Commissioner erred in law and fact in deciding that there was not a genuine redundancy with respect to Mr Foley's position in the meat section.

48 With respect to the freezer section and Mr Buktenica's position, the reasons of the Commissioner indicate again that she applied an incorrect test. The redundancy was not shown to be non-genuine by evidence that existing or casual employees worked longer hours during busy periods after the termination of Mr Buktenica's employment. Contrary to the findings of the Commissioner referred to at (k) above, in our opinion the evidence did establish that there was a reduction of full-time employees in the day freezer section following Mr Buktenica's dismissal.

49 Indeed, prior to the dismissal, Mr Jeffery said that he was asked by Mr Power how the freezer section would cope if it had to lose one or two staff members and that he had replied that they could get by with one to one and a half less employees (T290). Mr Jeffery said in his evidence that, before Mr Buktenica's dismissal, there were nine full-time employees and two casuals in the day freezer section. He said that, after Mr Buktenica left, he was not replaced (T289). He also said that, because of another resignation, the numbers of full-time employees had reduced by two but that there had been an additional casual employee engaged (T290).

50 Exhibit R3 was tendered by the appellant at the hearing to indicate the manning levels in the freezer and meat sections on 1 November 2004, May 2005 and 8 June 2005. With respect to the day freezer section, the exhibit showed there were nine full-time and two casual employees as at 1 November 2004. This included Mr Buktenica. A Mr Luison was so employed on 1 November 2004 but resigned on 8 December 2004 and was not replaced. A Mr Muncey resigned on 11 April 2005. On 4 April 2005, a Ms Snell became a full-time permanent employee in the freezer section. However, she went on sick leave following an aneurism on 7 April 2005. The document showed that there were eight full-time and two casual employees in the freezer section in May 2005 and seven full-time and two casual employees in that section on 8 June 2005. These numbers did not include Ms Snell. In our opinion, the Commissioner was in error at paragraph [149] of her reasons (finding (k)) in saying that, as at May 2005, eleven employees were rostered to work in the freezer section. To get to eleven employees, the Commissioner must have included Ms Snell. Due to her illness and absence from work at this time, we do not think that Ms Snell could be characterised as being someone "*rostered to work in the freezer section*", even though she remained, on paper, an employee attached to the freezer section. In our opinion, exhibit R3 did not provide evidence other than that Mr Buktenica was dismissed due to a genuine redundancy.

51 Mr Woodfin gave evidence that, before Mr Buktenica left, there were nine full-time employees and two casual employees working in the freezer on day shift. At the date of his evidence on 8 June 2005, he said that there were seven full-time employees and two casual employees working in the freezer section on day shift. This corroborated the appellant's position as contained in exhibit R3 (see T134, 138, 163, 164).

52 The Commissioner's reasons also referred to the letters received by Mr Buktenica and Mr Foley when they were terminated. The Commissioner attached weight to these letters not referring to any restructuring in the meat and freezer sections, in support of her finding that there was not a genuine redundancy. In our opinion, the terms of the letters did not outweigh the evidence which established that genuine redundancies had occurred.

53 Ground 4 attacks the finding referred to as (o) above that it was highly probable that the respondents were terminated due to their ongoing efforts to have a collective agreement govern their conditions of employment. The reasons given by the Commissioner to support this finding were as follows (at [152]):-

> "*Both applicants gave evidence that the respondent's Chief Executive Officer Ms Paino was unhappy that not all of the respondent's workforce were covered by AWAs and that in the period immediately prior to the applicants' terminations several meetings were held with the applicants and other employees to have those employees who had not signed AWAs reconsider their positions. It also appears that these meetings were held within the context of an apparent undertaking given by the respondent to its employees covered by AWAs that they would be paid any additional wages granted to employees covered by the enterprise order (see evidence of Mr O'Brien transcript page 282). If no employee was covered by the enterprise order then this commitment would not have to be fulfilled, thus saving the respondent money. It is also my view that by terminating the applicants, who were effectively the leaders of the group of employees who had chosen not to sign an AWA, the respondent was in a better position to encourage its remaining non-AWA employees to become covered by an AWA. Mr Power also gave evidence that Ms Paino was 'drained' by the issue of the enterprise order in October 2004 which was around the time that the respondent constructed the matrix which led to the applicants' terminations (see paragraph 88 of this decision).*"

54 In our respectful opinion, the facts referred to did not sustain the conclusion that the respondents' employment was terminated due to their efforts in having a collective agreement govern their conditions of employment. In our opinion, the finding made by the Commissioner was somewhat speculative, especially given the contents of the evidence of Mr Power and the lack of any direct evidence of union activity being a reason for the termination of the respondents' employment.

55 The Commissioner was concerned about the evidence given by Mr Power as referred to in finding (b) above. She did not, however, reject all of the evidence given by Mr Power. Mr Power's evidence was that a decision was made to reduce by one the number of full-time employees in each of the meat and day freezer sections. He then constructed a matrix to assist in determining which employees should be made redundant. After completing the matrix, with input from supervisory staff, he discussed the same with Ms Paino and Mr Pozzi. The outcome of the matrix was that Mr Buktenica and Mr Foley would be the employees selected for redundancy. When Mr Power discussed this with Mr Pozzi, Mr Pozzi expressed concern as to whether it would appear that they had been chosen for redundancy because of their union activities. Mr Power responded that it would not be fair to other employees to not dismiss Mr Buktenica and Mr Foley simply because of this concern. This was then accepted by Mr Pozzi. At the meetings when Mr Buktenica and Mr Foley were informed of their dismissal, Ms Paino told each of them that it was not related to their union activities.

56 If finding (o) of the Commissioner was correct, this would involve:-

(a) Mr Power having given false evidence that Mr Buktenica and Mr Foley were not selected for redundancy because of their union activities.

(b) The matrix, purportedly constructed to determine which employees should be made redundant, was a sham because the employees were selected for a reason not recorded on the matrix; that of union activity.

(c) Ms Paino lied to both Mr Buktenica and Mr Foley when informing them that they were not dismissed because of their union activities.

57 The Commissioner did not expressly make any of these findings. It may be that, in making the finding she did as reflected in (o) above, the Commissioner did not fully appreciate the implications of making such a finding in the circumstances of the case.

58 In our opinion, however, the evidence simply did not sustain the finding which was made by the Commissioner.

59 We would therefore uphold grounds of appeal 1 and 4. This does not of itself lead to the appeals being allowed. This is because the decision of the Commissioner was dependent upon findings alternate and additional to those which have been challenged in grounds of appeal 1 and 4. The outcome of the appeals is therefore dependent upon the other grounds of appeal and the findings and reasoning of the Commissioner leading to the conclusion that the respondents were unfairly dismissed.

Ground 2

60 This ground asserted that the Commissioner erred in fact in finding that, had each respondent's employment not been terminated on 11 November 2004, an alternative position would have become available, when the evidence demonstrated a continual decline in the appellant's numbers.

61 The ground was argued together with ground 9 which related to the Commissioner's findings about the consequences of the failure to comply with the procedures in the award and the *MCE Act*. In our opinion, the latter ground raises separate considerations and will be considered later.

62 The findings which ground 2 calls into question are those referred to as findings (h) and (r) above. In both findings, the Commissioner held that alternative positions would have become vacant in the freezer section for Mr Buktenica and Mr Foley to be employed within a short time after their dismissal. Specifically in paragraph [155], the Commissioner explained that Mr Buktenica and Mr Foley could have replaced a number of employees who resigned or left the freezer section day shift including Mr Luison (8 December 2004), Mr Muncey (11 April 2005), Mr Tucker and Mr Brabin (24 March 2005), or Mr Torre of the night shift (1 November 2004). The Commissioner said that all of these employees were replaced and referred to exhibit R3. The Commissioner said that the appellant was also aware that Mr O'Brien would be on leave in December 2004 and would need replacing and therefore Mr Foley could have continued to be employed in the meat section at least until Mr O'Brien returned from leave.

63 One difficulty with a number of these possibilities referred to by the Commissioner is that they were not known about or did not occur until after the date of dismissal of Mr Buktenica and Mr Foley, although the Commissioner did refer to the fact that there was known to be a high turnover of staff in the freezer section. Although this seems to be correct, it is difficult to make a finding of unfair dismissal because an employer has decided not to dismiss a redundant employee, in the hope that another employee will voluntarily leave their business in the near future so as to make the redundancy unnecessary.

64 There are also problems with the Commissioner's findings that Mr Buktenica and Mr Foley could have been kept on until one of the positions which was identified in paragraph [155] of her reasons became vacant. This was because:-

(a) When Mr Luison left from a position in the day freezer on 8 December 2004, he was replaced by an existing employee from night shift (T289).

(b) Mr Tucker did not resign but was transferred to night shift (T289).

(c) When Mr Muncey left on 11 April 2005, this was five months after the dismissals of Mr Buktenica and Mr Foley and also Mr Muncey was not replaced (T289, exhibit R3).

(d) Mr Torre resigned from night shift on 1 November 2004 (before the retrenchment of Mr Buktenica and Mr Foley) but was not replaced until 21 March 2005 (exhibit R3). This was when a Mr Cardoso commenced employment on 21 March 2005 (exhibit R3).

(e) Mr Brabin resigned on 24 March 2005 which was four and a half months after the dismissals of Mr Buktenica and Mr Foley. Additionally, Mr Brabin, as well as Mr Tucker, had been casual employees. The positions they left were not full-time positions of the same type as those enjoyed by Mr Buktenica and Mr Foley prior to their dismissals.

65 Therefore, the evidence was that the first position which would have become available to Mr Buktenica or Mr Foley which was not filled internally was the night shift position taken up by Mr Cardoso on 21 March 2005.

66 The reference to Mr O'Brien's leave by the Commissioner in paragraph [155] could have only provided short term relief from dismissal for either Mr Foley or Mr Buktenica until he returned from leave. Of itself, it does not suggest an alternative to the dismissal of either Mr Foley or Mr Buktenica which would make their dismissal unfair. Mr O'Brien's position whilst on leave was filled internally by Ms Osborne who returned to the freezer section after Mr O'Brien came back from leave.

67 In our opinion, this ground of appeal should also be upheld. However, the consequences of this are the same as those with respect to grounds 1 and 4 referred to earlier.

Ground 3

68 This ground argues as an alternative ground that the Commissioner had regard to an irrelevant consideration in finding that, had the respondents' employment not been terminated on 11 November 2004, an alternative position would have become available in December 2004 or March or April 2005.

69 This ground seems to refer to the same factual findings as those referred to with respect to ground 2. We do not think that the ground involves any separate consideration to ground 2. As it is phrased, we would not uphold this ground of appeal. This is because we do not think it is an irrelevant consideration for the Commission to consider whether there were alternatives open to an employer other than terminating the employment of an employee whose position was to be made redundant. It is legitimate to consider whether other positions were or were likely to become available. The difficulty with the Commissioner's findings in this instance is that the facts did not support the conclusions drawn by the Commissioner.

Ground 5

70 This ground contends the Commissioner erred in finding that Mr Power was not credible. In our opinion, this ground to some extent misstates the findings made by the Commissioner about Mr Power's evidence. The Commissioner did not state that Mr Power was not a credible witness. The Commissioner said, in effect, that she thought that all of the respondents' witnesses except Mr Power had given detailed, considered and plausible evidence. At paragraph [142], the Commissioner said she had concerns about the evidence given by Mr Power as he tailored his evidence to suit the appellant's case. The Commissioner said she found parts of Mr Power's evidence to be unconvincing. The Commissioner said that Mr Power's evidence explaining why he thought the award did not apply to the present redundancies lacked credibility. The Commissioner also said that Mr Power was evasive and unconvincing when he explained how he assessed the length of service of each employee on the appellant's matrix and when he attempted to justify how he assessed workplace safety. The Commissioner said that some of Mr Power's evidence was inconsistent with the evidence given by Mr O'Brien and Mr Jeffery and doubted Mr Power's evidence about the assessments included in the matrix. As a result of this, the Commissioner said that she treated his evidence with caution.

71 In our opinion, this fell short of a blanket finding that Mr Power lacked credibility, which is the assertion made in this ground of appeal. In our opinion, the findings made by the Commissioner about Mr Power's evidence in paragraph [142] of her reasons were open to her. The appellant questioned the Commissioner's description of Mr Power as being an "*experienced human resources practitioner*", in this paragraph when discussing his evidence about the applicability of the award to the redundancies. Mr Power gave evidence that he had been employed as the human resource and quality assurance manager for the appellant since 10 March 2003. This means that he had been engaged in this position for about twenty months prior to the dismissals of Mr Buktenica and Mr Foley. Given this, we do not think that the description given to Mr Power was inappropriate. Additionally, Mr Power gave evidence that he was aware of the respondents' employment being covered by the award and the Commissioner was entitled to form the view that Mr Power's explanation as to why he considered the redundancies were not covered by the provisions of the award to be unconvincing.

72 In referring to part of Mr Power's evidence as being "*evasive and unconvincing*", it is apparent that the findings made by the Commissioner were, in part, based upon her assessment of how he gave his evidence. Whilst a factual finding based in part upon such a consideration is not immune from appellate review (see *Skinner v Broadbent* at [34]), in this case we do not think there is any sound basis for overturning the findings made about Mr Power's evidence.

73 In our opinion, this ground of appeal has not been substantiated.

Ground 6

74 This ground pleads that the Commissioner erred in law in holding that the respondents were not required to show that their selection for dismissal was unfair because another employee should have been selected instead.

75 This ground relates to finding (dd) as set out above.

76 Earlier in these reasons, we have set out the basis upon which the Commission may find a dismissal from employment to be unfair, notwithstanding there is a situation of genuine redundancy. This ground of appeal proceeds on the premise that, in a situation of genuine redundancy, a dismissal cannot be shown to be unfair unless the applicant can establish another employee should have been selected for dismissal instead of them. As we have set out earlier, this view of the law is incorrect. Accordingly, the ground of appeal has not been established.

Ground 7

77 This grounds pleads the Commissioner erred in failing to find the respondents had not discharged their burden of showing their selection for dismissal was unfair because another employee should have been selected instead.

78 This ground must fail for similar reasons to those set out for ground 6. The ground is premised upon the assertion that the applications before the Commission, given a case of genuine redundancy, had to fail unless the applicants could establish another employee should have been selected for dismissal instead of them. As stated, the premise is not correct as a matter of law. The ground is not established.

Ground 8

79 This ground pleads the Commissioner had regard to an irrelevant consideration in finding that the process adopted by the appellant in determining who was to be made redundant was flawed.

80 To some extent, this ground is also dependant upon the acceptance by the Full Bench of the appellant's "*comparative test*" argument, which has been referred to earlier. As stated, with respect to ground 6, this contention of the appellant is not correct. Additionally, it was not irrelevant for the Commissioner to have regard to the process adopted by the appellant in determining who was to be made redundant, in considering whether the dismissal of the respondents was unfair. As stated by EM Heenan J in *Garbett* at paragraph [77] and quoted earlier, there can be unfair dismissal in a case of redundancy where the dismissed employee establishes, "*there is a failure to apply fair and objective selection criteria in determining which employee is to be made redundant*". This ground of appeal has not been established.

Ground 9

81 This ground pleads that the Commissioner erred in finding that, had the appellant complied with the procedures in the award and the *MCE Act* or taken other steps, alternative positions would have been found. The ground relates to finding (jj) referred to above.

82 The relevant clause of the award, clause 51, is referred to above in the context of the observations made by the Commissioner which we have noted as (ii). Clause 51 of the award was clearly not complied with by the appellant. The clause provided an obligation to give notice of the pending redundancies and discussions aimed at minimising the prospect of or potential impact of the redundancies on those whose employment could or was going to be terminated. The award provision has similar aims and functions to s41 of the *MCE Act*. The requirements of this section were also not complied with by the appellant, as noted by the Commissioner (see (gg) above).

83 Whilst the breach of the award and the *MCE Act* were both matters which the Commissioner was entitled to take into account in considering whether the dismissals were unfair, we do not think it was open to the Commissioner to make the finding that, had there been compliance with these obligations, then "*alternative positions would have been found*". Our reasons for coming to this conclusion are similar to those expressed above with respect to ground 2. If discussions were held prior to the dismissals, however, we do think it is possible that alternatives to this action could have been found, at least in the short term. It is possible that one of the respondents could have remained in employment whilst Mr O'Brien was on leave, as referred to earlier. If the relevant discussions had been held, it is also possible that the issue of whether either of the respondents would like to move to casual employment could have been discussed with them. Another possibility was that they could have taken any leave which was owed to them to see whether, during this period of leave, any other permanent employee resigned from their employment, thus creating an opening for either of the respondents. The known high rate of turnover of staff in the freezer section, as referred to by the Commissioner, made this a realistic possibility.

84 We also think that the facts did not establish, as a matter of inference, that the appellant deliberately did not comply with clause 51 of the award so that the appellant could escape the scrutiny of its actions by the union (finding (hh) above). Given the involvement of Mr Buktenica and Mr Foley with the union, it is most unlikely that the appellant would consider its actions, in making them redundant, would not be brought to the attention of the union.

85 To the extent referred to above, this ground of appeal should be upheld in our opinion. The consequences of this are dealt with below.

Disposition of Appeals

86 We have now considered each of the grounds which attack the conclusion of the Commissioner that both respondents were unfairly dismissed by the appellant. In general, we have found that the Commissioner erred in deciding the respondents were not dismissed on the basis of a genuine redundancy, that if they had remained in employment there were positions available for them and that if the award and the *MCE Act* had been complied with, then alternative positions for both respondents would have been found. As can be seen from the review of the Commissioner's reasons set out at length earlier, however, these were not the only bases on which the Commissioner found each of the respondents to be unfairly dismissed. There were additional or alternative findings leading to this conclusion.

87 These are findings (s), (t), (u), (v), (w), (x), (y), (z), (aa), (bb), (cc), (dd), (ff), (kk), (nn), (oo), (pp), (qq) and (rr) referred to above. These findings are not swept away by the grounds of appeal which have been allowed. They are not challenged in the grounds of appeal. They remain in support of the conclusion reached by the Commissioner that the dismissals were unfair and the orders which were made.

88 The appellant's written submissions contained the following with respect to the relief which was sought:-

> "*174 The appellant submits that the appropriate relief in each case is for the appeal to be upheld, the order issued on 18 November 2004 be quashed and the application be dismissed.*
>
> *175 That is because each of the respondents failed to discharge their burden of proving that another employee should have been selected for redundancy in their place.*"

89 The latter submission was based upon the appellant's contention that the Full Bench accept its "*comparative test*" argument. Indeed, that argument was a lynchpin of how the appeal grounds were drafted and the appeal argued. It is a lynchpin which we have not however accepted. Accordingly, the appeals fail, insofar as they seek to disturb Orders 1 – 3 made by the Commission. We also note that no appeal ground raised, in the event the findings that the dismissals were unfair could not be disturbed, that the reinstatement of the respondents' employment should have been found to be impracticable.

Ground 10 and Ground 11 (Foley Appeal)

90 Both of these grounds called into question Order 4 made by the Commission. They both concern issues of mitigation of loss. Ground 10 asserts that the Commissioner erred in law in holding the respondents were not required to mitigate their loss and in failing to take this into account in making the order. Ground 11, in the Foley appeal, is that the Commissioner erred in fact in holding that the respondent had mitigated his loss after 11 May 2005.

91 Ground 11 may be dealt with shortly, in our opinion. The Commissioner found that Mr Foley was not fit enough to seek out alternative employment immediately after he was terminated as he was stressed by his termination. The Commissioner found that, in January 2005, Mr Foley mitigated his loss and he found alternative employment. The Commissioner said that this "*lasted until around the first hearing date*". The alternative employment which Mr Foley obtained was casual boning work in Canning Vale. He was engaged in this employment from 23 January 2005 until 12 May 2005. He did not seek additional employment from 12 May 2005 until the first date of the hearing, when Mr Foley gave his evidence, on 7 June 2005. In our opinion, in these circumstances, it was open for the Commissioner to find that Mr Foley had mitigated his loss. There was only a few weeks between the date when he ceased the casual employment until the first date of the hearing in which Mr Foley was seeking reinstatement. In our opinion, it was open to the Commissioner to find that it was not unreasonable for Mr Foley to not have sought alternative employment during this relatively short period. We would therefore not uphold Ground 11 of the Foley appeal.

92 This has the effect that Ground 10 only remains live with respect to the Buktenica appeal. This is because of the Commissioner's finding that Mr Buktenica had not mitigated his loss. Yet, on the basis of the *Portilla* decision, the Commissioner said that this did not have any impact upon the orders which could be made under s23A(5)(b) of *the Act*. The appellant contends that the Commissioner erred in following *Portilla*, as *Portilla* was incorrectly decided.

93 The same issue was raised in *BHP Billiton Iron Ore Pty Ltd v Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch* (2006) WAIRC 03908. In that decision, the Full Bench found it unnecessary to consider the correctness of *Portilla*. At paragraphs [86] – [89] of the reasons of Ritter AP in the *BHP Billiton* case, His Honour considered the circumstances in which it would be appropriate for the Full Bench to consider the correctness of one of its earlier decisions. His Honour referred, for example, to the view taken, in joint reasons, by five Justices of the Court of Appeal of the Supreme Court of Western Australia in *Pilcher v H B Brady & Co Pty Ltd* [2005] WASCA 159 at [24] – [26]. In our view, although caution should be exercised in reviewing the correctness of an earlier decision of the Full Bench, it is now

appropriate to conduct that review of *Portilla* in this case. The factors referred to by the Court of Appeal in *Pilcher*, in our opinion, favour doing so.

94 The relevant paragraphs of *Portilla* are contained in the joint judgment of Sharkey P and Kenner C at [206] – [207]. Beech CC wrote separate reasons in *Portilla*, although there is nothing in those reasons to suggest any divergence of view. The paragraphs provided:-

> "*206 In our opinion, s23A(5)(a) and (b) orders are designed, unequivocally, to put an employee back in the position in which she or he would have been, had she or he not been unfairly dismissed, both by actual reinstatement or re-employment and/or by restoring the remuneration lost. Such an order is very different from an order to pay compensation for loss caused by an unfair dismissal. There is no requirement to mitigate loss where an order is made to the employer to pay to an employee "the remuneration lost or likely to have been lost by the employee because of the dismissal". Such an order is required by s23A(5)(b), in its actual words, to require the payment of the remuneration lost; that is, the actual remuneration lost or, alternatively, the remuneration which is likely to have been lost. There is no requirement to mitigate or take any act of mitigation into account in the section, unlike s23A(7) which expressly requires mitigation to be taken into account in awarding an amount of compensation (see also the Workplace Relations Act 1996 (Cth), s170CH(1), (2) and (4)).*
>
> *207 If we are wrong in that opinion, and the amount ordered to be paid under s23A(5)(b) of the Act constitutes compensation, then we would find fair compensation for loss during the time when Mr Portilla remained dismissed and was awaiting the outcome of proceedings was the whole amount of remuneration not paid to him (see the principles expressed in* ***Growers Market Butchers v Backman*** *(1999) 79 WAIG 1313 (FB)).*"

95 S23A of *the Act* sets outs the orders which the Commission may make if it determines that a dismissal of an employee was harsh, oppressive or unfair. S23A(3) provides the Commission with jurisdiction to order reinstatement. S23A(4) provides jurisdiction to order re-employment, where reinstatement is impracticable. S23A(5) provides for orders which the Commission may make in addition to an order under subsection (3) or (4). The subsection provides that the Commission may make either or both of the following orders:-

> "*(a) any order it considers necessary to maintain the continuity of the employee's employment;*
>
> *(b) an order to the employer to pay to the employee the remuneration lost, or likely to have been lost, by the employee because of the dismissal.*"

96 S23A(6) of *the Act* provides that, if and only if, the Commission considers reinstatement or re-employment to be impracticable, the Commission may, subject to subsections (7) and (8), order the employer to pay the employee an amount of compensation for loss or injury caused by the dismissal. S23A(7) provides for matters which the Commission is to have regard to in deciding an amount of compensation for the purposes of making an order under s23A(6). They include, as s23A(7)(a), the efforts of the employer and employee to mitigate the loss suffered by the employee as a result of the dismissal. S23A(8) provides that there is a limit to the amount which may be ordered under s23A(6) to that of 6 months' remuneration of the employee. S23A(9) – (12) provide for ancillary matters which are not relevant to the determination of the present appeal.

97 With respect, the reasoning of Sharkey P and Kenner C in *Portilla* as to why questions of mitigation are not relevant to the making of an order under s23A(5) of *the Act* is not particularly clear to us. It may be that their conclusion was reliant upon mitigation being specifically mentioned in s23A(7), but not in s23A(5). Whilst it is perhaps curious that mitigation might be mentioned in one subsection and not the other, in our opinion, the effect of this is not that mitigation of loss can never be relevant to a consideration of whether and, if so what order to make under s23A(5)(b) of *the Act*.

98 In considering this issue, it is necessary to look at the specific language used in s23A(5)(b) of *the Act*. This refers to an order to pay "*the remuneration lost, or likely to have been lost, by the employee because of the dismissal*". This involves, in our opinion, a causal link between the remuneration lost and the fact of the dismissal from employment. For example, if a person on the day after they have been dismissed, obtains employment which provides remuneration at the same or a greater level than that which they were receiving in their previous employment, then it could not be established, in our opinion, that the person had lost remuneration, because of the dismissal, up to the time of the making of a reinstatement order by the Commission. Further s23A(5) expressly contemplates, by the use of the words "may make either or both", that the Commission could exercise its discretion:-

(a) not to make any orders;

(b) to make an order under (a) but not (b);

(c) to make an order under (b) but not (a); or

(d) to make an order under both (a) and (b).

99 In our opinion, issues of mitigation are relevant to determining whether there has been a loss of remuneration because of a dismissal. This is because if a failure to mitigate is established, then it may not be found that there has been a loss of remuneration because of the dismissal; or at least, the total amount of remuneration not received prior to reinstatement is not found to be because of the dismissal. In this respect, in our respectful opinion, Sharkey P and Kenner C erred in what was said in *Portilla*.

100 The link between mitigation and causation of loss has been recognised in both the common law and in cases dealing with similar powers to those contained within s23A(5)(b) of *the Act*.

101 In *Sotiros Shipping Inc and Aeco Maritime S A v Sameiet Solholt ("The Solholt")* [1983] 1 Lloyd's Law Reports 605 at 608, the Court said:-

> "*A plaintiff is under no duty to mitigate his loss, despite the habitual use by the lawyers of the phrase "duty to mitigate". He is completely free to act as he judges to be in his best interests. On the other hand, a defendant is not liable for all loss suffered by the plaintiff in consequence of his so acting. A defendant is only liable for such part of the plaintiff's loss as is properly to be regarded as caused by the defendant's breach of duty.*"

102 Additionally, in *Standard Chartered Bank v Pakistan National Shipping Corporation and Others* [2001] 1 All ER (Comm) 822 at [41], Potter LJ with whom Wall J and Henry LJ agreed, said:-

> "*It seems to me that, in truth, causation and mitigation are two sides of the same coin, see per Robert Goff J in the Elena D'Amico at 88-89, to which Toulson J made reference at pp.758-9 of his judgment: see also Watts –v- Rake at paragraph 38 above. In every case where an issue of failure to mitigate is raised by the defendant it can be characterised as an issue of causation in the sense that, if damage has been caused or exacerbated by the claimant's unreasonable conduct or inaction, then to that extent it has not been caused by the defendant's tort or breach of contract. However, it seems clear that the burden of proving both unreasonable conduct and exacerbation of damage as a result rests upon the defendant.*"

103 The reference to the reasons of Robert Goff J are to those in the decision of *The Elena D'Amico* [1980] 1 Lloyd's Reports 75. The reference to *Watts v Rake* is to the judgment of the High Court reported at (1960) 108 CLR 158. Earlier in his reasons, Potter LJ at [38] quoted from the reasons of Dixon CJ in *Watts v Rake*, including the following:-

> "*If it appears satisfactorily that damage in a particular form or to a particular degree has been suffered by the plaintiff as a result of the wrong but the defendant maintains that the plaintiff might have avoided or mitigated that consequence by adopting some course which it was reasonable for him to take, it seems clear enough that the law places upon the defendant the burden of proof upon the question whether by the course suggested the damage could have so been mitigated and upon the reasonableness of pursuing that course…*"

104 The link between the concepts of mitigation of loss and causation was discussed in a similar way to these cases by Madgwick J in *Westen v Union des Assurances de Paris*, IRCA, 28 August 1996, 960419, in considering a claim for relief consequent upon an unreasonable termination of employment, pursuant to the former *Industrial Relations Act* 1988 (Cth). (See also *Biviano v Suji Kim Collection*, 28 March 2002, PR915963, AIRC; *Mann Judd (A Firm) v Paper Sales Australia (WA) Pty Ltd and Others* [1998] WASCA 268.)

105 Accordingly, it is relevant, in our opinion, for the Commission to take into account whether a respondent can establish that an applicant seeking reinstatement mitigated their loss in order to determine whether there has been a loss of remuneration because of the dismissal, for the purposes of deciding if an order under s23A(5)(b) of *the Act* should be made. If therefore, after dismissal, a former employee does not take reasonable steps to find new employment, this may mean that the loss they have suffered because of their non receipt of remuneration from their former employer is not, at least to some extent, "*because of the dismissal*". This is a question of fact, dependent on the evidence adduced in each case.

106 It follows that the Commissioner, albeit understandably, erred in following *Portilla* and deciding that mitigation was irrelevant to the making of an order under s23A(5)(b) of *the Act*. The Commissioner made a finding that Mr Buktenica had not mitigated his loss. The Commissioner did not make a finding, however, on what impact this would have had upon any orders to be made under s23A(5)(b) with respect to Mr Buktenica.

107 The order made by the Commission with respect to Mr Buktenica should be varied so that he does not receive payment for remuneration, not lost because of his dismissal, but because of his failure to take reasonable steps to obtain alternative employment. It may be that the parties can agree upon the way in which the order made by the Commission should be varied. If agreement cannot be reached, then further submissions will need to be made on this issue.

108 In our opinion, it is appropriate to request that the parties within 7 days advise the Full Bench of whether they have been able to reach agreement on this issue and, if they have not, to provide written submissions upon the way in which they contend the order of the Commission ought to be varied. If this occurs, it will be necessary for the Full Bench to consider these written submissions and provide supplementary reasons for decision. On either scenario, a minute of proposed orders will be published in due course.

2006 WAIRC 04431

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SEALANES (1985) PTY LTD
	APPELLANT
	-and-
	JOHN FRANCIS FOLEY AND JOHN ANTHONY BUKTENICA
	RESPONDENTS
CORAM	FULL BENCH
	THE HONOURABLE M T RITTER, ACTING PRESIDENT
	SENIOR COMMISSIONER J F GREGOR
	COMMISSIONER J H SMITH
HEARD	MONDAY, 13 MARCH 2006
REASONS DELIVERED	TUESDAY, 4 APRIL 2006
FINAL SUPPLEMENTARY WRITTEN SUBMISSIONS FILED	TUESDAY, 9 MAY 2006
SUPPLEMENTARY REASONS DELIVERED	WEDNESDAY, 31 MAY 2006
FILE NO.	FBA 22 OF 2005, FBA 23 OF 2005
CITATION NO.	2006 WAIRC 04431

CatchWords	Industrial Law (WA) - Appeals against decision of the Commission - Alleged unfair dismissals - Mitigation of loss and relevance to order under s23A of the *Industrial Relations Act* 1979 (WA) (as amended) - Orders that Commission permitted to make under s23A - Jurisdiction of Full Bench to make orders for repayment of money - Implied jurisdiction of the Full Bench - *Industrial Relations Act* 1979 (WA) (as amended), s23(3)(h), s23A, s23A(3), s23A(5)(a), s23A(5)(b), s23A(12), s49(5), s49(5)(b), s49(5)(c), s49(6), s49(6).
Decision	Appeal No FBA 22 of 2005 dismissed. Appeal No FBA 23 of 2005 upheld and order at first instance varied.
Appearances	
Appellant	Mr J Blackburn (of Counsel), by leave
Respondents	Ms J Boots (of Counsel), by leave

Supplementary Reasons for Decision

THE FULL BENCH:

1 In these two appeals, the Full Bench published reasons for decision on 4 April 2006. In the reasons the Full Bench stated that the grounds of appeal were not upheld, with the exception of ground 10 of what was described in the reasons as the Buktenica appeal (FBA 23 of 2005).

2 With respect to this ground, the Full Bench concluded as follows:-

> "*106* *It follows that the Commissioner, albeit understandably, erred in following Portilla and deciding that mitigation was irrelevant to the making of an order under s23A(5)(b) of the Act. The Commissioner made a finding that Mr Buktenica had not mitigated his loss. The Commissioner did not make a finding, however, on what impact this would have had upon any orders to be made under s23A(5)(b) with respect to Mr Buktenica.*
>
> *107* *The order made by the Commission with respect to Mr Buktenica should be varied so that he does not receive payment for remuneration, not lost because of his dismissal, but because of his failure to take reasonable steps to obtain alternative employment. It may be that the parties can agree upon the way in which the order made by the Commission should be varied. If agreement cannot be reached, then further submissions will need to be made on this issue*."

3 The reference to *Portilla* in these reasons is to the decision of the Full Bench in *Portilla v BHP Billiton Iron Ore Pty Ltd* (2005) 85 WAIG 3441.

4 In the concluding paragraph of the reasons of the Full Bench it was requested that the parties within seven days advise the Full Bench whether they were able to reach agreement on the orders to be made and, if they did not, to provide written submissions upon the way in which they contended the orders of the Commission ought to be varied. By agreement between the parties and the Full Bench, this period of time was extended. The parties were not, however, successful in reaching agreement on the issue. Accordingly, and as foreshadowed by the reasons of the Full Bench, the parties provided written submissions. As part of the submissions the parties attached a draft of the orders it was submitted the Full Bench should make.

5 The appellant contended in its written submissions that the Full Bench was in an appropriate position to make orders varying those made by the Commission at first instance and provided submissions on the way in which it contended this ought to be done.

6 The respondents, on the other hand, submitted that with respect to Mr Buktenica it was appropriate to remit the matter to the Commission as constituted at first instance for further hearing and determination. This was because the respondents contended there was insufficient evidence before the Full Bench to allow it to determine the extent to which the remuneration lost by Mr Buktenica was due to his dismissal, lack of mitigation or a combination of both. The written submissions of the respondents contended there was no finding by the Commission at first instance as to these issues.

7 The parties do agree that Order 4 of the Commission at first instance should be varied to only apply to Mr Foley. This will be reflected in the minute of orders to be published.

8 The Full Bench has, pursuant to s49(5)(c) of the *Industrial Relations Act* 1979 (WA) (as amended) (*the Act*), a discretion as to whether it will remit a case "*to the Commission for further hearing and determination*". It is a discretion which is qualified by the contents of s49(6a) of *the Act*. This provides that:-

> "*(6a)* *The Full Bench is not to remit a case to the Commission under subsection (5)(c) unless it considers that it is unable to make its own decision on the merits of the case because of lack of evidence or for other good reason.*"

9 This subsection provides a legislative direction to the Full Bench to not remit a matter to the Commission if it is properly able to conclude a case itself.

10 It is apparent from the transcript of the hearing at first instance that issues of mitigation and the remuneration lost by the respondents because of their dismissals were then live issues. The parties had the opportunity to adduce evidence relevant to them. There was evidence adduced and submissions made upon the issues. In our opinion, it would not be appropriate to remit the matter so as to allow the parties the opportunity to attempt to supplement the evidence which has already been led on these issues. Additionally, it is our opinion that the Full Bench, aided by the findings made by the Commission at first instance, is in a position to finalise the orders which should be made. Given the contents of s49(6)(a) of *the Act*, the Full Bench should therefore do so.

11 At paragraph [105] of the earlier reasons of the Full Bench the following was said:-

> "*105* *Accordingly, it is relevant, in our opinion, for the Commission to take into account whether a respondent can establish that an applicant seeking reinstatement mitigated their loss in order to determine whether there has been a loss of remuneration because of the dismissal, for the purposes of*

> *deciding if an order under s23A(5)(b) of the Act should be made. If therefore, after dismissal, a former employee does not take reasonable steps to find new employment, this may mean that the loss they have suffered because of their non receipt of remuneration from their former employer is not, at least to some extent, "because of the dismissal". This is a question of fact, dependent on the evidence adduced in each case.*"

12 The Commissioner made a finding at first instance, unchallenged by any appeal, that Mr Buktenica did not mitigate his loss. That is, Mr Buktenica did not take reasonable steps to find alternative employment. On his evidence, Mr Buktenica took no steps to find alternative employment. The question which remains is the extent to which, given the Commissioner's finding, Mr Buktenica nevertheless suffered a loss of remuneration because of his dismissal.

13 In considering this issue, the Full Bench must have regard to the evidence before the Commission at first instance as to the prospects of Mr Buktenica finding alternative employment if he chose to seek it. There was evidence of three types on this issue. The first was the evidence of Mr Foley that he was able to obtain casual work in a "*boning room*" within "*a couple of weeks*" of starting to look for work (T39). A payslip of Mr Foley's was received as an exhibit which showed he was paid $9,304.10 in gross wages. This payslip together with his oral evidence established that he was employed during the period from 23 January 2005 to 17 May 2005 (T39, 70). As stated in the earlier reasons of the Full Bench, the proceedings at first instance took place on the assumed basis that all of the evidence adduced at the joint hearing was admissible in each application. Accordingly, this evidence of Mr Foley is able to be considered for present purposes.

14 The second piece of evidence is that the appellant tendered as exhibit R11 a bundle of approximately 1,000 newspaper advertisements for storepersons, pickers and packers which appeared in the West Australian newspaper in the period 13 November 2004 to 1 June 2005. It is a notorious fact that the West Australian newspaper is an important source of ascertaining employment vacancies in Western Australia. This evidence reinforces the view that the prospects for Mr Buktenica to have obtained employment, if he had attempted to do so, were promising. It is correct, as submitted on behalf of Mr Buktenica, that the exhibit containing the West Australian newspaper advertisements was not put to him by counsel for the appellant for comment when he gave his evidence. In response, the appellant submitted that it would have been pointless to have put the exhibit to Mr Buktenica when he had said that he was not looking for employment.

15 In our opinion, this only partially answers the point that the exhibit was not put to Mr Buktenica. The importance of the exhibit is that it suggests there was employment available for Mr Buktenica to apply for if he chose to. Mr Buktenica could have been, but was not, asked by counsel for the appellant as to whether there was any reason that the type of employment referred to in the advertisements would not have been suitable for Mr Buktenica to apply for. Because this did not occur, it affects to some extent the cogency of the evidence of the advertisements with respect to Mr Buktenica.

16 Thirdly, Mr Buktenica gave evidence himself that he had been "*offered a few jobs by my friends, but I didn't want to take anything on until this case was finished, because I didn't want to start with somebody to let them go* [sic] *– and then later go back to Sealanes, which I am confident in winning the case and going back there in* [sic] *future*" (T107). This was part of the answer of Mr Buktenica in reply to a question from his counsel as to why he did not seek out employment. He also said, "*well I didn't want to*". Although Mr Buktenica did not indicate when he was offered employment by his friends, or what type of employment it was, the evidence again suggests that employment was fairly readily available to be obtained by Mr Buktenica if he had chosen to seek it.

17 Overall, we accept the submission of the appellant that, if he had chosen to seek employment, it is likely that Mr Buktenica would have been successful in doing so between two to five weeks after the termination of his employment by the appellant.

18 There is not much evidence about the amount of remuneration which Mr Buktenica would have been able to earn by obtaining other employment. The evidence of what Mr Foley was paid suggests that on average he received payment of about 10% less per week than he had when employed by the appellant. Accordingly, it may be that, if Mr Buktenica had obtained employment, he would not have been remunerated at the same level as he had been by the appellant. Due to this, we think it would be appropriate to make a finding that the loss to Mr Buktenica because of his dismissal was reasonably likely to have been the amount of five weeks of the remuneration he would have received if he had remained employed by the appellant. We have assessed the period at five weeks, the outer range referred to above, to take into account the possibility that the remuneration Mr Buktenica may have received from an alternative employer could have been less than that provided by his employment with the appellant. In our opinion, the loss Mr Buktenica suffered beyond five weeks' worth of remuneration was not a loss because of the dismissal, but because of his failure to mitigate his loss by reasonably seeking alternative employment, as found by the Commissioner at first instance.

19 As is set out below the appellant paid to Mr Buktenica five weeks remuneration in lieu of notice at or about the time of his dismissal. The payment of this sum should be taken into account in assessing the loss suffered because of the dismissal. In this instance the amount paid in lieu of notice equates with the amount which we have found Mr Buktenica would otherwise have lost because of his dismissal. The result is that, overall, Mr Buktenica did not suffer any loss because of his dismissal. Accordingly, no order should have been made by the Commission at first instance, in favour of Mr Buktenica, under s23A(5)(b) of *the Act*.

20 The order which should have been made by the Commission at first instance and the orders which should now be made by the Full Bench are complicated however by events which occurred as a consequence of Mr Buktenica's dismissal and the orders made by the Commission at first instance.

21 At or about the time of his dismissal on 11 November 2004, Mr Buktenica was paid the amount of $18,922.29 made up as follows:

Accrued annual leave – 7.48 weeks	$ 5,396.96
Accrued long service leave – 8.288 weeks	$ 5,470.13
Pay until 11 November 2004	$ 174.50
Pay in lieu of notice – 5 weeks	$ 3,300.00
Redundancy pay – 12 weeks	$ 7,920.00
Less tax and union fees	($ 3,339.30)
Net	$18,922.29

22 These figures are obtained from the letter of dismissal which was provided to Mr Buktenica on or about 11 November 2004.

23 The orders made by the Commission at first instance are set out in paragraph 3 of the earlier reasons of the Full Bench. Relevant, for present purposes, is Order 4 which was as follows:-

> "*… the Commission …*
>
> *4 ORDERS that the respondent shall pay Mr Buktenica and Mr Foley, within 14 days of the date of this order, an amount of money in respect of all of the remuneration lost by them by reason of the termination of their contracts of employment as if they had worked continuously in the employment of the respondent between 11 November 2004 and the date they are reinstated, less the following amounts:*
>
> *a) any income earned by Mr Buktenica or Mr Foley in the period from 11 November 2004 to the date they are reinstated;*
>
> *b) any payments made by the respondent to Mr Buktenica and Mr Foley in lieu of any accrued but untaken entitlements to annual leave and long service leave on or about 11 November 2004;*
>
> *c) any payments made by the respondent to Mr Buktenica and Mr Foley in lieu of notice on or about 11 November 2004; and*
>
> *d) any payments made by the respondent to Mr Buktenica and Mr Foley in lieu of redundancy payments on or about 11 November 2004.*"

24 In the respondents' supplementary written submissions, the Full Bench was advised as to what happened with respect to Mr Buktenica, in consequence of the making of this order. The appellant, in additional written submissions, did not object to the Full Bench receiving this information. Relevantly, the information provided was that on 15 December 2005 the appellant paid to Mr Buktenica the wages he would have earned from 12 November 2004 to 25 November 2005. This was a gross amount of $38,328.60. From this amount was deducted an amount of $22,087.09. This amount was deducted by way of notional repayment for the accrued long service leave, annual leave, notice and redundancy payments (including taxation paid by the appellant to the Australian Taxation Office), which had been paid to Mr Buktenica at or about the time of his termination. This was in accordance with Order 4 of the Commission. This amount of $22,087.09, together with taxation on wages, was deducted from the amount of $38,328.60 to leave a net amount to be paid to Mr Buktenica of $12,623.21.

25 The appellant submits that the orders now to be made by the Full Bench should be fashioned in such a way so as to have the effect of requiring Mr Buktenica to repay the monies paid to him at the time of his dismissal in November 2004. The appellant submits that, unless such orders are made, Mr Buktenica would receive a windfall gain. The respondents dispute this.

26 There is an issue as to whether the Full Bench has the power to make the order sought by the appellant. The orders which may be made by the Full Bench on appeal are set out in s49(5) and (6) of *the Act*. Section 49(5)(b) provides that the Full Bench may vary a decision in such manner as the Full Bench considers appropriate. This power is qualified by s49(6) which provides that the decision, as varied, "*shall be in terms which could have been awarded by the Commission that gave the decision*".

27 Section 23(3)(h) of *the Act* relevantly provides, in effect, that in a claim of harsh, oppressive or unfair dismissal such as the present, the Commission may not make any order except an order which is authorised by s23A of *the Act*.

28 The appellant submits that the order of repayment which it now seeks is authorised by s23A(3), s23A(5)(a) and/or s23A(12) of *the Act*. These subsections each provide as follows:-

> "*(3) The Commission may order the employer to reinstate the employee to the employee's former position on conditions at least as favourable as the conditions on which the employee was employed immediately before dismissal.*"
>
> "*(5) The Commission may, in addition to making an order under subsection (3) or (4), make either or both of the following orders —*
>
> *(a) an order it considers necessary to maintain the continuity of the employee's employment;*"
>
> "*(12) The Commission may make any ancillary or incidental order that the Commission thinks necessary for giving effect to any order made under this section.*"

29 In our opinion, s23A(3) of *the Act* does not of itself provide the authority to make any order for repayment. This subsection provides that the Commission may make an order for reinstatement on conditions at least as favourable to those which applied immediately prior to dismissal. An order for repayment of monies paid upon dismissal does not satisfy this criteria.

30 Additionally, an order for repayment of monies does not in our opinion satisfy the criteria of an order considered to be necessary to maintain the continuity of an employee's employment as set out in s23A(5)(a) of *the Act*. This subsection provides authority for the making of an order like order 3 as made by the Commission at first instance.

31 Section 23A(12) of *the Act* provides power for the Commission to make ancillary or incidental orders. These orders are restricted to those which the Commission thinks are "*necessary for giving effect to any order made under this section*". The appellant submits that an order for repayment of monies paid at the time of a dismissal could be made under s23A(12) as being an order necessary for giving effect to an order for reinstatement. In our opinion, this submission is correct. On occasions it will be necessary to make such an order to avoid a reinstatement order providing an unwarranted gain to an applicant and a corresponding hardship to the respondent. In our opinion, this is now such a case. The orders made by the Commission at first instance reinstated Mr Buktenica. Order 3 was ancillary to this in that it reinstated his accrued entitlements such as for annual leave and long service leave. These entitlements had, as noted earlier, been paid out by the appellant at or about the time of Mr Buktenica's dismissal. Once the Commission ordered the reinstatement of these entitlements, it was inappropriate for Mr Buktenica to have both the benefit of the entitlements and also the earlier receipt of the payout of these entitlements. It seems clear that the Commissioner was of this view. Accordingly, she drafted Order 4 (for payment of remuneration lost) to effectively allow for the repayment of the amounts paid for annual leave and long service leave entitlements. The same thing was done in Order 4 with respect to the amount paid to Mr Buktenica as a redundancy payment. Again this was appropriate. This is because, as ancillary to the reinstatement order, Mr Buktenica should have had to in effect repay the amount he

received as a redundancy payment upon termination. It would be unfair and inappropriate for Mr Buktenica to both be reinstated and keep the amount paid to him as a redundancy payment as a consequence of his dismissal.

32 There is now a difficulty in that the order made by the Commission, which in effect required the repayment of the amount paid to Mr Buktenica for accrued entitlements and redundancy, was the "*remuneration lost*" order under s23A(5)(b) of *the Act*. These amounts were to be deducted from what was to be paid pursuant to this order. The "*remuneration lost*" order is however one which, as stated above, in our opinion, should not have been made. Therefore Mr Buktenica has continued to have the benefit of the receipt of the accrued entitlements and redundancy payments when he should not have. In our opinion therefore the Full Bench should make an order requiring Mr Buktenica to repay these amounts. The amount paid to Mr Buktenica in lieu of notice should not be included in such an order. This is because this payment has already been taken into account in determining that no order should have been made under s23A(5)(b) of *the Act*.

33 On behalf of Mr Buktenica, it was submitted that he has in effect already repaid the accrued entitlements/redundancy payments as referred to in paragraph [24] above. The fallacy of this argument is that the amounts were not actually repaid and their notional deduction was from the amount paid in consequence of the "*remuneration lost*" order; an order which should not have been made.

34 The draft order filed by the appellant did not in its terms seek an order that Mr Buktenica repay the amount paid to him in December 2005 pursuant to the "*remuneration lost*" order. From their supplementary written submissions, particularly paragraph [47] however, we are satisfied that this was the appellant's intention. In our opinion it is appropriate to make such an order. We are as set out below also satisfied the Full Bench has the jurisdiction to make such an order.

35 A successful appellant is entitled to the repayment of an amount paid pursuant to a court order which is set aside on appeal. (*Easterday v Western Australia* (2005) 30 WAR 122 per Steytler J at [31]). It is usually open to an appeal court to make an order for the repayment of this amount. (See *Easterday* at [31]).

36 Although *the Act* does not provide the Full Bench with any specific jurisdiction to make such an order we are satisfied nevertheless it does have the jurisdiction to do so. This is because an order for repayment is, as expressed earlier, in our opinion, an order "*in terms which could have been awarded by the Commission*" at first instance. Accordingly it meets the terms of s49(6) of *the Act*. Additionally or alternatively the Full Bench, as any court of limited jurisdiction, has the jurisdiction necessarily implied to effectively carry out the powers granted to it. (See the reference to the authorities helpfully referred to in *Medical Board (SA) v N,JRP and Another* (2006) 93 SASR 546 at [21]-[23]).

37 In this context the reference to jurisdiction which is "*necessary*" is a reference to a power to make orders reasonably required or which are legally ancillary. (*Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435 at [51]). In our opinion the making of an order for repayment of the type under consideration is reasonably necessary as ancillary to the power of the Full Bench to uphold the appeal. This is because the orders made by the Full Bench will in effect set aside an order for payment of an amount of money made by the Commission, on the basis that the order should not have been made and the appellant has paid an amount of money to the respondent as a result of the order which was made.

38 In our opinion, the order which should be made by the Full Bench in the Foley appeal (FBA 22 of 2005) is that the appeal is dismissed.

39 The orders which in our opinion should be made in the Buktenica appeal (FBA 23 of 2005) are that:-

1. The appeal is upheld.
2. The order made in application Nos 1537 and 1538 of 2004 is varied by:-
   (a) The deletion of the words "*Mr Buktenica and*", and "*Mr Buktenica or*" wherever they appear in Order 4.
   (b) The insertion, as Order 4A, of the following:-
   "*4A Orders that Mr Buktenica is to repay to the respondent an amount of money equivalent to the monies paid to him by the respondent in or about November 2004 on account of accrued annual leave, accrued long service leave and redundancy.*"
3. The respondent shall repay to the appellant the amount paid to him in or about December 2005 in satisfaction of order 4 made by Commissioner Harrison in application Nos 1537 and 1538 of 2004.

40 Order 2(b) may be made, as explained above, as we are satisfied it is an order "*in terms which could have been awarded by the Commission*" at first instance. Section 49(6) of *the Act* is therefore satisfied.

41 A minute of proposed orders will issue in these terms.

2006 WAIRC 04543

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SEALANES (1985) PTY LTD
	APPELLANT
	-and-
	JOHN FRANCIS FOLEY
	RESPONDENT
CORAM	FULL BENCH THE HONOURABLE M T RITTER, ACTING PRESIDENT SENIOR COMMISSIONER J F GREGOR COMMISSIONER J H SMITH
DATE	WEDNESDAY, 14 JUNE 2006
FILE NO/S	FBA 22 OF 2005
CITATION NO.	2006 WAIRC 04543

Decision	Appeal dismissed.
Appearances	
Appellant	Mr J Blackburn (of Counsel), by leave
Respondent	Ms J Boots (of Counsel), by leave

Order

This matter having come on for hearing before the Full Bench on 13 March 2006, and having heard Mr J Blackburn (of Counsel), by leave on behalf of the appellant and Ms J Boots (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 4 April 2006 and supplementary reasons for decision having been delivered on 31 May 2006, it is this day, 14 June 2006, ordered that appeal No FBA 22 of 2005 be dismissed.

By the Full Bench

[L.S.] (Sgd.) M T RITTER, Acting President.

2006 WAIRC 04544

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SEALANES (1985) PTY LTD
	APPELLANT
	-and-
	JOHN ANTHONY BUKTENICA
	RESPONDENT
CORAM	FULL BENCH THE HONOURABLE M T RITTER, ACTING PRESIDENT SENIOR COMMISSIONER J F GREGOR COMMISSIONER J H SMITH
DATE	WEDNESDAY, 14 JUNE 2006
FILE NO/S	FBA 23 OF 2005
CITATION NO.	2006 WAIRC 04544

Decision	Appeal upheld and order at first instance varied.
Appearances	
Appellant	Mr J Blackburn (of Counsel), by leave
Respondent	Ms J Boots (of Counsel), by leave

Order

This matter having come on for hearing before the Full Bench on 13 March 2006, and having heard Mr J Blackburn (of Counsel), by leave on behalf of the appellant and Ms J Boots (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 4 April 2006 and supplementary reasons for decision having been delivered on 31 May 2006, and there having been a speaking to the minutes before the Full Bench on 14 June 2006, and the Full Bench having given reasons orally at the speaking to the minutes, it is this day, 14 June 2006, ordered that:-

1. The appeal is upheld.
2. The order made in application Nos 1537 and 1538 of 2004 is varied by:-
   (a) The deletion of the words "*Mr Buktenica and*", and "*Mr Buktenica or*" wherever they appear in Order 4.
   (b) The insertion, as Order 4A, of the following:-
   "*4A Orders that Mr Buktenica is to repay to the respondent an amount of money equivalent to the monies paid to him by the respondent in or about November 2004 on account of accrued annual leave, accrued long service leave and redundancy.*"
3. The respondent shall repay to the appellant the amount paid to him in or about December 2005 in satisfaction of order 4 made by Commissioner Harrison in application Nos 1537 and 1538 of 2004.
4. The respondent shall repay to the appellant the amounts referred to in Orders 2(b) and 3 of these Orders within 14 days of the date hereof.

By the Full Bench

[L.S.] (Sgd.) M T RITTER, Acting President.

PRESIDENT—Matters dealt with—

2006 WAIRC 04241

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE ST CECILIA'S COLLEGE SCHOOL BOARD
	APPLICANT
	-and-
	CARMELINA GRIGSON
	RESPONDENT
CORAM	THE HONOURABLE M T RITTER, ACTING PRESIDENT
HEARD	TUESDAY, 11 APRIL 2006
DELIVERED	WEDNESDAY, 26 APRIL 2006
FILE NO.	PRES 4 OF 2006
CITATION NO.	2006 WAIRC 04241

CatchWords	Industrial Law (WA) - Application to stay order made by Commission - Stay order principles - Circumstances that justify granting of a stay - Non opposition to order by respondent - Application granted - *Industrial Relations Act* 1979 (WA) (as amended), s49(11).
Decision	Application granted
Appearances	
Applicant	Mr I Curlewis (of Counsel), by leave
Respondent	No appearance

Reasons for Decision (Ex Tempore, Edited from the Transcript)

THE ACTING PRESIDENT:

1 I have before me today an application pursuant to s49(11) of the *Industrial Relations Act* 1979 (WA) (as amended) (*the Act*). That subsection provides that at any time after an appeal to the Full Bench has been instituted under that section a person who has a sufficient interest may apply to the Commission for an order that the operation of the decision appealed against be stayed wholly or in part, pending the hearing and determination of the appeal. The application today is for an order staying the operation of the order 3(a) of the Commission's order in application No 1555 of 2004 issued on 10 March 2006. Although not stated in the application in terms, it is apparent from the application that it seeks the stay of the operation of that order until the hearing and determination of appeal FBA 10 of 2006.

2 In accordance with s49(11) of *the Act* an appeal has been instituted by the present applicant to the Full Bench. It is also clear that the applicant, as the respondent at first instance and as the party against whom order 3(a) has been made, has sufficient interest to apply to the Commission for the stay order which is sought today.

3 After the application was filed, I made programming orders leading to the determination of the stay application this morning. Those programming orders included that the application endorsed with the programming orders be served on the respondent to this application and that a declaration of service be filed with the Commission by 4.00pm on 5 April 2006. That direction was complied with. There was also an order that should the respondent intend to oppose the application, then before 4.00pm on 6 April 2006 she should file and serve an answer. That direction was not complied with for reasons which will become apparent shortly. There was also an order that written submissions be filed and served by all parties by 4.00pm on 7 April 2006. That direction was complied with by the applicant but not the respondent.

4 I have read the written submissions that were filed by the applicant. They refer to the arguability of the appeal in terms of the appeal raising serious issues to be tried and also refer to the balance of convenience favouring the granting of the application. Whilst not descending to the detail of all of the submissions made on that point, the emphasis of the submissions is upon the possibility of the applicant being able to satisfy the order which was made by the Commission at first instance.

5 It is said that compliance with the order would cause the applicant extreme hardship. The submission also mentions that the St Cecilia's College School Board (the board) was at all times an unincorporated association; that the elected or nominated members of the board were volunteers and the role of the board in acting as a consultative committee to the principal of St Cecilia's School.

6 The submissions also state that the school ceased to operate as such at the end of the December 2004 year and at the same time the board ceased operating.

7 Yesterday morning at about 9.30am my associate received from the respondent's solicitor an email. The relevant parts of the email are as follows:-

> "*I have spoken with Mr Curlewis about this matter. I have instructions from my client not to oppose the application for a stay of Order 3(a) in application number 1555 of 2004 pending the outcome of the appeal FBA 10 of 2006. We will, therefore, not be filing submissions or attending the hearing of the application for a stay*."

8 Consistent with that email, the respondent is not represented this morning and submissions have not been filed on behalf of the respondent. The email indicates that Mr Curlewis who appears for the applicant today was sent a copy of the email and Mr Curlewis has confirmed this morning that this has occurred.

9 I have in previous cases set out the principles which should apply in deciding whether or not to order a stay. I refer in particular to my decisions in *John Holland Group Pty Ltd v CFMEU* (2005) 85 WAIG 3918 and also *Seacode Nominees Pty Ltd as Trustee for the Stonehouse Family Trust v Nigel Anthony Penfold* (2005) 85 WAIG 3926. I will not refer to the detail of those decisions setting out the principles to be applied, but it is clear that the jurisdiction is to be exercised when there are special reasons for doing so; special circumstances need to exist before one would ordinarily grant a stay order. Often special circumstances will occur when an order needs to be made to preserve the integrity of the appeal so that the appeal is not rendered nugatory. That is not the only circumstance however.

10 In this instance, I am satisfied that it is appropriate to make an order for a stay by a combination of three factors. The first is the arguability of the appeal; the second is the financial circumstances of the applicant and the third is the fact that the respondent does not oppose the making of the order. As I noted in the *Seacode* decision, the financial circumstances of an applicant does not usually of itself justify the granting of a stay. There are, however, other circumstances in this case which, as I have said, are the arguability of the appeal and perhaps, more importantly, the attitude of the respondent to the stay being ordered. Therefore what I propose to do is to make the following orders.

11 The first is that order 3(a) made by the Commission on 10 March 2006 in application No 1555 of 2004 is wholly stayed pending the hearing and determination of appeal FBA 10 of 2006 or until further order. Secondly, that the parties have liberty to apply on 48 hours notice for the purpose of seeking any amendment to or revocation of the first order made.

2006 WAIRC 04193

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE ST CECILIA'S COLLEGE SCHOOL BOARD
	APPLICANT
	-and-
	CARMELINA GRIGSON
	RESPONDENT
CORAM	THE HONOURABLE M T RITTER, ACTING PRESIDENT
DATE	THURSDAY, 13 APRIL 2006
FILE NO/S	PRES 4 OF 2006
CITATION NO.	2006 WAIRC 04193

Decision	Application granted
Appearances	
Applicant	Mr I Curlewis (of Counsel), by leave
Respondent	No appearance

Order

This matter having come on for hearing before me on 11 April 2006, and having heard Mr I Curlewis (of Counsel), by leave, on behalf of the applicant, and there being no appearance by or on behalf of the respondent, and the reasons for decision being given ex tempore and to be edited and published at a future date, it is this day, 11 April 2006, ordered that:-

(1) Order 3(a) made by the Commission on 10 March 2006, in application No 1555 of 2004, is wholly stayed pending the hearing and determination of FBA 10 of 2006 or until further order.

(2) The parties have liberty to apply on 48 hours notice for the purpose of seeking any amendment to or revocation of the first order made.

(Sgd.) M T RITTER,
[L.S.] Acting President.

AWARDS/AGREEMENTS—Application for—

2006 WAIRC 04552

CHUBB SECURITY PTY LTD BP SITE ENTERPRISE AGREEMENT 2006

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	CHUBB SECURITY PTY LTD
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	THURSDAY, 15 JUNE 2006
FILE NO/S	AG 55 OF 2006
CITATION NO.	2006 WAIRC 04552

Result	Discontinued

Order

WHEREAS on 23 March 2006 the applicant applied to the Commission for an order pursuant to the *Industrial Relations Act, 1979;* and

WHEREAS the Commission listed the matter for hearing on 25 May 2006; and

WHEREAS on 22 May 2006 the applicant advised the Commission that it did not wish to proceed with the matter and the hearing was vacated; and

WHEREAS on 2 June 2006 the applicant lodged a Notice of Discontinuance;

NOW THEREFORE pursuant to the powers vested in it by the *Industrial Relations Act, 1979,* the Commission, hereby orders:

THAT the application be, and is hereby, discontinued.

[L.S.]

(Sgd.) J L HARRISON,
Commissioner.

2005 WAIRC 03267

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS
	APPLICANT
	-v-
	SKILLED RAIL SERVICES PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
HEARD	WEDNESDAY, 7 DECEMBER 2005
DELIVERED	FRIDAY, 9 DECEMBER 2005
FILE NO.	A 5 OF 2005
CITATION NO.	2005 WAIRC 03267

Catchwords	Industrial law – Award – Application for a new award – Whether leave should be granted to intervenor to intervene in proceedings – Principles applied – Leave granted by Commission – Request by applicant to expedite proceedings due to impending legislation – Objection by respondent to expedition of proceedings – Commission not persuaded that some expedition to proceedings should not be provided – Industrial Relations Act 1979 (WA) s 27(1)(k), s 32, s 36A(2), s 36A(3); Commonwealth Constitution s 51(xx); Workplace Relations Amendment (Work Choices) Bill 2005 Part 3, Sch 1-15
Result	Orders and declarations issued
Representation	
Applicant	Mr D Schapper of counsel instructed by D H Schapper & Co
Respondent	Mr J Blackburn of counsel instructed by the Australian Mines and Metals Association
	Mr N Ellery of counsel instructed by Corrs Chambers Westgarth
Intervenor	Ms E Hartley of counsel instructed by Freehills

Reasons for Decision

1 The substantive claim in this matter is for a new award to be known as the Iron Ore Production and Processing (Engine Drivers - Skilled Rail services) Award ("the Award"). The application was filed on 9 September 2005 and following procedural requirements contained in the Industrial Relations Act 1979 ("the Act") and the Industrial Relations Commission Regulations 2005 ("the Regulations"). The application was the subject of a conciliation conference pursuant to s 32 of the Act on 30 November 2005, before the Commission as otherwise constituted. The substance of the application for the Proposed Award is not dissimilar to another application before the Commission in application A3 of 2005, which was the subject of a decision by the Commission, dated 2 November 2005, finding in favour in principle of the making of an award with the parties to confer as to its terms.

2 The Commission as presently constituted listed the application for mention on 7 December 2005, by reason of a request by the applicant's solicitor and counsel Mr Schapper, that due to impending legislative changes promulgated by the Commonwealth Parliament, that this application be expedited.

3 The application proceeded before the Commission on 7 December 2005. Mr Schapper of counsel appeared on behalf of the applicant. Mr Blackburn of counsel appeared on behalf of the respondent. Mr Ellery of counsel appeared on behalf of the Integrated Group Ltd who were served with a copy of the notice of application and are presently therefore, by reason of s 29B(b) of the Act, parties to the proceedings. Additionally, Ms Hartley of counsel by letter dated 6 December 2005, acting on behalf of Pilbara Iron Company (Services) Pty Ltd, Hamersley Iron Pty Ltd, Robe River Mining Company Pty Ltd and Robe River Iron Associates ("the Companies"), sought leave to intervene pursuant to s 27(1)(k) of the Act.

Intervention

4 The grounds advanced by the proposed intervenor to seek leave to intervene are essentially two-fold. The first ground is that the scope clause of the Proposed Award, as it is presently drafted, will apply to the Companies who employ engine drivers at the sites referred to in the scope clause. Secondly, it was submitted by counsel for the proposed intervenor that the Proposed Award had some potential to cause industrial difficulties because the Companies had concerns about the level of rates of pay claimed in the Proposed Award, being higher than those rates currently paid to employees of the

Companies. It appeared common ground that the respondent provides, by way of labour hire, engine drivers to one or all of the Companies.

5 The relevant principles in relation to the grant of an application to intervene are well settled. There is a requirement on a proposed intervenor to establish, particularly where seeking an unlimited right of intervention, a direct and immediate legal right or liability that may be affected by the result of the proceedings: *R v Ludeke*; *Ex parte COA* (1985) 59 ALR 17. In this case, it was not without some oscillation that I reached the view that the Companies may have an interest which may be directly affected by the outcome of the proceedings. It is only, in particular, the first ground of the application to seek leave to intervene that persuaded me to this effect. Had it only been the second ground, in my view that would not be a sufficient interest of itself to sustain the grant of leave to intervene. Whilst it was Mr Schapper's submission that it was not the intention of the applicant that the Proposed Award apply beyond labour hire companies and the like, as presently drafted, I was satisfied that the Companies had a legitimate interest on this basis.

Expedition

6 Mr Schapper submitted that the application should be listed for hearing and programming directions and orders should be made, to enable the matter to proceed to be heard prior to or soon after Christmas this year. His submission was that, in a nutshell, given the uncertainty surrounding the impact of the proposed changes to the Workplace Relations Act 1996 (Cth) ("the WR Act"), and in particular its effect on State jurisdictions, then the applicant has a right to have its matter dealt with on the law as it presently stands. For this not to be so, as the submission went, the applicant may be ultimately deprived of its right to prosecute the claim for the Proposed Award. Mr Schapper relied upon a judgement of the Full Court of the Federal Court in *Warramunda Village Inc v Pryde* (2002) 116 FCR 58 in support of his submissions.

7 Mr Blackburn, supported by Mr Ellery, put various submissions in opposition to the applicant's request. In summary terms, those submissions included that the amendments to the WRA have been foreshadowed to not become operative prior to about March 2006 and there is therefore no need for any undue expedition of the proceedings. Secondly, it was submitted that in any event, the Commonwealth Government has foreshadowed in parliamentary debate that it intends to enact regulations to allow proceedings in State jurisdictions that are part heard at the time of the commencement of the amendments to continue. In *Jupp v Computer Power Group Ltd & Another* (1994) 122 ALR 11 it was said that a court should not expedite a proceeding in view of pending legislative change as this may involve the court giving favourable consideration to one party or the other; may involve the court giving a quick rather than a considered judgement; and may deny a party natural justice. It was also submitted that expedition, without giving the respondent a proper opportunity to consider the applicant's claim and prepare its case in reply, would deny it natural justice. There was also a submission that the question of the public interest, as to whether the Proposed Award should be made at all, should be heard and determined separately from the "merits". Counsel also submitted, in supplementary submissions, that the observations of Finkelstein J in *Warramunda* were obiter and did not disturb the decision in *Jupp.*

Consideration

8 As to the legitimate expectation of parties to proceedings before this Commission to have their matters heard and determined under the Act, in my view, the approach to these issues as considered by Finkelstein J in *Warramunda* and by Burt CJ in *Re Minister for Minerals and Energy* is to be preferred. In *Warramunda* the question arose as to whether proceedings in the Federal Court before a judge at first instance, dealing with an award breach issue, should be brought forward in anticipation of an application to the Australian Industrial Relations Commission to seek a retrospective variation of the award in question. The application to bring forward the hearing date was acceded to. On appeal, amongst other matters, Finkelstein J considered the relevant authorities as to the grant or refusal of adjournments or expedition of proceedings, in the face of proposed legislative change that may affect the rights of one or other party. Finkelstein J referred to the judgement of Gray J in *Jupp* and also an earlier judgement of Gray J in *McGarry v Boonah Clothing Pty Ltd* (1993) 49 IR 66 to the effect that courts should not adjourn proceedings to await changes in legislation that may affect the rights of parties. In his judgement, Finkelstein J in dealing with the relevant authorities observed as follows at par 58:

> *"58 There is some controversy about the principle applied by Gray J. For example, in Re Minister for Minerals and Energy; ex parte Wingate Holdings Pty Ltd [1987] WAR 190, a majority of the Full Court of the Supreme Court of Western Australia (Wallace and Olney JJ, Burt CJ dissenting) granted an adjournment of a trial on the basis that legislation was likely to be enacted which would render moot the point at issue in the trial. In Sparks v Harland [1997] 1 WLR 143, 147 Sedley J said: "[T]here is in my judgment no rule that impending legislative change is never a material consideration in the exercise of the court's powers and discretions. Everything, it seems to me, turns upon the subject matter and the relevance of the pending legislation or possibility of change to the issues which the court has before it." In Humphris v Harbour Radio Pty Ltd (1999) 32 ACSR 537 Byrne J deferred making a ruling on a strike out application pending the passage of legislation (the Federal Courts (State Jurisdiction) Act) to remedy the effect of the High Court's decision in Re Wakim; ex parte McNally (1999) 198 CLR 511.*
>
> *59 On the other hand, there is an impressive array of authority for the proposition that found favour with Gray J. The cases include R v Whiteway; ex parte Stephenson [1961] VR 168, 171 per Dean J; Willow Wren Canal Carrying Co Ltd v British Transport Commission [1956] 1 WLR 213, 215-6 per Upjohn J; Attorney-General (Northern Territory) v Minister for Aboriginal Affairs (1987) 73 ALR 33, 50-51 per Lockhart and Gummow JJ. Importantly, there are two recent appellate decisions that provide support for his conclusion. The first is Meggitt Overseas Ltd v Grdovic (1998) 43 NSWLR 527. That was an appeal from a decision granting an adjournment of a trial date to permit the plaintiff in an industrial accident case to take advantage of certain proposed legislative changes announced by the Minister for Industrial Relations. The New South Wales Court of Appeal allowed an appeal from this discretionary decision on the basis that the discretion had miscarried. Mason P (with whom Shellar and Beazley JA agreed), after examining most of the authorities in point, said that courts are charged with the responsibility of administering justice according to the law as it is, and that it would therefore be wrong to adjourn a case to take advantage of a change in the law. The second decision is of*

the Full Federal Court in Attorney-General v Foster (1999) 84 FCR 582. In that case von Doussa, O'Loughlin and Mansfield JJ followed Meggitt Overseas Ltd.

60 It is true that these cases, if they apply, are only relevant by analogy. They hold that a case should not be adjourned to enable a party to take advantage of a proposed amendment of enacted law. Here we are not concerned with a proposed change to a statute, but with an anticipated change to an industrial award. In Ramsay v Aberfoyle Manufacturing Co (Australia) Pty Ltd (1935) 54 CLR 230, 253 Starke J said: "Courts of law, however, can only act upon the law as it is, and have no right to, and cannot, speculate about alterations in the law that may be made in the future." The underlying principle is that the court must determine a case in accordance with the present state of the law. But even this principle is subject to exceptions. In Meggitt Overseas Ltd at 534-535, Mason P noted two exceptions. The first is where an adjournment is sought to enable a proposition established in a decided case to be tested in an appeal. The second is where the court is dealing with an application for a discretionary remedy where relief may be denied on the ground of futility. In such a case Mason P said that it may be proper to have regard to imminent legislative changes. "

9 Further and importantly at par 63 Finkelstein J said:

"63 In my opinion, however, the position that presented itself in Jupp should not have been treated in the same way as the earlier cases. The underlying principle established by the authorities is somewhat different from that stated by Gray J. In Re Minister for Minerals and Energy at 194 Burt CJ, who would have refused the adjournment sought, explained the principle in the following language:

> *"As a matter of principle a submission made by Wingate in its opposition to the adjournment should be accepted. The courts are charged with the high responsibility of administering justice according to the law as it is. A party invoking the jurisdiction of the court must be permitted to seek his justice upon that basis and the court cannot deny him that right because of a reasonable expectation that at some future date the law will be changed and with that change that his rights according to the law will be changed."*

This passage was cited with approval by Mason P in Meggitt Overseas Ltd. In the passage it is apparent that Burt CJ is expressing the view that the principle that a party is entitled to "justice according the law as it is" refers to the law which is invoked when the writ is issued, and not to the law as it may be at the date of the hearing. It is the law as it stands at the time of commencement of an action that a party has a reasonable expectation will be applied to his case. If it were to the law at the time of trial, there would be the possibility of inconsistent findings in different cases, resulting solely from the state of a judge's list from time to time. To have cases decided differently on that basis would bring the law into disrepute. It follows that a court will not fall into error for bringing a case on for hearing earlier than the appointed day, provided it can be heard without injustice to any party to the proceeding, or to parties in other litigation that may also have a just claim on the judge's time."

10 In my view, the approach of Burt CJ in *Re Minister for Minerals and Energy*, cited with approval by Finkelstein J and followed in *Meggitt,* which in turn was followed in *Foster*, is the approach to be preferred. There is nothing in the supplementary submissions filed by the respondent that alters my views in this regard.

11 A thorough review of the authorities appears in *Meggitt,* where Mason J (with whom Sheller JA and Beazley JA agreed) upheld an appeal from a judgment of the Dust Diseases Tribunal to adjourn a trial by reason of impending legislative changes that may have advantaged the plaintiff in the action. Mason J, after canvassing the authorities at some length, referred to Burt CJ's dissent in *Re Minister for Minerals and Energy* and agreed with them. Notably he also referred to the application for special leave to the High Court from that judgment, with the majority refusing leave and Wilson and Dawson JJ observing that their refusal should not be taken as endorsing the course adopted by the majority below. Brennan J would have granted the special leave application.

12 The significance of this lies in a full appreciation of Burt CJ's judgment in *Re Minister for Minerals and Energy* recognised by Finklestein J in *Warrmunda* in particular at par 63 set out above, and his doubting, by implication, the correctness of its application in *Jupp*. That is, the principle about which the cases speak is that a court should deal with a matter before it on the basis of the law as it stands at the time the proceedings are instituted. That is at least the legitimate expectation of the initiating party, if not a right. It would be wrong for a court to adjourn a proceeding to enable a party to take advantage of a prospective change in the law, as it would be at odds with the principle of the court dealing with the matter on the basis of the law as it is as at the time of the institution of the proceedings. However, some reasonable expedition that does not unduly interfere with the business of the court in the present circumstances, to preserve the application of the fundamental principle espoused on the cases, would not be inappropriate. A party invoking the jurisdiction of this Commission is entitled to expect that the matter before the Commission will be heard and determined on the basis of the law as it stood as at the time of the initiation of the proceedings. In my opinion, there can be no valid basis in light of this proposition, to any objection to reasonable expedition, as long as that does not in turn unfairly prejudice any other party to the proceedings. It should also be observed that whilst the majority in *Re Minister for Minerals and Energy* (Wallace and Olney JJ) did grant an adjournment of the proceedings because of pending legislative changes, in that case the impending legislative changes would have more than likely rendered the subject matter of the hearing moot. That is far from the outcome that may ultimately occur in these proceedings.

13 Whilst it appears that the terms of Schedule 1 to Schedule 15 of the Workplace Relations Amendment (Work Choices) Bill 2005, in Part 3, purport to "convert" State awards into "notional agreements preserving State awards", it is clear, that subject to various exclusions, any award arising from these proceedings will be far from a dead letter. Subject to the Commonwealth Parliament's power under the Commonwealth Constitution to enact such a law, it seems intended that such "notional agreements preserving State awards" have a period of operation of three years from the commencement of the federal legislation. That is, subject to the various exclusions and exceptions contained in the legislation as to the content of awards, any award arising from these proceedings will operate according to its full terms and effect for at least

three years. This is entirely apart from any operation that any award may have in respect of employers which are not constitutional corporations for the purposes of s 51 (xx) of the Commonwealth Constitution.

14 I am not therefore persuaded by the respondent's submissions that the Commission should not provide some expedition to these proceedings to at least preserve the applicant's present statutory rights. This must of course, be balanced against not imposing undue burdens or prejudice on other parties to the proceedings.

15 Therefore, the Commission proposes to deal with the matter as follows.

16 Given the apparent concession by the respondent that the employees who may be covered by the Proposed Award are not presently governed by any award of this Commission, the Commission will first consider whether pursuant to s 36A(2) and (3) of the Act an interim award should be made, that extends to the relevant employees pending consideration of the claim for the Proposed Award. This matter will be dealt with on 20 December 2005. Directions will be made to enable that matter to proceed expeditiously.

17 Secondly, the substantive application for the Proposed Award will be listed for hearing in mid to late January 2006 and appropriate directions will be made in that respect also. Those directions will pay due regard to the requirement that the respondent and other persons interested in the proceedings have sufficient time to adequately prepare their cases. Given that the substantive proceedings in this matter were commenced on 9 September 2005, it could not be reasonably said in my opinion that a hearing date in mid to late January 2006, in terms of any final relief, would be proceeding with unseaming haste. I am not disposed to separating the issue of the public interest from the "merits" as such. It seems to me that there may well be some overlap in any event between these issues. As to conciliation pursuant to 32 of the Act, the respondent's notice of answer opposes the making of any award in its entirety, regardless of any public interest issues arising. Given the stated positions of the parties, I am not persuaded that conciliation at this stage of the matter would be availing. However, if the position of the parties changes then of course, given the terms of s 32A of the Act, the Commission can conciliate at any stage of a matter before it.

18 A minute of proposed orders and declarations now issues.

2005 WAIRC 03282

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS
	APPLICANT
	-v-
	SKILLED RAIL SERVICES PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 12 DECEMBER 2005
FILE NO/S	A 5 OF 2005
CITATION NO.	2005 WAIRC 03282

Result	Order and declaration issued
Representation	
Applicant	Mr D Schapper of counsel instructed by D H Schapper & Co
Respondent	Mr J Blackburn of counsel instructed by the Australian Mines and Metals Association
	Mr N Ellery of counsel instructed by Corrs
Intervenor	Ms E Hartley of counsel instructed by Freehills

Orders and Declarations

HAVING heard Mr D Schapper of counsel on behalf of the applicant, Mr J Blackburn of counsel on behalf of the respondent, Mr N Ellery of counsel on behalf of Integrated Group Ltd and Ms E Hartley of counsel on behalf of Pilbara Iron Company (Services) Pty Ltd, Hamersley Iron Pty Ltd, Robe River Mining Company Pty Ltd and Robe River Iron Associates, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby –

(1) ORDERS that Pilbara Iron Company (Services) Pty Ltd, Hamersley Iron Pty Ltd, Robe River Mining Company Pty Ltd and Robe River Mining Associates ("the intervenors") be and are hereby granted leave to intervene in the herein proceedings.

(2) DIRECTS that the issue of whether an interim award should be made by the Commission pursuant to s 36A(2) and (3) of the Act be heard as a preliminary issue on 21 December 2005.

(3) DIRECTS as to par (2):

(a) that the applicant file and serve on the other parties and the intervenors further and better particulars of its notice of application as to the basis of the claims made by 13 December 2005.

(b) that the respondent file and serve on the applicant, the intervenors and other parties further and better particulars of its notice of answer as to par 6 to specify, with particularity, the existing terms and conditions of employment of employees of the respondent that are the subject of the herein application by 13 December 2005.

(c) that the intervenors file and serve on the other parties particulars of the rates of pay paid by the intervenors to employees who may be bound by any award in the terms of the herein application by 13 December 2005.

(4) DIRECTS that otherwise the substantive application for any final award in terms of both the merits and public interest arguments be listed for hearing for two days in the fortnight commencing 16 January 2006 on dates to be fixed by the Commission.

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

2006 WAIRC 03463

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS
	APPLICANT
	-v-
	SKILLED RAIL SERVICES PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 11 JANUARY 2006
FILE NO/S	A 5 OF 2005
CITATION NO.	2006 WAIRC 03463

Result	Interim award made
Representation	
Applicant	Mr D H Schapper of counsel
Respondent	Mr J Blackburn of counsel

Order

HAVING heard Mr D H Schapper of counsel on behalf of the applicant and Mr J Blackburn of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby –

MAKES the Iron Ore Production and Processing (Engine Drivers - Skilled Rail Services) Interim Award 2006 in accordance with the following schedule and that this award shall have effect on and from 4 January 2006.

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

SCHEDULE

1 -TITLE

This award shall be known as the Iron Ore Production and Processing (Engine Drivers - Skilled Rail Services) Interim Award 2006**.**

2 - MINIMUM ADULT AWARD WAGE

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

(2) The Minimum Adult Award Wage for full time adult employees is $484.40 per week payable on and from 7th July 2005.

(3) The Minimum Adult Award Wage of $484.40 per week is deemed to include all arbitrated safety net adjustments from State Wage Case decisions.

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

(5) Juniors shall be paid no less than the wage determined by applying the percentage prescribed in the junior rates provision in this award to the Minimum Adult Award Wage of $484.40 per week.

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

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

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

(a) apply to all work in ordinary hours.

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

(8) Minimum Adult Award Wage

The rates of pay in this award include the minimum weekly wage for adult employees payable under the 2005 State Wage Case Decision. Any increase arising from the insertion of the minimum adult award wage will be offset against any equivalent amount in rates of pay received by employees whose wages and conditions of employment are regulated by this award which are above the wage rates prescribed in the award. Such above award payments include wages payable pursuant to enterprise agreements, consent awards or award variations to give effect to enterprise agreements and over award arrangements. Absorption which is contrary to the terms of an agreement is not required.

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

(9) Adult Apprentices

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

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

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

(d) Nothing in this clause shall operate to reduce the rate of pay fixed by this award for an adult apprentice in force immediately prior to 5th June 2003.

3 – AREA AND SCOPE

(1) This award shall apply to shall apply throughout the State of Western Australia and shall apply to all engine drivers working on the railroad which forms part of the iron ore production and processing operations carried on in and around Dampier, Pannawonica, Tom Price, Paraburdoo, Marandoo and associated places and who are employed by any firm, company, enterprise or undertaking engaged in the industry of labour hire.

(2) This award shall not apply to any employee employed by Pilbara Iron Company (Services) Pty Ltd, Hamersley Iron Pty Ltd, Robe River Mining Company and Robe River Iron Associates.

4 – ARRANGEMENT

5 – TERM

This award shall come into operation on 4 January 2005 and shall continue in force until further order of the Commission.

6 – CONDITIONS

(1) All employees are engaged on a casual basis.

(2) Rates of pay for all employees are paid on an "all in" basis to compensate for all penalties; allowances; overtime; and leave entitlements.

(3) Locomotive Mainline Drivers engaged on a 14 day on 14 day off roster, fly in fly out, shall be paid at the rate of $39.83 per hour.

(4) Locomotive Yard Drivers engaged on a 14 day on 14 day off roster, fly in fly out, shall be paid at the rate of $36.86 per hour.

(5) Locomotive Banker Drivers engaged on a 14 day on 7 day off roster, fly in fly out, shall be paid at the rate of $40.40 per hour.

(6) All travel to and from site shall be in an employee's own time except for those employees on a 14 day on 7 day off roster in which case travel time is paid.

(7) Employees shall work a 12 hour shift roster averaging 42 hours per week in the case of a 14 day on 14 day off fly in fly out roster and 56 hours per week in the case of a 14 day on 7 day off fly in fly out roster.

(8) In addition to their hourly rate of pay each employee who remains in employment until 30 June 2006 is entitled to a completion bonus calculated on the following basis: 21 times 12 times applicable hourly rate of pay. An employee who has been employed for only part of a qualifying period but remains in employment until 30 June 2006 or whose employment is terminated prior to 30 June 2006 through no fault of their own, is entitled to a pro rata payment.

7 - DISPUTE RESOLUTION

(1) In the case of any questions, disputes or difficulties arising under this award, the employer and employee(s) are to confer amongst themselves and make reasonable attempts to resolve any such questions, disputes or difficulties.

(2) In the event the employer and employee(s) are not able to resolve any questions, disputes or difficulties having complied with sub clause (1) above either may refer the matter to the Western Australian Industrial Relations Commission.

2006 WAIRC 03535

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS
	APPLICANT
	-v-
	SKILLED RAIL SERVICES PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 23 JANUARY 2006
FILE NO.	A 5 OF 2005
CITATION NO.	2006 WAIRC 03535

Result	Direction issued
Representation	
Applicant	Mr D Schapper of counsel
Respondent	Mr M Borlase as agent

Direction

HAVING heard Mr D Schapper of counsel on behalf of the applicant and Mr M Borlase as agent on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, and by consent hereby directs –

1. THAT evidence in chief in this matter be adduced by way of signed witness statements which will stand as the evidence in chief of the maker. Evidence in chief other than that contained in the witness statements filed and served in accordance with this direction may only be adduced by leave of the Commission.
2. THAT the applicant file and serve an outline of submissions and any witness statements upon which it intends to rely by 25 January 2006.
3. THAT the respondent file and serve an outline of submissions and any witness statements upon which it intends to rely by 27 January 2006.
4. THAT the parties have liberty to apply on short notice.

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

2006 WAIRC 03892

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS
	APPLICANT
	-v-
	SKILLED RAIL SERVICES PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
HEARD	WEDNESDAY, 7 DECEMBER 2005, WEDNESDAY, 21 DECEMBER 2005, TUESDAY, 31 JANUARY 2006, WEDNESDAY, 1 FEBRUARY 2006
DELIVERED	TUESDAY, 7 MARCH 2006
FILE NO.	A 5 OF 2005
CITATION NO.	2006 WAIRC 03892

Catchwords	Industrial law - Application for new award - Whether in the public interest for a final award to be made - Principles applied - Commission not persuaded that in the public interest award should not be made - Wage and conditions of employment - Fair conditions of employment - Minimum conditions of employment - Principles applied - New award made - Order issued - *Industrial Relations Act* (WA) 1979 s 6(ca), s 26(1)(d), s 27(1)(a)(ii), s 27(1)(k), s 36A; *Workplace Relations Act 1996* (Cth) s 89A(1), s 89B, s 128; *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) s 89A(1), s 89B, s 90ZD
Result	Order issued
Representation	
Applicant	Mr D Schapper of counsel
Respondent	Mr J Blackburn of counsel

Reasons for Decision

1 On 28 December 2005 the Commission as presently constituted published reasons for decision granting the making of an interim award binding the applicant and the respondent, pending the hearing and determination of the applicant's claim for an award by way of final relief. The order making the interim award was published on 11 January 2006: *Skilled Rail Services Pty Ltd v The Construction, Forestry, Mining and Energy Union of Workers* 2005 WAIRC 03446 & 2005 WAIRC 03463).

2 The substantive claim for a final award was heard in late January and early February 2006. The notice of application seeks the making of an award to be known as the Iron Ore Production and Processing (Engine Drivers - Skilled Rail Services) Award ("the Proposed Award"). The Proposed Award is in a relatively short form and contains claimed clauses as follows:

"1. Title

This award shall be known as the Iron Ore Production & Processing (Engine Drivers – Skilled Rail Services) Award.

2. Arrangement

1. Title
2. Arrangement
3. Scope and area of application
4. Wages
5. Hours
6. Overtime
7. Annual leave
8. Long service leave
9. Travel and accommodation
10. Safety equipment, uniforms and necessaries
11. Redundancy
12. Dispute Resolution

3. Scope and are of application

This award shall apply throughout the State of Western Australia and shall apply to all engine drivers working on the railroad which forms part of the iron ore production and processing operations carried on in and around Dampier, Pannawonica, Tom Price, Paraburdoo, Marandoo and associated places and who are also employed by any labour hire firm, company, enterprise or undertaking.

4. Wages

The hourly rate of wage for employees to whom this award applies shall be not less that $56.00 per hour.

A loading of 25% of the hourly rate shall be paid for each hour worked by a casual employee.

5. Hours

Ordinary hours of work shall not exceed an average of 42 per week taken over the roster cycle.

6. Overtime

Any hours outside or in excess of ordinary hours shall be paid at the rate of time and one half for the first 2 hours and double time thereafter.

7. Annual leave

6 weeks paid annual leave shall be allowed for each year worked. Pro rata leave shall be paid out on termination.

8. Long service leave

13 weeks paid long service leave shall be allowed for each period of 10 completed years of service. Pro rata leave shall be paid out on termination where termination occurs after more than 4 years service.

9. Travel and accommodation

The employer shall provide and shall pay all costs associated with travel to and from the site and to and from the workplace. The employer shall provide and pay all costs associated with the employee's accommodation whilst at site and the meals of the employee.

10. Safety equipment, uniforms and necessaries

The employer shall, at its own cost, provide all necessary safety gear, uniforms and other things necessary for the employee to fulfil his duties.

11. Redundancy

An employee terminated for redundancy shall receive not less than:

1. 3 month's pay; and
2. 2 weeks pay for each year of service pro rata; and
3. payout of any unused sick leave; and

4. reasonable relocation expenses, if any.

12. Dispute resolution

Where any dispute between the employer and employee arises, the parties shall discuss the same as soon as practicable after the dispute arises.

Where the discussions referred to above fail to resolve the dispute any party to the award may refer it to the Commission for resolution by conciliation and/or arbitration."

3 The respondent filed a notice of answer and counter-proposal which opposed in its entirety, the claim for the Proposed Award. There are a number of grounds advanced in support of the opposition to the applicant's claim, which include the application not being in the public interest; there being no necessity for the Proposed Award; there is no history of industrial disputation between the parties; the claim if granted would be inconsistent with the objects of the Industrial Relations Act 1979 ("the Act") and lead to disputation; that employees are presently engaged on fair terms and conditions of employment; and finally, that the Proposed Award, if made, contains a scope clause which is uncertain in its terms.

4 At the outset of these proceedings, a number of companies in the Rio Tinto group of companies sought and were granted leave to intervene pursuant to s 27(1)(k) of the Act, on the basis that the claim as framed, may have application to their operations. This was despite the applicant's submissions that its intention was to have the Proposed Award only apply to labour hire firms.

5 Subsequent to the intervention application having been granted, the intervenors sought and obtained an order pursuant to s 128 of the Workplace Relations Act 1996 (Cth) ("the WRA") in so far as they were concerned. A Full Bench of the Australian Industrial Relations Commission ("AIRC") by reasons for decision and order of 16 December 2005, made an order pursuant to s 128 of the WRA the terms of which order were reflected in the interim award made by this Commission on 11 January 2006. The terms of the interim award made by the Commission reflected the existing terms and conditions of employment of the affected employees and was made pursuant to s 36A(3)(b) of the Act.

Final Award Claim

7 The terms of the Proposed Award have been set out above. As was put by counsel for the applicant Mr Schapper, the claim is in a "bare bones" form, with the major issue to be determined by the Commission, if any final award is to be made, being the rate of pay to apply. In short counsel for the applicant submitted that no final award presently applies to the relevant employees of the respondent, notwithstanding the recent existence of Australian Workplace Agreements ("AWAs") made under the WRA.

8 The respondent, through its counsel, Mr Blackburn, made a number of submissions going to threshold issues as to why a final award should not be made including relevant considerations of the public interest under s 36A of the Act. I will return to those submissions later in these reasons.

9 First, it is necessary to consider the evidence adduced in the proceedings, which was lead in the initial proceedings for an interim award, as that evidence may also bear upon consideration by the Commission of the preliminary issues including those relating to the public interest pursuant to s 36A of the Act. Both parties supplemented that evidence with detailed written and oral submissions during the final award making hearing.

The Evidence

10 Mr Gary Wood is the secretary of the WA Branch of the Mining Division of the applicant. His union has traditionally had coverage of locomotive drivers in the iron ore industry in the Pilbara of this State. Despite a significant decline in the presence of the applicant in the Pilbara, in particular at the operations conducted by Robe River Iron Associates ("Robe") and Hamersley Iron ("Hamersley"), Mr Wood testified that contact has been maintained with drivers at those locations over the years. Mr Wood's evidence in these proceedings, by way of his witness statement filed as his evidence in chief, was formulated on the basis of information provided to him by locomotive drivers employed by both the respondent and a company by the name of Pilbara Iron, which company now provides rail services to both Robe and Hamersley. Mr Wood testified that he was not prepared to disclose the identity of those employees from whom he had obtained information for the purposes of these proceedings, because those employees feared retribution in their employment.

11 From his experience and position as secretary of the WA Branch of the Mining Division of the applicant, Mr Wood outlined the rail systems applicable at Hamersley and Robe, being the companies to which the respondent provides locomotive driving services under labour hire arrangements. According to Mr Wood both rail systems conducted by Hamersley and Robe are now largely integrated. At annexure 1 to Mr Wood's witness statement was a document outlining the operation of the Hamersley and Robe railway systems and the role played by Pilbara Iron.

12 In his evidence, Mr Wood also sought to highlight the major differences in the rail systems operated by Hamersley and Robe from that operated by BHP Billiton Iron Ore ("BHPB"). According to his evidence, there are five points of distinction between the two systems. Firstly, at Hamersley/Robe only head end locomotive power is used, whereas at BHPB locotrol trains are used which operate in the main body of the train configuration. Secondly, BHPB uses track signals, whereas at Hamersley and Robe in cab signalling is used. Thirdly, at Hamersley and Robe crews utilise a mid track changeover system, whereas BHPB has traditionally not done so but have moved to this system more recently. Fourthly, in terms of banking of trains, Hamersley trains are banked out of Yandi, West Angeles and Paraburdoo. There is presently no banking of trains at BHPB. Finally, there is some difference in the length of trains with Hamersley and Robe trains being run up to 230 cars in length, as opposed to BHPB trains being up to approximately 320 cars in length.

13 Otherwise Mr Wood testified that the two train systems, they being the Hamersley and Robe on the one hand, and that operated by BHPB on the other, are broadly similar.

14 In terms of the employees of the respondent providing labour hire driving services, there are according to Mr Wood, some 16 employees based at Tom Price and one employee based at Yandi. All employees are designated as casual employees regardless of their length of employment. According to Mr Wood, these employees are engaged in all kinds of mainline driving work between the various locations operated by Hamersley and Robe including Yandi, West Angeles, Paraburdoo

and Rosella. The drivers perform the full range of driving duties including driving fully loaded trains, bankers and unloaded trains and additionally are engaged in train loading operations.

15 Mr Wood expressed the view that so far as was within his knowledge and experience, the work performed by employees of the respondent and those employed by Pilbara Iron, over the track on which the respondent's employees worked, is essentially the same.

16 As to rates of pay, Mr Wood testified that the rate of pay for an employee of the respondent as a mainline driver is $39.83 per hour. He said that this was the lowest rate of pay for any mainline locomotive driver employed on any rail system in the Pilbara. He also expressed the view from his discussions with drivers, that employees were very dissatisfied with the rate of pay and there existed low morale and high employee turnover. As to the latter, the respondent in cross-examination took issue with this and there seemed to be some acceptance by Mr Wood that the employee turnover may not have been high as he initially understood. Further in cross-examination, Mr Wood maintained that he is aware that employees have been continually told that if they pressed ahead with their award application it would prejudice their employment.

17 According to Mr Wood's evidence, the respondent's employees were formerly engaged under common law contracts of employment at least at the time of related proceedings to this matter in application A 3 of 2005, also involving the respondent in provision of labour hire locomotive driving services to BHPB. He said that recently he has become aware that all employees of the respondent were required to sign AWAs at short notice. The inference that is sought to be drawn from this evidence is that the employees were encouraged to enter into AWAs because of the commencement of these proceedings.

18 Mr Malpass is the operations manager for the respondent. His evidence was that the respondent has about 23 employees in its rail operations providing services to the Rio Tinto companies and all are engaged on a fly in fly out basis. He testified that in the last few months the respondent took a decision to put all employees on AWAs. As at the time of the proceedings, all but one employee had signed such agreements. As far as he was aware, there was no dispute amongst employees as to terms and conditions of employment. He also gave some evidence about turnover in the last 12 months or thereabouts.

19 In relation to the respondent's arrangements with the Rio Tinto companies, whilst Mr Malpass testified he was not familiar with the detail, the rates paid by Rio Tinto to the respondent were based upon the salary paid to the locomotive drivers with an additional mark up.

20 Mr Butler is the locomotive specialist for the respondent and has had many years experience as a train driver. According to Mr Butler, he has a good working relationship with the respondent's drivers and morale is positive. In terms of the fly in fly out arrangement, he testified that this was desired by the drivers who preferred fly in fly out to on site residential arrangements.

21 In relation to entry into AWAs, Mr Butler denied that the respondent put any employees under pressure to sign such agreements but conceded that discussions with employees about AWAs took place after the present application was filed by the applicant for an award to cover the respondent's operations.

