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CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

FULL BENCH—Appeals against decision of Commission—

2006 WAIRC 04715

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THIESS PTY LTD

APPELLANT

-and-

THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING & KINDRED UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH

RESPONDENT

PARTIES O'DONNELL GRIFFIN PTY LTD, TOTAL CORROSION CONTROL, PERKINS BUILDERS, CIMECO GROUP PTY LTD, AUSCLAD GROUP OF COMPANIES LTD, THIESS KENTZ, CBI CONSTRUCTORS PTY LTD, AND THIESS PTY LTD

APPELLANTS

-and-

COMMUNICATIONS, ELECTRICAL, ELECTRONICS, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING AND ELECTRICAL DIVISION, THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS, WA BRANCH, AND THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS

RESPONDENTS

CORAM FULL BENCH

THE HONOURABLE M T RITTER, ACTING PRESIDENT

COMMISSIONER J H SMITH

COMMISSIONER J L HARRISON

HEARD TUESDAY, 13 JUNE 2006

DELIVERED THURSDAY, 6 JULY 2006

FILE NO. FBA 14 OF 2006, FBA 15 OF 2006

CITATION NO. 2006 WAIRC 04715

CatchWords	Industrial Law (WA) – Appeal against declarations of Commission sitting as Occupational Safety and Health Tribunal – Jurisdiction of Tribunal to hear and determine applications referred to it – Referrals made by a "*party to the dispute*" – Meaning of word "*party*" – Authority of registered organisations to refer disputes to Tribunal – *Industrial Relations Act* 1979 (WA) (as amended), s7, s27(1)(k), (l), s29(1)(a)(ii), (b)(ii), s31(1), (2), s44(9), s49(2a), (4)(a), (5)(b), (6), s60, s61 – *Mines Safety and Inspection Act* 1994 (WA), s3(1), s4, s68C(1), (3), s70, s71(2), s72(1)(a), (2), (2a), (2)(b), (3), s74, s74(2), s102, s102(1), (2), (3), (4) – *Occupational Safety and Health Act* 1984 (WA), s28, s28(2), s51G(1), (2), s51I(1), S51J(2)(b)(i), (ii) – *Interpretation Act* 1984 (WA), s3(1)(b), s5
Decision	Appeals allowed, declarations made by the Occupational Safety and Health Tribunal set aside, and applications to the Occupational Safety and Health Tribunal dismissed
Appearances	
Appellants	Mr T Caspersz (of Counsel), by leave
Respondents	Mr T Stephenson (of Counsel), by leave, on behalf of the AFMEP&KU, Mr L Edmonds (of Counsel), by leave, on behalf of the CEEEIPPAWU, and Mr G MacLean (of Counsel), by leave, on behalf of the CFMEU

Reasons for Decision

THE ACTING PRESIDENT:

The Institution of the Appeals

1 There are two appeals before the Full Bench. They were, with the agreement of the parties, heard together. This is because the appeals are against decisions on applications which were heard together at first instance, have identical grounds of appeal and accordingly raise common issues of law.

2 The applications at first instance were heard and determined by a single Commissioner of the Commission sitting as the Occupational Safety and Health Tribunal (the Tribunal). The decisions appealed against are declarations made on 3 May 2006 to the effect that the Tribunal had jurisdiction to hear and determine the applications.

3 The jurisdiction of the Tribunal which the applications sought to utilise was that provided by s74 and s102 of the *Mines Safety and Inspection Act 1994* (WA) (the *MSIA*).

4 The applications which were before the Tribunal were "*referred*" by the respondent organisations purportedly under s74(2) of the *MSIA*. Section 102(1) of the *MSIA* provides, amongst other things, that the section applies where a matter is referred to the Tribunal under s74(2) of the *MSIA*. Sections 102(2) - s102(4) of the *MSIA* in turn provide that:-

> "***102. Determination of certain matters and appeals by Tribunal***
>
> *(2) Where this section applies —*
>
> *(a) the matter, claim or appeal may be heard and determined; and*
>
> *(b) a determination made by the Tribunal on the matter, claim or appeal has effect, and may be —*
>
> *(i) appealed against; and*
>
> *(ii) enforced,*
>
> *as if it were —*
>
> *(c) a matter in respect of which jurisdiction is conferred on the Tribunal by Part VIB of the Occupational Safety and Health Act 1984 (**"Part VIB"**); or*
>
> *(d) a determination made for the purposes of Part VIB.*
>
> *(3) The provisions of —*
>
> *(a) Part VIB; and*
>
> *(b) the Industrial Relations Act 1979 applied by that Part,*
>
> *have effect for the purposes of this section with all necessary changes.*
>
> *(4) In the operation of subsection (3), section 51J(1) of the of the Occupational Safety and Health Act 1984 has effect as if it were expressed to apply where a matter has been referred to the Tribunal for determination under section 55(6), 55A(4), 56(11), 62(1), 67F or 74(2) of this Act.*"

5 By s4 of the *MSIA*, "*Tribunal*" has the meaning given by s51G(2) of the *Occupational Safety and Health Act 1984* (WA) (as amended) (the *OSHA*). Section 51G(1) of the *OSHA* provides that the Commission has jurisdiction to hear and determine matters referred to it under specified sections of the *OSHA*. Section 51G(2) of the *OSHA*, in turn, provides that when sitting in exercise of the jurisdiction conferred by s51G(1), the Commission is to be known as the Tribunal.

6 As provided for in s102(2)(b), a determination made by the Tribunal may be appealed against as if it were a matter in respect of which jurisdiction is conferred on the Tribunal by Part VIB of the *OSHA*. Within Part VIB of the *OSHA* is s51I(1). This subsection relevantly provides that the provisions of s49 of the *Industrial Relations Act 1979* (WA) (as amended) (*the Act*) apply to and in relation to the exercise of the jurisdiction conferred upon the Tribunal. Section 49 of *the Act* provides for

appeals to the Full Bench from decisions of the Commission. Accordingly, by a combination of s102 of the *MSIA*, s51I of the *OSHA* and s49 of *the Act*, the present appeals may be made to the Full Bench.

Leave to Appeal

7 As stated, the decisions of the Tribunal which are appealed against are declarations to the effect that the Tribunal has jurisdiction to hear and determine the applications before it. These declarations were made because the present appellants had argued that the Tribunal did not have any such jurisdiction. The jurisdictional argument was determined as a preliminary point. The same point was sought to be agitated in these appeals.

8 The appellants accept that the decisions of the Tribunal were "*findings*" as defined in s7 of *the Act*. Accordingly, pursuant to s49(2a) of *the Act*, an appeal does not lie unless in the opinion of the Full Bench, the matter is of such importance that, in the public interest, an appeal should lie.

9 The appellants' primary argument was that the requirements of s49(2a) of *the Act* were satisfied because of the nature of the questions sought to be agitated by the appeals. This was primarily whether the Tribunal had jurisdiction to hear a matter purportedly referred to it under s74(2) of the *MSIA* by an organisation registered under *the Act*. It was pointed out that the Full Bench has not previously considered this issue, which is an important one. The issue is whether an organisation registered under *the Act* may be a party to a dispute under s74 of the *MSIA* and accordingly, is a party who may refer such a dispute to the Tribunal for determination. Section 28(2) of the *OSHA* confers jurisdiction upon the Tribunal with respect to worksites within Western Australia other than mine sites, similar to that contained in s74(2) of the *MSIA*. Accordingly, the appellants argued that the determination of the issues sought to be argued in the appeals would have wide ramifications. It was also submitted that the *MSIA* operates in the context of the important mining industry in Western Australia.

10 Each of the respondents contended that the Full Bench should not form the opinion referred to in s49(2a) of *the Act*. Counsel for the Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union of Workers – Western Australia Branch (the AMWU) made submissions on this issue which were adopted by both Counsel for the Construction, Forestry, Mining and Energy Union of Workers (the CFMEU) and the Communications, Electrical, Electronics, Energy, Information, Postal, Plumbing and Allied Workers of Australia, Engineering and Electrical Division (the CEPU). Counsel for the AMWU argued that since the commencement of s28 of the *OSHA* and s74 of the *MSIA* in their present form, it has been a regular practice for registered organisations to make referrals under those sections to the Tribunal.

11 It was submitted that, until recently, there has been no challenge by employers to an organisation's capacity to do so. It was submitted that, given the appellants seek the Full Bench to decide that the Tribunal has no jurisdiction to deal with any referral under the *MSIA* made by a registered organisation, a finding to this effect would potentially lead to all previous decisions where this had occurred being liable to be set aside. In my opinion, whether or not this conclusion would follow is not necessary to determine at the present time. In my opinion, however, the existence of the regular practice as described by Counsel for the AMWU is a reason in favour of rather than against the hearing of the present appeals by the Full Bench. This is because it highlights the importance of the issue involved in the proposed appeals.

12 In *Murdoch University v The Liquor, Hospitality and Miscellaneous Union, Western Australian Branch* (2005) 86 WAIG 247 at [13] – [14], I described the public interest requirement in s49(2a) of *the Act* in the following way (with the concurrence of Gregor SC and Smith C):-

> "13 *In **RRIA v AMWSU and Others** (1989) 69 WAIG 1873, the Full Bench at 1879 said that the words "**public interest**" in s49(2a) of **the Act** should not be narrowed to mean "**special or extraordinary circumstances**". As stated by the Full Bench, an application may involve circumstances which are neither special nor extraordinary but which are, because of their very generality, of great importance in the public interest. The Full Bench, on the same page, went on to say that important questions with likely repercussions in other industries and substantial matters of law affecting jurisdiction can give rise to matters of sufficient importance in the public interest to justify an appeal. The RRIA decision was cited with approval and applied in the recent Full Bench decision of **CSA v Shean** (2005) 85 WAIG 2993 at 2995-2997.*
>
> *14 The forming of the opinion referred to in s49(2a) of **the Act** involves a value judgment and is clearly a matter which the Full Bench needs to assess on a case by case basis, having regard to the issues which the proposed appeal will give rise to.*"

13 In my opinion, the issues raised by the present appeals are of sufficient importance to lead to the conclusion that an appeal should lie under s49(2a) of *the Act*. This is because they raise important questions about the nature and extent of the jurisdiction of the Tribunal and the authority of registered organisations to refer a dispute to the Tribunal of the type referred to in s74(2) of the *MSIA* and s28(2) of the *OSHA*.

The Applications Before the Tribunal

14 As stated, there were two applications before the Tribunal. Application OSHT 13 of 2005 was referred to the Tribunal by the AMWU. Relevantly, it sought "*payment for members required to work at the Alcoa Pinjarra Upgrade Site from 28th November to the 1st December 2005*". The appeal against the decision of the Tribunal that it had jurisdiction to hear and determine the application is appeal FBA 14 of 2006.

15 Application OSHT 1 of 2006 was referred to the Tribunal by the CEPU, the AMWU and the CFMEU. The application in Schedule B referred to the construction workforce at the Worsley Alumina Refinery. The application claimed that the workforce was entitled to be paid for regularly scheduled overtime on Monday, 23 January 2006, ordinary hours and regularly scheduled overtime on Tuesday, 24 January 2006 and ordinary hours between 7.00am and 10.00am on Wednesday, 25 January 2006. The appeal against the decision of the Tribunal that it had jurisdiction to hear and determine this application is appeal FBA 15 of 2006.