Public Interest

22 Both counsel made detailed and helpful submissions in relation to whether it would be in the public interest for a final award to be made. The significance of this issue turns upon the operation and effect of s 36A of the Act. This section relevantly provides as follows:

"36A. Application for award coverage for non-award employees

*(1) In any proceedings in which the Commission is considering the making of an award (**"the new award"**) that extends to employees to whom no award currently extends (**"the employees"**), the onus is on any party opposing the making of the new award to show that it would not be in the public interest.*

(2) The Commission may make an interim award that extends to the employees pending the making of the new award.

(3) An interim award may be made if the Commission considers —

(a) that it would provide a fair basis for the application of the no-disadvantage test provided for by Part VID Division 6 Subdivision 1;

(b) that it would protect the existing wages and conditions of employment of the employees until the new award is made; or

(c) that it would be appropriate for any other reason."

23 The first question to determine is the meaning of this provision. Counsel for the applicant Mr Schapper contended that the effect of s 36A(1) is that there is a presumption that the Commission will make an award unless the respondent establishes that in the public interest no award should be made. Counsel for the respondent Mr Blackburn submitted that s 36A(1) of the Act does no more than reflect the long standing line of authority in this jurisdiction that the applicant Union needs to establish a prima facie case for an award to be made in the first instance.

24 Prior to the insertion of s 36A into the Act, in proceedings before this Commission, whether a union had right to an award was the subject of some consideration. In *Hamersley Iron Pty Ltd v Federated Clerks Union of Australia, WA Branch* (1982) 62 WAIG 2418 the Full Bench on appeal from a declaration of Collier C considered this issue. In dealing with the matter, O'Dea P said at 2420:

> *"It is axiomatic that any union is entitled to award coverage of employees in classifications within its constitution rule. The entitlement derives from its rules and the qualification for and basis of its registration to protect or further the interest of such employees. Object (d) of section 6 of the present Act is a recognition of that fact. Indeed it was also the case under the old Act where an award could be obtained in respect of union*

members by reference to the Commission pursuant to section 66(1)(d), even where no member of a union was involved (section 63).”

25 Kelly CC at 2422 also adopted the view that a union was entitled prima facie to an award and there was an onus on an employer to show why an award should not be made.

26 Some consideration of this issue occurred in a decision of the Industrial Appeal Court in *Hamersley Iron Pty Ltd v Association of Draughting, Supervisory and Technical Employees, WA Branch* (1984) 64 WAIG 852. In this case the Full Bench of the Commission upheld an appeal from a decision to not make an award for various reasons. In upholding the appeal from the Full Bench, Brinsden J at 853, in the majority, questioned whether as a proposition of law, it was correct to say that there a union had a prima facie entitlement to an award. Rather, given the terms of s 26 of the Act, the usual approach would apply, that being the burden initially would be on the union to establish on the substantial merits that an award should be made by the Commission.

27 Section 36A of the Act was inserted by Amending Act No 20 of 2002 s 116. The section deals with award coverage for employees to whom no award currently extends. In my view, with respect, the effect of this section has overtaken the views of Brinsden J in *Hamersley Iron*, whether those views were obiter or otherwise, and the Commission is now required to apply the statutory provision.

28 It seems to me that s 36A(1) is in two parts. The first part refers to “proceedings in which the Commission is considering the making of an award”. That is, there must be a competent application for an award on foot which requires the Commission to exercise its discretion in accordance with s 26 of the Act. The second part of s 36A(1), deals with the circumstance where there is opposition to an award being made, and requires an employer opposing such an award to establish in the public interest that it should not be made.

29 In my opinion, s 36A(1) does not mean that it follows automatically, upon a competent application having been made, that the Commission is to make an award if an employer fails to satisfy the public interest test. Such a construction of the section could lead to absurd and nonsensical results. For example, if that construction were preferred, then a union would need to do no more than simply make an application and the Commission would be required to make an award, devoid of any exercise of discretion, in circumstances where an employer has failed to discharge the burden upon it that no such award should be made in the public interest. In my view, that is not what Parliament meant by this provision.

30 I consider what s 36A(1) means is that in proceedings before the Commission when considering the making of an award, in the exercise of its discretion, if there is material before the Commission upon which the Commission's jurisdiction and power can properly be exercised then there is a presumption that an award will be made in the ordinary course. This is so unless the employer concerned establishes that it would be contrary to the public interest for such an award to be made by order of the Commission. In other words, there must be some evidence and submissions before the Commission, upon which the Commission could properly determine such an application in the first instance.

31 The respondent's submissions in relation to the public interest were set out in two outlines of submissions supplemented by oral submissions of counsel. I have carefully considered those submissions. Considerable emphasis was placed by the respondent in the public interest issue, on legislative changes at the Commonwealth level to be effected by the Workplace Relations Amendment (Work Choices) Act 2005 (“Work Choices”). In summary the respondent submitted that if any final award was made it will cease to have effect as a State award on the commencement of Work Choices and the Commission will not have any role to play in determining wages and conditions for the relevant employees. Further, it was said that as all of the respondent's employees were now employed on AWAs, the terms of any State award would not be preserved as a notional agreement preserving State awards. It was further submitted that in any event, any notional agreement preserving State awards that might be created would not have common rule effect and would not apply to new employers. Finally, it was submitted that even if the State award was preserved as part of an Australian Pay and Classification Scale under Work Choices, such rates of pay would only apply to new employees and not existing employees who are employed under AWAs.

32 The respondent argued on other bases why a final award should not be made in the public interest. It was submitted that because all of the respondent's employees are employed under AWAs there would be no employees to whom any the Proposed Award would apply. It was submitted that employees of the relevant Rio Tinto companies are all engaged under federal industrial instruments including the Rio Award, a certified agreement and AWAs and it would therefore be inconsistent for a State industrial instrument to be made to apply in these circumstances. A further submission was that there is no evidence of any dissatisfaction by employees of the respondent with their terms and conditions of employment and the applicant's case on the merits has been inadequate to establish that an award should be made.

33 In the alternative, it was submitted that if an award is to be made by the Commission, then the Proposed Award should be in the terms of the interim award, reflecting the existing terms and conditions of employment of the effected employees.

34 In reply, Mr Schapper said the respondent's public interest defence effectively falls away when one considers that under Work Choices it is reasonably clear that any rate of pay specified in the Proposed Award will become part of the Australian Pay and Classification Scales as a preserved APCS under s 90ZD of Work Choices. This means that the Australian Pay and Classification Scales will form part of the Australian Fair Pay and Conditions Standard which will prevail over any new AWA or collective agreement or any contract of employment to the extent that it is more favourable: s 89A(1) and 89B Work Choices.

35 Given the construction I have placed on s 36A(1) of the Act, it is for the respondent to demonstrate that it would not be in the public interest for the Proposed Award to the made. The notion of the “public interest” is somewhat amorphous. Consideration of this issue is similar to the terms of s 27(1)(a)(ii) of the Act empowering the Commission to dismiss or refrain from further hearing a matter on the basis that further proceedings are not necessary or desirable in the public interest. Similar provisions exist in other industrial jurisdictions. In *Re Queensland Electricity Commission and Ors; Ex-parte Electrical Trade's Union of Australia* (1987) 21 IR 151 the High Court in proceedings for prerogative writs against a Full Bench of the then Australian Conciliation and Arbitration Commission, held that for the purposes of the then s 41(1)(d)(iii) of the Conciliation and Arbitration Act 1904 (Cth) that “Ascertainment in any particular case of where the

public interest lies will often depend on a balancing of interests, including competing public interests, and be very much a question of fact and degree" (per Mason CJ and Wilson and Dawson JJ). In the same case, Deane J in dealing with the refrain from hearing power in the public interest observed at 162:

> *"The right to invoke the jurisdiction of the courts and other public tribunals of the land carries with it a prima facie right to insist upon the exercise of the jurisdiction invoked. That prima facie right to insist upon the exercise or jurisdiction is a concomitant of a basic element of the rule of law, namely, that every person and organisation, regardless of rank, condition or official standing, is "amenable to the jurisdiction" of the courts and other public tribunals (cf Dicey, An Introduction to the Study of the Law of the Constitution, 10th ed (1959), p 193). In the rare instances where a particular court of tribunal is given a broad discretionary power to refuse to exercise its jurisdiction on public interest grounds, the necessary starting point of a consideration whether such a refusal would be warranted in the circumstances of a particular case in which its jurisdiction has been duly invoked by a party must ordinarily be the prima facie right of the party who has invoked the jurisdiction to insist upon its exercise (cf per Higgins J, Merchant Service Guild of Australasia v Commonwealth Steamship Owners' Association [No 1] (1920) 28 CLR 278 at 281). That position is a fortiori in a case where no other court or tribunal, Commonwealth or State, possesses jurisdiction fully to deal with the particular dispute. Were it otherwise, effective access to the courts and other public tribunals would be not a right which could be denied in an exceptional case on the grounds of extraordinary consideration of public policy but an uncertain privilege which could be withheld at any time on unconfined and largely unexaminable discretionary grounds (see, generally, Friedman, "Access to Justice: Social and Historical Context: in Cappelletti and Weisner (eds) Access to Justice, vol II, book 1 (1978) pp 5ff; Raz, The Authority of Law, (1979), at p 217)."*

36 In this case I am required to have regard to the interests of both the employer and employees affected and to the extent that it is relevant, the interest of the community generally as s 26(1)(d) of the Act provides.

37 The applicant has brought the present claim for the Proposed Award under the terms of the Act as it is entitled to do. As Deane J observed in *Re QEC,* that right to invoke the jurisdiction of the Commission takes with it, at least prima facie, a right to the exercise of the Commission's jurisdiction.

38 In relation to the submissions by Mr Blackburn concerning the effect of the Work Choices legislation, I am not persuaded that for that reason the Commission should decline to make an award in the public interest. Whilst it may be that under Work Choices the Proposed Award if made, may have a more limited effect as between the parties to it than would otherwise be the case in the absence of Work Choices, as I observed in earlier reasons in this matter, I am far from persuaded that any award made would be a dead letter. That is simply so by reason of, at the very least, the terms of ss 89A(1) and 89B of Work Choices which, strongly arguably, will provide that any rate of pay in the Proposed Award will govern the rates of pay to be paid to any new employee of the respondent on and from the commencement of the Work Choices legislation.

39 Whilst I recognise the submissions of the respondent in relation to the effect of the Proposed Award as to existing employees, it is trite to observe that the Commission's award making powers are to be exercised not only in respect of those persons presently employed by the respondent, but also in respect of those employees who may be engaged in the future. It is also well settled, that consistent with that proposition, unions such as the applicant do not act merely as an agent on behalf of members or persons eligible to be members, but also as a party principal.

40 A further limb of the respondent's arguments as to public interest refers to the existence of federal industrial instruments at the Rio Tinto companies, for whom the respondent provides services, and the existence of AWAs as the form of employment regulation of employees of the respondent.

41 The fact of the existence of AWAs, a form of individual agreement provided under the WRA, does not of course deprive this Commission of its jurisdiction or power to make an award under the Act: *The Construction, Forestry, Mining and Energy Union of Workers v Hanssen Pty Ltd* (2004) 85 WAIG 1264. Furthermore, the submissions of the respondent primarily relate to the effect of the Proposed Award on existing employees covered by AWAs, rather than those who may be employed in the future. In my opinion, the existence of AWAs, as a lawful form of industrial regulation under the WRA, does not of itself mean that this Commission should not exercise the powers given to it under the Act in an appropriate case. For the reasons that I have noted above, and for the reasons set out by the Full Bench in *Hanssen,* the terms of an award made under the Act still exist while an AWA is in effect, however they are effectively suspended. Of course, the Work Choices legislation may well affect the position also.

42 However, for the reasons I have already referred to, the terms of any Proposed Award made as a consequence of these proceedings, will not in my view be a nullity as contended by the respondent. I am not therefore persuaded that the existence of AWAs presently is a reason in the public interest for the Commission to decline to make the Proposed Award.

43 As to the existence of other federal industrial instruments made under the WRA applying at Rio Tinto and it seems on the submissions, possibly some other companies providing services to Rio Tinto, I am not persuaded by those arguments that in the public interest the Proposed Award should not be made. Implicit in the submissions of the respondent, although not stated, is the proposition that the existence of federal coverage under the WRA at Rio Tinto and in relation to the provision of services by others to Rio Tinto, means that industrial matters and industrial disputes ought to be properly left to the AIRC under the WRA. Otherwise, there is nothing particularly novel or exceptional, of itself, about the co-existence of federal and State industrial instruments in the same industry. This has been occurring for decades. It is also noteworthy to observe that until recent times, industrial regulation in the iron ore industry in the Pilbara of this State has been exclusively within this State's jurisdiction.

44 Relevant to the argument about the existence of federal coverage, are the observations of Deane J set out above in relation to the public interest. In particular, Deane J's observations about the existence of jurisdiction by other tribunals, Commonwealth or State, to fully deal with a particular dispute are relevant to this matter. This arises it seems directly as a consequence of Work Choices. It would seem that from the commencement of Work Choices, at least in relation to

employers that are constitutional corporations and their employees, which would include the respondent, the role contemplated by the Commonwealth Parliament for the AIRC in terms of dispute resolution, is markedly different to that under the former legislation. There would seem to be little scope as I apprehend the terms of Work Choices, for the AIRC to resolve the present industrial dispute between the applicant and the respondent, in the manner contemplated by these proceedings before this Commission. In my view, this is a relevant consideration in assessing the public interest and weighing up the various interests, for the purposes of s 36A(1) of the Act. What purported effect Work Choices may have on the jurisdiction of this Commission remains to be determined.

45 Finally, there does not need to be industrial disputation as a necessary requirement for the exercise of the Commission's jurisdiction, as appeared to be the import of the respondent's submissions in this regard. Whilst the absence of any industrial disturbance is commendable, it is also to be observed that there was no evidence adduced by the respondent, as is sometimes the case in matters of this kind, that all employees are content with their terms and conditions of employment and do not wish the Commission to make an award to have application to them. This is in contrast to the circumstances before the Commission in *Hamersley*, referred to above, which moved the Commission to dismiss an application for an award to cover the relevant employees, because of the existence of a comprehensive collective industrial agreement and in view of direct evidence as to the wishes of the employees to not have an award of this Commission apply to them.

46 I am therefore not persuaded, for the foregoing reasons, that the respondent has discharged the onus on it to persuade the Commission that in the public interest an award should not be made.

The Proposed Award

47 The issue to now be determined, is the terms and conditions of an award to be made by the Commission. Mr Schapper mounted a spirited attack on the terms of the Rio Award as being a totally inadequate basis for the terms and conditions of employment of the respondent's employees. In summary, counsel submitted that the Rio Award was born out of circumstances which were highly controversial at the time. The import of Mr Schapper's submissions was that the Rio Award arose from a "deal" between federal officials of the AWU and officers of the Rio Tinto group of companies, and little or no employee input was obtained. Mr Schapper further submitted that the making of the Rio Award, which was by consent, involved considerable duplicity by the parties concerned against members and officers of the relevant State unions, who were at the same time, conducting negotiations with the Rio Tinto companies in relation to a State industrial instrument.

48 Additionally he said that given the Rio Award was a consent award, it has received no independent scrutiny by the AIRC as to its terms and conditions, save for some minimal amendments required to comply with statutory requirements under the WRA. Counsel also submitted that the rates of pay and conditions in the Rio Award, as they in fact operate together, mean that it is a totally inadequate instrument to be used for comparison purposes for locomotive drivers in the Pilbara. Counsel submitted that the rates of pay in the BHPB Award are a more appropriate guide for the Commission to consider in terms of rates of pay to be included in the Proposed Award.

49 Tendered as exhibits A1 and A3 were rates of pay comparisons for various rail work conducted at BHPB and a rates comparison for residential employees under the Rio Award, the Robe River Certified Agreement ("the Agreement") and a further rates comparison containing rates paid by the respondent at Pilbara Iron, BHPB, compared with rates paid by another contractor at BHPB and the BHPB award rates themselves. It was counsel's submission that based upon these rates of pay comparisons, the respondent's locomotive drivers were the lowest paid drivers of any in the Pilbara. He submitted that the present average hourly rate for a casual train driver is $39.83 per hour. This compares poorly with hourly rates paid to locomotive drivers by both the respondent and another labour hire firm at BHPB of $44.00 per hour and $60.30 per hour at Newman, and with rates of about $55 per hour for a casual train driver Level 4 under the BHPB Award.

50 On the basis of these rates of pay comparisons, counsel submitted that the base rate claimed of not less than $56.00 per hour was a reasonable rate of pay and one which would provide the respondent's drivers with fair terms and conditions of employment as required by the Act.

51 Furthermore, Mr Schapper submitted that the terms of exhibits A4 and A6, being correspondence from the law firm Freehills to this Commission dated 14 December 2005, and an affidavit of Mr Peter Danks, the Human Resources Manager for Pilbara Iron Company (Services) Pty Ltd, demonstrate that the rates of pay in the Rio Award are not the rates of pay actually paid by the Rio companies to rail employees. The import of this submission was that the terms of the Rio Award, upon which the respondent strikes its rate of pay for locomotive employees, does not reflect the actual rates paid to employees of Rio Tinto.

52 Mr Blackburn on behalf of the respondent mounted an equally spirited defence of the Rio Award, as the basis for the rates of pay paid by the respondent to its employees providing services in the Pilbara.

53 Counsel submitted that the Rio Award is an appropriate industrial instrument for the respondent to have regard in determining its rates of pay. He said that the Rio Award was not a consent award in the true sense and there was some scrutiny of its terms by the AIRC prior to it being made. Counsel submitted that the terms of the Rio Award are transparent and given the employees of Rio Tinto work with employees of Skilled on a side by side basis, this is an appropriate industrial instrument for comparison purposes. Counsel contrasted the terms of the Rio Award to the BHPB Award and submitted that the circumstances leading to the making of the BHPB Award were very different and there was a significant history attached to it, including significant productivity and efficiency changes in return for the rates of pay struck by the Commission in Court Session.

54 Additionally, Mr Blackburn submitted that the fly in fly out arrangements applied by the respondent, entail different conditions to residential employees and there are significant benefits for employees in not having to permanently reside in the Pilbara and the shift structures are different. Fly in fly out employees work a two week on two week off roster which enables them to be at home in their two weeks off as opposed to residential employees who work a four day on four day

off roster which is more intense. The site allowance structure under the Rio Award compensates employees for the cost of living permanently with their families in the Pilbara.

55 Mr Blackburn also made submissions about the operation of the wage fixing principles in particular Principle 11(a) and the need for structural efficiency considerations to apply to any award to be made. Furthermore, counsel submitted that the worth of work in terms of the respondent's employees has been established by the rates of pay and conditions offered as reflected in the Interim Award. The evidence was that the respondent has no real difficulty in attracting and retaining employees.

Consideration

56 To the extent that the respondent relies principally on the Rio Award as the basis for its submissions on comparisons with rates of pay and conditions of employment, the fact remains that in my opinion this award is to be properly characterised as a consent award. This is so notwithstanding that some minor variations to the agreement reached between the parties was required by the AIRC in order for it to be satisfied that an award in the terms agreed should be made. It is reasonably clear from the reasons of the Full Bench in that case, that the majority of the case was concerned with the applications brought by opposing unions pursuant to s 111AAA and 111(1)(g) of the WRA that the AIRC cease dealing with the dispute then before it. So much is plain by reason of the fact that the AIRC's consideration of the proposed consent award appears towards the end of the reasons at pars 134 to 157 and much of that consideration turned upon the operation of the AIRC's Wage Fixing Principles and whether provisions in the proposed consent award contained allowable award matters for the purposes of s 89A of the WRA. I therefore reject the submissions of the respondent that the Rio Award has been the subject of any determination by the AIRC as to its content or any rigorous assessment of its terms.

57 In any event, and as a matter of trite law, it is well settled that in arbitration proceedings, a party cannot rely upon consent arrangements as it may do in relation to any outcome which has been arbitrated by an industrial tribunal. That is not to say however that the terms of the Rio Award are not a relevant consideration in the Commission's determination of this matter. Additionally, the controversial circumstances surrounding the agreement leading to the making of the Rio Award are a matter of record and are dealt with fully in the reasons of the Full Bench of the AIRC.

58 It is for all of these reasons that I maintain the degree of caution in the consideration of the terms of the Rio Award that I expressed in my reasons leading to the making of the Interim Award, for the purposes of these proceedings.

59 The central issue for determination is the rate of pay to be contained in the Proposed Award. Mr Schapper urged the Commission to have regard to the aggregate salaries paid under the BHPB Award for locomotive drivers, in particular the Level 4 driver, as the appropriate benchmark. In particular, he submitted that the Commission in Court Session in its various decisions leading to the making of the BHP Award, and its subsequent variation, has undertaken a proper assessment of the worth of work for locomotive drivers and has made and maintained an award containing rates of pay and conditions that are relevant, fair and proper for such occupations in the Pilbara in this State.

60 On the other hand, by the terms of exhibits R2 to R5 inclusive, Mr Blackburn sought to establish that when one compares the fly in fly out rates under the Rio Award and the Agreement, the rates paid by the respondent are competitive. Relevant to this comparison, are the benefits attributable to fly in fly out employees in particular the ability of these employees and their families to live outside of the Pilbara. Counsel also informed the Commission that the respondent sets its rates of pay at 25 per cent above the minimum rate specified in the Agreement. This is done as the Commission understands it, to reflect the fact that the respondent's drivers do not operate over all of the Rio Tinto rail system.

61 The terms of exhibit A3 contained a rates comparison for mainline work based on residential employees only. Considering the terms of this exhibit, on an hourly rate basis, at first blush, the respondent's employees supplying services to Rio Tinto are paid an hourly rate considerably less than rates payable at BHPB and also under the Rio Award and the Agreement. Mr Schapper contended that the residential comparison was appropriate for a number of reasons. He submitted that the Rio Award, despite its consent status, if it is used as a comparison for fly in fly out employees, is inappropriate because of the deleterious treatment of fly in fly out employees under its terms.

62 Counsel took the Commission to various clauses of the Rio Award to demonstrate that for fly in fly out employees, employed on a casual basis, their hourly rate of pay is significantly depressed. In particular, the terms of the commute allowance in clause 6.8.1 payable to fly in fly out employees, is an amount of approximately $9,360 per annum. This is compared to the roster payments payable to residential employees under clause 6.7.2 whereby the combined site and shift allowances constitute payments of approximately $30,000 per annum. Mr Schapper submitted that under the Rio Award, whilst fly in fly out employees did not receive the shift allowance, they were still required to work shifts just as residential employees were. Furthermore, whilst the site allowance was paid to residential employees to compensate for living in the Pilbara, the fact remains that the fly in fly out employees are required to live in the Pilbara for six months of the year in return for which they only receive some $9,360 per annum, which is about $21,000 per annum less than residential employees. However, the fly in fly out employees have to suffer many of the same disabilities as do residential employees and there is no sound justification for such a differential.

63 In a further criticism of the Rio Award, even if it were to be used as a comparison which it should not be, Mr Schapper submitted that the casual loading under the Rio Award is paid on the minimum base salary only. Given that the casual loading is paid in lieu of all leave entitlements, if one looks at the rate of pay for leave benefits, such as long service leave for example, by clause 8.3.3 an employee proceeding on long service leave is paid at a rate including the minimum annual base salary, site allowance or commute allowance and rail allowance as applicable. This means, according to counsel's submissions, that casual employees are even worse off than in the ordinary course under the Rio Award, by the operation of these various provisions. Counsel submitted that the analysis performed for the purposes of these proceedings, only goes to further highlight the unsatisfactory nature for the employees concerned of the consent award made between the AWU and Rio Tinto.

64 In my opinion even if regard is to be had by the Commission to the Rio Award, notwithstanding its consent status, some of the criticisms advanced by Mr Schapper have validity. The very significant differences in rates for fly in fly out employees as opposed to residential employees, given the structure and operation of the Rio Award, do not seem to

adequately compensate for the disabilities that are experienced by fly in fly out employees who must reside for at least half of the time in the Pilbara. Also, as a matter of principle, it seems to me to be at least questionable, that fly in fly out employees, who may be required to be away from their families for up to half of the working year, and who otherwise work shifts the same as do residential employees, in the same conditions, should be paid so substantially less than residential employees under the Rio Award. This is so notwithstanding that for those on fly in fly out arrangements they and their families are not required to permanently reside in the Pilbara, with the attendant disabilities that may bring. Additionally however, I also accept that the fly in fly out drivers do enjoy some benefits not enjoyed by residential employees in relation to for example, accommodation and meals.

65 In terms of the rate comparisons between residential mainline work and fly in fly out work under the Rio Award, the terms of exhibits A3 and R2 when read together, demonstrate there is a very significant difference between the remuneration payable for a residential mainline driver and a fly in fly out driver. Assuming that the employee works a rostered 42 hour week 52 weeks of the year, the minimum salary payable under the Rio Award, including all of the various allowances as at 3 June 2004, when the award was last varied, is approximately $110,762. This compares to $83,977 for a fly in fly out mainline driver. I also note in passing that in a similar application A3 of 2005 before the Commission as otherwise constituted, in relation to a labour hire to apply to employers providing driving services to BHPB, Wood C observed that some fly in fly out drivers in that case were paid rates above those being considered by the Commission in that application. This would suggest that there may not be such a differential between residential and fly in fly out rates for drivers at BHPB, as appears to be the case under the Rio Award.

66 Significant also, when considering the argument of the respondent based upon reliance on the Rio Award, is the fact that the Rio Award, according to the history of its making, was intended to operate as a minimum safety net award. What the Commission has before it in this case however, is a claim for in effect, an award rate to reflect an actual paid rate, as is the case at BHPB. In concert with this observation, is the obvious proposition that the respondent's present rates of pay under the AWAs recently entered into, are actual paid rates which rates are based upon an award intended to be a minimum safety net award. Therefore the comparisons made by both the applicant and the respondent need to be considered by the Commission in light of these observations.

67 Counsel for the respondent also made reference to rates of pay and conditions applying to train drivers in other industries both in this State and elsewhere and he referred the Commission to various awards made by industrial tribunals in this regard. The submission was that when one examines those rates, and in the context of the minimum rates adjustment process under the Commission's Wage Fixing Principles, then the rates actually paid by the respondent based as they are on the Rio Award, are seen to be all the more reasonable and fair. I have considered those materials and these submissions. It must be borne in mind however, that the Commission in this case is considering appropriate rates and conditions of employment to apply to locomotive drivers in the Pilbara in this State. The Commission is not considering rates and conditions to apply in other industries elsewhere in Australia. Therefore, some caution must always been exercised in making comparisons of that kind.

68 From all of the materials and evidence before the Commission, I am not satisfied that the respondent's present "all up" hourly rate of pay for mainline fly in fly out drivers, reflecting as it does an actual rate of pay, in the context of other rates of pay for such work in the Pilbara in this State, is an adequate and fair rate of wage or salary for the purposes of ss 6(ca) and 26(1)(d)(vi) of the Act. Given that conclusion however, the Commission is also required by the Act to ensure that any determination that it makes is consistent with facilitating the efficient organisation and performance of work in accordance with the respondent's enterprise, as is also required by s 26(1)(d)(vi) of the Act.

69 What then is an appropriate and fair rate of pay for present purposes? I do not consider that a direct translation must be made between the rates payable by BHPB for a Level 4 locomotive driver, to establish the rate for employees of the respondent. The BHPB rates are certainly a relevant consideration in the exercise of the Commission's discretion. However, the Commission as presently constituted is well aware of the circumstances leading to the making of the BHPB Award, in relation to which there is a significant history. That history is a matter of record and is set out in detail in the various decisions of the Commission in Court Session and I need not repeat it for present purposes. Furthermore, whilst there may be some similarities between the work performed by the respondent's employees and those providing locomotive driving services to BHPB, a strict "like with like" comparison is somewhat difficult. The fact remains that the operations are distinct and in my opinion, the present circumstances are distinguishable from the conclusions of the Commission in application A3 of 2005, which dealt with the provision of services directly to BHPB, where employees of the respondent and BHPB are working side by side performing the same work in the same work environment. In this case, the respondent's employees are not working side by side with BHPB employees performing the same or substantially the same work in driving locomotives.

70 Given that wage fixation is far from a precise science, I have taken all these matters into account in my consideration of an appropriate rate of pay for the employees concerned. I propose to use as a guide only, the rate of pay for a Level 4 locomotive driver under the BHPB Award, which was accepted as the appropriate comparison for a head end power only train operation, as opposed to the locotrol operations at BHPB. Taking that rate of pay as a guide, I then consider it appropriate to discount that rate to account for the various factors to which I have referred. These factors include the absence of a direct "like with like" comparison with BHPB, the circumstances of fly in fly out work compared to residential work, and inherent differences in the operations between Rio Tinto and BHPB rail operations.

71 On the basis that the present hourly rate for a Level 4 BHPB locomotive driver casually employed is, according to exhibit A3, $54.47 per hour, and taking into account the rates payable under the Rio Award and the Agreement, adjusted to current times, and the factors I have referred to above, in my view, a fair casual rate of pay for a fly in fly out locomotive mainline driver engaged by the respondent is a discount of ten percent from the BHPB Level 4 rate that being $49.00 per hour in round terms. I see no basis to differentiate between mainline and other work in reaching this rate.

72 In my view, this rate of pay increase will reflect a fair adjustment to the rate of pay for the employees concerned consistent with the terms of the Act, having regard to the work performed and the working environment in the Pilbara. It is less than the BHPB rate but accounts for the comparisons made and the nature of the work performed in terms of the

skills and responsibilities of a locomotive driver, which is a very responsible position, in the context of a major iron ore mining operation.

73 Before turning to the rest of the applicant's claim, I need to deal with the submissions of the parties in relation to the Commission's Wage Fixing Principles. It seems to be accepted that despite the terms of s 26(1)(a) of the Act, the Commission in dealing with an application such as the present, is required to apply the terms of the Wage Fixing Principles, in the sense that to not do so would constitute error: *Robe River Iron Associates v AMWSU* (1993) 73 WAIG 1993. I say notwithstanding s 26(1)(a) of the Act, because it would seem that on its face, the statutory command on the Commission by this section creates some tension with this proposition. For present purposes however, the Principles are to be applied.

74 Mr Blackburn, in erecting this issue as a barrier to the applicant's claim, submitted that because Principle 11(a) of the Wage Fixing Principles applied, then any award made by the Commission needs to be structurally efficient which on his submissions, included the requirement for a minimum rates exercise.

75 Mr Schapper submitted that the minimum rates concept needs to be put in context and he referred to legislative changes in the federal and State jurisdictions over the last fifteen years that meant the notion of minimum rates was different between the federal and WA State jurisdictions. In particular he referred to the AIRC Paid Rates Review case which required the AIRC under its amended legislation, to undertake a conversion process of its awards so they would be a true safety net for enterprise bargaining, as containing minima in relation to rates and conditions. This required the AIRC to fix and adjust rates on a common basis across industries using the C10 rate for a tradesperson as a foundation.

76 In contrast Mr Schapper referred to the 2002 amendments to the Act that still retain a substantial focus on award making and his submission was the reference to "structural efficiency" in Principle 11(a), now acts as a reminder that awards must still be structurally efficient in that they should not contain provisions that are a hindrance to productivity.

77 This is a case of the making of a first award to which Principle 11(a) applies. On its proper construction the focus of the Principle, according to the plain language of its terms, refers to the "main" considerations being employee interests and the needs of the particular enterprise. This is the primary focus of Principle 11(a). I consider the reference to "structural efficiency" as being secondary in focus.

78 It is important to appreciate that the beginning of the movement to "structural efficiency" took place in 1988 federally and flowed through to the State systems. It commenced a broad ranging process of the review of awards in all jurisdictions to remove impediments to efficiency and productivity and to promote skills and career paths etc. Nearly twenty years, on many changes have occurred in terms of amendments to legislation and focus of the various industrial relations systems. In particular, the legislation in this State has diverged from that in the federal jurisdiction. I am not persuaded to the narrow view of Principle 11(a) contended by Mr Blackburn. What the Principle requires in my view is that any first award made is to be structurally efficient, in the sense that it is not to contain any provisions that would be a barrier to productivity and efficiency. In the context of the present case, to only prescribe a true minimum rate, which would not reflect the rate paid, would not be properly taking account of the interests of the employees concerned, as the terms of the Principle require. I also observe that at BHPB, the rates of pay have been assessed by the Commission in Court Session with some vigour, in terms of the overall worth of the work of a locomotive river in the Pilbara.

79 Consistent with the observations I have just made, the remaining terms of the Proposed Award will reflect the requirement for the Commission to ensure that work can be efficiently organised and performed according to the respondent's needs. I now turn to the remaining clauses of the Proposed Award as claimed.

80 As to cl 1 - Title, I accept the respondent's submissions that given the Proposed Award is to be a common rule award, albeit limited in practical terms only to the respondent, that its name should not appear in the title.

81 As to cl 3 - Scope and Area of Application, this will reflect the terms of the Interim Award save the reference to "engine driver" will be replaced with "locomotive driver".

82 As to cl 5 - Hours, this will reflect the existing conditions as in the Interim Award.

83 As to cl 6 - Overtime, the claimed rate is a common rate in awards of this Commission and of other jurisdictions and will be granted.

84 In relation to cl 7 - Annual Leave, the most prevalent entitlement for employment in the Pilbara is five weeks per annum or thereabouts with an additional week for continuous shift employees. This will be prescribed. Pro rata annual leave will be payable on termination of employment.

85 As to cl 8 - Long Service Leave, the Rio Tinto industrial instruments provide for 13 weeks leave after 10 years service and pro rata long service leave after five years service. This provision appears reasonable and will be granted.

86 In relation to cl 9 – Travel and Accommodation, there seemed to be no issue with the respondent presently paying the costs for travel to and from the site and providing accommodation and meals. This provision will be granted.

87 As to cl10 – Safety Equipment Uniforms and Necessaries, this was not controversial and would apply in the ordinary course of business and consequently this clause will be included.

88 No evidence was lead in support of the clause 11 – Redundancy and this clause is refused. The Commission's general order in relation to redundancy will in any event, apply. There will be prescribed a contract of service clause consistent with s 170CM of the WRA.

89 As to the dispute resolution clause, the terms of that contained in the Interim Award will apply.

90 It will be seen from the above that the award to issue will provide the respondent with almost complete flexibility in the deployment of its workforce. There are few if any restrictions on the employer contained in the award to be made.

91 A minute of proposed order now issues.

2006 WAIRC 03970

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS
	APPLICANT
	-v-
	SKILLED RAIL SERVICES PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 17 MARCH 2006
FILE NO.	A 5 OF 2005
CITATION NO.	2006 WAIRC 03970

Catchwords	Industrial law - Supplementary reasons for decision - Reasons for decision and minute of proposed order previously issued by Commission - Speaking to the minutes - Order issued - *Industrial Relations Act* (WA) 1979 s 29B; s 35(3); s 37(1)(b); s 38
Result	New Award
Representation	
Applicant	Mr D Schapper of counsel
Respondent	Mr J Blackburn of counsel

Supplementary Reasons for Decision

1 The Commission handed down its reasons for decision and minute of proposed order in this matter on 7 March 2006: 2006 WAIRC 03892. The parties were requested to advise in writing if they wished to speak to the minute of proposed order. Only the respondent did so.

2 The Commission listed the matter for a speaking to the minutes pursuant to s 35(3) of the Industrial Relations Act 1979 ("the Act"). Several matters were raised by counsel for the respondent Mr Blackburn. The first matter was as to cl 1 - Title. He submitted that as the award made in a similar application in A3 of 2005 by the Commission as otherwise constituted, contained the same name as in the proposed award in these proceedings, then some differentiation should apply. This was not opposed by counsel for the applicant Mr Schapper. Accordingly, the new award to be made will be known as the "Iron Ore Production and Processing (Locomotive Drivers Rio Tinto Railways) Award 2006.

3 The next matter related to the proposed cl 3 - Area and Scope. Mr Blackburn submitted that as the award will not apply throughout the State of Western Australia, but rather in the Pilbara region, then the area and scope clause should be amended accordingly. Mr Schapper submitted that the clause could remain as in the minute. Pursuant to s 37(1)(b) of the Act, an award will operate throughout the State of Western Australia unless its terms reflect otherwise. It seems to the Commission that as the award is only to operate in the Pilbara at the Rio Tinto railway operations, that it is appropriate that reference to its application throughout the State of Western Australia be deleted and its terms will reflect otherwise for the purposes of s 37(1)(b) of the Act.

4 As to cl 5 - Minimum Adult Award Wage, the Commission agrees that as the date prescribed in sub clause (9)(d) has passed, such a paragraph is redundant and it should be removed.

5 In relation to cl 6 - Wages, Mr Blackburn submitted that this clause should make it clear that the hourly rate of wage prescribed by the award is paid on an aggregate basis, that being it compensates for any other penalties, allowances or premiums save for overtime. Mr Schapper submitted that such prescription was not necessary given that the award does not confer any such benefits on employees in any event. I would generally have a reluctance to insert words into an award that might be said to be superfluous. However, given that the proposed drafting also makes it clear that the award will apply to residential as well as fly in fly out employees, and that the rate of pay to be paid represents an actual composite rate, then the variation sought to the minute will be made. The same applies to the absorption of any increases by way of arbitrated safety net adjustments determined by the Commission.

6 There were submissions made by Mr Blackburn in relation to cl 8 – Overtime, to the effect that it should be clear in the order that in the absence of a definition of ordinary hours, it is hours worked in excess of those prescribed in cl 7 - Hours that will attract overtime payments. Mr Schapper submitted in reply that despite the findings and conclusions of the Commission in its reasons for decision that as the award will apply to both residential and fly in fly out employees, then a 42 hour week should be prescribed in the award as ordinary hours.

7 The Commission has already determined that the hours of work should be as those prescribed in cl 7 – Hours, as in the Interim Award, reflecting existing arrangements for fly in fly out employees. Those arrangements are not unusual fly in fly out rosters. Notably also, is the fact that the cases of the parties were put and defended on the basis only of fly in fly out arrangements. The award will only at this point in time apply to one employer, that being Skilled Rail Services Pty Ltd. There was no evidence before the Commission as to working hours' arrangements for residential employees because no such employees are presently engaged on this basis. For these reasons the clause will remain as it is. In the event that subsequently, the respondent or any other employer coming into the industry engages employees on a residential basis, then an application to vary cl 7- Hours clause can be made to accommodate that circumstance. The proposed variation to cl 8 - Overtime to clarify its application to the hours prescribed in the award will be made.

8 As to cl 11 - Travel and Accommodation, the proposed amendment to sub clause (1) and the addition of a new sub clause (3) were not opposed and will be made.

9 Finally, the respondent proposed the insertion of a cl 14 - Named Parties to the award. Given the terms of s 38 of the Act, this clause will be inserted however, the Commission determines that there should be no reference to Integrated Group Ltd. Although it was served with a copy of the claim in these proceedings, and by s 29B of the Act became a party to the proceedings as a consequence, the Commission was informed that it does not have any present arrangements with the Rio Tinto group of companies. On that basis it sought and was granted leave to withdraw from the proceedings at an early stage.

10 An order now issues.

2006 WAIRC 03971

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS
	APPLICANT
	-v-
	SKILLED RAIL SERVICES PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 17 MARCH 2006
FILE NO/S	A 5 OF 2005
CITATION NO.	2006 WAIRC 03971

Result	New Award
Representation	
Applicant	Mr D Schapper of counsel
Respondent	Mr J Blackburn of counsel

Order

HAVING heard Mr D Schapper of counsel on behalf of the applicant and Mr J Blackburn of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby-

(1) MAKES an award to be known as the Iron Ore Production and Processing (Locomotive Drivers Rio Tinto Railway) Award 2006 in terms of the schedule hereto with effect on and from the date of this order.

(2) ORDERS that the Iron Ore Production and Processing (Engine Drivers - Skilled Rail Services) Interim Award 2006 (A5 of 2005) be and is hereby cancelled.

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

SCHEDULE

1. - TITLE

This award shall be known as the Iron Ore Production & Processing (Locomotive Drivers Rio Tinto Railway) Award 2006

2. - ARRANGEMENT

3. - AREA AND SCOPE

(1) This award shall apply to all locomotive drivers working on the railroad which forms part of the iron ore production and processing operations carried on in and around Dampier, Pannawonica, Tom Price, Paraburdoo, Marandoo and associated places and who are employed by any firm, company, enterprise or undertaking engaged in the industry of labour hire.

(2) This award shall not apply to any employee employed by Pilbara Iron Company (Services) Pty Ltd, Hamersley Iron Pty Ltd, Robe River Mining Company and Robe River Iron Associates.

4. - CONTRACT OF SERVICE

(1) An employer may direct an employee to carry out such duties as are within the limits of the employee's skill, competence and training.

(2) Notice of Termination by Employer

(a) The employment of any employee (other than a casual employee) may be terminated by the following notice period, provided that an employee has not been dismissed on the grounds of gross misconduct in which case shall only be paid up to the time of dismissal.

PERIOD OF CONTINUOUS SERVICE	PERIOD OF NOTICE
Less than 1 year	1 week
1 year but less than 3 years	2 weeks
3 years but less than 5 years	3 weeks
5 years and over	4 weeks

(b) An employee who at the time of being given notice is over 45 years of age and has completed two years' continuous service with the employer, shall be entitled to one week's additional notice.

(c) Payment in lieu of the notice prescribed in paragraphs (a) and (b) of this subclause shall be made if the appropriate notice period is not given. The employment may be terminated by part of the period of notice specified and part payment in lieu thereof.

(d) In calculating any payment in lieu of notice the employer shall pay the employee the ordinary wages for the period of notice had the employment not been terminated.

(e) 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 the Long Service Leave Provisions published in Volume 66 of the Western Australian Industrial Gazette at pages 1-4, as amended from time to time, shall constitute continuous service for the purpose of this clause.

(3) Notice of Termination by Employee

(a) The notice of termination required to be given by an employee shall be the same as that required of an employer, save and except that there shall be no additional notice based on the age of the employee concerned.

(b) If an employee fails to give the required notice or having given, or been given, such notice leaves before the notice expires, the employer shall have the right to withhold moneys due to the employee to a maximum amount equal to the ordinary time rate of pay for the required period of notice.

(4) Time Off During Notice Period

Where an employer has given notice of termination to an employee who has completed one month's continuous service, that employee shall, for the purpose of seeking other employment be entitled to be absent from work up to a maximum of eight ordinary hours without deduction of pay. The time off shall be taken at times that are convenient to the employee after consultation with the employer.

This subclause shall not apply to a casual employee.

(5) Statement of Employment

On termination of service a worker shall, on request, be given a certificate setting out the length of service and duties performed.

(6) Casual Employees

(a) (i) The period of notice of termination in the case of a casual employee shall be one hour.

(ii) If the required notice of termination is not given one hour's wages shall be paid by the employer or forfeited by the employee.

(7) Absence From Duty

The employer shall be under no obligation to pay for any day not worked upon which the employee is required to present for duty, except when such absence is due to leave to which the employee is entitled to take and be paid for under the provisions of this award.

(8) Standing Down of Employees

(a) (i) The employer is entitled to deduct payment for any day or part of a day on which an employee (including an apprentice) cannot be usefully employed because of industrial action by any of the unions party to this award, or by any other association or union.

(ii) If an employee is required to attend for work on any day but because of failure or shortage of electric power work is not provided, such employee shall be entitled to two hours' pay and further, where any employee commences work he/she shall be provided with four hours' employment or be paid for four hours' work.

(b) The provisions of paragraph (a) of this subclause also apply where the employee cannot be usefully employed through any cause which the employer could not reasonably have prevented but only if, and to the extent that, the employer and the union or unions concerned so agree or, in the event of disagreement, the Board of Reference so determines.

(c) Where the stoppage of work has resulted from a breakdown of the employer's machinery the Board of Reference/Commission, in determining a dispute under paragraph (b) of this subclause, shall have regard for the duration of the stoppage and the endeavours made by the employer to repair the breakdown.

5 - MINIMUM ADULT AWARD WAGE

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

(2) The Minimum Adult Award Wage for full time adult employees is $484.40 per week payable on and from 7th July 2005.

(3) The Minimum Adult Award Wage of $484.40 per week is deemed to include all arbitrated safety net adjustments from State Wage Case decisions.

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

(5) Juniors shall be paid no less than the wage determined by applying the percentage prescribed in the junior rates provision in this award to the Minimum Adult Award Wage of $484.40 per week.

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

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

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

(a) apply to all work in ordinary hours.

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

(8) Minimum Adult Award Wage

The rates of pay in this award include the minimum weekly wage for adult employees payable under the 2005 State Wage Case Decision. Any increase arising from the insertion of the minimum adult award wage will be offset against any equivalent amount in rates of pay received by employees whose wages and conditions of employment are regulated by this award which are above the wage rates prescribed in the award. Such above award payments include wages payable pursuant to enterprise agreements, consent awards or award variations to give effect to enterprise agreements and over award arrangements. Absorption which is contrary to the terms of an agreement is not required.

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

(9) Adult Apprentices

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

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

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

6. AGGREGATE WAGES

(1) The aggregate hourly rate of wage for employees to whom this award applies shall be $40.83 per hour.

(2) A loading of 20% of the hourly rate shall be paid for each hour worked by a casual employee.

(3) The aggregate hourly rate of wage covers all payments for the performance of the work (subject to clause 8 of this award) including penalties, allowances, shift premiums and compensation for all disabilities associated with the nature and location of the work whether the employees are employed on a residential or fly in fly out basis.

(4) Arbitrated Safety Net Adjustments

Increases to salaries, wages and allowances arising from arbitrated safety net adjustments determined by the Commission are to be absorbed into the wages prescribed by this award.

7. - HOURS

Employees shall work a 12 hour shift roster averaging 42 hours per week in the case of a 14 day on 14 day off fly in fly out roster and 56 hours per week in the case of a 14 day on 7 day off fly in fly out roster.

8. - OVERTIME

Any hours outside or in excess of those prescribed in clause 7 - Hours shall be paid at the rate of time and one half for the first 2 hours and double time thereafter.

9. - ANNUAL LEAVE

(1) Five weeks paid annual leave shall be allowed for each year worked.

(2) Continuous shift employees shall be allowed a further week as annual leave, in addition to that prescribed in (1).

(3) Pro rata leave shall be paid out on termination.

(4) This clause shall not apply to casual employees.

10. - LONG SERVICE LEAVE

(1) 13 weeks paid long service leave shall be allowed for each period of 10 completed years of service.

(2) Pro rata leave shall be paid out on termination where termination occurs after more than 5 years service.

11. - TRAVEL AND ACCOMMODATION

(1) The employer shall provide and shall pay all costs associated with travel between Perth Airport and site, to and from the site and to and from the workplace.

(2) The employer shall provide and pay all costs associated with the employee's accommodation whilst at site and the meals of the employee.

(3) This clause shall only apply to fly in fly out employees.

12. - SAFETY EQUIPMENT, UNIFORMS AND NECESSARIES

The employer shall, at its own cost, provide all necessary safety gear, uniforms and other things necessary for the employee to fulfil his duties.

13. - DISPUTE RESOLUTION

(1) In the case of any questions, disputes or difficulties arising under this award, the employer and employee(s) are to confer amongst themselves and make reasonable attempts to resolve any such questions, disputes or difficulties.

(2) In the event the employer and employee(s) are not able to resolve any questions, disputes or difficulties having complied with sub clause (1) above either may refer the matter to the Western Australian Industrial Relations Commission.

14. – NAMED PARTIES TO THE AWARD

The parties to this award are:

The Construction, Forestry, Mining & Energy Union of Workers

Skilled Rail Services Pty Ltd

2006 WAIRC 04400

WA HEALTH - HSU AWARD 2006

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS)
	APPLICANT
	-v-
	DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE HON MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER SECTION 7 OF THE HOSPITALS AND HEALTH SERVICES ACT (WA) AND OTHERS
	RESPONDENTS
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 24 MAY 2006
FILE NO	PSAA 2 OF 2005
CITATION NO.	2006 WAIRC 04400

Result	New Award Delivered

Award

HAVING heard Mr C Panizza and with him Ms C Thomas on behalf of the Health Services Union of Western Australia (Union of Workers) and Mr F Fury on behalf of the Director General of Health, Ms B Burke on behalf of The Australian Nursing Federation, Industrial Union of Workers, Perth, Mr P Jennings on behalf of the Australian Medical Association (WA) Incorporated and Ms N Ireland on behalf of the Liquor, Hospitality and Miscellaneous Union, Western Australian Branch, (and by consent), the Public Service Arbitrator, pursuant to the powers conferred on it under the Industrial Relations Act 1979 hereby makes the following Award. Such Award shall cancel and replace the Hospital Salaried Officers Award, 1968 (No. 39 of 1968). The Award shall operate on and from the 30th day of March 2006.

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

SCHEDULE

WA Health - HSU Award 2006

1. - TITLE

This Award shall be known as the WA Health - HSU Award 2006 (referred to as the Award).

1B. - MINIMUM ADULT AWARD WAGE

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

(2) The Minimum Adult Award Wage for full-time adult employees is $484.40 per week payable on and from 7 July 2005.

(3) The Minimum Adult Award Wage of $484.40 per week is deemed to include all arbitrated safety net adjustments from State Wage Case decisions.

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

(5) Juniors shall be paid no less than the wage determined by applying the percentage prescribed in the junior rates provision in this Award to the Minimum Adult Award Wage of $484.40 per week.

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

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

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

(a) apply to all work in ordinary hours.

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

(8) Minimum Adult Award Wage

The rates of pay in this Award include the minimum weekly wage for adult employees payable under the 2005 State Wage Case Decision. Any increase arising from the insertion of the minimum adult award wage will be offset against any equivalent amount in rates of pay received by employees whose wages and conditions of employment are regulated by this Award which are above the wage rates prescribed in the Award. Such above award payments include wages payable pursuant to enterprise agreements, consent awards or award variations to give effect to enterprise agreements and over award arrangements. Absorption which is contrary to the terms of an agreement is not required.

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

(9) Adult Apprentices

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

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

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

(d) Nothing in this clause shall operate to reduce the rate of pay fixed by this Award for an adult apprentice in force immediately prior to 5th June 2003.

2. - ARRANGEMENT

3. – EFFECT AREA AND SCOPE

(1) This Award shall extend to and bind:

(a) All salaried employees engaged in professional, administrative, clerical, technical, and supervisory capacities - including 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;

and

(2) Shall operate throughout the State of Western Australia.

(3) Notwithstanding subclause (1) of this clause, this Award shall not extend to and bind:

(a) Employees employed in the profession or industry of nursing and being registered or entitled to be registered with the Nurses Board of Western Australia howsoever titled;

(b) Medical practitioners as defined in the Medical Act 1894 including any medical student registered or otherwise authorised and employed to perform duties which would usually be performed by a medical practitioner;

(c) All salaried employees (being professional, administrative, clerical, technical and supervisory employees) employed by the Metropolitan Health Service Board or by any other Western Australian State Government person, enterprise or corporation in the Perth Dental Hospital and Community Dental Services or any other entity howsoever described or named which provides any of the services provided by Perth Dental Hospital or by the Dental Services Branch of the Health Department of Western Australia as at 30 April 1998 (referred to collectively as "the Dental Hospital"), provided that where from time to time the provision of dental services is devolved from management and control of the Dental Hospital, to the management and control of an individual Public Hospital Health Service such that the individual Public Hospital Health Service has permanent management control of employees and the provision of dental services at the Public Hospital Health Service then such employees will not be excluded from coverage of this Award;

(d) All salaried employees (being professional, administrative, clerical, technical and supervisory employees) employed by the Metropolitan Health Services Board at Graylands Selby-Lemnos and Special Care Health Services ("GSL") who, as at 6 May 1998 were financial members of the Civil Service Association of Western Australia Incorporated, while they remain employed at the GSL and financial members of the CSA;

(e) Any employees employed in callings which as at 30 March 2006 would have made them eligible for coverage by an award of the Liquor, Hospitality and Miscellaneous Union, Western Australian Branch.

(4) This Award cancels and replaces the Hospital Salaried Officers Award 1968, provided that any orders, agreements and/or arrangements made pursuant to the replaced award will continue under this Award with any variations necessary to allow references to the Award to be correctly read unless specifically cancelled, discontinued or replaced.

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.

5. - TERM

(1) This Award cancels and replaces the Hospital Salaried Officers Award, 1968, No. 39 of 1968, as amended.

(2) This Award has effect on and from the date of registration until such time as it is cancelled or replaced.

6. - DEFINITIONS

(1) "Metropolitan Area" means, that area within a radius of fifty kilometres from the Perth Railway Station.

(2) "Married Employee" means, an employee who is required to maintain a home and support dependants therein.

(3) "A Day" means, for the purposes of Clauses 20, 21, 23, 25, 27 and 28, from midnight to midnight.

(4) "Headquarters" means, that hospital in which the principal work is carried out, as defined by the employer.

(5) "Day Employee" means, an employee who works his/her ordinary hours from Monday to Friday inclusive and who commences work on such days after 6.00 a.m. and before 12.00 midday.

(6) "Shift employee" means, an employee who is not a day employee as defined.

(7) "Union" shall mean the Health Services Union of Western Australia (Union of Workers).

(8) “Spouse” means, an employee’s spouse/partner including defacto spouse/partner.

(9) “Defacto spouse/partner” means, a person of either opposite or same sex who is co-habiting with another person as that person’s partner on a bona fide domestic basis, although not actually married to that person, as if for all intents and purposes they are lawfully married.

7. - CONTRACT OF SERVICE

(1) (a) Upon employment an employee shall be appointed to a position and classification level and salary increment point within that level, and upon appointment to a new position an employee shall be appointed to a classification level and salary increment point within that level.

(b) During the first six (6) months of employment the contract of service shall be by the fortnight and may be terminated by two (2) weeks' notice on either side given in writing on any day or by the payment by the employer, or the forfeiture by the employee, of an amount equal to two (2) weeks' salary provided that, a lesser period of notice may be agreed, in writing between the employer and the employee concerned.

(2) (a) On the completion of six (6) months' employment the contract of service shall be by the month unless the employer notifies the employee of an intention to continue the contract of service on a fortnightly basis for a further period of up to six (6) months in which case the provisions of subclause (1)(a) of this clause will apply during that period.

(b) Where the employer notifies an employee of an intention to continue the contract of service on a fortnightly basis and the employment continues for a period of twelve (12) months the employer shall terminate the contract of service forthwith by one (1) month's notice given in writing on any day or by the payment of an amount equal to one (1) month's salary or, if the employer fails to do so, the contract of service shall be deemed to be by the month.

(3) An employee whose contract of service is by the month may terminate the contract of service by one (1) month's notice given in writing on any day or the forfeiture of an amount equal to one (1) month's salary provided that, a lesser period of notice may be agreed, in writing, between the employer and the employee concerned.

(4) The employer may terminate the contract of service of any employee, whose contract of service is by the month, by one (1) month's notice given in writing on any day but only if:

(a) The employer has followed the disciplinary procedure in accordance with subclause (3) of Clause 27. - Dispute Settlement Procedure of this Award, and is satisfied that the employee is guilty of;

(i) wilful disobedience or disregard of any lawful order made or given by any person having authority to make or give such an order;

(ii) being negligent or careless in the discharge of his/her duties;

(iii) being inefficient or incompetent in the discharge of his/her duties and such inefficiency or incompetency appears to arise from causes within his/her own control;

(iv) using intoxicating beverages to excess; or

(v) disgraceful or improper conduct.

(b) The employee is convicted of any indictable offence;

(c) On the basis of medical evidence, the employee does not have the capacity to continue to carry out the duties of his/her position; or

(d) The position occupied by an employee is no longer considered necessary and there is no suitable alternative employment available, provided that in such case, termination is subject to the minimum notification required in accordance with subclause (6) of this clause, and to the prevailing redeployment and redundancy provisions, and laws applying to public sector employees.

(5) The foregoing provisions of this clause do not affect the employer's right to dismiss an employee without notice for misconduct and in such a case the salary of the employee shall be paid up to the time of dismissal only but where an employee, whose contract of service is by the month, is dismissed the cause for dismissal shall be of the kind referred to in paragraphs (a) and (b) of subclause (4) of this clause.

(6) (a) Where an employer considers that a position occupied by an employee is no longer necessary and no other employment is available to that employee the Union shall be notified in writing to that effect.

(b) The Union may, within seven (7) days of the date upon which that notification is given, request the employer to review that decision but where an agreement is not reached in discussion between the employer and the Union the contract of service may, subject to the prevailing redeployment and redundancy provisions and laws applying to public sector employees, be terminated in accordance with the provisions of subclause (4) of this clause.

(7) Where the employer seeks to terminate the services of an employee in accordance with subclauses (4) and (5) of this clause, the employer shall, upon written request, supply to the employee, a written statement setting out the full details of the incident, circumstance, event or matters upon which the employer based its decision. Each statement shall be supplied within seventy-two hours of receipt of the request.

(8) The provisions of this clause shall not apply to casual employees.

8. - SALARIES

The minimum rates of salaries to be paid to employees covered by this Award shall be those set out in Schedule A – Minimum Salaries attached to this Award. Nothing contained in this Award shall preclude the payment by way of an allowance an amount in addition to that prescribed for the classification of a position.

9. - PAYMENT OF SALARIES

(1) Salaries shall be paid fortnightly but, where the usual pay day falls on a holiday prescribed in Clause 14. – Holidays and Annual Leave of this Award, payment shall be made on the previous day.

(2) A fortnight's salary shall be computed by dividing the annual salary rate by 313 and multiplying the result by 12.

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

(4) Salaries shall be paid by direct funds transfer to the credit of an account nominated by the employee at such bank, building society or credit union approved by the employer. Provided that where such form of payment is impractical or where some exceptional circumstances exist and by agreement between the employer and the Union, payment by cheque may be made.

(5) Annual increments shall be subject to the employee's satisfactory performance over the preceding twelve months, which shall be assessed according to an agreed system of performance appraisal.

10. - HIGHER DUTIES

(1) An employee, who is directed by the employer or a duly authorized senior employee to act in an office which is classified higher than his/her own and who performs the full duties and accepts the full responsibility of the higher office for five (5) consecutive working days or more, shall, subject to the provisions of this Award, be paid an allowance equal to the difference between his/her own salary and the salary he/she would receive if he/she were permanently appointed to the office in which he/she is so directed to act.

(2) Where the full duties of a higher office are temporarily performed by two (2) or more employees they shall each be paid an allowance as determined by the employer: Provided that any dispute or disagreement as to the amount of any such allowance shall be resolved in accordance with Clause 27. – Dispute Settlement Procedure of this Award.

(3) Where an employee is directed to act in an office which has an incremental range of salaries he/she shall be entitled to receive an increase in higher duties allowance equivalent to the annual increment he/she would have received had he/she been permanently appointed to such office: Provided that acting service with allowances for acting in offices of the same classification or higher than the office during the eighteen (18) months preceding the commencement of so acting shall aggregate as qualifying service towards such an increase in the allowance.

(4) Where an employee, who has qualified for payment of higher duties allowance under this clause, is required to act in another office or other offices classified higher than his/her own for periods of less than five (5) consecutive working days without any break occurring in acting service, he/she shall be paid a higher duties allowance in respect of such further period or periods of so acting: Provided that payment shall be made at the highest rate the employee has been paid during his/her term of continuous acting or at the rate applicable to the office in which he/she is currently acting, whichever is the less.

(5) Where an employee who is in receipt of an allowance granted under this clause and has been so for a continuous period of twelve (12) months or more, proceeds on:

(a) A period of normal annual leave; or

(b) A period of any other approved leave of absence of not more than one (1) calendar month;

the employee shall continue to receive the allowance for the period of leave. This subclause shall also apply to an employee who has been in receipt of an allowance for less than twelve (12) months if during his/her absence no other

employee acts in the office in which the employee was acting immediately prior to proceeding on leave and the employee resumes in the office immediately after his/her leave.

For the purposes of this subclause, the expression:

(c) "Normal annual leave" shall mean the annual period of leave referred to in subclause (4) and subclause (8) of Clause 14. - Holidays and Annual Leave of this Award and shall include any holidays mentioned in subclause (1) of that clause and leave in lieu accrued during the preceding twelve (12) months, taken in conjunction with such annual leave;

(d) "Any other approved leave of absence" shall include any period of long service leave of not more than one (1) calendar month.

(6) Where an employee who is in receipt of an allowance granted under this clause proceeds on:

(a) A period of annual leave in excess of the normal; or

(b) A period of any other approved leave of absence of more than one (1) calendar month;

he/she shall not be entitled to receive payment of such allowance for the whole or any part of the period of such leave.

(7) Where the full duties of a higher office are not performed, an employee shall be paid such proportion of the allowance provided for in subclause (1) as the duties performed bear to the full duties of the higher office. Where such a proportionate allowance is to be paid, however, employees shall be advised of the allowance to be paid before commencing the duties of the higher office.

The allowance may be adjusted during the period of higher duties.

11. - HOURS

(1) (a) Except as provided in subclause (3) and, subject to the provisions of subclause (2) of this clause the ordinary hours of work shall be an average of thirty seven and one half (37½) per week and shall be worked by one of the following arrangements:

(i) Prescribed hours of work of thirty seven and one half (37½) per week;

(ii) Flexitime roster covering a settlement period of four (4) weeks;

(iii) Actual hours of seventy five (75) over nine (9) days with the tenth day to be taken as a paid rostered day off;

(iv) Such other arrangements as are agreed between the employer and employee; or

(v) Where the Union and the employer so agree, shifts of more than ten (10) hours but not more than twelve (12) hours may be worked for the purpose of trialling alternative shift arrangements only.

(b) The operation of working arrangements prescribed in paragraph (a) above, shall be consistent with those working arrangements prescribed in Administrative Instruction 701, Hours of Duty, governing State Public Service employees.

(c) Where an employer has made a definite decision to introduce changes to shift rosters or employees' ordinary hours, the employer shall notify the employees who may be affected by the proposed changes and the Union as soon as the decision has been made and before the changes are to be introduced. Discussion with the employees and Union shall occur consistent with Clause 38. - Introduction of Change of this Award.

(2) Notwithstanding the provisions of this clause to the contrary, employees who on the 13 March, 1979, were employed to work the ordinary hours prescribed in subclause (1) hereof on four (4) days of the week shall continue to work such hours on such number of days of the week, provided that any change in the number of days of the week on which such ordinary hours may be worked, shall be the subject of agreement between the Union and the employer or failing agreement as determined in accordance with Clause 27. – Dispute Settlement Procedure of this Award.

(3) Notwithstanding anything elsewhere contained in this Award, X-Ray staff who on the 14 September, 1961, were employed by any of the respondents to this Award on a thirty-five (35) hour and four (4) week annual leave basis shall continue to be employed on such basis whilst employed by any of the said respondents.

12. - OVERTIME

(1) Subject to the provisions of subclauses (3) and (11) of this clause and, except as provided in subclause (2) of this clause, all time worked at the direction of the employer outside an employee's ordinary working hours shall be paid for at the rate of time and a half for the first three (3) hours and double time thereafter.

(2) (a) Subject to the provisions of subclauses (3) and (11) of this clause all time worked at the direction of the employer outside an employee's ordinary working hours on any day between midnight and 6.00 a.m. or on a Saturday after 12.00 midday or on a Sunday shall be paid for at the rate of double time.

(b) Subject to the provisions of subclauses (3) and (11) of this clause all time worked at the direction of the employer outside an employee's normal hours of labour or ordinary hours in the case of a shift employee on a public holiday observed in accordance with Clause 14. - Holidays and Annual Leave of this Award shall be paid for at the rate of double time and a half of the ordinary time rate.

(3) Subclauses (1) and (2) of this clause shall not apply in respect of any day on which the time worked, in addition to the ordinary hours, is less than thirty (30) minutes.

(4) In lieu of payment for overtime an employee, on request, may be allowed time off proportionate to the payment to which the employee is entitled but if the employee so requests in writing the employee shall be allowed such time off up to a maximum of five (5) days in each year of service. Time off shall be taken at a time convenient to the employer.

(5) Notwithstanding anything contained elsewhere in this clause an employee, whose salary exceeds that determined from time to time as the maximum payable to an employee in Level 6, shall:

(a) Be entitled to the benefit of the provisions of this clause if the employee is rostered to work regular overtime or is instructed by his/her employer to hold him/herself on-call in accordance with the provisions of subclause (10) of this clause; or

(b) In all other cases but subject to the provisions of subclause (3) of this clause, be allowed time off equivalent to the overtime worked. Such time off shall be taken at a time convenient to the employer.

(6) Payment for overtime shall be computed at the rate applicable to the day on which the overtime is worked which shall include any loading for afternoon or night shift, provided that with the exception of overtime worked on public holidays the maximum rate payable under this Award shall not exceed double the ordinary time rate.

(7) For the purpose of assessing overtime each day shall stand alone.

(8) An employee required to work overtime beyond 2.00 p.m., or beyond 7.00 p.m. on any day shall be allowed an unpaid break of at least thirty (30) minutes between 12.00 midday and 2.00 p.m. or between 5.00 p.m. and 7.00 p.m. as the case may be.

(9) (a) Subject to the provisions of paragraph (b) of this subclause an employee, other than one accommodated at the hospital, who is recalled to work for any purpose shall be paid a minimum of two (2) hours at the appropriate overtime rate but the employee shall not be obliged to work for two (2) hours if the work for which the employee was recalled is completed in less time, provided that if an employee is called out within two (2) hours of starting work on a previous call the employee shall not be entitled to any further payment for the time worked within that period of two (2) hours.

(b) Where an employee, other than one accommodated at the hospital, is recalled to work for any purpose, within two (2) hours of commencing normal duty, the employee shall be paid at the appropriate overtime rate for that period up until the commencement time of normal duty, but the employee shall not be obliged to work for the full period if the work for which the employee was recalled is completed in less time.

(c) Where an employee is recalled to duty in accordance with paragraphs (a) or (b) of subclause (9) of this clause, then the payment of the appropriate overtime rate shall commence from:

(i) In the case of an employee who is on-call, from the time the employee starts work; or

(ii) In the case of an employee who is not on-call, time spent travelling to and from the place of duty where the employee is actually recalled to perform emergency duty shall be included with actual duty performed for the purpose of overtime payment;

Provided that where an employee is recalled within two (2) hours of commencing normal duty, only time spent in travelling to work shall be included with actual duty for the purpose of overtime payment.

(d) An employee other than one accommodated at the hospital shall, if recalled to work:

(i) Except as provided in placitum (ii) of this paragraph, be provided free of charge with transport from his/her home to the hospital and return or, be paid the vehicle allowance provided in Clause 19. – Motor Vehicle Allowances of this Award.

(ii) If recalled to work within two hours of commencing normal duty and the employee remains at work, the employee shall be provided free of charge with transport from his/her home to the hospital or, be paid the vehicle allowance provided in Clause 19. – Motor Vehicle Allowances of this Award for the journey from the employee's home to the hospital.

(10) (a) For the purposes of this Award an employee is on-call when they are directed by the employer to remain at such a place as will enable the employer to readily contact him/her during the hours when the employee is not otherwise on duty. In so determining the place at which the employee shall remain, the employer may require that place to be within a specified radius from the hospital.

(b) An employee shall be paid an hourly allowance equal to 18.75% of 1/37.5th of the minimum weekly salary rate prescribed from time to time for a Medical Scientist: Provided that payment in accordance with this paragraph shall not be made with respect to any period for which payment is otherwise made in accordance with the provisions of this clause when the employee is recalled to work.

(c) Where the employer determines that there is a need for an employee to be on-call or to provide a consultative service and the means of contact is to be by telephone or telepage, the employer shall where the telephone is not already installed bear the cost of such installation.

(d) (i) Where the employee pays or contributes towards the payment of the rental of such telephone the employer shall pay the employee an amount being a proportion of the telephone rental calculated on the basis that for each seven days on which an employee is required to be on-call, the employer shall pay the employee 1/52nd of the annual rental paid by the employee.

(ii) Provided that where as a usual feature of the work an employee is regularly required to be on-call or to provide a consultative service the employer shall pay the full amount of the telephone rental.

(e) Where the employer determines that the means of contact is to be by a telepage or similar device the employer shall supply such device to the employee at no cost to the employee.

(f) Where the employer determines otherwise or it is not possible to contact an employee by telephone or telepage, the employer may send a taxi to the employee's residence or such other place with instructions for the employee to return to work.

(g) Notwithstanding the provisions of this subclause, where the employer and the Union, in writing agree, other arrangements may be made for compensation of on-call work.

(11) An Engineer or Maintenance Officer working singly in a hospital may be required by the hospital to hold himself/herself available for duty outside normal working hours in accordance with the following provisions:

(a) No restriction shall be placed on the Engineer's (or Maintenance Officer's) movements but he/she shall be required to advise the hospital of his/her whereabouts while he/she remains in the metropolitan area or in the country town in which he/she is employed;

(b) Before the Engineer (or Maintenance Officer) leaves the metropolitan area or the country town in which he/she is employed, at any time outside normal working hours, he/she shall advise the hospital of the following;

(i) The present condition of the engineering services in the hospital;

(ii) The name of any hospital employee or private tradesman who may be contacted in the event of an emergency;

(iii) Where he/she will be located in his/her absence and how he/she may be contacted if necessary, to provide advice and consultation; and

(iv) The approximate duration of his/her proposed absence;

(c) In lieu of payment of any allowance for being required to hold him/herself available for duty outside normal working hours and any overtime worked, each Engineer or Maintenance Officer working singly in a hospital shall be entitled to an additional two (2) weeks' leave per annum with pay and an allowance equivalent to 7% of the Level 4 point 4 salary.

(12) An Engineer employed at Royal Perth Hospital, Sir Charles Gairdner Hospital, Princess Margaret Hospital, Fremantle Hospital or King Edward Memorial Hospital rostered for on-call duty shall be available at all times for duty outside ordinary working hours.

In lieu of payment of the prescribed allowance and any overtime worked each Engineer shall be entitled to an additional two (2) weeks' leave per annum with pay and an allowance equivalent to 4% of the Level 5 point 3 salary.

(13) A Medical Imaging Technologist employed at a hospital employing no more than two (2) Medical Imaging Technologists may be required by the employer to hold him/herself available for duty outside of normal working hours in accordance with the following provisions:

(a) No restriction shall be placed on the Medical Imaging Technologist's movements but he/she shall be required to advise the hospital of his/her whereabouts while he/she remains in the metropolitan area or in the country town in which he/she is employed;

(b) Before a Medical Imaging Technologist leaves the metropolitan area or the country town in which he/she is employed, he/she shall advise the hospital of where he/she may be located in his/her absence, how he/she may be contacted if necessary and the approximate duration of his/her proposed absence;

(c) Subject to paragraph (d) of this subclause the Medical Imaging Technologist shall be available to provide an emergency service only and shall only be called into work by a Doctor who is giving treatment and who, in the course of that treatment, determines that x-rays are required urgently to ensure the proper care and management of the patient;

(d) Where, because of the nature of the emergency treatment being given, it is not possible for the Doctor to personally contact the Medical Imaging Technologist, another person may contact the Medical Imaging Technologist and request the Medical Imaging Technologist's attendance on the Doctor's behalf;

(e) A Medical Imaging Technologist called into work in accordance with paragraphs (c) and (d) of this clause shall attend at the required location to perform the service as soon as practicable following receipt of the call;

(f) A Medical Imaging Technologist who is required by the employer to hold him/herself available for duty outside of normal working hours in accordance with this subclause shall be entitled to an allowance equivalent to 11.5% of the minimum weekly salary rate prescribed from time to time in respect of classification Level 3 First Year as contained in Schedule A – Minimum Salaries of this Award;

(g) A Medical Imaging Technologist who is required by the employer to hold him/herself available for duty outside of normal working hours and who is recalled to work shall be paid overtime at the appropriate overtime rate in accordance with this clause;

(h) A Medical Imaging Technologist who is required by the employer to hold him/herself available for duty outside of normal working hours in accordance with this subclause may also be placed 'on-call' by the employer in accordance with the 'on-call' provisions contained in subclause (10) of this clause. Payment for any such 'on-call' duties shall be at the rate prescribed in subclause (10)(b) of this clause, and shall be in addition to the availability allowance prescribed in paragraph (f) above;

(i) Notwithstanding the foregoing provisions of this Award where the employer and the Union agree, in writing, emergency availability services may be provided in those hospitals where more than two (2) Medical Imaging Technologists are employed.

(14) Notwithstanding the foregoing provisions of this clause, where the employer and the Union agree, in writing, other arrangements may be made for compensation in lieu of payment of overtime.

(15) (a) Where an employee performs overtime duty after the time at which normal hours of duty end on one day and before the time at which normal hours of duty are to commence on the next succeeding day which results in the

employee not being off duty between these times for a continuous period of not less than ten (10) hours, the employee shall be entitled to be absent from duty without loss of salary, until from the time the employee ceased to perform overtime duty the employee has been off duty for a continuous period of ten (10) hours.

(b) Provided that where an employee is required to return to or continue work without the break provided in paragraph (a) of this subclause, then the employee shall be paid at double the ordinary rate until released from duty, or until the employee has had ten consecutive hours off duty without loss of salary for ordinary working time occurring during such absence.

(c) Where an employee (other than a casual employee or an employee engaged on continuous shift work) is called into work on a Sunday or holiday preceding an ordinary working day, the employee shall, whenever reasonably practicable, be given ten consecutive hours off duty before the employee's usual starting time on the next day. If this is not practicable then the provision of paragraph (b) shall apply.

(d) The provisions of this subclause shall apply in the case of shift employees who rotate from one shift to another, as if eight (8) hours were substituted for ten (10) when overtime is worked for the purpose of changing shift rosters.

(e) The provisions of paragraphs (a) and (b) of this subclause shall not apply to employees included in subclause (10) of this clause.

13. - MEAL MONEY

(1) An employee required to work overtime before or after the employees ordinary working hours on any day shall, when such additional duty necessitates taking a meal away from the employees usual place of residence, be supplied by the employer with any meal required or be reimbursed for each meal purchased at the rate of $8.25 for breakfast, $10.15 for the midday meal, and $12.20 for the evening meal: Provided that the overtime worked before or after the meal break totals not less than two (2) hours. Such reimbursement shall be in addition to any payment for overtime to which the employee is entitled.

(2) The rates prescribed in this clause shall be varied in accordance with any movement in the equivalent allowances in the Public Service Award, 1992.

14. - HOLIDAYS AND ANNUAL LEAVE

(1) (a) The following days or the days observed in lieu thereof shall, be allowed as holidays without deduction of pay, namely New Year's Day, Australia Day, Good Friday, Easter Monday, Anzac Day, Labour Day, Foundation Day, Sovereign's Birthday, Christmas Day, Boxing Day, provided that another day may be taken as a holiday by arrangement between the parties in lieu of any of the days named in this subclause.

(b) Where any of the days mentioned in subclause (1)(a) hereof falls on a Saturday or a Sunday the holiday shall be observed on the next succeeding Monday and when Boxing Day falls on a Sunday or a Monday, the holiday shall be observed on the next succeeding Tuesday.

(2) (a) When any of the days observed as a holiday in this clause fall during a period of annual leave the holiday or holidays shall be observed on the next succeeding work day or days as the case may be after completion of that annual leave.

(b) When any of the days observed as a holiday as prescribed in this clause fall on a day when a shift employee is rostered off duty and the employee has not been required to work on that day they shall be paid as if the day was an ordinary working day or if the employer agrees be allowed to take a day's holiday in lieu of the holiday at a time mutually acceptable to the employer and the employee.

(3) (a) Any employee, subject to paragraph (b) of this subclause, who is required to work on the day observed as a holiday as prescribed in this clause in his/her normal hours of labour or ordinary hours in the case of a shift employee shall be paid for the time worked at the rate of double time and a half or if the employer agrees be paid for the time worked at the rate of time and a half and in addition be allowed to observe the holiday on a day mutually acceptable to the employer and the employee.

(b) (i) An employee who is instructed by his/her employer to hold themself on-call in accordance with the provisions of subclause (10) of Clause 12. – Overtime of this Award on a day observed as a public holiday during his/her normal hours of labour or his/her ordinary hours in the case of a shift employee shall be allowed to observe that holiday on a day mutually acceptable to the employer and the employee.

(ii) An employee who is holding him/herself on-call during the period specified in the preceding paragraph in accordance with subclause (10) of Clause 12. – Overtime of this Award shall be paid for any time worked during the period at the rate of time and a half in accordance with the provisions of subclause (9) of Clause 12. – Overtime of this Award.

(c) An employee who is required to work on a public holiday outside of the hours referred to in subclause (3)(a) hereof shall be paid in accordance with subclause (2)(b) of Clause 12. – Overtime of this Award.

(4) Except as hereinafter provided a period of four (4) consecutive weeks' leave shall be allowed to an employee by his/her employer after each period of twelve (12) months' continuous service with such employer and this entitlement shall accrue pro-rata on a weekly basis.

(5) Where an employer and an employee have not agreed when the employee is to take his or her annual leave, subject to subclause (6) of this clause, the employer is not to refuse the employee taking, at any time suitable to the employee, any period of annual leave the entitlement to which accrued more than twelve (12) months before that time.

(6) The employee is to give the employer at least two (2) weeks' notice of the period during which the employee intends to take his or her leave unless a lesser period is agreed between the employee and the employer.

(7) The employee shall be paid for any period of annual leave prescribed by this clause at the ordinary rate of salary, and in the case of shift employees that rate of salary shall include the shift and weekend penalties the employee would have received had the employee not proceeded on annual leave. Where it is not possible to calculate the shift and weekend penalties the employee would have received, the employee shall be paid at the rate of the average of such payments made each week over the four (4) weeks prior to taking leave.

(8) By mutual agreement, an employee may be allowed to take the annual leave prescribed by this clause before the completion of twelve (12) months' continuous service as prescribed by subclause (4) of this clause.

(9) (a) (i) If after one (1) calendar month's continuous service in any qualifying twelve (12) monthly period, an employee leaves his/her employment or his/her employment is terminated by the employer through no fault of the employee, the employee shall be paid pro-rata annual leave calculated according to the following formula:

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

(ii) An employee provided for in subclause (10) of this clause shall, in addition to the payment prescribed in paragraph (a) (i), be paid one day's pay at his/her ordinary rate of salary in respect of each seven Sundays and/or public holidays worked in the period, provided that the maximum additional payment shall not exceed five (5) days' pay.

(iii) An employee who commences on the first working day of the month and works for the remainder of the month and an employee who has worked throughout a month and terminates on the last working day of a month shall be regarded as having completed that calendar month of service.

(iv) Notwithstanding paragraphs (a)(i) and (a)(ii) of this subclause, in the first and last months of an employee's service the employee is entitled to pro-rata annual leave calculated on the basis of one (1) working day for each completed two (2) weeks of service.

(b) The rate prescribed in subclause (3) hereof shall be paid in lieu of the amounts to which an employee may be entitled pursuant to Clause 28. - Shift Work of this Award.

(c) If the services of an employee terminate and the employee has taken a period of leave in accordance with subclause (8) of this clause and if the period of leave so taken exceeds that which would become due pursuant to paragraph (a) of this subclause the employee shall be liable to pay the amount representing the difference between the amount received by him/her for the period of leave taken in accordance with subclause (8) of this clause and the amount which would have accrued in accordance with paragraph (a) of this subclause. The employer may deduct this amount from moneys due to the employee by reason of the other provisions of this Award at the time of termination.

(10) Shift employees who are rostered to work their ordinary hours on Sundays and/or public holidays during a qualifying period of employment for annual leave purposes shall be entitled to receive additional annual leave as follows:

(a) If thirty-five (35) ordinary shifts on such days have been worked – one (1) week;

(b) If less than thirty-five (35) ordinary shifts on such days have been worked the employee shall be entitled to have one (1) additional day's leave for each seven (7) ordinary shifts so worked, provided that the maximum additional leave shall not exceed five (5) working days.

Provided that employees in employment on 1 January 1978 who because they were regularly rostered for work on Sundays and Public Holidays, were permitted an additional week's annual leave shall continue to be entitled to that additional week notwithstanding that the entitlement arrived at by the application of paragraph (b) of this subclause is less than one (1) week.

(11) The annual leave prescribed in subclause (4) of this clause may by mutual agreement be taken in two (2) portions provided that no portion shall be less than two (2) consecutive weeks.

(12) An employee stationed north of 26^{o} South latitude shall be entitled to an additional one (1) week's paid leave for each completed year of service in that area with free passes South each year. A married employee shall be granted free passes South each year for their spouse and dependent family under sixteen (16) years of age.

(13) When on annual leave an employee who does not avail themself of the board and lodging provided in his/her classification shall be granted an allowance for the period of his/her leave at the rate of $3.00 per week.

(14) The provisions of this clause shall not apply to casual employees.

(15) (a) An employee shall be paid a loading of 17.5% calculated on the rate as prescribed in subclause (7) of this clause.

(b) Shift employees when proceeding on annual leave including accumulated annual leave shall be paid:

(i) Shift and weekend penalties the employee would have received had the employee not proceeded on annual leave; or

(ii) A loading equivalent to 20% of normal salary; whichever is the greater.

(c) Provided that the maximum loading payable shall not exceed the amount set out in the Australian Bureau of Census and Statistics Publication for "average weekly earnings per male employed" in Western Australia for the September quarter immediately proceeding the date the leave became due.

(d) The loading prescribed in this subclause shall not apply to proportionate leave on termination.

(e) The loading prescribed in this subclause shall be payable on retirement, provided the employee is over fifty five (55) years of age.

(16) A full-time employee who, during a qualifying period towards an entitlement of annual leave was employed continuously on both a full-time and part-time basis may elect to take a lesser period of annual leave calculated by converting the part-time service to equivalent full-time service.

15. - SHORT LEAVE/BEREAVEMENT LEAVE

Short Leave

(1) The employer may upon sufficient cause being shown, grant an employee leave of absence not exceeding two (2) consecutive working days, but any leave of absence granted under the provisions of this clause shall not exceed, in the aggregate, three (3) working days in any one (1) calendar year.

Bereavement Leave

(2) An employee shall on the death of:

(a) The spouse of the employee;

(b) The child or step-child of the employee;

(c) The parent or step-parent of the employee;

(d) The brother, sister, step brother or step sister; or

(e) Any other person, who immediately before that person's death, lived with the employee as a member of the employee's family,

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

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

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

(5) An employee who claims to be entitled to paid leave under subclause (2) of this clause is to provide to the employer, if so requested, evidence that would satisfy a reasonable person as to:

(a) The death that is the subject of the leave sought; and

(b) The relationship of the employee to the deceased person.

(6) An employee requiring more than two (2) days bereavement leave in order to travel overseas in the event of the death overseas of a member of the employees immediate family may, upon providing adequate proof, in addition to any bereavement leave to which the employee is eligible, have immediate access to annual leave and/or accrued long service leave in weekly multiples and/or leave without pay provided all accrued leave is exhausted.

(7) The provisions of bereavement leave will be available to casual employees.

16. - SICK LEAVE

(1) An employee who is incapacitated for duty in consequence of illness or injury shall as soon as possible advise his/her supervisor in sufficient time to enable arrangements to be made for the performance of his/her duties. Any such employee who fails to do so shall be treated as absent without leave.

(2) An employee so incapacitated for duty shall notify his/her supervisor in sufficient time of the date on which he/she will resume duty, to enable any necessary arrangements to be made.

(3) (a) An application for leave of absence on the grounds of illness shall be supported by reasonable evidence.

(b) For the purposes of this clause reasonable evidence shall mean:

(i) For absences of up to a total of ten (10) working days in any one (1) anniversary year, evidence acceptable to a reasonable person;

(ii) For absences which in total exceed ten (10) working days in any anniversary year the certificate of a registered medical practitioner or where the nature of the illness consists of a dental condition and the period of absence does not exceed five (5) consecutive working days by a certificate of a registered dentist;

(iii) Provided that an employee may self certify in support of absences of two (2) days or less but not exceeding a total of five (5) working days in any anniversary year of employment.

(c) Where the absence exceeds two (2) consecutive working days, nothing in this subclause shall read as preventing the employer from requiring additional evidence acceptable to a reasonable person,

(4) Subject to the provisions of subclause (3) of this clause no leave of absence on the grounds of illness shall be granted with pay without the production of the required evidence.

An employee who finds that he/she is unable to resume duty on the expiration of the period shown on the first proof of evidence provided shall thereupon furnish a further proof of evidence and shall continue to do so upon the expiration of the period respectively covered by each such documented proof of evidence.

(5) Where an employee is ill during the period of his/her annual leave for recreation and produces at the time or as soon as practicable thereafter medical evidence to the satisfaction of the employer that he/she is or was as a result of his/her illness confined to his/her place of residence or a hospital for a period of at least seven (7) days, he/she may, with the approval of the employer, be granted at a time convenient to the employer additional leave equivalent to the period during which he/she was so confined.

(6) Where an employee is ill during the period of his/her long service leave and produces at the time or as soon as practicable thereafter medical evidence to the satisfaction of the employer that he/she is or was confined to his/her place of residence or a hospital for a period of at least fourteen (14) days, he/she may, with the approval of the employer, be granted at a time convenient to the employer additional leave equivalent to the period during which he/she was so confined.

(7) The basis for determining the leave of absence on the grounds of illness that may be granted shall be ascertained by crediting the employee concerned with the following periods, but the leave shall be cumulative and shall accrue pro-rata on a weekly basis:

		Leave On Full Pay Working Days	Leave On Half Pay Working Days
(a)	On date of employment of the employee	5	2
(b)	On completion by the employee of six months' service	5	3
(c)	On completion by the employee of twelve months' service	10	5
(d)	On completion of each additional twelve months' service by the employee	10	5

(8) When an employee is duly absent on account of illness and his/her entitlement to sick leave on full pay is exhausted, he/she may, with the approval of the employer, elect to convert any part of his/her entitlement to sick leave on half pay to sick leave on full pay, but so that his/her sick leave entitlement on half pay is reduced by two days for each day of sick leave on full pay that he/she receives by the conversion.

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

(10) An employee who is duly absent on leave without pay is not eligible for absence of leave on account of illness under this clause during the currency of that leave without pay.

(11) Where, on or after 1 August, 1972, an employee in the discharge of his/her duties suffers personal injuries by accident that are compensable in accordance with the provisions of the Workers' Compensation and Injury Management Act, 1981, and which necessitates the granting of leave of absence under this subclause:

(a) No charge shall be made against the employee’s sick leave credits in respect of so much of the period of leave as does not exceed twenty-six (26) weeks and the employee shall receive full pay for any such part of his/her leave of absence; and

(b) Where the employee is unable to resume duty at the expiration of the period of twenty-six (26) weeks, the employee shall be granted on full pay or half pay as the case requires, such further leave under this subclause as is required, but half the period only of such further leave shall be charged against the employee’s sick leave credits on full pay or half pay, as the case may be.

(12) Where an employee resigns or is dismissed by his/her employer through no fault of the employee’s and is engaged by another respondent to this Award within one (1) working week of the expiration of any period for which payment in lieu of annual leave or public holidays has been made, the period of sick leave that has accrued to the employee's credit shall remain to such employee's credit and the provisions of subclause (7) of this clause shall continue to apply to such employee.

(13) A pregnant employee shall not be refused sick leave by reason only that the "illness or injury" encountered by the employee is associated with the pregnancy.

(14) The provisions of this clause shall not apply to casual employees.

17. - PARENTAL LEAVE

(1) Definitions

For the purpose of this clause:

(a) "Child" means a child of the employee under the age of one (1) year except for adoption of a child where “child” means a person under the age of five (5) years of age who is placed with the employee for the purpose of adoption, other than a child or step-child of the employee or of the partner of the employee or child who has previously lived continuously with the employee for a period of six (6) months or more.

(b) "Employee" includes full-time, part-time, permanent and a fixed term contract employee up until the end of their contract period but does not include an employee engaged upon casual work.

(2) Basic entitlement

(a) Employees are entitled to fifty two (52) weeks parental leave in relation to the birth or adoption of their child.

(b) Parental leave is to be available to only one parent at a time, except that both parents may simultaneously access the leave in the following circumstances:

(i) An unbroken period of one (1) week at the time of the birth of the child;

(ii) An unbroken period of up to three (3) weeks at the time of adoption/placement of the child; or

(iii) Where the employer agrees.

(c) In order to demonstrate to the employer that, subject to paragraph (b), only one (1) parent will be off on parental leave at a time an employee shall, when applying for parental leave, provide the employer with a statutory declaration stating particulars of any period of parental leave sought or taken by his or her partner.

(d) Except as provided by subclause (15) of this clause, parental leave is unpaid.

(3) Birth of a child

(a) A pregnant employee will provide to the employer at least ten (10) weeks in advance of the expected date of birth:

(i) a certificate from a registered medical practitioner stating that she is pregnant and the expected date of birth; and

(ii) written notification of the date on which she proposes to commence parental leave, and the period of leave to be taken.

(b) Subject to subclause (c) and unless agreed otherwise between employer and employee, a pregnant employee may commence parental leave at any time within six (6) weeks immediately prior to the expected date of the birth.

(c) Where an employee continues to work within the six (6) week period immediately prior to the expected date of birth, or where the employee elects to return to work within six (6) weeks after the birth of the child, an employer may require the employee to provide a medical certificate stating that she is fit to work on her normal duties.

(d) Where the pregnancy of an employee terminates after twenty seven (27) weeks and the employee has not commenced parental leave, the employee may take unpaid leave (to be known as special parental leave) for such period as a registered medical practitioner certifies as necessary, except that where an employee is suffering from an illness not related to the direct consequences of the delivery, an employee shall be entitled to access paid sick leave to which she is entitled, in lieu of, or in addition to, special parental leave.

(e) Where leave is granted under subclause (3)(d), during the period of leave an employee may return to work at any time, as agreed between the employer and the employee provided that time does not exceed four (4) weeks from the recommencement date desired by the employee.

(f) Where the pregnancy of an employee then on parental leave terminates other than by the birth of a living child, it shall be the right of the employee to resume work at a time nominated by the employer which shall not exceed four weeks from the date of notice in writing by the employee to the employer that she desires to resume work.

(g) Where an employee then on parental leave suffers illness related to her pregnancy, she may take such paid sick leave as to which she is then entitled and such further unpaid leave (to be known as special parental leave) as a registered medical practitioner certifies as necessary before her return to work provided that the aggregate of paid sick leave, special parental leave and parental leave shall not exceed twelve (12) months.

(4) Adoption of a child

(a) The employee will notify the employer at least ten (10) weeks in advance of the date of commencement of parental leave and the period of leave to be taken. An employee may commence parental leave prior to providing such notice where through circumstances beyond the control of the employee, the adoption of a child takes place earlier.

(b) The employer may require an employee to provide confirmation from the appropriate government authority of the placement.

(c) The employer shall grant an employee who is seeking to adopt a child such unpaid leave as is required by the employee to attend any compulsory interviews or examinations as are necessary as part of the adoption procedure. Where paid leave is available to the employee, the employer may require the employee to take such leave in lieu of unpaid leave.

(d) Where the placement of child for adoption with an employee does not proceed or continue, the employee will notify the employer immediately and the employer will nominate a time not exceeding four (4) weeks from the date of notification for the employee's return to work.

(5) Partner leave

An employee will provide to the employer, at least ten (10) weeks prior to each proposed period of parental leave:

(a) (i) For the birth of a child, a certificate from a registered medical practitioner which names the employee's partner, states that she is pregnant and the expected date of birth, or states the date on which the birth took place; or

(ii) For the adoption/placement of a child the employer may require an employee to provide confirmation from the appropriate government authority of the placement; and

(b) written notification of the date on which he/she proposes to start and finish the period of parental leave.

(6) Variation of notice period

Notwithstanding the requirement to give at least ten (10) weeks notice of the date of commencement of parental leave, such notice may be for a greater or lesser period, where it is necessary to vary the date of commencement of parental leave due to a variation in the actual date of arrival of the child. Such variation does not count as a variation for the purposes of subclause (7) of this clause.

(7) Variation of period of parental leave

Unless agreed otherwise between the employer and employee, an employee may apply to their employer to change the period of parental leave on one occasion. Any such change shall be notified at least four (4) weeks prior to the commencement of the changed arrangements.

(8) Parental leave and other entitlements

(a) An employee may in lieu of or in conjunction with parental leave, access other paid leave entitlements which the employee has accrued, such as annual leave, long service leave, and time off in lieu (TOIL) or other time off entitlements accrued under flexible working arrangements, subject to the total amount of leave not exceeding fifty two (52) weeks.

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

(9) Transfer to a safe job

(a) Where an employee is pregnant and, 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 will, 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 parental leave.

(b) If the transfer to a safe job is not practicable, the employee may elect, or the employer may require the employee, to commence parental leave.

(10) Entitlement to Part-Time employment

(a) Where:

(i) An employee is pregnant, and has a doctors certificate advising that it would be preferable for the employee to work part-time; or

(ii) Where an employee is eligible for parental leave, and the employer agrees;

the employee may enter into an agreement, the terms of which are to be in writing, work part-time in one (1) or more periods at any time up to the child's third birthday or until the third anniversary of the placement of the child.

(b) The work to be performed part-time need not be the work performed by the employee in his or her former position.

(11) Returning to work after a period of parental leave or part-time work

(a) An employee will notify of their intention to return to work after a period of parental leave or part-time work entered into in accordance with this clause at least four (4) weeks prior to the expiration of the leave or part-time work.

(b) An employee will be entitled to the position that they held immediately before proceeding on parental leave. In the case of an employee transferred to a safe job pursuant to subclause (8), the employee will be entitled to return to the position they held immediately before such transfer. An employee who entered into part-time work in accordance with subclause (10) will be entitled to return to his or her former position.

(c) When such position no longer exists but there are other positions available, which the employee is qualified for and is capable of performing, the employee will be entitled to a position as nearly comparable in status and pay to that of their former position.

(12) Replacement employees

(a) A replacement employee is an employee specifically engaged or temporarily promoted or transferred, as a result of an employee proceeding on parental leave.

(b) A replacement employee will be informed of the temporary nature of the employment and of the rights of the employee who is being replaced.

(13) Notwithstanding any award, agreement or other provision to the contrary

(a) Absence 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 of the Award.

(b) Commencement of part-time employment in accordance with this clause, and return from part-time to full-time work under this clause, shall not break the continuity of service or employment.

(14) Casual employment during parental leave

(a) Notwithstanding any other provision of this clause, an employee may be employed on a casual basis during a period of parental leave, provided that any period of such service shall not count as service for the purposes of any other provision of this Award, and shall not break the continuity of employment of such an employee nor change the employees employment status in regard to their substantive employment.

(b) An employee shall not be engaged by the employer as a casual employee whilst the employee is on a period of paid parental leave, or a period of accrued annual or long service leave taken concurrently with a period of unpaid parental leave.

(c) An employee engaged for casual work pursuant to this subclause shall be employed at a level commensurate to the level of the available casual position.

(15) Paid parental leave

Paid parental leave will be granted to employees subject to the following:

(a) An employee who is the primary care giver, and who has completed twelve (12) months continuous service with the employer or any Commonwealth, State or Territory public sector body or authority, will be entitled to six consecutive weeks paid parental leave from the anticipated birth date or for the purposes of adoption from the date of placement of the child, or from a later date nominated by the primary care giver, provided that for parental leave commencing on or after 1 January 2005 this entitlement will increase to seven (7) weeks paid parental leave and for parental leave commencing on or after 1 January 2006 it will increase to eight (8) weeks paid parental leave.

(b) Definitions

For the purposes of this subclause:

"Continuous service" means service under an unbroken contract of employment and includes:

(i) Any period of leave taken in accordance with this clause;

(ii) Any period of part-time employment worked in accordance with the Award; and

(iii) Any period of leave or absence authorised by the employer or this Award.

(c) Only one (1) period of paid parental leave is available for each birth or adoption.

(d) Contract employees' paid parental leave cannot continue beyond the expiry date of their contract.

(e) Paid parental leave taken in accordance with paragraph (a) of this subclause will form part of the fifty two (52) weeks parental leave entitlement provided by this clause.

(f) (i) paid parental leave will be paid at ordinary rates and will not include the payment of any form of allowance or penalty payment.

(ii) notwithstanding paragraph (a), parental leave may be paid either before or after any other paid leave taken during a period of parental leave

(g) Absence on paid parental leave counts as service for the purpose of accruing entitlements to sick leave, annual leave or long service leave.

(h) The employer may request evidence of primary care giver status.

(i) Part-time employees whose ordinary working hours have been subject to variations during the preceding twelve (12) months may elect to average these hours for the purposes of calculating payment for paid parental leave. Alternatively, the employee may elect to be paid their ordinary working hours at the time of commencement of paid parental leave.

(j) Subject to the provisions of this subclause, all other provisions of this clause apply to employees on paid parental leave.

18. - LONG SERVICE LEAVE

(1) An employee shall be entitled to thirteen (13) weeks' long service leave on full pay if the employee has completed:

(a) Seven (7) years' continuous service under the terms of this Award; or

(b) Eight and a half years' (8½) continuous service, of which not less than eighteen (18) months shall have been served in a capacity which would normally entitle that employee to long service leave on the basis laid down for full-time State Government wages employees.

(2) For each and every subsequent period of seven (7) years' continuous service an employee shall be entitled to an additional thirteen (13) weeks' long service leave on full pay.

(3) Upon application by an employee, an employer may approve of the taking by the employee:

(a) Of double the period of long service leave entitlement on half pay, in lieu of the period of long service leave entitlement on full pay; or

(b) Of any portion of his/her long service leave entitlement on full pay or double such period on half pay;

(c) A full-time employee who, during a qualifying period towards an entitlement of long service leave was employed continuously on both a full-time and part-time basis may elect to take a lesser period of long service leave calculated by converting the part-time service to equivalent full-time service;

(d) Notwithstanding the provisions of paragraph (b) of this subclause an employee who has elected to compact an accrued entitlement to long service leave in accordance with paragraph (c) of this subclause shall only take such leave in one period of full pay.

(4) Continuous service shall not include the period during which an employee is on long service leave or any period exceeding two (2) weeks an employee is absent on leave without pay or any service an employee may have before reaching the age of eighteen (18) years.

(5) An employee who resigns or is dismissed, shall not be entitled to long service leave or payment for long service leave other than leave that had accrued to the employee prior to the date on which the employee resigned or the date of the offence for which the employee is dismissed.

(6) Any holiday occurring during the period in which an employee is on long service leave will be treated as part of the long service leave, and extra days in lieu thereof shall not be granted.

(7) Long service leave shall be taken as it falls due at the convenience of the employer but within three (3) years next after becoming entitled thereto: Provided that the employer may approve the accumulation of long service leave not exceeding six (6) months.

(8) A lump sum payment for long service leave accrued in accordance with this clause and for pro-rata long service leave shall be made in the following cases:

(a) To an employee who retires at or over the age of fifty-five (55) years or who has retired on the grounds of ill health, provided that no payment shall be made for pro-rata long service leave unless the employee has completed not less than twelve (12) months' continuous service;

(b) To an employee who has retired for any other cause: Provided that no payment shall be made for pro-rata long service leave unless the employee had completed not less than three (3) years' continuous service before the date of his/her retirement; or

(c) To the widow of an employee or such other person as may be approved by the employer in the event of the death of an employee: Provided that no payment shall be made for pro-rata long service leave unless the employee had completed not less than twelve (12) months' continuous service prior to the date of his/her death.

(9) A calculation of the amount due for long service leave accrued and for pro-rata long service leave shall be made at the rate of salary of an employee at the date of retirement, resignation or death, whichever applies and no such payment shall exceed the equivalent of twelve months' salary.

(10) Long service leave accrued prior to the issue of this Award shall remain to the credit of each employee.

(11) Subject to the provisions of subclauses (4), (5), (7), (8) and (12) of this clause, the service of an employee shall not be deemed to have been broken:

(a) By resignation, if the employee resigns from the employment of an employer a party to this Award and commences with another employer a party to this Award within one (1) working week of the expiration of any period for which payment in lieu of annual leave or holidays has been made by the employer from whom the employee resigned or, if no such payment has been made, within one (1) working week of the day on which the employee's resignation became effective;

(b) If his/her employment is ended by his/her employer a party to this Award for any reason other than misconduct or unsatisfactory service but only if;

(i) The employee resumes employment with an employer a party to this Award not later than six (6) months from the day on which his/her employment ended; and

(ii) Payment pursuant to subclause (8) of this clause has not been made; or

(c) By any absence approved by the employer as leave whether with or without pay.

(12) The expression "continuous service" in this clause includes any period during which an employee is absent on full pay or part pay, from his/her duties in the hospital service, but does not include:

(a) Any period exceeding two (2) weeks during which the employee is absent on leave without pay;

(b) Any period during which the employee is taking his/her long service leave entitlement or any portion thereof;

(c) Any service of the employee prior to his/her attaining the age of eighteen (18) years; or

(d) Any service of the employee who resigns or is dismissed, other than service prior to such resignation or to the date of any offence in respect of which the employee is dismissed when such prior service has actually entitled the employee to long service leave under this clause.

19. - MOTOR VEHICLE ALLOWANCES

(1) Allowance for Employees Required to Supply and Maintain a Vehicle as a Term of Employment

(a) An employee who is required to supply and maintain a motor vehicle for use when travelling on official business as a term of employment and who is not in receipt of an allowance provided by subclause (5) shall be reimbursed monthly in accordance with the appropriate rates set out in subclause (7) for journeys travelled on official business and approved by the employer or an authorised employee.

(b) An employee who is reimbursed under the provisions of subclause (1) (a) will also be subject to the following conditions:

(i) For the purposes of subclause (1) (a) an employee shall be reimbursed with the appropriate rates set out in subclause (7) for the distance travelled from the employee's residence to the place of duty and for the return distance travelled from place of duty to residence except on a day where the employee travels direct from residence to headquarters and return and is not required to use the vehicle on official business during the day;

(ii) Where an employee, in the course of a journey, travels through two (2) or more separate areas, reimbursement shall be made at the appropriate rate applicable to each of the areas traversed as set out in subclause (7);

(iii) Where an employee does not travel in excess of 4,000 kilometres in a year an allowance calculated by multiplying the appropriate rate per kilometre by the difference between the actual distance travelled and 4,000 kilometres shall be paid to the employee provided that where the employee has less than twelve (12) months' qualifying service in the year then the 4,000 kilometre distance will be reduced on a pro-rata basis and the allowance calculated accordingly;

(iv) Where a part-time employee is eligible for the payment of an allowance under (iii) above such allowance shall be calculated on the proportion of total hours worked in that year by the employee to the annual standard hours had the employee been employed on a full-time basis for the year;

(v) An employee who is required to supply and maintain a motor vehicle for use on official business is excused from this obligation in the event of the employee's vehicle being stolen, consumed by fire, or suffering a major and unforeseen mechanical breakdown or accident, in which case all entitlement to reimbursement ceases while the employee is unable to provide the motor vehicle or a replacement;

(vi) It shall be open to the employer or it's representative to elect to waive the requirement that an employee supply and maintain a motor vehicle for use on official business, but three (3) months' written notice of the intention so to do shall be given to the employee concerned.

(2) Allowance for Employees Relieving Employees Subject to Subclause (1)

(a) An employee not required to supply and maintain a motor vehicle as a term of employment who is required to relieve an employee required to supply and maintain a motor vehicle as a term of employment shall be reimbursed all expenses incurred in accordance with the appropriate rates set out in subclause (7) for all journeys travelled on official business and approved by the employer or an authorised employee where the employee is required to use his/her vehicle on official business whilst carrying out the relief duties.

(b) For the purposes of subclause (2)(a) an employee shall be reimbursed all expenses incurred in accordance with the appropriate rates set out in subclause (7) for the distance travelled from the employee's residence to place of duty and the return distance travelled from place of duty to residence except on a day where the employee travels direct from residence to headquarters and return and is not required to use the vehicle on official business during the day.

(c) Where an employee, in the course of a journey travels through two (2) or more separate areas, reimbursement shall be made at the appropriate rate applicable to each of the areas traversed as set out in subclause (7).

(d) For the purposes of this subclause the allowance provided in subclause (1)(b), (iii) and (iv) shall not apply.

(3) Allowance for Other Employees Using Vehicle on Official Business

(a) An employee who is not required to supply and maintain a motor vehicle for use when travelling on official business as a term of employment, but when requested by the employer or an authorised employee voluntarily consents to use the vehicle and who is not in receipt of an allowance provided by subclause (5) shall, for journeys travelled on official business approved by the employer or an authorised employee be reimbursed all expenses incurred in accordance with the appropriate rates set out in subclauses (8) and (9).

(b) For the purpose of subclause (3)(a) an employee shall not be entitled to reimbursement for any expenses incurred in respect to the distance between the employee's residence and headquarters and the return distance from headquarters to residence.

(c) Where an employee in the course of a journey travels through two (2) or more separate areas, reimbursement shall be made at the appropriate rate applicable to each of the areas traversed as set out in subclause (8).

(4) Allowance for Towing Employer's Caravan or Trailer

In the cases where employees are required to tow employer's caravans on official business, the additional rate shall be 6.5 cents per kilometre. When an employer's trailer is towed on official business the additional rate shall be 3.5 cents per kilometre.

(5) Commuted Allowance

The employer may authorise a commuted amount for reimbursement of costs for motor vehicles or any other conveyance belonging to an employee.

(6) Increase of Inadequate Rates:

The employer may increase the rates prescribed by this subclause in any case in which it is satisfied that they are inadequate.

(7) Requirement to Supply and Maintain a Motor Vehicle

Area Details	Rate (cents) per kilometre Engine Displacement (in cubic centimetres)		
	Over 2600cc to 2600cc	Over1600cc and under	1600cc
Metropolitan Area			
First 4000 kilometres	149.7	126.6	102.2
Over 4000 up to 8000 kms	61.7	52.7	44.0
Over 8000 up to 16000 kms	32.4	28.1	24.6
Over 16000 kms	34.0	28.8	24.7
South West Land Division			
First 4000 kilometres	154.3	130.9	106.4
Over 4000 up to 8000 kms	64.0	54.8	46.0
Over 8000 up to 16000 kms	33.9	29.4	25.8
Over 16000 kms	35.2	29.7	25.5
North of 23.5□ South Latitude			
First 4000 kilometres	170.9	145.4	118.9
Over 4000 up to 8000 kms	70.3	60.2	50.7
Over 8000 up to 16000 kms	36.7	31.9	28.0
Over 16000 kms	36.3	30.6	26.3
Rest of State			
First 4000 kilometres	159.2	134.8	109.2
Over 4000 up to 8000 kms	66.0	56.4	47.2
Over 8000 up to 16000 kms	34.9	30.2	26.5
Over 16000 kms	35.7	30.1	25.9
(8) Voluntary Use of a Motor Vehicle			
Metropolitan Area	69.0	58.9	48.9
South West Land Division	71.5	61.1	51.0
North of 23.5□ South Latitude	78.7	67.3	56.4
Rest of the State	73.7	62.9	52.4

(9) Voluntary Use of a Motor Cycle

Distance Travelled During a Year on Official Business	Rate Cents per kilometre
Rate per kilometre	23.9

(10) In this clause the following expressions shall have the following meanings:

(a) "A year" means twelve (12) months commencing on the first day of July and ending on the thirtieth day of June next following;

(b) "South West Land Division" means the South West Land Division as defined by section 28 of the Land Act, 1933-1971, excluding the area contained within the Metropolitan Area;

(c) "Rest of the State" means that area south of 23.5 degrees south latitude, excluding the Metropolitan Area and the South West Land Division;

(d) "Term of Employment" means a requirement made known to the employee at the time of applying for the position by way of publication in the advertisement for the position, written advice to the employee contained in the offer for the position or oral communication at interview by an interviewing employee and such requirement is accepted by the employee either in writing or orally.

(11) The allowances in this clause shall be varied in accordance with any movement in the allowance in the Public Service Award 1992.

20. - TRAVELLING

(1) An employee who travels on official business shall be reimbursed reasonable expenses in accordance with the provisions of this clause.

(2) When a trip necessitates an overnight stay away from an employee's headquarters and the employee:

is supplied with accommodation and meals free of charge;

or

attends a course, conference, etc., where the fee paid includes accommodation and meals;

or

travels by rail and is provided with a sleeping berth and meals;

or

is accommodated at a Government institution, hostel or similar establishment and supplied with meals;

reimbursement shall be in accordance with the rates prescribed in Column A, Items 1, 2 or 3 of Clause 24. – Travelling, Transfers and Relieving Duty – Rates of Allowance of this Award.

(3) When a trip necessitates an overnight stay away from an employee's headquarters and he/she is fully responsible for his/her own accommodation, meals and incidental expenses:

(a) Where hotel or motel accommodation is utilised reimbursement shall be in accordance with the rates prescribed in Column A, Items 4 to 8 of Clause 24. – Travelling, Transfers and Relieving Duty – Rates of Allowance of this Award;

(b) Where other than hotel or motel accommodation is utilised reimbursement shall be in accordance with the rates prescribed in Column A, Items 9, 10 or 11 of Clause 24. – Travelling, Transfers and Relieving Duty – Rates of Allowance of this Award.

(4) To calculate reimbursement under subclauses (2) and (3) for a part of a day, the following formulae shall apply:

(a) If departure from headquarters is;

Before 8.00 a.m. - 100% of the daily rate.

8.00 a.m. or later but prior to 1.00 p.m. - 90% of the daily rate.

1.00 p.m. or later but prior to 6.00 p.m. - 75% of the daily rate

6.00 p.m. or later - 50% of the daily rate.

(b) If arrival back at headquarters is;

8.00 a.m. or later but prior to 1.00 p.m. - 10% of the daily rate.

1.00 p.m. or later but prior to 6.00 p.m. - 25% of the daily rate.

6.00 p.m. or later but prior to 11.00 p.m. - 50% of the daily rate.

11.00 p.m. or later - 100% of the daily rate.

(5) When an employee travels to a place outside a radius of fifty (50) kilometres measured from his/her headquarters, and the trip does not involve an overnight stay away from his/her headquarters, reimbursement for all meals claimed shall be at the rate set out in Column A, Items 12 or 13 of Clause 24. – Travelling, Transfers and Relieving Duty – Rates of Allowance of this Award, subject to the employee's certification that each meal claimed was actually purchased.

Provided that when an employee departs from his/her headquarters before 8.00 a.m. and does not arrive back at his/her headquarters until after 11.00 p.m. on the same day the employee shall be paid at the appropriate rate prescribed in Column A, Items 4 to 8 of Clause 24. – Travelling, Transfers and Relieving Duty – Rates of Allowance of this Award.

(6) When it can be shown to the satisfaction of the employer by the production of receipts that reimbursement in accordance with Clause 24. – Travelling, Transfers and Relieving Duty – Rates of Allowance of this Award, does not cover an employee's reasonable expenses for a whole trip the employee shall be reimbursed the excess expenditure.

(7) In addition to the rates contained in Clause 24. – Travelling, Transfers and Relieving Duty – Rates of Allowance of this Award, an employee shall be reimbursed reasonable incidental expenses such as train, bus and taxi fares, official telephone calls, laundry and dry cleaning expenses, on production of receipts.

(8) If on account of lack of suitable transport facilities an employee necessarily engages reasonable accommodation for the night prior to commencing travelling on early morning transport the employee shall be reimbursed the actual cost of such accommodation.

(9) Reimbursement of expenses shall not be suspended should an employee become ill whilst travelling, provided leave for the period of such illness is approved in accordance with the provisions of this Award, and the employee continues to incur accommodation, meal and incidental expenses.

(10) Reimbursement claims for travelling in excess of fourteen (14) days in one (1) month shall not be passed for payment by a certifying officer until the employer has endorsed the account.

(11) An employee who is relieving at or temporarily transferred to any place within a radius of fifty (50) kilometres measured from his/her headquarters shall not be reimbursed the cost of midday meals purchased, but an employee travelling on duty within that area which requires his/her absence from his/her headquarters over the usual midday meal period shall be paid the rate prescribed by Item 17 of Clause 24. – Travelling, Transfers and Relieving Duty – Rates of Allowance of this Award, for each meal necessarily purchased provided that:

(a) Such travelling is not a normal feature in the performance of his/her duties; and

(b) Such travelling is not within the suburb in which the employee resides; and

(c) The employee's total reimbursement under this subclause for any one (1) pay period shall not exceed the amount prescribed by Item 18 of Clause 24. – Travelling, Transfers and Relieving Duty – Rates of Allowance of this Award.

21. - TRANSFERS

(1) (a) This clause shall not apply to employees of the Metropolitan Health Service employed at metropolitan locations who are transferring to another metropolitan location.

(b) The provisions of this clause shall apply to an employee who transfers from a position in one (1) locality to another position in a new locality provided that:

(i) the classification of the new position is higher than the classification of his/her former position; or

(ii) the classification of the new position is the same or lower than the classification of his/her former position and the employee is changing his/her employment on account of illness over which he/she has no control or, if the employer initiates the transfer and/or considers the transfer of the employee to be in the interests of the employer; and

(iii) the employee commences employment in the new employment with either the same employer or a new employer bound by this Award within one (1) working week of the expiration of any period for which payment in lieu of annual leave or holidays has been made by the employer from whom he/she transferred or resigned, or, if no such payment has been made, within one (1) working week of the day on which his/her resignation or transfer became effective.

(c) Except as provided in subclause (3) a married or single employee shall be paid by the new employer at the rates prescribed in Column A, Items 4, 5 or 6 of Clause 24. - Travelling, Transfers and Relieving Duty - Rates of Allowance of this Award, for a period of fourteen (14) days after arrival at his/her new locality: Provided that if an employee is required to travel on official business during the said period, such period will be extended by the time spent in travelling. Under no circumstances, however, shall the provisions of this subclause operate concurrently with those of Clause 20. – Travelling of this Award to permit an employee to be paid allowances in respect of both travelling and transfer expenses for the same period.

(2) If a married employee is unable to obtain reasonable accommodation for the transfer of his/her home within the prescribed period referred to in subclause (1) of this clause and the new employer is satisfied that the employee has taken all possible steps to secure reasonable accommodation, such employee shall, after the expiration of the prescribed period be paid in accordance with the rates prescribed by Column B, Items 4, 5, 6, 7 or 8 of Clause 24. - Travelling, Transfers and Relieving Duty - Rates of Allowance of this Award, as the case may require, until such time as the employee has secured reasonable accommodation: Provided that the period of reimbursement under this subclause shall not exceed seventy-seven (77) days without the approval of the new employer. A single employee shall not be paid allowances under this subclause.

(3) When it can be shown by the production of receipts or other evidence that an allowance payable under this clause would be insufficient to meet reasonable additional costs incurred by an employee on transfer, an appropriate rate of reimbursement shall be determined by the new employer.

In the event of a dispute, the matter may be determined in accordance with Clause 27. – Dispute Settlement Procedure of this Award.

(4) An employee who occupies hospital accommodation shall not be entitled to reimbursement under this clause: Provided that where entry into hospital accommodation is delayed through circumstances beyond the employee's control an employee may, subject to the production of receipts, be reimbursed actual reasonable accommodation and meal expenses for the employee and their spouse and dependent children under sixteen (16) years of age or other children wholly dependent on the employee, less a deduction for normal living expenses prescribed in Column A, Items 15 and 16 of Clause 24. - Travelling, Transfers and Relieving Duty - Rates of Allowance of this Award, and provided that if any costs are incurred under subclause (5)(b), they shall be reimbursed.

(5) (a) Where an employee transfers his/her employment in accordance with the other provisions of this clause and incurs expenses referred to in paragraph (b) hereof as a result of that transfer, then the employee shall be granted a Disturbance Allowance and shall be reimbursed by the new employer the actual expenditure incurred upon production of receipts or such other evidence as may be required.

(b) The Disturbance Allowance shall include:

(i) Cost incurred for telephone installation at the employee's new residence provided that the cost of telephone installation shall be reimbursed only where a telephone was installed at the employee's former residence including departmental accommodation and provided further, that reimbursement shall not apply to an employee's private residence wherein a telephone was not installed prior to his/her first transfer in accordance with this provision;

(ii) Costs incurred with the connection or reconnection of services to the employee's household including departmental accommodation for water, gas or electricity.

22. - TRAVELLING TIME

An employee who, in the course of his/her duties, is called upon to travel before the usual time for commencing or after the usual time for ceasing duty may, at the discretion of the employer, be granted time off in respect of such time or part of such time spent in travelling.

23. - RELIEVING OR SPECIAL DUTY

(1) An employee who is required to take up duty away from his/her usual headquarters on relief duty or to perform special duty, and necessarily resides temporarily away from his/her usual place of residence shall be reimbursed reasonable expenses in accordance with the provisions of this clause.

(2) Where the employee:

(a) Is supplied with accommodation and meals free of charge; or

(b) Is accommodated at a Government institution, hostel or similar establishment and supplied with meals;

Reimbursement shall be in accordance with the rates prescribed in Column A, Items 1, 2 or 3 of Clause 24. – Travelling, Transfers and Relieving Duty – Rates of Allowance of this Award.

(3) Where the employee is fully responsible for his/her own accommodation, meals and incidental expenses and hotel or motel accommodation is utilised:

(a) For the first forty-two (42) days after arrival at the new locality reimbursement shall be in accordance with the rates prescribed in Column A, Items 4 to 8 of Clause 24. – Travelling, Transfers and Relieving Duty – Rates of Allowance of this Award.

(b) For periods in excess of forty-two (42) days after arrival in the new locality reimbursement shall be in accordance with the rates prescribed in Column B, Items 4 to 8 of Clause 24. – Travelling, Transfers and Relieving Duty – Rates of Allowance of this Award for married employees or Column C, Items 4 to 8 of Clause 24. – Travelling, Transfers and Relieving Duty – Rates of Allowance of this Award for single employees;

Provided that the period of reimbursement, under this subclause, shall not exceed forty-nine (49) days without the approval of the employer.

(4) Where the employee is fully responsible for his/her own accommodation, meal and incidental expenses and other than hotel or motel accommodation is utilised, reimbursement shall be in accordance with the rates prescribed in Column A, Items 9, 10 or 11 of Clause 24. – Travelling, Transfers and Relieving Duty – Rates of Allowance of this Award.

(5) Reimbursement of expenses shall not be suspended should an employee become ill whilst on relief duty, provided leave for the period of such illness is approved in accordance with Clause 16. - Sick Leave of this Award and the employee continues to incur accommodation, meal and incidental expenses.

(6) When an employee who is required to relieve or perform special duties in accordance with subclause (1) of this clause is authorised by the employer to travel to the new locality in his/her own motor vehicle he/she shall be reimbursed for the return journey as follows:

(a) Where the employee will be required to maintain a motor vehicle for the performance of the relieving or special duties, reimbursement shall be in accordance with the appropriate rate prescribed by Clause 19. – Motor Vehicle Allowances of this Award;

(b) Where the employee will not be required to maintain a motor vehicle for the performance of the relieving or special duties reimbursement shall be on the basis of one-half of the appropriate rate prescribed by Clause 19. – Motor Vehicle Allowances of this Award: Provided that the maximum amount of reimbursement shall not exceed the cost of the fare by public conveyance which otherwise would be utilised for such return duty.

(7) The rate applicable to a married employee under subclause (3) (b) shall be paid to a single employee if the employer is satisfied that the employee has to maintain a home and support dependants therein, in a locality other than that to which the employee has been sent. A certificate to this effect must be furnished by a single employee claiming the higher rate.

(8) Where it can be shown by the production of receipts or other evidence that an allowance payable under this clause would be insufficient to meet reasonable additional costs incurred, an appropriate rate of reimbursement shall be determined by the employer.

In the event of a dispute, the matter may be resolved in accordance with Clause 27. – Dispute Settlement Procedure of this Award.

(9) The provisions of Clause 20. – Travelling of this Award shall not operate concurrently with the provisions of this clause to permit an employee to be paid allowances in respect of both travelling and relieving expenses for the same period: Provided that where an employee is required to travel on official business which involves an overnight stay away from his/her temporary headquarters the employer may extend the periods specified in subclause (3) by the time spent in travelling.

(10) An employee who is directed to relieve another employee or to perform special duty away from his/her usual headquarters and is not required to reside temporarily away from his/her usual place of residence shall, if he/she is not in receipt of a higher duties allowance or special allowance for such work, be reimbursed the amount of additional fares paid by him/her in travelling by public transport to and from his/her place of temporary duty.

24. - TRAVELLING, TRANSFERS AND RELIEVING DUTY - RATES OF ALLOWANCE

		COLUMN A	COLUMN B	COLUMN C
ITEM	PARTICULARS	DAILY RATE	DAILY RATE OFFICERS WITH DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 23 (3) (b)) TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 21 (2))	DAILY RATE OFFICERS WITHOUT DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 23 (3) (b))
ALLOWANCE TO MEET INCIDENTAL EXPENSES				
		$	$	$
(1)	WA - South of 26o			
	South Latitude	11.75		
(2)	WA - North of 26o			
	South Latitude	15.40		
(3)	Interstate	15.40		

		COLUMN A	COLUMN B	COLUMN C
ITEM	PARTICULARS	DAILY RATE	DAILY RATE OFFICERS WITH DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 23 (3) (b)) TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 21 (2))	DAILY RATE OFFICERS WITHOUT DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 23 (3) (b))
ACCOMMODATION INVOLVING AN OVERNIGHT STAY IN A HOTEL OR MOTEL				
		$	$	$
(4)	WA - Metropolitan			
	Hotel or Motel	210.05	105.00	70.00
(5)	Locality South of 26o			
	South Latitude	168.60	84.30	56.20
(6)	Locality North of 26o			
	South Latitude			
	Broome	284.40	142.20	94.80
	Carnarvon	222.30	111.15	74.10
	Dampier	209.15	104.55	69.70
	Derby	188.40	94.20	62.80
	Exmouth	215.90	107.95	71.95
	Fitzroy Crossing	314.90	157.45	104.95
	Gascoyne Junction	128.90	64.45	42.95
	Halls Creek	265.40	132.70	88.45
	Karratha	364.65	182.30	121.55
	Kununurra	266.80	133.40	88.95
	Marble Bar	179.40	89.70	59.80
	Newman	254.65	127.35	84.90
	Nullagine	189.75	94.90	63.25
	Onslow	207.20	103.60	69.05
	Pannawonica	177.15	88.60	59.05
	Paraburdoo	238.40	119.20	79.45
	Port Hedland	239.70	119.85	79.90
	Roebourne	132.90	66.45	44.30
	Sandfire	160.40	80.20	53.45
	Shark Bay	175.90	87.95	58.65
	Tom Price	219.40	109.70	73.15
	Turkey Creek	175.90	87.95	58.65
	Wickham	323.90	161.95	107.95
	Wyndham	158.90	79.45	52.95
(7)	Interstate - Capital City			
	Sydney	255.65	127.85	85.20
	Melbourne	245.65	122.85	81.90
	Other Capitals	213.15	106.60	71.00
(8)	Interstate - Other			
	than Capital City	168.60	84.30	56.20
ACCOMMODATION INVOLVING AN OVERNIGHT STAY AT OTHER THAN A HOTEL OR MOTEL				
(9)	WA - South of 26o South Latitude	79.40		
(10)	WA - North of 26o South Latitude	97.70		
(11)	Interstate	97.70		

TRAVEL NOT INVOLVING AN OVERNIGHT STAY OR TRAVEL INVOLVING AN OVERNIGHT STAY WHERE ACCOMMODATION ONLY IS PROVIDED.

(12)	WA - South of 26o South Latitude:	
	Breakfast	14.15
	Lunch	14.15
	Dinner	39.40
(13)	WA - North of 26o South Latitude	
	Breakfast	15.75
	Lunch	27.70
	Dinner	38.90
(14)	Interstate	
	Breakfast	15.75
	Lunch	27.70
	Dinner	38.90

DEDUCTION FOR NORMAL LIVING EXPENSES (CLAUSE 21 (4))

(15)	Each Adult	22.75
(16)	Each Child	3.90

MIDDAY MEAL (CLAUSE 20(11)

(17)	Rate per meal	5.50
(18)	Maximum reimbursement per pay period	27.50

The allowances prescribed in this clause shall be varied in accordance with any movement in the equivalent allowances in the Public Service Award, 1992.

25. - REMOVAL ALLOWANCE

(1) (a) This clause shall not apply to employees of the Metropolitan Health Service employed at metropolitan locations who are transferring to another metropolitan location.

(b) The provisions of this clause shall apply to an employee who transfers from a position in one locality to another position in a new locality provided that:

(i) The classification of the new position is higher than the classification of his/her former position; or

(ii) the classification of the new position is the same or lower than the classification of his/her former position and the employee is changing his/her employment on account of illness over which he/she has no control or, if the employer initiates the transfer and/or considers the transfer of the employee to be in the interests of the employer; and

(iii) the employee commences employment in the new employment with either the same employer or a new employer bound by this Award within one (1) working week of the expiration of any period for which payment in lieu of annual leave or holidays has been made by the employer from whom he/she transferred or resigned, or, if no such payment has been made, within one (1) working week of the day on which his/her resignation or transfer became effective.

(c) The employee shall be reimbursed by the new employer:

(i) The actual reasonable cost of conveyance for the employee and dependants;

(ii) The actual cost (including insurance) of the conveyance of an employee's household furniture, effects and appliances up to a maximum volume of thirty five (35) cubic metres, provided that a larger volume may be approved by the employer in special cases;

(iii) An allowance of $519.00 for accelerated depreciation and extra wear and tear on furniture, effects and appliances for each occasion that an employee is required to transport furniture, effects and appliances: Provided that the employer is satisfied that the value of household furniture, effects and appliances moved by the employee is at least $3,106.00;

(iv) Reimbursement of reasonable expenses in kennelling and transporting of domestic pet or pets up to a maximum amount of $160.00;

Pets are defined as dogs, cats, birds or other domestic animals kept by the employee or the employee's dependents for the purpose of household enjoyment;

Pets do not include domesticated livestock, native animals or equine animals.

(2) An employee who terminates employment solely for the employee's convenience or is terminated on account of misconduct must bear the whole cost of removal unless otherwise determined by the former employer prior to removal.

(3) An employee shall be reimbursed the full freight charges necessarily incurred in respect of the removal of his/her motor vehicle. If authorised by the new employer to travel to a new locality in his/her own motor vehicle, reimbursement shall be as follows:

(a) Where the employee will be required by the new employer to maintain a motor vehicle as a term of employment, reimbursement for the distance necessarily travelled shall be on the basis of the appropriate rate prescribed by subclause (1) of Clause 19. - Motor Vehicle Allowances of this Award; or

(b) Where the employee will not be required by the new employer to maintain a motor vehicle as a term of employment, reimbursement for the distance necessarily travelled shall be on the basis of one-half of the appropriate rate prescribed by subclause (3) of Clause 19. - Motor Vehicle Allowances of this Award.

(4) Where practicable furniture, effects and appliances, shall be removed by State-owned transport. Where it is impracticable to use State-owned transport the employee shall, before removal is undertaken, obtain quotes from at least two carriers, which shall be submitted to the new employer, who may authorise the acceptance of the more suitable:

Provided that the maximum amount prescribed by subclause (1) (b) (ii) of this clause is not exceeded without the written approval of the new employer having first been obtained.

(5) The new employer may, in lieu of conveyance, authorise payment of an amount not exceeding the maximum prescribed by subclause (1) (b) (ii) of this clause to compensate for loss in any case where an employee with prior approval of the employer, disposes of his/her furniture, effects and appliances instead of removing them to his/her new locality:

Provided that such payment, shall not exceed the sum, which would have been paid, if such furniture, effects and appliances, had been removed by the cheapest method of transport available.

(6) Where an employee occupies hospital accommodation where furniture is provided and as a consequence is obliged to store furniture, the employee shall be reimbursed the actual cost of such storage up to a maximum allowance of $964.00 per annum. Actual cost is deemed to include the premium for adequate insurance coverage of the value of the furniture stored. An allowance under this subclause shall not be paid for a period in excess of four (4) years without the approval of the employer.

(7) In the case of an employee without dependants an application for any reimbursement under this clause shall be considered by the employer.

(8) Newly appointed employees shall be entitled to receive the benefits of this clause if they are required by the employer to participate in any training course prior to being posted to their respective positions. This entitlement shall only be available to employees who have completed their training and who incur costs when moving to their first posting.

(9) Receipts must be produced for all sums claimed.

(10) The allowances prescribed in this clause shall apply from 1 July 2000 and shall be varied in accordance with any movement in the equivalent allowances in the Government Officers Salaries, Allowances and Conditions Award 1989.

26. - DIRTY WORK

A special allowance, to be determined by the employer, shall be paid to an employee when engaged in any dirty work (including moving or sorting old books and documents) which is not part of the regular duty of the employee concerned: Provided that a dispute or disagreement as to the amount of such allowance shall be resolved in accordance with Clause 27. – Dispute Settlement Procedure of this Award.

27. - DISPUTE SETTLEMENT PROCEDURE

(1) Preamble

Subject to the provisions of the Industrial Relations Act 1979 (as amended) any grievance, complaint or dispute, or any matter raised by the Union or a respondent employer and his/her employees, shall be settled in accordance with the procedures set out herein.

The parties agree that no bans, stoppages or limitations will be imposed prior to, or during the time this procedure is being followed.

This clause in no way limits the rights of employers, employees and the Union under the Occupational Safety and Health Act 1984 or other related legislation.

(2) Procedure

Where the matter is raised by an employee or a group of employees, the following steps shall be observed:

(a) The employee(s) concerned shall discuss the matter with the immediate supervisor. If the matter cannot be resolved at this level the supervisor shall, within two (2) working days, refer the matter to a more senior employee nominated by the employer and the employee(s) shall be advised accordingly;

(b) The senior employee shall, if able, answer the matter raised within five (5) working days of it being referred and if the senior employee is not so able, refer the matter to the employer for his/her attention, and the employee(s) shall be advised accordingly;

(c) (i) If the matter has been referred in accordance with paragraph (b) above the employee(s) or the shop steward shall notify the Union Secretary or nominee, to enable the opportunity of discussing the matter with the employer;

(ii) The employer shall, as soon as practicable after considering the matter before it, advise the employee(s) or, where necessary the Union of its decision: Provided that such advice shall be given within twenty-one (21) calendar days of the matter being referred to the employer;

(d) Should the matter remain in dispute after the above processes have been exhausted either party may refer the matter to the Western Australian Industrial Relations Commission;

(e) Nothing in this procedure shall preclude the parties reaching agreement to shorten or extend the period specified in subclauses (2) (a), (b) or (c) (ii).

(3) Disciplinary Procedure

Where an employer seeks to discipline an employee, or terminate an employee the following steps shall be observed:

(a) In the event that an employee commits a misdemeanour, the employee's immediate supervisor or any other employee so authorised, may exercise the employer's right to reprimand the employee so that the employee understands the nature and implications of his/her conduct;

(b) The first two (2) reprimands shall take the form of warnings and, if given verbally, shall be confirmed in writing as soon as practicable after the giving of the reprimand;

(c) Should it be necessary, for any reason, to reprimand an employee three (3) times in a period not exceeding twelve (12) months continuous service, the contract of service shall, upon the giving of that third reprimand, be terminable in accordance with Clause 7. - Contract of Service of this Award;

(d) The employee shall have the right to request representation when being reprimanded in accordance with this subclause;

(e) The above procedure is meant to preserve the rights of the individual employee, but it shall not, in any way, limit the right of the employer to summarily dismiss an employee for misconduct.

(4) Access to the Western Australian Industrial Relations Commission

The settlement procedures provided by this clause shall be applied to all manner of disputes referred to in subclause (1) hereof, and no party, or individual, or group of individuals, shall commence any other action, of whatever kind, which may frustrate a settlement in accordance with its procedures. Observance of these procedures shall in no way prejudice the right of any party in dispute to refer the matter for resolution in the Western Australian Industrial Relations Commission, at any time.

The status quo (i.e. the condition applying prior to the issue arising) will remain until the issue is resolved in accordance with the procedure outlined above.

(5) Provision of Services

The Union recognises that the Health Department and the teaching hospitals have a statutory and public responsibility to provide health care services without any avoidable interruptions.

This grievance procedure has been developed between the parties to provide an effective means by which employees may reasonably expect problems will be dealt with as expeditiously as possible by hospital management.

Accordingly, the Union hereby agrees that during any period of industrial action, sufficient labour will be made available to carry out work essential for life support within hospitals.

(6) Industry Wide Issues

In resolving issues of an industry wide nature discussions will commence at the level specified in subclause (2)(c)(i) above, between the appropriate Union official and the Manager, Industrial Relations, Health Department or his/her nominee.

(7) Definitions

For the purpose of this procedure:

"Employer" means the officer nominated at each work site;

"Senior Employee" means an employee nominated by management;

"Industry wide issues" include issues affecting more than one work site or claims seeking variations to an award;

"Work site" means, unless otherwise agreed between the parties, the usual place of work of an employee or number of employees covered by this Award.

(8) Breach of Procedure

The parties acknowledge that this procedure formed part of the package which justified the payment of the increases available under the Structural Efficiency Principle.

Accordingly, the parties agree that if either party is of the view that the other party is in breach of this procedure, the matter will be referred to the Western Australian Industrial Relations Commission for it to determine:

(a) Whether a breach of the procedure has occurred; and

(b) Subject to (a) above, the appropriateness of the continued provision of the benefits provided under the Structural Efficiency Principle or any other action considered appropriate by the Western Australian Industrial Relations Commission.

28. - SHIFT WORK

(1) (a) The loading on the ordinary rates of pay for an afternoon or night shift of seven and one half (7½) hours, worked in ordinary hours, shall be the same rate as prescribed from time to time in Clause 21. – Shift Work Allowance, subclause (2) (a) of the Public Service Award 1992.

(b) For the purposes of this subclause:

(i) "Day Shift" shall mean a shift which commences after 6.00 a.m. and before 12.00 midday;

(ii) "Afternoon Shift" shall mean a shift which commences at or after 12.00 midday and before 6.00 p.m;

(iii) "Night Shift" shall mean a shift which commences at or after 6.00 p.m. and before 6.01 a.m.

(2) (a) Shift work performed during ordinary hours on Saturdays or Sundays shall be paid for at the rate of time and a half and on the days prescribed in subclause (1) of Clause 14. - Holidays and Annual Leave of this Award it shall be paid in accordance with subclause (3) (a) of Clause 14. – Holidays and Annual Leave of this Award.

(b) The rates prescribed in this subclause shall be in substitution for and not cumulative on the rates prescribed in subclause (1) of this clause.

(c) Work performed by an employee in excess of the ordinary hours of his/her shift, or on a rostered day off, shall be paid for in accordance with Clause 12. – Overtime of this Award.

29. - PROTECTIVE CLOTHING AND UNIFORMS

(1) (a) An employer may supply and require to be worn such protective clothing as is considered necessary.

(b) An employer may supply uniforms and require them to be worn at all times when considered necessary by that hospital.

(c) Protective clothing or uniforms supplied under paragraphs (a) or (b) of this subclause shall be laundered free of charge and remain the property of the hospital.

(2) When the employer requires a uniform to be worn, such uniform shall be supplied in accordance with subclause (1) (b) of this clause or an allowance shall be paid to each staff member required to wear a uniform. The amount of such allowance shall be agreed upon between the employer and the Association, or, failing agreement shall be resolved in accordance with Clause 27. – Dispute Settlement Procedure of this Award.

30. - DISTRICT ALLOWANCE

(1) Definitions

For the purpose of this clause:

(a) "Dependant" in relation to an employee means;

(i) A spouse; or

(ii) Where there is no spouse, a child or any other relative resident within the State who rely on the employee for their main support;

who does not receive a district or location allowance of any kind.

(b) "Partial Dependant" in relation to an employee means;

(i) A spouse; or

(ii) Where there is no spouse, a child or any other relative resident within the State who rely on the employee for their main support;

who receives a district or location allowance of any kind less than that applicable to an employee without dependants under any award, agreement or other provision regulating the employment of the partial dependant.

(2) District Allowance

(a) An employee shall be paid a District Allowance at the standard rate prescribed in Column II of subclause (7) of this clause, for the district in which the employee's headquarters is located. Provided that where the employee's headquarters is situated in a town or place specified in Column III, subclause (7) the employee shall be paid a district allowance at the rate appropriate to that town or place as prescribed in Column IV of the said subclause.

(b) An employee who has a dependant shall be paid double the district allowance prescribed by paragraph (a) of this subclause for the district, town, or place in which the employee's headquarters is located.

(c) Where an employee has a partial dependant the total district allowance payable to the employee shall be the district allowance prescribed by paragraph (a) of this subclause plus an allowance equivalent to the difference between the rate of district or location allowance the partial dependant receives and the rate of district or location allowance the partial dependant would receive if he or she was employed in a full-time capacity under the award, agreement or other provision regulating the employment of the partial dependant.

(d) When an employee is on approved annual recreational leave, the employee shall for the period of such leave, be paid the district allowance to which he or she would ordinarily be entitled.

(e) When an employee is on long service leave or other approved leave with pay (other than annual recreational leave), the employee shall only be paid district allowance for the period of such leave if the employee, dependant/s or partial dependant/s remain in the district in which the employee's headquarters is situated.

(f) When an employee leaves his or her district on duty, payment of any district allowance to which the employee would ordinarily be entitled shall cease after the expiration of two (2) weeks unless the employee's dependant/s or partial dependant/s remain in the district or as otherwise approved by the employer.

(g) Except as provided in paragraph (f) of this subclause, a district allowance shall be paid to any employee ordinarily entitled thereto in addition to reimbursement of any travelling, transfer or relieving expenses or camping allowance.

(h) Where an employee whose headquarters is located in a district in respect of which no allowance is prescribed in subclause (7) of this clause, is required to travel or temporarily reside for any period in excess of one (1) month in any district or districts in respect of which such allowance is so payable, then notwithstanding the employee's entitlement to any such allowance provided by Clause 20. - Travelling or Clause 23. - Relieving or Special Duty of this Award, the employee shall be paid for the whole of such period a district allowance at the appropriate rate prescribed by paragraph (a), (b) or (c) of this subclause, for the district in which the employee spends the greater period of time.

(i) When an employee is provided with free board and lodging by the employer or a Public Authority the allowance shall be reduced to two thirds of the allowance the employee would ordinarily be entitled to under this clause.

(3) Part-time Employees

An employee who is employed on a part-time basis shall be paid a proportion of the appropriate district allowance payable in accordance with the following formula:

$$\frac{\text{Hours worked per fortnight}}{75} \times \frac{\text{Appropriate District Allowance}}{1}$$

(4) Transition

An employee who immediately prior to 1 July 1989 was in receipt of district allowance at a rate which was greater than the amount to which the employee is entitled under this clause shall have the difference reduced in accordance with the following:

(a) As from the first pay period commencing on or after 1 July 1989 the difference shall be reduced by thirty-three and one third (33 ⅓) %; and

(b) As from the first pay period commencing on or after 1 January 1990 the difference remaining between the amount paid pursuant to (a) above and that to which the employee is otherwise entitled under this clause shall be reduced by fifty (50) %; and

(c) As from the first pay period commencing on or after 1 July 1990 payment shall be in accordance with the employee's entitlement under this clause.

(5) Boundaries

For the purpose of subclause (7) of this clause, the boundaries of the various districts shall be as described hereunder and as delineated on the following plan.

District:

1. The area within a line commencing on the coast; thence east along lat. 28 to a point north of Tallering Peak, thence due south to Tallering Peak; thence southeast to Mt Gibson and Burracoppin, thence to a point southeast at the junction of lat. 32 and long. 119; thence south along long. 119 to coast.

2. That area within a line commencing on the south coast at long. 119 then east along the coast to long. 123; then north along long. 123 to a point on lat. 30; thence west along lat. 30 to the boundary of No. 1 District.

3. The area within a line commencing on the coast at lat. 26; thence along lat. 26 to long. 123; thence south along long. 123 to the boundary of No. 2 District.

4. The area within a line commencing on the coast at lat. 24; thence east to the South Australian border; thence south to the coast; thence along the coast to long. 123; thence north to the intersection of lat. 26; thence west along lat. 26 to the coast.

5. That area of the State situated between the lat. 24 and a line running east from Carnot Bay to the Northern Territory border.

6. That area of the State north of a line running east from Carnot Bay to the Northern Territory border.

(6) Adjustment of Rates

The allowances prescribed in this clause shall be varied in accordance with any movement in the equivalent allowances in the Public Service Award 1992.

(7) District Allowances

(a) Officers without dependants [Subclause (2)(a)]

COLUMN I DISTRICT NO.	COLUMN II STANDARD RATE $ p.a.	COLUMN III EXCEPTIONS TO STANDARD RATE TOWN OR PLACE	COLUMN IV $ p.a
6	3,569	Nil	Nil
5	2,920	Fitzroy Crossing	3,933
		Halls Creek	
		Turner River Camp	
		Nullagine	
		Liveringa (Camballin)	3,655
		Marble Bar	
		Wittenoom	
		Karratha	3,438
		Port Hedland	3,199
4	1,471	Warburton Mission	3,952
		Carnarvon	1,385
3	927	Meekatharra	1,471
		Mount Magnet	
		Wiluna	
		Laverton	
		Leonora	
		Cue	
2	665	Kalgoorlie	222
		Boulder	
		Ravensthorpe	878
		Norseman	
		Salmon Gums	
		Marvel Loch	
		Esperance	
1	Nil	Nil	Nil

(b) Officers with dependants [Subclause (2)(b)]

Double the appropriate rate as prescribed in (a) above for officers without dependants.

The allowances prescribed in this subclause shall operate from the beginning of the first pay period commencing on or after 1 July 2005.

31. - CHILD ALLOWANCE

(1) An employee whose permanent headquarters are located north of 26o South latitude, including Shark Bay, shall be paid an allowance at the rate of $100.00 per annum in respect of each one of his/her children of school age who is resident in the North: Provided that the total reimbursement per family unit under this clause shall not exceed $400.00 per annum.

(2) An allowance under this clause shall continue to be paid to an employee when he/she is absent from his/her headquarters on long service leave, annual leave or other leave as approved by the employer.

32. - CHANNEL OF COMMUNICATION

During the currency of this Award no employer shall recognise or negotiate with any organised body other than the Union in regard to the conditions of employment of employees covered by this Award.

33. - PART-TIME EMPLOYEES

(1) (a) Notwithstanding anything contained in this Award an employee may be regularly employed to work less hours per week than are prescribed in Clause 11. – Hours of this Award and such hours may be worked in less than five (5) days per week.

(b) Notwithstanding the provisions of subclause (2) of Clause 11. – Hours of this Award the employer may vary the ordinary hours or a part-time employee where the employee consents in writing provided that the employer shall give the part-time employee forty eight (48) hours notice of such variation in hours. For periods of less than forty eight (48) hours payment for the hours in addition to the ordinary hours shall be paid in accordance with Clause 12. – Overtime of this Award.

(2) When an employee is employed under the provisions of this clause the employee shall be paid at a rate pro-rata to the rate prescribed for the class of work on which he/she is engaged in the proportion to which his/her weekly hours bear to the weekly hours of an employee engaged full-time on that class of work.

(3) When an employee is employed under the provisions of this clause, he/she shall be entitled to the same leave, penalties and other conditions as prescribed in the Award for full-time employees, with payment being in the proportion to which his/her weekly hours bear to the weekly hours of an employee engaged full-time in that class of work.

(4) The employer shall advise the Secretary of the Union within twenty-eight (28) days of the date of this order as to the offices occupied, the days on which and number of hours worked by those employees employed in a part-time capacity.

(5) The employer shall advise the Secretary of the Union within seven (7) days of any part-time office created or altered after the date of this Award.

(6) Any dispute as to whether a part-time office is necessary shall be resolved in accordance with Clause 27.- Dispute Settlement Procedure of this Award.

(7) Notwithstanding the provisions of Clause 28. - Shift Work of this Award, for employees employed part-time in accordance with this clause, "Day Shift" shall include a shift, which commences after 12.00 midday and finishes ordinary hours before 6.00pm.

34. - PROPERTY ALLOWANCE

(1) (a) This clause shall not apply to employees of the Metropolitan Health Service employed at metropolitan locations who are transferring to another metropolitan location.

(b) The provisions of this clause shall apply to an employee who transfers from a position in one locality to another position in a new locality provided that:

(i) The classification of the new position is higher than the classification of his/her former position; or

(ii) The classification of the new position is the same or lower than the classification of his/her former position and the employee is changing his/her employment on account of illness over which he/she has no control or, if the employer initiates the transfer and/or considers the transfer of the employee to be in the interests of the employer; and

(iii) The employee commences employment in the new employment with either the same employer or a new employer bound by this Award within one (1) working week of the expiration of any period for which payment in lieu of annual leave or holidays has been made by the employer from whom he/she transferred or resigned, or, if no such payment has been made, within one (1) working week of the day on which his/her resignation or transfer became effective.

(c) The employee shall be entitled to be paid a property allowance by his/her new employer for reimbursement of prescribed expenses incurred by him/her:

(i) In the sale of a residence in an employee's former locality, which, at the date on which the employee received notice of his/her appointment in the new locality;

(aa) he/she owned and occupied; or

(bb) he/she was purchasing under a contract of sale providing for vacant possession; or

(cc) he/she was constructing for his/her own permanent occupation, on completion of construction;

and

(ii) In the purchase of a residence or land for the purpose of erecting a residence thereon for the employee's own permanent occupation in his/her new locality.

(2) An employee shall be reimbursed such following expenses as are incurred in relation to the sale of a dwelling/house:

(a) If the employee engaged an agent to sell the dwelling/house on his/her behalf - fifty (50) % of the amount of the commission paid to the agent in respect of the sale of the dwelling/house;

(b) If the employee engaged a solicitor to act for him/her in connection with the sale of the dwelling/house - the amount of the professional costs and disbursements necessarily incurred and paid to the solicitor in respect of the sale of the dwelling/house;

(c) If the land on which the dwelling/house is created was subject to a first mortgage and that mortgage was discharged on the sale, then an employee shall, if, in a case where a solicitor acted for the mortgagee in respect of the discharge of the mortgage and the employee is required to pay the amount of the professional costs and disbursements necessarily incurred by the mortgagee in respect of the discharge of the mortgage - the amount so paid by the employee;

(d) If the employee did not engage an agent to sell the dwelling/house on his/her behalf - the amount of the expenses reasonably incurred by the employee in advertising the dwelling/house for sale.

(3) An employee shall be reimbursed such following expenses as are incurred in relation to the purchase of a dwelling/house:

(a) If the employee engaged a solicitor or settlement agent to act for him/her in connection with the purchase of the dwelling/house - the amount of the professional costs and disbursements necessarily incurred and paid to the solicitor or settlement agent in respect of the purchase of the dwelling/house;

(b) If the employee mortgaged the land on which the dwelling/house was erected in conjunction with the purchase of the dwelling/house, then an employee shall, if, in a case where a solicitor acted for the mortgagee and the employee is required to pay and has paid the amount of the professional costs and disbursements (including valuation fees but not a procuration fee payable in connection with the mortgage) necessarily incurred by the mortgagee in respect of the mortgage - the amount so paid by the employee;

(c) If the employee did not engage a solicitor or settlement agent to act for him/her in connection with the purchase or such a mortgage - the amount of the expenses reasonably incurred by the employee in connection with the purchase or the mortgage, as the case may be, other than a procuration fee paid by the employee in connection with the mortgage.

(4) An employee is not entitled to be paid a property allowance under subclause (1)(c)(ii) unless he/she is entitled to be paid a property allowance under subclause (1)(c)(i); provided that the employer may approve the payment of a property allowance under subclause (1)(c)(ii) to an employee who is not entitled to be paid a property allowance under subclause (1)(c)(i) if the employer is satisfied that it was necessary for the employee to purchase a residence or land for the purpose of erecting a residence thereon in this new locality because of the employee's transfer from his/her former locality.

(5) For the purpose of this Award it is immaterial that the ownership, sale or purchase is:

(a) In the case of a married employee, solely or jointly or in common with;

(i) his/her spouse;

(ii) a dependant relative; or

(iii) his/her spouse and a dependant relative; or

(b) In the case of any other employee, solely or jointly or in common with a dependant relative living with him/her.

(6) Where the employee sells or purchases a residence jointly or in common with another person - not being a person referred to in subclause (5) - he/she shall be paid only the proportion of the expenses for which he/she is responsible.

(7) An application by an employee for a property allowance shall be accompanied by evidence of the payment by the employee of the expenses, being evidence that is satisfactory to the employer.

(8) Notwithstanding the foregoing provisions, an employee is not entitled to the payment of a property allowance:

(a) In respect of a sale or purchase prescribed in subclause (1) which is effected;

(i) More than twelve (12) months after the date on which the employee took up duty in his/her new locality; or

(ii) After the date on which the employee received notification that he/she was being transferred back to his/her former locality;

Provided that the employer may, in exceptional circumstances grant an extension of time for such period as is deemed reasonable.

(b) Where the employee is transferred from one locality to another solely at his/her own request or on account of misconduct.

(9) For the purpose of this clause:

(a) "Agent" means a person carrying on business as an estate agent in a State or Territory of the Commonwealth, being, in a case where the law of that State or Territory provides for the registration or licensing of persons who carry on such a business, a person duly registered or licensed under that law;

(b) "Dependant Relative" in relation to an employee means a relative or other person who is solely dependant on the employee for support;

(c) "Expenses" in relation to an employee means all costs incurred by the employee in the following areas:

(i) Legal fees in accordance with the Solicitor's Remuneration Order, 1976, as amended and varied, duly paid to a solicitor or in lieu thereof fees charged by a settlement agent for professional costs incurred in respect of the sale or purchase, the maximum fee to be claimed shall be as set out under Item 8 of the above Order;

(ii) Disbursements duly paid to a solicitor or a settlement agent necessarily incurred in respect of the sale or purchase of the residence;

(iii) Real Estate Agent's Commission in accordance with that fixed by the Real Estate and Business Agents Supervisory Board, acting under Section 61 of the Real Estate and Business Agents Act, 1978, duly paid to an agent for services rendered in the course of and incidental to the sale of the property, the maximum fee to be claimed shall be fifty percent (50%) as set out under Items 1 or 2 - Sales by Private Treaty or Items 1 or 2 - Sales by Auction of the Maximum Remuneration Notice;

(iv) Stamp duty;

(v) Fees paid to the Registrar of Titles or to the employee performing duties of a like nature and for the same purpose in another State of the Commonwealth;

(vi) Expenses relating to the execution or discharge of a first mortgage;

(vii) The amount of expenses reasonably incurred by the employee in advertising the dwelling/house for sale.

(d) "Locality" in relation to an employee means:

(i) Within the metropolitan area, that area within a radius of fifty (50) kilometres from the Perth Central Railway Station; and

(ii) Outside the metropolitan area, that area within a radius of fifty (50) kilometres from an employee's headquarters when they are situated outside of the metropolitan area;

(e) "Residence" includes any accommodation of a kind commonly known as a flat or a home unit that is, or is intended to be, a separate tenement;

(f) "Settlement Agent" means a person carrying on business as settlement agent in a State or Territory of the Commonwealth, being, in a case where the law of that State or Territory provides for the registration or licensing of persons who carry on such a business, a person duly registered or licensed under that law.

(10) Where there is a dispute or disagreement concerning:

(a) The necessity to purchase a residence or land;

(b) The amount of the disbursements necessarily incurred and duly paid by the employee;

(c) The amount of expenses reasonably incurred by an employee when;

(i) he/she did not engage an agent to sell the dwelling/house on his/her behalf; or

(ii) he/she did not engage a solicitor or settlement agent to act for him/her in connection with the purchase or a mortgage;

It shall be deemed to be a dispute or disagreement and shall be resolved in accordance with Clause 27. – Dispute Settlement Procedure of this Award.

35. - CASUAL EMPLOYEES

(1) "Casual Employee" shall mean an employee engaged by the hour for a period of less than two (2) consecutive weeks in any period of engagement and is informed of the conditions of employment for casual employees before he/she is employed.

(2) A casual employee shall be paid one seventy-fifth of the ordinary fortnightly rate of salary prescribed by this Award for the classification in which the casual employee is employed for each hour so employed, with the addition of twenty (20) %.

(3) At the request of the Union the employer shall supply to the Union the following information with respect to casual employees employed during the preceding month:

(a) The name of the casual employee or employees so employed;

(b) The address of such employee or employees;

(c) The classification in which such an employee was engaged and the number of hours so engaged; and

(d) The rate of salary paid to such employee or employees.

36. - LEAVE TO ATTEND UNION BUSINESS

(1) (a) The employer shall grant paid leave during ordinary working hours to an employee:

(i) Who is required to give evidence before any industrial tribunal;

(ii) Who as a Union-nominated representative of the employees is required to attend negotiations and/or conferences between the Union and employer;

(iii) When prior agreement between the Union and employer has been reached for the employee to attend official Union meetings preliminary to negotiations or industrial hearings;

(iv) Who as a Union-nominated representative of the employees is required to attend joint Union/management consultative committees or working parties.

(b) The granting of leave pursuant to paragraph (a) of this subclause shall only be approved:

(i) Where an application for leave has been submitted by an employee a reasonable time in advance;

(ii) For the minimum period necessary to enable the Union business to be conducted or evidence to be given;

(iii) For those employees whose attendance is essential;

(iv) When the operation of the organisation is not being unduly affected and the convenience of the employer impaired.

(2) (a) Leave of absence will be granted at the ordinary rate of pay.

(b) The employer shall not be liable for any expenses associated with an employee attending to Union business.

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

(3) (a) Nothing in this clause shall diminish the existing arrangements relating to the granting of paid leave for Union business.

(b) An employee shall not be entitled to paid leave to attend Union business other than as prescribed by this clause.

(c) The provisions of this clause shall not apply to special arrangements made between the parties which provide for unpaid leave for employees to conduct Union business.

(4) The provisions of this clause shall not apply when an employee is absent from work without the approval of the employer.

37. - TRADE UNION TRAINING LEAVE

(1) Subject to the provisions of this clause:

(a) The employer shall grant paid leave of absence to employees who are nominated by the Union to attend short courses relevant to the employee's employment or the role of the Union workplace representative, conducted by and/or on behalf of the Union;

(b) Paid leave of absence shall also be granted to attend similar courses or seminars as from time to time approved by agreement between the parties.

(2) An employee shall be granted up to a maximum of five (5) days' paid leave per calendar year for trade union training or similar courses or seminars as approved. However, leave of absence in excess of five (5) days and up to ten (10) days may be granted in any one (1) calendar year provided that the total leave being granted in that year and in the subsequent year does not exceed ten (10) days.

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

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

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

(5) The granting of leave pursuant to the provisions of subclause (1) of this clause is subject to the operation of the organisation not being unduly affected and to the convenience of the employer.

(6) (a) Any application by an employee shall be submitted to the employer for approval at least four (4) weeks before the commencement of the course, provided that the employer may agree to a lesser period of notice.

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

(7) A qualifying period of twelve (12) months in government employment shall be served before an employee is eligible to attend courses or seminars of more than one-half (½) day duration. An employer may, where special circumstances exist, approve an application to attend a course or seminar where an employee has less than twelve (12) months' government service.

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

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

38. - INTRODUCTION OF CHANGE

(1) (a) Where an employer has made a definite decision to introduce major changes in production, programme, organisation, structure or technology that are likely to have significant effects on employees, the employer shall notify the employees who may be affected by the proposed changes and the Union.

(b) "Significant effects" include 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 job opportunities, promotion opportunities or job tenure; the alteration of hours of work; the need for retraining or transfer of employees to other work or locations and restructuring of jobs: Provided that where the Award makes provision for alteration of any of the matters referred to herein an alteration shall be deemed not to have significant effect.

(2) (a) The employer shall discuss with the employees affected and the Union, inter alia, the introduction of the changes referred to in subclause (1) hereof, the effects the changes are likely to have on employees, measures to avert or mitigate the adverse effects of such changes on employees and shall give prompt consideration to matters raised by the employees and/or the Union in relation to the changes.

(b) The discussion shall commence as early as practicable after a firm decision has been made by the employer to make the changes referred to in subclause (1) hereof.

(c) For the purposes of such discussion, the employer shall provide to the employees concerned and the Union, 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 inimical to his/her interests.

39. - SKILLS ACQUISITION

(1) Classification by Skill Level

(a) The parties to this Award shall determine the appropriate range of skills applicable to each classification of position contained in Schedule B – Classes, and/or Groups and/or Callings Covered.

(b) Each employee shall be paid the salary rate specified for a classification level defined in accordance with subclause (1) (a) of this clause.

(c) Where the employee is required to apply skills which in total or in part correspond to the skills required of a higher classification than that under which they are usually paid, the employee shall receive the rate of pay corresponding to that higher classification in accordance with Clause 10. - Higher Duties of this Award.

(d) The level of skills possessed by each employee shall be determined by training standards, certification and experience in accordance with subclauses (2) and (3) of this clause.

(e) "Experience" for the purposes of this clause, means skills gained in an industry or occupation or away from work and which are recognised within the classification structure.

(2) Training Standards

(a) Where relevant training standards have been developed by the statutory State Training Authority, those standards shall be adopted in respect of matters relating to training in the industries and classifications covered by this Award.

(b) Where relevant national training standards have been registered by the National Training Board, those standards shall be adopted in respect of matters relating to training in the industries and classifications covered by this Award.

(c) Where relevant training standards have not been developed by the statutory State Training Authority or registered by the National Training Board, the parties to this Award shall establish the standards to be adopted with respect of matters relating to training in the industries and classifications covered by this Award.

(d) "Training Standards" for the purpose of this clause shall include, but not be limited to, the following:

(i) The standards and competencies of skills required for each classification;

(ii) Curricula development;

(iii) Training courses;

(iv) Articulation and accreditation requirements for both on and off the job training;

(v) On the job training guidelines.

(3) Training Standards, Vocational Education and Accreditation

All training and vocational education for the purpose of imparting skills corresponding to the classification structure of this Award shall be:

(a) Consistent with the training standards established in accordance with subclause (2);

(b) Of a form which is recognised for the purpose of attainment or contributory towards the attainment of an accredited vocational educational qualification; and

(c) Accredited by the statutory State Training Authority; or

(d) In the absence of the statutory State Training Authority, agreed by the parties to this Award as adequate in meeting the requirements of this subclause (3).

40. - TRAINEESHIPS

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

(b) The employer is to consult with the Union and seek its agreement before any particular traineeship program is to be introduced into the workplace.

(2) Training Conditions

The arrangements between the employer and the trainee in relation to training are as specified in the Traineeship Training Agreement, as administered by the Department of Training.

(3) Employment Conditions

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

(b) Completion of the traineeship scheme will not guarantee the trainee future employment in the public sector, but the employer will cooperate to assist the trainee to be placed in suitable employment, should a position arise;

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

(d) Overtime and shift work shall not be worked by trainees except to enable the requirements of the training to be effected. When overtime and shift work are worked the relevant allowances and penalties of the Award, based on the training wage stated in subclause (4) will apply. No trainee shall work overtime or shift work on their own.

(4) Wages

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

(5) Definitions

(a) “Part-time trainee” means a trainee who is employed for less than thirty seven and a half (37.5) hours per week; reasonably regular hours are worked each week; and wages and entitlements accrue on a pro-rata basis.

(b) “Traineeship” means a full-time or part-time structured employment based training arrangement approved by the Western Australian Department of Training where the trainee gains work experience and has the opportunity to learn new skills in a work environment. On successful completion of the traineeship the trainee obtains a

nationally recognised qualification. Notwithstanding the above, a "traineeship" does not include a training program, cadetship or similar, of a type that is currently offered or may be offered by the employer in order to train employees on the job.

(c) "Traineeship Training Agreement" means the agreement between the employer and the trainee that provides the training conditions for the traineeship and is registered with the Western Australian Department of Training.

41. - FLEXIBILITY AGREEMENTS

(1) (a) Employers and employees covered by this Award may endeavour to reach agreement to vary the provisions of this Award to meet the requirements of the employers' business and the consequential aspirations of the employees concerned.

The purpose of an agreement is to make the enterprise or workplace operate more efficiently according to its particular needs.

(b) Any such agreement shall be subject to the procedures contained in subclause (2) of this clause.

(2) (a) At each enterprise or workplace, consultative mechanisms and procedures appropriate to the organisation shall be established comprising representatives of the employer and employees.

(b) The particular mechanism and procedures established shall be appropriate to the size, structure, and needs of the enterprise and/or workplace.

(c) Nothing in this clause shall prevent the employees from seeking advice from, or representation by, the Union during such negotiations, nor prevent the Union from being party to the consultative processes.

(d) Before the agreement is finalised the employer must take reasonable steps to explain the likely effect of the proposed agreement to the employees affected.

(e) The agreement shall be provided to all employees who may be affected by the agreement. If the Union has not been involved in the negotiations, a copy shall be sent to the Secretary of the Union.

(f) Where the agreement represents the consent of the employer and the majority of the employees concerned, the Union shall not unreasonably oppose the terms of that agreement.

(g) In deciding the reasonableness of an agreement, account will be taken by the parties of whether or not terms and conditions are on balance, no less favourable than those prescribed by this Award.

(h) Any agreement reached under the provisions of this clause shall be processed in accordance with section 40 or 41 of the Industrial Relations Act, 1979 and shall be subject to approval or registration as the case may be by the Western Australian Industrial Relations Commission.

(i) Any agreement made pursuant to this clause shall take precedent over any provision of this Award to the extent of any inconsistency.

42. - SALARY PACKAGING

(1) For the purposes of this Award "salary packaging" shall mean an arrangement whereby the wage or salary benefit arising under a contract of employment are reduced, with another or other benefits to the value of the replaced salary being substituted and due to the employee.

(2) An employer and employee bound by this Award may enter into a salary packaging arrangement subject to the following:

(a) The employer shall take all reasonable steps to ensure that any salary package complies with taxation and other relevant laws;

(b) (i) The employer shall record the arrangement at the time it is entered into, and provide a copy to the employee before the arrangement comes into effect;

(ii) The record shall include details of the employee's classification and salary level applying immediately prior to the salary packaging, coming into effect, and the details of the package;

(c) The value of any agreed salary package, viewed objectively, shall not be less than the value of entitlements under this Award which would otherwise apply; and

(d) The value of any agreed salary package, viewed objectively, shall not be greater than the value of the contractual benefits which would otherwise be due to the employee.

(3) An employer shall not unreasonably withhold agreement to salary packaging on request from an employee.

(4) In the event of a dispute involving:

(a) Refusal by an employer to discuss after having received a request for salary packaging; and/or

(b) A claim by an employee or the Union party to this Award that an employer is unreasonably refusing to enter into a salary packaging arrangement with its employee/s;

Such dispute may be determined under the Industrial Relations Act, 1979 as amended.

43. - PRESERVATION OF RIGHTS

(1) As a result of this Award, nothing herein contained shall in itself operate so as to detrimentally alter the conditions of employment or salary that is the minimum prescribed in this Award or any benefit superior to any contained herein that have in accordance with custom and usage been and are continuing to be applied administratively.

(2) In particular, the two (2) public service holidays which up until its abolition were prescribed under Section 59 of the Public Service Act, 1979 and Regulation 12 of the Regulations to that Act and which following abolition of the said Act continued to be payable administratively.

SCHEDULE A

MINIMUM SALARIES

(1) Subject to the provisions of Clause 8. – Salaries and to the provisions of this Schedule the minimum annual salaries for employers bound by the Award are set out hereinafter.

(2) Minimum Salaries

LEVELS	CURRENT	**ASNA**	NEW
Level 1 under 17 years of age	11363	3350	14713
17 years of age	13270	3912	17182
18 years of age	15490	4566	20056
19 years of age	17929	5285	23214
20 years of age	20135	5936	26071
21 years of age 1 st year of service	22117	6520	28637
22 years of age 2 nd year of service	22771	6520	29291
23 years of age 3 rd year of service	23421	6520	29941
24 years of age 4 th year of service	24069	6625	30694
Level 2	24720	6520	31345
	25371	6625	31996
	26120	6521	32641
	26638	6521	33159
	27403	6521	33924
Level 3	28307	6521	34828
	29010	6521	35531
	29749	6521	36270
	30928	6521	37449
Level 4	31545	6521	38066
	32470	6521	38991
	33421	6521	39942
	34772	6416	41188
Level 5	35476	6416	41892
	36443	6416	42859
	37438	6312	43750
	38462	6312	44774
Level 6	40434	6312	46746
	41898	6312	48210
	43978	6312	50290
Level 7	45091	6312	51403
	46501	6312	52813
	47962	6312	54274
Level 8	50097	6312	56409
	51847	6312	58159
Level 9	54495	6312	60807
	56337	6312	62649
Level 10	58354	6312	64666
	61598	6312	67910
Level 11	64189	6312	70501
	66824	6312	73136
Level 12	70437	6312	76749
	72878	6312	79190
	75662	6312	81974

(a) An employee, who is 21 years of age or older on appointment to a classification equivalent to Level 1, may be appointed to the minimum rate of pay based on years of service, not on age.

(b) (i) For the purposes of this paragraph, 'Medical Typist' and "Medical Secretary' shall mean those employees classified on a classification equivalent to Level 1, 2, or 3 who spend at least 50% of their time typing from tapes, shorthand, and/or Doctor's notes of case history, summaries, reports or similar material involving a broad range of medical terminology.

(ii) A Medical Typist or Medical Secretary shall be paid a medical terminology allowance of an amount equivalent to 5.15% of Level 2 increment 3 per annum, which shall be converted to an hourly rate to enable payment:

(aa) on a fortnightly basis;

(bb) on a proportionate basis for a part-time employee;

(iii) Notwithstanding any other provisions of this paragraph, where an employee, classified equivalent to Level 1, 2 or 3 (other than an employee for whom training or instruction is a formal requirement of their job) has been instructed to provide short-term training or instruction in medical terminology, the employee shall be paid the medical terminology allowance on an hourly basis for the hours so worked.

(c) Where State Wage Case decisions of the Western Australian Industrial Relations Commission result in an expressed money adjustment to adult (21 years and over) salaries under this clause, the rates for Level 1 employees under 21 years shall be calculated using the following formula:

Current junior rate ÷ Current Level 1 (21 years, 1st year of service) rate x ASNA rate for Level 1 (21 years, 1st year of service) = Junior ASNA rate;

The junior ASNA rate is added to the Current Junior Rate to obtain the applicable New Junior rate.

(3) Salaries – Health Professionals

(a) Employees who possess a relevant tertiary level qualification, or equivalent as agreed between the Union and the employers, and who are employed in the callings of Audiologist, Bio Engineer, Chemist, Dietitian, Engineer, Medical Scientist, Librarian, Occupational Therapist, Physiotherapist, Physicist, Pharmacist, Clinical Psychologist, Psychologist, Research Officer, Scientific Officer, Social Worker, Speech Pathologist, Podiatrist, Medical Imaging Technologist, Nuclear Medicine Technologist, Radiation Therapist, Orthotist, Certified Clinical Perfusionist, Orthoptist or any other professional calling as agreed between the Union and employers, shall be entitled to Annual Salaries as follows:

LEVELS	CURRENT	ASNA	With effect from 7 July 2005
LEVEL 4/6	31545	6521	38066
	33421	6521	39942
	35476	6416	41892
	37438	6312	43750
	40434	6312	46746
	43978	6312	50290
LEVEL 7	45091	6312	51403
	46501	6312	52813
	47962	6312	54274
LEVEL 8	50097	6312	56409
	51847	6312	58159
LEVEL 9	54495	6312	60807
	56337	6312	62649
LEVEL 10	58354	6312	62649
	61598	6312	67910
LEVEL 11	64189	6312	70501
	66824	6312	73136
LEVEL 12	70437	6312	76749
	72878	6312	79190
	75662	6312	81974

(b) Subject to subclause (d) of this clause, on appointment or promotion to the Level 4/6 under this subclause:

(i) Employees, who have completed an approved three-year academic tertiary qualification, relevant to their calling, shall commence at the first year increment;

(ii) Employees, who have completed an approved four-year academic tertiary qualification, relevant to their calling, shall commence at the second year increment;

(iii) Employees, who have completed an approved Masters Degree or an approved PhD Degree relevant to their calling, shall commence on the third year increment;

Provided that employees who attain a higher tertiary level qualification, after appointment, shall not be entitled to any advanced progression through the range.

(c) The employer and Union shall be responsible for determining the relevant acceptable qualifications for appointment for the callings covered by this subclause and shall maintain a manual setting out such qualifications.

(d) The employer in allocating levels pursuant to clause (3) of this schedule may determine a commencing salary above Level 4/6 for a particular calling/s.

(e) The Classification Level Descriptors for each level in subclause (a) of this clause shall be as agreed from time to time between the Employer and the Union, and shall be published by the Employer in an Operational Circular.

(4) The following conditions shall apply to employees in the callings of Engineer:

Employees employed in the calling of Engineer and who are classified Level 4/6 under this Award shall be paid a minimum salary at the rate prescribed for the maximum of Level 4/6 where the employee is an "experienced engineer" as defined.

For the purposes of this paragraph "experienced engineer" shall mean:

(a) An engineer appointed to perform professional engineering duties and who is a Corporate Member of the Institution of Engineers, Australia or who attains that status during service;

(b) An engineer appointed to perform professional duties who is not a Corporate Member of the Institution of Engineers, Australia but who possesses a degree or diploma from a University, College or Institution acceptable to the employer on the recommendation of the Institution of Engineers, Australia, and who:

(i) Having graduated in a four (4) of five (5) academic year course at a University or Institution recognised by the employer, has had four (4) years' experience on professional engineering duties acceptable to the employer since becoming a qualified engineer, or

(ii) Not having a University degree but possessing a diploma recognised by the employer, has had five (5) years' experience on professional engineering duties, recognised by the employer since becoming a qualified engineer.

(5) (a) An employee appointed as a Clinical Psychologist Registrar (Grade 1) shall commence at Level 4/6.5 and shall progress to Level 4/6.6 in the second year.

(b) An employee appointed as a Clinical Psychologist (Grade 2) shall commence at Level 7.3 and shall progress by annual increments to Level 9.2.

(c) Progression from Clinical Psychologist Registrar (Grade 1) to Clinical Psychologist (Grade 2) shall occur with effect from the date registration as a "Clinical Psychologist" is conferred by the Psychologists' Board of Western Australia and the relevant positions may be advertised at Grade 1 or Grade 2 when vacant.

(d) "Clinical Psychologist (Grade 2)" shall mean a Clinical Psychologist who:

(i) is registered with the Psychologists' Board of Western Australia;

(ii) has a thorough knowledge of the methods, principles and practices of the profession;

(iii) works under general to limited direction; and

(iv) has an ability to practice psychology with a high degree of initiative and experience.

(e) The classification and grading structure for Clinical Psychologists above Grade 2 shall be as agreed from time to time between the Employer and the Union, and shall be published by the Employer in an Operational Circular.

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
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

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

Project Officer
Property Officer
Public Relations Officer
Purchasing & Stores Officer
Purchasing Officer
Purchasing Supply Officer
Quality Assurance Officer
Quality Improvement Officer
Rehabilitation Officer
Relieving Officer
Risk Management Officer
Salaries Officer
Security Officer
Senior Aboriginal Health Officer
Services Officer
Staff Clerk

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
Paymaster
Personnel Officer
Pharmacy Store Officer
Planning Officer
Policy Officer/Analyst
Principal Industrial Officer

Telephonist
Transport Clerk
Typist
Workers Compensation Clerk

Anaesthetic Technician
Animal House Technician
Architectural Draughtsperson
Art Therapist
Assistant Cath. Lab Technician
Assistant In Pharmacy
Audio Metrician
Audio Visual Assistant
Bio-Engineering Technician

Stores Officer
Superintendent
Supply Manager
Supply Officer
Systems Administrator
Training Officer
Transplant Co-ordinator
Transport Liaison Officer
Warden
Warehouse Controller
Workers Compensation Officer

Accounts Clerk
Administrative Assistant
Assistant Cashier
Assistant Medical Records Officer
Assistant Patients' Fees Officer
Clerk
Community Health Clerk
Data Processing Officer
Engineering Clerk
Enquiries Clerk
Filing Clerk
Junior Administrative Assistant
Key Punch Operator
Mailroom Clerk
Medical Records Clerk
Medical Secretary
Medical Typist
Morbidity Coding Clerk
P.A.T.S Clerk
Public Relations Assistant
Purchasing Clerk
Receival Liaison Officer
Receptionist
Research Assistant
Salaries Clerk
Secretary
Shorthand Typist
Stores Assistant
Surgical Appliance Clerk
Switchboard Operator

Security Officer
Shift Engineer
Specimen Control Officer
Technical Assistant
Technical Officer
Technician
Technician (Air Systems)

Cardiac Technician
Cardiology Technician
Catering Officer
Cath. Lab Technician
Clinical Perfusionist
Craft Worker
Cyto-technician
Dark Room Assistant
Dental Therapist
Draughtsperson
E.C.G Recordist
EEG/EMG Recordist
Film Processor
Handicraft Instructor
Handicraft Worker
Laboratory Technician
Library Assistant
Library Technician
Maintenance Engineer
Maxillo Facial Technician
Medical Artist
Medical Photographer
Mortuary Technician
Neurophysiology Technician
Occupational Therapy Assistant
Orthopaedic Appliance Assistant
Orthopaedic Appliance Technician
Orthopaedic Footwear Maker
Orthopaedic Technician
Orthoptist
Orthotic Technician
Orthotist
Outreach Worker
Pharmacy Assistant
Pharmacy Intern/Trainee
Phlebotomist
Physiotherapist Assistant
Production Assistant
Rehabilitation Technologist
Research Officer
Respiratory Technician

Urology Assistant
Urology Technician
Welfare Officer
X-ray Assistant

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
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
Chief
Co-ordinator
Deputy
Director
In-Charge
Manager
Officer
Regional
Senior
Superintendent
Supervisor
Trainee

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

(a) 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.

(b) The Minister for Health has in his incorporated capacity delegated all powers and duties as such to the Director General of Health.

(c) The Director General of Health, as delegate to the Minister to be referred to for the purposes of this Award 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
North Metropolitan Area Health Service
Mental Health Services
Midwest 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
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
Dwellingup Nursing Post
Esperance District Hospital
Eucla Nursing Post
Exmouth District Hospital
Fitzroy Crossing District Hospital
Geraldton Regional Hospital
Halls Creek District Hospital
Hawthorn Hospital
Kalgoorlie Regional Hospital
Katanning District Hospital
Kununurra District Hospital
Lake Grace District Hospital
Laverton District Hospital
Leonora District Hospital
Marble Bar Nursing Post
Margaret River District Hospital
Meekatharra District Hospital
Menzies Nursing Post

Merredin District Hospital
Mount Henry Hospital
Mount Magnet Health Centre
Narrogin Regional Hospital
Nickol Bay Hospital
Newman Hospital
Northam Regional Hospital
Onslow District Hospital
Osborne Park Hospital
Paraburdoo Hospital
Pemberton District Hospital
Port Hedland Regional Hospital
Raventhorpe Health Centre
Rockingham/Kwinana Hospital
Roebourne District Hospital
Sandstone Nursing Post
Shark Bay Nursing Post
Sunset Hospital
Swan District Hospital
Telfer Nursing Post
Tom Price Hospital
Varley Nursing Post
Wagin District Hospital
Wanneroo Hospital
Warburton Range Hospital
West Kambalda Nursing Post
Wickepin Nursing Post
Wickham Hospital
Wiluna Nursing Post
Wittenoom Nursing Post
Woodside Maternity Hospital
Wooroloo District Hospital
Wyndham District Hospital
York District Hospital

AWARDS/AGREEMENTS—Variation of—

2005 WAIRC 02635

CAN MANUFACTURING (PRODUCTION AND MAINTENANCE – AMALGAMATED INDUSTRIES PTY LTD) AWARD NO. A4 OF 1985

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING & ELECTRICAL DIVISON, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	WESTCAN (A DIVISION OF AMCOR LTD) & OTHERS
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 16 SEPTEMBER 2005
FILE NO/S	APPL 796 OF 2005
CITATION NO.	2005 WAIRC 02635

Result	Award varied. Order issued.
Representation	
Applicant	Mr D McLane as agent
Respondents	Mr D McLane on behalf of the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers – Western Australian Branch
	Mr D Lee as agent on behalf of Westcan (A Division of Amcor Ltd)

Order

HAVING heard Mr D Lane as agent on behalf of the applicant and on behalf of the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers – Western Australian Branch and Mr D Lee as agent on behalf of Westcan (A Division of Amcor Ltd), the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby –

(1) ORDERS that the Can Manufacturing (Production and Maintenance – Amalgamated Industries Pty Ltd) Award No. A4 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 the date hereof.

(2) NOTES that the allowances in Clauses 6(4)(a), 6(5) and 6(6) were amended in accordance with the following calculation:

Key classification Base Tradesperson \$447.50 + 1st – 11th safety net adjustments = \$591.50

$$\frac{17}{\$591.50} \times \frac{100}{1} = 2.87\%$$

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

SCHEDULE

1. Clause 6. - Rates of Pay:

A. Delete paragraph (a) of subclause (4) of this Clause and insert in lieu thereof the following:

(4) Tool Allowance

(a) Where the 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) \$12.60 per week to such tradesperson; or

(ii) In the case of an apprentice a percentage of \$12.60, being the wage percentage which is appropriate to the year of apprenticeship pursuant to subclause (3) hereof,

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. Delete subclauses (5) and (6) of this Clause and insert in lieu thereof the following:

(5) Electrician's Licence Allowance:

An electrical tradesperson 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 1945, shall be paid an allowance of \$18.00 per week.

(6) Laundry Allowance:

Employees shall receive a laundry allowance of \$10.60 per week as reimbursement of their personal layout for maintenance and cleaning of work clothing issued by Westcan.

2006 WAIRC 04484

COCKBURN CEMENT LIMITED AWARD 1991

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS
	APPLICANT
	-v-
	COCKBURN CEMENT LTD
	RESPONDENT
CORAM	SENIOR COMMISSIONER J F GREGOR
DATE	THURSDAY, 8 JUNE 2006
FILE NO	APPL 1429 OF 2002
CITATION NO.	2006 WAIRC 04484

Result Vary Award

Order

HAVING heard Mr T. Daly who appeared 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 Cockburn Cement Limited Award 1991 be varied in accordance with the following Schedule and that such variation shall have effect commencing from the first pay period on or after 15th May 2006.

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

SCHEDULE

1. Clause 2. – Arrangement: Delete this Clause and insert in lieu the following:

1. Title
1B. Minimum Adult Award Wage
2. Arrangement
3. Area and Scope
4. Special Flexibility Arrangements
5. Wages
6. Term
7. Classifications
8. Contract of Service
9. Hours
10. Rostered Days Off
11. Overtime
12. Shift Work
13. Annual Leave
14. Public Holidays
15. Long Service Leave
16. Sick Leave
17. Family Leave
18. Parental Leave
19. Deleted
20. Bereavement Leave
21. Time and Wages Records
22. Right of Entry and Interviewing Employees
23. Union Notices
24. Copy of Award
25. Change to Work Practice
26. Redundancy
27. Superannuation
28. Disputes Settlement Procedure
29. Workplace Behaviour and Performance
30. Morning and Meal Break
31. Call Out
32. Shutdown, Planned or Emergency
33. Trade Union Training Leave
34. Special Rates and Provisions
35. Higher Duties
36. Tea and Coffee
37. Washing Up Time
38. Protective Clothing and Equipment
39. Supply of Tools
40. Shop Stewards
41. Jury Service
42. Consultation
43. Training and Reclassification
44. Liberty to Apply
45. Signatories
Schedule A – Named Parties to the Award

2. Clause 3 – Area and Scope: Delete this Clause and insert in lieu the following:

(1) This Award shall apply to Cockburn Cement Limited, the employees employed in the classifications contained in Clause 5. - Wages of this award at the Main Works in Russell Road Kwinana Works in Heath Road and Woodman's Point, Dongara and the following unions:

The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch;

The Australian Workers' Union, Western Australian Branch, Industrial Union of Workers;

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division;

The Construction, Forestry, Mining and Energy Union of Workers;

Australian Maritime Officers Union – Western Area Union of Workers;

Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch.

(2) Except as provided in subclause (3) of this clause, this Award shall wholly replace and take precedence over all previous Awards, Orders and Agreements between the company and the respondent unions, as amended and consolidated, whether registered with the Western Australian Industrial Relations Commission or not.

(3) This Award shall not apply to employees engaged in the callings set out in the Foreman and Supervisors Cement and Lime Production Industry (Cockburn Cement Limited) Award No A40 of 1981 as amended and consolidated.

3. Clause 5 – Wages: Delete this Clause and insert in lieu the following:

(1) Rates of Pay:

(a) The wage rates and classifications in this award are the result of a substantial restructuring of provisions in the awards which this award replaces. They represent one of the means for providing improved efficiency and performance in the production, maintenance and distribution operations of the company.

(b) The objective of the classification and wages provisions of this award is to provide the basis for an equitable career path opportunity for all employees aimed at providing a flexible and productive workforce which can, with appropriate training, efficiently meet the operational and maintenance needs of the employer. An additional objective is to also provide work and a working environment which is satisfying for employees.

(c) The total wage payable in this subclause shall be inclusive of all over award, site allowances, dirt and disability allowances, metal trades allowances or any other allowance or payment not provided for in Clause 34. - Special Rates and Provisions.

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.

(d) The total wage payable fortnightly to all adult employees with more than two years service with the Company, except Woodman Point Dredging Operators, shall be:

Classification	Rate Per Fortnight $	Relativity to Grade 4 %	ASNA Per Fortnight $	Total Rate Per Fortnight $
Grade 1	977.70	88	318.00	1295.70
Grade 2	1022.10	92	318.00	1340.10
Grade 3	1066.60	96	318.00	1384.60
Grade 4	1111.00	100	318.00	1429.00
Grade 5	1155.40	104	318.00	1473.40
Grade 6	1199.90	108	318.00	1517.90
Grade 7	1244.30	112	318.00	1562.30
Grade 8	1288.80	116	314.00	1602.80

(e) The total wage payable fortnightly to all Woodman Point Dredging Operators with more than two years service with the Company shall be:

	Rate Per Fortnight $	Relativity to DO Grade 4 %	ASNA Per Fortnight $	Total Rate Per Fortnight $
Dredging Operator Grade 1	1177.10	88	318.00	1495.10
Dredging Operator Grade 2	1230.60	92	318.00	1548.60
Dredging Operator Grade 3	1284.10	96	314.00	1598.10
Dredging Operator Grade 4	1337.60	100	314.00	1651.60

(f) For the first two years of service with the Company an employee shall be paid 95% of their respective grade. Where an employee has previous experience with the Company in the two years prior to re-engagement, this may be taken into consideration as part of the first two years of service.

(2) Payment of Wages:

(a) Wages shall be paid fortnightly by direct deposit to the employee's Bank, Building Society, Credit Union Account or any other Institution with a BSB number for electronic banking, for the actual time worked.

(b) Each employee shall be provided in writing with details of the amount of wages to which the employee is entitled, the amount of deductions made thereupon, the net amount being paid and the number of hours worked.

(c) The ordinary rate per hour shall be calculated by dividing the appropriate fortnightly rate by 72 to the fourth decimal place, ie $00.0000 rounded off.

(d) An employee who lawfully leaves the employment or is dismissed for any reason, shall be paid wages up to that time of termination of employment and all monies due will be paid by electronic transfer or cheque at the time of termination or within 24 hours of such termination.

(e) All overtime, allowances and penalty rates as prescribed by this award may be paid if requested within 48 hours of the expiration of the pay period in which they occur.

(3) Leading Hand/Team Leader/Team Coordinator Rates:

(a) In addition to the wages prescribed in this Award a Leading Hand/Team Leader/Team Coordinator shall be paid 5% of his basic 36 hour week wage.

(4) Apprentices:

(a) The total wage payable fortnightly to all apprentices, expressed as a percentage of the Classification Grade 5 of paragraph (1)(d) of this clause shall be:

Four Year Term	**Relativity to Classification Grade 5 %**
First year	42
Second year	55
Third year	75
Fourth year	88

(b) Adult Apprenticeship

The total wage payable fortnightly to all first and second year adult apprentices shall be not less than the Grade 1 Classification rate, and for third year adult apprentices not less than 88% of the Grade 5 Classification rate expressed in paragraph (1)(d) of this clause.

(5) Junior Employees working in the chemical laboratory or clerical areas:

The total wage payable per fortnight, expressed as a percentage of the Classification Grade 1 Total Rate of paragraph (1)(d) of this clause.

	Relativity to Classification Grade 1 %
Under 16 years of age	40
16 years of age	50
17 years of age	60
18 years of age	70
19 years of age	80
20 years of age	90

4. Clause 8 – Contract of Service: Delete this Clause and insert in lieu the following:

(1) (a) A Contract of Service may be terminated in accordance with the provisions of this clause and not otherwise but this clause does not operate so as to prevent any party to a contract from giving a greater period of notice than is hereinafter prescribed, nor to affect the Company's right to dismiss an employee without notice for conduct that justifies instant dismissal [subclause (2)(b) of Clause 29. – Workplace Behaviour and Performance]. An employee so dismissed shall be paid for the time worked up to the time of dismissal only.

(b) Subject to the provisions of paragraph (e), a party to the contract of employment, may on any day, give to the other party the appropriate period of notice prescribed in paragraph (e) and the contract terminates when that period expires.

(c) Payment in lieu of the notice shall be made if the appropriate notice period is not given, provided that employment may be terminated by part of the period of notice specified and part payment in lieu thereof.

(d) In calculating any payment in lieu of notice the Company shall pay the employee the ordinary wages for the period of notice had the employment not been terminated.

(e) The period of notice required by an employee or the Company when terminating the contract of employment shall be:

Period of Continuous Service	**Period of Notice**
Not more than 1 year	2 weeks
More than 1 year but not more than 3 years	3 weeks
More than 3 years but not more than 5 years	4 weeks
More than 5 years	5 weeks

(f) Paragraph (e) of this subclause does not operate so as to prevent an employee and the company from mutually agreeing to accept a greater or lesser amount of notice when terminating the contract of employment.

(g) Employees over 45 years of age with two or more years continuous service at the time of termination, shall receive an additional weeks notice.

(2) Statement of Employment

The Company shall, upon receipt of a request from an employee whose employment has been terminated, provide to the employee a written statement specifying the period of employment and the classification or the type of work performed by the employee.

(3) Notification on Engagement

Before the first day of engagement, an employee shall be notified by the Company or by the Company's representative, whether the duration of their employment is full time, part-time or temporary.

(4) Time Off During Notice Period

Where the company has given notice of termination to an employee who has completed one month's continuous service, that employee shall, for the purpose of seeking other employment be entitled to be absent from work up to a maximum of eight ordinary hours without deduction of pay. The time off shall be taken at times that are convenient to the employee after consultation with the company.

(5) Absence from Duty

The company shall be under no obligation to pay for any day not worked upon which the employee is required to present for duty, except when such absence from work is due to paid leave to which the employee is entitled under the provisions of this award.

(6) Standing Down of Employees

(a) (i) The employer is entitled to deduct payment for any day or part of a day upon which an employee (including an apprentice) cannot be usefully employed because of industrial action by any of the Unions party to this award, or by any other association or union.

(ii) If an employee is required to attend for work on any day but by reason of failure or shortage of electric power work is not provided, they shall be entitled to two hours' pay and further, where any employee commences work they shall be entitled to four hours' employment or be paid for four hours' work.

(b) The provisions of paragraph (a) of this subclause also apply where the employee cannot be usefully employed through any cause which the Company could not reasonably have prevented but only if, and to the extent that, the Company and the union or unions concerned so agree or, in the event of disagreement, the Western Australian Industrial Relations Commission so determines.

(c) Where the stoppage of work has resulted from a breakdown of the employer's machinery the Western Australian Industrial Relations Commission, in determining a dispute under paragraph (b) of this subclause, shall have regard for the duration of the stoppage and the endeavours made by the Company to repair the breakdown.

(7) Casual Employees

(a) A casual employee is to be informed that they are employed on a casual basis and there is no entitlement to paid leave (except Bereavement Leave) before they are engaged.

(b) An employee engaged as a casual in any of the classifications set out in this Award shall be paid a 25% loading in addition to the ordinary 36 hour earnings for the relevant classification.

(c) The employment of a casual employee may be terminated by one hours notice, given by either party.

5. Clause 12. – Shift Work: Delete subclause (4) of this Clause and insert in lieu the following:

(4) (a) Subject to the provision of paragraphs (5)(a) and 5(b) of this clause, a shift employee when on day, afternoon or night shift, shall be paid for such shift, an allowance of $19.80.

(b) Employees engaged on the Off Peak Milling roster shall be paid a shift allowance of $29.70.

6. Clause 13. – Annual Leave:

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

(1) (a) Except as hereinafter provided, a period of four consecutive weeks' leave with payments as prescribed by paragraph (b) hereof, shall apply for each year of service and shall accrue pro rata on a weekly basis.

B. Delete subclause (3) of this Clause and insert in lieu the following:

(3) (a) An employee whose employment is terminated after they have completed a twelve monthly qualifying period and who has not been allowed the leave prescribed under this Clause in respect of that qualifying period shall be given payment as prescribed by paragraphs (b) and (c) of this subclause (1) of this Clause in lieu of that leave or, in the case of which subclauses (7), (8) or (9) of this Clause applies, in lieu of so much of that leave as has not been allowed unless:

(i) The employee has been justifiably dismissed for misconduct; and

(ii) The serious misconduct for which the employee has been dismissed occurred prior to the qualifying period.

(b) If an employee lawfully leaves the employment or the employment is terminated by the Company through no fault of the employee, the employee shall be paid 2.7692 hours' pay at the rate of wage prescribed by paragraph (1)(b) of this clause, divided by seventy two, in respect of each completed week of continuous service.

7. Clause 15. – Long Service Leave: Delete the preamble paragraph in this Clause and insert in lieu the following:

Subject to the following additional provisions of this Clause, the long service leave provisions in accordance with the Long Service Leave General Order of the Commission that is published in Part 1 (January) each year in the Western Australian Industrial Gazette shall apply to all employees bound by this Award.

8. Clause 16. – Sick Leave: Delete this Clause and insert in lieu the following:

(1) (a) 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 9 working days or 72 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 worker each week that the average number of hours worked each week bears to 36, up to 72 hours each year.

(b) If in the first or successive years of service with the Company an employee is absent on the grounds of personal ill health or injury for a period longer than the employee's entitlement to paid sick leave, payment may be adjusted at the end of that year of service, or at the time the employee's services terminate, if before the end of that year of service, to the extent that the employee has become entitled to further paid sick leave during that year of service.

(2) Sick leave shall accumulate from year to year for all years of continuous service.

(3) To be entitled to payment in accordance with this clause the employee shall notify the Company of the employee's inability to attend for work due to sickness, the nature of the employee's illness and the estimated duration of the absence prior to the commencement for the normal days work unless this is impractical. Provided that where such notification is impractical, the employee must notify the Company within 24 hours of the commencement of the absence.

(4) 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.

(5) (a) Subject to the provisions of this subclause, the provisions of this clause apply to an employee who suffers personal ill health or injury during the time when the employee is absent on annual leave and the employee may apply for and the Company shall grant paid sick leave in place of annual leave.

(b) Application for replacement shall be made within seven days of resuming work and then only if the employee was confined to the employee's place of residence or a hospital as a result of their personal ill health or injury for a period of seven consecutive days or more and the employee produces evidence that would satisfy a reasonable person that the employee was so confined. Provided that the provisions of this paragraph do not relieve the employee of the obligation to advise the Company in accordance with subclause (3) of this clause if the employee is unable to attend for work on the next working day following his/her annual leave.

(c) Replacement of paid annual leave by paid sick leave shall not exceed the period of paid sick leave to which the employee was entitled at the time the employee proceeded on annual leave and shall not be made with respect to fraction of a day.

(d) Where paid sick leave has been granted by the Company in accordance with paragraphs (a), (b) and (c), that portion of the annual leave equivalent to the paid sick leave is hereby replaced by the paid sick leave and the replaced annual leave may be taken at another time mutually agreed to by the Company and the employee, or failing agreement, shall be added to the employee's next period of annual leave or, if termination occurs before then, be paid for in accordance with the provisions of Clause 13. - Annual Leave.

(e) Payment for replaced annual leave shall be at the rate of wage applicable at the time the leave is subsequently taken provided that the annual leave loading prescribed in Clause 13. - Annual Leave shall be deemed to have been paid with respect to the replaced annual leave.

(6) Where a business has been transmitted from one employer to another and the employee's service has been deemed continuous in accordance with subclause (3) of Clause 2 of the Long Service Leave provisions published in January issues of the Western Australian Industrial Gazette, the sick leave standing to the credit of the employee at the date of transmission from service with the transmitter shall stand to the credit of the employee at the commencement of service with the Company and may be claimed in accordance with the provisions of this clause.

(7) 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.

(8) An employee's unused accumulated sick leave shall be paid in full to the employee (or their executor) on termination other than for misconduct.

(9) Provided 5 years' sick leave entitlement is maintained at all times, an employee may claim payment for all additional accumulated sick leave.

9. Clause 18. – Maternity Leave: Delete the number, title and Clause and insert in lieu the following:

18. – 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.

"Spouse" includes a 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 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) 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 (6) of this clause.

(6) 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 paren5tal 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.

(7) 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.