The Reasons of the Tribunal

16 The reasons for decision of the Tribunal in deciding that it had jurisdiction to hear and determine both applications were delivered on 24 April 2006. A single, combined set of reasons was published. In the reasons for decision, the Tribunal set out the relevant background to both applications OSHT 13 of 2005 and OSHT 1 of 2006. The reasons for decision set out the way in which the appellants had sought the determination by the Tribunal of the jurisdictional issue which is at the heart of these appeals. They also set out that the Tribunal decided the jurisdictional challenge should be determined before any consideration of the merits of the applications in accordance with *Springdale Comfort v Building Trades Association* (1987) 67 WAIG 325.

17 The jurisdictional argument was heard and determined on the basis of the written and oral submissions made by the parties to the Tribunal. There was no oral or documentary evidence which elaborated upon the background to the disputes which were before the Tribunal nor the involvement of the present respondents in these disputes. Schedule B to application OSHT 1 of 2006 did however note the involvement of "*union officials*" in some of the events which led to the dispute involved in that application.

18 The reasons of the Tribunal set out in detail the submissions made by the parties about the jurisdictional issue. The conclusions of the Tribunal on this issue are set out in paragraphs [27] – [29] of the reasons for decision as follows:-

> *"27 The Tribunal seeks to address the role and effect of trade union registration pursuant to s60 of the* ***Industrial Relations Act 1979*** *("the IR Act"). Under the terms of that section a registered trade union has the authority, under its own constitutional rules, to act on behalf of the persons who are claiming the entitlement. In applications OSHT 13 of 2005 and OSHT 1 of 2006 the Tribunal finds that three registered unions, registered under s60 of the IR Act have made applications on the relevant employees' behalf and, are entitled to do so.*
>
> *28 Particularly relevant is s 61 of the IR Act:*
>
> *"**61. Effect of registration***
>
> *Upon and after registration, the organisation and its members for the time being shall be subject to the jurisdiction of the Court and the Commission and to this Act; and, subject to this Act, all its members shall be bound by the rules of the organisation during the continuance of their membership."*
>
> *The operation of the rules of each of the respondent unions; the AFMEPKIU, the CEPU and the CFMEU, as registered under s 60 of the IR Act allow for each trade union to represent its members before the Industrial Relations Commission. Section 51G of the OSHT Act defines the Tribunal as "the Industrial Relations Commission sitting as the Occupational Safety and Health Tribunal". Of particular relevance is s 51G(2) and (3):*
>
> *"(2) When sitting in exercise of the jurisdiction conferred by subsection (1) the Commission is to be known as the Occupational Safety and Health Tribunal (the* ***"****Tribunal****"****).*
>
> *(3) A determination of the Tribunal on a matter mentioned in subsection (1) has effect according to its substance and an order containing the determination is an instrument to which section 83 of the* ***Industrial Relations Act 1979*** *applies."*
>
> *The Tribunal finds that the trade unions (AFMEPKIU, CEPU and CFMEU) each appear in a representative role on behalf of their members. Even if an employee the subject of a s 74(2) referral by a trade union was not a member of a trade union, so long as their occupation was covered within the constitutional rules of the trade union bringing the application, then such representation would be permitted under the MSIA and indeed the OSHT Act. The Tribunal so finds.*
>
> *29 In representing the claim for entitlements of employees at the Alcoa Pinjarra Upgrade and Worsley Alumina Construction sites, the Tribunal finds the respondent trade unions are parties to the disputes as referred to the Tribunal for determination. The Tribunal finds, that to the extent that jurisdiction is challenged in OSHT 13 of 2005 and OSHT 1 of 2006, that the Tribunal has jurisdiction. The Tribunal rejects any application for an order to strike out the applications."*

The Grounds of Appeal

19 The grounds of appeal in both appeals are, as stated earlier, identical. They are as follows:-

> *"1. The Tribunal erred in law in determining that in representing the claim for entitlements of employees the respondents are parties to the disputes referred to the Tribunal pursuant to section 74(2) of the Mines Safety and Inspection Act 1994 (****the MSI Act****) when:*
>
> *(a) even if the respondents were entitled to represent employees, that fact of itself does not make them a party to the dispute within the meaning of that phrase in section 74(2) of the MSI Act.*
>
> *(b) properly construed, the phrase party to the dispute in section 74(2) of the MSI Act does not include any of the respondents.*
>
> *2. The Tribunal erred in law in that it failed to properly approach the task of constructing the phrase party to the dispute in section 74(2) of the MSI Act by taking into account or having regard for irrelevant matters, namely:*
>
> *(a) sections 60 and 6l of the Industrial Relations Act 1979 (****the IR Act****):*

(b) the constitutional rules of the respondents:

(c) the fact that one counsel represented 10 employers:

(d) given the need to expedite applications, 600 separate applications could result in inequities, obvious delays and difficulties in recalling accurately the circumstances surrounding the events that led to the dispute in the first instance.

3. The Tribunal erred in law in that there was no evidence of the matters that it took account of described in grounds 2(b) and 2(d) above.

4. The Tribunal erred in law in that it took into account the matters referred to in grounds 2(a)-(b) above without first giving the appellant any proper opportunity to be heard in respect of such matters.

5. The Tribunal erred in law in finding in effect that the respondents could make applications under section 74(2) of the MSI Act on behalf of unnamed persons who were not their members when, properly construed, neither the IR Act nor the MSI Act permits that."