(8) 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 they wish to return to work.

(d) If they do so, the employer must notify them in writing of the day on which they are 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 they 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.

(9) 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 they 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.

(10) 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

(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 the employee is qualified for, and can perform the duties of, other positions in the employer's employment, the employer must employ the employee in whichever of those positions is nearest in status and remuneration to the position referred to in subclause (2).

(11) Replacement Employee

An employer must not employ a person:

(a) To replace an employee while they are 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.

(12) 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.

(13) 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 referred to in paragraph (d) of this subclause 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 an 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.

10. Clause 19. – Paternity Leave: Delete the number, title and Clause and insert in lieu the following:

19. – DELETED

11. Clause 20. – Bereavement Leave: Delete this Clause and insert in lieu the following:

(1) An employee on the death of:

(a) Spouse or de facto partner

(b) Child or step child

(c) Parent, step parent or parent-in-law

(d) Sibling

(e) Grandparent

(f) Any person, who immediately before that person's death, lived with the employee as a member of the employer's family is entitled to paid bereavement leave of up to seven consecutive days.

(2) If requested, evidence of the entitlement to bereavement leave that would satisfy a reasonable person is to be furnished to the employer.

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

(4) Upon written application by the employee, additional bereavement leave may be granted up to a maximum of seven consecutive days. Payment for such leave is at the discretion of the Works Manager.

12. Clause 27. – Superannuation: Delete subclause (1)(a) of this Clause and insert in lieu the following:

(a) All employees will be paid 9.0% or such other percentage as prescribed by the Superannuation Guarantee (Administration) Act 1992 (C'th) plus 1.5% of their basic fortnight award rate into one of the funds of their choice or the default fund, Westscheme.

13. Clause 30. – Morning and Meal Break: Delete subclause (5) of this Clause and insert in lieu the following:

(5) An employee required to work overtime for more than two hours shall be supplied with a meal by the Company or be paid $9.15 for a meal and, if owing to the amount of overtime worked after a further 4 hours a second or subsequent meal is required the employee shall be supplied with each such meal by the Company or be paid $6.10 for each meal so required.

The provisions of this subclause do not apply in respect of any period of overtime for which the employee has been notified of the requirement on the previous day or earlier or when the employee has already left work or is called in from home.

14. Clause 34. – Special Rates and Provisions: Delete subclauses (3) and (4) of this Clause and insert in lieu the following:

(3) Electrical Licence Allowance

An Electrician-Special Class or an Electrical Fitter who holds and, in the course of his/her 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, (as amended), under the Electricity Act 1945, shall be paid an allowance of $35.40 per fortnight.

(4) First Aid Certificate

An employee holding a current St John Ambulance Occupational First Aid Certificate or equivalent and who is appointed by the Company to perform first aid duties, shall be paid $33.40 per fortnight.

15. Appendix – Resolution of Disputes Requirements: Delete this Appendix.

16. Appendix 2 – Parties to the Award: Delete the title and Appendix and insert in lieu the following:

SCHEDULE A – NAMED PARTIES T THE AWARD

Union Parties to the Award

The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch;

The Australian Workers' Union, Western Australian Branch, Industrial Union of Workers;

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia, Engineering and Electrical Division;

The Construction, Forestry, Mining and Energy Union of Workers;

Australian Maritime Officers Union – Western Area Union of Workers;

Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch.

Company Party to the Award

Cockburn Cement Limited

17. Appendix – S.49B – Inspection of Records Requirements: Delete this Appendix.

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

2006 WAIRC 04470

CONTRACT CLEANERS' (MINISTRY OF EDUCATION) AWARD, 1990

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DELRON CLEANING PTY LTD AND JASON CLEANING SERVICES
	APPLICANT
	-v-
	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	TUESDAY, 6 JUNE 2006
FILE NO/S	APPL 2039 OF 2001
CITATION NO.	2006 WAIRC 04470

Result Discontinued

Order

WHEREAS this is an application to vary the *Contract Cleaners' (Ministry of Education) Award, 1990 (No A5 of 1981)*; and

WHEREAS on 24 July 2002 and 6 November 2002 the Commission convened conferences for the purpose of conciliating between the parties however agreement was not reached; and

WHEREAS the application was set down for hearing and determination by a Commission in Court Session on 21, 22 and 23 May 2003, which dates were vacated on 12 May 2003 at the request of the applicants to allow for further discussions between the parties; and

WHEREAS the Commission contacted the applicants on a number of occasions requesting advice as to their intentions in relation to this matter; and

WHEREAS the application was set down for mention on 3 November 2005; and

WHEREAS on 2 November 2005 the applicants lodged an amended application; and

WHEREAS at the hearing on 3 November 2005 the applicants sought further time to have discussions with the respondent in relation to the amended application; and

WHEREAS on 3 and 21 March 2006 the Commission convened further conferences for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of the second conference the applicants sought time to consider their position; and

WHEREAS on 18 April 2006 the applicants advised the Commission that they no longer wished to proceed with this application; and

WHEREAS on 25 May 2006 the applicants filed a Notice of Discontinuance in respect of the application;

WHEREAS on 6 June 2006 the respondent consented to the matter being discontinued;

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

THAT this application be, and is hereby discontinued

[L.S.]

(Sgd.) J L HARRISON,
Commissioner.

AWARDS/AGREEMENTS AND ORDERS—Interpretation of—

2006 WAIRC 04533

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE WESTERN AUSTRALIAN POLICE UNION OF WORKERS

APPLICANT

-v-

COMMISSIONER OF POLICE

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
COMMISSIONER P E SCOTT

DATE TUESDAY, 13 JUNE 2006

FILE NO P 8 OF 2006

CITATION NO. 2006 WAIRC 04533

Result Application Withdrawn by Leave

Order

WHEREAS this is an application lodged on Friday, the 17th day of March 2006, pursuant to Section 46 of the Industrial Relations Act 1979, for the Interpretation of an Agreement; and

WHEREAS on Monday, the 13th day of June 2006, the Applicant filed a Notice of Discontinuance; and

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

THAT this application be, and is hereby withdrawn by leave.

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

AGREEMENTS—Industrial—Retirement from—

2006 WAIRC 04561

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. 62 of 2006

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

Coastal Contractors Pty Ltd will cease to be a party to the Coastal Contractors/CFMEUW Industrial Agreement 2002 – 2005 AG 52 of 2003 on and from the 10th day of July 2006.

DATED at Perth this 12th day of June 2006.

J.A. SPURLING,
Registrar.

CANCELLATION OF—Awards/Agreements/Respondents—

2006 WAIRC 04447

BUILDING TRADES (CONSTRUCTION) AWARD 1987

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES (COMMISSION'S OWN MOTION)

APPLICANT

-v-

BUNNING BROTHERS PTY LTD, THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS AND OTHERS

RESPONDENT

CORAM CHIEF COMMISSIONER A R BEECH

DATE FRIDAY, 2 JUNE 2006

FILE NO/S APPL 61 OF 2006

CITATION NO. 2006 WAIRC 04447

Result	Respondent deleted

Order

WHEREAS the Commission, being of the opinion that the following employer named in the Building Trades (Construction) Award 1987 no longer carries on business as an employer in the industry to which the award applies did give notice on the 19th day of April, 2006 of an intention to strike out those employers as parties to the award;

AND HAVING read and considered the documents relating to this matter there being no party desiring to be heard in opposition thereto, and upon being satisfied that the requirements of the *Industrial Relations Act*, 1979 ("the Act") have been complied with, I, the undersigned, Chief Commissioner of the Western Australian Industrial Relations Commission, acting on my own motion in pursuance of the powers contained in section 47 of the Act, do hereby order and declare

THAT from the date of this order, Bunning Brothers Pty Ltd be struck out of Schedule B – Respondents of the Building Trades (Construction) Award 1987.

(Sgd.) A R BEECH,
[L.S.] Chief Commissioner.

NOTICES—Award/Agreement matters—

2006 WAIRC 04473

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 60 of 2006

APPLICATION FOR REGISTRATION OF AN INDUSTRIAL AGREEMENT

TITLED "INGHAMS ENTERPRISES SECURITY OFFICERS ENTERPRISE AGREEMENT (WA) 2006"

NOTICE is given that an application has been made to the Commission by the "Transport Workers Union of Australia, Industrial Union of Workers, Western Australian Branch" under the Industrial Relations Act 1979 for the registration of the above Agreement.

As far as relevant, those parts of the proposed Agreement which relate to area of operation and scope are published hereunder.

3. PARTIES BOUND

This Agreement shall be binding on the following parties:

(1) Inghams Enterprises Pty Ltd (the "Company").

(2) Transport Workers Union of Australia, Industrial Union of Workers, Western Australian Branch (the "Union")

(3) All Security Officers employed by the Company.

4. SCOPE

(1) This Agreement shall apply to all employees of the Company, engaged as Security Officers at its Osborne Park operations in Western Australia, who are eligible to be members of the Union, under the terms and conditions of the Cleaners and Caretakers Award 1969.

(2) The number of employees covered by this Agreement is 10.

6. RELATIONSHIP WITH PARENT AWARD

This Agreement shall be read and interpreted wholly in conjunction with the Cleaners and Caretakers State Award (No. 12 of 1969) as amended from time to time.

Where there is any inconsistency between this Agreement and the Award, this Agreement shall prevail to the extent of that inconsistency.

A copy of the Agreement may be inspected at my office at 111 St. Georges Terrace, Perth.

J.A. SPURLING,
Registrar.

16 May 2006

PUBLIC SERVICE ARBITRATOR—Matters dealt with—

2006 WAIRC 04414

DISPUTE REGARDING INDEFINITE TENURE OF UNION MEMBER.

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	GENERAL MANAGER, FOREST PRODUCTS COMMISSION
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR COMMISSIONER P E SCOTT
HEARD	
DELIVERED	MONDAY, 29 MAY 2006
FILE NO.	PSACR 38 OF 2005
CITATION NO.	2006 WAIRC 04414

CatchWords	Public Service Arbitrator – Application regarding indefinite tenure of union member – Applicant's member was a permanent employee on temporary deployment – Applicant's member already had indefinite tenure – Matter dismissed - *Industrial Relations Act 1979* (WA) s.44; *Public Sector Management Act 1994* s.64(1)(b); *Government Officers Salaries Allowances and Conditions Award 1989*; *Government Officers Salaries Allowances and Conditions General Agreement 2004*; *AWU (WA Public Sector) Award 1993*; *Australian Workers Union (Western Australian Public Sector) Forest Products Commission Industrial Agreement 2004; Premier's Circular 2002/17*.
Result	Matter dismissed
Representation	
Applicant	Ms J van den Herik
Respondent	Mr G McCorry

Reasons for Decision

1 The following matter was referred for hearing and determination pursuant to s.44 of the Industrial Relations Act 1979, it not having been resolved by conciliation:

"1. The Applicant says that:

(a) Its member Mr Peter Piper is employed as a Level 2 Technical Officer under the terms and conditions of the Government Officers Salaries, Allowances and Conditions (GOSAC) Award 1989 and the Government Officers Salaries Allowances and Conditions (GOSAC) General Agreement 2004.

(b) The Forest Products Commission has failed to comply with the Premier's Circular, 2002/17 as amended, issued on 23 October 2002, in that the respondent has failed to convert Mr Piper to indefinite tenure.

(c) Mr Piper has not been treated fairly and consistently with other like employees in accordance with the requirement of section 8 of the Public Sector Management Act 1994 in not continuing Mr Piper's employment status within the Level 2 Technical Officer position.

(d) Mr Piper has had numerous discrete fixed term contracts of employment.

2. The Applicant seeks:

(a) An Order that the Respondent's decision not to confirm Mr Peter Piper's indefinite tenure in accordance with the criteria contained in Premier's Circular 2002/17, be nullified.

(b) A Declaration that Mr Piper satisfies the criteria for conversion to permanency contained in Premier's Circular 2002/17 for the conversion of entry-level employees to indefinite tenure.

(c) Any other orders the Commission considers necessary to resolve this matter.

3. The Respondent rejects the Applicant's claims and says that:

(a) The intent of Premier's Circular 2002/17 is to grant permanent tenure to temporary employees who are on fixed term contracts. Mr Piper was a permanent employee prior to accepting two deployment opportunities. Mr Piper "acted" across awards, but this did not extinguish his permanency, rather Mr Piper's primary conditions of employment (AWU (WA Public Sector) Award 1993) were suspended during the acting period and temporarily replaced by the GOSAC Award.

(b) It has not treated Mr Piper unfairly nor has it failed to treat him in accordance with section 8 of the Public Sector Management Act 1994. Mr Piper was given two acting opportunities, and in the case of the second acting opportunity, Mr Piper was given an opportunity to improve his competitiveness. Mr Piper declined the offer. The Respondent recognised that Mr Piper could not be returned to his substantive AWU position because of his medical condition and instead redeployed him in a Level 1 GOSAC position and remunerated him to the top of Level 1 in recognition of his years of service.

4. In relation to the relief sought by the Applicant, the Respondent says that:

(a) The Order sought is not understood because Mr Piper has indefinite tenure.

(b) A Declaration that Mr Piper satisfies the criteria for conversion to permanency contained on Premier's Circular 2002/17 for conversion of entry level employment to indefinite tenure misapprehends the facts as Mr Piper has indefinite tenure.

(c) It is not necessary that an order issue to confirm Mr Piper's employment status as indefinite tenure in the position of Technical Officer, Level 2 of the GOSAC Award, as Mr Piper has indefinite tenure."

2 The Premier's Circular 2002/17 ("the Circular"), issued on 23 October 2003, contains the title of "Fixed Term Contract Staff". Its "Policy" and "Background" are set out as follows:

"**POLICY**

Ongoing positions in the public sector should not be filled by fixed term contract employees. A framework has been developed to facilitate a change in status for fixed term contract employees where this is feasible and appropriate.

BACKGROUND

Public sector employees are employed under many different pieces of legislation. The vast majority of these employment arrangements are subject to the general principles of human resource management contained in the Public Sector Management Act 1994 and the Public Sector Standards in Human Resource Management.

The use of fixed term contracts of employment is provided for in most employment situations. The Government's policy is for such arrangements to be restricted to the Senior Executive Service as detailed in the Public Sector Management Act 1994 and those circumstances where a position is genuinely not of an ongoing nature and/or is subject to limitations associated with external funding.

The framework attached to this Circular is designed to deal with the resolution of fixed term contract arrangements while satisfying all legislative requirements and the Public Sector Standards in Human Resource Management."

3 The Circular then contains a "Framework for dealing with fixed term contract employment", which provides for each government agency to review the positions occupied by employees on fixed term contracts under s.64(1)(b) of the Public Sector Management Act 1994. Section 64(1)(b) enables the employment of public service officers for fixed periods not exceeding 5 years. Those officers on fixed term contracts who meet particular criteria set out in the Circular are to have their employment confirmed as being of indefinite tenure rather than being fixed term.

4 According to Mr Piper's evidence and the documents before the Commission, the history of Mr Piper's employment with the Respondent goes back to 4 January 1998, when he was employed on a month's unpaid trial at the Timber Technology centre in Harvey. On 4 February 1998, he was engaged as a casual Timber Worker, AWU, Level 2 pursuant to the AWU (WA Public Sector) Award 1993, an award of the Australian Industrial Relations Commission. Mr Piper says that he was undertaking both timber worker's duties and those of a technical officer.

5 Exhibits A2 and A3 are the respondent's computer record of Mr Piper's employment. Exhibit A3 contains a code to many of the initials used in Exhibits A2 and A3. As a number of initials and terms within the exhibits were not defined, the Commission sought an explanation from the parties as to the meanings to be attributed to those terms and initiations. The respondent provided that explanation and the applicant concurred. Based on the code contained in Exhibit A3 and the respondent's further explanation, these exhibits provide some helpful information. Exhibit A3 refers to Mr Piper being substantively a Timber Worker by reference to the term SUB, and concurrently placed in another position by reference to the term CON. That position was as a Technical Officer. Accordingly, the exhibits tend to indicate that from 5 July 1998, Mr Piper was a permanent employee by reference to the initials PE in the column headed Reason, in the position of Timber Worker.

6 Subsequent references to his being a Technical Officer contain the terms AI, which according to the code in Exhibit A3 means annual increment, "FD" meaning transfer to Forest Products Commission ("FPC"), "HD" meaning Higher Duties Allowances, "CAP" meaning Project Extension on secondment.

7 Mr Piper says he did not receive or accept any offer to become a temporary AWU employee, and that the respondent's memorandum, from Ian Rotheram, Manager, to the Western Australian Department of Conservation and Land Management ("CALM") Mornington of 7 September 1998 to the effect that from 31 August 1998, Mr Piper and another employee were no longer casual but temporary, was the only document he ever sighted which said he was temporary. Mr Piper says, and the documents demonstrate, that he progressed through the increments in the classification structure of the award, taking account of his TAFE qualifications and experience, to AWU Level 2.6.

8 In the second half of 1999, 2 positions were advertised for expressions of interest for 2 year contracts as technical officers. Mr Piper applied and was successful in one of those positions. This was Technical Officer, Level 2, Position No. CLM 1546338, CALM Timber Technology, Harvey. Mr Piper was advised by letter dated 30 August 1999, that he was seconded to this position until 24 April 2002. The records indicate that for this period, Mr Piper was paid a higher duties allowance.

9 By letter dated 5 December 2000, Mr Piper was offered a "transfer with (his) substantive position to FPC." The substantive position referred to is that of "Timber Worker, CLM 3002756, AWU Level 2, CALM Timber Technology, Forest Resources Division, Department of Conservation and Land Management." This was to be transferred to "Timber Worker, FPC 3002756, AWU Level 2, Timber Technology Centre, Industry Development and Marketing Division, Forest Products Commission, Harvey." The letter noted that another letter was attached which offered "temporary deployment (acting) in an FPC position" should he "accept the transfer to FPC with (his) substantive position." He signed his acceptance of this offer of transfer with his substantive Timber Worker position on 25 January 2001.

10 The letter referred to above, attached to the transfer letter, and also dated 5th December 2000, offered Mr Piper temporary deployment (acting) in the position of Technical Officer FPC 3000122, Level 2, with the FPC for a period of twelve months, with the possibility of an extension to the period. Mr Piper signed, accepting this offer of temporary deployment, also on 25 January 2001.

11 According to his evidence, Mr Piper said he thought he was still a temporary AWU worker (Transcript p.12).

12 The respondent's records show that in April 2002, there was an intention to forward to Mr Piper contract documents to extend his contract as Technical Officer, Level 2 at Timber Technology, Harvey, by 3 months. Mr Piper says he did not receive those documents.

13 On 10th December 2002, in reply to a query from Mr Piper as to his status, he was advised by Michelle Bolitho as follows:

> "Peter, further to our conversation yesterday please find below details of your current employment status. In summary you are a permanent employee of the FPC and your substantive position is that of timber worker –you are currently on an internal secondment within the FPC into the role of Technical Officer.
>
> You may recall that at the time of your transfer to the FPC an explanation that you had a right of return to CALM – note however that any such right of return is at your substantive wages level. You should also note that there are potentially significant implications in choosing to exercise your right of return and I strongly recommend that you discuss these with Tracey Rankin on 9334 0187."

14 This email was part of a series, commencing with an email to Ms Bilitho from Tanya Mercer, Personnel Consultant with CALM which said:

> "As per our discussion regarding Mr Peter Pipers (sic) employment status.
>
> Peter is a permanent wages employee, employed as a Timber Worker, AWU Level 2, 3002756, Timber Technology. Peter has been temporary (sic) deployed to the position of Technical Officer, Level 2, 3000122 effective from the 4 January 2000. Therefore, as Timber Technology no longer exists in CALM, Peter's substantive and acting position belong to FPC.
>
> Peter was sent a letter of transfer on FPC letterhead on the 5 December 2000, inviting him to transfer with this substantive position (AWU Timber Worker), to the Forests Products Commission. Peter accepted this transfer 25 January 2001. In this letter, it states "Should you wish to accept this transfer to FPC, Clause 6 of Schedule 1 of the Conservation and Land Management Amendment Act 2000 gives you the right to return to CALM. Should you exercise this right, every effort will be made to place you in a suitable position within CALM. Where no suitable CALM position is available, standard government redeployment processes will apply".
>
> Peter was also sent a temporary deployment letter on FPC letterhead on the 5 December 2000, offering a temporary deployment from the 5 December 2000 to 9 December 2001 – Peter signed this letter on the 25 January 2001.
>
> I have put Mr Pipers (sic) personal file with relevant documentation on your desk for your information and or action."

15 The records also suggest that Mr Piper's "contract" was due to expire on 25 October 2002, and was extended for a further three months until 25 January 2003. This was in Position No. FPC 3002756, which was the AWU Level 2 position. The document states also that the "contract" was externally funded by CRC Wood Innovations.

16 In May 2003, Mr Piper was offered and accepted "Temporary Deployment Extensions" to the Technical Officer FPC 3000122 position until 30 June 2003. Further extensions were offered and accepted to 24 December 2003, 30 June 2004, 1 October 2004, 10 April 2005 and this ceased on 31 July 2005. The position FPC 3000122 moved to Bunbury and Mr Piper moved with it.

17 By letter dated 9 June 2005, Mr Piper applied to the Respondent for permanency said to be in accordance with Premier's Circular No. 2002/17. On 12 June 2005, the Civil Service Association of Western Australia Incorporated, the Applicant, also wrote to the Respondent supporting Mr Piper's application for permanency and received a reply dated 17 July 2005, in which the respondent rejected the request to convert Mr Piper's status to permanent according to the Premier's Circular, stating that:

1. Mr Piper was a permanent employee.
2. On 5 December 2000, Mr Piper had accepted a temporary deployment to a Technical Officer Level 2 position, at Harvey for an initial period of 12 months with the possibility of an extension.
3. "On 16 June 2003, the Commission wrote to the CPSU/CSA advising that the Timber Technology centre was being relocated to Perth. Also that it was anticipated that the relocation of the Timber Technology Centre would be finalized by the end of September and Mr Piper's temporary deployment would expire on 26 September 2003, and unless further opportunities could be found for him, he would revert to his substantive position i.e. a Mill Worker which was covered industrially by the Australian Workers Union.

   The Timber Technology Centre subsequently closed and Mr Piper was given a further temporary deployment opportunity as a Technical Officer at the Commission's Bunbury operations for an initial period of 6 months and this was followed by extensions to 30 June 2004, 1 October 2004 and 10 April 2005".

   Since then this position was advertised for permanent appointment on merit selection and Mr Piper was unsuccessful in gaining this position.
4. "Having regard for this information and given Mr Piper's medical condition, the Commission does not consider that it is appropriate to return him to his substantive AWU position. Instead the Commission proposes to redeploy Mr Piper into a permanent GOSAC Level 1 Officer position and remunerate him at the top of level 1 in recognition of his service".

18 By letter dated 1 August 2005, Mr Piper was offered permanent deployment from Timber Worker FPC 3002756 (AWU Level 2) to Officer FPC 3029003 (GOSAC Level 1) position. The terms of this letter of offer, formal parts omitted, read:

> **"**As you are aware, the temporary deployment of you into a Technical Assistant, FPC3000122, GOSAC Level 2 position will cease as of 31 July 2005. Effectively, this would mean that you would revert to your substantive permanent position with the Forest Products Commission of a Timberworker, FPC3002756, under the AWU FPC Certified Agreement 2004, at Level 2.6.
>
> Given your current medical condition, the Commission does not consider that it is appropriate to return you to your substantive AWU position. Instead we propose to redeploy you into a permanent GOSAC Level 1 Officer position, based

at Bunbury in the Forest Practices Office, and remunerate you at the top of level 1 salary range in recognition of your service. This would take effect from 1 August 2005. Your salary will be $37,366.00 per annum.

Attached is a copy of the Job Description Form (JDF) for the Officer, FPC3029003 GOSAC Level 1 position, for your information. In order to further ensure that the duties, outcomes and responsibilities listed on this JDF do not impact on your current medical condition, I will arrange for an appointment for you to see an Occupational Physician, to be paid for by the Commission. This physician will review the JDF and your current medical condition, and provide us with some advice and guidance if any of the content of the JDF is not appropriate for your role. Sandy Dodge, the Commission's Human Resource Manager will contact you shortly to provide you with details of this appointment.

If you agree to this permanent deployment to a Level 1 GOSAC Officer, FPC3029003, please sign the copy of this letter and return to Sandy Dodge in Human Resources at FPC Rivervale office. If you decide not to sign this permanent deployment offer, you will revert to your substantive position of AWU Level 2.6.

Please contact Sandy Dodge on 9475 8868 if you have any queries in regards to this matter."

19 On 3 August 2005, Mr Piper accepted the offer of permanent deployment to Level 1 GOSAC Officer. However, Mr Piper wrote to the Respondent on 19 August 2005 in the following terms:

"I omitted the following to my signed reply of 4th August 2005 and wish it to be added.

I agree without prejudice and under duress from the FPC to sign the permanent deployment offer, and so not revert me to my substantive position of AWU Level 2.6. I also wish it to be recorded that my acceptance of the Level 1.9 is without prejudice to my claim for conversion to ongoing status as a Level 2 Technical Officer."

20 Mr Piper says that he was put under duress to sign the offer of becoming a GOSAC Officer Level 1. This duress is said to have been that he received a number of communications pressing him into signing that offer quickly.

21 Sandra Lee Dodge, the respondent's human resources manager, gave evidence that the offer of redeployment into the GOSAC Level 1 position was not to be withdrawn if not accepted by 4 August 2005. Rather, 4 August 2005 was the pay period cut-off. If Mr Piper did not sign the offer by then, his pay for the next pay period would revert to AWU Level 2.6. If he signed the offer subsequent to 4 August 2005, the payment to GOSAC Level 1.9 would have been backdated. Mr Piper had applied for a GOSAC Level 2 position. If he did not win that position, he would have been "displaced." Given Mr Piper's medical condition, he could not go back to Timber Worker duties, and would have become a redeployee.

Conclusions

22 It is clear from Mr Piper's evidence that he was confused by the terms used in the various offers of employment. He does not appear to understand references made in correspondence to his "substantive" position, what "temporary deployment (acting)" might mean, nor the difference between casual, temporary, on contract and substantive. This is hardly surprising. From my experience, many employees and employers are not familiar with these terms and concepts. Further, given the confused state of the documents, it is not surprising that Mr Piper had a particular view of him employment status.

23 However, I make the following findings as to the facts. Mr Piper commenced as casual. There is conflict in the records and they indicated that from 31 August 1998, he became a temporary Timber Worker, AWU Level 2. However, the personal records also indicate that he was a permanent Timber Worker from 5 May 1998.

24 I conclude that at some point between 1998 and 5 December 2000, Mr Piper became substantive in the Timber Worker, CLM 3002756, AWU Level 2, CALM Timber Technology, Forest Resources Division, Department of Conservation and Land Management position. This is the position referred to by the Executive Director of the Department of Conservation and Land Management in his letter to Mr Piper of 5 December 2000. The purpose of this letter was to offer Mr Piper a transfer with that position to the newly created Forest Products Commission (FPC). The FPC had been created as a new agency as a result of the Forest Products Act 2000 and the Conservation and Land Management Act 2000. He was treated as having "permanency" from some time prior to 5 December 2000.

25 The real difficulty in this case arises because there are no records of the change in status. However, that does not mean the change in status did not occur. Clearly, Mr Piper was treated as if his employment was ongoing, that he substantively held the position of Timber Worker CLM 3002756, which transferred to Timber Worker, FPC 3002756.

26 On 25 January 2001, Mr Piper accepted a transfer when that position moved from CALM to FPC.

27 At the same time, Mr Piper was offered and accepted the opportunity to act in the position of Technical Officer FPC 3000122, Level 2, Timber Technology Centre, Industry Development and Marketing, Harvey, Forest Products Commission.

28 In the terminology used in the public sector arising from the Public Sector Management Act, "acting" is referred to as "temporary deployment (acting)". This latter term is that which is referred to in the letters of offer for the fixed term arrangements offered to and accepted by Mr Piper for periods from 5 December 2000 through to 31 July 2005.

29 According to Exhibits A2 and A3, Mr Piper's status was "PFT" i.e. permanent full time, from at least 29 August 1999 when he was receiving a temporary special allowance. Prior to that, from 5 July 1998, when Mr Piper was an AWU Award Level 2 Officer, as a permanent employee, a Timber Worker, and from 29 August 1999, at least, a full time permanent Timber Worker. At various times, he received temporary special allowances or higher duties allowances. There is within the records no suggestion that at any time after 1998, he was other than a permanent employee. Rather he was a permanent employee as a Timber Worker. He undertook higher duties and worked on temporary placements to a technical officer position. References to "CAP" (meaning project extension secondment), "EX" (meaning extension), "FD" or "FC" (meaning transfer to Forest Products Commission), "HD" (meaning higher duties allowance) and "TS" (meaning temporary special allowance) in Exhibits A2 and A3 do not remove his status as a permanent employee, being a Timber Worker.

30 While there was some confusion on Mr Piper's part, and it would appear on Mr Heslewood's and Mr Gill's parts also, that Mr Piper was on fixed term contract in position FPC 3002756, it is clear from all of the other documents that this position was his substantive position, and he was not, in fact, on a fixed term contract. Mr Piper's permanent status was clearly and correctly described by Ms Bilitho in her email to him of 10 December 2002. i.e.

"(Y)ou are a permanent employee of the FPC and your substantive position is that of timber worker – you are currently on an internal secondment within the FPC into the role of Technical Officer."

31 Accordingly, from at least 5 December 2000, Mr Piper continued to hold a substantive position as a Timber Worker, CLM 3002756, i.e. a permanent position. At the same time, he was on an internal secondment and "acted" in the position of Technical Officer FPC 3000122, Level 2, a temporary deployment.

32 It cannot be suggested that the respondent concocted the permanency as a Timber Worker to avoid converting Mr Piper to a permanent Technical Officer because the possibility of such a conversion did not arise until the Circular of 23 October 2003. By this time Mr Piper had been "permanent" as a Timber Worker on internal secondment or temporary deployment receiving a higher duties allowance, for some years.

33 Therefore, when the temporary deployment came to an end, due to the position at the Timber Technology Centre being relocated and the Centre subsequently closed, Mr Piper had been given the opportunity to act in a technical officer position in Bunbury for approximately 16 months. He unsuccessfully applied for this position when it was advertised. Having no other position, Mr Piper then reverted to his substantive (permanent) position as a Timber Worker.

34 The respondent then offered Mr Piper a GOSAC Level 1 position as he was unable to undertake Timber Worker work due to his medical condition. He accepted this position, but says he did so under duress.

35 I find that the respondent made the offer to appoint Mr Piper to the GOSAC Level 1 position in good faith. The importance of Mr Piper accepting the offer in the time specified was to ensure that his pay did not drop to the extent it would have had he not accepted by the date specified. Even if he had accepted at a later date, the respondent would have back dated the GOSAC Level 1 rate over the Timber Worker rate, although Mr Piper would still suffer a reduction from the GOSAC Level 2 rate to that of GOSAC Level 1.

36 In conclusion, Mr Piper was not eligible for conversion to "indefinite tenure" pursuant to the Premier's Circular 2002/17 because from at least 5 December 2000, he substantively held a Timber Worker position initially position CLM 3002756, which was transferred to the FPC and became FPC 3002756, AWU Level 2, i.e. he was "permanent". He was not engaged on fixed term contracts, but on permanent employment, with a lengthy series of temporary deployment (acting) opportunities.

37 An examination of Premier's Circular 2002/17 clearly demonstrates its purpose as being aimed at converting fixed term contract employees to indefinite tenure. Mr Piper already had indefinite tenure. Accordingly, he was not subject to the terms or intent of the Circular.

38 As the claim is predicated on a misapprehension of Mr Piper's status, and Mr Piper already has the permanency sought, albeit not at the level he sought, the matter must be dismissed.

2006 WAIRC 04415

DISPUTE REGARDING INDEFINITE TENURE OF UNION MEMBER.

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	GENERAL MANAGER, FOREST PRODUCTS COMMISSION
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER P E SCOTT
DATE	MONDAY, 29 MAY 2006
FILE NO	PSACR 38 OF 2005
CITATION NO.	2006 WAIRC 04415

Result Matter Dismissed

Order

HAVING heard Ms J van den Herik on behalf of the applicant and Mr G McCorry on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders:

THAT this matter be, and is hereby dismissed.

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

INDUSTRIAL MAGISTRATE—Complaints before—

2006 WAIRC 04417

	WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES' COURT
PARTIES	TERENCE WILLIAM MILES
	CLAIMANT
	-v-
	BRENDON PENN NOMINEES PTY LTD
	RESPONDENT
CORAM	INDUSTRIAL MAGISTRATE W.G. TARR
HEARD	WEDNESDAY, 26 APRIL 2006, THURSDAY, 27 APRIL 2006, WEDNESDAY, 17 MAY 2006
DELIVERED	MONDAY, 15 MAY 2006
CLAIM NO.	M 238 OF 2004
CITATION NO.	2006 WAIRC 04417

CatchWords	Breach of award; Alleged failure to pay accrued annual leave; notice and redundancy; Whether employee or sub-contractor; Flat hourly rate in excess of award entitlement.
Legislation	Workplace Relations Act 1996 – Mobile Crane Hiring Award 2002
Cases referred to in decision	
	Massey v Crown Life Insurance Co. (1978) 2 ALL ER 576
	Federal Commissioner of Taxation v Krakos Investments Pty Ltd 133 ALR 545
	Sharrment Pty Ltd and Others v Official Trustee in Bankruptcy (1988) 18 FCR 449.
	The Western Australian Builders" Labourers, Painters and Plasterers Union v RB Exclusive Pools Pty Ltd trading as Florida Exclusive Pools 77 WAIG 4.
Cases also cited	Australian Mutual provident Society v Allen (1978) 18 ALR 385; 52 ALJR 407
	Narich Pty Ltd v Commissioner of Pay-Roll tax [1983] 2 NSWLR 597.
	Stevens v Brodribb Sawmilling Co Pty Ltd (1985-1986) 160 CLR 16
	Hollis v Vabu Pty Limited [2001] 207 CLR 21
	Peters v James Turner Roofing 81 WAIG 3093
	James Turner Roofing Pty Ltd v Peters 83 WAIG 427
Result	Claim dismissed
Representation	
Applicant	Mr P Brunner (of Counsel) instructed by *Kott Gunning Lawyers* appeared for Claimant
Respondent	Mrs C McKenzie (of Counsel) instructed by *McKenzie Lalor*, Barristers and Solicitors appeared for the Respondent

REASONS FOR DECISION

Claim and Response

1 The Claimant in these proceedings is claiming that the Respondent is in breach of the Mobile Crane Hiring Award 2002 (the Award). He particularised his claim in Further and Better Particulars of claim filed in these proceedings as follows:

1. On or about 26 November 1999 the Claimant was engaged by the Respondent to undertake crane operating duties.
2. On or about 15 November 2002 the Claimant's position was made redundant by the Respondent due to a downsizing of the Respondent's business.
3. On the termination of his services, the Claimant was not paid entitlements to:
   - 3.1 accrued annual leave
   - 3.2 notice; and
   - 3.3 redundancy
4. At all material times the Claimant was an employee of the Respondent.
5. At all material times the provisions of the Mobile Crane Hiring Award 2002 (AW816842CRV) (the Award) applied to the employment relationship between the Claimant and the Respondent.
6. Pursuant to Clause 25 of the Award the Claimant was entitled to a period of 28 consecutive days leave annually (25.1.1) and 17.5% leave loading (25.8), with such accrued leave and loading being payable on the termination of the employment.
7. Pursuant to Clause 11.2 of the Award the Claimant was entitled to a minimum of 4 weeks notice.
8. Pursuant to Clause 11.3 of the Award the Claimant was entitled to retrenchment pay of 3 weeks per year of service and a pro rata payment, based on 3 weeks pay per year of service, for any uncompleted year.
9. As a consequence of these particulars the Claimant claims accrued annual leave, notice and redundancy pay.

10. The Claimant reserves the right to amend these particulars or raise further claim against the Respondent in relation to any underpayment of wages, overtime, penalties, shift loadings or allowances that may have been applicable during the Applicant's employment pursuant to the provisions of the Award.

2 THE Claimant now seeks:

1. Payment in the sum of $15,189.66, representing
   - 1.1 accrued annual leave of $7,289.08;
   - 1.2 notice of $2,446.00, and
   - 1.3 redundancy of $5,454.58
2. Costs.
3. Interest.
4 Imposition of a Penalty

3 The Respondent denies it has an obligation under the Award and asserts that the Claimant was employed as a sub-contractor and was paid as one pursuant to an agreement made prior to the Claimant commencing employment.

The Agreement

4 It is not in issue that the parties entered into an agreement that the Claimant be employed on a sub-contract arrangement and I find that was initiated by the Claimant.

5 The Claimant gave evidence of responding to a newspaper advertisement of the Respondent seeking a Hydraulic Slewing Crane Operator which I understand to be a type of mobile crane. During a telephone conversation with Mr Brendon Penn (Mr Penn) the Respondent's sole director and proprietor, the Claimant said he made it clear he would not work for award rates and wanted *"something extra or a sub-contract".*

6 After calculating the costs involved Mr Penn agreed to pay the Claimant $25.50 per hour on a sub-contract basis. This amount was $8.50 per hour more than was being paid to other crane drivers employed by the Respondent. The Claimant accepted that offer of $25.50, *"a flat rate on a sub-contract basis".* He said Mr Penn told him he would not be paid for holidays and would only be paid for hours worked. The Claimant agreed to that. In cross-examination the Claimant confirmed he had discussed sick pay and holiday pay and agreed that he did not expect to be paid overtime or other penalty rates.

7 Queanbeyan Crane and Rigging Services was a business name used by the Claimant and tax invoices were created each week from which the Claimant was paid. Those invoices were initiated by the Claimant who provided the invoice book which had been used by him when working in Queensland. An Australian Business Number (ABN) was issued to the Claimant and tax was withheld at a rate of 20% under the Australian Taxation Office Prescribed Payment System, a system used for other than employees.

8 have no doubt on the evidence that the parties intended to enter into an agreement, albeit oral and limited in details, where the Claimant would be employed as a sub-contractor by the Respondent and the expectation by them was that the hourly rate agreed was accepted as full payment under the contract.

Employee or Sub-Contractor

9 Notwithstanding the foregoing it has long been held that the test as to whether or not the relationship of an employee and its worker is not determined by the label they use to describe it. In *Massey v Crown Life Insurance Co (1978) 2 ALL ER 576 at 579* it was said:

> "…if the true relationship of the parties is that of master and servant under a contract of service, the parties cannot alter the truth of that relationship by putting a different label on it."

10 The case goes on to say, following the above passage:

> "On the other hand, if their relationship is ambiguous and is capable of being one or the other, then the parties can remove that ambiguity, by the very agreement itself which they make with one another."

11 The relationship question often arises where there is an issue with the bone fides of the agreement that led to the relationship.

12 In *Federal Commissioner of Taxation v Krakos Investments Pty Ltd 133 ALR 545* the Full Court of the Federal Court of Australia held per Hill J (Von Doussa and O'Loughlin JJ concurring) that:

> "*The parties cannot determine the proper characterisation of a relationship by the label which they choose to attach to it. However, where a transaction is not a sham, and it is not suggested that the label used is not a genuine statement of the parties' intention, that label will be given its proper weight."*
>
> *Australian Mutual Provident Society v Allen (1978) 18 ALR 385; 52 ALJR 407; Narich Pty Ltd v Commissioner of Pay-Roll tax [1983] 2 NSWLR 597, applied.*

13 In *Sharrment Pty Ltd and Others v Official Trustee in Bankruptcy (1988) 18 FCR 449 at 454* His Honour Lockhart J said:

> *"A 'sham' is therefore, for the purpose of Australian law, something that is intended to be mistaken for something else or that is not really what it purports to be. It is a spurious imitation, a counterfeit, a disguise or a false front. It is not genuine or true, but something made in imitation of something else or made to appear to be something which it is not. It is something which is false or deceptive."*

14 There is no suggestion in this case that the agreement between the parties was a sham. Although the agreement was oral and lacked detail I am satisfied that both parties understood what was agreed and this is demonstrated by the performance and

expectation of each. The Claimant, as I have said, initiated and accepted the arrangement and willingly accepted the conditions agreed. He was prepared to work as many hours at the agreed rate as was required. The rate commenced at $25.50 per hour for the first two weeks increasing to $26.50 per hour and later to $27.50 per hour with an hourly rate of $30.00 on weekends.

15 It was accepted by the Claimant that those rates were for hours worked and that the hourly rate was all that he expected from the Respondent. In fact, during the period of employment the Claimant was not paid for public holidays or for the days he had off as either leave or sick leave.

16 There was no expectation by the Claimant that he would be given notice should his employment with the Respondent terminate or that he would be paid in lieu of notice. He was surprised when he was given two weeks pay along with the other employees. Nor did the Claimant have any expectation that he would receive any redundancy as provided by the Award.

17 It has been argued on behalf of the Claimant that I should find that he was an employee and not a sub-contractor and that the Award applies and binds the Respondent.

18 The Award was negotiated by the Construction, Forestry, Mining and Energy Union and those respondent employers who took an interest in the negotiations or were members of the Australian Industry Group which represented those employers. It was an award made and reviewed pursuant to the ***Workplace Relations Act 1996*****,** as amended. The legislation provides for the making of awards which generally provide protection for the employee by recording the agreed conditions of employment and other related matters and, at the same time, provide the employers some certainty in relation to their contracts of employment with their workplace covered by the Award.

19 It was the Claimant in this case who said to the Respondent he did not want to work for the wages provided under the Award and required the Respondent to offer a more attractive hourly rate. It was the Claimant who also suggested he be paid as a sub-contractor.

20 The Respondent, through Mr Penn, gave evidence that all his employees were employed under the Award conditions, although at an above-award hourly rate, and it was his preference that the Claimant be employed likewise but it was because he needed a crane driver that he agreed to engage the Claimant as a sub-contractor.

21 I am aware of the authorities which have set out and followed the consideration of various indicia to determine the true nature of a relationship between an employer and employee. This approach was adopted in *Stevens v Brodribb Sawmilling Co Pty Ltd (1985-1986) 160 CLR 16* and followed in *The Western Australian Builders' Labourers, Painters and Plasterers Union v RB Exclusive Pools Pty Ltd trading as Florida Exclusive Pools 77 WAIG 4* and again this approach was adopted by the High Court of Australia in *Hollis v Vabu Pty Limited [2001] 207 CLR 21*. My brother, Industrial Magistrate Cicchini, in *Peters v James Turner Roofing 81 WAIG 3093* followed the afore-mentioned authorities on the issue of whether or not Peters was an employee or a sub-contractor and his finding on that issue was not disturbed by the Western Australian Industrial Appeals Court (see *83 WAIG 427*).

22 Notwithstanding those decisions, is it fair to an employer who agrees to conditions, initiated by an employee, that he be employed as a sub-contractor and accepts the agreed conditions for approximately three years until being made redundant to then claim to be an employee and claim entitlements under an award?

23 The issue of estoppel was considered by the Full Bench of the Western Australian Industrial Relations Commission in *Florida Exclusive Pools* (Supra). It was there said at pages 7-8:

> *"Three elements must be demonstrated in order to establish an estoppel (see "The Laws of Australia", Volume 35.6, paragraphs [2]-[5] and see paragraph [79]-Estoppel by Convention)-*
>
> *"First, the party claiming the estoppel must have adopted an assumption as the basis of an act or omission: see [41-52].*
>
> *Secondly, the claimant, upon the basis of assumption, must have so acted or abstained from acting that a detriment will be suffered if the person against whom the estoppel is asserted is afterwards allowed to set up rights inconsistent with it: see [53-60].*
>
> *Thirdly, the party against whom the estoppel is alleged must have played such a part in the adoption of, or persistence in, the assumption that freedom to act otherwise than in a manner consistent with it would be unfair or unjust: see [61-96]."*

24 In this case there was clearly an assumption by both parties that their relationship was based on a contract for service and not a contract of service.

25 The Claimant acted upon the basis of that assumption and a detriment will be suffered by the Respondent if the Claimant is now allowed to succeed with his claim that the Award has application.

26 On the third point, it is not in dispute that the Claimant "*played such a part in the adoption of, or persistence in, the assumption*" that freedom to act otherwise (or be considered otherwise) than in a manner consistent with it would be unfair or unjust.

27 I find therefore that the Claimant was a sub-contractor as a result of his initiated contract of service with the Respondent and his claim must fail. Accordingly the claim is dismissed.

W G Tarr
Industrial Magistrate

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2006 WAIRC 04341

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AMY CARMICHAEL BAIN
	APPLICANT
	-v-
	HOMEART
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
HEARD	MONDAY, 6 FEBRUARY 2006, TUESDAY, 21 FEBRUARY 2006
DELIVERED	FRIDAY, 12 MAY 2006
FILE NO.	U 91 OF 2005
CITATION NO.	2006 WAIRC 04341

Catchwords	Industrial law (WA) – termination of employment – harsh, oppressive and unfair dismissal – whether summary dismissal of applicant justified – principles applied – applicant harshly, oppressively and unfairly dismissed – reinstatement and relevant principles - *Industrial Relations Act 1979 (WA) s.29(1)(b)(i)*
Result	Order issued
Representation	
Applicant	Mr M. Cole (of counsel)
Respondent	Mr D.M. Jones (as agent)

Reasons for Decision

1 This is a claim by Amy Carmichael Bain ("the applicant") pursuant to s.29(1)(b)(i) of the *Industrial Relations Act 1979* ("the Act"). The applicant claims she was harshly, oppressively and unfairly dismissed by Homeart ('the respondent") on 28 September 2005 and seeks reinstatement to her position of sales assistant with the respondent by way of an order pursuant to s.23A of the Act.

2 The respondent opposes the claim.

Background

3 A number of issues are not in dispute in this matter. The applicant commenced employment with the respondent on 14 November 2003 as a full-time sales assistant. The applicant's employment was summarily terminated on 28 September 2005. The applicant's employment was terminated as a result of an incident on Friday, 16 September 2005 the effect of which is that the respondent alleges the applicant misappropriated $60, during a sale to a customer. At the time of the applicant's dismissal she was working 27.5 hours per week at $11.453 per hour.

4 In the course of the applicant's employment she was transferred by the respondent on a number of occasions; from the Warwick Grove Shopping Centre where she was employed for approximately 18 months to the Kingsway branch, and from the Kingsway branch where the applicant had been employed for some 3 months to Joondalup branch and from the Joondalup branch to the Whitfords branch, some 3 transfers throughout the applicant's employment.

5 Relevant to the submissions relied upon by the applicant and the respondent was the contract of employment signed by the applicant at the commencement of her employment with the respondent. The terms of that contract are as follows:

"CONTRACT OF EMPLOYMENT

I, the undersigned, agree to the terms and conditions of employment set out in this form and that my continuing in the employ of Copperart Pty Ltd is dependent of my acceptance of these terms and conditions:

(1) The general conditions of employment will be prescribed by the WA Retail Award.

(2) In accepting employment with this company, I understand I will be expected to work between different warehouses/shops during any day, as required, or by pre-arranged roster. Reasonable travelling time taken between one store and another during any day, I will be paid by the Company at the prevailing hourly rate of pay.

…

(10) I understand that the following actions in the area of my employment are considered to be Acts of Misconduct which could lead to summary dismissal. This list is not all – inclusive and the Company reserves the right to dismiss summarily for any act of misconduct: -

(a) Abuse, removal or destruction of ompany property or the property of other employees.

(b) Theft of Company property or the property of other employees.

(c) Immoral conduct or indecency physically or by way of innuendo.

(d) Lottery or gambling of any description.

(e) Employees must keep their PIN Numbers confidential.

(f) Possession or consumption of intoxicating beverage on the premises.

(g) Reporting to work while under the influence of alcohol.

(h) Making false or malicious statements concerning the Company, its products or another employee.

(i) Falsification of records, or making untrue statements which may result in the falsification of records.

(j) Misuse or removal or destruction of Company property.

(k) Distribution of written or printed matter without the permission of management.

(l) Postal or removing notices, signs or writing in any form or bulletin boards or company property without permission of management.

(m) Wasting time, loitering in lavatories or elsewhere during working hours.

(n) Refusal to follow instructions of supervisors or other management personnel.

(o) Frequent lateness or absence from work without from work without reasonable explanation.

(p) Clocking timesheet of another employee or repeated failure to clock your own timesheet.

(q) Leaving own department during working hours without permission.

(r) Performing personal tasks in Company time.

(s) Disregard for safety rules or common safety practices.

(t) Creating or contributing to any unsafe act or unsanitary conditions.

(u) Use of abusive language.

(v) Threatening, intimidating, coercing or interfering with fellow employees.

(w) Where company sales takings are under my control, failure to deposit them at a bank that same day, or not later than the nest (sic) banking day after the date of receipt. The Company shall nominate the bank.

(w) Failure to properly record monies received on behalf of the Company in accordance with Company Practice, Monies include cash, cheques, credit card transactions etc.

(x) Violation of any anti-discrimination legislation.

(y) Breach of the Trade Practices Act.

I undertake to hold any protective clothing or tools issued to me and I authorise the Company to deduct from wages due to me the assessed value thereof if any of these articles are not returned by me on demand.

That my employment is on the basis set out in the attached declaration. That such conditions may be amended by mutual consent between the company and myself.

The terms and conditions set out above shall have no force or effect if inconsistent with any Award or Government Regulation binding the Company.

Signature of employee ……..

Name of employee (please print): Amy Carmichael Bain

Store Name: Warwick Store Number 630

Signature of witness ……

Name of witness (Please print) Pamela Anne Beggs"

(Exhibit H3)

Applicant's evidence and submission

6 The applicant testified when she first commenced work with the respondent at the Warwick branch she was employed as a full-time shop assistant. After 6 months with the respondent the applicant received additional training which involved being able to cash up at the end of the day, balance the tills and undertake the necessary paperwork. The applicant testified she was shown how to undertake this work in case of any problems and, in the absence of the manager. It was the applicant's evidence that on several occasions that did occur.

7 The applicant testified that after some 18 months at the Warwick branch she was directed to transfer to the Kingsway branch by the respondent, a decision she was not happy with. The applicant testified that she raised her concerns with the respondent, Ms Wendy Eddins, the state manager. The applicant testified that having raised the issue with Ms Eddins, she was informed that transfers were part of the agreement the applicant had signed when she had started with the respondent and:

"… I couldn't say anything against it because I had to go there."

(Transcript page 7)

8 The applicant testified that she was at the Kingsway store for some three months before being requested to transfer to Joondalup. On the testimony of the applicant she was unhappy and again raised the matter with Ms Eddins. Of particular concern, was the distance from the applicant's home to the Kingsway shopping centre, being some 10 minutes compared to her

home to Joondalup (the proposed branch the applicant was being directed to transfer to) which was some 25 minutes away. The applicant testified that one of the reasons she was not keen to transfer to Joondalup was she would be unable to assist her mother in taking her brother to school prior to coming to work. That arrangement had to cease when the applicant transferred. Neither of these transfers (from Warwick to Kingsway and from Kingsway to Joondalup) resulted in a promotion for the applicant and on her own evidence she felt such transfers were because she was being picked on. On each occasion prior to a transfer there were limited notice periods leading up to the actual transfer.

9 The applicant testified that the respondent's store at Joondalup was busier and that there were more staff members. There were up to three or four casuals, a manager and the applicant herself. On the applicant's testimony, they were all required during the course of day to use the cash register. The applicant testified that in approximately August 2005 she was transferred again, this time to the Whitfords store. The applicant testified that she was pregnant at this stage and had regular bouts of severe morning sickness. The applicant testified she had consulted a doctor who certified she was fit to continue working full-time hours however requested that she reduce manual handling to weights of no greater than 5kgs for the first three months of pregnancy. The applicant testified that following the first three months of pregnancy she returned to the doctor and was cleared to work without lifting restrictions.

10 The applicant testified that while still at the Joondalup store, Ms Eddins approached her regarding the hours of work being reduced to 20 per week. On the applicant's evidence such hours would be insufficient to sustain herself economically. The applicant testified she wanted to remain working full-time however Ms Eddins had approached her to reduce her hours and on that basis, the applicant agreed that hours be reduced from 10:00am to 4:00pm each day, a minimum of 27½ hours per week. The applicant testified that the respondent offered her 27½ hours however required the applicant to transfer again this time to the Whitfords branch.

11 The applicant recalled in evidence that on 16 September 2005, she served a woman who purchased two beach towels at $20 each. The woman was in the company of a friend who had three beach towels in her hand. The applicant testified that she informed the woman with three towels that each towel was $20 each. To the best of the applicant's knowledge she understood the towels concerned had been replaced and when the purchase was placed through the till it was for two towels which would have come to $40. The applicant testified she could not recall the colouring of the towels but gave evidence that there were two prices for towels on display in the shop the more expensive being $20 and the cheaper towels were $15. The applicant testified that she did at the time have a conversation with the customer who purchased the towels indicating she was buying towels for her grandchildren for Christmas. On the evidence of the applicant she cannot recall the money that exchanged hands in the purchase.

12 Some three working days later the applicant testified she was approached at the commencement of her shift by Ms Eddins who, at the time, was together with the store manager, Pam Beggs at the rear of the shop counting towels. The applicant testified that Ms Eddins questioned her regarding the transaction that had occurred the previous Friday with a customer and whether she recalled selling beach towels. The applicant testified that she did recall a sale and in the exchange between Ms Eddins and the applicant the following took place:

> "… And I said "Yes" And she said, "what was it that you sold?" and I said "Two beach towels at $20 each."
>
> (Transcript page 22)

13 The applicant testified that she was informed by Ms Eddins that a customer had returned to the store and complained that she had purchased five beach towels and on the receipt it only recorded her as having purchased two. On the testimony of the applicant, Ms Eddins advised there would be a thorough investigation and the applicant was to be suspended on pay pending the investigation into whether the applicant had taken $60, the difference between the cost of two and five beach towels.

14 The applicant testified when she arrived at work on Thursday, 22 September 2005 she was called into a meeting with the state manager and Ms Beggs. The applicant testified she was informed by Ms Eddins of the allegations made by the customer and asked if she could recall the events surrounding the purchase of towels by this particular customer on Friday, 16 September 2005. The applicant testified her recall of the customer's purchase of two beach towels was clear because of the conversation the applicant had had with the customer over the issue of grandchildren and Christmas presents. The applicant testified she was unable to recall the currency that had exchanged hands but did recall that the customer had a friend who was in the store at the time and on the applicant's testimony had towels in her hand which she decided not to purchase because they were priced at $20 each. The applicant testified at the conclusion of the meeting Ms Eddins suspended her on full pay pending an investigation into the events of 16 September 2005.

15 At a subsequent meeting called by the respondent the applicant testified she was presented with a statement from the respondent and asked to prepare her own written response. The applicant testified that Ms Beggs, Mrs Bain (the applicant's mother), the applicant and Ms Eddins were in attendance at that meeting. The statement as presented to the applicant at that meeting was as follows:

> "23rd September 2005
>
> Miss Amy Bain
>
> 75 Lansvale Road
>
> DARCH WA 6065
>
> Dear Amy,
>
> Further to our conversation of Thursday 22nd September 2005, concerning the allegation made by a customer concerning your integrity, the company has conducted a further investigation of the matter and the facts are detailed below:
>
> - On Friday 16th September 2005 a customer claims that she purchased and paid for five (5) beach towels and was served by you.
> - You have confirmed that you do recall the sale and serving this customer and to your recollection, the sale was for two (2) beach towels.

- The computer logs support that the sale was done by you.
- The customer has provided Homeart with a statement about the incident and has provided proof of purchase.
- The customer has supplied Homeart with the SKU number of the five (5) beach towels she has in her possession.
- A stock count of the beach towel range was conducted on Thursday 22nd September 2005 and the results revealed stock shortages in the SKU numbers that the customer has in her possession.

At this point there are two conflicting versions of this event and in light of the seriousness of these allegations Homeart is continuing your suspension on full pay until close of business, Tuesday 27th September 2005. This extended period of time is to allow you to formulate a response to these very serious allegations and supply in writing, your response to the undersigned, on or before 5:30pm Tuesday 27th September 2005.

Upon receipt of your written response the company will consider your future with the Homeart organisation.

Sincerely,

……

Wendy Eddins

State Manager"

(Exhibit B1)

16 The applicant testified that she was required by Ms Eddins to provide a written response to Exhibit B1 and then attend a further meeting towards the end of the following week. The applicant testified that Mr Bain (the applicant's father) delivered the applicant's written response to the Whitfords branch on Tuesday, 27 September 2005, the applicant having had been informed that once her letter was provided Ms Eddins would send it to head office where the persons in head office would decide what would happen:

"… Wendy Eddins had told me that it would go to the eastern states because it was out of her hands then."

(Transcript page 26)

17 The written statement as presented to the respondent by the applicant was tabled in evidence and read as follows:

"Statement by Amy Bain

Reply to allegation made by Homeart against me.

On Friday 16/09/05 I served a customer who bought 2 towels at $20 each. Her friend who was with her had another 3 towels but did not want them when she found out they were $20 each. I am not in the habit of making mistakes and had the customer purchased 5 towels she would have been charged for them.

I would also like to question why on Thurs 22/09/05 I was told customer had complained to head office in Sydney and on Fri 23/09/05 the Area Manager changed her story saying the customer had complained to our shop.

As far as I am concerned I have done nothing wrong and my conscience is clear.

In all the time I have worked for Homeart, I have always followed policy and procedures.

Yours sincerely

….

Amy Bain

Received (sic) by Homeart Tuesday 27/09/05

…."

(Exhibit B2)

18 At the meeting held at the end of the week commencing 26 September 2005, the applicant testified Ms Eddins, Ms Beggs and herself were in attendance and on the applicant's testimony she was summarily terminated for gross misconduct. The applicant testified that no explanation was given as to what was meant by gross misconduct. The applicant testified that since her dismissal by the respondent she had been able to procure some casual work at a stall for about 24 hours in total at $10 per hour. The applicant testified there had been some difficulties given she was 5½ weeks away from giving birth and employers appeared reluctant to take on someone who was so advanced in their pregnancy.

19 The applicant gave evidence that the respondent had at least four stores in the Perth area, some of them nearby to where the applicant lived. For considerations of reinstatement the applicant testified that most of the respondent's stores were mainly north of the river. Throughout her employment with the respondent the applicant testified that she had no problems in working with the store managers.

20 In cross-examination the applicant testified that she had noticed a change in the respondent's attitude towards her work following her discussion with Ms Eddins regarding the transfer to the Whitfords branch. In cross-examination the applicant confirmed that she had only sold two towels to the customer, Ms Boreham. In the exchange between the agent for the respondent and the applicant:

"… you're adamant you sold two towels? - - Yes.

How can you be so certain so many months after the transaction when you can't remember the currency that was tendered, that you only sold two towels and not five? --- Because this has been going on for a long time and I deal with money everyday so I wouldn't remember what I take in whereas a customer, or what they are buying, because I had a

conversation with the lady and she said she was buying them for her grandkids for Christmas, that's how I remembered her, and the two beach towels, but I couldn't remember what currency she gave me."

(Transcript pages 48-49)

21 In cross-examination the applicant, when asked to identify a docket as the respondent's record of the sales transaction with Ms Boreham, testified she had not seen the receipt. The applicant testified that when Ms Eddins and Ms Beggs had first raised concerns regarding the incident the applicant had been informed that the customer had initially rung head office. On the evidence of the applicant that subsequently changed and she had been informed several days later by the respondent that Ms Boreham had first raised her concerns with Ms Beggs at the Whitfords branch. The applicant gave evidence that she requested Ms Boreham's statement at the meeting on 27 September 2005 and was denied the request.

22 Mrs Bain, the applicant's mother, gave evidence that prior to the incident regarding the towels between her daughter and the respondent she had had reason to become involved in her daughter's employment with the respondent. Mrs Bain testified she had phoned Ms Eddins to ask why so many transfers were being required of her daughter. On the evidence of Mrs Bain the contact with Mrs Eddins had no effect and the requirement to transfer went ahead. Mrs Bain gave evidence that a Ms Chappel, an ex-employee of the respondent had discussed with Mrs Bain that they were going to "set up Amy". Mrs Bain testified there was further contact with the respondent when she wrote on behalf of her daughter to head office in the eastern states outlining concerns regarding transfers from branch to branch with very little notice, discouragement on the part of Ms Eddins of the applicant to apply for promotional positions given she was too young, and a number of other matters. In summary it was asserted in correspondence with head office of the respondent by Mrs Bain that Ms Eddins was:

"… it is very noticeable to me that she, Wendy is trying to get Amy out of the company. …

I find the Area Manager's actions and comments deplorable and despicable and I find they are affecting my daughter's well-being. She is now afraid to go to work wondering what Wendy is going to do to her next.

…"

(extract from exhibit B3)

Head office investigated the matter and responded to Mrs Bain the documentation was identified in evidence during proceedings. In Mrs Bain's view the answers provided by the respondent were unsatisfactory.

23 Mrs Bain testified following the towel incident at the Joondalup store and the respondent's suspension of the applicant for allegedly stealing $60, she became involved in a meeting she attended with the applicant, Ms Eddins and Ms Beggs, the Store Manager. Mrs Bain testified that she had queried Ms Eddins whether she had discussed the issue with the customer. On the evidence of Mrs Bain, Ms Eddins confirmed there had been no such discussion. On the basis of hearsay evidence Mrs Bain alleged that the customer's story had changed from initially contacting head office to presenting in person to the Joondalup branch of the respondent. Mrs Bain testified that following the meeting she made telephone contact with Ms Eddins to request on the applicant's behalf a copy of the statement that had been made by Ms Boreham. Mrs Bain gave evidence that Ms Eddins had refused her request. Mrs Bain testified that Ms Eddins referred to the cash register docket during the course of the same meeting however, did not produce a copy or the actual document.

24 Mrs Bain testified there was no further contact between herself and the respondent, and she informed her daughter:

"… I pointed it out to Amy at the time that there had been a stocktake done of the towels, but the … the way I saw it was that it wouldn't had mattered what Amy had responded to, their minds were already made up.

… I showed her the paragraph where it said about there had been a … a stock check, and I says, "they got you guilty before you even … even put anything to paper.""

(Transcript page 76)

25 In cross-examination Mrs Bain confirmed that the allegations regarding the respondent wanting to set up the applicant were at no stage uttered by Ms Eddins. Mrs Bain contradicted her earlier evidence given regarding a phone call between herself and Ms Eddins that had allegedly taken place immediately following the meeting the applicant, Ms Eddins, Ms Beggs and Mrs Bain. Mrs Bain confirmed in cross-examination that she had little direct knowledge of the events that led to her daughter's dismissal apart from her attendance at a meeting held a week or so after the applicant was first suspended.

26 Counsel for the applicant submitted that the evidential onus required of the respondent had not been discharged simply because Ms Eddin's and Ms Beggs' evidence was that they had relayed information to the eastern states and in relation to the decision to dismiss the applicant had been made by persons in the eastern states. The respondent at no stage presented any evidence from the representatives from the respondent who had ultimately determined the applicant's fate. It was submitted by applicant's counsel that Ms Beggs' evidence was in essence the same as that of Ms Eddins in that the persons who had appeared in the matter before the Commission were relying entirely upon representatives in the eastern states, in particular Kerry McFarlane, the Human Resource Manager. Counsel for the applicant submitted that these actions undertaken by the respondent were not the actions of a reasonable employer, on the applicant's submissions it was "all or nothing" situation. It was submitted by the applicant that Ms Eddins was clearly employed by the respondent to compile the facts in relation to the matter and send them over to the eastern states then the eastern states would make the decision and Ms Eddins would be required to relay that information on behalf of the respondent. The applicant submitted that the evidential onus therefore had not been discharged by the respondent.

27 The applicant submitted the Commission was required to be satisfied that the respondent had a reasonable suspicion; namely the fact of the belief, reasonable grounds to sustain the belief and finally at the time at which the respondent formed the belief they had carried out an investigation into the matter such as would be reasonable in the circumstances. The applicant submitted that the evidence before the Commission that the investigation was sufficient ought be rejected. For example, the towels allegedly the subject of questioning were not produced before the Commission and the presentation of SKU numbers purportedly relating to a form of identification within the Whitfords store was at the very least insufficient. The applicant also

submitted that the stocktake undertaken in relation to the incident appeared to draw little or no conclusion given that on one account, on the evidence of the respondent, there were three towels missing, five on another account, seven on another.

28 The transfers required by the respondent during the term of the applicant's employment were excessive and whilst clause (2) of the contract of employment allowed for transfers between stores to occur the applicant submitted that the respondent could not direct, without reasonable consideration of the applicant's concerns, that a transfer be undertaken.

29 In evidence it was submitted that Ms Eddins had acknowledged the applicant's position in relation to the towel incident had been consistent. Counsel for the applicant submitted that it was the task of the Commission to determine whether the applicant had been telling the truth when she gave evidence or whether the customer Ms Boreham had been telling the truth.

30 In consideration of the "fair go all round" principle the applicant submitted that at no stage was it explained to her why she was being terminated. The applicant was not aware of what was meant by "gross misconduct". The respondent had no regard for "Amy's pregnant state" and it was clear there had been a degree of friction between Ms Eddins and the applicant. In essence the applicant asserted that she had been set up and the excessive number of transfers had been to perhaps force the applicant into leaving of her own accord.

31 For the purpose of the investigation into the towel incident there was no reasonable exchange between the respondent and the applicant. The applicant was simply asked to respond to a letter and when she did so the respondent confirmed that the applicant had been dismissed on the grounds of gross misconduct.

Respondent's evidence and submissions

32 Ms Eddins gave evidence that she had been employed by the respondent for some three years, the last year as state manager. Ms Eddins testified that the applicant had never expressed to her an interest in achieving the level of a store manager's position and at no stage to her knowledge did the applicant apply. On the evidence of Ms Eddins the approach for a reduction in the applicant's hours had been initiated by the applicant, a request consented to by the respondent and when the roster was worked out arrangement for 20 hours was set in place. Ms Eddins testified that the applicant rang her the next day having spoken with her parents and requested it be increased to 27 hours, a request agreed to by the respondent.

33 Ms Eddins testified that the applicant throughout her employment with the respondent had been transferred on a number of occasions always, on the evidence of Ms Eddins, for good reason and no one transfer resulted in a demotion for the applicant. Ms Eddins, in evidence denied that she "had it in for Amy".

34 Following the towel incident of September 2005 Ms Eddins gave evidence that she received a phone call from Ms Beggs, advising that a customer had on the previous day bought a receipt into the store indicating she had purchased some two towels on Friday. Ms Eddins gave evidence that the customer reported to Ms Beggs she had in fact purchased five towels on the 16 September 2005 at $20 per item. Ms Eddins gave evidence that she understood the customer to have been alleging that the previous Friday when in the store the customer had purchased five beach towels at $20 per item, had provided $100 to the sales person but on the basis of the docket presented to Ms Beggs, the customer was alleging only $40 had gone into the respondent's till. Ms Eddins testified her first reaction to the allegation was that she needed to investigate the matter to determine whether such an allegation was indeed valid. Ms Eddins gave evidence that the conclusion of that day she had examined the respondent's takings at the Whitfords store for the day in question and found the records to be in order with the exception of $1. Ms Eddins gave evidence that she contacted Ms Kerry McFarlane, the human resources manager based in the eastern states, and informed her of the customer's allegation regarding the applicant. On the evidence of Ms Eddins, Ms McFarlane advised Ms Eddins as to how to proceed with an investigation into the matter. The steps in that process, on the evidence of Ms Eddins, were advised by the respondent's head office. Initially Ms Eddins was told to contact the customer then to undertake a stocktake of all towels currently held by the store that were being sold by the respondent for $20, to separate them into SKU numbers and to record those numbers and transfer the results of the investigation through to head office. Finally, the applicant was to be called in and, on the evidence of Ms Eddins, there was to be an investigative meeting between the applicant and herself with Ms Beggs as a witness for the applicant and the respondent. On the evidence of Ms Eddins the applicant was suspended on full pay pending the outcome of the investigation.

35 Ms Eddins gave evidence that she had forwarded the applicant's written response (exhibit B2) to head office who had informed Ms Eddins that the applicant's response did not satisfy the respondent and on that basis on the evidence of Ms Eddins the applicant was to be terminated for gross misconduct. Ms Eddins testified she arranged for and met with the applicant, Ms Beggs and herself. Prior to the meeting occurring Ms Eddins testified:

> "… Kerry McFarlane in her phone conversation with me had read to me over the telephone of exactly what I was say … to say to Amy, which I had written down, and I basically read that to Amy word for word."
>
> (Transcript page 137)

36 Ms Eddins confirmed in cross-examination that when she spoke to the customer following her discussion with Ms Beggs there was no information the customer Ms Boreham was able to provide to Ms Eddins that would assist to form the conclusion or belief that the applicant had pocketed $60. Ms Eddins confirmed that subsequent to that telephone conversation there was no meeting between herself as state manger and the customer. Further confirmation was provided by Ms Eddins that the applicant's version of what events was at no stage put to the customer. Ms Eddins testified that when she first met with the applicant and her mother following the towel incident that her mind had not been made up. Ms Eddins testified that throughout the so called investigation the applicant had been consistent in her response to the respondent. Ms Eddins further testified that the decision to terminate the applicant was not made by herself, that it had been made by Kerry McFarlane, the Human Resources Manager at head office in Sydney. Ms Eddins gave testimony that she had no idea the respondent was going to terminate until such time as she received a phone call from Ms McFarlane of the respondent advising her to terminate the applicant. Ms Eddins testified that at no stage were her own views asked for in respect of whether the dismissal ought occur. Ms Eddins testified that the instructions from head office to terminate the applicant were issued by way of a phone call and notes were recorded by Ms Eddins of the details the respondent instructed would be undertaken in the dismissal process:

- You were not told that the customer complained to H/O.

- H/O has reviewed your statement of reply and you were asked to explain the variances and the customer's allegations.
- You have failed to satisfactorily explain and after careful consideration an impartial investigation the decision has been made to terminate your employment.
- Effective immediately on the grounds of gross misconduct."

(Exhibit H11)

37 Ms Eddins testified that the number of transfers required of the applicant during her employment with the respondent were higher than average and on Ms Eddins' testimony carried out for the applicant's benefit. Ms Eddins gave testimony that the applicant had been a good employee with a particular flare for merchandising and a very good rapport with customer service. Ms Eddins confirmed in testimony that issues put to the applicant would be relayed back to her mother and come back to the state manager with her position it would have changed.

38 Mrs Boreham testified for the respondent that on Friday, 16 September 2005 she and a friend had visited the Whitfords store and as a result had purchased five beach towels at $20 per item. Mrs Boreham testified that on the day in question she had tendered five $20 notes and that her friend had assisted in carrying some of the towels to the counter. Mrs Boreham could not recognise Ms Bain (the applicant) as being the sales assistant who had received the money on the day in question. Mrs Boreham testified that the respondent had no bags to assist with carrying items from the store consequently she and her friend shared that task with the witness placing some towels into a material bag in her possession. Mrs Boreham testified that at no stage during the transaction with the sales assistant was any money tendered as change.

39 Mrs Boreham testified that she was not aware there was any problem until checking the receipt at home when she noticed the receipt as identifying the purchase of only two items at $20 each. Mrs Boreham contacted the store the following Tuesday, 20 September 2005 and provided the receipt in question to the local store manager. Mrs Boreham testified that she was contacted by Ms Eddins and asked to outline her position on the purchase in writing and forward same to the respondent's head office in Sydney. During the telephone call with Ms Eddins, Mrs Boreham testified that she read out the SKU numbers over the phone. Mrs Boreham was unable in evidence to recall the colours of the towels but confirmed the towels as Christmas presents for her grandchildren. Mrs Boreham testified that at no stage were the towels taken into the respondent.

40 Ms Beggs for the respondent testified she was the store manager at Whitfords at the time of the applicant's dismissal. Ms Beggs testified that the applicant was a competent employee and while the witness did not work directly in the first year or so with the applicant she was aware of the applicant's reluctance to transfer from Joondalup through to Whitfords.

41 Ms Beggs gave evidence that following the towel incident a woman came into the Whitfords store on Tuesday, 20 September 2005 advising that she had purchased some five towels the previous Friday, 16 September 2005. Ms Beggs testified that the woman had informed her each towel was priced at $20 per item and she paid for the towels with five $20 notes. Ms Beggs testified that she had been aware of the presence of two customers on Friday, 16 September 2005 and had sighted both customers at the counter and the applicant attending to them.

42 Ms Beggs testified that she, having taken the receipt from the customer on 20 September 2005 and recorded contact details, took the opportunity to discuss the issue with the state manager. At the request of the state manager the receipt was kept. Ms Beggs testified that she was present at a meeting the following Thursday with the applicant and Ms Eddins where the applicant was asked a series of questions and Ms Beggs took notes. Ms Beggs testified that at that meeting the applicant was certain that there were two women, one who purchased two towels, the other lady had three towels but questioned the price and from the applicant's point of view determined she would not buy them. Ms Beggs testified that the applicant could not recall how much money had exchanged hands however confirmed in definite terms that the applicant had put two towels through the till. Ms Beggs testified that on Thursday, 22 September 2005 she was involved in a stocktake together with Ms Eddins at the Whitfords branch of the respondent. Ms Beggs testified that the first count was carried out in situ and the conclusion of that first count there was some confusion regarding the numbers. Ms Beggs testified that thereafter the relevant stock was taken out and placed in the relevant block SKU numbers which indicate the specific range. On the evidence of Ms Beggs at the conclusion of the second count, the numbers were checked with the respondent's inventory as to what ought have been in situ.

43 Ms Beggs testified that the decision as to whether the applicant ought be terminated was not one that would be made by the state manager. Ms Beggs confirmed that at the series of meetings held following 16 September 2005 and on the day the applicant was terminated Ms Beggs' presence was to act as a witness both for the applicant and for the respondent. Ms Beggs testified that at all times her actions with respect to the investigation of the towel incident re the applicant were at the direction of head office. It was Ms Beggs' evidence that head office of the respondent was instructing her to do everything. Ms Beggs testified that at the conclusion of the stocktake of the relevant stock there were more items missing than those in consideration in relation to the allegations against the applicant.

44 In cross-examination Ms Beggs testified that there was bad blood between the applicant and Ms Eddins and Ms Beggs had become aware of the applicant's concerns with regard to the number of transfers she was being required to undertake. Ms Beggs testified that the applicant was "a whiz" on remembering SKU numbers.

45 The respondent submitted that the applicant was employed by the respondent and was a competent sales assistant. During the course of her employment the applicant worked at Warwick, Kingsway, Joondalup and Whitfords. The respondent submitted that Ms Eddins who was directing that the transfers of the applicant from store to store take place was not a vindictive person and indeed went out of her way to accommodate the applicant during stages of her pregnancy when different arrangements for hours of work as a part-time employee were required.

46 The respondent submitted that the evidence of Mrs Bains, was circumstantial and carried no force other than revealing her concern for the applicant as her daughter. The respondent submitted that there was, on the basis of the evidence and submissions, no sufficient strength for the Commission to conclude that Ms Eddins was out to terminate the applicant at all costs. The respondent submitted that the applicant had particular merchandising skills and at one stage assisted with

statements to the police regarding the activities of a fellow employee. This had assisted the respondent and the police in their investigations.

47 The respondent submitted that the termination of employment took effect because the respondent following its investigation into the towel incident believed that the applicant had committed gross misconduct and in the process had lost the trust of the respondent. In particular, it was submitted by the respondent that the evidence of the customer, Mrs Boreham led the respondent to form that view. Following a series of meetings with the applicant and a requirement for the applicant to respond to a series of concerns raised by the respondent, the views of the applicant and Mrs Boreham were considered by head office. At all times it was submitted by the respondent Ms Eddins consulted with head office who were:

> "… in full cognisance of the facts as they knew it"

(Transcript page 198)

48 The respondent submitted that at all times due process was followed, and the investigation was carried out properly, the applicant was made aware of the complaint and was given the benefit of a period of time to consider her response. On balance, the respondent was faced with a matter of great concern and made a decision based on the facts. The respondent submitted that on this occasion they believed the customer and stock reports rather than the applicant. The respondent submitted that the responsibility of an employee in the position of a sales assistant had responsibilities relating to fiduciary obligations in handling cash. The applicant was required in the course of her work to handle cash in the correct manner, make sure that the cash was recorded properly and appropriate change given to customers. It is the view of the respondent that the evidence demonstrates that the applicant did not record the transaction with Mrs Boreham, the customer, correctly that day. The applicant, on the submissions of the respondent recorded a sale of 2 towels, incorrectly recording a return of $60 to the customer, a customer who strongly denied that she got $60 in return.

49 Agent for the respondent submitted that the test the Commission was required to apply in matters of this nature was the fair go all round as reflected in *Undercliffe Nursing v. FMWU* (1985) 65 WAIG 385. The question as to whether the conduct of the applicant was such as to qualify as misconduct deserving of summary dismissal is a matter that is dealt with on the submissions of the respondent in the decision of his Honour Kirby J in *Concut Pty Ltd v. Worrell* 75 ALJR 313 (para 46) where Kirby J said:

> "The ordinary relationship of an employer and employee at common law is one importing implied duties of loyalty, honesty, confidentially and mutual trust at common law."

50 The respondent submitted that it was these duties in particular loyalty, honesty and trust which had broken down in the view of the respondent. As a result, the respondent had lost trust with the applicant which became the linchpin for the termination of the employment. The respondent referred also to the extract from *Laws v. London Chronicle (Indicators Newspapers) Ltd* (1959) 2 ALL ER 285 where it was said:

> "Since a contract of service is but an example of a contract in general so that the general law of contract will be applicable, it follows that if summary dismissal is claimed to be justifiable, the question must be whether the conduct complained of is of such as to show the servant to have disregarded the essential conditions of the contract of service. I think that one act of disobedient or misconduct can justify dismissal only if it is of a nature which goes to show an effect that the servant is repudiating the contract or one of the essential conditions and therefore the disobedience must at least have the quality that it is wilful, it does in other words connote a deliberate flouting of the essential contractual conditions."

51 The respondent in conclusion submitted that they were not required to prove the applicant stole the $60 merely demonstrate that there was a possibility she had been involved in the misconduct and that therefore such possibility struck out the very heart of the contract of employment.

Commissioner's conclusions and findings

52 The Commission has considered all of the evidence and submissions. Much turned in these proceedings on the issue of credibility of witness evidence and the manner in which it was presented to the Commission. I turn firstly to the evidence of the applicant. I observed closely the applicant's evidence with respect to the towel incident of 16 September 2005 and what occurred at the meetings. Her evidence was consistent, straightforward and not diminished under cross-examination. Where the applicant did not know or recall issues or points she admitted to this. I accept the applicant's evidence as being truthful. I do however have doubts regarding the evidence given by the applicant's mother. Mrs Bain's evidence was largely circumstantial and the Commission does not rely on her evidence other than to confirm there were discussions between the applicant and her mother regarding the number of transfers and other matters considered relevant to the applicant's work environment. I have also had the opportunity of closely observing Ms Eddins in the witness box and she gave evidence to the best of her ability. It was clear that at times Ms Eddins was evasive, particularly during cross-examination. Some of the differences do not effect the outcome of the case other than to provide a measure by which the Commission can assess the credibility of the witnesses. I do have some doubts about whether Ms Eddins' memory regarding relevant facts is particularly accurate. I have no reason to doubt the sincerity of the evidence presented to the Commission by Ms Beggs. Finally, on the issue of credibility, I turn to the evidence of Mrs Boreham, the customer. In so far as the evidence of Mrs Boreham is concerned at times her evidence caused some difficulty. Her evidence on some events was quite clear compared with loss of memory for other events on the same day. For example, Mrs Boreham's evidence regarding the number of towels purchased, who had carried the towels up to the counter and how Mrs Boreham and her friend had exited the store including how the towels had been divided between them appeared on the face of it to be clear yet when asked to identify which sales assistant served Mrs Boreham that day she was unable to remember. All in all, I find where the evidence of the applicant differs from the evidence of the witnesses for the respondent, I favour the applicant's evidence, particularly for its consistency in relation to the towel incident and the events that followed. It was clear to the Commission that Mrs Bain, the applicant's mother and Ms Eddins were openly hostile towards each other, an issue confirmed by Ms Eddins in evidence.

53 Significant comment was made in these proceedings regarding the number of transfers required of the applicant in the course of her employment to date with the respondent. The Commission finds, on the basis of the evidence, that the transfers were on occasion implemented in an unreasonable manner by the respondent. For example, insufficient notice was given to the

applicant. Overall, the respondent should have had regard for the number of transfers being required of the applicant. The Commission finds there is no evidence to support the assertion that transfers were being used to force the applicant to resign.

54 The Commission finds there is no evidence to support the allegation that the applicant was being "set up" by the state manager. The Commission did observe in the course of proceedings, a general resentment towards the applicant's mother by the state manager, Ms Eddins. The Commission reminds the respondent and the applicant that it is Ms Amy Bain, the applicant and Homeart, the respondent who are in an employer / employee relationship.

55 In this matter, the termination was a summary dismissal for misconduct, and therefore the respondent carries an evidentiary onus to establish the facts on which the decision to dismiss was based as per the principles outlined in *Newmont Australia Ltd v. Australian Workers Union, WA Branch* (1988) 68 WAIG 677. Where an employee is to be dismissed for misconduct, in particular a single act of misconduct, that behaviour must be of a nature which demonstrates the employee is repudiating the contract of employment or one of its essential conditions and for that reason the disobedience complained of should really connote a deliberate flouting of the contractual conditions (*Laws v. London Chronicle (Indicators Newspapers) Ltd* (1959) 2 ALL ER 285). It must be borne in mind that summary dismissal for misconduct is the most extreme penalty available to an employer. It is not always the case that a single incident of a behaviour complained of would amount to gross misconduct justifying summary dismissal. In considering matters such as examining the facts surrounding a summary dismissal it must be remembered that a rigid approach is not consistent with the requirements of s.26 of the Act. Consideration by the Commission must be determined in accordance with equity, good conscience and the substantial merits of the case.

56 The allegations in this matter were that the applicant stole monies from the respondent on Friday, 16 September 2005 and therefore given the dismissal was summary it is necessary for the respondent to establish on the evidence that at the time the decision to dismiss was taken, the respondent held a reasonable belief based upon reasonable grounds as to the applicant's guilt. Where there has been summary dismissal, the onus of proof to establish the evidentiary fact of the dismissal lies upon the respondent. The onus to establish unfairness rests with the applicant. The Commission finds that the respondent has not discharged the onus to establish the facts to underpin a summary dismissal. Of particular relevance are 2 aspects of the investigative process undertaken by the respondent. Firstly, the Commission has had little or no direct evidence from the respondent who made the decision as to how the investigation would be carried out and ultimately determined the applicant would be dismissed. Other than circumstantial evidence presented by Ms Eddins and the written evidence identified as having come from head office I do not find the evidence before me as sufficient to enable the Commission to find that the respondent has discharged its evidentiary onus. With respect to the second aspect, I do not consider that the stocktake on which the respondent appeared to rely achieved anything more than determine different figures on each occasion the towels were counted. Certainly there was nothing conclusive from any of the counts undertaken

57 A customer made a complaint which is not a reason to dismiss anybody. There is evidence, based on the Commission's finding of credibility of witnesses that the applicant served Mrs Boreham that day and sold her two towels at $20.00 per item. I so find. The Commission finds the towel incident and the allegations in relation to the applicant's behaviour on 16 September, 2005 do not amount to "gross misconduct". That view is drawn from the evidence and submissions which establish only, based on the evidence given by Mrs Boreham, the applicant and Ms Beggs, that there was:

- a lack of bags available in the store that day;
- the fact that the five towels were not able to be held by Mrs Boreham at once and were split between herself and her friend;
- Mrs Boreham left the Whitfords branch of the respondent's premises with towels split between her friend and herself.

58 On balance, the Commission finds that the applicant did not steal $60 from the respondent and that the applicant's behaviour on the day was capable of an innocent construction. The Commission finds that the penalty of summary dismissal is too severe, and therefore the dismissal is held to be harsh, oppressive and unfair.

59 The next question is the remedy to be applied. The applicant seeks reinstatement and there is no evidence before the Commission that reinstatement would not be practicable. The applicant is seeking an order for reinstatement to her former employment without loss of wages and continuity of employment. The principles associated with reinstatement were recently considered by the Full Bench in *Gonzalo Portilla v. BHP Billiton Iron Ore Pty Ltd* (2005) 85 WAIG 3441. The Full Bench outlined the Commission's powers when dealing with the reinstatement of an employee in this particular decision. His Honour the President and Kenner C stated the following at page 3458:

> "The statute prescribes that the Commission may order the employer to reinstate the employee to the employee's former position on conditions at least as favourable as the conditions on which the employee was immediately employed before the dismissal (s.23A (3) of the Act).
>
> The Commission also has the power, if it considers reinstatement impracticable, and only then, to order the employer to re-employ the employee in another position that the Commission considers the employee has available and is suitable. No such remedy is or was sought (s.23A(4) of the Act). If and only if the Commission considers reinstatement or re-employment would be impracticable, may the Commission order an employer to pay the employee an amount of compensation for loss or injury caused by the dismissal.
>
> "Impracticable" does not mean impossible, but means more than inconsistent or difficult.
>
> As Anderson J said (Franklyn J agreeing) in *FDR Pty Ltd and Another v. Gilmore and Others* (1988) 78 WAIG 1099 (IAC): -
>
> > "In ordinary language, the difference between "impossible" and "impracticable" is that the former is a definite concept while the latter is not. As Veale J said in *Jayne v. National Coldboard* (1963) 2 ALL ER 220 at 223 -
> >
> > > "Impracticability" is a conception different from that 'impossibility'; the latter is absolute, the former introduces, at all events, some degree of reason and involves, at all events, some regard for practice."

Here we are considering impracticability in the context of reinstatement to particular employment. In that context Wilcox J said in *Nicholson v. Heaven and Earth Gallery Pty Ltd* (1994) 126 ALR 233 at 244: -

> "The word 'impracticable' requires and permits the court to take into account all the circumstances of the case, relating to both the employer and the employee and to evaluate the practicability of a reinstatement order in a commonsense way. If a reinstatement order is likely to impose unacceptable problems or embarrassments, or seriously effect productivity, or harmony within the employer's business, it may be 'impracticable' to order reinstatement, notwithstanding that the job remains available."

One must have in mind in considering this issue that reinstatement is the primary remedy for harsh, oppressive or unfair dismissal."

And further at page 3459:

> "In our opinion, section 23A(5)(a) and (b) orders a design, unequivocally, to put an employee back into the position in which she or he would have been, had she or he not been unfairly dismissed, both by actual reinstatement or re-employment and/or by restoring the remuneration lost. Such an order is very different from an order to pay compensation for loss caused by an unfair dismissal. There is no requirement to mitigate loss where an order is made to the employer to pay to an employee "the remuneration lost or likely to have been lost by the employee because of the dismissal". Such an order is required by section 23A(5)(b), in its actual words to require to payment of the remuneration lost; that is the actual remuneration lost or alternatively the remuneration which is likely to have been lost. There is no requirement to mitigate or take any account of mitigation into account in the section unlike section 23A(7) which expressly required mitigation to be taken into account in awarding an amount of compensation (see also the *Workplace Relations Act 1996* (Cth), section 170CH(1), (2) and (4)).
>
> If we are wrong in that opinion, and the amount ordered to be paid under section 23A(5)(b) of the Act constitutes compensation then we would find fair compensation for loss during the time when Mr Portilla remained dismissed and was awaiting the outcome of proceedings was the whole amount of remuneration not paid to him (see the principles expressed in *Growers Market Butchers v. Backman* (1999) 79 WAIG 1313).
>
> …
>
> For those reasons, there is sufficient evidence to enable the Full Bench to make a finding under section 49(6) of the Act and no other good reason which should prevent that occurring. We would order the reinstatement of Mr Portilla as and from 2 December 2004 and we would order that he be paid by his employer, BHPB the whole of the remuneration not merely wages, lost by him as a result of his unfair dismissal. We find, for those reasons that the amount of lost remuneration should not and cannot be reduced by the amount which Mr Portilla earned whilst he was in another employment after he was unfairly dismissed."

60 In the circumstances of the matter before the Commission the respondent opposed the applicant's reinstatement by way of submissions. The Commission is satisfied on the evidence and submissions before it that the working relationship between the applicant and the respondent has not broken down to the extent that an order for reinstatement would be impracticable. The respondent submits that reinstatement is not supported. This does not make such remedy impracticable. The Commission finds there was little or no evidence to support the respondent's submission.

61 The Commission find in all of the circumstances, that the applicant should be reinstated to her former position as sales assistant effective from the date of her dismissal. With reinstatement goes the requirement that the applicant should be no worse off, on account of her termination of employment. Therefore, she is to be treated as if her employment was continuous with no loss of entitlement. The applicant is to be paid for all wages lost during the period 16 September 2005 to date of reinstatement. This loss should cover her normal weekly earnings for the period of unemployment. The Commission so finds. At the time of the hearing the applicant and her counsel referred on a number of occasions to the applicant's advanced state of gestation. Prior to the preparation of a minute to reflect the reasons for decision the applicant is to calculate the amount of wages that would have been paid had she not been terminated by the respondent, having regard for the issue of parental leave, the reduced hours she was working as at the date of dismissal and any other matter considered relevant and provide this information to the Commission with a copy to the respondent who will be then be invited to comment on the accuracy or otherwise of such an amount.

2006 WAIRC 04514

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AMY CARMICHAEL BAIN
	APPLICANT
	-v-
	HOMEART
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 12 JUNE 2006
FILE NO	U 91 OF 2005
CITATION NO.	2006 WAIRC 04514

Result	Order issued
Representation	
Applicant	Mr M. Cole (of counsel)
Respondent	Mr D.M. Jones (as agent)

Order

HAVING HEARD Mr M. Cole (of counsel) on behalf of the applicant and Mr D.M. Jones (as agent) on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby –

(1) DECLARES that the respondent harshly, oppressively and unfairly dismissed the applicant on 28 September 2005.

(2) ORDERS that the respondent shall reinstate the applicant to the position of part-time sales assistant; working 27.5 hours per week and effective from 29 September 2005.

(3) ORDERS that the respondent reinstate the applicant's accrued entitlements and that her service with the respondent be regarded as continuous for all purposes including long service leave.

(4) ORDERS that the respondent shall pay the applicant an amount of money in respect of all the remuneration (including superannuation) lost by her by reason of the termination of her contract of her employment as if she had worked continuously in the employment of respondent between 28 September 2005 and the date she is reinstated, less any income earned by her in this period, and the payment of any entitlements at termination, within 14 days of the date of this order.

(5) ORDERS that liberty to apply is reserved to the parties to this order in relation to (4) above.

[L.S.] (Sgd.) S M MAYMAN, Commissioner.

2006 WAIRC 04313

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ROBIN ADAM DOWNES **APPLICANT** **-v-** DIRECTOR GENERAL OF EDUCATION IN THE STATE OF WESTERN AUSTRALIA **RESPONDENT**
CORAM	COMMISSIONER J L HARRISON
HEARD	25 NOVEMBER 2005, 21 JANUARY 2006 WRITTEN SUBMISSIONS 7 AND 15 FEBRUARY 2006
DELIVERED	MONDAY, 8 MAY 2006
FILE NO.	APPL 32 OF 2005
CITATION NO.	2006 WAIRC 04313

Catchwords	Termination of employment - Harsh, oppressive and unfair dismissal - Dismissal occurred during period of probationary employment - Issues in relation to applicant's performance - Procedural fairness considered - Principles applied - Applicant unfairly dismissed - penalty of dismissal set aside – order made for re-instatement – *Industrial Relations Act 1979* (WA) s 29(1)(b)(i) – *Public Sector Management Act 1994* (WA) s78, s 79(3) and (5)
Result	Upheld and Order Issued
Representation	
Applicant	Mr S Millman (of counsel)
Respondent	Ms S Murphy (of counsel)

Reasons for Decision

1 This is an application by Robin Adam Downes ("the applicant") pursuant to s29(1)(b)(i) of the *Industrial Relations Act 1979* ("the Act"). The applicant alleges that he was unfairly terminated from his employment as a teacher with the Director General of Education in the State of Western Australia ("the respondent") on 17 December 2004. The respondent denies that the applicant was unfairly terminated.

2 A statement of agreed facts was tendered at the hearing and is as follows:

"1. The Applicant was employed by the Respondent as a teacher at the Kimberley School of the Air;

2. The Applicant commenced employment with the Respondent at the commencement of the 2003 academic year;

3. Prior to commencing employment with the Respondent, the Applicant had graduated from Murdoch University with a four-year Bachelor of Education degree;

4. During 2003, the Applicant's principal was Mr Ron Rudolphy;
5. During 2004, the Applicant's principal was Mr George Craig;
6. By letter dated 16 December 2004, Mr Alby Huts, an agent of the Respondent advised the Applicant that his appointment had been terminated effective 17 December 2004;
7. Pursuant to Clause 12.4 of the Government School Teachers and School Administrators Certified Agreement, the Applicant applied to have the decision reviewed;
8. Mr Joe Baskwell of Insurance Support Services, an independent investigator, conducted a review of the Decision to Terminate Employment of a Teacher Whilst on Probation, and on 19 January 2005 reported to the Respondent;
9. On 14 January 2005, the Applicant filed an application in the WAIRC seeking an order pursuant to Section 29 that the termination of his employment was harsh, unjust or unfair."

(Exhibit A1)

3 A file of relevant documents was tendered at the commencement of the proceedings (Exhibit R1).

Applicant's evidence

4 The applicant gave evidence that when he commenced his first appointment with the respondent in Derby he had no friends in the town and it was the first time that he had lived in the northwest of Western Australia. The applicant stated that the Kimberley School of the Air ("KSA") was classified as a difficult school to staff and he stated that it had a high staff turnover. The applicant stated that he did not apply to work at KSA.

5 The applicant stated that in his first year of teaching at KSA he taught year two and three students and he stated that the work he undertook was difficult. The applicant stated that in 2003 he was initially allocated twelve students and he stated that this was increased to sixteen by the end of term one. The applicant stated that the number of students he taught was later reduced. The applicant stated that during 2003 he was assisted by an itinerant teacher who visited his students and he stated that every few weeks he visited the students.

6 The applicant stated that when he was training to be a teacher he mainly worked with upper primary students and he told Mr Rudolphy that he was more comfortable working with upper primary students.

7 The applicant stated that his main role was to support each student's home tutor who facilitated the student's learning programme.

8 The applicant stated that he experienced personal difficulties throughout 2003. The applicant's father was diagnosed with cancer in 2002 and in the middle of 2003 his older brother living in England was imprisoned and at the end of 2003 his younger brother was also imprisoned. The applicant stated that these events were a major blow to him and his family. The applicant stated that because of the impact of these events he had difficulty concentrating in the middle of 2003 and experienced "psychomotor retardation".

9 The applicant conceded that his performance declined during 2003 as he was slow to mark students' work, he had difficulty understanding his colleagues and he was slow sending emails to his students and he took a long time to undertake simple tasks and the applicant stated that he was depressed and unhappy and that he tried to deal with these issues on his own and did not seek support. The applicant stated that his problems were compounded when he commenced a dysfunctional relationship with another teacher in Derby in the middle of 2003 and he stated that as this was an unhappy relationship this added to the applicant's stress. The applicant stated that at some point in 2003 he discussed his personal problems with Mr Rudolphy and he understood that his colleagues were also aware that he was experiencing personal difficulties. The applicant stated that even though Mr Rudolphy agreed that the applicant's personal issues were affecting him he told him that he did not believe that these problems were a significant factor in relation to his poor performance. The applicant stated that he agreed with Mr Rudolphy at the time but in retrospect he believed that the personal problems he experienced in 2003 impacted on his performance.

10 The applicant stated that because of his performance difficulties in 2003 Mr Rudolphy wrote to him on 17 October 2003 indicating that he had determined that the applicant was unable to meet the required standard of performance (see Exhibit R1 pp 51-53). The applicant was asked to respond to this letter explaining his unsatisfactory performance in the areas listed and did so on 23 October 2003 (Exhibit R1 pp 56-59). The applicant stated that he was subject to a Performance Improvement Plan ("PIP") between 27 October 2003 and 24 November 2003 ("PIP1"). The applicant understood that his performance improved and Mr Rudolphy confirmed this when he wrote to him on 24 November 2003 stating that his performance had improved in some areas. In this letter Mr Rudolphy also indicated that the applicant's performance remained unsatisfactory in three areas, Planning and Preparation, Assessing and Reporting on Student Outcomes and Teaching Skills and extended the applicant's PIP1 until 19 December 2003 and the applicant stated that his performance was not monitored after 24 November 2003 (Exhibit R1 pp 79-80).