The Affidavit of Mr Ellis

20 At the hearing of the appeals, the AMWU sought to tender an affidavit of Mr Dean Ellis sworn on 12 June 2006. Mr Ellis is a solicitor employed by the AMWU who has the conduct of the present matters on their behalf. In general terms, the affidavit deposes to Mr Ellis' knowledge and belief as to the involvement of the AMWU in the disputes which have given rise to OSHT 13 of 2005 and OSHT 1 of 2006. It does so for the purpose of trying to aid the AMWU in submitting that it is a "*party to the dispute*" in accordance with s74(2) of the *MSIA*. The affidavit also sets out reasons why, if the appellants' jurisdictional argument is accepted, the AMWU ought to be allowed to intervene in the applications before the Tribunal.

21 The appellants opposed the Full Bench receiving into evidence the affidavit of Mr Ellis. In doing so, in part, they call in aid s49(4)(a) of *the Act*. Relevantly, this provides that an appeal under s49 "*shall be heard and determined on the evidence and matters raised in the proceedings before the Commission*".

22 The appellants submit that, although in previous decisions the Full Bench has decided that evidence may be received by the Full Bench, notwithstanding the terms of s49(4)(a) of *the Act*, the affidavit of Mr Ellis does not meet the relevant tests of admissibility. In this regard, the appellants referred to the decision of the Full Bench in *Federated Clerks Union of Australia, Industrial Union of Workers, WA Branch v George Moss Limited* (1990) 70 WAIG 3040. The Full Bench there decided that, notwithstanding the terms of s49(4)(a) of *the Act*, it was entitled to receive additional evidence on appeal. As stated at page 3041, this was fresh evidence "*which was not available … at the time of the trial and which reasonable diligence in the preparation of the case could not have made available*". On the same page, the Full Bench said that to be received, "*the evidence must be such that it would have had an important influence on the result of the trial, and it must be credible but not necessarily beyond controversy*". The *George Moss* decision has been followed in subsequent decisions of the Full Bench. (See, for example, *Hanssen Pty Ltd v CFMEU* (2004) 84 WAIG 694).

23 In my opinion, the affidavit of Mr Ellis does not satisfy the strictures of the test referred to in the *George Moss* decision. The evidence was readily available to the AMWU at the time of the hearing at first instance and could have been placed before the Tribunal if the AMWU had so wished. It did not do so and cannot, in my opinion, now attempt to supplement its case by the contents of the affidavit.

24 Accordingly, in my opinion, the affidavit of Mr Ellis ought not to be received into evidence by the Full Bench.

The Statutory Framework

25 I have earlier referred to s102(1) of the *MSIA* which states that that section applies where, amongst other things, a matter is referred to the Tribunal under s74(2) of the *MSIA*. I have also quoted s102(2) which provides that, where the section applies, a matter so referred may be heard and determined by the Tribunal. Also, as stated earlier, the applications which were referred to the Tribunal were purportedly referred under s74(2) of the *MSIA*. This subsection links with ss70, 71 and 72 of the *MSIA* in the following way.

26 Each of these sections is included in Part 6 of the *MSIA* which is headed "*Resolution of Safety and Health Issues*". Section 70(1) refers to the way in which an occupational safety or health issue in relation to a mine must be attempted to be resolved. Section 71 of the *MSIA* provides that where attempts to resolve an issue in accordance with s70 are unsuccessful "*and where there is a risk of imminent and serious injury to or imminent and serious harm to the health of any person, the manager of the mine, any employer or employee involved, or safety and health representative may notify the district inspector for the region in which the mine is situated of the unresolved issue*". Section 71(2) provides that a district inspector, upon being so notified, must attend without delay at the mine and either take such action under the *MSIA* as the inspector considers appropriate or determine that no action is required to be taken under the *MSIA*.

27 Section 72(1) of the *MSIA* then relevantly provides:

"*Nothing in s71 prevents an employee from refusing to work where that employee has reasonable grounds to believe that to continue to work would expose that employee or any other person to a risk of imminent and serious injury or imminent and serious harm to the health of that employee or other person.*"

28 Section 72(1)(a) sets out matters which are relevant to consider in determining whether an employee has reasonable grounds for the belief referred to in s72(1). Section 72(2) of the *MSIA* sets out whom an employee must notify when they refuse to work, in accordance with s72(1). Sections 72(2a) and (2b) refer to procedural aspects of the entitlement of an employee to refuse to work in accordance with s72(1). Section 72(3) provides that an employee who contravenes s72(2) or (2a) commits an

offence. Section 73 of the *MSIA* provides that an employee who refuses to work as mentioned in s72(1) may be given reasonable alternative work to do until that employee resumes his or her usual work.

29 Section 74 of the *MSIA* is central to the present appeals. Accordingly, it is appropriate to set it out in full:-

> "***74. Entitlements to continue***
>
> *(1) An employee who refuses to work as mentioned in section 72(1) is entitled to receive the same pay and other benefits, if any, which that employee would have been entitled to receive if the employee had continued to do his or her usual work.*
>
> *(1a) Subsection (1) does not apply if —*
>
> *(a) the employee leaves the mine without the authorisation of the employer as required under section 72(2a); or*
>
> *(b) the employee refuses to do reasonable alternative work that the employee is given under section 73.*
>
> *(2) A dispute arising as to —*
>
> *(a) whether a person is entitled to pay and other benefits; or*
>
> *(b) what pay or benefits a person is entitled to receive,*
>
> *in accordance with subsection (1), may be referred by any party to the dispute to the Tribunal for determination.*"

30 In short, the appellants' main argument on the appeals was that the respondent organisations are not "*any party to the dispute*" in accordance with s74(2) of the *MSIA*. Accordingly, it was submitted that they are not able to refer the disputes covered by the present applications to the Tribunal for determination. In consequence, it was submitted that the Tribunal has no jurisdiction to determine the applications made to it, the Tribunal was in error in deciding that it did and this error should be corrected by the upholding of the appeals and making an order that the applications be dismissed.