11 The applicant stated that Mr Rudolphy told him that working at KSA was a unique environment and that he had taken this into account when assessing the applicant. The applicant stated that Mr Rudolphy also indicated to the applicant that he would approach the local District Director to have the applicant transferred to a mainstream school.

12 The applicant stated that towards the end of 2003 he applied to be selected on merit for a position at KSA for 2004 but his application was unsuccessful and that notwithstanding his failure to be appointed to KSA on merit the applicant continued to teach at KSA in 2004 and he was advised of his appointment to KSA on 11 December 2003 (see Exhibit R1 p 93).

13 At the commencement of the 2004 school year the applicant approached KSA's new Principal Mr Craig and told him that he had been on PIP1 in 2003.

14 The applicant stated that in 2004 he visited students more frequently than previously, he had responsibility for eight students and he did not have the support of an itinerant teacher. The applicant stated that in 2004 he experienced difficulties with two

students and the applicant stated that because the mother of one of these high needs students was very busy it was difficult to rely on her to undertake the home tutoring duties.

15 The applicant stated that in 2004 he had difficulties undertaking his duties because he was suffering from depression. The applicant also lacked confidence and he stated that his personal circumstances in 2004 were difficult. The applicant stated that because of these problems he cut corners and had difficulties developing materials for individual students. The applicant stated that in July 2004 his grandfather died and this exacerbated his pre-existing depression, and he stated that in mid 2004 his relationship with his partner was deteriorating and he stated that this relationship was made more difficult when his partner was transferred to work at KSA in semester two 2004. The applicant stated that this relationship ended in October or November 2004.

16 The applicant stated that he had a good relationship with his mentor during 2004 however he found his mentor in 2003 Mr David Felstead to be unhelpful as Mr Felstead had only been at KSA for one year.

17 The applicant stated that when his performance deteriorated in 2004 he was unable to cope without assistance and as a result he visited a medical practitioner in June 2004. The applicant stated that he started taking anti-depressants in 2004 and his treatment for depression from June 2004 onwards was confirmed by his medical practitioner (see Exhibit R1 p 174). The applicant stated that even though he first sought medical assistance in June 2004 he had been unwell since the middle of 2003 and the applicant stated that his colleagues were aware of his personal problems but not his health issues. The applicant stated that on 6 September 2004 he committed an act of self harm and that this incident took place after he drove on the Gibb River Road (an unsealed road) contrary to the respondent's policy. The applicant stated that after his partner suggested that he could lose his job over this incident he then "took a pen and proceeded to bash it into my - - my forehead" and the applicant stated that after harming himself he visited the Principal's partner Ms Joanne Hine.

18 The applicant gave evidence about the monitoring of his performance during 2004. The applicant stated that in August 2004 he received a letter from Mr Craig advising him that he considered that he was not performing to a satisfactory standard and the areas identified by Mr Craig are as follows:

"Planning and Preparation

- Demonstrated planning and structuring of learning programs in a manner that facilitates the attainment of student outcomes
- Demonstrated knowledge of learning areas
- Demonstrated relationship between planned lessons and activities
- Demonstrated publication of learning materials to meet the individual needs of students and tutors

Assessing and Reporting on Student Outcomes

- Demonstrated processes to systematically and comprehensively assess student outcomes
- Demonstrated use of valid, accurate and comprehensive evaluation to assess student outcomes
- Demonstrated prompt assessment and return of student work

Teaching skills

- Demonstrated use of a range of effective teaching techniques particularly support for home tutors and parents

Professional Characteristics

- Demonstrated collaboration with colleagues for the purpose of implementing learning programs in camp settings
- Punctuality and following of procedures for absences

Classroom Management Skills

- Demonstrated effective management of a class as a group
- Demonstrated ability to establish and maintain explicit expectations for behaviour conducive to learning"

(Exhibit R1 pp 152-3)

The applicant was asked to provide a written explanation in response to this letter and did so on 25 August 2004 and on 18 October 2004 the applicant commenced a second twenty day PIP ("PIP2").

19 The applicant stated that when Mr Craig raised the issue of the applicant's unsatisfactory performance with him he encouraged the applicant to contact his union representative Mr Frank Herzog. The applicant stated that he sent the following email to Mr Herzog on 10 September 2004 (formal parts omitted):

"Re: Robin Downes, Kimberley School of the Air, Performance management

Dear Frank,

I hope that all is well with you. I am writing concerning issues related to my performance management/sub-standard performance. You may recall me mentioning to you that I had been diagnosed with depression and that I had concerns with regard to this and my work performance. I have been forced to declare this situation to George (my principal) as on Monday evening this week I became very distressed due to work stress (combined with personal stress) and went to my principal's wife (Jo Hine – teacher at KSOTA) in a distressed state at her home to talk about work related issues. George was away in Darwin at the time and Jo welcomed me to talk. The extent to which I was distressed has meant that I have had talk to George about my diagnosis and have produced a letter from my doctor confirming the situation.

In light of this situation George and I have had an important discussion. George is suggesting that I may have the grounds for a compassionate transfer in the department and be moved to a less stressful school. George has indicated that the School of the Air is not a positive environment for a beginning teacher and is indeed 'high stress'. My only concern here is that I have my partner in Derby and contemplating a move away would not be positive. My own

thoughts are that with reviewed counselling and treatment things will get better and I should be able to take on the sub-standard performance management process and achieve at it.

I would appreciate it if you were able to call me here at school when you can to discuss this issue. I am mindful of your time. Some questions that I have include:

- What is a compassionate transfer?
- Do I have any choice of transfer eg Derby District, Looma etc
- If I follow my sub-standard performance management plan at KSOTA and am unsuccessful, what does this mean? Am I able to complete teaching as a relief teacher?
- Could I apply for a compassionate transfer at the end of this year should I require extension of my P on P?"

(Exhibit R1 pp 162-3)

The applicant stated that he forwarded this email to Mr Craig on 13 September 2004.

20 The applicant stated that in Term 3, 2004 he was made 'Teacher in Charge' at KSA to undertake certain duties in the principal's absence.

21 The applicant stated that Term 4, 2004 was a busy period as he had to complete student reports and magazine articles and student portfolios had to be finalised.

22 The applicant stated that Mr Craig wrote to him on 22 November 2004 stating that he had not demonstrated satisfactory performance over the review period 18 October 2004 through to 12 November 2004 and the applicant was asked to respond in writing to the outcomes of the review meeting held on 15 November 2004 and did so on 26 November 2004 stating that whilst he understood that his performance was a concern he believed that he had the potential to succeed as a teacher and the motivation to achieve the required standard and that the reduced PIP period was insufficient to demonstrate the required improvements (Exhibit R1 p 166). In response Mr Craig sent the following letter to the applicant on 26 November 2004 (formal parts omitted:

"Thank-you for (sic) response to my letter dated the 22 November 2005. Your response and all documents pertaining to this matter are being forwarded to the Director General for investigation in accordance with section 79(5) of the *Public Sector Management Act 1994.* I would also advise that the above determination may have some consequences upon your ongoing employment, as this decision may impact upon the probationary provisions of clause 12.3 of the *Government School Teachers' and School Administrators' Certified Agreement 2004.*

This process will continue until the outcome of the investigation."

(Exhibit R1/167)

23 The applicant stated that after receiving this letter from the respondent he was notified that he was not suitable to be made permanent and he was advised that the respondent had determined that the applicant's appointment was to be terminated effective from 17 December 2004 (Exhibit R1 p 170). The applicant was also advised at the time that he could have this decision reviewed under the *Government School Teachers' and School Administrators' Certified Agreement 2004* ("the Agreement").

24 On 29 December 2004 the applicant requested a review of his termination and on 28 January 2005 the applicant was advised that this review had been undertaken and that the respondent would not reverse its decision to terminate the applicant. A copy of the report prepared as part of this review was also provided to the applicant on this date (Exhibit R1 p 190).

25 The applicant stated that apart from the standard professional development given to all teachers at KSA he was given two days of professional development in Perth in 2003 for beginning teachers. The applicant stated that no other professional development specific to his needs was provided to him. The applicant stated that Mr Felstead also gave him an induction and was available to assist him in Term 1, 2003 and that Ms Hine was the applicant's mentor from mid to late 2004.

26 After the applicant was terminated he worked with the Army Reserve in the northwest of Western Australia and he stated that this work involved a high level of responsibility and he stated that the Army Reserve has indicated that it wanted to employ the applicant on a full time basis. After the applicant completed a crowd control course he was employed to undertake some security work. The applicant also applied to work as a Customs Officer and he applied for a position with the Northern Territory Police and he is soon to commence a position at the Derby Hospital as an Activity Officer.

27 Mr Downes submitted a summary of his earnings up to 13 January 2006 (see Exhibit A2).

28 Under cross-examination the applicant stated that because he had a high number of students in 2003 Ms Heather Te Amo was appointed to assist him.

29 The applicant stated that by May 2003 he had not commenced programming and he stated that a lot of the materials he was using were pre-packaged in booklets which had to be tailored to each students needs. The applicant stated that at the time he was struggling to provide individual programmes for students.

30 The applicant was asked about materials he sent to one of his difficult students Andrew Morris, the applicant stated that he put a lot of thought into choosing particular work sheets for this student but the applicant acknowledged that the documents he sent to Andrew Morris' home tutor in September 2003 was not a proper programme and the applicant agreed that Ms Te Amo gave him support to deal with this student. The applicant stated that at the time he was struggling to assess where students were at but he maintained that by this stage he was starting to use relevant tools to help with student assessments.

31 The applicant stated that he did not agree with all of the assessments made of his performance when he applied to be appointed on merit to KSA in 2004 (see Exhibit R2).

32 The applicant agreed that in 2003 he was given time to settle in to working at KSA and he agreed that he was not pro-active in seeking assistance in 2003 even though Ms Te Amo was available to assist him. The applicant stated that during September and October 2003 he sought assistance in his own time from his partner who was a teacher at Derby District High School and he stated that he relied heavily on her to help him with his work. When asked if his partner authored the majority of his work the applicant stated that his partner helped him with his work but he stated that he completed most of the work himself after

hours. The applicant stated that even though he was undertaking the same work as other teachers he found his workload difficult. The applicant stated that he had no experience in behaviour management and as a result it was difficult to produce programmes in this area. The applicant stated that after a discussion with Mr Rudolphy about this issue he was aware of what was needed to develop programmes in this area.

33 The applicant understood that Mr Craig decided not to put the applicant on a PIP at the beginning of 2004 as he wanted the applicant to start the year with a clean slate.

34 The applicant stated that when he was experiencing problems in early 2004 he sent a student a programme developed by Ms Te Amo. The applicant conceded that his actions in this regard were wrong and he stated that this led to a break down in his relationship with Ms Te Amo. The applicant stated that this was indicative of his inability to cope professionally and personally at the time.

35 The applicant stated that even though Ms Te Amo and Ms Hine provided support to him he was under-confident in his relationship with them.

36 The applicant was asked to comment about a complaint made about him in August 2004 by the mother of Andrew Morris (see Exhibit R1 pp 150-151). The applicant stated that this complaint reflected his inability to cope at the time and the applicant stated that when Mr Craig discussed this complaint with him he suggested that the applicant resign and the applicant stated that in hindsight he should have. The applicant stated that after this complaint was made in August 2004 he was advised that his performance was substandard and he was required to show Mr Craig all of the materials that he was sending out to students.

37 The applicant stated that after Ms Hine went on maternity leave in June or July 2004 she provided lessons for Andrew Morris but he continued to deliver radio lessons to this student.

38 The applicant stated that at the time he committed an act of self harm on 6 September 2004 he had not previously raised his depression with Mr Craig and the applicant stated that he took some sick leave to deal with his depression.

39 The applicant stated that as his PIP2 lasted only fifteen days and not the required twenty days this put additional stress on him however, the applicant stated that even if he had the full twenty days in October and November 2004 to make the required improvements it would not have made any difference to his unsatisfactory performance. The applicant stated that he focused on one area of this plan and did not address the other three areas because this was the best he could do at the time (see Exhibit R1 p 164).

40 The applicant stated that it was unfair to subject his students to his substandard performance in 2004 and he stated that he should have resigned.

41 The applicant stated that he did not find the support he was given whilst at KSA in 2004 to be useful.

42 Under re-examination the applicant stated that he was currently in a position to return to teaching as his health problems were behind him and he now feels strong enough to return to work. The applicant stated that even though he had support from Ms Te Amo he believed that this support was insufficient and he did not feel confident to respond to Ms Te Amo on an equal basis. The applicant stated that he should not have been put on PIP2 in 2004 as he was bound to fail and that he should not have been teaching at the time. The applicant stated that at the time he was terminated he had eight students on his roll and he was given some assistance by Ms Hine.

Respondent's evidence

43 Mr Rudolphy was the Acting Principal at KSA from October 1999 through to October 2005. In 2004 he did not work at KSA as he was a relieving principal at another school. Mr Rudolphy commenced teaching in 1994.

44 Mr Rudolphy stated that KSA students were mainly taught through correspondence and teachers regularly forwarded documents to a student's tutor and provided support to the student's tutor. Mr Rudolphy stated that learning materials were pre packaged and the teacher was required to modify these materials to suit an individual student's needs. Mr Rudolphy stated that students and teachers also attended camps and when the applicant taught at KSA teachers communicated directly with students via radio lessons.

45 Mr Rudolphy stated that when he was Principal at KSA the school had between twelve to sixteen staff members and he stated that there was a high turnover of staff members as it was a difficult school to staff. Mr Rudolphy stated that KSA typically had a large number of graduate teachers working at the school and he stated that class numbers usually consisted of twelve to sixteen students. Mr Rudolphy stated that when the applicant commenced employment at KSA in 2003 he inducted him over a two week period and a mentor was appointed to assist the applicant and he stated that this was the case for all new staff members. Mr Rudolphy stated that as well as having an induction the applicant was subject to an ongoing performance management process that applied to all teachers at KSA. Mr Rudolphy stated that he kept a 'running record" on his interactions with each teacher (see Exhibit R1 pp 3-8).

46 Mr Rudolphy stated that he had concerns about the applicant not keeping up with marking required of him in early March 2003 as he had a significant backlog in this area, he organised a local relief teacher to do some of the applicant's marking and he also organised training for the applicant in this area on 26 March 2003 and 8 April 2003. Mr Rudolphy stated that as at April 2003 the applicant was on top of his marking but still felt under pressure so he arranged for Ms Te Amo to give the applicant additional support by taking on a significant part of his teaching responsibilities. Mr Rudolphy stated that by the end of May 2003 the applicant was not developing programmes for his students even though the applicant had a reduced workload and he was concerned about the applicant's intermittent communications with some home tutors.

47 Mr Rudolphy stated that he believed that the applicant was indecisive and Mr Rudolphy stated that by September 2003 as he had concerns about the applicant's suitability as a teacher and his ability to cope with his workload he allocated Ms Te Amo to support the applicant both as a mentor and exemplar.

48 Mr Rudolphy stated that even though the applicant spent many hours at work and he worked hard on the camps he attended his output was limited. When the applicant requested that someone show him how to develop a learning programme Mr Rudolphy stated that the applicant had opportunities to see what other teachers were doing and to get ideas and support from them. Mr Rudolphy stated that even though the applicant was given this support he was unable to develop programmes.

49 Mr Rudolphy stated that he had a meeting with the applicant on 16 October 2003 and he formally raised a range of concerns with the applicant and he gave him feedback about his ongoing performance as part of the formal performance management process (see Exhibit R1 pp 20-32). Mr Rudolphy stated that by this point in time the applicant's lack of programming was his main concern and he maintained that the applicant had little knowledge of and understanding about developing relevant programmes for students.

50 Mr Rudolphy stated that he wrote to the applicant on 17 October 2003 identifying areas where he considered the applicant's performance to be unsatisfactory and satisfactory and Mr Rudolphy identified areas that he was unable to make a final judgment about the applicant due to the applicant's limited face to face contact with the students (see Exhibit R1 pp 51-53). The applicant was advised at the time that if he was unable to meet the required standard of performance that action may be taken under s239 of the *School Education Act 1999* and s79 of the *Public Sector Management Act 1994* ("the PSM Act") and the applicant was invited to provide a written explanation for his unsatisfactory performance (see Exhibit R1 pp 51-53). Mr Rudolphy received a formal response from the applicant on 23 October 2003 (Exhibit R1 pp 56-59). Mr Rudolphy was of the view that the applicant's response did not reflect an understanding of what was required of him. On 23 October 2003 Mr Rudolphy responded and had a meeting with the applicant on 24 October 2003 to agree on PIP1 (see Exhibit R1 p 69). Mr Rudolphy stated that prior to this meeting he was aware that one of the applicant's family member's had been ill and Mr Rudolphy stated that around the time of the first review meeting with the applicant he told him that he was dealing with some significant family and personal issues.

51 Mr Rudolphy stated that he was unable to provide the applicant with "First Steps" professional development training during PIP1. Mr Rudolphy stated that during PIP1 the applicant showed some improvement but not a lot and he did not believe that the applicant was a competent teacher.

52 Mr Rudolphy stated that throughout 2003 the applicant's development as a teacher had been marginal and the applicant's personal issues did not explain his lack of competency.

53 Under cross-examination Mr Rudolphy stated that the average time that graduate teachers stayed at KSA was two to four years.

54 Mr Rudolphy stated that he understood that the applicant attended two training courses during 2003 and Mr Rudolphy maintained that these courses were useful to the applicant even though they did not specifically relate to teaching at KSA. Mr Rudolphy believed that the applicant would benefit more from having Ms Te Amo as a mentor than by attending professional development courses.

55 Mr Rudolphy stated that as at 24 November 2003 he decided to extend PIP1 as the applicant had made some marginal improvement in his performance and he understood that he would be Principal at KSA in 2004 however this did not eventuate as he was transferred to another school in 2004. Mr Rudolphy stated that it might have been better for the applicant to do a further PIP in a mainstream school but he stated this was not essential.

56 Ms Te Amo worked with the applicant in 2003 and for part of 2004 she was the applicant's mentor. Ms Te Amo confirmed that late in 2003 the nature of her relationship with the applicant was as set out in the email dated 25 October 2003 and that she met weekly with the applicant to prepare work for Andrew Morris (Exhibit R1 p 70). Ms Te Amo stated that even though the applicant completed the tasks required of him he required a lot of support and Ms Te Amo stated that the applicant found it hard to meet the basic requirements of a teacher including meeting deadlines and completing the required programming.

57 Ms Te Amo stated that in 2004 she ceased working closely with the applicant. Ms Te Amo stated that at the start of the 2004 school year she assisted the applicant by giving him extra support as and when necessary as part of her normal duties. Ms Te Amo stated that two incidents occurred in March 2004 which led to her having a falling out with the applicant and Ms Te Amo stated that as a result Ms Hine was then appointed as the applicant's mentor (see notes Exhibit R1 p 97). Ms Te Amo stated that she felt at that point in time that the applicant was not coping and that the applicant was unable to meet his students' needs and the deadlines required of him even though he had been given substantial support.

58 Mr Craig has been a teacher since the middle of 1994 and he has taught at a range of metropolitan and country schools. Mr Craig stated that his first appointment as a principal was in 2004. Mr Craig stated that after he commenced employment at KSA he kept a 'running record' of his interactions with teachers (see Exhibit R1 pp 96-101).

59 Mr Craig stated that from the briefing notes left for him he was aware that the applicant was on PIP1 in 2003. Mr Craig stated that he believed that it was best to put the applicant on the standard performance management process at the beginning of 2004 because he was concerned there was insufficient documentation concerning the substandard performance process the applicant had been subject to in late 2003. Mr Craig stated that his main concerns with the applicant in early 2004 was making sure student programmes and work were sent to students on time and were tailored to a student's needs.

60 Mr Craig stated that after discussing the applicant's situation with him in March 2004 he arranged for Ms Hine to be the applicant's mentor. Mr Craig stated that under the mentoring arrangement the applicant could approach Ms Hine as necessary and they met once a fortnight. Mr Craig confirmed that Ms Hine went on maternity leave at the end of term two 2004.

61 Mr Craig stated that Andrew Morris was a student with academic concerns and that Ms Te Amo's role was to assist teachers in dealing with students of this nature.

62 Mr Craig stated that the first time he formally raised the applicant's substandard performance with him was in August 2004 and he confirmed this was after a complaint was made about the applicant by Andrew Morris' mother. Mr Craig stated that after he investigated this complaint he was of the view that the applicant was lacking in a number of areas that he had been given assistance with during the year particularly programming. As a result Mr Craig notified the applicant by letter dated 19 August 2004 that his performance was unsatisfactory and he was asked to respond to Mr Craig's letter. Mr Craig stated that Ms Hine, who was on maternity leave at the time, took over setting out a specialised program for Andrew Morris' learning needs and the applicant continued his radio lessons.

63 Mr Craig stated that he was aware that the applicant was experiencing personal and family problems in 2004 and he was aware that the death of the applicant's grandfather at the end of July 2004 had a big affect on the applicant. Mr Craig stated that he was aware that at the end of September 2004 the applicant had accessed the respondent's counselling services and that the

applicant had been suffering from depression and Mr Craig stated that the applicant believed that his personal problems were impacting on his performance at the end of 2003. Mr Craig stated that he took these issues into account when deciding in early 2004 whether to keep the applicant on substandard performance or the normal performance management process.

64 Mr Craig stated that when the applicant was placed on PIP2 he was aware that the applicant was depressed and taking medication and this was verified when the applicant provided him with a letter from his Doctor to this effect on 30 September 2004. Mr Craig stated that there was no indication that the applicant's illness was affecting his performance and he stated that the applicant told him that his illness should not affect his work.

65 Mr Craig stated that even though the applicant only had six students there had been no improvement in his performance in 2004.

66 Mr Craig stated that he had a meeting with the applicant on 18 October 2004 and identified a range of concerns. The applicant was told at this meeting that he had twenty days to make the required improvements and he told the applicant that a review meeting would be held on 15 November 2004. Mr Craig's 'running record' states the following about the meeting held on 18 October 2004:

> "Held meeting with Robin and identified 4 areas for his improvement plan (see attached document). Informed him he had 20 days and told him that the review would be on the 12 Nov."
>
> (Exhibit R1 p 101)

67 Mr Craig stated that he sought advice about transferring the applicant to a mainstream school so that he could have face to face contact with children but he stated the respondent was reluctant to do so when a teacher is subject to a substandard performance process.

68 Mr Craig confirmed that on 22 November 2004 he advised the applicant that his performance was still unsatisfactory and that the applicant responded complaining that he was not given the required twenty day period to improve. Mr Craig stated that during PIP2 he could not recall having a formal meeting with the applicant. Mr Craig also stated that he believed that a second review period was to be provided to the applicant in 2004 but he could not recall if this occurred even though he notified the applicant that this would be taking place.

69 Mr Craig gave evidence that he believed twenty days was a sufficient period for the applicant to demonstrate improvements in the required areas and that he had been given a lot of support during 2004 to improve and that as the areas identified for improvement were specific the applicant should have been able to instantly make the required improvement. Mr Craig stated that even though he provided assistance to the applicant along with the applicant having support from Ms Hine for six months in 2004 and Ms Te Amo, the applicant's performance did not improve.

70 Mr Craig stated that in addition to the complaint from Andrew Morris' mother he was aware that the applicant had difficulties with two other students.

71 Mr Craig stated that the applicant was open with him about his illness.

72 Mr Craig stated that he believed working in a mainstream school would assist the applicant and that working in a school of the air would be very difficult for an inexperienced teacher.

73 Ms Hine has been teaching since 1989. Ms Hine stated that in March 2004 she and the applicant agreed on a number of goals to assist the applicant with his performance and that they met on an as needs basis and Ms Hine documented what was discussed at these meetings. Ms Hine stated that the main issues facing the applicant were with the teaching process, monitoring and assessing students and time management. Ms Hine stated that she saw little improvement in the applicant's performance during 2004 and Ms Hine stated that the applicant's performance was not at the level of a graduate teacher. Ms Hine stated she was aware that the applicant was experiencing some personal problems in 2004.

74 Since January 2004 Mr Donald Barnes' role with the respondent is to support line managers when dealing with teachers experiencing performance difficulties. Mr Barnes stated that he prepared a briefing note for the respondent's Executive Director, Human Resources Mr Huts in relation to the applicant's performance and that after sending this note to Mr Huts the applicant was sent a letter confirming his termination (see Exhibit R1 p 170).

75 Mr Barnes stated that from August 2004 he worked with Mr Craig to assist him in his dealings with the applicant. Mr Barnes stated that he completed his briefing note about the applicant based on the information provided to him about the applicant's performance in 2004 which is contained in Exhibit R1.

76 Mr Barnes stated that he was not aware of any probationary teacher being granted a two term extension as provided for in the Agreement and understood if an extension was granted it would only occur in the case where there was some merit in giving the teacher time to demonstrate improvements.

77 Mr Barnes initially stated that he understood the applicant was given a second period to improve his performance in November 2004 however after reviewing the documentation contained in Exhibit R1 he stated that was not the case.

78 Mr Barnes stated that the respondent was aware that the applicant was suffering depression in the second half of 2004 and he stated that he took this issue into account when deciding the applicant's future. Mr Barnes stated that the respondent considered whether or not it was appropriate to grant an extension to the applicant's probationary period as provided for under the Agreement and he confirmed that it was the respondent's policy not to move employees who were subject to a substandard performance process to another school. Mr Barnes stated that as the applicant was on probation the respondent was able to terminate him after his performance was found to be substandard.

Applicant's submissions

79 The applicant submits that the decision to terminate him was harsh, unjust and unfair.

80 The applicant argues that his performance at KSA in 2003 and 2004 was affected by a number of personal factors and the applicant submits that the respondent failed to take into account a number of relevant considerations when deciding to terminate him at the end of 2004.

81 The applicant gave uncontested evidence that he had successfully undertaken relief placements at two primary schools prior to being employed at KSA. The applicant had no support network when he went to Derby at the beginning of 2003 and the applicant found it difficult to establish these networks. In 2003 the applicant suffered stress because of his father's health problems and the imprisonment of his two brothers and the applicant also entered into a dysfunctional relationship with a teacher at Derby District High School in 2003. The applicant argues that in 2004 the respondent failed to consider the effect of the applicant's medical condition on his ability to perform his normal duties, PIP2 did not run the mandated minimum twenty days and the applicant submits that the required improvements were not achievable within this reduced period. No feedback was given to the applicant by Mr Craig about the applicant's progress during PIP2 and the applicant argues that Mr Craig did not give sufficient weight to the breakdown in the applicant's relationship with his partner and the applicant suffering a stress related illness and depression for which the applicant was seeking medical treatment. The applicant also argues that the respondent failed to take into account the unique environment of KSA and the applicant argues that the respondent failed to provide him with any professional development specific to his needs in both 2003 and 2004.

82 The applicant argues that PIP2 was not initiated as a result of the applicant's poor performance because Mr Craig did not place the applicant on PIP2 until a complaint was made from a parent about the applicant.

83 The applicant argues that he was treated unfairly when Mr Craig advised him after PIP2 finished that a second monitoring period would be put in place however this did not eventuate.

84 There was no evidence that an investigation pursuant to s79(5) of the PSM Act took place as advised to the applicant except for a statement from the respondent that Mr Barnes carried out an investigation and there was no evidence that anyone was interviewed as part of this investigation. The applicant also argues that a review of relevant documentation by Mr Barnes does not constitute an investigation for the purposes of the PSM Act or the regulations.

85 The applicant argues that alternatives to termination were not canvassed by the respondent and the applicant maintains that the respondent did not adequately consider his future employment prospects. The applicant argues that it was open to the respondent to transfer the applicant to a mainstream school, which was recommended by Mr Rudolphy at the end of 2003 and in the alternative the applicant argues that the respondent could have continued to employ the applicant for a further period of up to two terms. The applicant also maintains that when the respondent chose not to transfer the applicant to an alternative school to complete PIP2 it took an inflexible approach to teachers who are subject to a PIP and the application of this policy was effected notwithstanding Mr Rudolphy's recommendation that the applicant gain experience in a mainstream school.

86 Even though the applicant had input into a review of the process used to terminate him the applicant maintains that this review did not consider the issues of merit relevant to the applicant's termination.

87 The applicant submits that the decision to terminate him should be set aside and requests that in the event that the Commission finds that the applicant has been unfairly dismissed he wishes to make further submissions in respect to final orders.

Respondent's submissions

88 The respondent maintains that it had good reason to terminate the applicant.

89 The respondent argues that there were a number of indications that the applicant was struggling to undertake his teaching duties in 2003. The respondent claims that once the respondent became aware that the applicant was experiencing difficulties in early 2003 he was given support with his marking duties and the respondent reduced his teaching workload to less than 80% of an ordinary teaching load. The respondent argues that notwithstanding this support the applicant was unable to appropriately tailor or modify learning materials to meet the educational needs of individual students. The respondent argues that the applicant was not a pro-active participant at the camps he attended and claims that when the applicant experienced further difficulties when dealing with a difficult student Ms Te Amo gave the applicant support in this regard. The respondent was also concerned about the applicant's heavy reliance on his partner for support and assistance. Towards the end of 2003 Mr Rudolphy determined that the applicant's performance was unsatisfactory with respect to the applicant's lesson planning and preparation, assessing and reporting on student outcomes and teaching skills and he was placed on PIP1, and after undergoing PIP1 which ended on 24 November 2003 Mr Rudolphy determined that the applicant's performance was still unsatisfactory and a second monitoring period was put in place which lasted until the end of the 2003 school year.

90 The respondent argues that even though the applicant was extensively monitored and given significant support during 2004 he again experienced performance difficulties. When Mr Craig became aware that the applicant was struggling he established a collaborative relationship between the applicant and Ms Hine and Ms Hine later took over responsibility for one of the applicant's difficult students after his mother complained about the applicant. Furthermore, the applicant admitted that his performance was substandard in August 2004.

91 The respondent argues that after the applicant commenced PIP2 on 18 October 2004 he was unable to meet the requirements in any of the areas identified under this plan and the applicant did not deny at the time that his performance was substandard. The respondent accepts that the twenty day PIP2 period was not suspended for the periods when the applicant was on sick leave however it argues that the applicant could have demonstrated improvements that were realistic and achievable in the time available to him.

92 The respondent argues that Mr Barnes conducted an appropriate investigation into the applicant's performance using correspondence and notes supplied to him by Mr Craig and claims that it was appropriate for Mr Barnes to recommend that the applicant be terminated. Even though Mr Barnes did not interview the applicant or other relevant witnesses as part of his investigation into the applicant's performance the respondent maintains that it substantially complied with s79(5) of the PSM Act as the applicant had several opportunities to respond to allegations of substandard performance in 2004 and each response was considered by Mr Barnes. The respondent also relies on a further review under the processes provided for in the Agreement after the applicant complained about his dismissal and this review determined that the applicant's dismissal be upheld. The respondent acknowledges that even though this review excluded considerations of merit the respondent maintains that the interviewer reviewed evidence relevant to the fairness and appropriateness of the respondent's decision to terminate the applicant.

93 The respondent argues that even if a finding is made that it did not substantially comply with s79(5) of the PSM Act this is not fatal to the respondent's case as this application should be regarded as a hearing de novo and the respondent argues that if problems existed with the process used when terminating the applicant the Commission's role in matters of this nature is to bring the matter in dispute to finality and not merely to deal with procedural defects and send the matter back to the respondent to rectify (see *Gudgeon v Black; Ex parte Gudgeon* (1994) 14 WAR 158 as cited recently in *Premila Levaci v Director General, Disability Services Commission* (2005) 85 WAIG 171). The respondent also maintains that as the applicant is challenging both the procedures followed and the merits of his termination the Commission can treat this application as a hearing de novo and make a decision whether to terminate the applicant based on all of the available evidence (see *Geoffrey Johnston v Mr Ron Mance, Acting Director Genera, Department of Education* (2002) 83 WAIG 1553).

94 The respondent concedes that the applicant's personal difficulties in 2003 and 2004 may have had some impact on his ability to perform his functions as a teacher but it maintains that there was no medical evidence to suggest that these difficulties were significant and Mr Craig did not consider that the applicant's personal circumstances in September 2004 warranted the applicant taking extended sick leave. Additionally, the applicant did not advise Mr Craig that his personal circumstances warranted the taking of extensive sick leave.

95 The respondent argues that there is no evidence as to whether or not suitable positions were available for the applicant to be transferred into and on this basis it maintains that there was nothing to confirm that the applicant's transfer to a mainstream school was a realistic option.

96 In summary the respondent maintains that the applicant experienced difficulties throughout his two years at KSA and made little improvement in his performance during this period and the respondent maintains that even when appropriate allowances are made for the applicant's personal circumstances, being a graduate teacher and the difficulties associated with the unique school of the air setting there was a substantial amount of evidence that the applicant's performance was substandard in both 2003 and 2004. The respondent maintains that over a two year period the applicant was unable to demonstrate basic teaching competencies despite being given significant support and feedback and the respondent argues that the applicant's inability to perform to the required standard related to the applicant's underlying inability to develop basic teaching competencies rather than a response to the personal pressures he was facing. The respondent maintains that the fact that the applicant was on probation when he was terminated should be taken into account and claims that as the applicant failed to achieve basic teaching competencies in his first two years of teaching there was no point in extending the applicant's probationary period as it would be unfair to compromise educational standards of the children the applicant would be teaching.

Findings and conclusions

97 I listened carefully to the evidence given by the witnesses in these proceedings and closely observed them whilst they gave their evidence. I find that the applicant gave his evidence honestly and in a clear and considered manner. I also find that at times the applicant conceded some issues which were against his interests which in my view reinforces the credibility of the evidence given by the applicant. In my view each of the witnesses who gave evidence on behalf of the respondent gave their evidence in a forthright and clear manner and I find that their evidence was given honestly and to the best of their recollection.

98 As the rights, duties and obligations between employers and employees in the public sector are governed by statute, where it is established that mandatory statutory requirements have not been met, steps taken and decisions arrived at may well be held to be ultra vires and invalid (see *Re Kenner; Ex-Parte Minister for Education* [2003] WASCA 37 at para 24 per Olsson AUJ [Parker and Templeman JJ agreeing] and also *Civil Service Association of WA Incorporated v Director General, Department of Consumer and Employment Protection* [2002 82 WAIG 952).

99 Section 78 of the PSM Act, which is contained in Part 5 of that Act and is headed 'Substandard Performance and Disciplinary Matters', outlines the rights of appeal to the Commission for relevant employees and there was no dispute and I find that the applicant is a relevant employee for the purposes of these proceedings.

100 In *Geoffrey Johnston v Ron Mance, Acting Director General of Department of Education* (op cit) at 1557 Kenner C discussed the approach which should be taken by the Commission with respect to a referral under s78(2) of the PSM Act. Kenner C stated the following:

> "Whilst s 78(2) does not refer to an "appeal" to the Commission, it seems plain enough from the language in the section as a whole, that it is concerned with challenges to a decision taken by the employer in relation to which the employee is "aggrieved". Reference to "aggrieved" is made in s 78(1)(b) dealing with appeals to the Public Service Appeal Board, and also in ss 78(2)(b), (3) and (4) dealing with referrals to the Commission. In my opinion, given the nature of the proceeding contemplated by s 78 of the PSMA, a matter referred to the Commission pursuant to s 78(2) by an aggrieved employee from one of the nominated decisions, is to be dealt with in the same manner as a matter referred under s 78(1) of the PSMA. That is, I do not consider that such a proceeding ought to be regarded as an "appeal" in the strict sense, as that issue was discussed by the Full Bench in *Milentis*. Nor is it the case in my opinion, that the Commission is limited to determining only the reasonableness of the employer's decision.
>
> In other words, depending upon the nature of the challenge to the decision under review, such a proceeding may involve the Commission re-hearing the matter afresh or it may only be necessary to consider the decision taken by the employer "on such record of the proceedings below as comes up to it, supplemented or not by evidence": *Ormsby*. It would seem to be the case therefore, that consistent with the reasoning of the Full Bench in *Milentis*, the decision of the employer is not to be totally disregarded in the Commission hearing and determining the matter.
>
> Furthermore, it also seems to me that if the referral to the Commission pursuant to s 78(2) of the PSMA involves an allegation of harsh, oppressive or unfair dismissal, then, consistent with the referral of such a matter to the Commission pursuant to s 44 of the Act, s 23A should apply to such matters in terms of the relief to be granted. Such a matter, although referred to the Commission under s 78(2) of the PSMA, would nonetheless constitute "a claim of harsh, oppressive or unfair dismissal" for the purposes of s 23A of the Act and any relief to be granted. In my opinion, it would be incongruous if this were not to be the case, as claimants commencing proceedings under ss 29(1)(b)(i) and 44 would be entitled and limited to the remedies under s 23A if successful, whereas those under s 78(2) of the PSMA would not be so limited, for example, as to matters of compensation for loss and injury. Given the scheme of the Act in relation to such

matters, I do not think parliament could have intended such an outcome. Different considerations may apply of course in cases where it is alleged that a dismissal was unlawful, for example, on the grounds of a failure by the employer to comply with a mandatory statutory requirement.

…

Therefore, matters referred to the Commission pursuant to s 78(2) of the PSMA are not restricted to consideration by the Commission of the reasonableness of the employer's conduct, but the Commission may review the employer's decision de novo, as the circumstances warrant and determine the matter afresh and substitute its own decision for the employer's decision if that is appropriate."

101 I respectfully agree with the reasoning of Kenner C and find that in this instance, given the nature of this appeal, the Commission can review the respondent's decision to terminate the applicant as a hearing de novo.

102 Section 79(3) of the PSM Act reads as follows:

"(3) Subject to subsections (4), (5) and (6), an employing authority may, in respect of one of its employees whose performance is in the opinion of the employing authority substandard for the purposes of this section —

(a) withhold for such period as the employing authority thinks fit an increment of remuneration otherwise payable to that employee;

(b) reduce the level of classification of that employee; or

(c) terminate the employment in the Public Sector of that employee."

and s79 of the PSM Act reads as follows:

"(5) If an employee does not admit to his or her employing authority that his or her performance is substandard for the purposes of this section, that employing authority shall, before forming the opinion that the performance of the employee is substandard for those purposes, cause an investigation to be held into whether or not the performance of the employee is substandard."

103 The law relating to unfair dismissals when an employee is on probation was considered by the Full Bench in *East v Picton Press Pty Ltd* (2001) 81 WAIG 1367. At page 1369 of this decision, the President set out the following principles from *East Kimberley Aboriginal Medical Service v The Australian Nursing Federation, Industrial Union of Workers Perth* (2000) 80 WAIG 3155:

"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] SAIRComm 8 (31 January 1994), citing *Re J M Hamblin v London Borough of Ealing* (1975) IRLR 354 and see *Hutchinson v Cable Sand (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)."

104 In *Rosanne Isidora Van Den Broeck v Highway Gynaecology* (2000) 81 WAIG 319 at 319 Beech C (as he then was) stated the following:

"A period of probation is a period at least where the employee is to be assessed as being suitable for the job. The employee knows that he or she is on trial and must establish his or her suitability for the post. The employer, for its part, must give the employee a proper opportunity to prove him or herself, and an employee on probation can expect to be

counselled and informed that if that (sic) he or she is not meeting the required standards of performance dismissal may occur. An employee is also entitled to receive reasonable training as well as a warning of a possible failure to improve."

105 Paragraph 2 of this decision sets out the agreed facts in relation to this application.

Background

106 It is necessary to detail relevant information about the applicant's performance at KSA in 2003.

107 It was not in dispute that the applicant underwent PIP1 from 27 October 2003 until 24 November 2003, a period of twenty working days and that prior to the commencement of PIP1 Mr Rudolphy identified the indicators of the performance required of the applicant in the areas where Mr Rudolphy considered the applicant's performance was deficient and Mr Rudolphy and the applicant agreed on strategies to assist the applicant to achieve the required improvements and support was given to the applicant to assist him to make these improvements. A review meeting was held on 7 November 2003 to monitor the applicant's progress and at a meeting held on 24 November 2003 at the end of PIP1 Mr Rudolphy told the applicant that his performance had improved in most areas however he still considered that the applicant's performance was unsatisfactory in some areas relating to planning and preparation and assessing and reporting on student outcomes and teaching skills. Mr Rudolphy also advised the applicant that he was unable to judge the applicant's performance in relation to classroom management and Mr Rudolphy indicated to the applicant that he believed that it was appropriate for him to be given a second period of monitoring to provide him with an opportunity to improve his performance to a satisfactory standard. Mr Rudolphy stated the following in his letter to the applicant dated 24 November 2003:

> "I believe, however, that it is desirable for this to take place in a mainstream school setting, rather that in our distance education setting – which, I believe, would be far more conducive for you to actively demonstrate your level of teaching competency.
>
> I will refer this matter to the Director of Isolated and Distance Education, and to the Staffing Directorate, for further advice in terms of your on-going placement with the Department of Education and Training."
>
> (Exhibit R1 p 80)

Mr Rudolphy also stated the following in this letter:

> "Due to your limited face-to-face contact with students in a School of the Air setting, I am still unable to make a complete judgement at this stage on your level of performance in the following areas:
>
> **Classroom Management Skills**
>
> - Demonstrated effective management of a class as a group or as several groups
> - Demonstrated ability to establish and maintain explicit expectations for behaviour conducive to learning
> - Demonstrated capacity to know what is going on in the classroom including the ability to deal effectively with potential problems"
>
> (Exhibit R1 p 80)

The following were identified by Mr Rudolphy as the areas where the applicant had demonstrated satisfactory performance:

> "**Assessment and Reporting on Student Outcomes**
>
> - Demonstrated prompt assessment and return of student work
>
> **Teaching Skills**
>
> - Demonstrated capacity to develop a positive rapport with students
>
> **Professional Characteristics**
>
> - Demonstrated collaboration with colleagues for the purpose of implementing learning programs in camp settings
> - Demonstrated participation in important school and community events outside of normal school hours
> - Demonstrated participation in professional development as described above
> - Demonstrated ability to sustain working relationships with colleagues
> - Demonstrated willingness to improve skills and performance"
>
> (Exhibit R1 p 80)

108 After Mr Rudolphy extended PIP1 to 19 December 2003 it appears that no further concerns were raised by Mr Rudolphy about the applicant's performance and the applicant was reappointed to KSA in 2004 even though he was unsuccessful in gaining an appointment on merit to KSA for 2004.

109 I have considered the evidence given in these proceedings and reviewed the substantial amount of documentation tendered at the hearing. On the evidence before me it is my view and I find that the decision made by the respondent to terminate the applicant was unfair for a number of reasons.

110 I find that the applicant was disadvantaged when Mr Craig waited until August 2004 to indicate to the applicant that he had significant concerns about his performance thereby giving the applicant a limited timeframe in which to improve his performance as he was approaching the end of his two year probationary period. It is also my view that if Mr Craig had the range of serious concerns about the applicant's performance which he outlined in his letter to the applicant dated 19 August 2004 he should have advised the applicant of these concerns earlier than August 2004 so that the applicant had an adequate opportunity to address these concerns prior to his probationary period ceasing. There was no dispute that at the beginning of 2004 Mr Craig was aware that the applicant had been subject to PIP1 in 2003 and he advised the applicant that he would consider whether or not to return the applicant to the substandard performance process by week nine of Term 1. In the event Mr Craig decided to place the applicant on the standard performance management process which the applicant was subject to until he commenced PIP2 on 18 October 2004. Even though the applicant had discussions with Mr Craig as part of the standard performance management process there was no evidence that Mr Craig advised the applicant that he had serious concerns about the applicant's performance and Mr Craig's running notes do not refer to the applicant being specifically

advised about his performance being unsatisfactory and that the applicant could be terminated if his performance did not improve. It is also the case that it was only after a complaint was made by the mother of Andrew Morris that Mr Craig advised the applicant that he would be writing to him about his substandard performance and Mr Craig then formally wrote to the applicant on 19 August 2004 stating that he considered his performance to be unsatisfactory in twelve areas relating to planning and preparation, assessing and reporting student outcomes, teaching skills, professional characteristics and classroom management skills (see Exhibit R1 p 152).

111 I find that the support given to the applicant in 2004 to assist him to perform at an acceptable level was insufficient for a graduate teacher working in the unique environment of a school of the air. Whilst I acknowledge that some support was given to the applicant to assist him to improve his performance throughout 2004 and the applicant was subject to a performance management process and Ms Hine was the applicant's mentor for part of the year and gave the applicant general feedback about his performance I find that the support given to the applicant lacked co-ordination and structure and mainly concentrated on assisting the applicant to deal with Andrew Morris who was a difficult student with special needs. The assistance provided to the applicant by Ms Te Amo, whose general role was to assist teachers to deal with students with special needs, reduced significantly in March 2004 when the applicant and Ms Te Amo fell out over the applicant using one of Ms Te Amo's unmodified programmes for one of his students and as a result of this incident Ms Te Amo no longer liaised closely with the applicant. Even though Mr Craig then appointed Ms Hine to assist the applicant on an as needs basis, usually fortnightly, Ms Hine ceased giving the applicant support when she commenced maternity leave in July 2004. I find that when Ms Hine was later appointed to assist the applicant to develop programmes for Andrew Morris after his mother complained about the applicant in mid August 2004 this was the only additional support given to the applicant after he was formally advised that his performance was unsatisfactory on 18 August 2004.

112 I find that in the period prior to and during the period that the applicant was on PIP2 Mr Craig gave insufficient weight to the applicant's deteriorating mental state and the emotional difficulties he was experiencing and the impact that these issues had on the applicant's poor performance. I accept the applicant's evidence and I find that at the time Mr Craig advised the applicant in August 2004 that he considered that his performance was unsatisfactory the applicant had been and was experiencing significant personal and health problems which impacted on his ability to undertake his work and I find that Mr Craig was aware at this point in time that the applicant was struggling to cope in his role as a teacher due to a range of personal and health difficulties. It is my view that the applicant's act of self harm prior to visiting Ms Hine on 6 September 2004 is indicative of the applicant being very unwell at this time. Mr Craig gave evidence that he was aware that the applicant was distressed following the death of his grandfather and Mr Craig's notes of a meeting held with the applicant on 11 August 2004 state that the applicant told him that he felt like quitting because he was not coping with his work and doing his job (see Exhibit R1 p 99). In an email to the applicant's union representative dated 10 September 2004, a copy of which was sent to Mr Craig on 13 September 2004, the applicant confirmed that he had discussed his diagnosis of depression with Mr Craig, he had provided him with a letter confirming this diagnosis and he stated that he was advised by Mr Craig that he may have grounds for a compassionate transfer to a less stressful school on the basis that KSA is a high stress school for a beginning teacher. Mr Craig's notes, dated 13 September 2004, indicate that he was aware that the applicant had made an appointment at Derby Hospital and when the applicant and Mr Craig discussed the applicant's substandard performance on 30 September 2004 Mr Craig's notes of this meeting state that the applicant told him about his depression, that he was taking medication for this illness and the applicant told him he wanted to work at a school where he could work with more experienced teachers and with students (see Exhibit R1 p 101). It was not long after this meeting that Mr Craig met with the applicant on 18 October 2004 and identified four areas where the applicant had to improve his performance and the applicant was informed that he had twenty days within which to improve his performance in these areas. The applicant gave evidence, which I accept, that during PIP2 he was unable to function adequately as a teacher and it was not in dispute that the applicant had three days off on approved sick leave during PIP2 which confirms the applicant's poor health at the time. In the circumstances I find that there was sufficient evidence for Mr Craig to conclude that the poor state of the applicant's health would have made it extremely difficult for the applicant to improve his performance during PIP2 and would have gone some way to explain the applicant's lack of progress during PIP2.

113 I have concerns about the way in which Mr Craig managed the applicant's unsatisfactory performance during PIP2. PIP2, which was agreed between the applicant and the respondent and was effective during the period 18 October through to 12 November 2004, is as follows:

"Appendix 4.3

PERFORMANCE IMPROVEMENT PLAN

Employee	**Position title**	**School/Branch/District Office**	**Principal School Administrator/ Line Manager**	**Commencement date**
Robin Downes	Teacher	Kimberley School of the Air	Mr George Craig	01/10/2004
Identified dimensions of satisfactory performance	**Indicators of satisfactory performance**	**Strategies**	**Support available**	**Monitoring**
15th November	Program that includes SOS and CAR policy – appropriate planning and programming using CF and SOS	Experiment with a type of program writing	Principal, C.F, S.O.S	

Employee	Position title	School/Branch/District Office	Principal School Administrator/ Line Manager	Commencement date
Robin Downes	Teacher	Kimberley School of the Air	Mr George Craig	01/10/2004
Identified dimensions of satisfactory performance	**Indicators of satisfactory performance**	**Strategies**	**Support available**	**Monitoring**
(2) Planning and preparation 4	Appropriate materials for KSOTA students – modification of set materials or development of IEPs to meet the needs of students in class.	Collaborate with other staff to identify program needs	STL – Principal	15th November
(3) Assessment and reporting 1	Appropriate assessment cycle. Clear and concise monitoring tool and cycle link to the student outcome and lessons	Access assessment tools and plan	STL – principal and other staff	15th November
(4) Assessment and reporting 3	2 week turn around with appropriate feedback. Prompt assessment and return of student work following KSOTA guidelines.	Timetable into day making assessment time		15th November

(Exhibit R1/164)

The following letter highlighting five areas where the applicant's performance was deficient was sent to the applicant by Mr Craig on 22 November 2004 (formal parts omitted):

> "Having monitored and reviewed your performance over the period of 18 October 2004 to 12 November 2004, I wish to inform you that you have not demonstrated satisfactory performance.
>
> In particular, I consider your performance remains unsatisfactory in the following areas:
>
> Planning and Preparation:
>
> Assessing and Reporting on Student Outcomes;
>
> Teaching Skills:
>
> Professional Characteristics;
>
> Classroom Management Skills;
>
> I invite you to respond in writing to the outcomes of our review meeting held on 15 November 2004 within five days of the date of this letter.
>
> Following receipt of your response, or upon the expiry of the above period within which to respond, I intend to make a recommendation to the Director General that your performance be investigated in accordance with section 79(5) of the *Public Sector Management Act 1994*. I would also advise that the above determination may have some consequences upon your ongoing employment, as this decision may impact upon the probationary provisions of clause 12.3 of the *Government School Teachers' and School Administrators' Certified Agreement 2004*."

(Exhibit R1 p 165)

114 I find that Mr Craig treated the applicant unfairly when he only gave the applicant the opportunity to improve in two of the five areas he maintained the applicant's performance was unsatisfactory in, during the period of PIP2. The applicant was advised by Mr Craig on 19 August 2004 that he had not demonstrated satisfactory performance in five major areas - planning and preparation, assessing and reporting on student outcomes, teaching skills, professional characteristics and classroom management skills and PIP2 identifies four dimensions of satisfactory performance that the applicant was required to meet, two in relation to planning and preparation and assessment and reporting. Clearly these requirements do not cover the other three areas referred to by Mr Craig on 19 August 2004. Furthermore, when Mr Craig advised the applicant that he was referring the applicant's situation to the Director General for investigation in accordance with s79(5) of the PSM Act he referred to the applicant not performing in the five areas originally advised to the applicant in August 2004 (Exhibit R1 pp 152-153 and p 165).

115 I find that the provisions of PIP2 did not adequately provide for sufficient assistance and feedback to the applicant so that he could improve his performance within the required timeframe as required under the respondent's Managing Unsatisfactory and Substandard Performance Policy ("the Policy"). The Policy states that when a PIP is established it shall address identified areas of unsatisfactory performance and assist the employee to attain a satisfactory standard of performance (see Exhibit R1 p 191). Page 5 of the Policy states that a PIP is to allow for the person subject to the PIP to have his or her performance monitored in a structured way and this person is to be provided with advice and assistance during the duration of PIP and the Policy requires that an employee be given feedback about his or her progress during the PIP process (see Appendix 4.2 of the Policy which sets out a pro-forma document to assist in this regard). I find that no specific support was identified and made available to the applicant under PIP2 to assist him to attain the level of performance required of him and I find that the little assistance available to the applicant during PIP2 was ad hoc and did not form part of a co-ordinated process to assist the applicant to improve his performance. Even though Mr Craig stated that the professional development sessions attended by the applicant during the period of PIP2 would have assisted the applicant's performance I find that these sessions were of a general nature and did not specifically address the applicant's performance deficiencies. There was no evidence that the applicant participated in any formal review meetings or that specific feedback sessions were held with the applicant during PIP2 and Mr Craig could not recall having a meeting with the applicant after PIP2 was formulated and his notes do not indicate that any meeting was held with the applicant during the period of PIP2. I therefore find on the balance of probabilities that the applicant was not given any feedback about his progress and where his performance could improve during PIP2 which is a requirement under the Policy.

116 I find that the respondent did not give the applicant a sufficient opportunity to improve his performance during PIP 2 as it is my view that the significantly reduced timeframe of 15 days to complete PIP2 seriously compromised the applicant's capacity to make the improvements required of him. The Policy mandates that PIP is to run for a minimum of 20 working days and it states that if an employee has sick leave during the process, the process will be suspended and resume on the employee's return to work (see Exhibit R1 p 206). During PIP2 the applicant had three days off work due to illness and two additional days were spent by the applicant undertaking general professional development sessions not related to his performance deficiencies. In this instance the process was not suspended when the applicant had three days off during PIP2 on approved sick leave which in my view constitutes a significant breach of the Policy. Additionally, the applicant complained to Mr Craig about not having twenty days within which to improve his performance and this issue was not rectified by Mr Craig. Even though the applicant gave evidence that he would not have met the requirements on him in all areas if he was given the required 20 days to improve his performance I find that the applicant was entitled to be given the full 20 days to improve as provided for in the Policy and may well have improved in enough areas for Mr Craig to decide that the applicant could continue working with the respondent. In reaching this view I note that during PIP1 the applicant made improvements when he was given sufficient time and structured support and feedback.

117 The applicant was at the end of a two year probationary period when his performance was assessed as being unsatisfactory. Given my findings about the lack of specific professional development given to the applicant once he was advised of his performance difficulties and the lack of feedback given to the applicant about his performance deficiencies up to August 2004 and how his performance could have improved during PIP2 it is my view that the respondent abrogated its responsibilities to the applicant as a probationary employee. When an employee is on probation there is an onus on an employer to notify an employee of his or her performance deficiencies and ensure that the employee is given sufficient training to meet the required performance standards. I find that as the applicant was on probation during 2004 he was entitled to be given appropriate training and assistance to ensure that his performance met the required standards and it is my view that the respondent did not meet these requirements. I accept that Ms Te Amo and Ms Hine assisted the applicant early in 2004 however this support ceased in March and July 2004 respectively and even though the applicant was later given support by Ms Hine from August 2004 in relation to Andrew Morris and I accept that Mr Craig gave the applicant informal feedback about his progress during 2004 as part of the standard performance management process I find that these efforts were insufficient and did not adequately address the applicants' specific performance deficiencies.

118 I find that the applicant was treated unfairly when he was denied the opportunity to undertake the second review period which Mr Craig told the applicant would take place after PIP2 finished. Mr Craig's notes confirm what he stated to the applicant on 12 November 2004:

> "18/10/04
>
> Held meeting with Robin and identified 4 areas for his improvement plan (see attached document). Informed him he had 20 days and told him that the review would be on the 12 Nov.
>
> 12/11/04
>
> Held review meeting with Robin on his performance according to the improvement plan outlined on the 18/10. Robin had not met any of the areas that were outlined in the Improvement plan. There had been a limited effort in meeting planning using CF and OSF but was not satisfactory. There had been no effort in meeting the other three areas. Informed Robin that I needed to speak to the appropriate people and that a second period would be required and that I needed to see some significant improvement and achievement of the goals outlined. Informed Robin that he needed to be proactive and come to me and not just wait for the review meeting to discuss his achievement of the objectives."
>
> (Exhibit R1 p 101)

Mr Craig also made the following entry after this review meeting:

> "15/11/04
>
> Spoke to Robin about attending Pt Peron camp. Although I am willing to take him I discussed with him the requirements before I would take him as a staff member. Robin believed that he would have all the required work done before the leaving date. I also spoke to Robin about the camp being an opportunity to address some of the areas of concern in his sub-standard performance."
>
> (Exhibit R1 p 101)

I find that if the applicant was subject to a second review period after PIP2 his performance may have improved to a level which would have enabled him to remain employed by the respondent.

119 I find that the respondent treated the applicant unfairly when it denied him the opportunity to develop his skills by teaching in a mainstream setting after experiencing difficulties working in a school of the air setting which is also a school which is designated as difficult to staff. Mr Craig and Mr Rudolphy gave evidence supporting the applicant's claim that working at a school of the air presented difficulties for him as a graduate teacher which in my view is a significant departure from the normal requirements on a teacher working in a mainstream school. Furthermore, in November 2003 Mr Rudolphy considered that the applicant would benefit from the opportunity to teach in a mainstream school and that it would be desirable for the applicant to complete a second PIP period in a mainstream school setting yet this was not acted upon and Mr Craig stated that he would look into the possibility of the applicant completing PIP2 at a mainstream school but this did not eventuate. Mr Craig's notes as at the end of September 2004 refer to the applicant advising him that he wanted to go to a school where he could work with more experienced teachers and with students and Mr Craig advised the applicant that he would speak to the union, staffing and the SIDE director (see Exhibit R1 p 101). In the event the applicant remained at KSA and soon after this date the applicant was placed on PIP2 as at 18 October 2004. At a school of the air there is limited face to face contact with children, teachers are not required to teach students in groups and a major role for a teacher at a school of the air is to support another adult to assist in meeting the educational outcomes of students which presents as a different challenge to directly teaching a group of students. Whilst I accept that some graduate teachers find it easier to cope in this environment than others, it was clear that as a graduate teacher the applicant experienced substantial difficulties in meeting the unique requirements of working in a school of the air environment and in coping with living in an isolated community.

120 I reject the respondent's claim that Mr Barnes conducted an investigation into the applicant's performance pursuant to s79 of the PSM Act and I find that as the applicant's performance was not investigated as required under s79 of the PSM Act the applicant was denied procedural fairness. Mr Craig advised the applicant by letter dated 22 November 2004 that the applicant's performance was unsatisfactory and that he would be recommending to the Director General that the applicant's performance be investigated under s79 of the PSM Act. Page 11 of the Policy states that the Director General or a delegated officer has the responsibility to formally investigate areas of possible substandard performance and may form an opinion that an employee's performance is substandard and impose sanctions on an employee as a consequence of that opinion as required by s79 of the PSM Act and on receipt of a report about a staff member's persistent unsatisfactory performance the Director General will then examine the matter. The employee concerned is to be advised when an investigation takes place and under the Policy the respondent is required to appoint suitably qualified independent people to conduct investigations as required by Part 5 of the PSM Act and to interview the parties concerned. Even if Mr Barnes was a suitable person to conduct the investigation, which I do not concede, I find that the briefing note completed by Mr Barnes did not constitute an investigation as provided for under the Policy and the PSM Act and there was no formal investigation of the applicant's alleged substandard performance, nor were relevant persons, including the applicant interviewed. It is also my view that the review undertaken by Mr Joe Baskwell after the applicant was terminated does not constitute an appropriate investigation pursuant to s79(5) of the PSM Act and the Policy as this review focussed on the process used when terminating the applicant.

121 I find that Mr Barnes' review of the applicant's performance at the end of 2004 was contrary to the requirements of the Policy as this policy states that investigations will not be carried out by departmental employees who have had direct involvement in the process (see Exhibit R1/203). Both Mr Barnes and Mr Craig gave evidence that Mr Barnes had direct involvement in assisting in the management of the applicant's substandard performance whilst the applicant was still teaching at KSA and prior to Mr Barnes compiling his briefing note, as Mr Barnes liaised with Mr Craig and gave him advice about how to manage the applicant's performance. As Mr Barnes had prior involvement with Mr Craig and the applicant and was therefore not 'independent' in my view this amounts to a serious breach of the Policy.

122 I find that the briefing note generated by Mr Barnes, which recommends that the applicant be terminated, specifies conclusions that were not open to be made on the evidence before him and omits relevant considerations. Mr Barnes stated that extensive positive support documented over the 2004 school year had not resulted in any reported measurable improvement in the applicant's performance as a teacher yet there was no specific documentation contained in Exhibit R1 in support of this claim. I accept that there is reference in some of the documents to discussions the applicant had with Mr Craig about his performance and behaviour and about the applicant's interactions with Ms Te Amo and Ms Hine however, there is no evidence about which specific areas the applicant was expected to make measurable improvements in and whether or not the applicant's performance was assessed in these areas prior to the applicant commencing PIP2. Reference is made in Mr Barnes' report to the applicant's history of unsatisfactory performance in 2003 yet no reference is made to Mr Craig's decision not to put the applicant on PIP in Term 1, 2004, despite Mr Craig stating that he would review the applicant in week nine Term 1 to determine whether the applicant should be subject to the unsatisfactory performance process and Mr Barnes does not refer to performance improvements made by the applicant during PIP1 and Mr Rudolphy's concerns about the applicant gaining experience in a mainstream school setting. Mr Barnes refers to the applicant being depressed in 2004 and accessing the respondent's employee assistance programme and rehabilitation officer however he comments on this issue only in relation to how the applicant will react when he is to be advised of his termination and not by way of mitigation in relation to the applicant's performance. Furthermore no investigation was made by the respondent into the extent of the applicant's depression during 2004 and its impact on his performance.

123 There was no evidence that the range of possible sanctions as provided for under s79(3) of the PSM Act against the applicant was considered by the respondent following it forming an opinion that the applicant's performance was substandard and I also find that as there was no evidence that the applicant was given an opportunity to be heard on the issue of penalty he was denied natural justice. Even though this omission would not necessarily render the whole process invalid the applicant was entitled to be heard on the issue of penalty. I also observe that as the respondent employs a substantial proportion of teachers in Western Australia the penalty of dismissal precludes an employee from seeking work in a large number of schools in the State.

124 In all of the circumstances I find that the applicant was not given a fair go all round and was unfairly terminated (see *Undercliffe Nursing Home v Federated Miscellaneous Workers Union of Australia, Hospital Service and Miscellaneous WA Branch* (1985) 65 WAIG 385).

125 The applicant argues that if the Commission find that he has been unfairly dismissed then he should be reinstated.

126 The onus is on the respondent to establish that reinstatement or re-employment is impracticable (see *Quality Bakers of Australia Ltd v Goulding* (1995) 60 IR 327; *Gilmore v Cecil Bros & Ors* (1996) 76 WAIG 4434 and (1998) 78 WAIG 1099). The issue of reinstatement was recently considered in detail by the Full Bench in *Gonzalo Portilla v BHP Billiton Iron Ore Pty Ltd* (2005) 85 WAIG 3441. In this decision the Full Bench clarified the Commission's powers when dealing with employee's reinstatement. His Honour the President and Kenner C stated the following at page 3458:

> "The statute prescribes that the Commission may order the employer to reinstate the employee to the employee's former position on conditions at least as favourable as the conditions on which the employee was employed immediately before the dismissal (s23A(3) of *the Act*).
>
> The Commission also has the power, if it considers reinstatement impracticable, and only then, to order the employer to re-employ the employee in another position that the Commission considers the employee has available and is suitable. No such remedy is or was sought (s23A(4) of *the Act*). If and only if the Commission considers reinstatement or re-employment would be impracticable, may the Commission order an employer to pay to the employee an amount of compensation for loss or injury caused by the dismissal.
>
> "Impracticable" does not mean impossible, but means more than inconsistent or difficult. As Anderson J said (Franklyn J agreeing) in *FDR Pty Ltd and Another v Gilmore and Others* (1998) 78 WAIG 1099 (IAC) (see also *Gilmore and Another v Cecil Bros and Others* (1996) 76 WAIG 4434 at 4446 (FB)):-
>
> > "In ordinary language, the difference between "impossible" and "impracticable" is that the former is a definite concept, while the latter is not. As Veale J said in Jayne v National Coal Board [1963] 2 All ER 220 at 223-
> >
> > > "'Impracticability' is a conception different from that of 'impossibility'; the latter is absolute, the former introduces, at all events, some degree of reason and involves, at all events, some regard for practice."
> >
> > Here we are considering impracticability in the context of reinstatement to particular employment. In that context Wilcox J said in Nicolson v Heaven & Earth Gallery Pty Ltd (1994) 126 ALR 233 at 244-
> >
> > > "The word 'impracticable' requires and permits the court to take into account all the circumstances of the case, relating to both the employer and employee, and to evaluate the practicability of a reinstatement order in a commonsense way. If a reinstatement order is likely to impose unacceptable problems or embarrassments, or seriously affect productivity, or harmony within the employer's business, it may be 'impracticable' to order reinstatement, notwithstanding that the job remains available."
>
> One must have in mind in considering this issue that reinstatement is the primary remedy for harsh, oppressive or unfair dismissal."

and further at page 3459:

> "S23A(5) of *the Act* is the section which empowers the Full Bench in this case to make an order maintaining the continuity of Mr Portilla's employment (s23A(5)(a)), and/or confers the power to order the employer to pay the remuneration lost or likely to have been lost by the employee because of the dismissal (s23A(5)(b)).
>
> In our opinion, s23A(5)(a) and (b) orders are designed, unequivocally, to put an employee back in the position in which she or he would have been, had she or he not been unfairly dismissed, both by actual reinstatement or re-employment and/or by restoring the remuneration lost. Such an order is very different from an order to pay compensation for loss caused by an unfair dismissal. There is no requirement to mitigate loss where an order is made to the employer to pay to an employee "the remuneration lost or likely to have been lost by the employee because of the dismissal". Such an order is required by s23A(5)(b), in its actual words, to require the payment of the remuneration lost; that is, the actual remuneration lost or, alternatively, the remuneration which is likely to have been lost. There is no requirement to mitigate or take any act of mitigation into account in the section, unlike s23A(7) which expressly requires mitigation to be taken into account in awarding an amount of compensation (see also the *Workplace Relations Act* 1996 (Cth), s170CH(1), (2) and (4)).
>
> If we are wrong in that opinion, and the amount ordered to be paid under s23A(5)(b) of *the Act* constitutes compensation, then we would find fair compensation for loss during the time when Mr Portilla remained dismissed and was awaiting the outcome of proceedings was the whole amount of remuneration not paid to him (see the principles expressed in *Growers Market Butchers v Backman* (1999) 79 WAIG 1313 (FB)).
>
> …
>
> "In any event, if any mitigation were required, Mr Portilla did mitigate by working as he did, and there was no evidence that the steps taken to mitigate were not reasonable or that there was a failure to mitigate. It was never put to Mr Portilla that he had not "mitigated his loss", or that he was required to mitigate it, or that he had not taken reasonable steps to mitigate it. Mr Portilla, after all, was a man who was dismissed for unsafe conduct in the mining industry and was awaiting the outcome of an application for reinstatement following an alleged unfair dismissal. There could be no proper finding at first instance or by this Full Bench that he failed to mitigate. The matter of mitigation, in any event, was not raised as a live issue on this appeal, even when the Full Bench was required, as it has been required to do to embark on the exercise of making findings of its own. At first instance, too, no evidence was adduced by BHPB, and its onus was not discharged by BHPB (see *Growers Market Butchers v Backman* (FB) (op cit)).
>
> For those reasons, there is sufficient evidence to enable the Full Bench to make a finding under s49(6) of *the Act* and no other good reason which should prevent that occurring. We would order the reinstatement of Mr Portilla as and from 2 December 2004 and we would order that he be paid by his employer, BHPB, the whole of the remuneration, not merely wages, lost by him as a result of his unfair dismissal. We find, for those reasons, that the amount of lost remuneration should not and cannot be reduced by the amount which Mr Portilla earned whilst he was in other employment after he was unfairly dismissed."

127 I am satisfied that the applicant has mitigated his loss as he sought out and gained ongoing employment after his termination.

128 I have no evidence before me to suggest that it would be inappropriate to re-instate the applicant to his former position as a teacher with the respondent and I am satisfied on the evidence that the working relationship between the applicant and the respondent has not broken down such that an order for re-instatement or re-employment would be impracticable.

129 I am satisfied that the applicant is well enough to return to teaching however given the applicants' performance difficulties at KSA at the end of 2004 in particular it is my view the applicant should be re-instated to a mainstream school and have his probation extended for a duration of two terms as provided for in clause 12.3 of the Agreement. I find that this course of action is appropriate as it is my view that this period of time should be sufficient for the applicant to demonstrate whether or not he can meet the requirements of a permanent teacher.

130 As it is my view that the applicant should be re-instated to his former status with the respondent effective from the date of his termination, I will order that the respondent pay the applicant a sum of money being the remuneration that the applicant would have earned from the date of his dismissal on 17 December 2004 less any wages and other entitlements paid to the applicant during the period 17 December 2004 up to the date of his re-instatement. I will also order that the respondent re-instate the applicant's accrued entitlements from the date of his termination and that his service with the respondent be regarded as continuous for all purposes, including long service leave.

131 As the applicant requested the opportunity to make further submissions as to final orders if the Commission finds that he has been unfairly dismissed I will re-list this application to allow the parties the opportunity to make further submissions on the course of action that is most appropriate with respect to this applicant in line with my reasons for decision.

2006 WAIRC 04396

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ROBIN ADAM DOWNES
	APPLICANT
	-v-
	DIRECTOR GENERAL OF EDUCATION IN THE STATE OF WESTERN AUSTRALIA
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	TUESDAY, 23 MAY 2006
FILE NO/S	APPL 32 OF 2005
CITATION NO.	2006 WAIRC 04396

Result Order issued

Order

WHEREAS on 8 May 2006 the Commission issued Reasons for Decision and a Minute of Proposed Order in this matter; and

WHEREAS the Commission set down a hearing on 17 May 2006 for the parties to provide submissions in relation to the final orders to issue in this matter; and

WHEREAS at the hearing on 17 May 2006 the Commission was advised that the parties had discussed the final orders that should issue and the applicant undertook to provide a draft of the minute of proposed order to the Commission later that day; and

FURTHER the parties agreed that the applicant would recommence employment with the respondent no later than 24 July 2006; and

WHEREAS on 19 May 2006 the applicant provided an agreed minute of proposed order to the Commission;

NOW HAVING HEARD Mr S Millman of counsel on behalf of the applicant and Mr S Murphy and later Ms T Cole of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby:

1. DECLARES that the dismissal of Robin Adam Downes by the respondent was unfair.
2. ORDERS that Mr Downes be reinstated to the position of probationary primary school teacher with the respondent effective no later than 24 July 2006.
3. ORDERS that Mr Downes' probation be extended for a duration of two (2) terms from the date of reinstatement, as provided for in clause 12.3 of the *Government School Teachers' and School Administrators' Certified Agreement 2004*.
4. ORDERS that the respondent pay Mr Downes a sum of money as agreed between the parties being the remuneration that he would have earned from the date of his dismissal on 17 December 2004 less any wages and other entitlements paid to him during the period 17 December 2004 up to the date of his reinstatement.
5. ORDERS that the respondent reinstate Mr Downes' accrued entitlements as at 17 December 2004.
6. ORDERS that the respondent regard Mr Downes' service as continuous for all purposes, including long service leave.
7. ORDERS that there be liberty to apply in respect to order 4.

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

2006 WAIRC 04546

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LINDA BARBARA DUDEK
	APPLICANT
	-v-
	NO 1 RIVERSIDE QUAY, B.P. AUSTRALIA
	RESPONDENT
CORAM	COMMISSIONER S WOOD
HEARD	FRIDAY, 9 JUNE 2006
DELIVERED	WEDNESDAY, 14 JUNE 2006
FILE NO.	U 182 OF 2005
CITATION NO.	2006 WAIRC 04546

CatchWords	Termination of employment – Adjournment – insufficient pursuit of claim – Industrial Relations Act 1979
Result	Application dismissed for want of prosecution
Representation	
Applicant	No Appearance
Respondent	Mr N Ellery of Counsel

Reasons for Decision

1 This is an application pursuant to s.29(1)(b)(i) of the *Industrial Relations Act 1979* ("the Act"), filed in the Commission on 8 November 2005 by Linda Barbara Dudek alleging that she was unfairly dismissed by the respondent on 20 October 2005. The order dismissing the application for want of prosecution was issued on Friday, 9 June 2006; Reasons for Decision were to follow. I now publish those reasons.

2 The matter was programmed for a conciliation conference for the afternoon of 24 January 2006. On that day the applicant contacted the Commission to request that the conference be vacated. The applicant said she had to take her child to hospital. The conference was vacated. The Commission wrote to the applicant on 7 February 2006 and requested her availability for conference. This letter followed an unsuccessful attempt to contact the applicant by telephone. On 10 February 2006 the applicant provided her unavailable dates and new contact details. The matter was programmed for conference on 27 February 2006.

3 Conciliation was unavailing on that day and the matter was referred to hearing. The Commission wrote to the parties on 28 February 2006 requesting unavailable dates for hearing. Both parties responded and a notice was sent to the parties on 8 March 2006 advising them that a hearing would be convened on 12 April 2006. On 10 April 2006 the applicant faxed to the Commission a Statutory Declaration in the following terms:

> "Have only just received this notification today 10.04.06. I have contacted my Lawyer. Derek Schapper and neither he or myself are able to attend this hearing at such short notice"

4 The Commission ascertained that Mr Schapper was in fact not acting for the applicant. The Commission advised the applicant that the grounds provided were not sufficient and that she would be required to particularise in writing why the matter should be adjourned. The applicant then provided a further Statutory Declaration to the Commission on 11 April 2006 in the following terms:

> "Am writing to you to request an adjournment for my hearing on 12/4/06 for the following reasons when I arrived home on 10/4/06 at about 1.00pm I found a letter on my mat out the front of my house, when I discovered that it was my letter relating to my hearing and that it was in just 2 days I was both shocked and confused and immediately rang the appropriate people. Bruce Rock is 260km east of Perth with no regular public transport. I need time to make arrangements for someone to mind my two children. Organise a ride to Merredin to catch the train to Perth, then find overnite accommodation. As this has to be funded on my supporting parent allowance, which is due fortnightly because of the short notice I received it is impossible for me to go and I will not have legal representation as it is too short of notice for my legal representation. I do not believe I will receive a fair hearing as this can proceed without me."

5 The respondent through correspondence on 11 April 2006 opposed the applicant's request for an adjournment and advised that they were ready to proceed to hearing on 12 April 2006. The Commission contacted the parties on 11 April 2006 and advised that having considered the submissions of the parties the matter would be adjourned. The notice of listing was sent to the correct address on record. The Commission, however, considered that the applicant should be able to avail herself of counsel, and would be prejudiced otherwise. The question of prejudice was in the applicant's favour.

6 The applicant advised the Commission on 11 April 2006 as to her availability for hearing. A notice of listing was then forwarded to the parties on 20 April 2006 advising that the matter would be heard on 9 June 2006. By correspondence copied to the Commission of 30 May 2006 the respondent advised the applicant that should a request for adjournment be made they would oppose any such request.

7 On the morning of 9 June 2006 the applicant faxed to the Commission the following letter:

> "My name is Linda dudek and I am writing to you re my alleged unfair dismissal case. Due to a serve family crisis I am unable to attend the hearing set for the 9th June. My daughter has recently arrived home from Bentley Menatl health, and the supervision she needed while I was away is no longer available and I cannot leave her. I am sorry for the short notice, but this has just come to light. I am not asking or expecting you to adjourn the case, as I do not wish to

inconvenience you or the other party. I do understand that it must proceed, or could be dismissed. And due to my severe financial strain have not been able to obtain legal help so no one will be attending for me. Once again I apologize to you and to the other party for any inconvenience I've caused. Even without legal help I was still planning to come, but my situation has made it impossible. I will be faxing a copy of this letter to you and Corrs Chambers."

8 By email of the same date the respondent advised that they would be attending the hearing and requesting that the matter be dismissed. At hearing Mr Ellery on behalf of the respondent submitted that the matter should be dismissed by the Commission given the history of the matter and the conduct of the applicant in progressing her claim; that the claim had no merit and that if the matter were adjourned to another date the applicant may again request that the matter be adjourned.

9 Given that the applicant did not seek an adjournment and the history of the applicant's approach to the application I dismissed the application for want of prosecution. The applicant has clearly taken insufficient steps to pursue the claim. At almost every stage the applicant has belatedly provided a reason as to why she could not attend. I doubt greatly if the matter were adjourned again, that the applicant would in fact attend at hearing.

2006 WAIRC 04513

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LINDA BARBARA DUDEK
	APPLICANT
	-v-
	NO 1 RIVERSIDE QUAY, B.P. AUSTRALIA
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	FRIDAY, 9 JUNE 2006
FILE NO	U 182 OF 2005
CITATION NO.	2006 WAIRC 04513

Result	Application dismissed for want of prosecution
Representation	
Applicant	No appearance
Respondent	Mr N Ellery of Counsel

Order

WHEREAS this is an application pursuant to section 29(1)(b)(i) of the Industrial Relations Act 1979; and

WHEREAS the Commission sent to the parties a notice of hearing on 20 April 2006 advising that the matter would be heard on 9 June 2006; and

WHEREAS the applicant did not attend the hearing;

NOW THEREFORE having heard Mr N Ellery of Counsel on behalf of the respondent and there being no appearance on behalf of the applicant, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the application be and is hereby dismissed for want of prosecution.

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

2006 WAIRC 04435

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PETER WILLIAM GRIERSON
	APPLICANT
	-v-
	INTERNATIONAL EXPORTERS PTY LTD
	RESPONDENT
CORAM	SENIOR COMMISSIONER J F GREGOR
HEARD	THURSDAY, 13 OCTOBER 2005, MONDAY, 6 FEBRUARY 2006, THURSDAY, 23 MARCH 2006, WEDNESDAY, 19 APRIL 2006, THURSDAY, 20 APRIL 2006
DELIVERED	THURSDAY, 1 JUNE 2006
FILE NO.	APPL 371 OF 2005
CITATION NO.	2006 WAIRC 04435

CatchWords	Termination of employment – unfair dismissal – resignation – no jurisdiction - *Industrial Relations Act, 1979, s29*
Result	Dismissed for want of jurisdiction
Representation	
Applicant	Mr G. McCorry appeared for the Applicant
Respondent	Mr M. Darcy appeared for the Respondent

Reasons for Decision

1 Peter William Grierson (the Applicant) applied on 8th April 2005 for orders from the Commission for harsh, oppressive or unfair dismissal and what he says were outstanding benefits due to him under a contract of employment with International Exporters Pty Ltd (the Respondent) which came to an end in controversial circumstances on or about 30th March 2005. The Applicant had been employed as a General Manager and responsible for the day to day running of the Respondent's abattoir. The circumstances of this abattoir are interesting. It is situated approximately 20kms west of the Gingin town site in Western Australia about 15kms from the Great Northern Highway and about 10kms from Wanneroo Road. There is some housing close to the abattoir mostly on hobby farm blocks on which some commercial crops are grown. The abattoir itself was originally constructed to slaughter ostriches for export. Because it was specifically designed to process ostriches there were issues arising concerning weight bearing loads of the chain, difficulties with electrics and plumbing and drainage. It was to process other species was therefore problematic from the start.

2 The Applicant is a man of 35 years experience in supervisory and management senior roles in the meat industry. He has held general manager positions and at one stage was a Manager of Operations for the Western Australian Meat Commission at Robb's Jetty, when the operations at Robb's Jetty were an extremely large export abattoir.

3 Over his career in the meat industry the Applicant managed abattoirs not only at Robb's Jetty but at Katanning, Albany and Linley Valley. These were export abattoirs and the Applicant had a hands on role in the successful operations of those various sheds.

4 The Applicant knew Stephanie Tucun a representative and most likely Chief Executive of the Respondent for over twenty years. They had entered into business arrangements so that the Applicant had worked at Cowaramup Abattoir as a Manager for the Respondent's management company. It was through these contacts that the Respondent knew he was available when it decided it would tender for the purchase of the works at Gingin.

5 The Applicant says that early on in the discussions Stephanie Tucun offered him the opportunity to take some financial interest in the operation but he was unable to do so. Suffice to say for the purposes of these Reasons for Decision the abattoir was purchased and its management was given to a company known as Mansar of which Stephanie and her husband Tugomir Tucun are principals.

6 The Applicant was given the task of sourcing skilled people for the works. There was no accommodation close to the abattoir and so the Applicant set about staffing the works.

7 He was to be paid a substantial salary. In his evidence he said around $75,000 per year and he was to receive a company vehicle. He also says that at the initial stage at a board meeting at the plant he was also offered 10% of any profit. Initially he was disappointed by the vehicle that was supplied and there were also other parts of the contract which are not really relevant for these Reasons as it transpires, but they included mobile phone and that sort of thing.

8 In his evidence the Applicant talked about the shareholdings of the Respondent but again his comments are not relevant to be recited here.

9 The Applicant told the Commission of the difficulties he had in setting the abattoir up. At one time it employed around 30 people, but with a large turnover. When he started the skill level in the boning room were low and he had to work on upgrading the skills of employees. He gave evidence about how the boning room was set up and he talked about difficulties he had in complying with requirements of AQIS and AUSMEAT, two regularity bodies that enforce legislation covering the operation of abattoirs. The Applicant told of the very large number of hours that he put in. He talked too about discussions with Directors of the Respondent from South Africa. He was concerned too when parts of running from the accounting side of the business were taken away from him. He gave evidence about how he sought to upgrade the abattoirs by upgrading chillers, in short his evidence is indicative of a multitude of problems which apparently are expected when an abattoir is set up.

10 All of this from his point of view came to a head on 30th March 2005 when Stephanie Tucun and her husband arrived with another man at the plant. The Applicant was told the other man was an employee of a security company. The Applicant says he had no idea what was to happen thereafter. Mrs Tucun had not even indicated to him in a telephone call that morning she intended to come to the plant or to Western Australia. In the end he was told that his services were effectively terminated as of then. The security officer searched his bag and he was asked to pack all of his personal things and clean out his desk.

11 His evidence was he was bereft about this, in fact he said he was 'pissed off'. He had confronted Stephanie Tucun and told her that he did not believe what she had done and it was an 'indecent thing' to do. There had been no notification of dissatisfaction from either the Tucun's or any of the other Board members. As late as two weeks before a Director was on site and had complimented him about getting the plant up and achieving the US license.

12 The Applicant was very upset, he rang his wife. He refused an offer from the Respondent for transport. He told his wife he had been sacked and she should come and pick him up. He rang the veterinary officer, Dr James Godwin, who gave evidence in these proceedings and thanked him for his support. In that conversation he talked about how the two men did not always see eye to eye because he was pushing production and Dr Godwin conceded that was his job. He checked with the shed fitter to make sure all the systems were ready to go the next morning, telling the fitter, Ian Wood, that he had been sacked. He claimed that Stephanie Tucun said to him "We didn't want to do it the other Directors [told us] that [we] have to terminate [you]". He said Stephanie Tucun then told him she would diarise her reasons in bullet points. These included failure to meet production

targets, the high cost of production and an inability to get on with AQIS personnel. The Applicant says none of these charges had ever been raised with him.

13 The Applicant's wife arrived and he removed himself from the site. He suffered the indignity of having the security officer search his bag. He said he had a walk around with the security officer who told him that he heard the Tucuns planning the meeting when he travelled with them in a car to the meat works. The Applicant concluded from that that the Tucun's were discussing the situation. The Applicant told the Commission that the security officer had said to him words to the effect "don't get upset get even". He also told the Applicant that 'someone' was coming up the following day to take over. This turned out to be Brian Patrick McAuliffe who gave evidence for the Applicant in these proceedings.

14 It is relevant at this time to recite a part of Mr McAuliffe's evidence. He told the Commission that he received a contact from Dr James Godwin the veterinary officer at the plant telling him that Stephanie Tucun would like to talk to him about his experience in the meat industry. He had only recently resigned from AQIS and Dr Godwin was aware of that. Dr Godwin thought Mr McAuliffe might come available and take on some work in the meat industry. Mr McAuliffe spoke to Stephanie Tucun but at that stage she did not offer him the position of General Manager in the plant. Mr McAuliffe was not clear about the sequence of events afterwards but remembered that some eight weeks later Mrs Tucun contacted him again and he was offered a job to manage the plant. He was aware at the time that Mr Grierson was the General Manager. His evidence in chief was that he saw the two jobs as possibly being distinct from each other. On 29th March 2005 he was asked to start on 30th March 2005. He found after he arrived at the plant that Mr Grierson had been removed the day before. He remembered Mr Grierson telling him that he had been dismissed. In cross examination he also gave evidence about the loss of licence at the plant. That evidence does not need to be summarised in detail.

15 In a nut shell the Applicant says that he was dismissed by surprise, he had no idea it was on the horizon.

16 There was evidence given on his behalf by Ms Nicole Williams. She told the Commission that she had heard that the Applicant had parted company with the Respondent but in cross examination she admitted she did not hear the detail of that conversation or at least her memory was unclear about that. It appears the source of her information was initially in a communication with either the Applicant or Mr Tugomir Tucun.

17 The Commission heard evidence on behalf of the Respondent from Mrs Stephanie Tucun. There was also evidence from Mr Tugomir Tucun, also a director the Respondent. The on-plant veterinary officer Dr James Augustus Godwin gave evidence as did Mr George Nelson Chalklen a senior meat inspector at the Gingin Shire.

18 It should be noted at this time that there was an intervention in the proceedings by Mr N. Douglas, of Counsel, who appeared for witnesses Godwin and Chalklen. The grounds for the intervention were that the Applicant's agent had raised a number of issues which indicated there were legal risks associated with Dr Godwin and Mr Chalklen giving evidence in the proceedings. Mr Douglas was allowed intervention in the matter. However the Applicant's advocate never confronted the witnesses as he foreshadowed he would and there was no need for Mr Douglas to make any submissions.

19 Stephan Tucun gave extensive evidence in chief and was subject to a detailed cross examination by Mr McCorry who appeared for the Applicant. I will say more about that cross examination later in this matter. Without summarising what she said in precise detail the position of the Respondent as evidenced in Mrs Tucun's statements to the Commission are as follows. A number of problems occurred at the abattoir and they needed clarification. Enquiries were regularly made with the Applicant and these enquiries had not been answered to her satisfaction. Mrs Tucun made it her business to investigate with persons associated with the business what was happening at the plant. These enquiries included taking industrial relations advice from an industrial agent about how she could address the issues. Part of that advice was for her to create a list of matters she wished to raise with the Applicant and to keep a contemporaneous record of those dealings. The sole purpose of the visit was to address the issues with the Applicant and get him back on track; to lighten the administration and to enhance relationships with the regulators AQIS and AUSMEAT. To assist him to do this she approached Mr McAuliffe and offered him a position as a manager at the abattoir. This was in an attempt to take the load off the Applicant in a genuine attempt to assist him. The Applicant produced a diary in which many of her conversations leading up to this time were noted. In particular were contemporaneous notes of her conversations with Dr James Godwin. Mrs Tucun's evidence was that her intention for the meeting, which she conceded was by surprise with the Applicant, was to make him aware of the problems that the Respondent had with his performance and try and help him to address the issues; which need not be detailed here but which were very much alive as far as the Respondent was concerned. These were matters which were at point in the various conversations they had with persons associated with the abattoirs and with the Applicant himself and included the purchase of plant and equipment, the handling of sheep skins and the relationship with the regulatory authorities, to name but a few.

20 However from Mrs Tucun's point of view the meeting, during which she was accompanied by her husband Mr Tucun did not proceed the way that she had anticipated. The Applicant refused to discuss the matters, became angry and made adverse comments concerning the Respondent and the Tucuns themselves and declared that he would leave immediately. On hearing this and in accordance with the industrial advice she had been given she offered him one month's pay. It is clear from her evidence that Mrs Tucun had known the Applicant for many years and had a great respect for him. It is conceded that he was approached as a person who could drive the Gingin abattoir and the Respondent wanted to take him on as an investor. However that did not come to pass. The Respondent offered him employment as a General Manager, they later became aware of problems, talked to him about those and did not get the response they needed. There were particular problems with the preparation for transport of some sheep skins, the explanation for the Applicant about those problems were unsatisfactory. On top of this and more important there appeared to be a whole range of problems that were being raised by government agencies which needed to be addressed. They tried to address them but the Applicant was dismissive.

21 Tugomir Tucun also gave evidence. In company with Stephanie Tucun he attended the meeting with the Applicant. In general his future was heavily involved in the accounting side of the business. Later he relinquished the monthly reporting but continued with the general accounting of the business and still does. He had many discussions with the Applicant over accounting and accounts payable, budgeting and setting up timetables for implementation for various projects. He had to deal with a show cause notice from the Regulators why the provisional export license should not be taken away. There was an unsatisfactory response from the Applicant and the matter was resolved by the Respondent in direct communication with AUSMEAT. He recognised the Applicant as a person whose experience indicated he would be a competent General Manager.

The Applicant's job was to make the plant operational because it had not operated for some months, so he had to employ staff and implement all procedures to conform with regulations.

22 Mr Tucun denied that the Applicant was sacked from operating the accounting functions. What happened was that the monthly reporting was taken over by someone else as he had problems producing reports on a timely basis because of other business that he had. He still is involved in the business even now. Of the events concerning the termination he said that the Respondent took advice from their industrial advisors about how to deal with the situation with the Applicant. When the Respondent's officers arrived at the plant they asked the Applicant to go to the office. They could not go through the issues they wanted to raise with the Applicant because he was very angry. He kept asking them what is 'the bottom line' and kept saying that even though the Directors wished to discuss the issues with him. He then became very bitter about the company, said it was 'a lemon' and was not going to make a profit and that he would probably get the blame for it, but then he said he was going to leave. He was given a month's pay. He asked to retain the company vehicle for a month which was refused. Sometime later he came back and he wanted to go through the various points that the Respondent had attempted to raise with him earlier. Then according to Mr Tucun he tried to negotiate a payment above and beyond the one month that had been offered to him. According to Mr Tucun he had tried to negotiate some more favourable settlement having thought his position through.

23 Before I go to the assessment of witness evidence there is a particular issue to which I draw attention. This is Applicant's advocate's caution to witnesses Godwin and Chalklen that in giving their evidence they may face action under various pieces of legislation at least in the 'legal' opinion of the advocate. The two witnesses then engaged Counsel to protect their interests yet when they eventually gave evidence not one word was said in relation to the foreshadowed potential 'breaches' of these Acts which mainly related to their employment but also potential criminal conduct. The Commission is extremely concerned about this conduct because in one view it could be seen as an attempt to intimidate the witnesses or at least making them cautious about what they might say in evidence and so deprive the Commission of access to the full story. Something of similar effect occurred during the cross examination of Stephanie Tucun. In adversary proceedings it is accepted that cross examination can be incisive and vigorous but when it borders on hectoring and insulting as it did in these proceedings is something to be discouraged.

24 I now deal with the witness evidence. The evidence of the Applicant himself is important. There is no doubt in my mind that he honestly believes all of what he said to the Commission. He believed in his version of the events. It is on cross examination clear that he is not a man who suffers fools gladly and is a strong and forceful character. His background in the meat industry which is a difficult industry gives testament to the type of character he is. It is obvious that if a Respondent had an operation which needed to be driven along to be successful that the Applicant was the ideal person to undertake such an activity. The Applicant is a credible witness and I so find.

25 The evidence called on his behalf from Mr McAuliffe is also evidence which should be given weight; in fact, it is useful in assisting the Commission to determine what has happened in this matter. His evidence in that sense goes more to supporting the contentions of the Respondent than the Applicant. The evidence of Nicole Williams on behalf of the Applicant is credible but the reality is she adds very little weight to the Applicant's version of events because she admits that she cannot recall or might not even know the precise words used by the Respondent at the time of the dismissal.

26 The main witness on behalf of the Respondent was Stephanie Tucun. As I have indicated earlier Mrs Tucun gave clear and concise evidence which was subject to vigorous attack by the Applicant's advocate. Much of what Mrs Tucun says is corroborated by the contemporaneous notes in her diary which I find should be given weight. Mrs Tucun's version of events survived that attack. I find that Stephanie Tucun is a witness of truth and her evidence is credible. Tugomir Tucun was less positive in his evidence. He is nevertheless credible. Dr Godwin and Mr Chalklen both gave evidence there is nothing to indicate their evidence is not credible.

27 Where the Commission finds that all the witnesses are prima facie credible it must look to corroboration or other evidence which might help it distil the events in order to decide on the balance of probabilities what happened.

Analysis and Conclusions

28 I first add some further comments concerning the Applicant. He is an experienced man in the meat industry and has held positions in the most senior ranks of management in the meat industry in Western Australia. It is notorious that the meat industry in this State has suffered difficult economic circumstances over the past decade. Particularly so in the export sector where the Applicant has much experience.

29 It is therefore not surprising that when the Respondent faced a problematic abattoir which was in reality designed for another purpose that they would go to the Applicant with whom they had a long term relationship. They knew when they engaged him they would get someone who would drive the business hard.

30 That the Applicant did drive the business hard is eloquently reported in the testimony of Dr Godwin and Mr Chalklen. Particularly the evidence of Dr Godwin. Both Dr Godwin and Mr Chalklen admit that there is a natural tension between the management of the operators of meat works and the Regulators and that this is a tension which is prevalent through the meat industry. This particular abattoir was not very much different. So that the Applicant may have had words with, arguments, disagreements or differences of opinion with the Regulators is not surprising because that happens in the meat industry generally. When a person of the character of the Applicant, who it appears does not readily take a backward step, this had potential to happen at the Respondent's Gingin abattoir.

31 I accept the evidence of Stephanie and Tugomir Tucan that there had been difficulties with the accounting and general management of the abattoir and that they had in various conversations raised those issues with the Applicant. It is available to draw the conclusion on the evidence that the Respondent, while uncomfortable that some of the accounting and management side of the abattoir, nevertheless needed a person of the Applicant's character, skill and experience to continue to drive the operation. It was not in their interest to replace him with someone else who did not have those particular character traits and therefore on the balance of probabilities their story about the engagement of Mr McAuliffe to in effect soften the dealings with Regulators carries the ring of truth. Mr McAuliffe was first approached some eight weeks before 30th March 2005. The final approach was on the day before the Tucun's came to the abattoir to speak with the Applicant but even though that is in close proximity to the time to the so called dismissal does not detract from the probability that Mr McAuliffe's engagement was to

provide backup management to deal with what had become strained relationships with the Regulators. Mr McAuliffe would have been the ideal person to do this because of his experience while employed by the Regulator. Therefore the story that he was employed for that purpose is one on which the balance of probabilities should be accepted.

32 The Respondent says that they took advice as to how they should deal with the Applicant. His character and approach was well known to them as it was apparently to their industrial advisor. The Applicant is not a man who would take such an approach with equanimity. He is a strong man and when confronted with someone telling him they did not like his method of management predictably could have a strong reaction. In that context the engagement of the security officer to go with the Tucun's to the works is one which can be understood. Whether it was sensible is a matter of industrial relations or human resources management is another question but not one which the Commission needs to answer in this Decision. The Applicant's advocate says that the presence of a security officer obviously meant that his client was to be dismissed. It is open to find that that is not the case in the circumstances I have described above.

33 On the balance of probabilities, having carefully considered the evidence, the Commission concludes that the Respondent decided that it had to change the management structure of its Gingin operations. That was because of a whole series of events which had occurred, in particular a more than usually strained relationship with the Regulators. To ameliorate that strain they decided that they would remove interface from the work done by the Applicant and have it done by someone else. Hence they approached Mr McAuliffe some weeks before they moved to raise the issue with the Applicant.

34 On 30th March 2005 they went to the plant, after having received advice as to how they ought to conduct themselves with the Applicant. It is open to conclude they took that advice because they anticipated that the Applicant would not take kindly to what they were going to do and that was to remove from him some of his work and give it to someone else. It is open to conclude that when they tried to raise this with the Applicant that his response was that he thought they were trying to dismiss him. The evidence of Stephanie and Tugomir Tucun abut what occurred in the meeting should be accepted on the balance of probabilities. Nothing that happened later, for instance the memory of Nicole Williams indicates that the Applicant was dismissed. There is sometimes a very fine line in these matters and one can appreciate the Applicant being extremely distressed about what happened and having concluded in his own mind that he had been let go as it were, and using words to that effect to other people they spoke to at the time. That he knew he was going to leave is apparent from the fact that he returned to try and negotiate a better deal for himself after Stephanie Tucun had offered him a month's pay after he had resigned.

35 The matters which led to the failure of the employment relationship between these parties came about in circumstances they would both probably regret now and would rather not have occurred in the first place. The Applicant clearly put in a huge effort on behalf of the Respondent to get their plant up and running but it was an effort which was characterised by the way he normally works that is a strong, powerful, aggressive management style. If the Respondent had handled the matter a different way maybe the issue would not have lead to the events which occurred on 30th March 2005 and now find their way into this Commission.