31 The appeals therefore, in large part, turn on the point of construction of whether the respondent organisations are a "*party to the dispute*" in accordance with s74(2) of the *MSIA*.

Grounds of Appeal 1-3

32 The issue of statutory construction referred to in the previous paragraph is at the hub of grounds of appeal 1 and 2 and to some extent grounds 3 and 5. I will now summarise the main submissions of each of the parties. In the course of the summary I will, in some instances, set out my opinion of the strength or validity of the submissions. Otherwise, I will address them in an analysis of the issues which will follow.

The Appellant's Submissions

33 The appellants submitted in effect that s74(2) of the *MSIA* confers a narrow and specific entitlement upon specified parties. The entitlement is to refer a dispute of the type described in s74(2) of the *MSIA* to the Tribunal for determination. The only party who may make such a referral is a "*party to the dispute*". The appellants submitted that if the referral is not made by such a person, then the Tribunal has no authority or jurisdiction to determine the dispute, because the matter is not properly before it. In making this submission the appellants also rely on s102 of the *MSIA*. As set out earlier, s102(1) provides that the section applies, amongst other things, where under s74(2) a matter is referred to the Tribunal. Section 102(2) then provides that where the section applies, the matter may be heard and determined as if it were a matter in respect of which jurisdiction was conferred on the Tribunal by Part VIB of the *OSHA*.

34 The appellants submitted that the ordinary meaning of the word "*party*" should apply in construing s74(2) of the *MSIA*. The appellants argued that a "*party*" should therefore be construed to mean "*someone who is immediately concerned in some transaction or a legal proceeding*". This definition is from The Macquarie Dictionary. (No particular edition of The Macquarie Dictionary was cited in the appellants' written submissions, but the definition quoted is definition number 7 of "*party*", in the Macquarie Dictionary, second edition). The appellants submitted that a party to the relevant dispute is someone who is immediately concerned in it. It was submitted in effect that only someone whose rights or interests could be directly affected by the dispute could be a party to the dispute within s74(2) of the *MSIA*. It was submitted therefore that this would include a putative employee or employer but no other entity such as a registered organisation or union of which the putative employee was a member. It was submitted that s74(2) referred to a "*party to the dispute*" rather than simply an employer or employee, to cover for the position of a putative employee or employer. Accordingly, a putative employer (for example) as a party to the dispute, could refer a claim being made against them under s74 of the *MSIA* to the Tribunal for determination, even in circumstances where they would argue that they were not the employer of the person who had allegedly refused to work in accordance with s72 of the *MSIA*.

35 The appellants argued that although a registered organisation could represent an employee in a hearing before the Tribunal pursuant to s74(2) of the *MSIA*, this did not mean that the organisation was a party to the dispute. The same followed, it was argued, even if the organisation was involved in representing their members or potential members in the events which led to a dispute arising in the terms described in s74(2) of the *MSIA*. The appellants argued that a solicitor may also be involved in representing employees in any dispute as to whether they were entitled to the relevant pay or other benefits, but this did not mean that the solicitor was a party to the dispute within the terms of s74(2) of the *MSIA*.

36 The appellants also argued that the Tribunal was in error in deciding that because the respondent organisations were entitled to represent employees this made them a party to the dispute within s74(2) of the *MSIA*. The appellants also submitted that the Tribunal erred in relying on s60 and s61 of *the Act* to reach the conclusions it did. It was submitted that s60 simply confers corporate status to an organisation upon registration. It was submitted that s61 makes a registered organisation and its members subject to the jurisdiction of the Industrial Appeal Court and the Commission and binds members of organisations to

its rules, for so long as they are members. It was submitted that the rules of the respondent organisations did not operate to confer upon them the status of being a party to the dispute described in s74 of the *MSIA*. It was submitted that even under *the Act*, more is needed than s60 or s61, or the rules of the organisation, for an organisation to have standing to refer a matter to the Commission, in its general jurisdiction. Reference was made to s29(1)(a)(ii) of *the Act*. This provides an organisation with an entitlement to refer an industrial matter to the Commission when persons to whom the industrial matter relates are eligible to be enrolled as members of the organisation.

37 The appellants also relied on the contents of s68C(3) of the *MSIA* to support their contentions. Sections 68A-68D of the *MSIA* are about discrimination against safety and health representatives in relation to employment. Section 68C(1) provides that a person may refer to the Tribunal claims that their employer, prospective employer or relevantly described contractor, has caused disadvantage to them in contravention of s68A or s68B and request the Tribunal to make one or more of the orders provided for by s68D of *the MSIA*. Section 68C(3) then provides that a "*referral under subsection (1) may also be made on a person's behalf by an agent or legal practitioner referred to in section 31*" of *the Act*. The appellants submitted that this section is a "*powerful indicator that Parliament's intention was that, even as concerns the ability to refer something on behalf of a person, unless an express provision exists in the MSIA permitting that, then the person in question must refer the matter in their own name*". I do not accept this submission as s68C and s68D are in different terms to s74(2) of the *MSIA*. If an organisation can be a "*party to the dispute*" in s74(2) then they are a "*person in question*", to use the expression just quoted from the appellants' written submissions.

38 Overall the appellants submit that there is nothing within the *MSIA* which supports the contention that the respondent organisations can refer a dispute to the Tribunal under s74(2) of the *MSIA* as they have done.