36 In all of the circumstances by fine balance the Commission has decided that there was not a termination in this matter and therefore the Applicant has not the authority to refer this matter to the Commission. Because in that there are two conditions precedent for s.29 to operate and that is that there be an employer and there be a dismissal. There was no dismissal in this case and for that reason the application will be dismissed for want of jurisdiction.

2006 WAIRC 04436

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PETER WILLIAM GRIERSON
	APPLICANT
	-v-
	INTERNATIONAL EXPORTERS PTY LTD
	RESPONDENT
CORAM	SENIOR COMMISSIONER J F GREGOR
DATE	THURSDAY, 1 JUNE 2006
FILE NO/S	APPL 371 OF 2005
CITATION NO.	2006 WAIRC 04436

Result	Dismissed for want of jurisdiction

Order

HAVING heard Mr G. McCorry who appeared on behalf of the Applicant and Mr M. Darcy who appeared on behalf of the Respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders:

THAT the application, and is hereby dismissed for want of jurisdiction.

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

2006 WAIRC 04433

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARIA HALL
	APPLICANT
	-v-
	NAR NOMINEES PTY LTD
	RESPONDENT
CORAM	SENIOR COMMISSIONER J F GREGOR
HEARD	MONDAY, 15 MAY 2006
DELIVERED	THURSDAY, 1 JUNE 2006
FILE NO.	B 205 OF 2005
CITATION NO.	2006 WAIRC 04433

CatchWords	Termination of employment – contractual benefits – contract not proved - *Industrial Relations Act, 1979, s.29(1)(b)(ii)*
Result	Dismissed
Representation	
Applicant	Ms M. Hall appeared on her own behalf
Respondent	Mr I. Gibson appeared for the Respondent

Reasons for Decision

(Given extempore as edited by the Commission)

1 This application is filed against Ian Gibson of Beaumont's Chartered Accounts. The real employer is Nar Nominees Pty Ltd and I amend the name of the Respondent accordingly and the file will now show that the action was against Nar Nominees Pty Ltd (the Respondent). The application was filed on 17th November 2005 by Maria Hall.

2 Maria Hall is an accountant; she commenced employment in 2003, although there is some debate that, it may have been 2002. Little turns on the start date because this is a claim for contractual benefits. The Applicant says that she finished employment on 13th July 2005. However, she recanted that in evidence and said she finished sometime in November 2005. There is a debate between the parties about what happened in that period between end July 2005 and in August and September 2005. I will deal with that debate later in these Reasons for Decision.

3 What the Applicant says is that she had a discussion with Ian Gibson, the Principal of the Respondent, after which she entered into some sort of employment relationship with the Respondent. Whether that employment relationship was truly one of employer/employee I do not need to determine. On the face of the arrangement it appears as though it may have been. She was categorised by Mr Gibson as being a contractor but on the information before the Commission and on the tests in *Philip Thomas Squirrell v Bibra Lakes Adventure World Pty Limited t/a Adventure World (1984)* 64 WAIG 1834 more likely than not there was an employment relationship such that would attract the jurisdiction of the Commission set out in s.29(1)(b)(ii) of the *Industrial Relations Act, 1979* (the Act).

4 The Applicant says that she had discussions when she entered into the employment relationship by agreement between her and Mr Gibson that the Respondent would pay professional training costs such as the cost during CPA programs, examination fees and course fees and that in addition to her annual leave she would be able to take study leave and be paid for that. The Applicant says that she sat exams in 2003 and 2004 which she passed. Those exams entailed her in payment of costs such as subscription fees and the CPA program units and course materials and workshops. She says in total this amounted to $4,682.56. She also says that she took study break for the two exams in October/November 2003 and in April/May 2004 and that the total value to her of the leave which she took during that time was the sum of $4,680.00, the equivalent of 6 weeks' pay. The Applicant says that she raised these issues during the course of her employment with the Respondent and had left a claim in writing sometime in 2003 on his desk. From that document, which was headed "CPA Courses" (Exhibit G2), he should have known that was a claim which flowed from the arrangement they had made between them.

5 It is passing strange that an arrangement such as this nature was not committed to writing. Bear in mind the persons involved in this dispute are both professionals in the accounting business and one would have thought that it would follow almost as night follows day that they reduce those arrangements to writing if in fact they were made. However, there was no such writing produced, nor has the Commission before it anything relating to the claims that the Applicant may have made about her employment conditions other than a memo she wrote to Mr Gibson in June 2005. This document is instructive. In a document headed "Request for Pay Slip", she posed to Mr Gibson a number of questions which went to the terms and conditions fo her employment. These were:

How much is the gross amount paid?

How much tax is deducted from the gross amount?

What is the hourly rate of pay?

How many hours have I been paid?

Is it a contract rate or a part-time rate or a combination of both?

What is the pay period paid up to?

Am I entitled to sick leave or public holidays?

Have I been paid sick leave and public holidays?

Am I entitled to superannuation?

Am I covered by Workers' Compensation?

6 Each of those questions was answered and the answers were attached to the memo. The Respondent set out the rate of pay, the end time of the pay period, that the Applicant was entitled to pro rata sick leave, holidays and public leave, that superannuation was payable and she was covered by Workers' Compensation.

7 The significance of the document for the Commission is that it does not mention these rather fundamental and large claims that the Applicant now makes. And I will come back to that later.

8 Mr Gibson gave evidence that he never made any of the arrangements that the Applicant claims. He raised issues about trying to contact her during a period when she was absent from work during July, August and September 2005. It has to be said she rather hotly denied inferences which one might draw from the allegation that she was absent during that period. Mr Gibson says that during that period he tried and his other staff tried to contact the Applicant to no avail. The reason they were doing so is that she had files in her possession and they were time expired on ATO requirements and he wanted to have them back. He says that he made no arrangement initially or at any other time and that when the Applicant left her claim on his desk sometime in 2003 he merely put it on her personnel file. He did not action it in any other way because he was of the view that there was no entitlement. He says the Commission should take into account that in the following 2½ years of employment the Applicant never again mentioned the matter, at least according to him. According to the Applicant she did. And hence lies the dispute between the parties.

9 This application is an application filed under s.29(1)(b)(ii) of the Act. An employee can refer a matter to the Commission that she has not been allowed by her employer a benefit, not being a benefit under an award or order to which she is entitled under her contract of employment.

10 I find that the Applicant was an employee so she has standing to make the application. The question is whether she has not been allowed a benefit under her contract of employment, not being a benefit under an award or order of the Commission.

11 The Full Bench in *Perth Finishing College Pty Ltd v Susan Watts (1989)* 69 WAIG 2307 and in *Reginald Simons v Business Computers International Pty Ltd (1985)* 65 WAIG 2039 has set out the tests to be applied and the steps to be followed by the Commission in determining a matter such as this. According to *Perth Finishing College* the Commission is acting judicially when it deals with a claim under s.29(1)(b)(ii) of the Act. This means the Commission is to make an inquiry to discover the terms of any contract between the parties and once it has done so, if it discovers those terms have not been honoured it can give effect to the contract by order.

12 Because the action is a judicial one the Commission's functions under s.26 of the Act where it is required to act in equity, good conscience and substantial merit are not to be applied in the formation of the decision as to whether a contract was made or not. They may be applied if for instance the Commission discovers there is a contract but the Applicant comes with unclean hands or there is some other impediment which should act so that the Commission should apply the equity and good conscience test. And particularly too, the Commission is not considering the fairness or otherwise of the contract or pretended contract or of the dealings between the parties. Whether one party has been fair or not to the other is not a matter which should weigh upon the Commission's mind in determining whether or not a contract was formed and the terms of any such contract.

13 Clearly the Commission cannot just guess that a contract has been formed. The Applicant has an obligation to establish that there was a contract of employment on the balance of probabilities.

14 The Commission has had the benefit of hearing evidence from the Applicant in person and Mr Gibson on behalf of the Respondent. I take into account that English is not the Applicant's first language and I should ensure that when assessing the standard of her evidence I bear that in mind and I do and have.

15 The Applicant, it must be said, was argumentative in her evidence giving, she was evasive under cross-examination by Mr Gibson and her evasiveness made it difficult for the Commission to carry out the assessment process of the credit of her evidence. The evidence turns entirely around her memory of the events. She offers very little in the way of documentary evidence. The only document she offers is in Exhibit H2 which is the request for her pay slip, specifically excludes the dispute the subject of this application. One would have thought if this was a burning issue with her that she would have included the claims in a list of questions she asked, particularly seeing that the other piece of documentary evidence, that is the claim she made in 2003 and is Exhibit G2, had been made upon Mr Gibson prior to this document being constructed by her. The document might be of use to her in other proceedings concerning payment of holiday pay and other things because it seems to say that she was entitled to pro rata leave of some sort. However, that is not a matter I can inquire into today. That seems to be matter more for the Industrial Magistrate than for this Commission. But significantly for this case the only documentary evidence that she produces does not support her verbal evidence.

16 The general standard of her evidence too is diminished because of the argumentative and somewhat confusing answers that she gave. I find that where the evidence of the Applicant differs from the evidence of the Respondent that the Commission should accept the evidence of the Respondent.

17 On the tests established in *Perth Finishing College* (ibid) the Applicant has not established that there was a contract of the form she claimed and therefore the application will be dismissed.

18 I finally add that Mr Gibson complained that the Applicant waited four months to lodge this claim. It is relevant to note she could have waited six years and still lodged the claim and she would be entitled to have the claim heard in the same way as it has been heard today.

19 Orders will issue to give effect of the Commission's decision.

2006 WAIRC 04434

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARIA HALL
	APPLICANT
	-v-
	NAR NOMINEES PTY LTD
	RESPONDENT
CORAM	SENIOR COMMISSIONER J F GREGOR
DATE	THURSDAY, 1 JUNE 2006
FILE NO	B 205 OF 2005
CITATION NO.	2006 WAIRC 04434

Result	Dismissed

Order

HAVING heard Mr M. Hall who appeared on her own behalf and Mr I. Gibson who appeared on behalf of the Respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders:

THAT the application, be and is hereby dismissed.

[L.S.]

(Sgd.) J F GREGOR,
Senior Commissioner.

2006 WAIRC 04557

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ANDREW HERZFELD
	APPLICANT
	-v-
	ANTHONY & SONS PTY LTD T/A OCEANIC CRUISES
	RESPONDENT
CORAM	SENIOR COMMISSIONER J F GREGOR
HEARD	WEDNESDAY, 20 JULY 2005, TUESDAY, 14 FEBRUARY 2006
DELIVERED	TUESDAY, 13 JUNE 2006
FILE NO.	APPL 206 OF 2005
CITATION NO.	2006 WAIRC 04557

CatchWords	Termination of employment – unfair dismissal – whether casual employee – compensation found - *Industrial Relations Act, 1979 s.29*
Result	Unfairly dismissed. Compensation Awarded
Representation	
Applicant	Mr G. Stubbs, of Counsel, appeared for the Applicant
Respondent	Mr D. Johnston appeared for the Respondent

Reasons for Decision

Introduction

1 This application was filed by Andrew Timothy Herzfeld (the Applicant) on 23rd February 2005. The dispute the subject to a conference before Deputy Registrar Mullins on 4th May 2005 at which time there was discussion between the Applicant and Anthony & Sons Pty Ltd t/a Oceanic Cruises (the Respondent). That discussion did not lead to a resolution of the matter. This case is one of series of cases involving this Respondent and ex employees. For instance *Peter Fowler v Anthony & Sons Pty Ltd t/a Oceanic Cruises 2004 84 WAIG 3855* which was subject to appeal to the Full Bench in *Anthony & Sons Pty Ltd t/a Oceanic Cruises v Peter Fowler 2005 85 WAIG 199*. There were also proceedings in *Henry Michael Doyle v Anthony & Sons Pty Ltd t/a Oceanic Cruises 2005 86 WAIG 123* and again *Edward Izydorski v Anthony & Sons Pty Ltd t/a Oceanic Cruises 2005 86 WAIG 929*.

The Factual Matrix

2 Each of these cases apart from the last contains similar types of facts. They all involve persons who the Respondent purports to be casual employees who were employed for a considerable period of time. In *Fowler's Case* Smith C encapsulated the employment relationship in her findings as follows:

> "In this matter the Applicant worked a substantial number of hours each week from 22 September 2002 to 18 May 2004. His hours varied between 20 hours per week on one occasion to 44 hours per week on another occasion. On average, the Applicant usually worked over 30 hours per week. Despite a submission on behalf of the Respondent to the contrary, it cannot be disputed that there was a reasonable mutual expectation of continuity of employment. I am

satisfied that the Applicant had a continuing contract of service, even though it was a contract, which could be described as a "casual" contract of employment which did not entitle the Applicant to be paid sick or annual leave. In my view, by failing to roster the Applicant for work and not allowing him to work on 19 May 2004, (which was the last day he was rostered to work), constituted a dismissal."

3 In this case the Applicant who holds a Masters Class 5 Skippers ticket endorsed with a Marine Engineer Engine Driver Grade 3 ticket was employed for a period of 22 months. Apart from the different length of service as the following paragraph shows the employment relationship was all but identical.

4 How the Respondent ran its business is that it would issue rosters each week. The Applicant in this case says he worked up to 65 hours; this was regular till sometime in November 2004. He worked regularly up to 7 days per week and sometimes up to 18 to 20 hours a day. He was often called in on short notice to fill gaps in the roster and worked extra hours during busy tourist periods. Over that period of his employment he worked regular hours or at least consistent hours upon a roster prepared in advance. He had to tell the Respondent when he was unavailable.

5 It is common ground that this relationship travelled along quite comfortably until November 2005 when there was industrial action at the Respondent's business. That industrial action became the subject of an Interim Order issued by Wood C in *Anthony & Sons Pty Ltd t/as Oceanic Cruises v The Australian Maritime Officers Union – Western Area Union of Employees, Seamen's Union of Australia, West Australian Branch, Australian Institution of Marine and Power Engineers, Western Australian Union of Workers 2004 84 WAIG 3876* (the Interim Order). It is upon this Interim Order that the Respondent erects at least part of its defence concerning the categorisation of the contract of employment of the Applicant. This is because the Interim Order purports to prescribe that employees "are to be treated as casual employees". It is upon that suggestion that the Respondent says the Interim Order was never retired or cancelled that they are entitled to regard the relationship with the Applicant as a casual one.

6 The Commission was taken to the history of the relationship after the industrial action in some detail by the Applicant in his evidence. He says there were 8 incidents which resulted in ultimately what he has described as a breakdown in the relationship between him and the Respondent. As I have mentioned earlier prior to 26th November 2004 the Applicant had considered his relationship with the management of the Respondent was good and in particular with its Manager Mr Tony DiLatte. The series of incidents I identify in brief following.

7 On Friday 26th November 2004 there was an incident relating to the amount of diesel in the bilge of a vessel. There was an attempt by the Applicant to off-load the diesel in the bilge into drums. There were not enough drums and the Applicant alleges the Respondent started to pump the bilge into the river. The second incident involved the removal of a bain marie from another vessel, this lead to an argument between the Applicant and Tony DiLatte. The Applicant claimed that he used his prerogative as skipper to remove the bain marie where as Mr DiLatte said the removal caused a dangerous situation to passengers. Mr DiLatte issued a written notice [warning] and claimed that after he did so the Applicant abused him.

8 There was a further incident in December 2004 when the Applicant had difficulty manoeuvring a vessel which was operating on one engine. He was told to use another vessel as a replacement but it could not be used. The Applicant said he was later abused over the telephone by Mr DiLatte. There was a further incident in 2004 where there was broken glass in a cabinet which was not repaired for some time; there was an argument between the Applicant and Mr DiLatte about the failure to repair the breakages. In January 2005 there was an incident concerning a leaking stern gland in a vessel where the Applicant was accused by Mr DiLatte of leaving the vessel with a stern gland leaking. Where as the Applicant says he carried out all of the necessary checks at the end of his shift.

9 There was an incident where the Applicant was accused of washing the windows of a vessel with river water. His memory of the matter is it did not happen at all and the windows were washed with fresh water.

10 There were minor incidents where prior to the disaffection caused by the industrial action the Applicant had regarded working with the Respondent as a happy, friendly place to work. After the industrial action the Applicant received a letter from Mr DiLatte complaining about conversations [chats] he was having with work colleagues. The Applicant had reposted that these all took place before the commencement of the shift. Finally in this resume of events which the Applicant says gives rise to a feeling that he believes the relationship had broken down, there was an incident in January 2005 concerning an alleged failure to plug a vessel into shore power. The Applicant had not done so because he was aware of an Improvement Notice issued under the OHWS Act on the use of shore power. He was told the Improvement Notice was none of his business. The Applicant admitted that he swore and walked away. This resulted in another letter from Mr DiLatte asking him to apologise to staff in the vicinity. When he did so none of the staff knew what he was apologising for, on the contrary they were totally disgusted by the way Mr DiLatte had handled the situation.

The Termination

11 The Applicant found out about the termination when a work colleague told him that his name was off the roster which was to commence on 27th January 2005. He received no notice himself about this, when he asked Mr DiLatte by telephone why he was no longer on the roster Mr DiLatte's response was "you are only a casual I don't have to tell you anything". In February 2005 the Applicant received a letter from the Respondent along with his final pay slip. He has not worked for them since.

12 In *Fowler v Anthony & Sons Pty Ltd t/a Oceanic Cruises Ibid* Commissioner Smith examined the employment relationship in a detailed manner. Her exposition was approved by the Full Bench in *Anthony & Sons Pty Ltd t/a Oceanic Cruises v Peter Fowler 2005* WAIC 0174. The Commission is to follow the law as expressed by the Full Bench from time to time and I do so here.

13 It is clear on the evidence before the Commission that the factual matrix involving the Applicant in this case is very similar to the factual matrix in *Fowler's Case* (see paragraphs 2-4 hereof). It needs to be said for the purpose of completeness that a casual employee is an employee who works under a series of separate distinct contracts of employment entered into for a fixed period to meet the exigencies of particular work requirements of an employee rather than a single ongoing contract of indefinite duration see *Serco (Australia) Pty Ltd v Moreno 1996 76 WAIG 937 at 939* and *Philip Thomas Squirrell v Bibra Lakes Adventure World Pty Limited t/a Adventure World (1984) 64 WAIG 1834*. The status of casual employment is not necessarily inconsistent with the concept of ongoing employment as discussed in *Swan Yacht Club (Inc) v Leanne Bramwell*

(1997) 78 WAIG 579; also an employee defined as a casual for the purposes of an Award, in this case an Interim Order may not necessarily be a casual employee for the purposes of the common law definition of a casual employee *The Australian Worker's Union v Palermo Family Trust (2004) WAIRC 10911:*

> *"If the employee knew from week to week the roster of hours that he will be working and had an expectation of regular employment then this would indicate that he is not a casual employee in the common law sense:*
>
> *'if one looks at the contract itself and the way the work was performed there is not evidence before me that the essential ingredients of a casual employment was present here. For instance, there was no regular re-engagement. There was no loading, a usual characteristic of a casual contract. ..It does not appear from the pattern of work over the period of some three months that the engagement could be characterised as casual engagement in the common law sense. For instance, the applicant knew from week to week the roster of hours. He had expectation of regular employment. He had consistent starting and finishing times.'*
>
> *Bitter v YYH Holdings (1997) 77 WAIG 2984 per Commissioner J.F. Gregor*

As Commissioner Smith said in *Fowler's* case that the Applicant did not receive payments for annual leave, sick leave and like did not necessarily make him a casual.

Conclusions

14 Applying the law and bearing in mind what can be learned from the exposition and findings by Smith C in *Fowler's Case,* it is clear on the evidence before the Commission that the Applicant was not a casual employee. I accept though that the working relationship did change following the industrial incident involving the Respondent and several of its employees who have mounted cases before the Commission. The circumstances affecting the Applicant are not markedly different to those affecting the other employees who have brought matters before this Commission. The suggestion by the Respondent that in the two months following the strike action vessels were being sabotaged through the cutting of wires to pumps, the removal of fuses in pumping circuits and the bending of fuel pipe lines, can somehow be and sheeted home to the Applicant unsupportable on the evidence before the Commission. The Respondent suggested the Applicant acknowledged incidents but denied involvement. Notwithstanding this Mr DiLatte's evidence was that since the termination of the Applicant's employment no further incidents had occurred. This is an attempt to load the Applicant with the responsibility for this criminal activity by circumstantial evidence ie 'it stopped because he's no longer there'. That must be rejected. The Respondent would have to call far more cogent and relevant evidence to support its contention. In any event the Applicant was never confronted with these allegations prior to his termination.

15 I find there is no substance in the complaint of the Respondent that the Applicant raised issues with it after the strike and on more than one occasion refused to carry out required duties. That is a jaundiced view of the facts of the matter particularly relating to the pumping diesel when the Applicant had sound reasons on environmental grounds not to carry out what it might be suggested the Respondent wanted him to do. In reviewing these findings I accept the evidence of the Applicant in preference to that of Tony DiLatte, whose evidence I conclude is less reliable. It is true that the Respondent did write to the Applicant in relation to a number of those incidents, but there is nothing to support the contention that the Applicant was no longer performing his duties in a cooperative manner which had marked his performance prior to the strike action and that the Respondent no longer had the trust and confidence of him.

16 If that was the case the Respondent should have been more precise about its dissatisfaction with his employment or at least his performance and he be given a chance to remediate his so called short comings. However this was never done instead he was unceremoniously left off the roster. As I found previously it cannot be said that the Applicant was a casual in the common law sense although the relationship does carry some of the characteristics which sometimes point to casual employment but these do not out weigh the finding available that on application the Rule in *Serco* (*Ibid*) and *Moreno's Cases* (*Ibid*) that the Applicant was an employee who was not a casual in the true sense.

17 The Applicant was therefore unfairly dismissed and the Commission should therefore move to consider what should happen next.

18 It is common ground that the parties had reached the stage where the relationship between them was tenuous. It had not broken down at the time the Applicant was no longer offered work but it seems to me that applying the rules set out in and summarised by the Full Bench in *Boganovich v Bayside Western Australia Pty Ltd (1999) 79 WAIG 8* and in particular the writing of Kenner C that the relationship could well have been one which had not much further time to run. I think in the circumstances that the relationship, upon the facts that are available before the Commission, would have lasted another month. In those circumstances the Applicant should be compensated for a loss suffered in that time. He was not able to obtain work during that period. I reject the contention that the relationship was at such a low ebb however that it would only have continued for another further week. I therefore will fix compensation at an average payment of $899.85 for a period of four weeks. The Applicant's earnings commenced after that time and there was therefore no off-set for that amount of money. An order will issue that the Applicant was unfairly dismissed and that he be paid compensation for a period of four weeks. There is nothing in the evidence which would lead me to conclude as did Commissioner Smith in *Fowler's Case* that the dismissal was unusually oppressive, callous and humiliating so as to erect a right for compensation for injury.

19 Finally I need to examine the question of denied contractual benefits. The contract, as I found, was an ongoing one and the law provides in those circumstances the Respondent give reasonable notice of termination. There was none and in an employment such as this for the period that one should be guided by the industry standard as set out in the relevant award. This Award is the *Masters, Mates and Engineers Passenger Ferries Award No. A9 of 1996* and using that as a guide the Applicant should receive a further week's pay. Orders will issue that the Applicant was unfairly dismissed, that reinstatement is unavailing, he will be paid compensation equivalent to four weeks at $899.85 and a further one week's pay at $899.85 for failure to give appropriate notice.

20 Minutes of Proposed Order will issue that the Applicant was unfairly dismissed. Reinstatement is unavailing and the Commission will award compensation of $3,599.40 for loss. A further $899.85 will be awarded as a denied contractual benefit for an implied right to notice.

2006 WAIRC 04558

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ANDREW HERZFELD
	APPLICANT
	-v-
	ANTHONY & SONS PTY LTD T/A OCEANIC CRUISES
	RESPONDENT
CORAM	SENIOR COMMISSIONER J F GREGOR
DATE	FRIDAY, 16 JUNE 2006
FILE NO/S	APPL 206 OF 2005
CITATION NO.	2006 WAIRC 04558

Result Unfairly dismissed. Compensation Awarded

Order

HAVING heard Mr G. Stubbs, of Counsel, who appeared on behalf of the Applicant and Mr D. Johnston who appeared on behalf of the Respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders:

1. THAT the Applicant was unfairly dismissed and reinstatement is unavailing.
2. THAT the Respondent pay the Applicant compensation in the sum of $3,599.40.
3. THAT the Respondent pay the Applicant a further contractual benefit of $899.85 for implied notice.

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

2006 WAIRC 04329

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KEVIN HOLDEN
	APPLICANT
	-v-
	DRIVER GROUP PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S WOOD
HEARD	WEDNESDAY, 19 APRIL 2006
DELIVERED	WEDNESDAY, 19 APRIL 2006
FILE NO.	U 147 OF 2006
CITATION NO.	2006 WAIRC 04329

CatchWords	Termination of employment – Harsh, oppressive and unfair dismissal –Application referred outside of 28 day time limit – Acceptance of referral out of time not granted – Industrial Relations Act 1979 (WA) s 29(3)
Result	Extension of time not granted; Application dismissed
Representation	
Applicant	Mr D Singh of Counsel
Respondent	Mr M Cuomo of Counsel

Reasons for Decision

(Given extemporaneously and subsequently edited by the Commissioner)

1 This is an application pursuant to s.29(1)(b)(i) of the *Industrial Relations Act 1979* ("the Act"). The matter is alleged to be out of time and was brought on for hearing pursuant to s.29(3) of the Act.

2 The matter at hearing is founded on the Notice of Application and the Notice of Answer and Counter Proposal, the affidavit of the applicant and the evidence of Mr Nickels given at hearing and, of course, the submissions of the parties. There are two crucial issues involved, the first being the date of termination and the second being the contest as to whether the redundancy was, in fact, bona fide. In the application, the applicant's affidavit and in the submissions, the contention is that the redundancy was not bona fide.

3 It is the case in my view, and I find so, that the date of termination is 16 January 2006. The evidence of Mr Nickels is clear on this point and I accept his evidence. He says that on that day he met with Mr Holden in Perth. He delivered to him two documents, being a letter and another document and had Mr Holden sign off on the letter and then effected the redundancy payments. Document KH1, which is attached to the statement of Mr Holden, gives a date of 16 January 2006. This would seem to support the evidence of Mr Nickels in that regard. There is a period ending shown on the document for a later date. In my view, that represents the normal approach to a pay advice, i.e. a pay advice typically has a period ending. It may be that

Mr Holden was paid for the remainder of that period or it may be that he was paid for a week or a fortnightly period; given the evidence of Mr Nickels that there was a fortnightly period. But in any event, it is clear that the termination was effected and took effect on 16 January 2006.

4 In terms of who terminated the contract, it was in this case terminated at the hands of the employer and effected on that day. Mr Holden on the evidence of Mr Nickels was to pack up his belongings that day and to work no longer for the respondent. That is then the day of termination. Given the date of dismissal was 16 January 2006, this makes the application out of time by approximately a week on my calculation. On my calculation the application would then have been due in the Commission on 13 February 2006.

5 The law in relation to s.29(3) applications is as outlined in the decision of *Malik v Paul Albert, Director General, Department of Education of Western Australia* 84 WAIG 683. Steytler J in his judgment says:

> "Like E M Heenan J, I consider that the principles enunciated by Marshall J in ***Brodie-Hanns v MTV Publishing Ltd*** (1995) 67 IR 298 are apposite. As E M Heenan J has said, Marshall J there identified the following six "principles" (at 299 - 300):
>
> "1. Special circumstances are not necessary but the Court must be positively satisfied that the prescribed period should be extended. The prima facie position is that the time limit should be complied with unless there is an acceptable explanation of the delay which makes it equitable to so extend.
>
> 2. Action taken by the applicant to contest the termination, other than applying under the Act will be relevant. It will show that the decision to terminate is actively contested. It may favour the granting of an extension of time.
>
> 3. Prejudice to the respondent including prejudice caused by delay will go against the granting of an extension of time.
>
> 4. The mere absence of prejudice to the respondent is an insufficient basis to grant an extension of time.
>
> 5. The merits of the substantive application may be taken into account in determining whether to grant an extension of time.
>
> 6. Consideration of fairness as between the applicant and other persons in a like position are relevant to the exercise of the Court's discretion."'

6 In terms of the criteria applied in *Malik*, the length of the delay is not great and that must weigh in the applicant's favour. The reason for the delay is quite clearly explained in the affidavit and that is the applicant relied on the advice of his solicitors. The solicitors took the date of dismissal to be 22 January 2006. I make no criticism of that. On that basis they approached the respondent to see if the matter could be settled in some way. There is attached to the affidavit correspondence to that effect.

7 They also highlighted in that correspondence that they would take the matter to the Commission, if the matter could not be resolved within a certain time frame. The time frame was specified. The applicant has then challenged his dismissal. The criteria in respect of challenge, delay, and the reason for the delay, are all matters that weigh in the applicant's favour.

8 In terms of prejudice to the respondent, the prejudice is, in fact, no more than having to face a claim in the Commission. There is no great delay in time. The fact that the respondent is in Melbourne is just the nature of the employment contract. So the question of prejudice is a neutral point.

9 However, the important consideration in this application is the question of merit. It is for the respondent to satisfy the Commission that the redundancy was, in fact, genuine and for the applicant to satisfy the Commission as to whether the dismissal was then, in any way, unfair. In all the contests to date, the application, submission and affidavit, the relevant issue has been about whether the redundancy was, in fact, genuine. The applicant says that cutting the wages substantially for the position, effectively the same position, was unfair. This point is expressed at clause 11.5 of the affidavit as follows:

> "The job description is exactly what I was doing as a regional manager but at a much reduced package."

10 That is the only evidence from the applicant that I have other than, of course, reference then to the attached description for the position of a Perth Day Tour Supervisor.

11 The submissions on behalf of Mr Holden rely on the fact that a position description states that the person is to oversee the running of the office. Counsel for the applicant submitted that just because someone has modified duties, it does not mean that the person concerned is not running the office. However, the evidence of Mr Nickels counters this and counters it substantially in two ways. One is that the respondent's restructure was done throughout Australia; so all positions in Australia were affected. That is not evidence that has been broken down. Secondly, the duties of the position were, in fact, substantially changed. I accept this evidence. That is typically the nature of a redundancy. The duties were changed in a number of ways. The person who now occupies that position, because the position was refused understandably by Mr Holden due to the decrease in pay, does not do payroll, or sourcing product, or design of tours, or deal with the coach operators and the drivers, or deal with any disciplinary matters that may arise. I do not go through all of the duties. That is the evidence of Mr Nickels which is not diminished.

12 On that basis then, the respondent has discharged the onus to prove that this redundancy was, in fact, genuine. There is no other contest before the Commission as to any other grounds of unfairness in respect of that. On that basis then, it is difficult to see how one, on a preliminary or more substantive consideration, could, in fact, come to any other conclusion than the redundancy was genuine. The position was changed substantially and all positions of like character in Australia were changed, with the exception of the position in Adelaide. In that State the marketing manager fulfils a dual function. That is the evidence of Mr Nickels, which I accept.

13 On that basis then I find that the application does not have merit. I would therefore exercise my discretion, given the findings in respect of the criteria in *Malik* and the date of termination, to declare that it would not be unfair not to accept the application being out of time. I would issue an order incorporating this declaration and dismissing the application.

2006 WAIRC 04330

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KEVIN HOLDEN
	APPLICANT
	-v-
	DRIVER GROUP PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	WEDNESDAY, 10 MAY 2006
FILE NO/S	U 147 OF 2006
CITATION NO.	2006 WAIRC 04330

Result	Extension of time not granted; Application dismissed
Representation	
Applicant	Mr D Singh of Counsel
Respondent	Mr M Cuomo of Counsel

Order

HAVING heard Mr M Diamond of counsel on behalf of the applicant and Ms F Stanton of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby:

(1) DECLARES that, pursuant to s.29(3), it would not be unfair not to accept the referral of Mr Holden's application.

(2) ORDERS that the application be dismissed.

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

2006 WAIRC 04416

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KEVIN GERARD LAWLESS
	APPLICANT
	-v-
	THE TRINITY BUILDING GROUP PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
HEARD	MONDAY, 15 MAY 2006
DELIVERED	MONDAY, 29 MAY 2006
FILE NO.	U 185 OF 2006
CITATION NO.	2006 WAIRC 04416

Catchwords	Industrial law - Termination of employment - Harsh, oppressive and unfair dismissal - Whether proceedings constituted an abuse of process - Principles applied - Commission satisfied applying principles that discretion should be exercised - Further proceedings not necessary or desirable in public interest - Application dismissed - *Industrial Relation Act 1979* (WA) s 27(1)(a), s 29(1)(b)(i)
Result	Order issued
Representation	
Applicant	In person
Respondent	Ms J Alilovic of counsel instructed by Jackson McDonald Lawyers

Reasons for Decision

1 This application is made pursuant to s 29(1)(b)(i) of the Industrial Relations Act 1979 ("the Act"). By the claim, the applicant alleges that he was on or about 2 March 2006 harshly, oppressively and unfairly dismissed by the respondent.

2 The respondent, by an amended notice of answer and counter proposal, alleges that the applicant was never employed by it or alternatively if he was, then it never dismissed him. In the further alternative, it is said that if there was a dismissal of the applicant to attract the jurisdiction of the Commission, then in the circumstances it was not unfair.

3 The applicant testified that he commenced employment on or about 20 February 2006 as a labourer at the Central Law Courts complex in Perth. Construction works were being undertaken at that site. The applicant testified that some time after commencing employment, around 2 March, he was told by Mr Donnelly of the respondent that there was a problem with the applicant's security clearance for the site. Security clearances were required for employees working on the site by reason of the nature of the work environment and he could no longer attend for work. The applicant had initially

completed a security clearance application but apparently, the wrong form was used and a further application was required. This was subsequently submitted. The applicant was not able to further attend for work until security clearance had been given.

4 On 7 March 2006 the applicant commenced these proceedings alleging that the respondent had unfairly dismissed him on 2 March 2006.

5 Subsequently, it seems on or about 18 April 2006 there was formal confirmation given that security clearance was not given for the applicant to resume work at the Central Law Courts site. On the second application for security clearance, the applicant detailed past and pending criminal convictions and charges.

6 As the applicant's testimony unfolded, it became apparent that the applicant was only really concerned as to who had made the decision to refuse him security clearance for the site. In this regard, the applicant summonsed a number of persons to give evidence on his behalf. These included the Attorney General for the State of Western Australia, the Commissioner of Police for Western Australia, and a senior public servant with the Department of the Attorney General. Also, the applicant summonsed two management employees from companies to whom the respondent contracted for the works on the Central Law Courts site.

7 In relation to the summonses issued against the Attorney General and the Commissioner of Police, the Commission set those summonses aside by order, on the basis that I was not satisfied that good cause was shown by the applicant that those persons should be compelled to appear to give evidence in these proceedings.

8 At the conclusion of the applicant's case, an application was made by counsel for the respondent Ms Alilovic, that the Commission dismiss or refrain from further hearing the application pursuant to s 27(1)(a) of the Act, as further proceedings were not desirable in the public interest. Counsel submitted that the applicant conceded in his own evidence, as it transpired, that he was now no longer seeking a remedy against the respondent but rather, was using the present proceedings to ascertain who was behind the decision to not grant him security access to the Central Law Courts construction site at the material time. Counsel submitted that it was therefore an abuse of process for the proceedings to continue.

9 The Commission adjourned for a short time to consider the respondent's application. When the proceedings resumed, I announced my decision to dismiss the application pursuant to s 27(1)(a)(ii) of the Act, on the ground that further proceedings were not necessary or desirable in the public interest, with a brief outline of the basis for that decision and reasons to follow. These are those reasons.

10 It is trite to observe that at common law, it is an abuse of process, which is of itself an actionable tort, when the process of a court or tribunal is invoked for a purpose which, in the eyes of the law, it is not intended to serve: *Grainger v Hill* (1838) 132 ER 769 per Tindal CJ. In such circumstances, a court may stay or dismiss a proceeding, if it is satisfied that there is no arguable basis for a proceeding to continue on the grounds of an abuse of process: *Rajski v Rainton* (1990) 22 NSWLR 125; *Jago v District Court* (NSW) (1989) 168 CLR 23. Aside from the common law position, the Commission has express powers in s 27(1)(a) of the Act to at any stage of a proceeding, dismiss or refrain from further hearing or determining a matter, on the various bases as set out in sub paragraphs (i) to (iv).

10 I was satisfied on the evidence and it became quite evident, that the applicant was in fact not seeking a remedy against the respondent, even if the Commission was to find his dismissal to be unfair, but rather was seeking information about those making the decision to not grant him security clearance to access his work site. On that basis and without hesitation, I formed the view that to continue the proceedings any further would amount to an abuse of process. In those circumstances, I was prepared to exercise my discretion pursuant to s 27(1)(a) of the Act to dismiss the application on the ground that further proceedings were not necessary or desirable in the public interest.

11 Having announced the Commission's decision in this matter, counsel for the respondent then foreshadowed that it would make an application for costs against the applicant. The Commission made directions for the filing of written submissions in this regard. Subsequently, by letter dated 16 May 2006, the respondent's solicitors notified my Associate that the respondent did not wish to pursue its application for costs and withdrew that application.

2006 WAIRC 04345

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KEVIN LAWLESS
	APPLICANT
	-v-
	TRINITY BUILDING GROUP
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 15 MAY 2006
FILE NO/S	U 185 OF 2006
CITATION NO.	2006 WAIRC 04345

Result	Summons set aside
Representation	
Applicant	In person
Respondent	Mr R Andretich of counsel

Order

HAVING heard the applicant on his own behalf and Mr R Andretich of counsel on behalf of the Honourable Attorney General for the State of Western Australia, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders –

THAT the summons to witness directed to the Honourable Attorney General for the State of Western Australia issued on 10 May 2006 be and is hereby set aside.

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

2006 WAIRC 04359

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KEVIN LAWLESS
	APPLICANT
	-v-
	THE TRINITY BUILDING GROUP PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 16 MAY 2006
FILE NO/S	U 185 OF 2006
CITATION NO.	2006 WAIRC 04359

Result	Application dismissed
Representation	
Applicant	In person
Respondent	Ms J Alilovic

Order

HAVING heard the applicant on his own behalf and Ms J Alilovic 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 on the ground that further proceedings are not necessary or desirable in the public interest.

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

2006 WAIRC 04521

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JADE LIM
	APPLICANT
	-v-
	8 DEGREES HOLDINGS PTY LTD ACN 112 935 494 TRADING AS 8 DEGREES DAY SPA
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
HEARD	FRIDAY, 9 JUNE 2006
DELIVERED	MONDAY, 12 JUNE 2006
FILE NO.	B 337 OF 2006
CITATION NO.	2006 WAIRC 04521

CatchWords	Contractual benefits claim - Entitlements under contract of employment - Application granted - *Industrial Relations Act 1979* (WA) s 29(1)(b)(ii); *Corporations Act 2001* (Cth)
Result	Order made Respondent to pay $156 (gross) as wages and $493.56 as superannuation
Representation	
Applicant	In person
Respondent	No appearance

Reasons for Decision

1 This is an application made under s 29(1)(b)(ii) of the *Industrial Relations Act 1979* ("the Act"). Jade Hong Po Lim ("the Applicant") claims that she is owed the sum of $172 as unpaid wages for hours worked on 13 March 2006, 14 March 2006 and 16 March 2006. The Applicant also claims that she is owed an amount as superannuation that has not been paid to her

superannuation fund, namely the Medical & Associated Professions Super Fund. The Applicant claims that 8 Degrees Day Spa ("the Respondent") as her employer owes her the amounts being amounts that she is entitled to under her contract of employment, not being a benefit under an award or order of this Commission.

2 This matter was listed for hearing on 9 June 2006. The Applicant appeared at the hearing. There was no appearance on behalf of the Respondent. The Commission heard the Applicant's claim in the absence of the Respondent. Prior to the hearing the Commission received correspondence from the Respondent's Principal, Dr Malcolm Wee on 8 June 2006 in which he informed the Commission that he did not intend to attend the hearing on 9 June 2006. Dr Wee also advised the Commission that he has engaged chartered accountants and business advisors, SimsPartners, to call a meeting of creditors on 21 June 2006 with the view to have the Respondent placed in liquidation. In the Notice of Meeting of Creditors (Form 529) *Corporations Act 2001*, the Applicant is listed as a creditor of 8 Degrees Holdings Pty Ltd. Consequently, I will make an order changing the name of the Respondent to 8 Degrees Holdings Pty Ltd ACN 112 935 494 trading as 8 Degrees Day Spa.

3 The Applicant testified that she was engaged on 16 June 2005, as a casual employee to work for the Respondent. The terms and conditions of employment discussed at her interview prior to commencing work were that she would be paid $16.00 per hour for each hour that she worked and superannuation would be paid to her superannuation fund. It was agreed that she would work on Mondays and Thursdays and alternate Saturdays. Although, the amount of superannuation was not specifically discussed by the parties the Applicant assumed that her superannuation fund would be paid an amount of nine percent of her wages.

4 Whilst employed by the Respondent, the Applicant was paid wages for the hours she worked except for the last week. On 16 March 2006 at 9:00 am, the Applicant arrived at work but was unable to enter the premises because the landlord of the Respondent's premises had taken possession. When she was unable to obtain access, she and other employees met with Dr Wee between 9:00 am and 10:30 am at another location. The Applicant claims she should be paid a minimum of three hours for the time that she attended work on that day. However, the Applicant was unable to provide any evidence of a contractual obligation which entitled her to payment for a minimum of three hours' work.

5 The Applicant tendered into evidence time and wages records (*Exhibit 2*) which records that the Applicant worked 5.75 hours on 13 March 2006 and 2.5 hours on 14 March 2006.

6 Since the Applicant's employment came to an end on 16 March 2006, she ascertained that superannuation payments to her superannuation fund, Medical & Associated Professions Super Fund, by the Respondent has been paid in part. The Applicant tendered into evidence a payslip for the pay period ending on 10 March 2006, which records that her year to date employer superannuation contributions of nine percent were $743.04. Subsequent to the hearing the Applicant provided a printout from her superannuation fund containing a list of transactions from 1 July 2005 to 9 June 2006. The printout shows that during that period of time there was one contribution from the Respondent and that was for the period from 24 November 2005 to 30 September 2005 for an amount of $263.52. The Applicant says that she is owed $743.04 as superannuation payments less the amount paid to her superannuation fund of $263.52 plus an amount of nine percent of wages for the hours worked by her on 13, 14 and 16 March 2006.

Conclusion

7 Having heard the evidence, I am satisfied that the Applicant should be paid for the hours that she worked on and between 13 March 2006 and 16 March 2006. However, in relation to her claim that she should be paid for three hours' work on 16 March 2006, I am not satisfied that she has made out a claim that such an amount is due and owing to her as a contractual benefit. However, I am satisfied that she attended work for a period of one and a half hours on that day. Consequently, I am satisfied that the Applicant should be paid for 9.75 hours worked on and between 13 March 2006 and 16 March 2006 at the rate of $16.00 an hour which is a gross amount of $156.00. Accordingly, I will make an order that the Respondent pay the Applicant that amount as unpaid wages due and owing. I am also satisfied that the Respondent owes the Applicant's superannuation fund $493.56. This amount is calculated as $743.04 less the amount of $263.52 which has been paid plus an amount of $14.04 which is nine percent of $156.00.

8 In light of these reasons, I will make a declaration that the Applicant is owed contractual benefits by the Respondent and make orders that the Respondent pay the amounts set out in these reasons for decision.

2006 WAIRC 04519

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JADE LIM
	APPLICANT
	-v-
	8 DEGREES DAY SPA
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	MONDAY, 12 JUNE 2006
FILE NO/S	B 337 OF 2006
CITATION NO.	2006 WAIRC 04519

Result	Respondent's name changed
Representation	
Applicant	In person
Respondent	No appearance

Order

HAVING heard the Applicant in person and no appearance 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, 8 Degrees Holdings Pty Ltd ACN 112 935 494 trading as 8 Degrees Day Spa.

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

2006 WAIRC 04523

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES JADE LIM

APPLICANT

-v-

8 DEGREES HOLDINGS PTY LTD ACN 112 935 494 TRADING AS 8 DEGREES DAY SPA

RESPONDENT

CORAM	COMMISSIONER J H SMITH
DATE	MONDAY, 12 JUNE 2006
FILE NO/S	B 337 OF 2006
CITATION NO.	2006 WAIRC 04523

Result	Declaration and Order Issued
Representation	
Applicant	In person
Respondent	No appearance

Order

HAVING heard the Applicant in person and no appearance on behalf of the Respondent the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979,* hereby:

(1) DECLARES that the Applicant is owed contractual benefits;

(2) ORDERS that the Respondent pay to the Applicant within 7 days of the date of this order the sum of $156.00 (gross) as unpaid wages; and

(3) ORDERS that the Respondent within 7 days of the date of this order pay superannuation contributions to the Applicant's superannuation fund, Medical & Associated Professions Super Fund (02211232), or to the Australian Taxation Office, the sum of $493.56 being an amount of superannuation due and owing by the Respondent; and

(4) ORDERS that the application is otherwise hereby dismissed.

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

2006 WAIRC 04362

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES VANESSA MARQUEZ REVILLO

APPLICANT

-v-

UMBERTO FIORE C/O CAMERALAND CAMERA-HOUSE DUTY FREE SHOP

RESPONDENT

CORAM	SENIOR COMMISSIONER J F GREGOR
HEARD	TUESDAY, 18 OCTOBER 2005, FRIDAY, 17 MARCH 2006
DELIVERED	WEDNESDAY, 17 MAY 2006
FILE NO.	APPL 881 OF 2005
CITATION NO.	2006 WAIRC 04362

CatchWords	Termination of employment – unfair dismissal – principles applied – *Industrial Relations Act, 1979*
Result	Unfairly dismissed. Reinstatement was unavailing. Compensation not awarded.
Representation	
Applicant	Ms V.M. Revilla appeared on her own behalf
Respondent	Mr U. Fiore appeared on behalf of the Respondent

Reasons for Decision

1 This is an application for orders from the Commission in the claim for harsh, oppressive or unfair dismissal filed by Vanessa Marquez Revilla (the Applicant) on 22nd August 2005. The application was the subject of proceedings before Deputy Registrar Wickham on 9th October 2005. Those proceedings did not resolve the matter.

2 The Applicant was first employed by the Respondent in 2004 as a shop assistant in its business which is a duty free shop. Her duties involved retailing fragrance, crystal, watches, bulk replenishment, ordering and dealing with suppliers. In evidence the Applicant told the Commission that she had been engaged by Mr Umberto Fiore, the Principal of the Respondent, as a full time shop assistant. From the start she had an extremely good relationship with her employer which continued into July 2005. Of significance is that she had a break in service whilst she went home to South America. Her job was held open for her until she came back. It appears from the evidence that she may well have been absent for medical reasons but whether she was or not is not germane to the issues which need to be examined in the adjudication of this matter.

3 It appears that the relationship was so good she was treated as part of the family. However it took a turn for the worst when one month prior to her dismissal Mr Leedia Fiore, who is the Store Manager and son of the Principal Umberto Fiore, was abrupt and rude to her. From that time on there was friction between them. There was also issue about a reduction in the rate of commission she was receiving. She thought that the targets which were set for her became unfair and this upset her. During this period she suffered some humiliation and on 22nd July 2005 she had another clash with the Store Manager which left her crying. Mr Fiore's daughter tried to console her. She told the Applicant that was the way he treated members of his family. The Applicant claimed she asked if she could go home and the Store Manager gave approval.

4 The Applicant returned to work on the following Saturday and a clash occurred with Mr Fiore senior when she was closing the till. She says she was doing it exactly the same way she had always done. Mr Fiore alleged she was closing the till earlier. On Monday morning she was not feeling well so she went to the Doctor who suggested that she take two days off sick. The Applicant claims she telephoned on 26th July 2005 to tell the Store Manager that she was not going to be able to go to work and that she had two days off. She claimed he said that was fine. When she went to work on Thursday 28th July 2005, she was asked by the Store Manager what she was doing there. She told him she was coming to work. The Store Manager said to her that he thought she had left her employment because she did not show up for work the day before and did not ring. The Applicant reminded him that she did call on Tuesday to say that she was having two days off, he denied that she did. He then asked her to wait and Mr Fiore senior came downstairs. There was then a heated argument during which she told him that she had a medical certificate covering her absence. He did not care that she did and told her that she should go away, that he did not want to see her anymore. She asked him whether she was being fired and he said no you are resigning.

5 The Applicant told the Commission she seeks compensation for lost wages for six weeks in which she could not get a job.

6 Mr Umberto Fiore gave evidence. He confirmed that the Applicant had been appointed as a full time shop assistant and that in November 2004 she left saying she was going back to her home in South America. She was away until May the following year. When she returned he happily re-employer her. She had such a wonderful time working he had no hesitation in giving her a job back. He did so in the full belief that she had undertaken two medical procedures while she was away.

7 Mr Fiore says that the relationship was fine until the Respondent decided they wished to employ another girl on the floor in the same department. The new employee started in July 2005. He approached the two women and raised with them the issue of rostered days off and sort a fair arrangement between them whereby they would take alternate Mondays off.

8 Mr Fiore says that the Applicant was upset by this and said bluntly to him "that Mondays are mine, I was here first and I will not share Mondays with the other girl." He had told the Applicant that was not fair. The Applicant then accused him of being rude and started crying. He confirmed he did send his daughter to see what was happening with the Applicant and then she went home. On the following Saturday when she appeared for duty she was destructive as she could be. In retrospect Mr Fiore said he should have sent her home but her conduct was unacceptable, she was not approaching customers; she was abrupt and not making sales. Although she was present her performance was non existent. For that reason he said to her that they needed to adjust the commission rates as an incentive for her to get her mind back on the job. All of this failure in the relationship happened over a week.

9 The first they heard from the Applicant following that Saturday was on the Tuesday when she rang saying she was sick. There was nothing heard from her on Wednesday, but significantly there was nothing said on Tuesday to indicate that she coming back. She did not say she had two days leave and he thought "thank god she's not coming back." It had been a great frustration to him but on Thursday he was told by his son that the Applicant had appeared. He immediately asked him what for because he genuinely thought she was not coming back to work anymore. The Applicant then tried to give him a doctor's certificate but he was doubtful about its veracity. Putting all these things together when the Applicant left crying on the Saturday, and then said she was not coming back, Mr Fiore concluded she was not coming back at all. He said to her "what are you doing here, I thought you had resigned". She then asked whether she was being sacked and then he repeated he thought she had resigned. As far as he was concerned she did not call in, did not say how long she would be absent and this constituted a resignation from his point of view.

10 The preceding is sufficient resumé of the facts for the purposes of this decision. Insofar as credibility of witnesses there is nothing from the Applicant's evidence which would cause the Commission to believe that she did not honestly give her version of the events. The same can be said to Mr Fiore. In terms of the witnesses recollection of the events it has to be said that

English is not the first language of both of the persons involved and that should be taken into account in assessing the intention of what they said to each other. Neither of the parties called any evidence in corroboration and the Commission is left to determine the matter on very limited evidence in chief of the Applicant and Mr Umberto Fiore. There was no effective cross examination by either of the parties.

11 The best that can be drawn on the evidence on the balance of probabilities is the parties entered into an employment relationship and in the first instance it was a good and happy one. The Applicant then had a substantial break in service and resumed employment. The relationship picked up where it was before but then in a very short time the relationship fell upon bad times. The Applicant says that she told the Store Manager that she needed two days off for sick leave but there was no evidence called to verify that either way. Mr Umberto Fiore had thought because of a chain of events that is the crying, the abrupt conduct that he had every reason to believe that when the Applicant did not come in she was not going to come back at all.

12 There is nothing though in any of the evidence which indicates to me that at any time the Applicant actually told the Respondent that she was resigning. The Respondent assumed that she was by her conduct. The question is whether that was a reasonable assumption given the circumstances.

13 An Applicant has the onus of proof to establish that there has been unfairness in the terms described in *Undercliffe Nursing Home v Federated Miscellaneous Workers Union (1985)* 65 WAIG 385 in examining what has happened the Commission has to ascertain whether there has been a fair go all round. Nevertheless the Applicant bears the burden of establishing there has been unfairness in the dismissal. What can be said about this dismissal is that it certainly is not a dismissal which is executed in an entirely clear way and the process is very hard to discover from the extremely limited evidence. On balance and I have reached the conclusion that in the final analysis it has to be found that the Applicant did not resign. When she was ill she called as she should have and told the Respondent that she was sick. There was nothing in that sequence of events which should have left the Respondent to immediately conclude she was resigning. He should have made further enquires to discover the Applicant's intention and he did not do so. For that reason on the authority of the *The Attorney General v Western Australian Prison Officers' Union of Workers (1995)* 75 WAIG 3166 the Applicant was constructively dismissed and that dismissal was unfair.

14 The Applicant now does not live in Australia and is therefore incapable of accepting the first remedy which would be reinstatement. In any event it is doubtful whether reinstatement could be effected in any constructive way for both of the parties. Therefore the Commission finds that reinstatement would be unavailing. The Commission then should fix compensation. The Full Bench has laid down the principles to be applied in such circumstances in a number of cases starting with *Boganovich v Bayside Western Australia Pty Ltd (1999)* 79 WAIG 8. The Commission in fixing compensation for loss should put the Applicant back into the position they would have been had they not lost the job but in doing so should make an assessment of the likely life of the contract of employment. It is clear from the information before the Commission that the relationship of the parties had deteriorated to such an extent that the continuation of the relationship was doubtful. I conclude that the Applicant may well have been and could have been properly dismissed by the Respondent within one week. In those circumstances she would receive compensation for loss of one week's pay. She has given evidence that she has already received a week's pay and the Commission is required to offset this amount against compensation received. There is no claim for compensation for injury. The Commission will issue an order that the Applicant was unfairly dismissed. That reinstatement was unavailing and that compensation will not be awarded.

2006 WAIRC 04363

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	VANESSA MARQUEZ REVILLO
	APPLICANT
	-v-
	UMBERTO FIORE C/O CAMERALAND CAMERA-HOUSE DUTY FREE SHOP
	RESPONDENT
CORAM	SENIOR COMMISSIONER J F GREGOR
DATE	WEDNESDAY, 17 MAY 2006
FILE NO	APPL 881 OF 2005
CITATION NO.	2006 WAIRC 04363

Result	Unfairly dismissed. Reinstatement was unavailing. Compensation not awarded.

Order

HAVING heard Ms V.M. Revillo on her own behalf and Mr U. Fiore 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 Applicant was unfairly dismissed.
2. THAT reinstatement is unavailing.
3. THAT compensation not be awarded.

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

2006 WAIRC 04398

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RICHARD STERN
	APPLICANT
	-v-
	C RESTAURANT
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
HEARD	FRIDAY, 7 APRIL 2006
DELIVERED	WEDNESDAY, 24 MAY 2006
FILE NO.	APPL 791 OF 2005
CITATION NO.	2006 WAIRC 04398

Catchwords	Industrial Law (WA) - Termination of employment - Harsh, oppressive and unfair dismissal – Contractual benefits claim – Whether applicant an employee or independent contractor – Principles applied –Applicant held to be an employee - Applicant harshly, oppressively and unfairly dismissed - Applicant denied a benefit under contract of employment – Application upheld – Industrial Relations Act 1979 (WA) s 29(1)(b)(i) and (ii)
Result	Upheld and order issued
Representation	
Applicant	Mr R Stern on his own behalf
Respondent	Mr P Clements

Reasons for Decision

1 On 1 August 2005 Richard Stern ("the applicant") lodged an application pursuant to s29(1)(b)(i) and (ii) of the *Industrial Relations Act 1979* ("the Act") against C Restaurant ("the respondent") claiming that he was unfairly terminated on or about 26 July 2005 and that he is owed benefits under his contract of employment with the respondent. The respondent denies that the applicant was unfairly terminated and maintains that the Commission does not have jurisdiction to deal with this application on the basis that the applicant was an independent contractor and therefore not an employee of the respondent.

Background

2 It was not in dispute that the applicant performed as a singer and pianist on three occasions between 17 July 2005 and 25 July 2005 at the C Restaurant and the applicant was paid $300 for the two hours he performed each evening. After the applicant's third performance he was advised by the respondent's assistant to the general manager, Ms Kym Clements that his services were no longer required.

3 During the applicant's relationship with the respondent a memorandum of understanding was signed by the parties detailing the applicant's contractual arrangement with the respondent (Exhibit A2). This memorandum is as follows:

> "Memorandum of Understanding
>
> Between Mr Ric Stern and Silverbird Nominees Pty Ltd trading as C Restaurant
>
> Mr Ric Stern will perform at C Restaurant located at level 33, 44 St George's Terrace Perth on Sunday evenings commencing on the 17th July 2005.
>
> Mr Stern will perform from 7.00pm to 8.00pm then 8.30pm to 9.30pm.
>
> Mr Stern will be entitled to a staff meal between 8.00pm and 8.30pm. In addition Mr Stern will be invited to introduce a guest once a week to the restaurant and will be entitled to a dining allowance of up to $200.
>
> Mr Stern will provide his database to C Restaurant for promotional use. Should Mr Stern no longer perform at C Restaurant, use of this database will cease.
>
> Remuneration is to be $300.00 per evening and will be directly transferred to Mr Stern's bank account, details of which have been provided.
>
> Mr Stern's car parking in St Martin's car park will be paid for by C Restaurant on Sunday evenings.
>
> Both parties are to give two weeks notice should they wish to terminate this agreement."
>
> (Exhibit A2)

4 The respondent conceded that if the Commission finds that the applicant was an employee then the applicant is due the dining allowance that he is claiming as a benefit under his contract for a three week period equating to $600.

Name of the respondent

5 During interlocutory proceedings held prior to the hearing it became evident that the respondent had been incorrectly named and during these proceedings the respondent consented to the correct name of the respondent being included in this application. The Commission has discretion under s27(1)(j), (l) and (m) of the Act to issue an order amending the name of a respondent to an application (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). Furthermore, the Commission is to act with the minimum of legal form and technicality when dealing with industrial matters (see s6(c) and s26(1)(a) of the Act). It is my view that in this instance the name C Restaurant should be deleted as the respondent and replaced with the respondent's correct name, which is Silverbird Nominees Pty Ltd as this entity operates the

C Restaurant and the respondent consented to this course of action. I therefore propose to issue an order that C Restaurant be deleted as the named respondent in this application and be substituted with Silverbird Nominees Pty Ltd.

Applicant's evidence

6 The applicant gave evidence that when he performs his terms and conditions of employment are governed by the *Performers Live Award (WA) 1993 (No A18 of 1989)* ("the Award").

7 The applicant stated that after he approached the manager of C Restaurant Ms Trish Harding about working at the C Restaurant a meeting was arranged with the respondent's director Mr Phillip Clements. The applicant stated that at this meeting he reached an agreement with Mr Clements about the terms and conditions of his relationship with the respondent. The applicant stated that they discussed whether or not the applicant would work as an employee or under a specific Australian Taxation Office ("ATO") scheme which allowed the applicant to be paid a gross amount and have no tax deducted at source. The applicant stated that this arrangement was possible if the applicant's earnings were under a certain threshold. The applicant gave evidence that Mr Clements told him that he did not want him to be an employee and advised the applicant that he preferred that the applicant work under the ATO scheme and he was asked to invoice the respondent for his services. The applicant stated that working under this arrangement was not an unusual practice in the entertainment industry and was allowed for by the ATO provided that entertainers did not earn above a certain amount. The applicant stated that he saw the agreement as a formalised workplace agreement and he stated that this was a common practice in the entertainment industry. In addition to being paid $300 for each evening's performance the applicant gave evidence that he and Mr Clements agreed that he was entitled to dining privileges for two persons each week to the value of $200 per week. The applicant stated that he was also told the hours that he was to perform.

8 The applicant stated that he did not run his own business, he did not have an Australian Business Number ("ABN") and he maintained that when he performed it was not in the role of an independent contractor.

9 The applicant stated that he auditioned for the respondent which was not normal under a standard subcontract arrangement and the applicant also stated that when he required additional sound equipment to perform at the restaurant he arranged the rental of this equipment and the respondent paid for the cost of renting this equipment.

10 The applicant stated that as his performances at the restaurant were going well he understood that his employment with the respondent would be ongoing.

11 The applicant stated that when he performed on Saturday 23 July 2005 he had a minor altercation with Mr Clements about some speakers which were not working. The applicant stated that he asked another staff member to help him check the sound during his performance and he stated that the only speaker not working was the one near where Mr Clements was seated. The applicant stated that Mr Clements was annoyed when the applicant brought this issue to his attention.

12 The applicant stated that he turned up to work as usual on Sunday 24 July 2005 and he stated that the patrons that evening gave him favourable comments about his performance. The applicant stated that after his performance he joined some friends for a drink and the applicant stated that a young woman was celebrating her birthday and he sang a song for her. The applicant stated that the evening was uneventful and he gave evidence that whilst he was at work on this date he did not have any altercations with other staff nor did he upset any of the staff.

13 The applicant stated that sometime in the week following his performance on Sunday 24 July 2005 he was at the restaurant fixing some sound equipment and was told by Ms Clements to stop undertaking this work and he was advised that he had been terminated. The applicant asked if his termination was effective immediately and he was told to leave straight away. After enquiring why his arrangement with the respondent was finishing he was told that he had upset some staff the previous Sunday evening and the applicant stated that no details were given to him about this complaint. The applicant then approached the acting assistant manager who was in charge on 24 July 2005 and asked him if any issues had arisen that night that he should be aware of and the applicant was told that the respondent understood that he had been making derogatory comments about the in-house PA system and that he behaved inappropriately when ordering a cup of tea from a staff member.

14 After he was terminated the applicant wrote to the respondent complaining about his termination and the manner of his dismissal.

15 Under cross-examination the applicant conceded that in one of the emails he sent to the respondent prior to commencing with the respondent he referred to working under a subcontract arrangement for the past 15 years when performing. The applicant stated that the reference to a subcontract arrangement was on the basis that he was not a direct employee and that he would not be employed under the normal employee/employer relationship. The applicant confirmed that at the time he was performing for the respondent he also performed at the Sheraton Hotel and he stated that he would have accepted other offers made to him to perform at other venues. The applicant stated that when he had a meeting with Mr Clements prior to commencing with the respondent he agreed that he would not be employed under the normal employee/employer arrangement but would work under ATO legislation which exempted him from providing an ABN to the respondent and the applicant agreed that he supplied an invoice to the respondent for each performance. The applicant agreed that he did not complete one of the respondent's new employee details forms at the time he commenced working with the respondent (see Exhibit R1).

16 The applicant stated that when he made sound checks in the middle of his performance on Saturday 23 July 2005 it was only for a period of five minutes. The applicant stated that there was no issue with the PA system that he installed, he stated that the problems were with the respondent's system and the applicant denied that he was rude to restaurant staff during this evening. The applicant denied telling customers that there was a problem with the restaurant sound system and the applicant stated that he only had a general conversation with some friends about the respondent's sound system.

17 In re-examination the applicant stated that Mr Clements asked the applicant to contact PA installers to service the speakers and the applicant stated that he used the term "Employer/Contractor" on the invoices he provided to all employers with whom he worked.

18 Mr Mark Clayton and Ms Shelley Roy gave evidence. Both stated that they dined at the restaurant in July 2005 and that during a break in the applicant's performance they had a drink with him. Both witnesses stated that it was a congenial evening and

both recalled that there was some issue with the sound system. Neither Mr Clayton nor Ms Roy could recall the applicant making any derogatory comments about the respondent's sound system.

19 The respondent did not call any evidence.

Submissions

20 The applicant submits that he was an employee of the respondent. The applicant maintains that he was under the respondent's control, the respondent supplied the PA system and equipment used by the applicant and the applicant maintains that the ATO taxation arrangement he had with the respondent arose as a result of the unique situation of performers and that the only element of a subcontract arrangement was the lack of taxation being taken out at source. The applicant stated that he was aware of the true nature of the subcontract system and it was his view that he was an employee of the respondent and was treated as such.

21 The respondent maintains that the applicant worked with the respondent as an independent contractor. The respondent claims that the applicant had full control of the way in which he undertook his duties even though the piano was owned by the respondent and the respondent argues that it had no control over the applicant on the days that he was not working with the respondent as the applicant was free to play at other venues, which he did. The applicant was not obliged to attend work, the applicant could advise his unavailability, the respondent made no taxation deductions or superannuation payments on behalf of the applicant, and the applicant had no entitlement to annual leave and was not treated by the respondent as a normal employee would be. The respondent argues that the level of remuneration paid to the applicant was that of a contractual arrangement as opposed to an employee being paid wages and the respondent argues that the applicant was not an integral part of its organisation. The respondent maintains that the applicant described himself as a subcontractor on his invoices and in an e-mail sent to the respondent and argues that the applicant entered into the contract with the respondent on this basis. The respondent also argues that the respondent's taxation arrangement with the applicant supports its argument that the applicant was a subcontractor.

Findings and conclusions

Credibility

22 I listened carefully to the evidence given by each witness. In my view the applicant gave his evidence honestly and to the best of his recollection and his evidence was not broken down during cross-examination. I have the same confidence in the evidence given by Ms Roy and Mr Clayton. On that basis I have no hesitation accepting their evidence.

Was the applicant an employee or an independent contractor?

23 It is not for the respondent to show that the applicant was not an employee but for the applicant to show, on the balance of probabilities, that he was an employee (*Western Australian Builders' Labourers, Painters and Plasterers Union of Workers v R B Exclusive Pools Pty Ltd t/as Florida Exclusive Pools* (1996) 77 WAIG 4 at 8 per Fielding SC). If the applicant is found not to have been employed by the respondent under a contract of service then the Commission has no jurisdiction to deal with the applicant's claim that he was unfairly dismissed and that he was denied a benefit under his contract of employment with the respondent.

24 A number of relevant indicia are to be taken into account when determining the employment relationship. In *Gregory Patrick Millar v JB & BL Nominees Pty Ltd t/a Southern Cross Traders* (2005) 85 WAIG 3802 at 3809 Smith, C stated the following:

> "I observed in *Howe v Intercorp Services Pty Ltd trading as WestVision Painting Company* [2001] WAIRC 2643 at [24] and [25]; 81 WAIG 1212 at 1214 that:
>
> > "The relationship of employer and employee is a contract of service where an employee contracts to provide his or her work and skill (typically to enable an employer to achieve a result). An independent contractor works in his or her own business on his or her own account. Whilst the authorities do not establish a conclusive test for determining whether a person is an employer, regard must be had to the whole of the relationship. In *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 Mason J at 24 and Wilson and Dawson JJ at 36 held that a prominent factor is the degree of control which the person (who engages the other) can exercise over the person engaged to perform work. The High Court also held that the existence of control is not the sole criteria, other relevant matters include, but are not limited to, the mode of remuneration, the provision and maintenance of equipment, the obligation to provide exclusive services, provision for holidays, deduction of income tax, delegation of work, the right to suspend or dismiss, the right to dictate the place of work and hours of work. Further, Mason J in *Stevens v Brodribb Sawmilling Co Pty Ltd* at 26 to 27 also observed that in some cases the organization test can be a further factor to be weighed (along with control), in deciding whether the relationship is one of employment or of independent contractor. The organization test is whether the party in question is carrying on the business, in the sense of carrying it on for himself or on his own behalf and not for a superior (*Montreal v Montreal Locomotive Works* [1947] 1 DLR 161 per Lord Wright at 169).
> >
> > Whilst regard can be had to whether the parties regarded their contractual relationship one of employee/employer or independent contractor, if the evidence shows otherwise the parties cannot alter the truth of that relationship by putting another label on it (*Massey v Crown Life Insurance Co* (1978) 1 WLR 676 and *Narich Pty Ltd v Commissioner of Pay-Roll Tax* (1983) 2 NSWLR 601)."
>
> The distinction between an employee and an independent contractor is "rooted fundamentally in the difference between a person who serves his employer in his, the employer's, business, and a person who carries on a trade or business of his own" (*Marshall v Whittaker's Building Supply Co* (1963) 109 CLR 210 per Windeyer J at 217; see also *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 per McHugh J at 366; approved by Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ in *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at [40]."

25 In this decision at 3810 Smith, C also stated the following:

> "In *Federal Commissioner of Taxation v Barrett* (1973) 129 CLR 395 Stephen J at page 404 observed in relation to land salesmen who were remunerated solely by commission in the case before him:

> "… the employers had at least equal skill and knowledge to that possessed by their land salesmen and yet voluntarily refrained from the exercise of control over those salesmen, relying instead upon the existence of mere "self-governing" conventions and giving the salesmen "almost total freedom", the most striking instance of which was their ability to take extended leave without prior permission.
>
> It is, to my mind, of little significance that these employers, when dealing with persons working for them who are remunerated by commission, do not, in the particular circumstances of this case, impose upon those persons what the majority refer to as "a detailed regimen". When the work involved is that of the persuasion of buyers the manner in which it is performed must perforce vary from salesman to salesman; each employs his preferred techniques which experience has taught him and any attempted imposition of a uniform method of work might well prove very disadvantageous in the outcome. The nature of the work is precisely of that kind in which it might be expected that an employer would deal with his expert and experienced salesmen in very much the way the respondents did; I would not for that reason regard those salesmen as other than employees."

Stephen J then went on to observe at page 405 in relation to the matter before him that the salesmen remained very much a part of the employer's organisation and were subject to control by their employer in a number of respects. He then noted at page 407 that the salesmen were not supervised in their work and observed:

> "This lack of supervision is in large measure accounted for by the nature of their work and their careful selection and resultant skill and responsibility, coupled with the fact that payment by commission itself provides adequate incentive so as to safeguard the interests of the respondents."'

26 I make the following findings in relation to the applicant's contractual arrangement with the respondent.

The terms of the contract

27 A memorandum of understanding detailed the applicant's contractual arrangement with the respondent. There is nothing in this memorandum identifying the applicant's employment status however in my view the memorandum confirms that the arrangement between the parties is an ongoing permanent part time relationship which could be terminated by two week's notice by either party. Even though the applicant refers to working as a performer under a subcontract arrangement for 15 years in an e-mail to the respondent his invoices are ambiguous as it refers to the respondent as "Employer/Contractor" which in my view reinforces the applicant's evidence that his intention was not to operate on a true subcontract basis with the respondent. On balance it is therefore my view that this points to a contract of service arrangement between the applicant and the respondent.

Mode of remuneration

28 The applicant was paid on a weekly basis for hours worked after an invoice was submitted to the respondent, which is similar to the payment of weekly wages. Even though the applicant was paid at a rate of $150 per hour I find this amount to be a reasonable hourly recompense for a person of the applicant's skills and experience whether or not the applicant was an employee. On balance it is therefore my view that this indicia points to a contract of service.

Hours

29 The hours worked by the applicant were regular and fixed which is indicative of a contract of service.

Leave

30 There was no provision in the applicant's contractual arrangement with the respondent for an entitlement to annual leave, sick leave or long service leave. This is indicative of a contract for service.

Taxation

31 Whilst the applicant was responsible for paying his own tax, I accept the applicant's evidence that this was under a specific arrangement with the ATO which applied when a person's income is less than a specified amount and where the income was generated from a hobby. I also accept that under this arrangement the applicant did not have to have an ABN to utilise this facility which is usually required when a contractor conducts his or her business (see Exhibit A1). In the circumstance I find this indicia to be neutral.

Control

32 The applicant was not under the respondents' direct control when performing I accept that given the nature of the work undertaken by the applicant this is not unusual. I therefore find this indicia to be neutral.

Organisation

33 I find that the applicant's arrangement with the respondent indicates that he was part of the respondent's operational structure. In addition to performing at the respondent's restaurant the applicant assisted the respondent to update its sound system as requested by Mr Clements, the applicant provided his database to the respondent for promotional use and the applicant was provided with a staff meal and car parking facilities. I therefore find that these arrangements point to the applicant being under a contract of service with the respondent.

Superannuation

34 The respondent did not make superannuation contributions on behalf of the applicant which in my view lends weight to the applicant being under a contract for service.

Provision and maintenance of equipment

35 The respondent provided and maintained the piano and sound equipment used by the applicant. In my view the provision of this equipment is indicative of the applicant being under a contract of service.

Was the applicant carrying on his own business?

36 There was no evidence that the applicant was running his own business and the applicant gave evidence that he did not have an ABN. In my view this is indicative of the applicant being under a contract of service.

Obligation to work

37 The applicant was required to work for the respondent at a set time and day which is similar to an employee working on a regular part-time basis and there was no evidence that there was an agreement between the parties that this arrangement could be unilaterally varied by the applicant. In my view this is indicative of the applicant working under a contract of service arrangement.

Conclusion

38 The findings above indicate that the nature of the applicant's working arrangement with the respondent supports the applicant working under both a subcontract and employee arrangement. In all of the circumstances of this case however, and when taking into account the above findings in light of the totality of the relationship between the applicant and the respondent I find that on balance the applicant's working arrangement with the respondent during the period the applicant worked with the respondent was as an employee. I therefore find that the applicant was an employee as defined in s7(1) of the Act and the Commission has jurisdiction to deal with this application.

Was the applicant unfairly terminated?

39 The test for determining whether a dismissal is unfair or not is well settled. The question is whether the employer acted harshly, unfairly or oppressively in dismissing the applicant as outlined by the Industrial Appeal Court in *Undercliffe Nursing Home v Federated Miscellaneous Workers Union of Australia, Hospital Service and Miscellaneous WA Branch* (1985) 65 WAIG 385. The onus is on the applicant to establish that the dismissal was, in all the circumstances, unfair. Whether the right of the employer to terminate the employment has been exercised so harshly or oppressively or unfairly against the applicant as to amount to an abuse of the right needs to be determined. A dismissal for a valid reason within the meaning of the Act may still be unfair if, for example, it is effected in a manner which is unfair. However, terminating an employment contract in a manner which is procedurally irregular may not of itself mean the dismissal is unfair (*see Shire of Esperance v Mouritz* (1991) 71 WAIG 891 and *Byrne v Australian Airlines* (1995) 61 IR 32). In *Shire of Esperance v Mouritz* (op cit), Kennedy J observed that unfair procedures adopted by an employer when dismissing an employee are only one element that needs to be considered when determining whether a dismissal was harsh or unjust.

40 On the evidence before me it is my view that the applicant was unfairly terminated.

41 I find that the respondent did not have any reason to terminate the applicant as I accept the applicant's evidence that he did not behave in a manner whilst performing at the respondent's restaurant which warranted his termination. Furthermore, no evidence was given by the respondent to the contrary and the applicant's evidence about his behaviour on the evenings he performed at the restaurant was not broken down during cross-examination.

42 I am also of the view that the applicant was unlawfully terminated as he was not given two week's notice of his termination.

43 I find that the applicant was denied procedural fairness given the manner of his termination. The applicant was terminated in a perfunctory way when he was told that his services were no longer required by Ms Clements on or about 25 July 2006 and he was required to cease working with the respondent with immediate effect and the applicant was not given specific reasons for his termination. The applicant therefore had no opportunity to dispute his termination. Furthermore, the applicant was not warned that his employment with the respondent was in jeopardy prior to his termination.

44 In the circumstances I find that the applicant was unfairly terminated as he was not given a 'fair go all round'.

45 The applicant is not seeking re-instatement and given the circumstances of this case it is my view that re-instatement is impracticable. Given the summary manner of the applicant's termination and his inability to obtain suitable alternative employment I find that the applicant should be compensated $600 gross for his unfair termination, being the equivalent of two weeks' notice which was claimed by the applicant in his application.

Was the applicant denied a benefit under his contract with the respondent?

46 In an application for contractual benefits under s29(1)(b)(ii) of the Act, the onus is on the applicant to establish that the subject of the claim is a benefit to which the applicant was entitled under his or her contract of employment. It is for the Commission to determine the terms of the contract of employment and to ascertain whether the claim constitutes a benefit which has been denied under the contract of employment, having regard to the obligations on the Commission to act according to equity, good conscience and the substantial merits of the case (*Belo Fisheries v Froggett* (1983) 63 WAIG 2394; *Waroona Contracting v Usher* (1984) 64 WAIG 1500; *Perth Finishing College Pty Ltd v Watts* (1989) 69 WAIG 2307).

47 The respondent conceded that if the applicant was found to be an employee he was due $600.00 (3 x $200) for three weeks of dining allowance. As I have found that the applicant was an employee and as it is clear from Exhibit A2 that he was entitled to a $200 per week dining allowance I will also order that the respondent pay the applicant $600.00.

48 A minute of proposed order will now issue.

2006 WAIRC 04432

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RICHARD STERN
	APPLICANT
	-v-
	SILVERBIRD NOMINEES PTY LTD
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	THURSDAY, 1 JUNE 2006
FILE NO/S	APPL 791 OF 2005
CITATION NO.	2006 WAIRC 04432

Result Order issued

Order

HAVING HEARD Mr R Stern on his own behalf and Mr P Clements on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby:

1. ORDERS that the name of the respondent be deleted and that Silverbird Nominees Pty Ltd be substituted in lieu thereof.
2. DECLARES that Richard Stern was an employee of the respondent and the Commission therefore has jurisdiction to deal with this application.
3. DECLARES that the dismissal of Richard Stern by the respondent was unfair and that reinstatement is impracticable.
4. ORDERS the respondent to pay Richard Stern compensation in the sum of $600.00 gross within 14 days of the date of this order.
5. DECLARES that the respondent denied Richard Stern a benefit under his contract of employment.
6. ORDERS that the respondent pay Richard Stern $600.00 being a benefit owed under his contract of employment, within 14 days of the date of this order.

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

2006 WAIRC 04554

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES JOHN (ZHI HONG) WANG

APPLICANT

-v-

J.DICKMAN ENGINEERING PTY LTD

RESPONDENT

CORAM	COMMISSIONER S WOOD
HEARD	THURSDAY, 9 FEBRUARY 2006, WEDNESDAY, 15 MARCH 2006, THURSDAY, 20 APRIL 2006, WEDNESDAY 31 MAY 2006
DELIVERED	THURSDAY, 15 JUNE 2006
FILE NO.	U 5 OF 2005
CITATION NO.	2006 WAIRC 04554

Catchwords	Termination of employment – alleged unfair dismissal - Abandonment, Resignation or Dismissal - Credibility of witnesses - Workplace assault - Workers Compensation and Injury Management Act 1981 - Industrial Relations Act 1979
Result	No dismissal; Application dismissed for want of jurisdiction
Representation	
Applicant	Mr J Wang
Respondent	Mr S Hadlow of Counsel

Reasons for Decision

1 This is an application made pursuant to s.29(1)(b)(i) of the *Industrial Relations Act 1979* ("the Act"). The applicant, Mr John (Zhi Hong) Wang, worked for the respondent, J. Dickman Engineering Pty Ltd from 1995 to 25 August 2005 as a welder. He at times left the respondent's employment, but returned. He alleges that he was assaulted by a fellow employee, Mr Grant Murdoch, on the morning of 25 August 2005, and in the presence of his employer, Mr John Dickman. He says that he then attended the Cannington Police Station to report the incident and later visited a doctor to seek medical attention. He says that as a result of the incident that he has been unable to work since. The respondent accepts that Mr Wang was the victim of an assault, but says that the assault did not take place in their workshop. The respondent does not know how Mr Wang came to be assaulted. The respondent says that Mr Wang had earlier made comments to the effect that it would be good to be paid workers compensation and not work. They allege that this is the reason behind this application.

2 There is no evidence that Mr Wang was ever dismissed by any person acting on behalf of the respondent. Mr Wang says that he was never told that his services were no longer required. Albeit Mr Wang alleges that Mr Dickman was somehow complicit in the assault. In this way potentially a constructive dismissal may be argued. I say 'in this way' because this is not the actual claim made by the applicant. The applicant was self represented, and I had difficulty comprehending what the applicant had to say. Mr Wang as best he could, simply told his story to the Commission. During the course of giving evidence he also made various allegations about Mr Dickman and the business. I will not deal with each of these allegations as they were no more than unsubstantiated claims by the applicant. However, the claim that Mr Dickman was somehow behind the assault is relevant and has to be considered in the context of whether Mr Dickman attempted to bring Mr Wang's employment to an end.

I will deal with the evidence, however, in short, there is no case to be made that somehow Mr Dickman was behind the alleged assault, or involved in any way.

3 There is also no evidence that Mr Wang ever resigned his employment. Albeit it is common ground that the respondent received a request for an employment separation certificate for the applicant on 30 August 2005. Mr Wang was attending Centrelink at the time. I am not clear as to whether Mr Wang requested directly the separation certificate from Mr Dickman, or whether someone from Centrelink spoke to Mr Dickman, seemingly on Mr Wang's behalf. Albeit, I consider the latter scenario to be most likely. Nevertheless, it is common ground that Mr Wang did not attend at the respondent's premises after 25 August 2005. It is also common ground that Mr Wang submitted a claim for workers compensation. There is medical evidence to suggest that Mr Wang has not been capable of working since the alleged incident on 25 August 2005. In all the circumstances of this matter, I do not consider that a case can be made out that Mr Wang has either resigned or abandoned his employment.

4 The respondent maintains that the applicant voluntarily left his employment, and had done so on previous occasions. The Notice of Answer and Counterproposal states:

> "1. The Applicant cites the date of termination as 25 August 2005.
>
> 2. The Application is otherwise deficient in respect of the particulars required pursuant to Regulation 13 (3) of the *Industrial Relations Commission Regulations 2005.*
>
> 3. Given the deficiency it is clearly not possible for the Respondent to provide any answer or comment. However, on the presumption that the Applicant asserts that a dismissal occurred, the Respondent states:
>
> 3.1 the Applicant was not dismissed;
>
> 3.2 on 25 August 2005 the Applicant voluntarily left the Respondent's premises shortly after commencing work, without notifying the Respondent of his intentions;
>
> 3.3 the Applicant failed to attend for work thereafter;
>
> 3.4 on 30 August 2005 the Respondent received a request from the Applicant for an Employment Separation Certificate (which was duly supplied);
>
> 3.5 the Respondent contends that the Applicant voluntarily ceased employment with the Respondent on either 25 or 30 August 2005.
>
> 4. The Respondent objects to the Application and to any Orders that are or may be sought."

5 The respondent made an application on 4 November 2005 for further and better particulars from the applicant. The application had not been particularised in any way. The matter was then called on for a directions hearing on 28 November 2005. I attempted to elicit from the applicant the grounds for unfairness and the remedy which he sought. Due to language difficulties I could not obtain either. My impression is that Mr Wang has a reasonable grasp of spoken English but has difficulty expressing himself clearly in English. In any event I could not understand him and needed to resort to an interpreter. I should also say that even with the use of an interpreter the hearing did not proceed smoothly as various interpreters appeared to have some difficulty with understanding the points Mr Wang was attempting to convey. I had to instruct and rebuke Mr Wang for the manner in which he dealt with the interpreters. At times Mr Wang became frustrated with the process of the hearing, and at times he simply appeared frustrated and agitated. It was a difficult hearing to conduct and I had considerable difficulty at times in trying to understand the points Mr Wang sought to make. In the circumstances, I would acknowledge the professional and patient manner in which Mr Hadlow represented his client, before the Commission.

6 The matter was called on again for a directions hearing on 15 December 2005 with the aid of an interpreter. Mr Wang gave details of the alleged assault, discovered relevant documents, and said that present at the time of the assault were Mr Murdoch, Mr Dickman, the owner, Mr Dave Covban and Mr Steve Bajtek, both fellow employees. Mr Wang says that Mr Covban helped him up from the floor after he had been assaulted. Mr Wang could not express reasons for unfairness or what remedy he sought; except that his case is seemingly that he was assaulted at the workplace, with the knowledge of his employer, and now cannot work. This is said to be unfair and he seeks compensation for his loss. He says that he has been on Centrelink payments since about 23 September 2005.

7 Various statements taken by the police were tendered at hearing. As stated, Mr Wang attended at the Cannington police station early on the morning of 25 August 2005. Each statement is consistent in so far as each person maintains that he did not have any knowledge of an assault on Mr Wang at his work. Mr Wang applied for workers compensation and various progress report medical certificates were tendered. It would seem that the workers compensation claim has not been finalised and that the claim at least at this point has not been recognised as arising at work.

8 Mr Wang tendered a statement he had made to the Police on 25 August 2005 [Exhibit A1]. The statement was witnessed by, I assume, Senior Constable Peter Wall [No.8692] at 10:45am on that day. The statement reads as follows:

> "1. I am 51 years of age and I live by myself in Bayswater. I work as a Welder at John Dickman Engineering in Welshpool.
>
> 2. I have worked at this job with John Dickman as my Employer for 10 years on and off.
>
> 3. John has problems keeping people working for him because he runs a very messy workshop. He has a lot of trouble with the Safety Department because of his dangerous work practices. He employs people that make trouble in the workshop.
>
> 4. At about 8:45am on the 25th of August 2005 I was at work in the work shop alongside another employee, Grant Murdoch. Grant has been working at Dickman's for 2 or 3 months.
>
> 5. On this day Grant was using an Electric Cutting Disc to grind a steel rubbish bin. This was the first time I had seen him grinding a bin since he started working at Dickman's.
>
> 6. I knew that it was incorrect and very dangerous to use a Cutting Disc to grind steel. The disc can break off and fly through the air spinning at high speed and cut someone's head off.
>
> 7. John Dickman was standing nearby. He seemed to have a close relationship with Grant and said nothing to Grant. He didn't care about the situation.

8. I was close to Grant and I said to him, "You are grinding too hard and you are using the wrong tools. It is very dangerous and I am close to you. You can't make the bin."

9. He said, 'Fuck you cunt. You do your own job."

10. He then charged at me and immediately started throwing punches which were landing all over my face and head. He was saying, "Fucking cunt. I'm going to kill you." He continued punching me and kicking me and I lay on the floor face down with my hands over my face. He was kicking me in the head as I lay on the floor. He was wearing steel capped boots and I felt a lot of pain. I looked up and I saw my boss, John Dickman standing in front of me about a metre away. He just looked at me and said, "We'll be ok. He's gone." He then walked away.

11. There were about 5 other people standing nearby that saw this happen. I don't know their names, but one of them helped me to my feet and asked me if I was ok.

12. I felt numbness on the left side of my face and I still feel it now. I feel very sore in my head.

13. Grant is about 30 years of age, about 172cm tall, solid build with short brown hair. He has a black band tattooed on his arm, I don't know which arm. He is clean shaven.

14. I could not defend myself. He was too strong and too young. I just put my hands over my face and tried to protect myself.

15. I packed my tools in my bag and I went straight to the Police Station to report it. I am now going to the Doctor's surgery to get. treatment for pain and swelling on both sides of my face and numbness around my left ear.

16. I declare that this statement is true to the best of my knowledge and belief and I that I have made this statement knowing that if it is tendered in evidence I will be guilty of a crime if I have wilfully included in this statement anything which I know to be false or that I do not believe to be true.

9 The statement serves as a good summary of the allegations made by Mr Wang. Attached to the statement were a series of black and white photographs of Mr Wang, presumably displaying his facial injuries. I cannot readily see these injuries in the photographs, other than there appears to be some swelling around one eye. However, as part of Exhibit A2 there was a medical certificate dated 25 August 2005 outlining the injuries to Mr Wang on examination that day. There was also an unsigned letter dated 27 September 2005 from, it would appear, Dr C Heaysman addressed to the Cannington Police Station. The letter reads as follows:

"RE: Zhi Hong WANG

I refer to your letter dated 19th September 2005

I saw Zhi Hong WANG on the morning of 25th August 2005 approx 11:20 am who claimed to have been punched in the face at 8:45 am that day.

1. He had a large swelling over the left cheek maxilla

2. Bruising right eye

3. Abrasions over right cheek

4. Bruising of the left hand

X-ray of the facial bones showed no fractures.

He was seen on 26th August, 30th August, 3rd September and 10th September when all swelling and bruised had disappeared.

The injuries were consistent with him having been punched or kicked about the head.

There was little danger to life and no concussion. There should be no sequelae.

It is immaterial that subsequent medical attention has prevented the death or permanent injury."

10 There can be little doubt then that Mr Wang suffered certain injuries, consistent with him having been punched or kicked about the head, on 25 August 2005. There can be little doubt that those injuries were received prior to 10:45 am on that morning; and probably some time earlier than that because the statement for the Police had been received, typed and signed by that time. It is accepted by the respondent that Mr Wang suffered injuries on that morning, but not at the respondent's premises. The suggestion seemingly being that Mr Wang had on occasion turned up to work injured, had some difficulty with what is referred to as the Chinese mafia, and must then have been bashed in the period between leaving the respondent's premises and arriving at the police station. The respondent accepts that Mr Wang attended work that day; albeit Mr Covban says he did not see Mr Wang. Work commenced at the respondent's premises at about 8:00am. The evidence for the respondent, in the main, is that Mr Wang appeared to be alright on that morning. Therefore, the only conclusion to be reached, on the evidence, is that Mr Wang suffered his injuries somewhere between 8:00am and not later than 10:45 am on 25 August 2005. The respondent's case would lead to the conclusion that Mr Wang suffered those injuries somehow after about 8:50 am, which is when Mr Dickman says he saw Mr Wang drive out of the respondent's premises. I do not know when Mr Wang arrived at the Cannington Police Station. No police officer was called to give evidence.

11 Exhibit A7 contains a medical report dated 13 March 2006 from Dr Goodheart, a Consultant Neurologist. I do not go to all the medical certificates, reports, or worker's compensation progress medical certificates. These were accepted in evidence but were untested. No medical practitioner was called and Mr Wang's medical state, other than whether he was assaulted, is only important in this matter in terms of his capacity for work past 25 August 2005. Dr Goodheart makes it clear that, in his opinion, Mr Wang, "has been totally unfit to return to work activity since the date of the assault", and was as of the date of review, "unable to return to work duties due to the ongoing symptoms".

12 Importantly, there is also a tape of a conversation between Mr Wang and Mr Covban, at Mr Covban's home, in late November/early December 2005. The tape is of poor quality and its admission was opposed by the respondent. Mr Wang says he taped the conversation to gain evidence as to what had happened on 25 August 2005.

EVIDENCE

13 Mr Wang in evidence adopted his statement to the police and his comments to the Commission, on transcript, from the hearing on 15 December 2005.

14 Mr Wang's evidence is that he has received Centrelink payments since dismissal. He has not been able to work since that time. He has made a workers compensation claim. Mr Wang says that Mr Covban, on the tape, said, "that the boss (Mr Dickman) had said to Mr Murdoch, "John Wang is a good worker. Why you hit him? You gave me a lot of trouble. I cannot have you here anymore". He says the boss has lied. Mr Covban, on the tape, says that two weeks after the incident Mr Dickman dismissed Mr Murdoch. Mr Wang says, that Mr Covban said, during their taped conversation, that Mr Murdoch assaulted Mr Wang and that Mr Dickman said to Mr Murdoch that he cannot assault people. Mr Wang went through what he says was said in his conversation with Mr Covban, and which appears on the tape (Transcript p.104-105). Mr Wang says he did not really know what Mr Covban was saying when he indicated that he had not seen anything on 25 August 2005. Mr Wang says that Mr Covban saw the assault and picked him up from the floor after the assault. Mr Wang says Mr Dickman saw him after he was assaulted and while he lay on the floor. Mr Dickman said, "John Wang would be okay". Mr Wang says this occurred at approximately 8:35am and he arrived at the police station before 9:00am. Mr Wang says he left the workplace at approximately 8:40am. Mr Wang says:

> "No, I repeat, yeah, sorry. Yeah, after I was assaulted I wanted to leave the surrounding. My boss came from outside to the place that close to me and we - - we were face to face. We met face to face inside the yard. But let's say this is the road outside and inside - - I was about to get out. He was coming in, then I saw him. I wanted to talk to him but after he saw immediately he drop away." (Transcript p.131)

The reference to 'drop away' should read 'drove away'.

15 Mr Wang says Mr Dickman was driving a white Toyota Land Cruiser into the yard. Mr Wang says that after being assaulted he saw two people, Mr Bajtek and Mr Covban. Before he left he says he shook hands with Mr Bajtek. Mr Wang had his tool box with him and Mr Bajtek was working next to a rubbish bin.

16 Mr Wang says that he had a feeling Mr Dickman was trying to give him a hard time. He says:

> "Of course there was reason. Because I ask him to - - for pay rise he - - he doesn't agree. He then hate me and try to give me a casual - - oh, okay, he tried to give me a casual job from full-time change to casual and at $15 per hour." (Transcript p.141)

17 Mr Wang says that one or two days later he went to Centrelink to get money to support himself because he could not work, on medical advice, for at least three to six months. The doctor gave him a medical certificate to give to Centrelink and told him to apply for workers compensation. He did not ring Mr Dickman as Mr Dickman did not care. He says he did not ask for a separation certificate from Mr Dickman; Centrelink requested it. When Mr Wang later rang and spoke to Mrs Dickman, he told her he would be applying for workers compensation. He says it was the policeman, Peter Wall, who told him to apply for workers compensation and to go to the Justice Department. He denies ever saying that he thought going on workers compensation would be a good idea. He agrees that Mr Dickman never told him that he was dismissed or sacked.

18 Mr Covban made a statement to the police [Exhibit R1] dated 7 November 2005. In that statement he says that he did not see Mr Wang at work on 25 August 2005. Mr Covban was inside a storage bin doing some welding. He says the only other person working inside the workshop on that day was Mr Bajtek. Mr Covban was asked where Mr Wang was and he said he had not seen him. He says that he did not see any altercation or assault between any person. He swore to the truth of the statement.

19 Mr Covban also made a statutory declaration dated 21 September 2005 [Exhibit R2] concerning the personal injury claim of Mr Wang. In that statement he says that Mr Wang is a lazy worker who was sick of working and was 'always trying to make a dollar without having to work for it'. He says Mr Wang was quite aggressive. It would not be unusual for him to leave work in a rage and disappear for days on end. Mr Covban says that he never witnessed any altercation between Mr Murdoch and Mr Wang. He says he was not aware that Mr Wang was in the workshop on 25 August 2005. He says that 'a few days later' he was informed that Mr Wang had alleged that Mr Murdoch had assaulted him.

20 Mr Covban gave evidence that he heard about Mr Wang's alleged assault when Mr Wang visited him at his flat around 6 December 2005. Mr Covban says that Mr Wang asked him to ask Mr Dickman to give him back his job. Mr Covban says that on 25 August 2005 he was at work and, "practically on my hands and knees welding the floor", inside a rubbish bin. He started this job at about 8:00am. He did not see Mr Wang when he commenced work or at work that day. He had a break from welding the bin at about 10:00am. He did not see Mr Dickman either between 8:00am and 10:00am. He saw Mr Bajtek, Mr Murdoch and perhaps Graham at the start of work. He says he saw Michael and Mr Dickman about 10:00am at smoko. Mr Covban says that Mr Bajtek's work bench is about 2 metres to the right of his. Whilst working between 8:00am and 10:00am he saw Mr Bajtek but he is not sure whether he saw Mr Murdoch. These three men were the only ones in the workshop. The bins are 3.6 x 1.74 metres across and 1.3 metres in height. Mr Murdoch was working about 30 feet from Mr Covban. Mr Covban did not see Mr Wang that morning at any time. At about 10:00am at smoko Mr Bajtek told Mr Covban that Mr Wang had left again. Mr Wang normally worked about 20 feet from Mr Covban and to the left of him. However, on 25 August 2005 Mr Covban says that Mr Murdoch was working in the area Mr Wang normally worked in. He says Mr Wang had over the previous day, worked at a bench to the left of him.

21 Mr Covban says that he did not see Mr Wang until he came to his house in December 2005. Mr Covban was very surprised by the visit. He says he came to his house to ask him to ask the boss to give him back his job. Mr Covban says of the transcript of the taped conversation as follows:

> "WOOD C: All right. And looking through it, does that look like it's an accurate record of what happened in the conversation, what was said?"

> "Yes, sort of, but I said things to Mr Wang that I felt sorry for him because he comes to my door begging for his job back, for me to ask the boss. I said, "Why don't you just ring him up? You've been working there 10 years on and off, three or four times over 10 years. Just ask him." Yeah, no, I've read this. I know - - I know what it said in it, and like I said, I just felt sorry for John and I told him what he wanted to hear because I really honestly didn't want him to be there." (Transcript 221)

22 Mr Covban says the transcript is fairly accurate but reinforced that he was just telling Mr Wang what he wanted to hear. He says that he had about three or four cans of beer before Mr Wang arrived and was 'half-cut'.

23 Mr Covban says of the part in the transcript that refers to Mr Wang being 51 years old that he was telling Mr Wang what he wanted to hear. He says that he ran down Mr Murdoch to make Mr Wang feel better. Mr Covban says that the first time he heard the allegation that Mr Murdoch hit Mr Wang was during their conversation in Mr Covban's flat. He says the first time he understood the date of the alleged assault was at hearing. Mr Covban says that Mr Murdoch left the respondent's employment about one month before Christmas.