The Submissions of the AMWU

39 The AMWU submitted there was no warrant within the *MSIA* to "*read down*" the expression "*any party to the dispute*" in the way contended for by the appellants. The AMWU submitted that the referral entitlement in s74(2) of the *MSIA* needed to be considered by reference to not only the contents of the *MSIA* but also the *OSHA* and *the Act*. It was argued *the Act* acknowledged that organisations could be parties to disputes before the Commission. It was submitted that there was nothing in the *MSIA* which clearly excluded organisations from referring disputes to the Tribunal. It was submitted that in the absence of something clear in this regard, the overall legislative intention was to allow this to occur.

40 The AMWU submitted that the position of an organisation may be distinguished from that of a solicitor who represents a client in seeking to obtain the entitlement described in s74 of the *MSIA*. The distinction was, so it was submitted, that an organisation and their members have coincident interests, whereas the interests of the solicitor and the client are not. It was argued in effect that the solicitor has a purely representative status as opposed to the greater involvement of, and benefit for, the organisation in any relevant dispute.

41 The AMWU also argued, by reference to the definition of "*person*" in s5 of the *Interpretation Act 1984* (WA), a "*person*" in s74(2) of the *MSIA* could include an organisation as an incorporated entity. It was then argued that if an organisation may be the "*person*" referred to in s74(2) then they can be a "*party*" to the relevant dispute. In my opinion this argument is clearly untenable. The reference to a person in s74 is a reference to an employee who refuses to work as mentioned in s72(1) of the *MSIA*. This is a reference to a natural person. It is a situation where, as contemplated by s3(1)(b) of the *Interpretation Act*, there is something in the context of the *MSIA* which is inconsistent with the application of the extended definition of a person as contained in s5 of the *Interpretation Act*.

42 The AMWU also referred to the objects of the *MSIA* as contained in s3 of the *MSIA*. The object referred to in s3(1)(a) is to promote, and secure the safety and health of persons engaged in mining operations. The AMWU asserted that this object will be promoted if an organisation, as well as an individual employee, is able to refer a matter to the Tribunal under s74 of the *MSIA*. Attention was also drawn by the AMWU to the object referred to in s3(1)(d) of the *MSIA* which is to foster and facilitate cooperation and consultation between employers and employees, and associations representing employers and employees, and to provide for the participation of those persons and associations in the formulation and implementation of safety and health standards and optimum working practices. Again it was argued that this object will be enhanced by a construction of s74(2) that allows an organisation to refer a dispute to the Tribunal.

43 The AMWU also cited the decision of the Full Bench in *Transfield Pty Ltd v Building Trades Association of Unions of Western Australia (Association of Workers) and Others* (1990) 70 WAIG 3023, in support of their arguments. In this matter the Full Bench observed at page 3029 that a union may be a party to a dispute under s28 of the then titled *Occupational Health, Safety and Welfare Act 1984*. It was acknowledged by the AMWU however that the legislative provisions of the *Occupational Health, Safety and Welfare Act 1984* and its interaction with *the Act* were somewhat different to the relevant sections of *the Act*, the *OSHA*, and the *MSIA* as they presently stand. Additionally, the observation made by the Full Bench was not attended with any discussion of the issue at hand. The decision of the Full Bench in *Transfield* did not purport to decide the jurisdictional issue now before the Full Bench. For these reasons, in my opinion, the *Transfield* decision is of no real assistance to the present appeals.

44 The AMWU also drew attention to the potential inconvenience of the appellants' arguments being accepted. It was submitted that in a case such as this, where there may be a dispute about payments being made to a large number of workers, it would be highly inconvenient for each of those people to have to file an individual application in their own name with the Tribunal.

The Submissions of the CFMEU

45 The CFMEU supported the submissions made by the AMWU and made additional written and oral submissions. The CFMEU submitted that implicit in the structure of s74 of the *MSIA* is the proposition that a person who is entitled to pay and other benefits is not the same entity as a party to the dispute. It was submitted that "*a party*" has a broader meaning. It was submitted that if no distinction was intended between a person entitled and a party then the same term would have been used to describe both. This submission can be readily countered however by understanding that both a putative employee and

employer may refer the dispute to the Tribunal; it is not simply the person who is arguably entitled to the pay and other benefits.

46 It was also submitted by the CFMEU that s74 of the *MSIA* is identical to s28 of the *OSHA*. It was submitted that by using identical terms, Parliament intended that it have identical operation. It was also submitted that when s74 of the *MSIA* was enacted it was common practice for unions to be parties to disputes under s28 of the *OSHA*. It was submitted it was reasonable to assume Parliament was aware of this practice. It was submitted that if Parliament intended a "*party*" to have a narrower meaning than the practice referred to, it could have specifically provided for this at the time of drafting. Whilst mentioning this argument I should note that both the appellants and some of the respondents referred the Full Bench to the explanatory memoranda and second reading speeches of the Minister when the relevant provisions of the *MSIA* and *OSHA* were introduced into Parliament. There is nothing within the explanatory memoranda or second reading speeches which refers to this regular practice or otherwise throws any light upon the meaning of the expression "*party to the dispute*", in s74(2) of the *MSIA*.

47 The CFMEU also argued that whether or not an employee was entitled to be paid despite their refusal to work depended, in accordance with s72(1) of the *MSIA*, on whether the "*employee has reasonable grounds to believe that to continue to work would expose that employee or any other person to a risk of imminent and serious injury or imminent and serious harm to the health of that employee or other person*". It was submitted that this involved an objective question which was "*premised on whether reasonable grounds exist to believe that a continuation of work will lead to a risk of harm. The test is not concerned with the subjective state of mind of each employee but rather on the objective existence of reasonable grounds to found the belief*". This submission was supported by reference to the reasons for decision of Commissioner Mayman in *The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers – Western Australian Branch and Others v CBI Constructors and Others* [2005] WAIRC at [7]. In that paragraph, Commissioner Mayman said that the test "*is not whether the employee in question believes that it is unsafe to work, but whether he or she has reasonable grounds to believe that to continue to work would expose themselves or other persons to a risk of imminent and serious injury or imminent and serious harm to their health*". The CFMEU therefore submitted that it was appropriate in cases involving large numbers of employee claimants for a representative union body to lead evidence from selected employees and other witnesses to establish whether reasonable grounds objectively exist to found a belief that to continue to work could involve a risk of imminent and serious injury/harm. It was submitted that it is not necessary for each individual employee to establish that they had a subjective belief. It was submitted that the focus being on objective rather than subjective beliefs was consistent with an ability to bring "*union type collective claims*" rather than an insistence on an individual employee being a party to a dispute over entitlements. It was submitted that this also had a pragmatic advantage in that the question of entitlement to pay and other benefits could be determined once and for all in a single application rather than by multiple applications which could number into the hundreds in a particular case.

48 Although it is probably not necessary to finally determine this issue in these appeals, I doubt whether the contention is correct that the subjective beliefs of an individual employee are irrelevant for the purposes of s72(1) of the *MSIA*. I state this with respect to the views expressed by Mayman C in the *CBI Constructors* case. It seems to me that s72(1) directs attention to both the subjective beliefs of an individual employee and an objective analysis of those beliefs. This is because the section seems to require the employee to have a belief. Furthermore, that belief must be based on "*reasonable grounds*". In other words, there needs to be a belief actually held by the employee and one which is based on reasonable grounds. Accordingly, absent some concession being made by a respondent, it would seem that in the determination of a dispute under s74(2) of the *MSIA* it would be necessary for an individual employee to attest to their belief and the reason for that belief. In addition, it would be necessary for the applicant to provide evidence establishing the reasonable grounds for the employee's belief. This would need to be assessed by the Tribunal together with those factors specifically listed in s72(1)(a) of the *MSIA*, to determine whether "*reasonable grounds*" existed.

49 The CFMEU also submitted that a collection of employees speaking through a representative body of their organisation can just as accurately be described as a party to a dispute involving its members, as can an individual employee.

50 In support of this submission, the CFMEU referred to *CFMEU v Clarke* [2006] FCA 245. There, Nicholson J at [61] stated, for the purpose of an alleged contravention of s170MN of the *Workplace Relations Act 1996* (Cth), that a union was not a "*separate juristic entity*" from its members. In that paragraph and by reference to the rules of the union before the Court, his Honour said, "*the Union consists of the Employees. The Union comprises every part of the Union. There is no constitutional concept of the Union on the one hand and the Employees on the other hand… The consequence is that if the Employees make a decision to go on strike, the Union is on strike.*" The CFMEU, in these appeals, therefore argued in effect that if an organisation's member was, together with the organisation, involved in a dispute about payments due under s74(1) of the *MSIA*, that organisation was a party to the dispute.

51 The CFMEU also referred to and provided copies of collective agreements which the CMFEU is a party to which governs the employment relationship of its members at the sites which are involved in the present disputes. These agreements were also before the Tribunal but were not included in the Appeal Books. The agreements are between the CFMEU, the relevant employer groups and the employees. It was submitted that the agreements provide for an obligation to pay wages at a particular level and also provide for a dispute resolution procedure. The CFMEU submitted that by entering into the agreements the CFMEU becomes a party to the agreement creating the obligation to pay wages. It was also noted that it is the obligation to pay wages that is currently in dispute. It was therefore argued that a union which is a party to an agreement creating obligations to pay wages must be a party to any dispute concerning this obligation. It was submitted that, as the agreements created an obligation to pay wages and the CFMEU was a party to the agreements, then the CFMEU thereby had standing to enforce the obligation.

The Submissions of the CEPU

52 The CEPU did not file any written submissions. In a brief oral submission, counsel for the CEPU simply adopted the written and oral submissions made by the AMWU and the CFMEU.

Analysis

53 The determination of these grounds of the appeals involves the construction of the expression "*any party to the dispute*" in s74(2) of the *MSIA*.

54 In *Wilson v Anderson* (2002) 213 CLR 401, Gleeson CJ said at [8]:-

> "*In the construction or interpretation of a statute, the object of a court is to ascertain, and give effect to, the will of parliament. Courts commonly refer to the "intention of the legislature". This has been described as a "very slippery phrase", (Salomon v Salomon & Co Ltd [1897] AC 22 at 38, per Lord Watson) but it reflects the constitutional relationship between the legislature and the judiciary… Parliament manifests its intention by the use of language, and it is by determining the meaning of that language, in accordance with principles of construction established by the common law and statute, that courts give effect to the legislative will.*"

55 In *Attorney General (Qld) v Australian Industrial Relations Commission* (2002) 213 CLR 485 at [113], Kirby J reiterated that it is necessary when engaging in the exercise of statutory construction to focus attention "*upon the crucial language of the relevant provisions before other aids to construction are considered*".

56 In *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, McHugh, Gummow, Kirby and Hayne JJ at [69] quoted from the reasons of Mason and Wilson JJ in *Cooper Brookes (Wollongong) Pty Ltd v FCT* (1981) 147 CLR 297 at 320, the effect that the meaning of a statutory provision must be determined "*by reference to the language of the instrument viewed as a whole*".

57 Although the focus must be on the meaning of the language used in the statute, s18 of the *Interpretation Act*, requires that in "*the interpretation of a provision of a written law, a construction that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to a construction that would not promote that purpose or object*". As stated however by the Full Federal Court in *R v L* (1994) 122 ALR 464 at 468/9, the command contained in provisions like s18 of the *Interpretation Act* "*can have meaning only where two constructions are otherwise open*", and the section "*is not a warrant for redrafting legislation nearer to an assumed desire of the legislature*".