24 Under cross-examination Mr Covban denies that he witnessed any assault at work on 25 August 2005. He says he did not help Mr Wang get up off the ground. At about 10:00am at smoko Mr Bajtek told him that Mr Wang had left again. He says Mr Wang would just leave the workshop if, for example, a grinder stopped working. So when Mr Bajtek told him Mr Wang had left he did not think much of it. Mr Covban says that he had heard Mr Wang say many times that there must be an easier way to make money.

25 Mr Covban later says, when asked if the police spoke to him in September 2005 about an assault allegation, that the police did ask him and he told them he did not see anything. He cannot remember if the police visit generated any discussion in the workplace.

26 Mr Grant Murdoch wrote a letter to Mr Dickman on 2 September 2005 stating that he did not assault Mr Wang [Exhibit R3]. He says that he had read Mr Wang's allegation.

27 Mr Murdoch gave evidence that he last saw Mr Wang the day Mr Wang left the respondent's premises. Mr Murdoch says he did not assault Mr Wang on 25 August 2005. He says Mr Wang was not happy about the sparks off his grinder. Mr Wang got 'shitty' and said that he was not working there under those conditions. He simply walked out the door, returned and packed up his tool box and left. Mr Murdoch says that he was grinding the bin with a grinder, not a cutter. Mr Murdoch denies that he swore at Mr Wang.

28 Mr Murdoch saw Mr Dickman that morning with another employee, Michael. They went around to the seeder yard 'first thing in the morning'. Mr Dickman started work that day at about 8:00am. Mr Dickman was not present when Mr Murdoch was grinding the bin. Mr Covban and Mr Bajtek were present at that time. The police questioned Mr Murdoch and he told them he did not assault Mr Wang. They contacted him by telephone. He cannot recall when that happened; perhaps a couple of days after 25 August 2005. He wrote a letter on 1 September 2005 stating that he did not assault Mr Wang. He was not sacked by Mr Dickman.

29 Mr Murdoch says that on that morning he started welding a bin and did so for about one hour. After this he proceeded to grind the bin. He was grinding for about 20 minutes before Mr Wang approached him. Mr Wang had been pacing backwards and forwards and was not happy about something. He then started to raise his voice about the sparks from the grinder. Mr Wang's work area was directly across from Mr Murdoch's work area, to the left of him, and approximately 5 metres away. Mr Murdoch said that Mr Wang had a go at him for grinding his bin near him. Mr Murdoch replied that he could not grind the bin outside. Mr Wang then walked off. Voices were raised but there was no swearing. Mr Dickman was not around at that time. Mr Murdoch says the police asked him to make a statement and he did not because the police did not follow up on this. He says Mr Wang looked normal on that morning. Shortly after 25 August 2005 Mr Murdoch went to work at another sandblasting company. He says 'it was only a couple days after'. The police spoke to him after he had left employment with the respondent.

30 Mr Bajtek made a statement to the police dated 4 November 2005 [Exhibit R4]. He states that he was at work welding on the morning of 25 August 2005. Mr Wang came up to him, while he was working in a bin, and 'stuck out his hand and said, "see you later"'. Mr Bajtek saw him walk out of the workshop. He says Mr Wang, "is always walking off the job when he gets annoyed or angry. He has done the same sort of thing three or four times in the past." Mr Bajtek says that later that afternoon Mr Dickman asked him if he knew 'what had happened'. He told Mr Dickman that he had no idea. He says that he did not see Mr Wang get assaulted. He declared to the truth of the statement.

31 Mr Bajtek made a statutory declaration on 21 September 2005 [Exhibit R5] in connection with Mr Wang's personal injury claim. He says that Mr Wang is a 'reasonably good worker and he always did what I asked him'. He says that sometimes Mr Wang came to work late and would get quite aggressive especially if things did not go his way, for example, 'like grinders breaking down'. He says that he never witnessed any altercation between Mr Murdoch and Mr Wang and did not hear any untoward commotion in the workplace. He says that Mr Wang packed up his tools and came over to where he, Mr Bajtek, was working and Mr Wang said he was leaving. Mr Bajtek remembers seeing Mr Wang on 25 August 2005 when he arrived at work and he says Mr Wang did not appear to be under the influence of any drugs or alcohol and did not appear to be suffering from a physical disability. He says Mr Wang commenced work at approximately 8:00am and it was not long after that Mr Wang approached him, shook his hand and said he was leaving. There was no evidence that he had been assaulted. He was informed a few days later that Mr Wang had alleged that Mr Murdoch had assaulted him. Mr Bajtek says that Mr Wang had 'a few personal problems'. Mr Murdoch left the respondent company 'shortly after' the alleged incident and Mr Bajtek does not know why. He says that he did not ever see Mr Wang threaten anyone with physical harm nor did he see anyone, including Mr Murdoch, threaten Mr Wang with physical harm.

32 Mr Bajtek gave evidence that he last saw Mr Wang on 25 August 2005 when Mr Wang came up to him, shook his hand and walked out of the workshop. Mr Bajtek started work that day at 8:00am. He saw Mr Wang at that time. Mr Bajtek was welding inside a bin and about 30-40 minutes after he started Mr Wang approached him, took his hand and said, "See ya, Steve". Mr Wang looked normal at that time. He did not look like he had been hit in the face. Mr Bajtek says that Mr Wang

had done this four times previously, but would come back to work the next day. Mr Dickman later asked him where Mr Wang was and Mr Bajtek said, "Oh, he's cracked the shits and taken off again".

33 Mr Bajtek says that a few days later the police came to the workplace and he learnt then that Mr Wang alleged he had been assaulted. Mr Bajtek says that he never witnessed an assault on Mr Wang in the workplace. He did not see Mr Covban help Mr Wang get up from the ground. Mr Bajtek cannot remember from whom he learnt that Mr Wang alleged he was assaulted. Mr Bajtek says that he asked Mr Murdoch what he did and Mr Murdoch replied, "Nothing". He says that he learnt from the other blokes in the workplace that Mr Wang's allegations were all a pack of lies. Mr Bajtek says that he does not know why Mr Wang left but it could have been over, "somebody shooting grinding sparks or something like that".

34 Mr Bajtek says that he took a guess that Mr Murdoch had upset Mr Wang on 25 August 2005 and asked him what he did to upset Mr Wang. Mr Bajtek says that Mr Murdoch replied, "Don't worry about it, Steve, its nothing."

35 Mr John Dickman gave a statement to the police [Exhibit R6] dated 7 November 2005. He stated that he was at the workplace at 8:00am on 25 August 2005 and left shortly after in the work truck with Mr Michael Grieves. They went to collect some containers and on return to the workplace, when he was approaching the driveway of the respondent's yard, he saw Mr Wang leaving in his car. He says Mr Wang did not stop or wave to him as he drove past. Mr Dickman asked Mr Bajtek where Mr Wang had gone and Mr Bajtek said that he had 'just left'. Mr Dickman says that Mr Wang had a habit of leaving when he became upset. Mr Dickman says that Mr Wang telephoned the office 'about a week later' and spoke to his wife. He says that Mr Wang told his wife that Mr Murdoch had assaulted him on 25 August 2005 and Mr Wang requested a separation certificate. Mr Dickman says he had not heard from Mr Wang since 25 August 2005. Mr Dickman rang Centrelink and they told him that Mr Wang was not returning to work for the respondent and they 'also mentioned the assault'. Mr Dickman spoke that day to Mr Covban, Mr Bajtek and Mr Murdoch about any assault. Mr Bajtek and Mr Covban said they had been working and Mr Murdoch said he did not know what Mr Dickman was talking about. He decided to call his safety consultant, his insurance company (GIO) and the Cannington Police, 'to get some advice'. He says they all told him there was nothing he could do until Mr Wang made an official complaint. He says, "Since that time Mr Wang also continued with an unfair dismissal claim which was subsequently proven untrue in Court". He says he did not see any assault or altercation. He declared to the truth of the statement.

36 Mr Dickman made a statutory declaration on 21 September 2005 [Exhibit R7] concerning Mr Wang's personal injury claim. Mr Dickman says that Mr Wang has been employed by him on and off for 10 years and, he has always been a very good worker. Mr Dickman says that Mr Wang, "does have a very short fuse and it was not uncommon for him to become disgruntled and leave his place of employment for days on end with no approach to me". Mr Dickman says that in those circumstances, eventually Mr Wang would contact him and would return to work. He says that Mr Wang has never assaulted anyone at work and never been assaulted by anyone at work. Mr Wang had been involved in an altercation outside of work and has not been able to attend work due to injuries. He says that in 2000, Mr Wang was beaten up by the Chinese mafia in his unit and Mr Wang was fearful that they were always out to get him. Mr Dickman refers to Mr Wang as, "for a Chinese he was very volatile and aggressive".

37 Mr Dickman says in the statement that on 25 August 2005, Mr Wang had not commenced work when he, Mr Dickman, left the premises at approximately 8:10am. Other employees had already commenced welding in their bins. Mr Dickman returned to the workshop at approximately 8:50am and as he entered the yard he saw Mr Wang drive out. He saw Mr Wang and he waved to Mr Wang. Mr Wang did not acknowledge him. Mr Dickman asked Mr Bajtek where Mr Wang was going. Mr Bajtek could only tell him that Mr Wang had left with his tool box without saying anything. Mr Dickman thought Mr Wang had decided to leave the workplace again, 'as may be his grinder wasn't working'. Mr Dickman says Mr Wang rang the office on 30 August 2005. He spoke to Mrs Dickman. Mr Wang said that he was at Centrelink and wanted a separation certificate. He alleged that he had been assaulted by Mr Murdoch on 25 August 2005. Mr Wang said he had reported the assault to the Cannington police and had seen a doctor. On 1 September 2005 Mr Dickman received a first medical certificate. Mr Dickman spoke to Mr Murdoch about the allegation. Mr Murdoch denied it. On 5 September 2005 Mr Dickman received the claim for unfair dismissal. Mr Dickman says, "If John were to ring me today asking for a job then I would employ him no questions asked". He says he asked Mr Bajtek and Mr Covban about the alleged assault and they did not know anything. Mr Murdoch left the employment of the respondent on 9 September 2005. Mr Dickman says he thinks this is because Mr Murdoch felt he had been unfairly accused by Mr Wang of, "an assault which may not have taken place". Mr Dickman says that in 1999 he issued verbal warnings to Mr Wang about his aggressive behaviour towards other employees.

38 Mr Dickman gave evidence that Mr Wang had worked for the respondent for the last 10 years welding and repairing waste containers. He says that during this time Mr Wang had left several times. Mr Dickman says that on 25 August 2005 he was driving into the respondent's yard with a truck load of bins and Mr Wang was driving out of the gate. This occurred at approximately 9:00am. Mr Dickman waved his hand out the window but Mr Wang did not acknowledge him. Mr Dickman did not get a good look at Mr Wang. Mr Dickman spoke to Mr Bajtek to ask what had happened and the whereabouts of Mr Wang. Mr Bajtek said that he had left again. Mr Dickman says that Mr Wang has simply walked off about three times previously and then come back. Mr Dickman says he thought he could give Mr Wang a few days. He tried to telephone him, but Mr Wang did not answer. Mr Dickman says that Mr Wang was a good worker. He had a very short fuse.

39 Mr Dickman says that Mr Wang telephoned about five days later and spoke to Mrs Dickman. Mr Wang was at Centrelink and he asked for a separation certificate. Mr Dickman rang Centrelink who advised him that Mr Wang was leaving his employment and wanted a separation certificate and Mr Dickman said, "Well, tell him he can come back to work". Centrelink told Mr Dickman that Mr Wang was leaving because he had been assaulted by Mr Murdoch. He rang the Cannington police to come to the workshop, his safety consultant to seek advice and GIO Insurance. Mr Dickman says he rang Mr Wang several times. Mr Dickman next received a workers' compensation form for Mr Wang. He then let the insurance company and the police handle the matter. The insurance company said there was not much they could do as they did not have enough evidence. Mr Dickman asked his employees to make and sign statements. He says he did not sack Mr Murdoch and Mr Murdoch left shortly after 25 August 2005. Mr Dickman says that he would have taken Mr Wang back at work.

40 Mr Dickman denies that he saw an assault on Mr Wang, or Mr Murdoch using the wrong tools. He says Mr Wang has never been assaulted in his workplace. Mr Wang had bricks thrown through his home windows in 2000. Mr Dickman visited him at

his house and Mr Wang told him that the Chinese mafia were after him. On another occasion Mr Wang came to work with a black eye from an argument he had with someone at the markets. Mr Dickman says he trained Mr Wang to weld and drive a forklift. He has assisted Mr Wang with tax returns over the years. He says he quite liked Mr Wang. He gave Mr Wang a table from the lunch room. Mr Wang went to work at Subway and another engineering firm at some stage and Mr Dickman was also happy to re-employ him. Mr Dickman says that Mr Wang had previously asked him about workers compensation and said that getting workers compensation was a great idea. He says that Mr Wang told him that a lot of people he knew did it, i.e. claim workers compensation. Mr Dickman says that he never dismissed Mr Wang. Mr Dickman says that now he does not want Mr Wang working for him because Mr Wang lied about Mr Murdoch assaulting him. He knows this because he asked Mr Murdoch and he denied assaulting Mr Wang. Mr Dickman says, "Nothing out of the ordinary happened in the workshop". Mr Dickman says that, "I'm not denying that John was assaulted, but there was no assault on our premises in our workshop". He knows that Mr Wang was assaulted on 25 August 2005 because the police told him this and he accepted it to be so. This happened 5 to 7 days after 25 August 2005. He did not see Mr Wang start work on that morning.

RECORDED CONVERSATION WANG/COVBAN

41 An important part of this hearing is a recorded conversation between Mr Wang and Mr Covban which Mr Wang says he taped at Mr Covban's home, on 30 November 2005. The recording was made on a hand held Dictaphone and made without the knowledge or consent of Mr Covban. I note that at the front of the tape there appears to be a news broadcast and reference to scratchings from the Melbourne Cup. This might cast doubt on whether the tape was made on 30 November 2005, whether the tape has been edited, or whether the tape had other material on it. In any event, Mr Covban was not aware that the conversation was taped, albeit in evidence he agrees that they had a conversation at his home around this time. Mr Covban says it occurred in December 2005. Mr Wang says that he gave a copy of the tape to Inspector Sue Young of the Western Australian Police Service.

42 Mr Hadlow for the respondent submitted that the tape should not be allowed to be used at hearing. There is a general prohibition making recordings without consent under the *Surveillance Devices Act 1998*. Section 9 of that Act states:

"**9 .Prohibition of publication or communication of private conversations or activities**

(1) Subject to subsection (2), a person shall not knowingly publish or communicate a private conversation, or a report or record of a private conversation, or a record of a private activity that has come to the person's knowledge as a direct or indirect result of the use of a listening device or an optical surveillance device.

Penalty:

(a) for an individual: $5 000 or imprisonment for 12 months, or both;

(b) for a body corporate: $50 000.

(2) Subsection (1) does not apply —

(a) where the publication or communication is made —

(i) to a party to the private conversation or the private activity;

(ii) with the express or implied consent of each principal party to the private conversation or private activity;

(iii) to any person or persons authorised for the purpose by the Commissioner of Police, the Corruption and Crime Commission, the chairman or any 2 members of the Anti-Corruption Commission or the Chairperson of the National Crime Authority;

(iv) by a law enforcement officer to the Director of Public Prosecutions of the State or of the Commonwealth or an authorised representative of the Director of Public Prosecutions of the State or of the Commonwealth;

(v) in the course of the duty of the person making the publication or communication;

(vi) for the protection of the lawful interests of the person making the publication or communication;

(vii) in the case of the use of a listening device or an optical surveillance device in the circumstances referred to in section 5(3)(d) or 6(3)(b)(iii), as the case requires, in the course of reasonable action taken to protect the lawful interests of the principal party to the conversation or activity who consented to the use of the device;

(viii) in accordance with Part 5; or

(ix) in the course of any legal proceedings;

(b) where the publication or communication is made to a member of the police force of the State or of another State or a Territory in connection with —

(i) an indictable drug offence or an external indictable drug offence; or

(ii) any other indictable matter of such seriousness as to warrant the publication or communication;

or

(c) where the person making the publication or communication believes on reasonable grounds that it was necessary to make that publication or communication in connection with an imminent threat of serious violence to persons or of substantial damage to property.

(3) Subsection (2) only provides a defence if the publication or communication –

(a) is not more than is reasonably necessary –

(i) in the public interest;

(ii) in the performance of a duty of the person making the publication or communication; or

(iii) for the protection of the lawful interests of the person making the publication or communication;

(b) is made to a person who has, or is believed on reasonable grounds by the person making the publication or communication to have, such an interest in the private conversation or activity as to make the publication or communication reasonable under the circumstances in which it is made;

(c) is made by a person who used the listening device to record, monitor or listen to that conversation or an optical surveillance device to record or observe that private activity in accordance with a warrant or an emergency authorisation issued under Part 4; or

(d) is made by an authorised person employed in connection with the security of the Commonwealth under an Act of the Commonwealth relating to the security of the Commonwealth."

43 Mr Wang says that he made the recording because the alleged assault was denied and he had difficulty pursuing his claims with no evidence. Mr Wang then sought to help himself by obtaining further evidence. Mr Wang's application was lodged in the Commission on 5 September 2005. Hence he had made a claim prior to making the recording. Mr Hadlow, Counsel for the respondent, submitted that there was nothing about these proceedings, i.e. an alleged unfair dismissal, whereby Mr Wang had to make a recording to protect his lawful interests. His interests under s.29 of the Act had not been eroded in anyway. It was therefore not reasonably necessary for Mr Wang to make the tape. In that sense then, s.9(3)(a)(iii) is not enlivened. I allowed use of the tape, with a question of weight to be determined, in accordance with the Surveillance Devices Act. In my view, Mr Wang was attempting to gain support for his case, in the face of Mr Covban and others having earlier given statements that they knew nothing of an assault.

44 The tape presented a difficulty at hearing in that Mr Hadlow for the respondent had not had the opportunity to hear the tape or to take instructions. The hearing was adjourned for this purpose. However, it was difficult to discern a lot of the tape. The tape was sent to the court reporters to be transcribed [Exhibit A5]. The transcript of the tape was then used during the hearing. This is the transcript which Mr Covban responded to under questioning. Mr Wang had a difficulty with what appeared on the transcription. Much of the tape was transcribed as being 'indistinct'. Mr Wang had the opportunity to say what he considered had been said during the conversation with Mr Covban. I have since had the opportunity to listen more carefully to the tape several times, and to compare it to the transcription. It became apparent to me after listening to the tape several times that portions of the tape which I could hear, albeit with some difficulty, had not been transcribed. The quality of the recording and the transcription caused a disadvantage for both parties during the hearing. However, of more relevance is the fact that since the hearing, having recognised the deficiencies in the transcript, my Associate was able to set up a player and speakers which produced a noticeable improvement to the clarity of the tape. The tape is still indistinct in many parts, however, importantly, Mr Covban, can be heard, after some replaying, to say the following at various times:

"Mr Wang : the guy no working there any more?

Mr Covban: No, no, no, John got rid of him like 2 weeks after what happened. Two weeks after he fucked him off. He tried to beat me up, he tried to beat everybody up, made, fucking hell.

Mr Wang: Yeah

Mr Covban: Yeah idiot mate I want to go to his house I'll show you where the wanker lives

Mr Covban: I'll show you where he lives one day you go break his windows if you want mate

Mr Wang: No Dave I don't want making any trouble

Mr W: we have …… little bit argue its ok ….. never like punch a me kick a me

Mr C: Yeah I know mate I'm sorry

Mr W: Dave, what's the reason he a kicking me ……. See my face …. My blood ….I just cover my head, bang bang

Mr C: I am sorry John. Not here .. it shouldn't happen

Mr W: I just trying to say thank you very much. You give me a hand and pick me from the floor

Mr W: Yeah, I just thank you very much, it happened – you taking my hand – lifting me up.

Mr C: You're always worried John you know

Mr W: This time I know you really good a friend -- just for taking my hand.

Mr C: Boss Not happy mate. My boss didn't want to have any trouble at work. You know what I mean. They get fucking sued or something John.

Mr W: So two weeks later John sack him

Mr C: Yeah Yeah …… Anita said you fuck off, Anita said you cause trouble you fuck off, you not even allowed to come into the yard anymore banned him

Mr W: You and me Steve working everyday

Mr C: Yeah I know John I'm sorry he even tried to have a go at me … oxy cut …. I'll do it when I want to …. Don't you fuck with me …. I told him to fuck off

Mr C: I'm sorry I didn't want anything like that to happen John. I very upset mate. I don't know mate. Don't know - like - you know - like we can keep you working like - like people working JFK big engineering jobs.

Mr C: You don't want to sell you place do ya

Mr W: I really like working there … I working there 10 years .. you like a brother

Mr C: What do want me to say to the boss, do you want me to tell the boss that I seen you last night and you want your job back Do you want me to tell the boss that.

Mr W: No No Dave I ask him myself, I know you helping me out … I ask him myself Dave.

Mr W: After he punching, kicking me what did John say to him?

Mr C: I don't really know. I didn't see anything John. I just remember Steve come up to me and say, "Oh – oh – John - John, John and Grant have fight. I said "what?" And then I said, "John - - John you all right? You were on the floor you all right and then I……. Beaten – and the next thing I know you shake my hand. That's all I remember John

Mr W: You gave me a hand and lift a me up.

After I left the yard. I follow John.

Mr W: Why he take my bench ……what do you think

Mr C: He's just a fucking wanker John the said it on TV the other day that everywhere you go in the workplace there is one work psychopath, that wants to cause trouble, and John told me that this Grant is no good he cause trouble, he beat John up, he tried to have a go at you, he mouth off to everybody You know what I mean.

Mr W: JD said

Mr C: JD said that, he wasn't happy either hay, he was not happy mate he felt very sorry for you he goes John good worker good bloke, what's going on

Mr W: I working there ten years ……. Why he took my bench for He not a welder he's a pretend you and me Steve the welders why he take a my bench

Mr C: He's a smart arse John, he's just a wanker guy stays that way somebody kick him fucking good mate I really wanted to go to his house and kick him good mate I really wanted to

Mr W: I left there a couple of days later I ring John, John not there his wife ….. you know what ….. said to me … I couldn't believe … Grant he has to defend … he punch and kick a me … how he can defend ….. I said Anita you not there …. She always comes before 10 but not 8:30/9 o'clock , John I know you a good man but you fighting with him he has to defend …. I said Anita that's a wrong … I defend myself I cover the head after he kick a me punch

Mr C: He kick you too did he the bastard

Mr W: I said Dave give me a hand, lift a me up. No one was helping me. Only Dave was helping me. Only Dave was good, no one good …….. lift up a my hand

Mr C: I'm sorry John. Grant is a fucking idiot, he's really fucking wanker … he's on drugs dexamphetamine…. 2 weeks after sacked him……. fuck off…..he's not there anymore

Mr C: The old man worried about him he pay half his wage……..

Interchange with third person (Sarah)

Mr W: So after he kick a me punch a me john have warning him

Mr C: ……. He wasn't happy hay, he was not happy hay, honestly John he wasn't happy

Mr W: said to him

Mr C: I just said to him know you shouldn't have done that and that …… I felt like burning his house down, I know where he lives I wanted to burn his house down mate smash his…… I wanted to, he tried to have a go at me, he's cheeky to Steve oh ya fucken you pinch all our parts mate

Mr W: he said to Steve huh

Mr C: Yeah he gives Steve shit everyone shit mate …..fucken idiot … good job OK you've got JFK there you know Mark .. don't lose your house over that fucken wanker you know

Mr W:

Mr C: I'm a lover I don't like to fight

Mr W: He should have said Grant don't touch don't kick John.

Mr C: I wasn't' happy John I wasn't happy at all mate.

Mr W: It's no good to kick

Mr C: It's not mate, its not then he tried to pick on me he tried to pick on Steve, he tried to pick on everybody.

Mr W: But he cannot ….Michael

Mr C: Not so much Michael ……..he's a very strong man

Mr W: I no happy with John Dickman …….He give me four days wages/three days wages John, he no give me full week.

Mr C: You were there six months did he give you any holiday pay or anything

Mr W: No I have a one week holiday they no give it to me, Grant kick me punch me not my fault he didn't give me pay only three days …….. it's not my fault

Mr C: Yeah I know ….. every workplace on the news the other night they said there is a workplace psychopath somebody that just causes trouble in every workplace it doesn't matter boilermaker, in an office or in the courts or something there's always one psychopath one wanker that always tries

Mr W: What's a psychopath

Mr C: psychopath is a crazy person …….. wants to hurt people……. yell and scream, there are many crazy people out there….

Mr W: You cannot make a trouble in the workshop

Mr C: I know John I know

Mr W: never making trouble … you and me sometimes a little bit argue

Mr C: Grant he told me that, "I didn't know John Wang was 50, 51 years of age." He said to me, "I feel sick --I don't believe he was that old." I always say you've got a baby face. I always tell you how young you look. He did not believe that you are 51. He goes, "How could I hit and kick a 50, 51 year-old man?" He nearly cried, Grant …… "I didn't know he was that old." That's what he told me. He said, "I did not believe that he was over 50 years of age." I said, "Yes,. He's over 50, mate."...(indistinct)... "Oh, my God. I thought he was 38 - 40 at the most."

Mr W: He should have stopped…… he punch a kick a me …….. you ……. bin

Mr C: You're quite strong John, I know your quite strong

Mr W: I don't want to punch a people Dave ….. I cannot …. I just cover my head……. He should have stopped

Mr C: He's a wanker John he really is a wanker

Mr W: I cannot

Mr C: I know you're a good person you don't want to hurt anybody

Mr W: …. His father pay him there, john paid him half

Mr C: If you say anything now I get into trouble John

Mr W: I no say anything

Mr C: His father pays half John, but like I said you say something to Deniva or anybody I could get sacked, then I'm in trouble.

Mr W: ……. We need help each other ……. We don't punch a kick people

Mr C: I'm sorry John, that's all I can say mate I don't want that to happen to anybody …. You know …. He's a fucken he's a wanker mate, he'll get his, he'll get it one day, I know where he lives ……

Mr W: … When I left there what a John Dickman think about me

Mr C: I don't really know John he wasn't happy

Mr W: he didn't say not happy

Mr C: he wasn't happy no

Mr W: he didn't say I bad

Mr C: No he didn't

Mr C: I don't know John, there's work around I can get you job don't worry. Mark can get you job if you really need job ….. have you tried JFK tomorrow or the next day and work there a couple of weeks and then build up confidence go back and ask John

Mr W: When I sort my daughters problem. I come and see you again help me

Mr C: I can say something to the boss mate

Mr W: No couple of weeks later Dave If I ask John Dickman job I come here ask you help me out

Mr C: Yeah you can come over anytime ok"

45 I should make it clear that this transcript was made by my chambers staff on my instruction. It is not a full transcript of the conversation. It represents, in my view, relevant parts of the conversation which I can hear, with some difficulty, and after replaying the tape. In that way the above represents what I say can be heard on the tape and is relevant to my decision. I alerted parties initially at hearing that I would be listening to the tape and would take account of what I heard. The parties had not had the opportunity to view this transcript. Therefore as it relates to the main dispute, that is, the alleged assault, the transcript was sent to the parties and the hearing resumed to deal with any further submission or evidence as it related to this new transcript.

46 No further evidence was led. The applicant made no other submissions. Mr Hadlow reiterated the respondent's submissions as to the use of the tape generally and the relevance of the tape. I do not repeat all his submissions, however, he stressed that it is unclear as to what was discussed though it is clear that Mr Covban says that he did not see any assault. Mr Hadlow submitted also that he heard the tape differently, in parts, to the transcript produced by the Commission. He submitted that Mr Wang, during the conversation was attempting to 'pepper' the dialogue. Mr Covban did not recognise that he had helped Mr Wang to get up off the floor.

CLOSING SUBMISSIONS

47 Mr Hadlow for the respondent submitted in closing that Mr Wang, on his own evidence, was unsure whether he was dismissed and, if so, whether the circumstances were unfair. It is clear that no actual dismissal took place. The respondent says there was no assault in the workplace. Mr Dickman saw Mr Wang leaving the premises and there was nothing out of the ordinary. Mr Wang had left work before; had taken off. When the employer was alerted to the alleged assault, he acted immediately to do what he could. Mr Wang asked unilaterally to sever the contract when he sought a separation certificate to obtain Centrelink benefits. Mr Wang also shortly thereafter made a workers' compensation claim. Mr Hadlow submitted that, pursuant to s.84AA of the *Workers' Compensation and Injury Management Act 1981*, the employer could not in any event dismiss Mr Wang. If Mr Wang was fit to work he could effectively go back to work as a matter of right.

48 Mr Hadlow submitted that it would seem that Mr Wang sustained injuries on or about the relevant time but the evidence does not support a claim that Mr Wang was assaulted in the workplace. The claim has simply not been made out. Mr Wang's claims do not ring true and are not credible. Mr Wang says that Mr Dickman watched the events and yet he says Mr Dickman, moments later, was driving into the yard. There is a ludicrous element to the claim in that it is suggested Mr Dickman was behind an assault. There is a background of assaults on Mr Wang outside the workplace and talk by Mr Wang of a bogus workers' compensation claim. The evidence of every other witness does not support the claim. Little can be concluded from the taped conversation between Mr Wang and Mr Covban. The conversation is notably indistinct. Mr Covban says clearly on the tape that he did not see anything.

CONCLUSION

49 The evidence of each of the witnesses must be treated with considerable caution. However, having weighed the evidence and having seen each witness at hearing, I would prefer the evidence of Mr Wang to that of the other witnesses. I note also in assessing the evidence, I had considerable difficulties at hearing in comprehending what Mr Wang had to say.

50 The prime question for the Commission is whether there has been a dismissal at the hands of the employer. In the case of *Mohazab v Dick Smith Electronics Pty Ltd* 62 IR 200 as per Lee, Moore and Marshall JJs it was stated:

> "In these proceedings it is unnecessary and undesirable to endeavour to formulate an exhaustive description of what is termination at the initiative of the employer but plainly an important feature is that the act of the employer results directly or consequentially in the termination of the employment and the employment relationship is not voluntarily left by the employee. That is, had the employer not taken the action it did, the employee would have remained in the employment relationship."

51 As stated, there is no suggestion that the employer ever advised the applicant that he was dismissed. The question is whether the actions of Mr Dickman resulted consequentially in the termination of Mr Wang's employment, or whether Mr Wang voluntarily left his employment. I will return to the actual issue of the alleged assault. However, if it is assumed that Mr Wang was assaulted at work then what were Mr Dickman's actions? Mr Wang says that Mr Dickman was present at the assault or shortly after. He says that Mr Dickman said, "John Wang would be okay". On Mr Wang's evidence alone it is difficult to comprehend how this could be so. On Mr Wang's version of events he must have left the respondent's premises shortly after the assault. He said goodbye to Mr Bajtek prior to leaving and was helped off the floor by Mr Covban directly after the assault. Yet he says that he saw Mr Dickman in his vehicle as he (Mr Wang) was driving out of the yard. He also says he wanted to talk to Mr Dickman, yet Mr Wang did not stop his vehicle or turn around and drive back into the premises. On Mr Wang's own evidence then, I consider it improbable that Mr Dickman was present at work at the time of the alleged assault. For this to be otherwise Mr Dickman would have had to have walked off after seeing Mr Wang being beaten, proceeded to quickly get into his vehicle, drive out of the yard, and then back into the yard, in the short time between the assault and Mr Wang leaving. This scenario is improbable on Mr Wang's evidence alone. All the evidence for the respondent maintains that Mr Dickman was not in the workshop that morning except perhaps at the start of work and then not until after Mr Wang departed the premises. In other words, if there was an assault, then it is improbable that Mr Dickman was present for or took any part in the actual events.

52 I say all this because, if as alleged Mr Dickman was present or involved in the alleged assault, I could comprehend why Mr Wang might not then seek to return to the workplace or to contact the respondent. I could comprehend why Mr Wang would consider his services were not wanted and would go directly to the police and not speak again with Mr Dickman. Whether such purposeful actions on the part of the respondent would amount to a dismissal is not an issue I need cover, as for the reasons expressed I do not find that Mr Dickman acted in that way.

53 If Mr Wang was assaulted and Mr Dickman had not been present, it could be expected that Mr Wang would have contacted Mr Dickman shortly after the incident to let him know what had happened. Mr Wang was able to drive his car so he was capable of going to see Mr Dickman. There is no evidence that Mr Dickman made contact with Mr Wang on 25 August 2005 or thereafter. Mr Dickman says that he tried unsuccessfully on several occasions to contact Mr Wang. The next contact between the applicant and the respondent would appear to be when Mr Wang attended Centrelink on about 30 August 2005. Mr Dickman was asked for a separation certificate and it seems that Mr Dickman did not speak with Mr Wang on that occasion because he says he said, "tell him to come back to work". Mr Wang and Mr Dickman say that Mr Wang telephoned about one week after 25 August 2005 and spoke with Mrs Dickman. Mr Wang says that Mrs Dickman said, "It's you who assaulted him, not him who assaulted you". Meaning that she is said to have accused Mr Wang of assaulting Mr Murdoch. Mr Dickman says that he tried to talk to Mr Wang but Mr Wang hung up the telephone. If Mr Wang was assaulted and if Mrs Dickman accused him of assaulting Mr Murdoch then, I could understand why Mr Wang would have steered away from further contact with the respondent. The question, however, is whether these subsequent actions by Mrs Dickman, if that is what occurred, or lack of contact by Mr Dickman, could amount to a dismissal at the hands of the employer. I do not consider that such a scenario could be said to amount to a dismissal.

54 I do not seek to resolve the conflicts in evidence about whether Mrs Dickman accused Mr Wang of assaulting Mr Murdoch. It is not necessary to do so. Neither party chose to call Mrs Dickman.

55 Therefore, on the basis of Mr Wang's evidence alone, even if he was assaulted at work, for the reasons given there has been no dismissal by the employer and hence I am without jurisdiction to deal with this application.

56 The alternate argument is that put by the respondent that the applicant resigned his employment. Neither Mr Dickman nor Mr Wang said that Mr Wang said he was resigning. The respondent submitted that by his actions Mr Wang can be said to have resigned. The applicant says, in effect, that he simply left the workplace to get medical attention and to report the assault to the police. I have covered the contact between the applicant and the respondent post the alleged incident. The request for a separation certificate, on the applicant's evidence, but reinforced by Mr Dickman's comment, would seem to have come from someone in Centrelink acting on Mr Wang's behalf. The applicant, after he left the workshop, made no attempt to return to the respondent's premises. In any event, the evidence is that Mr Wang has not been capable of working since. If Mr Wang was assaulted at work, I do not consider that his actions amount to a resignation or abandonment of his employment. I factor into this consideration that Mr Wang had a good reason to leave work on that day, the apparent lack of concern shown for Mr Wang since by the respondent and Mr Wang's limited comprehension of matters industrial.

57 Of course, if Mr Wang was not assaulted at work on that day then clearly his actions amount to an abandonment of his employment. He would have then had no basis for acting as he did and he would simply be seeking to deceive his previous employer.

58 I then turn to the key issue in the matter. Was Mr Wang assaulted by Mr Murdoch at work on 25 August 2005?

59 But for the taped conversation between Mr Wang and Mr Covban I would effectively have little more than the applicant's allegations and blanket denials from the witnesses for the respondent. Mr Wang has passionately and consistently given evidence about how he says Mr Murdoch assaulted him; albeit I am cautious of his evidence and do not accept all of it. I must say though that if Mr Wang was not assaulted by Mr Murdoch then he has given one of the most convincing and consistent performances to deceive that I have seen. Mr Covban says that he did not see an assault and did not know about it for some considerable time. The latter part of this evidence was subsequently corrected. The first part of that evidence, that he did not see an assault, is consistent throughout his statements and then again on the tape. Mr Covban in fact says that he did not see Mr Wang at work that day. He is the only witness to say this. Mr Covban says he was working in a large bin at the time. Mr Covban then went on to disparage Mr Wang as a worker. He referred to him in a statement as a lazy worker. He is the only one to give such evidence. His evidence clearly does not sit well with Mr Dickman's and Mr Bajtek's comments about Mr Wang's work. Mr Covban dismisses the tape as him simply seeking to agree with Mr Wang and because he was "half-cut". This is improbable. One has only to look at the conversation in its full context to appreciate that whilst Mr Covban was agreeing with Mr Wang in part, this does not truly represent Mr Covban's approach to the dialogue. Mr Covban was engaged in the conversation and adding points liberally. Mr Covban also makes a range of unprompted comments which display that he considered Mr Murdoch to be aggressive, and that Mr Dickman terminated Mr Murdoch's services. Having seen Mr Covban give evidence I have no confidence in his evidence at all.

60 Mr Bajtek says that he did not see anything other than when Mr Wang came to shake his hand before he left and Mr Wang looked normal. Mr Murdoch's evidence is short and he simply denies assaulting Mr Wang. Mr Dickman says that he was not there; which I accept. He says also that he spoke with each of the employees, except Mr Wang, and they all said that effectively nothing had happened. It is curious that Mr Dickman did not take greater steps to speak with Mr Wang given the seriousness of the allegation. This is especially so as Mr Wang had been a good worker for many years and Mr Dickman's evidence would lead one to believe that he at times looked after Mr Wang's interests. Mr Dickman, once he knew of the alleged assault, could not simply have rested on the notion that Mr Wang had got upset and left work.

61 If it were not for the tape and the evidence of Mr Covban and Mr Wang about that conversation, then I would have to conclude that Mr Wang had not proven the key point of his case. I would have been left with no more than a suspicion that, given Mr Wang's evidence was reasonably compelling about an assault on him, and given that clearly he was assaulted on that day sometime prior to mid-morning, then he might have been assaulted at work.

62 Mr Covban initially said that he only recently had heard about the assault. He later corrected that as clearly he had given a statement to the police. I am not guided by this point except that in my view it displays Mr Covban's approach to giving evidence. He attempted to simply deny matters and to explain away the taped conversation. He says of the conversation that Mr Wang came to ask him to ask Mr Dickman to give Mr Wang back his job. Clearly this is not so. Mr Covban raised with Mr Wang whether he wanted him to ask Mr Dickman to give him back his job. Mr Wang clearly rejected this offer and said that he (Mr Wang) could ask Mr Dickman. More relevantly, the Commission's transcript of the recording should be read in light of Mr Covban maintaining that he had no knowledge of any assault on the day of 25 August 2005. In Mr Covban's mind it never happened. This is as opposed to Mr Covban saying that he never saw anything. I accept that Mr Covban never saw an assault on Mr Wang. The evidence of Mr Bajtek and Mr Covban is that they worked on large rubbish bins that were placed reasonably close together. It is quite probable then that someone working inside a bin and operating a welder or grinder would not see anything outside the bins. However, this is quite separate to whether Mr Covban knew that an assault had taken place. It is also separate to whether he helped Mr Wang from the floor as Mr Wang's evidence would have the Commission believe.

63 Mr Covban says in the taped dialogue:

> "Mr Covban: No, no, no, John got rid of him like 2 weeks after what happened. Two weeks after he fucked him off. He tried to beat me up, he tried to beat everybody up, made, fucking hell".
>
> And,
>
> "Mr W: After he punching, kicking me what did John say to him?
>
> Mr C: I don't really know. I didn't see anything John. I just remember Steve come up to me and say, "Oh – oh – John - John, John and Grant have fight. I said "what?" And then I said, "John - - John you all right? You were on the floor you all right and then I……. Beaten – and the next thing I know you shake my hand. That's all I remember John"

64 In my mind, much of the taped conversation and in particular those two excerpts make it clear that Mr Covban was aware that Mr Wang had been assaulted by Mr Murdoch on 25 August 2005. I so find. Mr Covban saw Mr Wang on the floor and took or shook Mr Wang's hand. I so find. I note also that these excerpts, as well as the conversation generally, make it clear that Mr Covban did see Mr Wang at work that day. Mr Covban would have the Commission believe otherwise.

65 Whilst for the reasons given I must dismiss the application for want of jurisdiction, the matter cannot rest there. If the employment relationship has not been severed by either dismissal, resignation or abandonment; if it is simply a matter of the employee not having been capable of working, through no fault of his own, and arising from an assault on him at work; then seemingly he may be covered by the provisions of section 84AA of the *Workers' Compensation and Injury Management Act 1981*. The workers compensation issue is of course not a matter for me, however, I will send to the Chief Executive Officer of Workcover a copy of my decision and order, the transcript of proceedings and the exhibits to alert Workcover to my findings. At this time I will retain the tape made by the applicant of his conversation with Mr Covban. The recording is of poor quality, but as covered in my decision, there are elements of the tape which are distinguishable and which have assisted in leading me to the conclusion that it is probable that Mr Wang was assaulted at work. Workcover may wish to access the recording through my Associate.

2006 WAIRC 04555

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOHN (ZHI HONG) WANG
	APPLICANT
	-v-
	J.DICKMAN ENGINEERING PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	THURSDAY, 15 JUNE 2006
FILE NO	U 5 OF 2005
CITATION NO.	2006 WAIRC 04555

Result	No dismissal; Application dismissed for want of jurisdiction
Representation	
Applicant	Mr J Wang
Respondent	Mr S Hadlow of Counsel

Order

HAVING heard Mr J Wang on his own behalf and Mr S Hadlow 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.

[L.S.]

(Sgd.) S WOOD,
Commissioner.

2006 WAIRC 04517

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HAZEL ELIZABETH WARDLE
	APPLICANT
	-v-
	DIRECTOR GENERAL DEPARTMENT OF HOUSING AND WORKS
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
HEARD	WRITTEN SUBMISSIONS 23 AND 29 MAY 2006
DELIVERED	TUESDAY, 13 JUNE 2006
FILE NO.	U 183 OF 2006
CITATION NO.	2006 WAIRC 04517

Catchwords	Termination of employment - Harsh, oppressive and unfair dismissal - Whether Commission has jurisdiction to deal with application under general powers - Whether Public Service Appeal Board has exclusive jurisdiction - Employee a Government officer - No jurisdiction for Commission as currently constituted - Application dismissed - *Industrial Relations Act 1979* s 7, s 22A, s 29(1)(b)(i), s 80C, s 80H, s 80I, *Public Sector Management Act 1994* s 35, s 64
Result	Dismissed
Representation	
Applicant	Ms H Wardle (by way of written submissions)
Respondent	Ms L Howe (by way of written submissions)

Reasons for Decision

1 This is an application by Hazel Elizabeth Wardle ("the applicant") pursuant to s29(1)(b)(i) of the *Industrial Relations Act 1979* ("the Act"). The applicant alleges that she was unfairly terminated from her employment with the Department of Housing and Works ("the respondent") on 7 February 2006. The respondent denies that the applicant was unfairly terminated.

2 As the issue of the Commission's jurisdiction to deal with this application was raised by the respondent at conciliation proceedings the parties were required to file and serve written submissions in relation to this issue.

Respondent's submissions

3 The respondent argues that the Commission does not have the power to deal with this application.

4 The respondent submits that the Commission has no power under its general jurisdiction to hear and determine this application and argues that the applicant should have lodged an appeal against her termination to the Public Service Appeal Board ("the Board"). The respondent submits that the Commission as constituted has no power to hear and determine this application as

the Board, which is established under Part IIA Division 2 of the Act, has exclusive jurisdiction to deal with this application and the respondent maintains that the Commission's ability to hear and determine this matter pursuant to s29(1)(b)(i) of the Act is ousted by the exclusive jurisdiction of the Board as set out under s80I of the Act (see *Anthony Hordern and Sons Ltd and Others v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 and *Bellamy v Chairman Public Service Board* (1986) 66 WAIG 1579).

5 The respondent argues that the applicant's claims should be dealt with by the Board under s80I(1)(e) of the Act which reads as follows:

> "an appeal, other that 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."

6 The respondent claims that the applicant is a Government officer as she was appointed as a public service officer under s64(1)(a) of Part 3, Division 3 of the *Public Sector Management Act 1994* ("the PSM Act") and the applicant occupied a position that carried a lower salary than the prescribed salary within the meaning of s80I(1) of the Act (see letter of appointment attached to the respondent's submissions). The respondent also maintains that at all relevant times the respondent was an employer as defined in s80C(1)(a) of the Act as it is a department established by the Governor, with effect from 1 July 2001, under s35(1)(d) of the PSM Act.

Applicant's submissions

7 The applicant filed submissions in relation to the issue of jurisdiction however she did not address whether or not the Commission as constituted has the power to deal with this application but instead raised the issue of the respondent not properly informing her as to the correct procedures for disputing her claim of unfair dismissal.

Findings and conclusions

8 Division 2 - General Jurisdiction and powers of the Commission in Part II of the Act provides the following at s22A:

> "In this Division and Divisions 2A to 2G —
>
> **'Commission'** means the Commission constituted otherwise than as a constituent authority;
>
> **'industrial matter'** does not include a matter in respect of which, subject to Division 3, a constituent authority has exclusive jurisdiction under this Act.201"

9 A constituent authority is defined in s7 of the Act to mean "the Public Service Arbitrator, a Public Service Appeal Board, or the Railways Classification Board, established or appointed under Part IIA" of the Act and the Board is the constituent authority established under s80H to deal with appeals lodged pursuant to s80I of the Act and these sections are contained within Part IIA of the Act.

10 Section 80I of the Act sets out the jurisdiction of the Board. Specifically s80I(1)(e) provides that the Board has jurisdiction to hear and determine:

> "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."

11 Section 80C(1) defines an employer for the purposes of Part IIA, Division 2 of the Act as:

> "(a) in relation to a Government officer who is a public service officer, means the employing authority of that public service officer; and
>
> (b) in relation to any other Government officer, means the public authority by whom or by which that Government officer is employed;"

and Government officer means:

> "(a) every public service officer;
>
> (aa) each member of the Governor's Establishment within the meaning of the *Governor's Establishment Act 1992*;
>
> (ab) each member of a department of the staff of Parliament referred to in, and each electorate officer within the meaning of, the *Parliamentary and Electorate Staff (Employment) Act 1992*;
>
> (b) every other person employed on the salaried staff of a public authority; and
>
> (c) any person not referred to in paragraph (a) or (b) who would have been a Government officer within the meaning of section 96 of this Act as enacted before the coming into operation of section 58 of the *Acts Amendment and Repeal (Industrial Relations) Act (No. 2) 1984* [1],
>
> but does not include —
>
> (d) any teacher;
>
> (e) any railway officer as defined in section 80M; or
>
> (f) any member of the academic staff of a post-secondary education institution;"

12 When the authority of *Anthony Hordern and Sons Ltd and Others v Amalgamated Clothing and Allied Trades Union of Australia* (op cit) and *Bellamy v Chairman Public Service Board* (op cit) is applied to this matter it is clear that the general powers under the Act for the Commission to deal with an application by a Government officer alleging unfair termination lodged under s29(1)(b)(i) of the Act cannot be used when specific powers exist under s80I of the Act for the Board to deal with an application of this nature.

13 It was not in dispute and I find that the applicant was a Government officer as defined in s80C(1) of the Act at the time that she was dismissed by the respondent as the applicant's letter of appointment confirms that the applicant was appointed as a public service officer pursuant to s64(1)(a) of Part 3, Division 3 of the PSM Act. I also find that the applicant was employed by an employer as defined in s80C(1) of the Act as I accept that the respondent is a department established under s35(1)(d) of the PSM Act and therefore meets the definition of an employing authority for the purposes of Part IIA, Division 2 of the Act.

14 As I have found that the Commission as constituted cannot deal with this application for the reasons set out above, if the applicant wishes to continue to contest her termination she must lodge an appeal to the Board.

15 In the circumstances I will make an order dismissing the application.

2006 WAIRC 04518

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES HAZEL ELIZABETH WARDLE

APPLICANT

-v-

DIRECTOR GENERAL DEPARTMENT OF HOUSING AND WORKS

RESPONDENT

CORAM COMMISSIONER J L HARRISON
DATE TUESDAY, 13 JUNE 2006
FILE NO/S U 183 OF 2006
CITATION NO. 2006 WAIRC 04518

Result Dismissed

Order

HAVING HEARD Ms H Wardle on her own behalf by way of written submissions and Ms L Howe on behalf of the respondent by way of written submissions, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders –

THAT the application be and is hereby dismissed.

(Sgd.) J L HARRISON,
Commissioner.

[L.S.]

SECTION 29(1)(B)—Notation of—

Parties		Number	Commissioner	Result
Abdul Salam Rahhal	Aurora Stone	B 123/2005	Commissioner S M Mayman	Application discontinued
Adam John Found	Xplosive Electro-Acoustics Pty Ltd	U 48/2006	Commissioner S Wood	Application discontinued
Alan Wood	Stafflink Pty Ltd	APPL 863/2005	Commissioner J L Harrison	Order issued
Andrew James Greene	Hancock Prospecting Pty Ltd	U 267/2006	Commissioner S J Kenner	Application discontinued by leave
Anne Smith	Spotlight Stores Pty Ltd	U 104/2006	Commissioner S M Mayman	Application discontinued
Anthony James Smith	Timbercorp Forestry Pty Ltd	U 230/2006	Commissioner S Wood	Application discontinued
Ashley James Mastai	Rangelink Enterprises Pty Ltd trading as TRAX2000	B 146/2006	Commissioner S Wood	Application discontinued
Ashley James Mastai	Rangelink Enterprises Pty Ltd trading as TRAX2000	U 146/2006	Commissioner S Wood	Application discontinued
Bronwyen Jane Marie Howell	Jennifer Lord - HR Manager OAMPS Insurance Brokers Ltd	U 332/2006	Commissioner S J Kenner	Application discontinued by leave
Calen Feorn	Jarrup Nominees Pty Ltd Trustee for D.P.S Unit Trust T/As Little Loads River Nominees Pty Ltd T/As Purearth	B 195/2005	Commissioner S M Mayman	Application discontinued
Cara Susanne Kelly	Westco Jeans Pty Ltd	U 214/2006	Commissioner J L Harrison	Discontinued
Carlos Haynes	Intermet	U 180/2005	Commissioner S M Mayman	Application struck out for want of prosecution
Caroline Aylsa Fisher	The Albany & Districts Skills Training Committee Incorporated	U 324/2005	Commissioner P E Scott	Application Dismissed
Caterina Ranieri	European Ceramics Pty Ltd	U 268/2006	Commissioner S J Kenner	Application discontinued by leave

Parties		Number	Commissioner	Result
Claire Jennifer Cross	University of Western Australia	B 301/2005	Senior Commissioner J F Gregor	Discontinued
Clifford Andre Ame	City Wide Trading Pty Ltd Gibbons Holden	U 244/2006	Commissioner S M Mayman	Application discontinued
Clinton Knott	Chris Reich	B 88/2005	Commissioner J L Harrison	Discontinued
Clynton Antonio	Next Generation Clubs Australia	U 134/2006	Commissioner S M Mayman	Application struck out for want of prosecution
Colleen Mary Charnock	Mr Ray Fitzgerald, St Ives Realty	U 153/2006	Commissioner S Wood	Application discontinued
Craig Matthew Maguire	REH Nominees Pty Ltd t/a GDK Electrical Services	U 16/2005	Commissioner S M Mayman	Application discontinued
Cynthia Olson	Nutech Australia	U 287/2006	Commissioner S M Mayman	Application discontinued
Danielle Tara Cleverley	Algar Burns Computing	U 288/2006	Commissioner S J Kenner	Application discontinued by leave
David Christopher Tooth	Clough Projects Pty Ltd	U 176/2006	Commissioner S J Kenner	Application discontinued by leave
David John Shepherdson	The Albany & Districts Skills Training Committee Incorporated	U 320/2005	Commissioner P E Scott	Application Dismissed
David Stuart Chambers	WIV-Australia	U 328/2005	Commissioner S J Kenner	Application discontinued by leave
David Stuart Spry	South West Irrigation Management	U 289/2005	Commissioner S M Mayman	Application discontinued
Dianne Joyce O'Connor	Quantum Contract Services	B 116/2006	Commissioner S J Kenner	Application discontinued by leave
Donald Harry Palmer	Theiss Pty Ltd	U 21/2006	Commissioner S J Kenner	Application discontinued by leave
Dylan Thomas	The South Perth Oyster Bar	U 13/2006	Commissioner P E Scott	Application Dismissed
Elaine Morris	Settlers Lifestyle Villages Ltd	APPL 1078/2004	Commissioner P E Scott	Application Dismissed
Emma Richardson	Hospitality Marketing Concepts	B 242/2005	Senior Commissioner J F Gregor	Discontinued
Emma Richardson	Hospitality Marketing Concepts	U 242/2005	Senior Commissioner J F Gregor	Discontinued
Erin Isabel Baker	Giacci Bros Pty Ltd	U 251/2006	Senior Commissioner J F Gregor	Discontinued
Frances Esther Irwin	The Albany & Districts Skills Training Committee Incorporated	U 322/2005	Commissioner P E Scott	Application Dismissed
Gloria Ann Lockyer	Wirraka Maya Health Services Aboriginal Corporation	B 82/2006	Commissioner S Wood	Application discontinued
Gloria Ann Lockyer	Wirraka Maya Health Services Aboriginal Corporation	U 82/2006	Commissioner S Wood	Application discontinued
Gloria Grant	Perth Auto Alliance Pty Ltd	U 152/2005	Commissioner J L Harrison	Discontinued
Gordon Maurice Jamieson	Kirkland Pty Ltd t/as Force Equipment Service & Hire	U 150/2006	Commissioner S J Kenner	Application discontinued by leave
Hieu Minh Pham	Better Wear Welding Pty Ltd	U 147/2005	Commissioner S M Mayman	Application discontinued
James William Jeffery	Sheryl Grimwood, Richard Veza and Joe Zito of NewTown Toyota and United Motor Traders	B 64/2006	Senior Commissioner J F Gregor	Discontinued

Parties		Number	Commissioner	Result
James William Jeffery	Sheryl Grimwood, Richard Veza & Joe Zito of United Motor Trades, trading as New Town Toyota	U 64/2006	Senior Commissioner J F Gregor	Discontinued
Jamie Ryan Marshall	Wayne Richardson @ Cape Range Electrical Contractors	B 7/2006	Commissioner S Wood	Application discontinued
John Christopher Maughan	Inline Security WA	B 323/2006	Commissioner P E Scott	Application Dismissed
John Howard Kelmar	Security First P/L T/A Office National Canning Vale	U 298/2006	Commissioner S J Kenner	Application discontinued by leave
John Norman Beswick	Signmasters	U 222/2006	Commissioner S Wood	Application discontinued
John Peter Misson	Inflatable Packers International Pty Ltd	B 214/2005	Commissioner S Wood	Application discontinued
John Peter Misson	Inflatable Packers International Pty Ltd	U 214/2005	Commissioner S Wood	Application discontinued
John Vaughan Lee	Lakewood Logistics	U 273/2006	Commissioner J L Harrison	Discontinued
Jonathan Walker	Centacare Employment	U 126/2005	Commissioner P E Scott	Application Dismissed
Joyce Katherine Reason	Wirraka Maya Health Services Aboriginal Corporation	B 83/2006	Commissioner S Wood	Application discontinued
Joyce Katherine Reason	Wirraka Maya Health Services Aboriginal Corporation	U 83/2006	Commissioner S Wood	Application discontinued
Kenneth MacDonald	Shire of Wyndham	U 142/2006	Senior Commissioner J F Gregor	Discontinued
Kirsten Anne Kelly	Flight Centre Limited	APPL 269/2005	Commissioner S Wood	Application discontinued
Kristian Michael Ayre	Landcorp	U 352/2005	Commissioner P E Scott	Dismissed
Lawrence Louis Junior	Specialised Welding (WA) Pty Ltd - Trustee for Specialised Welding Unit Trust (ABN 27281636255)	U 112/2006	Commissioner S Wood	Application discontinued
Lee Ruby	Smartstone Modular Building Systems Pty Ltd	APPL 198/2005	Commissioner S M Mayman	Application struck out for want of prosecution
Leonie June Pomeroy	The Albany & Districts Skills Training Committee Incorporated	U 337/2005	Commissioner P E Scott	Application Dismissed
Lorelle Kate Parker	The Albany & Districts Skills Training Committee Incorporated	U 326/2005	Commissioner P E Scott	Application Dismissed
Louise Amanda Hartshorn	Spectrum Tint-A-Car Morley	U 34/2006	Commissioner J L Harrison	Discontinued
Maree D'Arcy	Swift & Moore Pty Limited	APPL 145/2005	Commissioner J L Harrison	Discontinued
Mark Jeffrey Kelly	Silver Chain Nursing Association	U 207/2006	Commissioner S Wood	Application discontinued
Mark Peter Heritage	Mindibungu Aboriginal Corporation, Billiluna Community	U 175/2005	Commissioner S Wood	Application discontinued
Mekalla Turton	Dr Gary Wood / Michelle Gray, Whitfords Dental Centre	U 283/2006	Commissioner S J Kenner	Application discontinued by leave
Melvyn Jones	Swan Health Service, Swan Valley Centre	B 62/2006	Commissioner P E Scott	Application Dismissed
Michael Noel Allie	Orlando Supa Valu Pty Ltd	U 160/2006	Commissioner S M Mayman	Application struck out for want of prosecution

Parties		Number	Commissioner	Result
Moya Patricia Lowson	Mint Settlement Services Pty Ltd	APPL 700/2005	Senior Commissioner J F Gregor	Discontinued
Nicholas George Filevski	Rendezvous Observation City Perth Pty Ltd	U 335/2006	Commissioner J L Harrison	Discontinued
Nicola June Heath	Quality Soft Furnishings	U 6/2005	Commissioner J H Smith	Dismissed
Patricia Carol O'Dea	F1-11 Engineering	U 314/2005	Commissioner S M Mayman	Application struck out for want of prosecution
Patricia Sivwright	Bethny Armstrong Central Pool Maintenance	U 276/2006	Commissioner P E Scott	Application Dismissed
Paul Gavshon	Kings Transport Services	U 119/2006	Senior Commissioner J F Gregor	Discontinued
Paul Tomlinson	Austal Ships	U 109/2005	Commissioner S Wood	Application discontinued
Paula Davenport	Bunbury Insulation & Sheetmetal Services	U 168/2005	Commissioner S Wood	Application discontinued
Penny Bonifant	Australian Weaving Mills Pty Ltd	U 145/2006	Commissioner S J Kenner	Application discontinued by leave
Peter Cormack	Captam Pty Ltd & Timberglen Pty Ltd t/a The Boat	APPL 901/2005	Commissioner S Wood	Application discontinued
Peter Michael Turner	Tim Moore (Vice President) P & H MinePro	U 124/2006	Commissioner S J Kenner	Application discontinued by leave
Peter West	Reeves Steel Fabrication Pty Ltd T/A Reeves Engineering	U 257/2006	Senior Commissioner J F Gregor	Discontinued
Raymond Sydney Stegenga	National Security Systems	B 75/2006	Commissioner S M Mayman	Application discontinued
Rebecca Carroll	Woolworths	U 296/2006	Commissioner S M Mayman	Application discontinued
Robert Batten	Mr Paul Albert, Chief Executive Officer, Department of Education and Training	U 47/2006	Commissioner J L Harrison	Discontinued
Robert Michael Reljanovic	Geographe Energy Pty Ltd	APPL 820/2005	Commissioner S Wood	Application discontinued
Roger Matthew Jeffery	Dress Circle Farms	U 111/2006	Commissioner S Wood	Application discontinued
Rohan Michael Skeggs	Retravison (WA) Ltd	U 217/2006	Commissioner P E Scott	Application Dismissed
Ron Priemus	Transfield Services (Australia) Pty Ltd	U 253/2005	Commissioner S M Mayman	Application discontinued
Rosalind Kate De'Laney	Fremantle Gynaecology	APPL 81/2005	Commissioner S M Mayman	Application struck out for want of prosecution
Rosanne Baker	Nekros Pty Ltd	B 227/2006	Commissioner S M Mayman	Application discontinued
Ross Clarke	City of Melville	U 228/2006	Commissioner S J Kenner	Application discontinued by leave
Ross Norman Weir	Narrogin Hay Pty Ltd	U 233/2005	Commissioner S M Mayman	Application discontinued
Russell James Flint	Matrix Asia Pacific Pty Ltd	U 68/2006	Commissioner S Wood	Application discontinued
Samantha Micale	Goodman Fielder Pty Limited ABN 44 000 003 958	U 97/2006	Commissioner J L Harrison	Discontinued

Parties		Number	Commissioner	Result
Sandra Ann Wilson	Eli Ecologic Australia Pty Ltd	U 183/2005	Commissioner S J Kenner	Application discontinued by leave
Scott Ryan Kelly	Mr Paul Gardner of Honda North	B 170/2006	Commissioner S Wood	Application discontinued
Sharon Jon Prudham	Director General, Department of Education and Training	APPL 550/2005	Commissioner J H Smith	Dismissed
Sheena Lynn Francis	The Electric Contact P/L t/as MC & TA Data Electrical Wholesalers	U 93/2006	Commissioner S J Kenner	Application dismissed for want of prosecution
Simon Carter	Leeuwin Star Pty Ltd	B 117/2005	Commissioner P E Scott	Application Dismissed
Steven Carl Tritton	Shark Bay Salt Joint Venture	U 277/2005	Commissioner J H Smith	Dismissed
Steven Frederick Thomas	WA Skydiving Academy Pty Ltd	B 127/2006	Senior Commissioner J F Gregor	Discontinued
Teressa Hickman	Inter City Belmont Pty Ltd	U 307/2005	Commissioner P E Scott	Application Dismissed
Tony DeCoppi	WA Country Builders (JWH Group)	B 137/2006	Commissioner S Wood	Application discontinued
Wanda Maria Shardlow	Judayne Pty Ltd (Settlers Roadhouse)	U 318/2005	Commissioner S M Mayman	Application discontinued
Wayne Williams	REH Nominees Pty Ltd t/a GDK Electrical Services	U 15/2005	Commissioner S M Mayman	Application struck out for want of prosecution
Wendy Scott	The Western Australian Turf Club	U 196/2006	Commissioner S J Kenner	Application discontinued by leave
Yue Huang	Sunlong Fresh Foods Pty Ltd	U 221/2006	Commissioner S Wood	Application discontinued
Yvonne Paula Westoll	Outdoor Centre Holdings t/a Perth Home Improvement and Half Price Patios and Pergolas Pty Ltd	U 201/2006	Commissioner S M Mayman	Application discontinued

CONFERENCES—Matters arising out of—

2006 WAIRC 04366

A DISPUTE REGARDING COMPLAINT ABOUT UNION DELEGATES AND SUBSEQUENT DISTRESS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES INDEPENDENT EDUCATION UNION OF WESTERN AUSTRALIA,UNION OF EMPLOYEES

APPLICANT

-v-

CORPUS CHRISTI COLLEGE

RESPONDENT

CORAM COMMISSIONER J L HARRISON
HEARD WRITTEN SUBMISSIONS 22 AND 30 MARCH 2006
DELIVERED THURSDAY, 18 MAY 2006
FILE NO. C 188 OF 2005
CITATION NO. 2006 WAIRC 04366

Catchwords	Compulsory conference - Dispute regarding complaint about union delegates and subsequent distress - Whether Industrial Matter - Jurisdiction found - *Industrial Relations Act 1979* (WA) s 6, s 7, s 23, s 27, s 29, s 44
Result	Jurisdiction found
Representation	
Applicant	Mr G Stubbs (of counsel) by way of written submissions
Respondent	Ms K Wroughton (of counsel) by way of written submissions

Reasons for Decision

1 On 2 November 2005 the Independent Education Union of Western Australia, Union of Employees ("the union") lodged an application pursuant to s44 of the *Industrial Relations Act 1979* ("the Act") as the applicant and some of its delegates had an unresolved dispute with the Acting Principal of Corpus Christi College ("the College/the respondent"), Mr Barry Harvie.

2 As the issue of the Commission's jurisdiction to deal with this application was raised by the respondent the parties were required to file and serve written submissions in relation to this issue.

3 Before dealing with the parties' submissions on jurisdiction it is necessary to outline the nature of this application as detailed in the schedule attached to the application. The applicant maintains that on 2 September 2004 the College's then Acting Principal Mr Harvie published as an attachment to an email to teaching and non-teaching staff at the College a copy of a letter he had sent to the applicant's secretary on 31 August 2004 expressing his concerns about the activities of the union and its delegates at the College. This letter suggested that the applicant's delegates had bullied and harassed some staff and that a staff member had resigned from the College claiming that this bullying was a factor in her leaving the College. The applicant maintains that four of the applicant's delegates at the College claim that the publication of this letter caused them distress and damaged their reputations as Mr Harvie's letter implied that they had bullied and harassed other College staff whilst undertaking their delegate duties and the applicant maintains the resignation of the staff member had nothing to do with the actions of the delegates. After the letter was published some of the delegates at the College requested clarification from Mr Harvie about his concerns and with the assistance of the applicant some delegates sought a written apology from Mr Harvie, a written retraction of the claims of bullying and harassment, publication of the retraction and an apology by email to all those to whom the original publication was made, an undertaking that the statements would not be repeated and damages. As no agreement was reached between the applicant's delegates and Mr Harvie and as Mr Harvie did not retract the statements he made in his letter dated 31 August 2004 the applicant lodged this application seeking the assistance of the Commission to resolve the dispute.

Respondent's submissions

4 The respondent argues that as the substance of the application before the Commission does not involve an industrial matter the Commission does not have the jurisdiction to deal with this application.

5 The respondent maintains that as this application relates to allegations of defamation the Commission is not empowered to make findings of fact in relation to a claim of this nature and the respondent argues that the Commission should not extend its powers to enquire into and make findings into areas of law, such as defamation, which it does not have the express or implied power to deal with. In support of this contention the respondent relies on *Hotcopper Australia Ltd v Saab* (2002) 82 WAIG 2020. The respondent also maintains that the Commission is unable to award damages for defamation (see *Robe River Iron Associates v Metals and Engineering Workers' Union* (1995) AILR 13,034).

6 The respondent submits that this dispute relates to allegations of defamation between one employee and a group of other employees and that as the allegations are issues between employees they do not relate to the relationship between an employer and employees as required by s7(ca) of the Act and the respondent argues that this dispute has been incorrectly referred to the Commission under the dispute resolution provisions of the *Independent Schools' Teachers' Award 1976 (No R27 of 1976)* ("the Award") as these provisions relate to disputes between the parties to the Award and not disputes between employees.

7 The respondent argues that the Commission is unable to deal with this application as the College is not a respondent to the *Western Australian Catholic Schools Enterprise Bargaining Agreement 2004* and is not the employer of the applicant's members and Mr Harvie and that the College employees are employed by the Roman Catholic Archbishop of Perth.

8 The respondent argues in the alternative that if the Commission finds that the College is the employer and that the subject matter of this application is an industrial matter then it argues that the College cannot be held vicariously liable for the actions of one of its employees as the employer did not expressly or impliedly authorise Mr Harvie to defame the applicant's delegates.

Applicant's submissions

9 The applicant maintains that the Commission has jurisdiction to deal with this application and argues that this application relates to an industrial matter and is in accord with the achievement of a number of the objects of the Act, specifically objects 6(ab), (ad), (ae), (b), (c), (e), (f) and (g).

10 The applicant maintains that this dispute involves an industrial matter as it relates to the relationship between an employer and its employees and the privileges rights and duties of an organisation or association or its officers or members as provided for in the definition of industrial matter in s7 of the Act, specifically subsections (ca), (d) and (e). In support of its argument the applicant relies on the authority contained in *Hotcopper Australia Ltd v Saab* (op cit). The applicant argues that the proper character of this dispute is not whether the respondent through one of its employees defamed the applicant's delegates, this matter relates to a dispute about the claimed misbehaviour of some of the applicant's members acting in their capacity as the applicant's delegates and the applicant argues that the Commission is capable of dealing with this application as it relates to a dispute about the actions of the applicant's delegates when carrying out their duties at the workplace. The applicant also

argues that even if the published comments were defamatory that is not something the Commission would be required to make a finding about.

11 The applicant argues that Mr Harvie was acting on behalf of the respondent when he sent the letter dated 31 August 2004 to the applicant and it argues that this application relates to more than a dispute between employees. The applicant maintains that the letter giving rise to this dispute details allegations about the applicant's delegates whilst undertaking their roles as delegates and was sent to the applicant by Mr Harvie in his capacity as the Acting Principal of the College. The applicant maintains that Mr Harvie published his comments whilst acting as the Principal of the College and his comments did not arise as a result of his role as an employee of the respondent.

12 The applicant maintains that it is directly involved in this dispute because the Acting Principal sent the letter complaining about the applicant's delegates to the applicant and to the respondent's staff members, many of whom are or are eligible to be members of the applicant. The application also claims that the contents of this letter impugned the industrial behaviour and reputations of the applicant's delegates and therefore the applicant.

13 The applicant maintains that the dispute settlement procedure in the Award provides that any question, dispute or difficulty not settled at the workplace can be referred to the Commission and is wide enough to encompass this dispute being referred to the Commission.

14 The applicant maintains that if the correct name of the respondent is the Roman Catholic Archbishop of Perth then this can be corrected pursuant to s27(m) of the Act or the Roman Catholic Archbishop of Perth could be joined as a respondent to this application pursuant to s27(j) of the Act.

Findings and conclusions

15 Section 7 of the Act defines industrial matter, in part, as follows

> "**'Industrial matter'** means any matter affecting or relating or pertaining to the work, privileges, rights or duties of employers or employees in any industry or of any employer or employee therein and, without limiting the generality of that meaning, includes any matter affecting or relating or pertaining to:
>
> …
>
> (ca) the relationship between employers and employees;
>
> …
>
> (e) the privileges, rights or duties of any organisation or association or any officer or member thereof in or in respect of any industry;"

and also includes any matter of an industrial nature the subject of an industrial dispute or the subject of a situation that may give rise to an industrial dispute, subject to a number of exclusions which are not relevant to this application.

16 Section 23 of the Act gives the Commission "cognizance of and authority to enquire into and deal with any industrial matter" and s29 of the Act sets out who may refer matters to the Commission and reads in part as follows:

> "(1) An industrial matter may be referred to the Commission —
>
> (a) in any case, by —
>
> (i) an employer with a sufficient interest in the industrial matter;
>
> (ii) an organisation in which persons to whom the industrial matter relates are eligible to be enrolled as members or an association that represents such an organisation;"

17 In the *Construction, Forestry, Mining and Energy Union of Workers v Sanwell Pty Ltd and Another* (2004) 84 WAIG 727 his Honour the President and Gregor C (as he was then) stated the following in relation to the definition of an industrial matter:

> "63 We now turn to consider the question of whether the clause is an "industrial matter" as defined, and whether, in 2002, the definition of "industrial matter" was substantially amended (see the *Labour Relations Reform Act* 2002).
>
> 64 There is a great deal of authority in the High Court, the Federal Court, the Industrial Appeal Court, and in the courts and tribunals of other States about the definition of "industrial matter" and the federal definition of "industrial dispute". In our opinion, the first step to be taken is to deal with the construction of the definition of "industrial matter" in s7 of *the Act*.
>
> 65 It is to be noted that the definition of "industrial matter" in *the Act* is and has been enlarged or extended by the use of the well known extending word "includes" (see *R v Holmes and Others; Ex parte Public Service Association of New South Wales and Another* [1977] 140 CLR 63 at 72).
>
> 66 We also observe that the definition of "industrial matter" has, by the amendments of 2002 (the *Labour Relations Reform Act* 2002), been substantially enlarged, and the value of authorities decided in the Industrial Appeal Court before that date, insofar as they are limited to the more limited words of "industrial matter" as it was then defined, are not so apposite.
>
> 67 The definition should be interpreted in accordance with the approach taken by the High Court in *R v Coldham and Others; Ex parte The Australian Social Welfare Union* [1983] 153 CLR 297 at 312 where whilst interpreting the then definition of "industrial dispute" in *the WR Act*, Their Honours said, per curiam:-
>
> > "The words are not a technical or legal expression. They have to be given their popular meaning -- what they convey to the man in the street. And that is essentially a question of fact."
>
> 68 A further indication of the approach to be taken is that contained in the dicta of King CJ (Mohr J agreeing) in *R v Industrial Commission of South Australia; Ex parte Master Builders Association of South Australia Incorporated* [1981] 26 SASR 535 at 537-538 (In Banco). Referring to the definition of "industrial matter" in the South Australian Act, which was in similar terms to the first paragraph of the definition in *the Act* before the amendments of 2002, he said:-

> "The natural meaning of these words is wide and I see no reason to restrict the natural meaning. The Act manifests a clear intention to give the Industrial Commission wide powers to adjudicate upon and to resolve disputes concerning matters which might reasonably be regarded as affecting the employer and employee relationship or which might be the source of disharmony in that relationship.
>
> Clearly, there may be causes of disharmony between employers and employees which are totally unrelated to the relationship and which could not be regarded as arising from or relating to industrial matters, but, to my mind, the legislature has indicted its will that the Industrial Commission should be a tribunal to which employers and employees can resort to have a decision upon all issues which can legitimately be regarded as industrial issues and which might otherwise result in industrial conflict. If this is the true policy of the Act, as I think it is, it would be quite inconsistent with that policy to place a restrictive interpretation upon the naturally wide meaning of the words "affecting or relating to" in the definition."

69 We respectfully adopt those dicta and apply them in construction of the definition of "industrial matter" in *the Act*.

…

71 Whilst we follow what Parker J (Kennedy J agreeing) said in *RGC Mineral Sands Ltd and Another v CMETSWU* (2000) 80 WAIG 2437 at 2443 about the inapplicability of reasoning directed to the nature of an industrial dispute, in interpreting the definition of "industrial matter" in *the Act*, assistance can clearly be derived, and we do derive it from the High Court authorities to which we refer hereinafter. In so saying, we note that the term "industrial dispute" and the definitions generally in the Federal Acts are narrower than that which now appears in *the Act*. The general part of the definition of "industrial matter" in s7 of *the Act* reads as follows:-

> "**"industrial matter"** means any matter affecting or relating or pertaining to the work, privileges, rights, or duties of employers or employees in any industry or of any employer or employee therein and, without limiting the generality of that meaning, includes any matter affecting or relating or pertaining to …" (our emphasis)

72 There follow the items of expanded definition of a particular kind, some of which we refer to hereinafter.

73 It should be noted that the word "includes" is a word which expands the definition. It should also be noted that the particular items of definition, which appear after what we have just quoted above, are specifically expressed not to limit the generality of the first six lines of the definition in s7 of *the Act*.

74 (It is necessary also to look generally at the analysis of the definition as it was formerly, which the Full Bench undertook in *Hamersley Iron Pty Ltd v AMWSU* (1990) 70 WAIG 3001 at 3006-3008 (FB), and the authorities cited therein).

75 The words now are "any matter affecting or relating or pertaining to the work, privileges, rights or duties of employers or employees in any industry …". (The words "or pertaining to" were added in 2002).

76 The words "pertaining to" mean "belonging to" or "within the sphere of" (see *Re Cram and Others; Ex parte New South Wales Colliery Proprietors' Association Ltd and Others* [1987] 163 CLR 117 at 134 per Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).

77 Such an approach is fortified by the naturally wide meaning of the words in the definition of "industrial matter" in s7 of *the Act*, which words are even wider than those referred to in the South Australian Act in *R v Industrial Commission of South Australia; Ex parte Master Builders Association of South Australia Incorporated* (In Banco) (op cit) or those words which defined "industrial matter" before the amendments of 2002.

78 The words "affecting or relating to" alone must be read widely and unrestrictedly, and, in our opinion, for the reasons expressed hereinafter, are sufficient to render the clause an "industrial matter". The definition has been widened so that any matter "affecting or relating or pertaining to" the relationship between employers and employees is an industrial matter, and, a fortiori, must be read widely and unrestrictedly (see *R v Industrial Commission of South Australia; Ex parte Master Builders Association of South Australia Incorporated* (In Banco) (op cit) per King CJ and see *Hamersley Iron Pty Ltd v AMWSU* (FB) (op cit)).

79 In particular is it made clear in that case that such a definition includes "the relations of employers and employees". Paragraph (ca) of the definition "industrial matter" in s7 of *the Act*, which has now been added, expressly uses the words "the relationship between employers and employees" and augments the definition."

18 I find that this matter has been properly referred to the Commission pursuant to s29(1)(a)(ii) of the Act. I accept that the applicant is an organisation as defined in the Act and can enrol as members persons to whom this matter relates as it was not in dispute and I find that the delegates involved in this application and a number of the respondent's employees were members of or eligible to be members of the applicant at the time this application was lodged.

19 The changes in 2002 to the definition of industrial matter in the Act widened the definition of industrial matter. When applying the authorities cited above to the current definition of an industrial matter as defined in s7 of the Act to the circumstances of this case I find that this application involves an industrial matter and the Commission therefore has jurisdiction to deal with this application.

20 I find that the subject matter of this dispute is caught by the definition of industrial matter in a number of areas. I am of the view that this dispute concerns a matter affecting, relating or pertaining to the relationship between an employer and employees. I find that this dispute arose after Mr Harvie, in his role as Acting Principal of the College, complained to the applicant by letter dated 31 August 2004, about the actions of the applicant's delegates. I find that when Mr Harvie wrote to the applicant complaining about the activities of the delegates he was communicating to the applicant in his capacity as Acting Principal of the College and therefore the delegates' employer. Mr Harvie also sent a copy of this letter to all College staff members which is indicative of Mr Harvie acting on behalf of the respondent. If the respondent's argument that this was a dispute between Mr Harvie and his fellow employees at the College was plausible it would have been appropriate for Mr Harvie to deal with his concerns on an individual basis directly with the delegates concerned however he chose not to do so and formally raised his concerns about the applicant's delegates with the applicant's secretary and informed College staff members about his concerns.

21 It is also my view that the issue before the Commission falls within the definition of an industrial matter because it relates to the privileges, rights and duties of an organisation and any member thereof. Mr Harvie involved the applicant in this dispute when he sent the letter dated 31 August 2004 to the applicant complaining about the actions of its delegates. Furthermore, I am of the view and I find that the issue in dispute which involves the role of the applicant's delegates at the workplace, is a matter of an industrial nature which may give rise to an industrial dispute as the issue between the parties remains unresolved notwithstanding attempts by the applicant and its delegates to resolve the dispute with the respondent.

22 I reject the respondent's claim that the Commission does not have jurisdiction to deal with this application as it is an action for damages involving the alleged defamation of the applicant's delegates. The issue currently before the Commission has arisen because of a dispute about the actions of the applicant's delegates and the subsequent actions of Mr Harvie, acting on behalf of the respondent, in response to these actions. Even though the applicant refers to the delegates seeking damages for its delegates as part of the remedy sought in relation to this application this is one of a number of remedies the applicant is seeking in order to resolve this dispute. If this application is successful the issue of whether or not any compensation is to be awarded to the applicant and its delegates because of Mr Harvie's statements about the actions of the applicant's delegates is an issue the Commission will deal with as and when appropriate.

23 As it is unclear at this point as to the correct name of the respondent I will hear further from the parties in relation to the true name of the respondent and whether or not the name of the respondent should be altered given the Commission's powers under s27(j) and (m) of the Act.

24 A declaration will now issue that this matter is within the jurisdiction of the Commission.

2006 WAIRC 04391

A DISPUTE REGARDING COMPLAINT ABOUT UNION DELEGATES AND SUBSEQUENT DISTRESS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	INDEPENDENT EDUCATION UNION OF WESTERN AUSTRALIA,UNION OF EMPLOYEES
	APPLICANT
	-v-
	CORPUS CHRISTI COLLEGE
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	MONDAY, 22 MAY 2006
FILE NO.	C 188 OF 2005
CITATION NO.	2006 WAIRC 04391

Result	Jurisdiction found

Declaration

HAVING HEARD Mr G Stubbs of counsel by way of written submissions on behalf of the applicant and Ms K Wroughton of counsel by way of written submissions on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby:

DECLARES THAT that this matter is within the jurisdiction of the Commission.

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

CONFERENCES—Matters referred—

2006 WAIRC 04520

REFUSAL TO EMPLOY A UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS
	APPLICANT
	-v-
	BHP BILLITON IRON ORE PTY LTD, INTEGRATED GROUP LTD T/AS INTEGRATED WORKFORCE
	RESPONDENTS
CORAM	COMMISSIONER S WOOD
HEARD	FRIDAY, 19 MAY 2006
DELIVERED	MONDAY, 12 JUNE 2006
FILE NO.	CR 128 OF 2004
CITATION NO.	2006 WAIRC 04520

CatchWords	Matter remitted by Industrial Appeal Court - Application for interim order - Whether Commission should exercise discretion - Industrial Relations Act s.44(6)(ba), s.44(6)(bb) - Work Choices Legislation - Order issued.
Result	Interim Order Issued
Representation	
Applicant	Mr D Schapper of Counsel
Respondent	Mr R Lilburne for BHP Billiton Iron Ore Pty Ltd Mr N Ellery for Integrated Group

Reasons for Decision

BACKGROUND

1 The Commission convened a conference on 19 May 2006 pursuant to s.44 of the *Industrial Relations Act 1979* ("the Act"), to deal with an application by the applicant union to make an interim order to continue the employment of their member Mr Gregory Brandis, as a Rail Transport Technician with BHP Billiton Iron Ore (BHPB). By email of 17 May 2006, Ms Boots for the applicant sought, "an urgent listing of CR 128 of 2004 for the purpose of seeking an interim order that BHP continue to employ Mr Brandis pending the further hearing of this matter by the Commission". The application for an interim order was opposed at conference by BHPB. Integrated supported and adopted the submissions of BHPB. At conference the applicant sought to provide further written submissions by 26 May 2006. This was agreed and the respondents were then directed similarly to supply further written submissions by 2 June 2006. The applicant union forwarded their submissions by letter on 25 May 2006. BHPB replied by letter dated 2 June 2006. Integrated were not originally sent the applicant's submissions and hence did not reply until 8 June 2006. The applicant seeks, if successful, that Mr Brandis be employed from the date the order requiring employment is made.

2 The matter was originally one of joint employment and refusal to employ. Mr Brandis being a locomotive driver, employed by Integrated and working on the BHPB railroad system. He applied for direct employment with BHPB and was rejected. By order dated 13 September 2004 I dismissed the union's application.

3 By order dated 28 June 2005 the Full Bench deleted my order and substituted the following declaration and order:

> "(1) THAT the above-named first respondent, BHP Billiton Iron Ore Pty Ltd, did unfairly refuse to employ Gregory James Brandis as a locomotive driver on a continuing and indefinite basis in position No V56084 Rail Transport Technician, as and from the 7th day of May 2004.
>
> (2) THAT the above-named first respondent, BHP Billiton Iron Ore Pty Ltd, do employ the said Gregory James Brandis in position No V56084 Rail Transport Technician as and from the 7th day of May 2004."

4 Then in a stay application, by order dated 31 August 2005, Wheeler J partially stayed the order of the Full Bench pending appeal, removed the retrospective aspect of the Full Bench's order, and applied a date of 28 June 2005 to the employment of Mr Brandis with BHPB. This was after hearing affidavit evidence from BHPB concerning safety breaches, which they complained Mr Brandis had committed since the original Commission decision in September 2004. In that judgment Wheeler J considered whether there were 'special circumstances' to grant a stay and in particular whether the employment of Mr Brandis would pose an unacceptable risk to safety, given the safety incidents and in light of any earlier pattern of behaviour. Wheeler J concluded:

> "While I accept, therefore, that the Court should err on the side of caution where the safety of Mr Brandis' fellow employees, and others, is concerned, it is my view that the appellant has not demonstrated that Mr Brandis poses such a safety risk that the order of the Commission should be stayed. I would add that the order of the Commission is, of course, not such as to immunise Mr Brandis from whatever steps, in terms of supervision and the like, that the appellant may consider to be appropriate, nor would it prevent the appellant from taking measured and appropriate disciplinary action in the event of any further breaches of safety requirements."

5 The Industrial Appeal Court (IAC) then considered the appeal and by order dated 17 May 2006, ordered that:

> "The Appeal is allowed.
>
> The decision of the Full Bench is varied by deleting paragraph (2) of the Order of the Full Bench in FBA matter number 36 of 2004 and substituting an Order that the case be remitted to Commissioner Wood for further hearing and determination."

6 The IAC stated at paragraph 74 of the original decision as follows:

> "The Full Bench has power to suspend the operation of the decision appealed from and to remit the case to the Commission for further hearing and determination if it considers that it is unable to make its own decision on the merits of the case because of lack of evidence or for other good reason. There was good reason to remit the case to the Commission for further hearing and determination. …….. Importantly, BHPB and the Union agreed before the Full Bench that if the Full Bench found that the Commissioner had erred then the case should be remitted to the Commissioner and the allegations concerning the breach of safety issues in December 2004 and February 2005 should be the subject of further hearing before the Commissioner.

7 The declaration that Mr Brandis was unfairly refused employment remained, but the order to employ was deleted and the matter remitted so that I should hear evidence of Mr Brandis' conduct which BHPB had previously sought before the Full Bench to have heard by the Commission.

8 Relevantly, the IAC by majority said in their reasons as follows:

> "15 So far as the remitter to Commissioner Wood is concerned, it should be observed that it is a normal and usual incident of appellate jurisdiction that an appellate court has power to remit matters to a decision-maker at first instance, where appropriate. The orders proposed by this Court include an order of that kind, varying the orders of the Full Bench by providing that the matter be remitted to Commissioner Wood. Although, once the matter is remitted, the powers which Commissioner Wood would be exercising would be those powers which the *Industrial Relations Act* directly confers upon the Commission, the powers would be exercised pursuant to, and for giving proper effect to, the orders of the Full Bench, as varied by this Court, pursuant to s 90 of the *Industrial Relations Act*. That section is, as I have already explained, a law of the kind referred to in reg 4.55. This Court is, in effect, providing the order which should have been made on the original appeal from Commissioner Wood.
>
> 16 In my view, the exception which reg 4.55 provides must be understood as having operation not only in relation to the formal orders of this Court, which plainly "relate to" the appeal to the Full Bench, but also in relation to whatever provisions in the State law may be necessary to give effect to those orders. To hold otherwise would give rise to the absurd result that this Court could, by reason of reg 4.55, order a remitter which would be incapable of being given any effect. For that reason, I would conclude that the partial exclusion of the *Industrial Relations Act*, pursuant to s 16(1) of the WRA and regulations, does not operate so as to exclude the powers which would fall to be exercised by Commissioner Wood pursuant to the orders proposed by this Court."

Both the applicant and respondents relied on these paragraphs in their submissions at conference.

9 I was advised at conference that Mr Brandis had been employed, subsequent to the Full Bench order, as a Rail Transport Technician since October 2005. By letter dated 3 August 2005, BHPB having regard to the Full Bench decision, and a decision by the Industrial Appeal Court to partially stay the Full Bench order, offered employment to Mr Brandis as follows:

> "Accordingly, in accordance with the order of the Full Bench as stayed by the Court the Company offers you employment in the position of Rail Transport Technician in the Rail Operations Department at Port Hedland.
>
> Your employment will commence the day after your AWA approval notice is issued by the Office of the Employment Advocate, in accordance with the company's usual practice. We will then contact you to make the appropriate arrangements. However, you will be deemed to have commenced employment from 28 June 2005 being the date of the order of the Full Bench.
>
> However, as indicated above, the Company has issued an appeal against the proceedings to set aside the decision and order of the Full Bench pursuant to which this offer of employment is made.
>
> If the Company's appeal is successful and the order of the Full Bench requiring the Company to employ you is set aside then your employment with the Company will lapse."

10 Following the decision of the IAC on 17 May 2006, BHPB then in a letter to Mr Brandis dated 17 May 2006 advised him as follows:

> "Dear Greg
>
> **Industrial Appeal Court Decision**
>
> I refer to the Company's letter of offer of employment to you dated 3 August 2005.
>
> As set out therein, that offer of employment was made in compliance with the order of the Full Bench in Construction, Forestry, Mining & Energy Union of Workers v BHP Billiton Iron Ore Pty Ltd & Anor (FBA36 of 2004) made on 28 June 2005.
>
> Further, as advised in that letter of offer, your employment with the Company would lapse if the Company's appeal against the decision of the Full Bench was successful and the order set aside.
>
> I advise that the Industrial Appeal Court set aside that order this morning and, accordingly, confirm that your employment with the Company lapsed when that occurred.
>
> Payment of your salary up to termination and accrued but untaken entitlements will be paid into your bank account forthwith."

11 BHPB submitted that the offer of employment to Mr Brandis was contingent upon the outcome of the appeal to the Industrial Appeal Court (IAC). Consequently, the IAC having varied the order of the Full Bench, the offer of employment lapsed. BHPB submitted then that Mr Brandis was not dismissed.

12 I should add for completeness that there is another application concerning Mr Brandis (application CR 49 of 2005). This application concerns the dismissal of Mr Brandis on 8 March 2005 from his employment with Integrated, whilst working on the BHPB railroad system, for alleged misconduct in relation to damage to a Digitair on or about 23 February 2005. The matter was to be heard on 26, 27 and 28 July 2005. On 6 July 2005 I adjourned the hearing sine die given the Full Bench order that BHPB employ Mr Brandis and pending the outcome of further litigation. It is the case then that Mr Brandis worked on the BHPB railroad system to 8 March 2005, then commenced again in October 2005, with deemed employment from 28 June 2005, and his employment lapsed on 17 May 2006.

JURISDICTION

13 The respondents challenged the jurisdiction of the Commission to make such an interim order on three grounds. BHPB submitted that the Commission is without jurisdiction due to:

> "(a) the effect of the *Workplace Relations Amendment (WorkChoices) Act 2005* (**WorkChoices legislation**);
>
> (b) limited powers of the Commission on remittal; and
>
> (c) limits on the Commission's powers to issue interim orders of this nature."

The applicant submitted that:

> "It is apparent from paragraph [15] of the Supplementary Reasons of the Court that, once remitted as it now has been, the Commission has all the powers which the Act directly confers on the Commission. Those powers include those set out in ss23, 27, 32, 32A and 44."

14 I will deal with points (a) and (b) together. BHPB and Integrated submitted that this application is a new or fresh application and hence outside the matters on appeal and the powers are beyond those necessary to give effect to the matters remitted. Hence s.16(1) of the Workchoices Legislation excludes the Commission from dealing with this application. BHPB relied in particular on the following passages of the IAC's decision:

> "15. …….. Although, once the matter is remitted, the powers which Commissioner Wood would be exercising would be those powers which the *Industrial Relations Act* directly confers upon the Commission, the powers would be exercised pursuant to, and for giving proper effect to, the orders of the Full Bench, as varied by this Court. ……
>
> 16. …….. exception which reg 4.55 provides must be understood as having operation ……. but also in relation to whatever provisions in the State law may be necessary to give effect to those orders."

15 The respondents submitted also that s.44(6) is not a provision in the Act necessary to give proper effect to the Full Bench order, as varied by the IAC, and hence is not part of the exemption from the exclusion of the operation of the Federal legislation. A matter on remittal is not 'at large' before the Commission.

16 The argument was put to the IAC that the Commission, if the matter was remitted, was without power generally due to the operation of the Federal legislation. The majority decision of the IAC was that the Commission had power to deal with the matter remitted as, "To hold otherwise would give rise to the absurd result that this Court could, by reason of reg 4.55, order a remitter which would be incapable of being given any effect." The IAC decision made it plain, in my respectful view, that the powers which I exercise are those pursuant to the order of the IAC and are "whatever provisions in the State law may be necessary to give effect to those orders". Wheeler J, with Pullin J in agreement, said, "once the matter is remitted, the powers which Commissioner Wood would be exercising would be those powers which the *Industrial Relations Act* directly confers upon the Commission, the powers would be exercised pursuant to, and for giving proper effect to, the orders of the Full Bench, as varied by this Court".

17 This would then seem to be the answer to both points (a) and (b), namely the matter only has life before the Commission in so far as the Commission may use its powers to deal with the issues remitted. Due to the federal legislation the matter is then constrained to giving effect to the orders arising from the appeal; and seemingly then would only have a life of some six months from the date of operation of the federal Act. If a matter once remitted (i.e point (b)) would otherwise typically have a larger operation, then it cannot continue to operate so after the commencement of the federal Act. Using that rationale point (b) is not a separate ground given the context in which this matter before the Commission must now be considered.

18 The Commission then has power, and must do whatever is necessary and appropriate to give effect to the order of the Full Bench, as varied by the IAC. The order is that the matter is remitted; the reasoning is that the respondents were denied procedural fairness in not having been able to present evidence as to the conduct of Mr Brandis regarding safety breaches. Read literally then the Commission would have no role other than to convene a hearing and fashion an order binding the parties (s.44(9)), give relevant directions to ensure a fair hearing (s.27) and have proper regard to the merits of the matter (s.26). It would negate a role for the Commission in any conciliation, inspection or other method to resolve the matter; notwithstanding that the Act exists in part for the "prevention and resolution of conflict in respect of industrial matters" (refer to the preamble). I do not consider that in all commonsense such a narrow approach is meant. Such an approach would also negate the possibility of the Commission responding to any new circumstance arising in this matter between the parties. I depart from Mr Brandis' circumstances to illustrate the point. If this matter were one of typical industrial conflict and action then the Commission, even though the matter was live before the Commission, could not fairly direct the parties in resolution of the conflict. Again, simply because the matter arises from appeal and is remitted to the Commission, this being the source of exclusion from the Federal legislation, I do not consider that the Commission is straight-jacketed in power so as to not be able to fairly and properly deal with the situation.

19 In saying this I do not for a moment contemplate that the Commission is operating at large on the remitted issue. The Commission is to consider the employment or otherwise of Mr Brandis, having regard for the decision of the IAC, the Full Bench and the evidence and submissions yet to be given. As for the argument that the union's application is a new matter, or a fresh application, I note that the application is an interim application concerning the employment of Mr Brandis by BHPB. It is squarely an application about the continuing circumstances of Mr Brandis whilst the litigation, following appeal, is finalised.

20 The parties advised that the issue of Mr Brandis' continuing employment was raised before the IAC. The parties agreed to provide the Commission with their summary of arguments before the IAC. I have read these submissions and do not need to repeat them here. Much of what was put to the IAC was revisted in the submissions before me. The IAC was invited to give instruction to the Commission on this matter. I have already recited the relevant parts of the IAC's decision. I respectfully read the judgment of the IAC, i.e. 'whatever provisions in the State law may be necessary to give effect to those orders", as meaning that I have discretion to entertain this application for an interim order. I do not repeat my earlier reasonings. Of course, if I am wrong on this part then the union's application must fail.

21 In summary, I do not agree with points (a) and (b) of the respondents' submissions that the Commission is without power to deal with this matter due to the effect of the federal legislation or the limited powers of the Commission on remittal.

22 In relation to point (c) it was submitted by the respondents that s.44(6) (bb)(i) is the only source of power for such an interim order. Section 27 is procedural only and ss.32(5) and 44(6)(ba) are subject to various preconditions which do not apply here. BHBP submitted that they should not be forced to employ someone when the order to employ him in the first place was incorrect.

23 Section 44(6)(bb)(ii) provides for the making of interim orders and relates to unfair dismissals. This section does not limit s.44(6)(bb)(i) but its presence demonstrates that the power to make such an interim order is not provided for in (bb)(i), otherwise there would be no need for (bb)(ii). The Act includes an express power for interim orders in unfair dismissal matters, it has no such provision for matters involving a refusal to employ. If this had been intended then Parliament would have provided for it. BHPB referred to the explanatory second reading speech concerning the Act which inserted section 44(6)(bb). The submission being that those documents reinforce the notion that the provision relates only to unfair dismissals. This is not a case of unfair dismissal. The Commission is permitted specifically also to make interim orders pursuant to s.36A, s.83(7) and s.83E. Each of these sections does not apply to this matter.

24 In my view, this is plainly not a matter concerning unfair dismissal or enforcement issues and to that extent I accept the arguments of the respondents. However, the provisions of the Act which potentially have application in my view are s.44(6)(ba)(i) and (ii) and (bb)(i), if the relevant conditions are present. I exclude the provisions of s.32(8) only because they mirror similar provisions within s.44 and the matter has been brought pursuant to s.44. I do not accept that somehow a matter concerning refusal to employ, brought properly under s.44, cannot then be covered by those provisions. The defining characteristic is simply that it be an 'industrial matter'. Orders made under those provisions, whilst not specifically termed interim, are of course interim by their very nature. Those orders cannot be said to dispose of the matter. They exist only in advance of further conciliation or arbitration required to resolve the matter. (See *Burswood Resort (Management) Ltd v ALHMWU* 83 WAIG 3556 and *Burswood Resort (Management) Ltd v ALHMWU* 83 WAIG 3314.

25 The relevant sub-sections of the Act read as follows (I include bb(ii) for completeness):

> "44. (6)(ba) with respect to industrial matters, give such directions and make such orders as will in the opinion of the Commission —
>
> (i) prevent the deterioration of industrial relations in respect of the matter in question until conciliation or arbitration has resolved that matter;
>
> (ii) enable conciliation or arbitration to resolve the matter in question;"
>
> "44. (6)(bb) with respect to industrial matters —
>
> (i) give any direction or make any order or declaration which the Commission is otherwise authorised to give or make under this Act; and
>
> (ii) without limiting paragraph (ba) or subparagraph (i), in the case of a claim of harsh, oppressive or unfair dismissal of an employee, make any interim order the Commission thinks appropriate in the circumstances pending resolution of the claim;"

26 In summary, I consider that there is power to order an interim order.

MERIT

27 In the present circumstance, having reviewed the history of the matter, which is now back before me, I am of the clear view that conciliation will not be availing. No party has made any formal submission to me on this point, however, my conclusion appears obvious from the manner in which the matter is being pursued and argued. If I am wrong on this point then of course I am happy to be advised of this by the parties and I would convene urgently in conciliation to deal with the matter (s.32A).

28 At conference the applicant submitted that there would be a disadvantage to Mr Brandis if an order was not made. It would also be very difficult for Mr Brandis as he would lose income, accommodation and work when he had in fact been unfairly refused employment. More particularly, the order of the Full Bench that Mr Brandis was unfairly refused employment was not disturbed, hence Mr Brandis should have the benefit of this finding. The applicant did not argue at conference or in submission that there would be a deterioration in industrial relations. This point was made in an earlier email, that is before the matter was before the Commission, but was not pursued in later submissions. This would preclude an order being made pursuant to s.44(6)(ba)(i), the condition precedent not having been apparent.

29 The applicant in written submission states:

> "Mr Brandis was in fact employed from October 2005 until 17 May 2006 pursuant to the Full Bench order. That employment is residential in Port Hedland to where he moved his residence. During that employment he was required to undergo all training from scratch which he completed successfully. In January he was passed out as competent at level 5 for all work up to and including mainline work. In the course of his work he was, from time to time, assigned to work with trainees to whom he was required to demonstrate various aspects of the operation
>
> Prima facie he is entitled to be employed unless and until the Commission determines that
>
> 1. the allegations made by BHP are true; and
> 2. if true, the allegations are such that further non-employment is warranted; and
> 3. those matters are not overtaken by his subsequent retraining and pass out as competent; and
> 4. those matters are such that, even when viewed in the context of other incidents, as to warrant further non-employment.
>
> The date from which the employment should run is the date on which the order requiring employment is made."

30 The respondent submitted that the burden on them is inefficient and costly in that Mr Brandis has had to be under supervision in his driving duties. This has required dual manning on the train driven by him each shift. Mr Brandis did not relocate to Port Hedland and has been in temporary rental accommodation. Mr Brandis knew at all times that his offer of employment was contingent upon the outcome of the matter before the IAC and hence his employment has naturally lapsed. He cannot be said to have been disadvantaged by this arrangement.

31 BHPB submitted also that:

> "28. There must be compelling reasons for the making of an interim order in the form of a mandatory injunction to require an entity to employ a person who was not previously (relevantly) employed by that entity.
>
> 29. There are no compelling reasons for an order that BHPB employ Mr Brandis pending the hearing and determination of the matters remitted. BHPB has not previously been (relevantly) Mr Brandis' employer other than as a result an order of the Full Bench which has been deleted on appeal by the Court.
>
> 30. Further, the substantive matter that the Commission is to determine on the remittal is whether, due to events since the decision at first instance, it is appropriate for the Commission to order the BHPB employ Mr Brandis.
>
> 31. In the Applicant union's submissions for the interim order set out in its facsimile transmission to the Associate to Commissioner Wood dated 25 May 2006, it is submitted that Mr Brandis is "entitled to be employed" by BHPB pending the hearing and determination of the matter remitted. This is denied. The Court has expressly removed the obligations that BHPB employ Mr Brandis."

32 The respondent referred to the separate decisions of the Hon President Sharkey and Kenner C in *Thomas James Brown v President, State School Teachers Union of WA (Inc) and Others* 69 WAIG 1390 and *ALHMWU v National Foods Pty Ltd* 84 WAIG 3395. The Hon President (reasons adopted by Kenner C in relation to a s.44(6)(bb)(ii) order) stated in relation to an order pursuant to s.66, that:

> "It seems to me that the principles which apply to the granting of interim injunction proceedings 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.

33 I note in contrast that in *Burswood Resort (Management) Ltd v ALHMWU* 83 WAIG 3556 the Hon President stated:

> "In other words, s44(6)(bb) does not confer a narrow power which merely enables the making of procedural orders. In particular, s44(6)(ba)(ii) of *the Act*, which confers the power to make orders pending arbitration does not either. To so interpret s44(6)(ba)(ii) would be inconsonant with *the Act* read as a whole, and, in particular, s6(ag), (b) and (c) of *the Act*. In other words, the power conferred by s44(6)(ba)(ii) to make orders which will, in the opinion of the Commission, enable conciliation or arbitration to resolve the matter in question, is not confined to mere procedural orders, but to orders which are capable, for example, of preserving the status quo. Further, s44(6)(bb) enables the making of orders to preserve the status quo (see *SSTUWA v Honourable Minister for Education* (1990) 70 WAIG 21 at 27 per Sharkey P, Salmon and Kennedy CC)."

In other words, whilst BHPB might view an interim order, following the IAC's decision as being akin to an interim injunction, the applicant by the tenor of their submissions might consider the order being akin to a status quo arrangement.

34 The arguments as to merit essentially condense to each party arguing that they should enjoy the fruits of their litigation and matters of disadvantage or convenience. There is no submission by any party as to the alleged safety incidents and how that evidence might be viewed. In other words the applicant's argument is that the finding that Mr Brandis was unfairly refused employment stands; hence Mr Brandis should have employment unless and until it is provided otherwise. The disadvantage caused by loss of income and disruption to his living should support the order being made. BHPB, supported by Integrated, argue that having been successful in their appeal to the IAC they should not be required to employ Mr Brandis. That requirement has been removed by the IAC's order. They should not now be made to employ Mr Brandis in the absence of the Commission hearing the evidence of safety breaches. The cost and inefficiency of having to supervise Mr Brandis is unwarranted. BHPB submitted that it is clear from the IAC's decision that Mr Brandis should not be employed until the further matters are heard and determined and the circumstances warrant it.

35 There has been no submission to the effect that Mr Brandis has, since his employment in October 2005, committed any safety breaches or other misdemeanours. Albeit the submission is that he was supervised at all times. The applicant submitted that Mr Brandis has operated effectively and has been passed out as having Level 5 competence.

36 The matter to be heard concerns Mr Brandis' suitability for employment, not in the general sense, but on the limited basis of conduct surrounding some alleged breaches of safety. Those breaches at this time have only been considered in the context of the stay application. There does not appear to be any material detrimental to Mr Brandis' ability to operate separate to and since that application was heard.

37 I am conscious that the declaration that Mr Brandis was unfairly refused employment stands. Naturally then the remedy, separate from other matters intervening, would be to employ Mr Brandis. This matter rests on whether, given the decision of the IAC, and the parties' submissions, there are sufficient reasons to issue an interim order granting Mr Brandis employment until the matters to be arbitrated are finally decided.

38 The submission by BHPB would have the Commission believe that this matter has already been decided by the IAC. The order to employ was removed and hence that ends the prospect of any interim order. However, I note from the parties' submissions that the matter was aired before the IAC and I am referred only to the paragraphs I have quoted previously. I respectfully consider that the matter is open for the Commission to exercise discretion if there are good reasons to do so.

39 Given that this is an application concerning refusal to employ, and given that Mr Brandis was unfairly refused employment, if this application is not granted and Mr Brandis were later successful at hearing before me, then he would seemingly have missed further employment to which he was otherwise entitled. Alternatively, there may be reasons to apply a retrospective date, if possible, to this employment. I note though the reasoning of Wheeler J in the stay application on that point. If BHPB were successful then they would have had to employ Mr Brandis when it was not warranted.

40 On balance, having reflected carefully on the parties' submissions, the decision of the IAC, and the balance of convenience for the parties, and having regard to my obligations under s.26 of the Act, I am minded to issue an interim order, pursuant to s.44(6)(bb)(i) for BHPB to employ Mr Brandis pending the matter being finally decided by the Commission. The employment to be on an interim basis to apply from the date of the order.

2006 WAIRC 04534

REFUSAL TO EMPLOY A UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CONSTRUCTION, FORESTRY MINING AND ENERGY UNION OF WORKERS
	APPLICANT
	-v-
	BHP BILLITON IRON ORE PTY LTD
	FIRST NAMED RESPONDENT
	INTEGRATED GROUP LTD T/AS INTEGRATED WORKFORCE
	SECOND NAMED RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	WEDNESDAY, 14 JUNE 2006
FILE NO	CR 128 OF 2004
CITATION NO.	2006 WAIRC 04534

Result	Interim Order Issued
Representation	
Applicant	Mr D H Schapper of Counsel
First Respondent	Mr R Lilburne of Counsel
Second Respondent	Mr N Ellery of Counsel

Order

WHEREAS this is an application pursuant to section 44 of the Industrial Relations Act 1979; and

WHEREAS by order dated 17 May 2006 the case was remitted from the Industrial Appeal Court to the Commission; and

WHEREAS the parties have provided to the Commission oral and written submissions on the issue of an interim order regarding Mr Gregory James Brandis' employment; and

WHEREAS the Commission has published its reasons for decision in the matter;

NOW THEREFORE having heard Mr D H Schapper of Counsel on behalf of the applicant, Mr R Lilburne of Counsel on behalf of the first named respondent and Mr N Ellery of Counsel on behalf of the second named respondent, the Commission, pursuant to the powers conferred on it under section 44(6)(bb)(i) of the Industrial Relations Act, 1979, hereby orders:

THAT the above named first respondent, BHP Billiton Iron Ore Pty Ltd, do employ the said Gregory James Brandis in position No V56084 Rail Transport Technician as and from the date of this order; on an interim basis until the matter remitted has been finally heard and determined by the Commission.

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

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
Australian Manufacturing Workers' Union	KSN Engineering Pty Ltd	Gregor SC	C 53/2006	5/05/2006	Dispute regarding termination of employment of union member	Concluded
Australian Manufacturing Workers' Union	Cars R Us (ABN 79 071 462 354)	Harrison C	C 29/2006	N/A	Dispute regarding long service leave entitlements	Discontinued
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union of Australia, Engineering & Electrical Div.	Main Roads	Gregor SC	C 61/2006	7/06/2006	Dispute regarding disciplinary procedure against union member.	Concluded

Parties		Commissioner	Conference Number	Dates	Matter	Result
Health Services Union of Western Australia (Union of Workers)	Director General of Health in right of the Minister for Health in his Incorporated capacity as the WA Country Service under s7 of the Hospital and Health Services Act 1927 (WA)	Kenner C	PSAC 12/2006	8/05/2006	Dispute regarding dismissal of employee	Application discontinued by leave
Health Services Union of Western Australia (Union of Workers)	Director General of Health in right of the Minister for Health as the Metropolitan Health Service at Path West Laboratory Medicine WA	Scott C	PSAC 9/2006	13/04/2006	Dispute regarding reclassifications	Concluded
Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	Dr Neale Fong, Director General, Department of Health	Scott C	C 40/2006	4/04/2006	Dispute regarding the termination of employment of union member	Concluded
Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	Health Department of W.A	Scott C	C 44/2006	4/04/2006	Dispute regarding non payment of wages for union member whilst being stood down from his position	Concluded
Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	Kids Campus Ltd (ABN 27 009 815 472)	Harrison C	C 202/2005	15/02/2006	A dispute regarding alleged unfair dismissal of a union member	Discontinued
The Civil Service Association Of Western Australia Incorporated	Water Corporation	Scott C	PSAC 26/2005	17/08/2005	Dispute regarding the suspension of union member	Concluded
The Civil Service Association Of Western Australia Incorporated	Commissioner of Police, Western Australian Police	Scott C	PSAC 15/2005	31/03/2005 14/04/2005 14/04/2005 14/11/2005 2/02/2006	Dispute regarding abolishment of employee's level 3 position	Concluded
The State School Teachers Union of W.A.(Incorporated)	Paul Albert Director General Department of Education	Harrison C	CR 136/2004	16/01/2006	Dispute regarding termination of employment of Union member	Discontinued
The State School Teachers Union of W.A.(Incorporated)	Paul Albert Director General Department of Education	Harrison C	C 136/2004	12/07/2004 23/03/2005 22/08/2005	Termination of a Union member	Referred

PRACTICE NOTES—

2006 WAIRC 04532

PRACTICE NOTE 1 OF 2006

REGULATION 45(8) - CONCURRENT EXPERT EVIDENCE

Where more than one expert witness is to be called in a matter and the Commission decides that the evidence of the expert witnesses will be heard together the following procedure will be followed unless the Commission decides that in the circumstances of the case a different procedure should be followed.

1. Prior to the Hearing:

As soon as possible after the filing of the experts' reports prior to the hearing, the Commission will advise the parties' representatives of the intention of the Commission to hear the evidence of expert witnesses together and direct the parties to advise the expert witnesses to be called by them:

(a) That the Commission requires the experts to meet and confer with one another in the absence of the parties and their representatives.

(b) That the object of the experts conferring is for them to prepare a written statement containing the matters in their respective reports about which they agree, and to identify any matters in their respective reports about which they disagree and the reasons for that disagreement.

(c) That the expert witnesses are to use their best endeavours to reach an agreement.

(d) That the expert witnesses are to each sign the written statement and arrange for one of them to lodge it with the Commission, and give copies of it to the parties, no less than 3 days before the commencement of the hearing.

(e) That if any of the expert witnesses considers that further work is required to be done before the written statement can be finalised, the expert witnesses should prepare and sign the written statement in relation to those matters which are able to be agreed and identify in that document what further work is required to be done. The expert witnesses should complete any further work as quickly as possible and complete, sign and lodge with the Commission a further written statement and give copies of it to the parties.

2. At the Hearing:

(a) The Commission will call the expert witnesses to give evidence together and each will be sworn in by the Associate.

(b) The Commission will arrange for the expert witnesses to be seated at a table where their evidence may be conveniently transcribed and heard by the Commission and each of the parties and their representatives.

(c) The Commission will then explain the procedure to be followed and ask the expert witnesses if they have any questions regarding that procedure.

(d) The Commission will then mark the filed written statement as an exhibit.

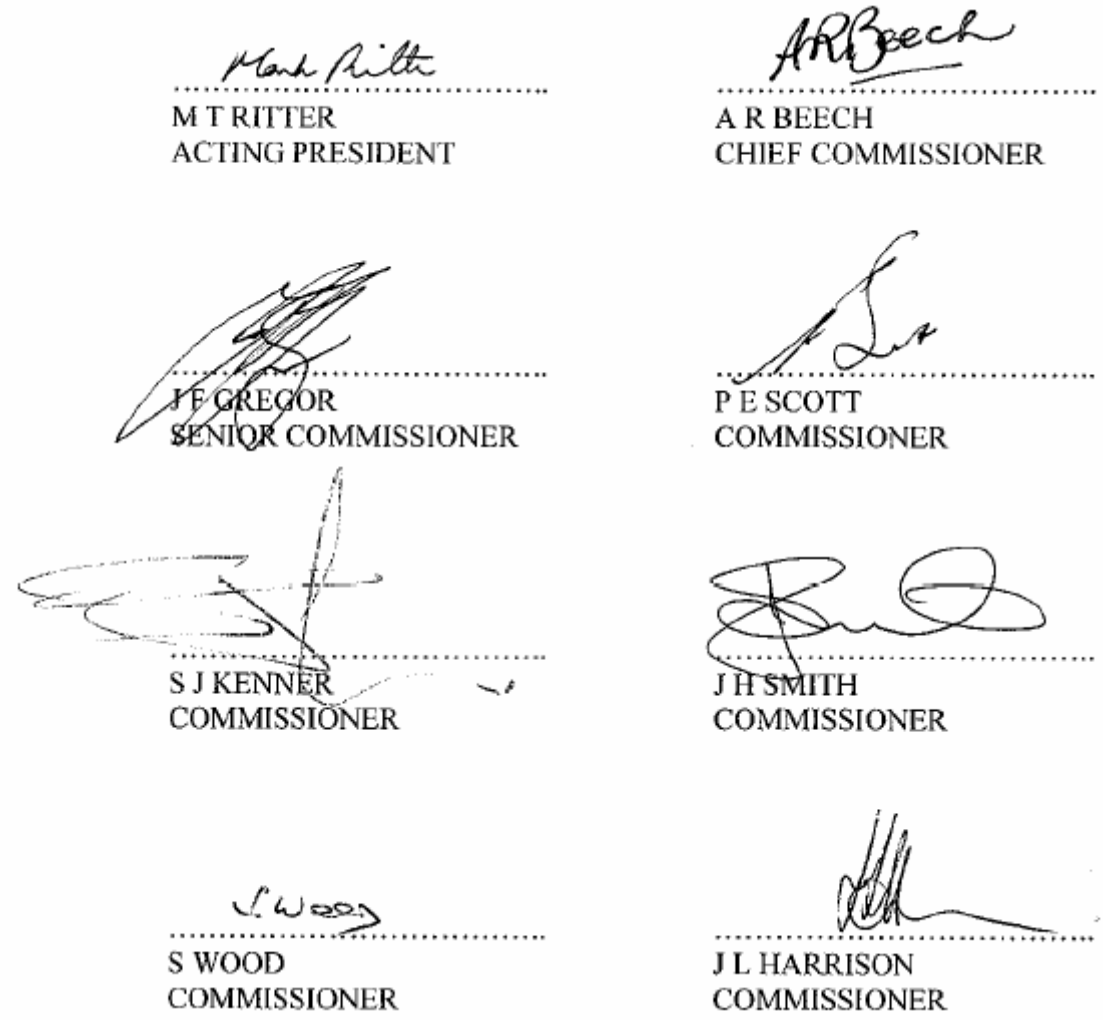
(e) The Commission will then ask questions of the expert witnesses.

(f) The Commission will then give the expert witnesses an opportunity to ask each other any questions which they consider might assist the Commission.

(g) The Commission will then provide an opportunity for the expert witnesses to be asked questions by the parties or their representatives.

(h) The Commission will then ask the expert witnesses if any matters arise from the questions asked by the parties or their representatives upon which any of them wishes to comment and give them an opportunity to do so.

(i) That will then complete the evidence given by the expert witnesses and they will then be discharged from giving evidence.



M T RITTER
ACTING PRESIDENT

A R BEECH
CHIEF COMMISSIONER

J F GREGOR
SENIOR COMMISSIONER

P E SCOTT
COMMISSIONER

S J KENNER
COMMISSIONER

J H SMITH
COMMISSIONER

S WOOD
COMMISSIONER

J L HARRISON
COMMISSIONER

PROCEDURAL DIRECTIONS AND ORDERS—

2006 WAIRC 04371

ALLEGED UNFAIR DISMISSAL

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE STATE SCHOOL TEACHERS UNION OF W.A.(INCORPORATED) **APPLICANT**
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION AND TRAINING **RESPONDENT**
CORAM	COMMISSIONER J L HARRISON
DATE	THURSDAY, 18 MAY 2006
FILE NO/S	CR 15 OF 2006
CITATION NO.	2006 WAIRC 04371

Result Order issued

Order

WHEREAS this is a matter referred for hearing and determination pursuant to s44 of the Industrial Relations Act 1979; and

WHEREAS on 23 March 2006 the application was set down for hearing and determination on 7 and 8 June 2006; and

WHEREAS on 15 May 2006 the applicant wrote to the Commission requesting an adjournment of the hearing because of unexpected delays incurred in the preparation of the applicant's case; and

WHEREAS on 16 May 2006 the respondent advised the Commission that it consents to an adjournment being granted; and

WHEREAS when considering whether the Commission should exercise its discretion to grant an adjournment taking into account the objects of the Act, s26(1) of the Act and whether a refusal to adjourn would result in a serious injustice to one party (*Myers v Myers* (1969) WAR 19) I am of the view that an adjournment of the hearing set down for 7 and 8 June 2006 should be granted; and

FURTHER in reaching this view I accept that the applicant will suffer some prejudice if the matter proceeds on the dates set down for hearing due to unexpected delays which has affected the preparation of its case, the respondent has not highlighted any prejudice it will suffer if the hearing is delayed and the applicant's member is not significantly prejudiced if this matter does not go ahead on the dates set down as the respondent reinstated the applicant's member on an interim basis pending the hearing and determination of this application;

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 hearing of application CR 15 of 2005 scheduled to take place on 7 and 8 June 2006 be adjourned to a date to be fixed.

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

2006 WAIRC 04418

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DAVID GRAHAM MAGUIRE
	APPLICANT
	-v-
	TREVOR HUGHES, GENERAL MANAGER WA AT NMHG DIST. PTY LTD T/A HYSTER WEST
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	MONDAY, 29 MAY 2006
FILE NO/S	U 252 OF 2005
CITATION NO.	2006 WAIRC 04418

Result	Order for discovery issued
Representation	
Applicant	In person
Respondent	Ms L J Nickels (of counsel)

Order

HAVING heard Mr Maguire in person and Ms Nickels (of counsel) on behalf of the Respondent and by consent, the Commission pursuant to the powers conferred on it under the Industrial Relations Act 1979 hereby orders –

(a) Each party file and serve on each other:

(i) a list of witnesses; and

(ii) a list of documents they intend to rely upon;

no later than seven days prior to the first date of hearing.

(b) The Respondent is to provide discovery to the Applicant within seven days from 26 May 2006 of the following classes of documents:

(i) any files in the email inbox, outbox and deleted files between 1 January 2005 and 8 November 2005 of Maureen Johns and Trevor Hughes that breach the NMHG Code of Conduct; and

(ii) any emails from or received by Trevor Hughes or Nicola Langton between 1 January 2005 and 31 December 2006 that are defamatory of the Applicant.

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

2006 WAIRC 04248

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DAVID STUART CHAMBERS
	APPLICANT
	-v-
	WIV-AUSTRALIA
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 27 APRIL 2006
FILE NO.	U 328 OF 2005, B 328 OF 2005
CITATION NO.	2006 WAIRC 04248

Result	Direction issued
Representation	
Applicant	Mr P Brunner of counsel
Respondent	Ms K Groves of counsel

Direction

HAVING heard Mr P Brunner of counsel on behalf of the applicant and Ms K Groves of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby directs by consent–

1. THAT each party file and serve upon the other party a list of the documents upon which it intends to rely by 5 May 2006.
2. THAT the applicant file and serve upon the respondent further and better particulars of its claim by 8 May 2006.
3. THAT the respondent file and serve upon the applicant further and better particulars of its answer by 10 May 2006.
4. THAT the applicant file and serve upon the respondent any signed witness statements upon which it intends to rely by 12 May 2006.
5. THAT the respondent file and serve upon the applicant any signed witness statements upon which it intends to rely by 16 May 2006.
6. THAT the parties file and serve upon one another any signed witness statements in reply no later than 18 May 2006.
7. THAT the parties give notice to one another of witnesses they require to attend at the proceedings for the purposes of cross-examination no later than 2 days prior to the date of hearing.
8. THAT the parties file and serve an outline of submissions and any list of authorities upon which they intend to rely no later than 2 days prior to the date of hearing.
9. THAT the matter be listed for hearing for one day.
10. THAT the parties have liberty to apply on short notice.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.

2006 WAIRC 03716

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DONALD HARRY PALMER
	APPLICANT
	-v-
	THEISS PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 13 FEBRUARY 2006
FILE NO/S	U 21 OF 2006
CITATION NO.	2006 WAIRC 03716

Result	Order issued
Representation	
Applicant	Mr K Trainer as agent
Respondent	No appearance

Order

HAVING heard Mr K Trainer as agent on behalf of the applicant and there being no appearance on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 ("the Act") hereby orders –

1. THAT the herein application be and is hereby accepted out of time.
2. THAT the herein application be referred to a Deputy Registrar for conciliation pursuant to s 32 of the Act.

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

ENTERPRISE BARGAINING AGREEMENT—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Department of Land Information Agency Specific Agreement 2006 PSAAG 5/2006	16/05/2006	The Civil Service Association of Western Australia Incorporated	Chief Executive, Department of Land Information	Commissioner P E Scott	Agreement Registered
Grove Construction Services Pty Ltd Metro Rail Southern Suburbs Rail Project, Structural Project Agreement 2005 AG 235/2005	9/06/2006	Construction, Forestry Mining and Energy Union of Workers	Grove Construction Services Pty Ltd	Senior Commissioner J F Gregor	Register Agreement
Neway Transport Western Australian Certified Agreement 2006 AG 49/2006	31/05/2006	Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch	NT WestAus Pty Ltd t/as Neway Transport	Commissioner J H Smith	Agreement registered

NOTICES—Appointments

2006 WAIRC 04525

APPOINTMENT

ADDITIONAL PUBLIC SERVICE ARBITRATOR

I, the undersigned Chief Commissioner of the Western Australian Industrial Relations Commission, acting pursuant to the provisions of section 80D(2) of the Industrial Relations Act 1979, hereby appoint, subject to the provisions of the Act, Commissioner SJ Kenner to be an additional Public Service Arbitrator for a further period of one year from the 24th day of June, 2006.

Dated the 9th day of June, 2006.

CHIEF COMMISSIONER A.R. BEECH

NOTICES—Cancellation of Awards/Agreements/Respondents—under Section 47—

2006 WAIRC 04472

NOTICE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

TAKE NOTICE that the Commission acting pursuant to Section 47 of the Industrial Relations Act, 1979, intends, by order, to cancel the following award, namely -

The Transport Trust Salaried Officers Award No 3 of 1977

on the grounds that there are no longer any persons employed under the provisions of the award.

Any person who has a sufficient interest in the matter may, within 30 days of the date of the publication of this notice, object to the Commission making such order.

Please quote File No. ADMIN/46/2006 on all correspondence

DATED THIS 31st DAY OF MAY 2006

J. SPURLING,
Registrar.

PUBLIC SERVICE APPEAL BOARD—

2006 WAIRC 04419

AN APPEAL AGAINST THE DECISION TO TERMINATE A UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH
	APPELLANT
	-v-
	MURDOCH UNIVERSITY
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD COMMISSIONER P E SCOTT - CHAIRMAN MS H CREED - BOARD MEMBER PROFESSOR G MOENS - BOARD MEMBER
DATE	MONDAY, 29 MAY 2006
FILE NO	PSAB 1 OF 2006
CITATION NO.	2006 WAIRC 04419

Result	Extension of time granted

Order

WHEREAS this is an appeal pursuant to the Industrial Relations Act 1979 filed beyond the 21 days allowed by the Act; and

WHEREAS at a conference convened on the 17th day of March the Respondent consented to the appeal being accepted out of time; and

NOW THEREFORE, the Commission, pursuant to the powers conferred under the Industrial Relations Act 1979, and by consent, hereby orders:

THAT the appeal be accepted out of time

(Sgd.) P E SCOTT,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2006 WAIRC 04479

AN APPEAL AGAINST THE DECISION TO TERMINATE A UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH
	APPELLANT
	-v-
	MURDOCH UNIVERSITY
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD COMMISSIONER P E SCOTT - CHAIRMAN MS H CREED - BOARD MEMBER PROFESSOR G MOENS - BOARD MEMBER
DATE	WEDNESDAY, 7 JUNE 2006
FILE NO	PSAB 1 OF 2006
CITATION NO.	2006 WAIRC 04479

Result Appeal upheld

Order

HAVING heard Mr M Swinborn on behalf of the appellant and Mr K Cameron on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby:

1. FINDS that the decision of the Respondent to dismiss Mr David Mayger was harsh and unfair.
2. ORDERS that:
   (a) The appeal be upheld; and
   (b) The decision to dismiss David Mayger be adjusted in that Mr Mayger be reinstated into the position of Senior Security Officer without loss of pay or entitlements.
3. RECOMMENDS that Mr Mayger be counselled as to the inappropriateness of his actions in taking for his own use lost property.

(Sgd.) P E SCOTT,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2006 WAIRC 04089

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KRISHNA THAVARASAN **APPELLANT** **-v-** THE WATER CORPORATION **RESPONDENT**
CORAM	PUBLIC SERVICE APPEAL BOARD COMMISSIONER S J KENNER - CHAIRMAN MS VINKA ZUPANOVICH- BOARD MEMBER MS JO DORAHY - BOARD MEMBER
HEARD	TUESDAY, 22 NOVEMBER 2005, MONDAY, 19 DECEMBER 2005, TUESDAY, 20 DECEMBER 2005
DELIVERED	FRIDAY, 31 MARCH 2006
FILE NO.	PSAB 11 OF 2005
CITATION NO.	2006 WAIRC 04089

Catchwords	Industrial law - Termination of employment - Appeal against decision of respondent to terminate appellant's employment - Acceptance of notice of appeal out of time - Whether sufficient evidence before the Appeal Board to establish the misconduct complained of - Principles applied - Appeal Board not satisfied that on balance appellant engaged in all misconduct alleged - Evidence largely of hearsay nature - Appellants conduct not made out to warrant dismissal on evidence -Appeal Board satisfied that appeal made out by appellant - *Industrial Relations Act 1979* (WA) s 23A; s 26(1); s 29(1)(b)(i); s 80I(1)(b); s 80L; *Industrial Relations Commission Regulations 2005* (WA) reg 107(2)
Result	Order issued
Representation	
Appellant	Mr G Stubbs of counsel
Respondent	Mr S Rooke

Reasons for Decision

1 THE CHAIRMAN: These are the joint reasons of myself and Ms Zupanovich. The appellant appeals against the decision of the respondent to terminate her employment which was effective 30 June 2005 pursuant to s 80I(1) of the Industrial Relations At 1979 ("the Act"). The notice of appeal challenges the respondent's decision to dismiss the appellant on a number of grounds as particularised.

2 The notice of appeal filed on 31 August 2005 was filed outside of the 21 day time limit prescribed by reg 107 (2) of the Industrial Relations Commission Regulations 2005. At the outset of the hearing of the appeal before the Public Service Appeal Board ("the Appeal Board") the respondent opposed the appeal being out of time. After having heard submissions from counsel for the appellant Mr Stubbs and Mr Rooke on behalf of the respondent, the Appeal Board decided to extend the time for the filing of the appeal, having been satisfied that the reasons advanced by the appellant justified the lateness in filing.

3 The appeal was heard over three days in late November and December 2005. The parties' closing submissions were submitted in writing with the appellant's submissions in reply being filed on 17 January 2006.

Background

4 The appellant had been employed by the respondent from 15 January 2000. During the course of her employment, the appellant undertook a number of positions with the respondent. Materially however, for present purposes, the appellant was appointed as an acting Management Accountant at the respondent's Engineering and Construction Branch, located at both Hamilton Hill and Shenton Park, in the Perth metropolitan area, between February and the end of June 2005. The appellant is a qualified accountant. Up until about February 2005, the appellant was based at the respondent's corporate real estate branch. In her acting management position, the appellant was responsible for about seven subordinate employees who reported to her at Hamilton Hill, and about four subordinate employees at Shenton Park. The appellant had no prior managerial experience, having been responsible for only one other employee in her former position. The appellant reported to the Manager of the Engineering and Construction Branch, Mr Becu. Whilst Mr Becu was based at the Shenton Park location, the appellant spent most of her working time at the Hamilton Hill office.

5 It was common ground that prior to taking up the acting management appointment, the appellant had a good employment record with the respondent and there were no complaints or concerns in relation to the appellant's work performance. Additionally it seems, at least up until about early June 2005, the respondent appeared to consider the appellant as performing well in the acting management position.

6 Events leading to the present proceedings started with a meeting that took place according to the appellant, on a Friday afternoon, which she thought was 2 June 2005. The appellant testified that she was having a discussion with one of the respondent's engineers and Mr Becu approached her and requested her attendance at a meeting at head office. The appellant asked Mr Becu what the meeting was about and she was told "her work". The appellant was also told a Ms Scott, a human resources officer would also be present. At about 3.30pm the appellant attended the meeting at head office. She testified it was a small meeting room on the third floor of the respondent's head office building in Leederville.

7 The appellant said she entered the meeting room and Mr Becu and Ms Scott were present. She testified that as soon as she saw Mr Becu he started shouting at her that she was a liar and he was banging his fist on the table. This occurred before she even sat down. The appellant asked what the matter was about and Mr Becu told her that "she had lied to him about the appointment of a fixed term contract employee". The employee concerned, Hiran, had been appointed as a result of an internal need and the appellant said she suggested him as she had met him at university and considered he would be suitable for a clerical position. There seemed to be an issue raised by Mr Becu that the appellant had allegedly misled him about Hiran's possession of "SAP" computer system experience. The appellant testified she followed the respondent's employment protocols to engage Hiran on a one year fixed term contract, and sought assistance from the Human Resources Branch as a part of this process. Additionally, the appointment of Hiran was authorised by Mr Becu.

8 Also at the meeting, the appellant said Mr Becu accused her of not keeping appropriate log book entries for the respondent's motor vehicle which she used to travel to and from home. The appellant also referred on some occasions, to dropping her niece to and from school on the way to work. She had told another manager of this who said it was alright to do so.

9 According to the appellant, Mr Becu said that these allegations were serious and her employment was at risk. The appellant requested the allegations to be put in writing and Mr Becu said a further meeting would take place at head office the following Tuesday morning.

10 The appellant testified that she was very upset as a result of this meeting. After it ended, she went into the head office car park. She testified that she rang another employee, Dilu, who also reported to her, and who lived at a house owned by her sister, to not bring a laptop computer home as previously arranged as she was not in any state to work over the weekend.

11 The following Tuesday morning a further meeting took place in the same room at the head office, as arranged. Mr Becu told the appellant that there were further allegations against her. She requested that they be put in writing. According to the appellant, at this meeting Mr Becu put two options to her. The first option was for her to go to the respondent's head office to perform the construction branch work. The second option was for her to return to her substantive position as an accountant at Hamilton Hill. The appellant requested some time off to consider her position. She testified that she then went home. The respondent granted the appellant some time off in response to this request.

12 On or about 13 June 2005 the appellant received a letter from the respondent setting out some 13 allegations against her, including many of which were discussed at the first and second meetings with Mr Becu. This letter was exhibit A1. Many of these allegations involved Hiran and another employee in the appellant's work group, Dilu. Additionally, allegation 13 in the letter contained reference to an assertion that the appellant had informed another employee of the respondent, a Mr Roebuck that Mr Becu had been stealing from the respondent.

13 After receiving the letter of 13 June, the appellant obtained legal advice. A letter of response to the allegations prepared by Dwyer Durack was dated 21 June 2005 and was sent to Mr Becu. A copy of this letter was exhibit A2. This letter rejected the allegations made by the respondent against the appellant and foreshadowed that if the respondent acted as it said, by terminating the appellant's employment, then proceedings would be commenced to challenge that decision. Not insignificantly also, the penultimate paragraph of the letter of 21 June 2005 from Dwyer Durack, refers to the stress and anxiety caused by the recent events, and the appellant's view that it would be difficult for her to return to the Construction Branch. The letter on behalf of the appellant indicated her acceptance of the earlier offer, for the appellant to return to her substantive position.

14 The appellant then proceeded on a period of sick leave. She had no contact from Mr Becu. The next she heard was a letter from the respondent dated 30 June 2005. This letter referred to her responses to the allegations contained in Dwyer Durack's letter of 21 June and went on to provide:

> *"The Corporation has determined that you have been unable to satisfy us that either these allegations are not true or that there are mitigating circumstances that warrant consideration, and your services with the Water Corporation will be terminated effective from 1 July 2005, with 3 weeks pay in lieu of notice."*

15 Prior to receiving this letter, the appellant testified that she had both Hiran and Dilu at her home and they read the letter containing the allegations against her from the respondent. According to the appellant, both Hiran and Dilu said that the

allegations which were allegedly made by them against the appellant were "rubbish". However, neither Hiran nor Dilu were called to give evidence by the appellant or the respondent and this evidence, as was much that followed, was hearsay. We will comment on this further below.

16 Following her dismissal, the appellant sought and obtained a contract position with a mining company which was, as at the time of the hearing, due to run to the end of November 2005.

17 An issue between the parties arising on the submissions was the nature of an appeal to the Appeal Board. We turn to that matter now.

Nature of Appeal

18 On behalf of the respondent Mr Rooke, in his written submissions, said that the relevant test to apply is the same as that applicable to an unfair dismissal claim before the Commission pursuant to s 29(1)(b)(i) Act and he referred to *Miles v Federated Miscellaneous Workers Union of Australia, Industrial Union of Workers, Western Australian Branch* (1995) 65 WAIG 385 in that regard. The respondent also referred to the authorities in relation to acts of misconduct and the evidentiary onus being satisfied if the employer conducted a proper investigation and had an honest belief, based upon reasonable grounds, that the misconduct occurred: *Bi-Lo Pty Ltd v Hooper* (1992) 52 IR 224; *Shire of Esperance v Mouritz; Patrick Joseph Whelan v City of Joondalup* (2004) 84 WAIG 2975.

19 On the other hand, the appellant submitted that the nature of an appeal pursuant to s 80I(1) of the Act is different in nature to a claim of unfair dismissal made pursuant to s 29(1)(b)(i) and the powers available on an appeal of this kind, are also different to those available to the Commission in an unfair dismissal claim. Mr Stubbs referred to a decision of the Appeal Board in *Raxworthy v Authority for Intellectually Handicapped Persons* (1989) 69 WAIG 2266 to the effect that an Appeal Board is able to substitute its view for that of the employer and consider on the evidence, whether the conduct complained of actually occurred, so as to ground the employer's decision to dismiss the employee.

20 In our view, with due respect, we consider the approach in *Raxworthy* to be the correct approach in relation to an appeal to the Appeal Board. That is, as distinct from an unfair dismissal claim before the Commission, the nature of an appeal to the Appeal Board is an appeal, in the nature of a hearing de novo, based upon the evidence before it. The Appeal Board has far greater scope to substitute its view for that of the employer, in light of the evidence adduced in the proceedings. What this means in the context of the present case, concerning allegations of misconduct, is that the misconduct allegations must be established as a matter of fact, as the basis for the employer's decision to dismiss. It is not sufficient in our view, for the Appeal Board to only be satisfied that the employer had an honest and genuine belief, based upon reasonable grounds that the misconduct occurred. More than a sense of unease by the employer is required. Whilst this does not alter the overall onus on an appellant to persuade the Appeal Board that it should interfere with and "adjust" the employer's decision in a particular case, there must be sufficient evidence before the Appeal Board to establish the misconduct complained of.

21 We also observe that by s 80L of the Act, s 26(1) as it applies to the exercise of jurisdiction by the Commission, also applies to the exercise of jurisdiction by the Appeal Board. Whilst s 26(1)(b) provides that the Commission shall not be bound by the rules of evidence, it has never been the case that the relevant principles of the rules of evidence are to be completely disregarded and the Commission proceed to deal with a matter in the absence of any cogent evidence. There is a difference between applying the rules of evidence, generally, to ensure parties receive a fair hearing, and being bound by the strictures of such rules. This is particularly so in arbitration proceedings, for example where the Commission is dealing with a claim for the making of a new award or a variation to an award, where the Commission may be informed in a variety of ways, not strictly in accordance with the rules of evidence. This enables the Commission to deal with matters flexibly, whilst at the same time not abrogating from the basic principle that parties are entitled to be heard fully and to be afforded natural justice. However, in cases in which misconduct is alleged, the requirement for cogent evidence is heightened: *Baron v George Western Foods Ltd* (1984) 64 WAIG 590 per Fielding C at 590.

22 In the present proceedings before the Appeal Board, many of the central allegations by the respondent against the appellant involved the leading of hearsay evidence. In particular, were the allegations alleged to have involved Hiran and Dilu. Many of those allegations were central to the case against the appellant. We have not heard from Hiran and Dilu, and the evidence about their involvement in matters alleged against the appellant, which are strenuously denied by the appellant in her testimony, was second hand. Whilst we acknowledge the submissions of Mr Rooke as to the reluctance of either Hiran or Dilu to give evidence, hearsay evidence in these circumstances should be treated with the utmost caution: *Baron*. This poses difficulties for the respondent in that the Appeal Board must make findings of fact in relation to the allegations of misconduct, based upon the evidence before it.

23 In light of those observations, we now turn to the specific allegations against the appellant.

24 Whilst there were a number of allegations made against the appellant as set out in the correspondence, it is necessary for the Appeal Board to deal with each of them as taken individually or collectively, as it is those specific allegations against the appellant which led to her dismissal.

Allegation One

25 By this allegation, the respondent complained that the appellant had abused her supervisory position by instructing staff to undertake personal errands during working time. A number of examples were set out in exhibit A1, including instructing Dilu to pick up the appellant's family from the airport; instructing Dilu to collect relatives from school; and on at least one occasion, requiring another employee to accompany the appellant to pick up and drop off the appellant's sister at university.

26 As to the latter allegation, Ms Anderson is employed by the respondent in the administration area. She gave evidence that she was interviewed by Mr Becu and Ms Scott on or about 8 June 2005 and they asked her some questions about the work environment. She referred to an occasion where the appellant informed her that she had to get a medical book to her sister in Applecross and that she and the appellant left early to travel from Hamilton Hill to Shenton Park for an audit meeting, in order to do this on the way. Ms Anderson was sure that the book which they collected on the way, she thought from a medical building of sorts, was a medical book and not an audit book. Once having done this, she then

drove with the appellant to Applecross to the appellant's home, where the appellant's sister then travelled with them and was dropped off at the University of Western Australia on the way to the meeting at Shenton Park. Both the appellant and Ms Anderson were to attend this meeting. When shown an audit book of the appellant's, Ms Anderson said this was not the book that was collected on that day and she had not seen that particular book prior. Ms Anderson did not think to report this matter to Mr Becu prior to her being interviewed in relation to various allegations against the appellant.

27 Both the appellant and her sister gave evidence about this allegation. The appellant confirmed the content of exhibit A2, the reply from Dwyer Durack. She testified that on the day in question she was required to attend Shenton Park to provide an opinion on an audit being undertaken. She confirmed that on the way to Shenton Park, without major deviation of their route, she needed to pick up a particular audit book from home which she did. When she arrived at home her sister was going to UWA and requested a lift, which was on the way. The appellant said there was no prior knowledge of this and she simply dropped her sister off at university on the way to Shenton Park which did not involve any deviation from their normal route. When it was put to her in cross-examination, the appellant could not recollect collecting any medical book from a medical building as referred to by Ms Anderson.

28 The appellant's sister, Krishna Ramani, who also knows Dilu and Hiran as family friends, and who was also Dilu's landlord, referred to this event. She testified that she could recall one occasion where the appellant dropped her off at university on her way to a meeting. She recalled that Ms Anderson was with the appellant at the time. She said this was not prearranged and that the appellant did not have a medical book for her as far as she could recollect.

29 In relation to the airport issue, the appellant denied any such instruction was given. It seemed on the evidence that Dilu was intending to go to the airport to pick up her landlord, who is the appellant's sister. However, from other evidence before the Appeal Board, it would appear that Dilu did not in fact go to the airport as alleged, as other events overtook the situation. The appellant said that in hindsight she probably should have prevented any such intention from having been effected, but also said it was not uncommon that from time to time, employees of the respondent did undertake some personal business during work time.

30 Both Ms Rossi and Ms Stuart, who gave evidence for the respondent, referred to conversations they in turn had had with Dilu where it was allegedly said that she had been requested to go to the airport but ultimately she did not. As Dilu was not called, this evidence is of questionable weight. We also note that in Mr Becu's evidence, he testified that both Ms Rossi and Ms Stuart had referred to unfair treatment of Hiran and Dilu by the appellant and both told him that Dilu actually went to the airport with the appellant to collect relatives. This was not consistent with either Ms Rossi's or Ms Stuart's testimony and appears to be incorrect.

31 As to the allegation that the appellant instructed Dilu to collect relatives from school on occasions, this was denied by the appellant. She said that she does not have children but her sister does. On occasions her sister may have asked Dilu to pick up children from school on her way home after work. The appellant said this also had occurred prior to her employment by the respondent and therefore had nothing to do with her employment. The appellant also said she had never seen either Ms Stuart's or Ms Anderson's statements, where it was alleged that such a direction had been given by her. The appellant's sister testified that she has one daughter at school and on occasions Dilu has picked her up from school. The content of this allegation was not put to the appellant and the rule in *Brown v Dunn* (1863) 6R 67 has application. Dilu was not called in relation to this issue and there was no other direct evidence about the matter.

32 As to the allegation involving Ms Anderson, it is important to note that the allegation was that Ms Anderson was required to accompany the appellant to collect and drop off her sister at university. No reference was made to the fact that Ms Anderson was attending the meeting with the appellant as part of her work duties. The evidence conflicts on this issue. We do not overlook the possibility of collusion between the appellant and her sister as to the events on this day, given that the appellant's sister is not an independent witness. Ms Anderson seemed quite firm that the book in question was not an audit book as said by the appellant.

33 However, as noted above, the allegation was not in relation to picking up a book but to taking Ms Anderson away from the office for the purpose it seems, of taking the appellant's sister to university. This cannot be sustained as Ms Anderson was required to attend the meeting with the appellant. There also seems little to be gained from taking Ms Anderson as alleged, if the purpose of the appellant was to take her sister to university. Whilst we have some reservations about the appellant's evidence on this issue, the evidence is inconclusive and we cannot be satisfied on balance that the allegation is made out. Even if as alleged by the respondent the conduct occurred, then at its highest the appellant was guilty of engaging in some personal business en route to work commitments that did not involve a substantial departure in terms of time and resources from her duties.

34 As to the allegation in relation to picking up children from school, in the absence of Dilu's testimony, and in view of the appellant's and her sister's evidence, this allegation cannot be sustained. We also note the uncontroverted evidence that Dilu is said to have collected Krishna Ramani's child from school on occasions well prior to the appellant's employment with the respondent. The connection with the appellant is therefore tenuous at best.

35 Finally, as to the airport issue, at its highest it contains an allegation that the appellant made a request to Dilu to travel to the airport. The evidence was that she did in fact not do so. Dilu was not called so this allegation could not be tested directly. The appellant said she should have in hindsight said to Dilu she should not go to the airport as was suggested. There was also the evidence from both the appellant and Ms Scott that from time to time, employees can conduct some reasonable degree of personal business during work time.

Allegation Two

36 By this allegation it is alleged that the appellant created an intimidating working environment causing distress and embarrassment to other employees. A number of examples are cited in exhibit A1. Notably, all of those examples except one involve allegations concerning either Dilu or Hiran or both of them, who were not called to testify. The evidence lead in support of these allegations was hearsay in large part.

37 The appellant denied the allegations made by the respondent and affirmed in evidence, the content of exhibit A2, her response to them. The appellant testified that the first she heard of such allegations was at the meeting with Mr Becu in

early June 2005. This is despite being in the acting manager position from February of that year. She said that Mr Becu had never raised any such matters with her before. The first complaint was that the appellant asked Ms Stuart for feedback on Hiran's performance which led to the appellant becoming aggressive and accusing Ms Stuart of calling the appellant a liar. This was denied by the appellant in her evidence in chief. The appellant was not cross-examined on this issue and hence was denied the opportunity to comment on it. Whilst it was not entirely clear, it seems that this was the issue about which Ms Stuart gave evidence when she said that she and the appellant engaged in a "shouting match" with each other. According to Ms Stuart, it concerned Hiran's performance and whether he had the necessary experience and background. This exchange led to Ms Stuart contacting Mr Becu. Other employees were present according to Ms Stuart when this incident occurred. We are inclined to accept that there was some form of verbal altercation between the appellant and Ms Stuart. This is consistent with Mr Becu's testimony, that Ms Stuart contacted him about the exchange between her and the appellant and that "both had a screaming match". This seemed however to involve both of them and was not a one way incident.

38 The next complaint under this allegation is that straight after the meeting on 3 June, the appellant telephoned Dilu to instruct her to leave the office so she could not speak with Mr Becu. It was further alleged that the appellant instructed Dilu to lie about her reasons for leaving the office early.

39 The appellant's testimony was that she did speak with Dilu shortly after the meeting on 3 June with Mr Becu, for the purpose of telling her not to take a laptop computer home that evening as she was too upset to work over the weekend. The appellant denied the allegation that she sought to have Dilu leave the premises. In the absence of Dilu being called, the only reference to this was in the evidence of Mr Becu who said Dilu informed him during the course of his inquiries, that the appellant rang her and said she should leave the office as the appellant had to tell her what to say to Mr Becu. There was no other direct evidence as to this matter. We cannot therefore be satisfied on the evidence as to the substance of this allegation.

40 A further complaint under this general head was that the appellant instructed Dilu to provide Hiran with her personal computer log on details. It is alleged the appellant then disciplined Dilu in front other staff members for doing this. The appellant's evidence was that all she did with Dilu in relation to work matters was to instruct Dilu to give Hiran appropriate training. The appellant became aware that Hiran had been given Dilu's computer log on and she said that Hiran told her that he had lost his own. The appellant said that she informed employees about the importance of computer security and not using others' computer passwords. The appellant was not cross-examined on this issue by the respondent. There was some hearsay reference to it in the evidence from Ms Stuart to the effect that Dilu informed her that Hiran had used her password and that the appellant had overheard this and told them both off. The only other reference to this matter was again hearsay evidence through Ms Scott where the allegation was alleged to have been made by Dilu. We also note the inconsistency between the testimony of Ms Stuart and Ms Scott on this issue. We have no reason to not accept the appellant's version of events in the absence of any direct evidence to the contrary. Also, the appellant's explanation is not inconsistent with the hearsay evidence of Ms Stuart.

41 There was a generalised allegation that other staff members felt uncomfortable as the appellant had treated Dilu unfairly by, for example, sometimes yelling at her and disciplining her in front of others. The appellant said she had not treated Dilu in a poor fashion and she was not cross-examined about any such incidents. In the absence of Dilu being called, there was no direct evidence from the respondent to support these allegations.

42 A further example under this complaint is that the appellant was alleged to have told Dilu that Ms Stuart had informed a meeting of engineers that they were behind in their work schedule because of Dilu. Ms Stuart denied this ever was said. The appellant said this did not occur. Again, the appellant was not cross-examined about this matter. Ms Stuart did not deal with the issue in her evidence. The appellant said that the only mention she made about this to Dilu was that she was required to get her work done in a timely way in order that Ms Rossi could do so also. The appellant denied that this was a criticism of Dilu in terms of any delays to that point in time.

43 The final allegation under this head was that both Dilu and Hiran had been instructed to attend the appellant's home on or about 7 June 2005. The appellant is alleged to have told them that they had to lie to support statements made by the appellant to Mr Becu in relation to a number of matters. The appellant testified that both Dilu and Hiran were at her home and saw and read the letter containing the respondent allegations. The appellant's sister was also present at the time. The appellant's evidence was that both Dilu and Hiran described the allegations as "rubbish". This position was maintained when it was put to her in cross-examination. The appellant strongly denied that she asked either Hiran or Dilu to tell lies on her behalf. The appellant said when Hiran and Dilu came to her home, they spoke in Singhalese which they sometimes did. The appellant's sister also testified on this matter and said much the same thing. It was the appellant's sister who gave both Dilu and Hiran the letter to read. The appellant's sister has not spoken to either of them since this time. There was no other direct evidence led in relation to this allegation and as neither Dilu nor Hiran were called, this serious allegation could not be properly tested on the evidence.

Allegation Three

44 This allegation was a general claim that the appellant engaged in unprofessional behaviour. Three examples were cited in exhibit A1. The first was that the appellant spoke in Sri Lankan in the workplace, even though both Dilu and Hiran allegedly said they felt uncomfortable. The second was that Ms Stuart had said that the appellant brought an eight year old child into work for three to four days which was disruptive. Finally, it was alleged that when Dilu raised the manner of communication with the appellant, the appellant was alleged to have said that she was required to yell because "we don't have very educated people around here".

45 As to the allegation that the appellant occasionally spoke in Sri Lankan in the workplace, this was not denied by the appellant but she said that at no time did anyone say they felt uncomfortable. In cross-examination she said that neither Hiran nor Dilu indicated that they preferred her to speak in English when speaking with them. Mr Finch testified that at Hamilton Hill, employees have a variety of cultural backgrounds and sometimes a variety of languages are spoken. Ms Stuart testified that on occasions she heard the appellant and Dilu and Hiran speak Sri Lankan at work. The only other

reference to this matter was in the testimony of Ms Scott who again, being hearsay, referred to a discussion with Dilu in which it was alleged to have been said that she felt uncomfortable being spoken to in Sri Lankan. This allegation in any event falls far short of any form of misconduct, even if established. It would be a matter properly the subject of some performance management by the respondent.

46 As to bringing children into work, the appellant admitted that on one occasion she brought her niece into the office for a couple of days but did not consider this unprofessional as others also did so, in particular during school holidays. The only other direct evidence about this matter came from Mr Finch who said he recalled a couple of occasions when the appellant had young children in the office he thought sometime in about May 2005. He also said he had seen others in the respondent's offices do the same. He did not raise the matter with either the appellant or Mr Becu at the time. It appeared that he only mentioned this matter when he was interviewed in June 2005 by Mr Becu. This issue again is one of appropriate behaviour, particularly from an acting manager. The bringing of children into the workplace, without appropriate insurance and security arrangements is not conduct to be condoned. It may also be disruptive to others. It falls short, however, of an act of misconduct. This is so in light of the uncontradicted evidence that other employees did the same thing from time to time.

47 Finally as to the allegation in relation to communication style, the appellant said she had no difficulty in her communications with Dilu. This was both her evidence in chief and cross-examination. In the absence of Dilu having testified, this matter cannot be directly tested.

Allegation Four

48 This allegation was to the effect that the appellant told Ms Barrie, the respondent's Human Resources Manager, that prior to engaging Hiran she had contacted recruitment agencies and there were no available candidates. It was further alleged that at the meeting on 7 June 2005 with Mr Becu, the appellant contradicted herself by telling Mr Becu that she had not contacted any recruitment agencies.

49 As to this issue, the appellant testified that she sought advice from Ms Barrie and followed what she understood to be the respondent's recruitment protocol available on the respondent's intranet. This involved firstly looking internally and then considering any external networks, before considering the use of a recruitment firm, which would incur a cost. The appellant said she did make inquiries within her network and considered that Hiran would be a suitable candidate for the finance and administration officer position. This meant she did not need to use an outside agency and incur the costs of so doing.

50 Ms Barrie's testimony was that the appellant did contact her about a vacancy in her department. She said that the appellant informed her that she had someone in mind and Ms Barrie gave her approval to approach this particular person. Ms Barrie also outlined the formal requirements for recruitment which involved the completion of relevant forms and approvals from senior management, in this case Mr Becu and a Ms Murphy. The approvals for the appointment of Hiran were properly obtained. Additionally, Ms Barrie accepted that the appellant provided to her a detailed email in relation to the recruitment of Hiran. Furthermore, Ms Barrie initially testified that the respondent's recruitment policy at the time, that being about April or May 2005, did not contain reference to sourcing candidates from external networks. When a copy of the recruitment policy was tendered in evidence as exhibit A4, Ms Barrie conceded that this was not correct and at the material time, the recruitment policy did contain reference to external networks.

51 In view of the appellant's direct evidence, the evidence overall is inconclusive of, this matter and we are not persuaded that the allegation is made out.

Allegation Five

52 This complaint alleged that the appellant informed both Mr Becu and her work team that Hiran had sufficient experience with a software programme, SAP, for the position of finance and administration officer. It was alleged that this was knowingly untrue.

53 It was the appellant's case that at no time did she advise anyone, in particular Mr Becu, that Hiran had had SAP experience. Her testimony was she informed Mr Becu, who authorised the appointment, that Hiran had the necessary background and qualifications for the position. Mr Becu gave evidence that he was required to approve Hiran's appointment. Certain forms were required to be completed which he, as the responsible manager, was to sign. He testified that he spoke to the appellant about approving Hiran's appointment. There seemed to be some sensitivity about these kinds of appointments in the appellant's work group, by reason of inappropriately qualified people having been employed previously. Mr Becu said he relied upon the appellant to tell him about Hiran's suitability. Mr Becu testified that he did not specifically ask about Hiran's qualifications and it emerged in cross-examination, that he was unsure of whether or not the appellant in fact said that Hiran had SAP experience and indeed she may not have said this. He did say however that the appellant told him that "he had experience and would be of benefit to the team". This evidence was generally consistent with that given by the appellant.

54 We pause to note that this issue seemed to assume some significance in the termination of the appellant's employment.

55 Other employees gave some evidence about this matter. Ms Rossi said that the appellant informed her that Hiran was a friend who had previously worked at an accounting firm and had some SAP experience. There was concern in the work area about employees with a lack of experience because they were under pressure at the time and did not have time or resources to train people. Ms Stuart also said that on occasion she and the appellant discussed the appointment of an additional person. She was led to believe that Hiran had some SAP experience and had spent some time at the respondent's corporate real estate section.

56 It would appear to be common ground that Hiran did not initially perform as well as expected and did not have sufficient training in SAP. It is to be noted however, that other witnesses called by the respondent also testified that when they joined the respondent it took them considerable time to become versed in the respondent's SAP system. It was the discussion about Hiran's performance between the appellant and Ms Stuart that led to the "shouting match" between them.

57 To establish that the appellant had knowingly misled the respondent, in particular Mr Becu, who approved Hiran's appointment, there would need to be clear evidence before us that on balance, could lead us to the conclusion that the appellant was deliberately untruthful in this regard. We cannot be satisfied as to this. In particular and importantly, Mr Becu himself could not say in his evidence that the appellant did represent Hiran as having the necessary SAP experience. Rather it was more likely that she did not say this to him on his own evidence.

Allegation Six

58 This allegation asserted that the appellant engaged Hiran knowing he was insufficiently equipped to perform the position, and without following the respondent's recruitment and selection policy. Based on the evidence outlined above, we are not satisfied that this allegation is made out at all. It is inconsistent with Mr Becu's evidence and indeed the evidence of Ms Barry.

Allegation Seven

59 This allegation is to the effect that the appellant informed Mr Becu that both Hiran and Dilu had requested to work weekends at their instigation. It was alleged that this was not true and neither had sought to work weekends. This was not the appellant's testimony. She said that Hiran did not work weekends and the reason that Dilu did, was in response to her request as she had other employment in the evenings during the week and was unavailable to work overtime during those periods. This was not put to the appellant is cross-examination. As neither Hiran nor Dilu were called to testify, we cannot determine conclusively the substance of this allegation in the face of the appellant's direct evidence.

Allegation Eight

60 The allegation asserts that the appellant failed to keep records of work done by Hiran and Dilu on weekends or pay them for such work. As noted above, the appellant testified that Hiran did not work on the weekend. She said Dilu only worked about four hours overtime and took time in lieu for this. In the absence of evidence from Hiran or Dilu or other evidence we cannot sustain the allegation on the evidence.

Allegation Nine

61 The appellant is said to have requested that Hiran fabricate entries into the appellant's vehicle log book. This allegation was denied by the appellant. Her evidence was that she generally used her diary to record travel and would on a later date transfer that information to the vehicle log book. In the absence of direct testimony from Hiran, we are simply unable to find this allegation made out on balance.

62 Additionally, this issue was not put to the appellant in cross-examination for her to respond to it. Given that falsification of business records is a serious allegation, in the absence of any direct evidence as to this matter, including for example the log books in question, the Appeal Board cannot make any findings of fact against the appellant.

Allegations 10, 11 & 12

63 As outlined in the appellant's submissions, allegations 10, 11 and 12 can be conveniently dealt with together. In essence, these allegations refer to various acts of deceitful conduct said to have been engaged in by the appellant. Firstly, it was alleged that the appellant said at a team meeting that she had a friend who she wished to give some work experience to. It was further alleged that when the appellant then approached Mr Becu she informed him that the person she had in mind was a friend of Dilu's and not hers. This was denied by the appellant and her evidence was that there were two separate people considered. The appellant knew a person named Nirosha who she proposed for work experience. Another person name Misha, a friend of Dilu's, was put forward by Dilu for consideration. The appellant said she does not know Misha well but however, the persons concerned are different. It was further alleged that after speaking to Mr Becu, the appellant attempted to coerce both Dilu and Hiran to tell lies about these matters. This was also strongly denied by the appellant in her evidence. No evidence from Dilu and Hiran is before us and the only other evidence is some hearsay testimony about what Dilu is reported to have told Ms Scott. Allegations as to misleading and deceptive conduct by the appellant are serious allegations. In the absence of direct evidence adduced by the respondent, we are not in a position to make findings of fact that such allegations have been established on balance.

Allegation 13

64 Finally, it was alleged by the respondent that following the investigation, allegations were made by the appellant to a Mr Roebuck, another manager, that Mr Becu had been involved in misappropriating the respondent's property. It was further alleged that the appellant failed to comply with the respondent's code of conduct in reporting these matters to the General Manager. The appellant testified that she spoke with Mr Roebuck about this matter and he advised her generally as to how she should deal with her situation after the investigation. The appellant's evidence was that it was Mr Roebuck who suggested she get legal advice following receipt of exhibit A1. According to the appellant although again hearsay, Mr Roebuck denied the allegations made by the respondent under this head. There was no direct evidence about this matter, save for that of the appellant. We are not in a position accordingly, to make findings of fact against the appellant in light of the state of the evidence. Furthermore, this matter was not put to the appellant in cross-examination.

Conclusions

65 From all of the evidence before the Appeal Board, we are not satisfied that it has been established on balance that the appellant engaged in all of the misconduct alleged against her. The major difficulty that confronts us is in relation to the most serious allegations which involved either or both Hiran and Dilu, is that in the absence of their direct testimony we are left with evidence largely of a hearsay nature in the face of the appellant's direct testimony. Whilst we have some reservations about aspects of the appellant's evidence, to which we have referred above, which has given us a sense of unease in some respects, we simply cannot make the necessary findings of fact against the appellant, as urged by the respondent, in order for the Appeal Board to be satisfied that the facts upon which the respondent relied to dismiss the appellant, have been established.

66 In any event, a number of the allegations against the appellant appear to stem from poor management rather than deliberate misconduct. Examples include the allegations of inappropriate management of staff such as allowing children in the workplace, perhaps entertaining the conduct of personal business beyond the realms of reasonableness, speaking in

other than English in the workplace and engaging in a verbal altercation with Ms Stuart. It must be borne in mind however, that when the respondent appointed the appellant to the acting management position, they were well aware she had no prior experience in managing a larger group of other subordinate employees, and she was not afforded any training opportunities in this regard. It is also to be observed, that it seems up until about late May or early June 2005, there were no apparent difficulties in the appellant's work performance or conduct, and indeed, up until about that time, all of the reports about the appellant's general performance seemed to have been largely positive. It is therefore somewhat surprising that such a raft of matters came to the surface so quickly after the appellant had been in the acting management position for some months.

67 Whilst at its highest, some of the allegations against the appellant may have warranted performance management and counselling, including perhaps a return of the appellant to her former substantive position, we cannot be satisfied on all of the evidence before the Appeal Board, that the conduct complained of has been made out to warrant the dismissal of the appellant. We also observe, that prior to exhibit A1 being received by the appellant, setting out all of the allegations in writing, many of the allegations had been put to the appellant orally in meetings between her and Mr Becu and Ms Scott. Significantly, at the conclusion of the second meeting, when those allegations were in the knowledge of the respondent, the respondent saw fit to give the appellant the options which they did, they being performing her duties at head office or returning to her substantive position. Dismissal did not seem to be in the respondent's mind at that point.

68 For all of the forgoing reasons we are persuaded that the appeal has been made out.

Remedy

69 We turn therefore to consider the question of remedy. The Appeal Board's powers in relation to an appeal of the present kind are set out in s 80I(1) of the Act which enables the Appeal Board to "adjust" any decision to dismiss an employee. Counsel for the appellant correctly submitted that the meaning of "adjust" for the purposes of s 80I(1) from the Act was dealt with by the Industrial Appeal Court in *State Government Insurance Commission v Johnson* (1997) 77 WAIG 2169. In that case, Anderson J (Franklyn and Scott JJ agreeing) said at 2170 that:

> *"the power to "adjust" a decision for determination can only be a power to reform the decision in some way. In the case of a decision or determination by an employer to dismiss an employee with one month's pay in lieu of notice, the most obvious way to do that would be to reverse it. Whether there may be other ways of adjusting such a decision is perhaps an open question. It may be arguable that the power to adjust a decision of dismissal includes a power to adjust the period of notice. The issue does not arise in this case because no such adjustment was sought by the respondent. He made no claim to reform the decision in that way, that is by altering the period of notice."*

70 An obvious means of adjusting the respondent's decision in this case, would be to order the re-employment of the appellant with a consequential order that the appellant be paid lost benefits. On all of the evidence before the Appeal Board, we have some reservations about such an order. Whilst the specific allegations against the appellant, or at least the most serious allegations, have not been made out before us on the evidence, it was very apparent that the trust and confidence in the relationship between the parties has broken down. This is, as it is trite to observe, an essential ingredient in the employment relationship between an employer and an employee. Clearly on the evidence, there was a degree of animosity between the appellant and members of her work team at Hamilton Hill and lesser so at Shenton Park. Additionally, Mr Becu's evidence was he had lost his confidence in the appellant. The Appeal Board cannot ignore this state of affairs.

71 It seems to us, that whilst the terms of s 23A of the Act have no application to an appeal before the Appeal Board, considerations of the workability of a re-established employment relationship fall within the broad discretion of the Appeal Board, when it comes to consider any "adjustment" in the case of a decision to dismiss an employee. Were that not so, in the case of an appeal from a decision to dismiss, in circumstances of a manifest breakdown in relations between the former employer and employee, the Appeal Board would be compelled to restore that relationship if the only option contemplated by Parliament by way of remedy was re-employment. We do not consider this to be the case.

72 Given the breath of the meaning of "adjust", we consider that it is open to the Appeal Board to adjust the actual decision in a manner which is consistent with s 26(1)(a) of the Act, requiring the Appeal Board to discharge its jurisdiction and power in accordance with equity, good conscience and the substantial merits of the case. The Appeal Board is also required to have regard to the interests of the persons immediately concerned, in this case both the appellant and the respondent, by reason of s 26(1)(c) of the Act.

73 Having regard for all of these matters, we do not consider it would be in the interests of either the appellant or the respondent, to restore the employment relationship in the particular circumstances of this case. We consider that it is open to the Appeal Board to adjust the respondent's decision to dismiss the appellant, by adjusting the period of notice, by way of payment in lieu of notice that she should be afforded to give effect to the decision to dismiss. We determine that in this case, a period of an additional three months' salary and benefits in lieu of notice should be paid to the appellant by the respondent. This payment will be required to be paid within 21 days of the date of the final order. Given that we do not have evidence of the appellant's remuneration before us, we direct the parties to confer within 14 days and to prepare a minute of proposed order to give effect to our reasons. In the event the parties are unable to agree we will re-list the matter on short notice.

74 MS DORAHY: The appellant, I believe, was unfairly dismissed from the respondent. The appellant appears to have become a victim of circumstance. The myriad of problems encountered by both the respondent and appellant appeared to have escalated due to the absence of appropriate training and timely feedback.

75 It is my opinion that the appellant was demonstrably qualified at a technical level but out of her depth in supervisory and managerial roles. She was also supervising staff at two locations some distance apart. Those staff may have some resentment in relation to an "outsider", to whom English is a second language, being appointed to supervise them. Had

the appellant been inducted, monitored, and mentored from the commencement of her acting position in accordance with good corporate practice many of the problems could have been averted.

76 According to the respondent's testimony they have not followed their own policies, procedures, or public sector guidelines in relation to the circumstances of this matter. It was quite obvious when Mr Stubbs cross-examined two of the respondent's senior human resources personnel that they were ill prepared and their understanding and application of the (then) current policies at the time critical decision were made, was inadequate.

77 The respondent's assumption that the situation was becoming dysfunctional was based on hearsay and innuendo. This made a corrective course of action from the appellant difficult to formulate. When Mr Becu sought the assistance of senior human resources personnel he was misdirected by the one area that could have remedied the situation had their professionalism and understanding of the corporation's policies been applied.

78 As a manager Mr Becu's human resource knowledge as a corporate and state level was shown to be lacking.

79 The appellant was called to a meeting on Friday June 2, 2005. The appellant testified that during this meeting, held at approx 1530 hrs with Mr Becu and Ms Scott, she found herself subject to Mr Becu shouting at her "Liar!" whilst banging his fist on the table (unsubstantiated). The only person who could substantiate the appellant's testimony would be Ms Scott.

80 I am of the opinion that as in the Chairman's reasons for decision (at para 11), this second meeting held on the following Tuesday was a watershed in relations between the respondent and appellant. Given the fact that the appellant's acting position was for a period of 13 weeks, it appears the two options presented to the appellant of either:

1 Performing the construction work at head office; or

2 Returning to her substantive position as an accountant

was, at this point, fair and just. It would be understandable that the appellant would require time to consider and weigh up her options.

81 Had the respondent accommodated the appellant by placing or returning her to one of the two positions as outlined by Ms Scott on Friday June 3, 2005, (refer to appellant's statement of facts prepared by Dywer Durack Lawyers page 3.10) then the respondent would have exhibited reasonable fairness and consistency.

82 It could also be viewed that the respondent was deliberate in disturbing the appellant. The respondent had full knowledge that the appellant was indeed on sick leave. (See appellant's statement of facts as prepared by Dwyer Durack Lawyers page 3.14). The respondent's very action of sending the appellant a letter listing 13 allegations may be considered a form of harassment particularly in light of the fact that she was unwell and advised the respondent accordingly.

83 Perhaps better management practice would have been to reschedule a meeting when the appellant was fit to return to work. This would have also given both parties a cooling off period to assess facts pertaining to the validity of all 13 allegations in question. Rescheduling a meeting with the appellant may have enabled real dialogue, keeping communications transparent and open, thereby assisting parties in taking responsibility in resolving real or perceived conflict. The respondent has clearly breached procedural fairness by not giving the appellant the opportunity to address all of the respondent's concerns.

84 The majority of the allegations have not been substantiated or proven by the facts. The appellant's solicitors contend that there was no substance to the allegations made against the appellant. Assuming this is correct then it could appear that there was an attempt by the respondent to misrepresent the truth regarding the appellant. If this is the case then it would follow that it would be in their interest to attempt to shift "the onus of proof".

85 It is interesting to note that in Mr Becu's brief letter of termination to the appellant dated June 30, 2005 he states that "The Corporation has determined that you have been unable to satisfy us that either these allegations are not true…" (Refer to Annexure 2). This letter fails to outline or explain the procedures the respondent took at this time.

86 Neither Hiran or Dilu appeared to testify. Considering both parties before the Appeal Board had legal representatives it may be concluded that they would have proven to be unconvincing in supporting evidence for either party. It was apparent on one occasion (when Mr Becu recalled questioning Hiran) that Hiran changed his account of the facts twice. (Refer to Transcript of Proceedings dated December 20, 2005 page 263).

87 Since many of the allegations are centred on both Hiran and Dilu, without their testimony the Appeal Board observes that much of the information presented is hearsay. In the absence of any sound evidence I believe the respondent was unable to convince the Appeal Board that they had good reasons to dismiss the appellant.

88 It appears that sometime in late May or early June 2005 there has been a breakdown of trust and communication between the appellant and subordinate staff, prior to this timeframe there had been no adverse reports. (Refer to the Chairman's reasons for decision Allegation 2, para 37).

89 It may be of some interest to note that Dilu was based at Hamilton Hill well before the appellant was appointed to the Acting Manager's position. (Refer to Transcript of Proceedings dated November 22, 2005 page 25). Human resources and senior management need to be cognisant of the multitude of factors that may have contributed to the several personality clashes experienced by the appellant and her subordinate staff.

90 The very fact that the appellant was given the opportunity to act in the manager's position over other existing experienced employees that had been there for years prior could have contributed to the build-up of resentment and her non-acceptance by the staff.

91 Alongside culture and personality clashes, the potential of professional jealousy between Dilu and the appellant resulted in a hostile working environment. This could have impacted adversely upon the appellant's success in the Acting Position and professional development.

92 Mr Stubbs when cross examining Mr Becu highlighted the fact that Mr Becu was unaware of "…the cultural issues that might create problems in terms of supervision between Dilu and Krishna". Mr Becu made no attempt to inquire into this

situation and confirmed that he saw no reason to do so. (Refer to Transcript of Proceedings dated December 20, 2005 page 233).

93 Dilu's domestic problems which were brought to work could have also attributed to the unfair victimization of appellant due to the fact colleagues took it upon themselves to become involved rather than solicit professional intervention particularly in the case of someone alleging suicidal tendencies. (Refer to Transcript of proceedings December 20, 2005 page 231). In Mr Becu's testimony it appears that he has placed a certain bias on influences outside the workplace which could be argued was not relevant to the appellant's performance issues and therefore should not have been cited as a contributing factor in the respondent's decision to go further than originally intended, with the end result, termination.

94 I consider that Mr Becu did not demonstrate professional objectivity when arriving at his decision to terminate the appellant. In Mr Becu's own admission he was influenced by Dilu's unrelated domestic affairs.

95 I am of the belief that this particular factor requires particular attention.

96 Considering the appellant had the difficult task of taking over the management of an area that was approximately three months without a manager, meant that the appellant had to cope without a professional handover. The question also needs to be asked why did management not fill the manager's position at Hamilton Hill for three months? In order to keep up with the workload the appellant stated "Yes, I took work all the time home. Bob Becu knew that." (Refer to Transcript of Proceedings dated November 22, 2005 page 23).

97 The appellant whilst adjusting to her new role also undertook the unenviable task of filling staff shortages expediently to cope with the section's backlog of work. It was shown that the appellant followed the respondent's guidelines in filling those positions, as set out on the respondent's own website.

98 It should be acknowledged that the appellant put in long hours including taking work home in order to achieve the respondent's expected outcomes, as revealed in the appellant's testimony. Such behaviour shows a desire to succeed in this trying situation. (Refer transcript of proceedings dated November 22, 2005 page 22).

99 In conclusion I believe to allow the appellant to be terminated with unfounded allegations would be entirely inappropriate. I believe the respondent has an excellent opportunity to right this wrong and restore relations with the appellant by giving her the opportunity to return to her substantive position (without the loss of pay, seniority or conditions which was one of the original options offered to her by the respondent) and an outcome the appellant has made clear to both her (then) employer and her legal representative she wishes to pursue.

100 This incident may be seen as a reminder to managers and human resources personnel generally that when deciding to terminate an employee the employer has the responsibility to prove the allegations are based on sound evidence and not just hearsay and innuendo.

2006 WAIRC 04475

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KRISHNA THAVARASAN
	APPELLANT
	-v-
	THE WATER CORPORATION
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER S J KENNER - CHAIRMAN
	MS VINKA ZUPANOVICH – BOARD MEMBER
	MS JO DORAHY – BOARD MEMBER
HEARD	TUESDAY, 22 NOVEMBER 2005, MONDAY, 19 DECEMBER 2005, TUESDAY, 20 DECEMBER 2005, FRIDAY, 26 MAY 2006
DELIVERED	WEDNESDAY, 7 JUNE 2006
FILE NO.	PSAB 11 OF 2005
CITATION NO.	2006 WAIRC 04475

Catchwords	Industrial law - Supplementary reasons for decision - Reasons for decision previously issued by Appeal Board - Parties unable to reach agreement on quantum of order to issue - Application made by appellant for leave to re-open proceedings to adduce further evidence - Whether leave should be granted - Principles applied - Appeal Board not persuaded to grant leave - Order issued
Result	Order issued
Representation	
Appellant	Mr G Stubbs of counsel
Respondent	Mr S Rooke

Supplementary Reasons for Decision

1 THE CHAIRMAN: This is the unanimous decision of the Appeal Board. In our reasons for decision dated 31 March 2006 (2006 WAIRC 04089), we unanimously upheld the appellant's appeal against her dismissal by the respondent. By majority, the Appeal Board held that the respondent's decision to dismiss the appellant be adjusted by increasing the period of pay in lieu of notice provided by the respondent by an additional three months. The parties were directed to confer as to the quantum of an order to give effect to the Appeal Board's majority reasons. The parties were unable to agree on the quantum of an order to issue and accordingly, the matter was re-listed to hear from the parties further.

2 The appellant, through her counsel Mr Stubbs, made an application supported by an affidavit of the appellant sworn 4 May 2006, for leave to re-open the proceedings to adduce further evidence in an endeavour to persuade us that we should reinstate the appellant in her employment with the respondent. Draft orders in support of such an application were also before us. The respondent resisted such an application and said the original decision of the Appeal Board should stand.

3 Until the final order is perfected the Appeal Board is not functus officio. It is permissible for a party to seek leave to re-open a case after the close of evidence, even after there has been the delivery of judgement. Generally speaking, consistent with the principle of the finality of litigation, a party seeking leave to re-open to admit new evidence is required to establish that the interests of justice require it; that the new evidence would probably produce a different result; and that this evidence was not available before the original hearing: *Watson v Metropolitan (Perth) Passenger Transport Trust* [1965] WAR 88 at 89 per Wolff CJ. In the case of an application to re-open prior to the delivery of judgement, a somewhat less stringent test was proposed in *Londish v Gull Pacific Pty Ltd* (1993) 45 FCR 128 at 139 by the Full Federal Court, which suggested that the same test as that applied to seeking leave to amend pleadings during a hearing, which is whatever the justice required, should apply.

4 We are not persuaded by the appellant's submissions in support of her application for leave to re-open her case. In considering the application, we have found it necessary to briefly examine the affidavit filed in support. In our opinion, there is nothing in the affidavit of the appellant that raises any new matters not previously taken into account by the Appeal Board and certainly nothing in our view that would satisfy the test in *Watson* to warrant granting leave to re-open.

5 The parties now appear to be in agreement as to the quantum of the proposed order to issue. We will now order that the respondent's decision to dismiss the appellant be adjusted by increasing the pay in lieu of notice to be given to the appellant by an additional amount of $15,030.08.

2006 WAIRC 04477

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KRISHNA THAVARASAN
	APPELLANT
	-v-
	THE WATER CORPORATION
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER S J KENNER - CHAIRMAN
	MS VINKA ZUPANOVICH – BOARD MEMBER
	MS JO DORAHY – BOARD MEMBER
DATE	WEDNESDAY, 7 JUNE 2006
FILE NO	PSAB 11 OF 2005
CITATION NO.	2006 WAIRC 04477

Result	Order issued
Representation	
Appellant	Mr G Stubbs of counsel
Respondent	Mr S Rooke

Order

HAVING heard Mr G Stubbs of counsel on behalf of the appellant and Mr S Rooke on behalf of the respondent, the Commission, constituted by the Public Service Appeal Board pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders –

(1) THAT the appeal be and is hereby upheld.

(2) THAT the decision to terminate the appellant's employment be adjusted by payment by the respondent to the appellant of an additional three months' pay in lieu of notice, in the sum of $15,030.08 within 7 days of the date of this order.

(Sgd.) S J KENNER,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

RECLASSIFICATION APPEALS—

2006 WAIRC 04402

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES PETER ERNEST BULLEN

APPELLANT

-v-

WORKER'S COMPENSATION & INJURY MANAGEMENT COMMISSION

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
COMMISSIONER P E SCOTT

DATE WEDNESDAY, 24 MAY 2006

FILE NO PSA 48 OF 2005

CITATION NO. 2006 WAIRC 04402

Result Direction Issued

Direction

WHEREAS this a reclassification appeal pursuant to Section 80E(2)(a) of the Industrial Relations Act 1979; and

WHEREAS on Wednesday the 22nd day of February 2006, Monday the 20th day of March 2006 and Wednesday the 24th day of May 2006, the Public Service Arbitrator ("the Arbitrator") convened conferences pursuant to Section 32 of the Industrial Relations Act 1979 for the purpose of conciliating between the parties; and

WHEREAS at the conference on Wednesday the 24th day of May 2006 the Arbitrator issued a direction to assist in the resolution of the dispute between the parties,

NOW THEREFORE the Arbitrator, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby directs:

THAT the respondent shall provide to the Arbitrator and to Mr Bullen, with copy to the Department of the Premier Cabinet:

1. the views of the Chief Executive Officer and any recommendation in respect of Mr Bullen seeking a Temporary Service Allowance; and
2. the grounds for such view and recommendation including an assessment of the work value change to the position previously held by Mr Bullen, appropriate Job Description Forms, any effect on relativities within the agency and, if appropriate, a BIPERS assessment.
3. The information set out in paragraphs 1 and 2 above shall be provided within 14 days of the date hereof.

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

2006 WAIRC 04403

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES PETER ERNEST BULLEN

APPELLANT

-v-

WORKER'S COMPENSATION & INJURY MANAGEMENT COMMISSION

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
COMMISSIONER P E SCOTT

DATE WEDNESDAY, 24 MAY 2006

FILE NO PSA 48 OF 2005

CITATION NO. 2006 WAIRC 04403

Result Appeal to be amended

Order

WHEREAS this is a reclassification appeal made pursuant to Section 80E(2)(a) of the Industrial Relations Act 1979; and

WHEREAS during the course of a conference convened on Monday, 20th day of March 2006, the appellant formally sought an amendment to the appeal to read "reclassification to Class 1 and/or Temporary Special Allowance"; and

WHEREAS the respondent agreed to such an amendment;

WHEREAS on Tuesday, the 21st day of March 2006 the Commission issued an order that the appeal be formally amended to "the reclassification to Class 1 and/or Temporary Special Allowance"; and

WHEREAS during the course of a conference convened on Wednesday, 24th day of May 2006, the appellant formally sought to further amend the appeal to read "reclassification to Class 1 and/or Temporary Special Allowance, in accordance with the recommendation of the Coleman Report"; and

WHEREAS the respondent agreed to such an amendment;

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

THAT this appeal be formally amended to "reclassification to Class 1 and/or Temporary Special Allowance, in accordance with the recommendation of the Coleman Report."

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

2006 WAIRC 04480

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PETER ERNEST BULLEN
	APPELLANT
	-v-
	WORKERS' COMPENSATION & INJURY MANAGEMENT COMMISSION
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR COMMISSIONER P E SCOTT
DATE	THURSDAY, 8 JUNE 2006
FILE NO	PSA 48 OF 2005
CITATION NO.	2006 WAIRC 04480

Result Direction amended

Order

WHEREAS this is a reclassification appeal pursuant to Section 80E(2)(a) of the Industrial Relations Act 1979; and

WHEREAS on Wednesday the 24th day of May 2006, the Public Service Arbitrator ("the Arbitrator") issued a direction to assist in the resolution of the dispute between the parties; and

WHEREAS that direction required the respondent to do certain things within 14 days of the date of the conference; and

WHEREAS on Wednesday the 7th day of June 2006, the Respondent's representative requested an extension of time until Tuesday the 20th day of June 2006; and

WHEREAS the Appellant opposes an extension of time for the Respondent,

NOW THEREFORE the Arbitrator, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby directs:

THAT the direction issued on Wednesday the 24th day of May 2006 be amended at point 3 to read "The information set out in paragraphs 1 and 2 above shall be provided by no later than 4.00 o'clock in the afternoon on Wednesday the 14th day of June 2006."

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

RECLASSIFICATION APPEALS—Notation of—

File Number	Appellant	Respondent	Commissioner	Decision	Finalisation Date
PSA 2/2006	Dianne Marie Elder	Department of Corrective Services	Scott C	Application Dismissed	15/05/2006
PSA 3/2006	Carole Whitehall	Department of Corrective Services	Scott C	Appeal Dismissed	19/05/2006
PSA 28/2005	Valmai Roslyn Beaumont	Challenger TAFE	Scott C	Appeal Dismissed	9/06/2006
PSA 29/2005	Sharon Cattermole	Challenger TAFE	Scott C	Appeal Dismissed	9/06/2006
PSA 30/2005	Rosemary Sue Fossilo	Challenger TAFE	Scott C	Appeal Dismissed	9/06/2006

File Number	Appellant	Respondent	Commissioner	Decision	Finalisation Date
PSA 31/2005	Janet Margaret Beattie	Challenger TAFE	Scott C	Appeal Dismissed	9/06/2006
PSA 32/2005	Eileen Kathleen Parry	Challenger TAFE	Scott C	Appeal Dismissed	9/06/2006
PSA 33/2005	Pauline M Townsend	Challenger TAFE	Scott C	Appeal Dismissed	9/06/2006
PSA 34/2005	Suzanne Kim Lowndes	Challenger TAFE	Scott C	Appeal Dismissed	9/06/2006
PSA 35/2005	Jacquelyn Johnstone	Challenger TAFE	Scott C	Appeal Dismissed	9/06/2006
PSA 40/2005	Sue Norelli	Challenger TAFE	Scott C	Appeal Dismissed	9/06/2006
PSA 50/2005	David Jason Holmes	Registrar/CEO Department of the Registrar Western Australian Industrial Relations Commission	Scott C	Withdrawn by leave	2/06/2006
PSA 135/2004	Eric Punton Huntly	Royal Perth Hospital (ABN 13 993 250 709)	Kenner C	Application discontinued	18/02/2005

OCCUPATIONAL SAFETY AND HEALTH ACT—Matters Dealt With—

2006 WAIRC 04332

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SITTING AS
THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING & KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH

APPLICANT

-v-

BLUESCOPE STEEL LIMITED

RESPONDENT

CORAM COMMISSIONER S M MAYMAN
DATE THURSDAY, 11 MAY 2006
FILE NO OSHT 11 OF 2005
CITATION NO. 2006 WAIRC 04332

Result Application discontinued
Representation
Applicant Mr A Talbert (as agent) and Mr D Hicks
Respondent Mr R Collinson (as agent)

Order

WHEREAS this is an application pursuant to Section 35C of the *Occupational Health and Safety Act 1984*;

AND WHEREAS Tribunal convened several conferences for the purpose of conciliating between the parties;

AND WHEREAS at the conclusion of the conferences matters remained unresolved between the parties;

AND WHEREAS the matter was listed for hearing on 30 March 2006;

AND WHEREAS the Tribunal adjourned the hearing into a conference and an agreement was reached between the parties at that conference;

AND WHEREAS on 2 May 2006 the applicant filed a Notice of Discontinuance in respect of the application;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under the *Occupational Health and Safety Act 1984,* hereby orders -

THAT this application be, and is hereby discontinued.

(Sgd.) S M MAYMAN,
[L.S.] Commissioner.

2006 WAIRC 04401

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SITTING AS
THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING & KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	THIESS PTY LTD AND ANOTHER
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	WEDNESDAY, 24 MAY 2006
FILE NO	OSHT 12 OF 2005
CITATION NO.	2006 WAIRC 04401

Result	Application withdrawn
Representation	
Applicant	Mr D McLane and later Mr D Ellis (of counsel)
Respondent	Mr J Brits, Mr G Bull and Mr G Paull (all of counsel) on behalf of Thiess Pty Ltd
Other	Ms M Foley (of counsel) on behalf of Alcoa of Australia Limited t/as Alcoa World Alumina

Order

WHEREAS on 12 December 2005 The Automotive, Food, Metals, Engineering, Printing and Industries Union of Workers – Western Australian Branch ("the applicant") applied to the Tribunal for a conference pursuant to s.74 of the *Mines Safety and Inspection Act 1994* ("the Act")

AND WHEREAS the dispute related to the issue of payment for members required to work on Tank 24A at the Alcoa Pinjarra Upgrade Site in the week of 1 November 2005 and another matter;

AND WHEREAS the Tribunal convened conciliation conferences between the parties on 16 December 2005 and 16 February 2006;

AND WHEREAS at the conclusion of the conferences the parties remained in dispute;

AND WHEREAS on 21 February the applicant advised the Tribunal that it wished to withdraw the application;

AND WHEREAS in correspondence to the Tribunal dated 20 March 2006 the applicant confirmed its withdrawal of that part of the claim relating

to the payment of wages however sought to proceed with that part of the application seeking orders against Alcoa World Alumina requiring them to take reasonability for the safe working area around the Tank and commit to procedures agreed to with Employee Safety Representatives;

AND WHEREAS the Tribunal listed the matter For Mention Only on 8 May 2006;

AND WHEREAS the Tribunal requested the applicant clarify which section of the *Mines Safety and Inspection Act 1994* by the amended claim was being referred;

AND WHEREAS in correspondence to the Tribunal dated 11 May 2006 the applicant sought to withdraw its application;

NOW THEREFORE the Occupational Safety and Health Tribunal, pursuant to the powers conferred on it under the Act hereby orders –

THAT the application be, and is hereby withdrawn by leave.

(Sgd.) S M MAYMAN,
[L.S.] Commissioner.

2006 WAIRC 04425

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SITTING AS
THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING & KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	THIESS PTY LTD AND ANOTHER
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 30 MAY 2006
FILE NO	OSHT 13 OF 2005
CITATION NO.	2006 WAIRC 04425

Result	Order issued
Representation	
Applicant	Mr D Ellis (of counsel) on behalf of The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers – Western Australian Branch,
Respondent	Mr T Caspersz (of counsel) on behalf of Thiess Pty Ltd
Others	Mr G McLean (of counsel) on behalf of The Construction, Forestry, Mining and Energy Union
	Mr L Edmonds (of counsel) on behalf of The Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division

Order

WHEREAS the applicants referred this matter to the Tribunal pursuant to s.74(2) of the *Mines Safety and Inspection Act 1994*;

AND WHEREAS this matter was the subject of conciliation conferences on 16 December 2005 and 16 February 2006;

AND WHEREAS no agreement was reached between the parties in conciliation proceedings;

AND WHEREAS this matter was listed on 2 March 2006 to deal with the issue of whether the Tribunal has jurisdiction to deal with the matter;

AND WHEREAS the Tribunal issued a declaration finding the Tribunal has jurisdiction;

AND WHEREAS thereafter the matter was listed for mention only on 19 May 2006;

AND WHEREAS The Construction, Forestry, Mining and Energy Union and The Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division sought to be joined to the application;

AND WHEREAS the applicant clarified that the claim related to s.74(2)(a) of the *Mines Safety and Inspection Act 1994*;

AND WHEREAS the parties consented to a process to further progress the application;

AND WHEREAS the Occupational Safety and Health Tribunal, pursuant to the powers conferred it under the *Mines Safety and Inspection Act 1994* hereby orders -

1. Any person or party who seeks to be joined or intervene in the proceedings is to do so within 7 days of the issuance of this order.
2. Within 2 days of being served with any application for joinder or intervention the respondents are to respond to such application.
3. If the respondents object to any application for joinder or intervention the matter will be listed for hearing and determination.
4. Within 21 days of the determination of the Tribunal all applicants are to file statements of claim particularising the following:
    (a) Classes/levels of employees engaged by each respondent for whom an entitlement is claimed;
    (b) Dates and shifts of employees engaged by each respondent for whom an entitlement is claimed; and
    (c) Details of the reasons why employees absented themselves as claimed above.
5. Within 21 days of receiving statements of claim the respondents are to file and serve responses.
6. The matter is then to be listed for further conciliation.
7. Liberty to apply is granted to the parties in relation to the above.

[L.S.]

(Sgd.) S M MAYMAN,
Commissioner.

2006 WAIRC 04424

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SITTING AS
THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	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 & ELECTRICAL DIV., THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS
	APPLICANT
	-v-
	WORLEY PARSONS AND WORSLEY ALUMINA PTY LTD AND OTHERS
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 30 MAY 2006
FILE NO	OSHT 1 OF 2006
CITATION NO.	2006 WAIRC 04424

Result	Order issued
Representation	
Applicant	Mr D Ellis (of counsel) on behalf of The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers – Western Australian Branch
	Mr L Edmonds (of counsel) on behalf of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division
	Mr G McLean (of counsel) on behalf of The Construction, Forestry, Mining and Energy Union
Respondent	Mr T. Caspersz (of counsel) on behalf of Thiess Pty Ltd, Total Corrosion Control, Perkins Builders, Cimeco Group Pty Ltd, Ausclad Group of Companies Ltd, Thiess Kentz, CBI Constructors Pty Ltd, O'Donnell Griffin Pty Ltd, Protective Coating Systems
	Mr S Kemp (of counsel) on behalf of Worley Parsons and Worlsey Alumina Pty Ltd

Order

WHEREAS the applicants referred this matter to the Tribunal pursuant to s.74(2) of the *Mines Safety and Inspection Act 1994*;

AND WHEREAS this matter was the subject of a conciliation conference on 17 February 2006;

AND WHEREAS no agreement was reached between the parties in conciliation proceedings;

AND WHEREAS this matter was listed on 2 March 2006 to deal with the issue of whether the Tribunal has jurisdiction to deal with the matter;

AND WHEREAS the Tribunal issued a declaration finding the Tribunal has jurisdiction;

AND WHEREAS thereafter the matter was listed for mention only on 19 May 2006;

AND WHEREAS the applicants clarified that the claim related to s.74(2)(a) of the *Mines Safety and Inspection Act 1994*;

AND WHEREAS the parties consented to a process to further progress the application;

AND WHEREAS the Occupational Safety and Health Tribunal, pursuant to the powers conferred it under the *Mines Safety and Inspection Act 1994* hereby orders-

1. Any person or party who seeks to be joined or intervene in the proceedings is to do so within 7 days of the issuance of this order.
2. Within 2 days of being served with any application for joinder or intervention the respondents are to respond to such application.
3. If the respondents object to any application for joinder or intervention the matter will be listed for hearing and determination.
4. Within 21 days of the determination of the Tribunal all applicants are to file statements of claim particularising the following:
    (a) Classes/levels of employees engaged by each respondent for whom an entitlement is claimed;
    (b) Dates and shifts of employees engaged by each respondent for whom an entitlement is claimed; and
    (c) Details of the reasons why employees absented themselves as claimed above.
5. Within 21 days of receiving statements of claim the respondents (other than Worley Parsons and Worsley Alumina Pty Ltd) are to file and serve responses.

6. The matter is then to be listed for further conciliation.

7. Liberty to apply is granted to the parties in relation to the above.

(Sgd.) S M MAYMAN,
[L.S.] Commissioner.

2006 WAIRC 04335

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SITTING AS
THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS
	APPLICANT
	-v-
	JOHN HOLLAND PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	THURSDAY, 11 MAY 2006
FILE NO	OSHTA 6 OF 2005
CITATION NO.	2006 WAIRC 04335

Result	Application discontinued
Representation	
Applicant	Mr T Kucera (of counsel) for The Construction, Forestry, Mining and Energy Union of Workers and Mr L Edmonds (of counsel) for the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering & Electrical Division
Respondent	Mr S Harben (of counsel)

Order

WHEREAS this is an application pursuant to s.28(2) of the *Occupational Health and Safety Act 1984* for a claim for payment for Monday, 15 August 2005 at the John Holland Pty Ltd Country Travellers Association Construction Project;

AND WHEREAS the matter was listing for a directions hearing on 29 August 2005;

AND WHEREAS the Tribunal adjourned the hearing into a conference for the purpose of conciliation between the parties;

AND WHEREAS at the conclusion of the conference matters remained unresolved between the parties;

AND WHEREAS the Tribunal issued a decision and directions order on 29 August 2005;

AND WHEREAS the Tribunal made a further order on 30 September 2005 suspending the directions order issued on 29 August 2005;

AND WHEREAS on 20 January 2006 the applicant filed a Notice of Discontinuance in respect of the application;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under the *Occupational Safety and Health Act 1984*, hereby orders -

THAT this application be, and is hereby discontinued.

(Sgd.) S M MAYMAN,
[L.S.] Commissioner.

2006 WAIRC 04334

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SITTING AS
THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS
	APPLICANT
	-v-
	JOHN HOLLAND PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	THURSDAY, 11 MAY 2006
FILE NO	OSHTB 6 OF 2005
CITATION NO.	2006 WAIRC 04334

Result	Application discontinued
Representation	
Applicant	Mr T Kucera (of counsel) for The Construction, Forestry, Mining and Energy Union of Workers and Mr L Edmonds (of counsel) for the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering & Electrical Division
Respondent	Mr S Harben (of counsel)

Order

WHEREAS this is an application pursuant to 35C of the *Occupational Health and Safety Act 1984* relating to a dispute over the alleged discrimination of a safety and health representative;

AND WHEREAS the matter was listing for a directions hearing on 29 August 2005;

AND WHEREAS the Tribunal adjourned the hearing into a conference for the purpose of conciliation between the parties;

AND WHEREAS at the conclusion of the conference matters remained unresolved between the parties;

AND WHEREAS on 20 January 2006 the applicant filed a Notice of Discontinuance in respect of the application;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under the *Occupational Health and Safety Act 1984*, hereby orders -

THAT this application be, and is hereby discontinued.

(Sgd.) S M MAYMAN,
Commissioner.

[L.S.]