58 I will first consider the context of s74(2) in the *MSIA*. The preamble to the *MSIA* states that it is an Act "*to consolidate and amend the law relating to the safety of mines and mining operations and the inspection and regulation of mines, mining operations and plant and substances supplied to or used at mines; to promote and improve the safety and health of persons at mines and for connected purposes*". Reference has already been made to some of the objects of the *MSIA* as set out in s3(1). I note that the objects of the *MSIA* do not make reference to registered organisations taking legal proceedings on behalf of members such as under s74(2) of the *MSIA*. As set out earlier, there is reference in the object described in s3(1)(d) to "*associations representing employers and employees*". This is for a limited purpose however, being to "*foster and facilitate cooperation and consultation*" and "*to provide for the participation of those persons and associations in the formulation and implementation of safety and health standards and optimum working practices*". In my opinion, this object does not greatly assist with the present issue of statutory construction. It is largely given effect to in Part 5 of the *MSIA* which deals with safety and health representatives and committees. In my opinion, the expressed objects of the *MSIA* do not further the contentions of either the appellants or the respondents as to the preferable construction of s74(2).

59 There are no other sections of the *MSIA* which use the expression "*a party to the dispute*" as being the descriptor for those who may refer a matter to the Tribunal. This expression is not, for example, found in s31BA, s55(6), s55A(4), s56(11), s59(1), s62(1), or s67F(1), (2) or (3), whereby a matter may be also referred to the Tribunal. Within these sections, the parties who may refer a matter to the Tribunal are more specifically described. There is specification of referral by, for example, the State mining engineer (eg s31BA), an employer, mine manager or "*relevant employee*" (s59), or with respect to s67F, the "*relevant parties*" as defined in s67E(1) of the *MSIA*.

60 It is also relevant to consider those sections of *the Act* which are specified to apply to the jurisdiction of the Tribunal to see whether this assists in the construction of s74(2) of the *MSIA*. Reference has already been made to s51I(1) of the *OSHA* which applies to a referral to the Tribunal under s74(2) of the *MSIA*. S51I of the *OSHA* in full provides as follows:-

> ***51I. Practice, procedure and appeals***
>
> *(1) The provisions of sections 22B, 26(1), (2) and (3), 27, 28, 31(1), (2), (3), (5) and (6), 33, 34(1), (3) and (4), 36 and 49 of the Industrial Relations Act 1979 that apply to and in relation to the exercise of the jurisdiction of the Commission constituted by a Commissioner apply to the exercise of the jurisdiction conferred by section 51G —*
>
> *(a) with such modifications as are prescribed under section 113 of that Act; and*
>
> *(b) with such other modifications as may be necessary or appropriate.*
>
> *(2) For the purposes of subsection (1), section 31(1) of the Industrial Relations Act 1979 applies as if paragraph (c) were deleted and the following paragraph were inserted instead —*
>
> *"(c) by a legal practitioner".*

61 There have been no modifications prescribed under s113 of *the Act* as referred to in s51I(1)(a) of the *OSHA*. I have considered each of the sections of *the Act* listed in s51I(1) of the *OSHA*. In my opinion none of these sections assist in the construction of s74(2) of the *MSIA*. There was some discussion during the hearing of the appeals as to the relevance of s31(2) of *the Act* to a hearing before the Tribunal, if the appellants' contention was correct and a registered organisation could not be a party to the dispute referred to in s74(2) of the *MSIA*. I accept however the submission of the appellants on this issue as follows. Section

31(2) of *the Act* refers to the appearance of, amongst other things, an organisation. Further, s31(1) of *the Act* refers to the appearance of a party to proceedings or any other person or body permitted by or under *the Act* to intervene or be heard in proceedings before the Commission. It was submitted that an organisation, although not a party to the dispute, may be permitted to intervene in a matter referred to the Tribunal under s74(2) of the *MSIA*, in accordance with s27(1)(k) of *the Act*. Accordingly, the fact that s31(2) of *the Act* is applicable to the jurisdiction of the Tribunal is a neutral factor rather than a pointer to an organisation being a party to a dispute under s74(2) of the *MSIA*.

62 It is notable that s51I of the *OSHA* does not list s29 of *the Act*. Section 29 of *the Act* sets out those parties who may refer an industrial matter to the Commission. The exclusion of s29 from those sections listed in s51I of the *OSHA* is no doubt because the sections of the *OSHA* and *MSIA* which confer jurisdiction on the Tribunal specify the parties who may refer a matter to the Tribunal. I also note that the wording used in s74(2) of the *MSIA* is different to s83(1) of *the Act* which allows certain parties to apply to the Industrial Magistrates Court for the enforcement of the provision of an instrument (including an award). The list of those parties referred to in s83(1) of *the Act* includes in the case of an award or an industrial agreement, any organisation or association named as a party to it and also any person on his or her own behalf who is a party to the instrument or to whom it applies.

63 Section 51J of the *OSHA* provides the Tribunal with the power to assist the parties to reach agreement by conciliation. Section 51J(2)(b)(i) of the *OSHA* provides that, for the purposes of conciliation, the Tribunal may, amongst other things, arrange conferences of the parties or their representatives presided over by the Tribunal. Alternatively, the Tribunal may arrange for the parties or their representatives to confer amongst themselves at a conference at which the Tribunal is not present (s51J(2)(b)(ii)). It could be argued, where there are multiple employees in factually similar matters under s74(2) of the *MSIA*, that conciliation would more likely resolve the dispute when attended on behalf of the employees by their union (if any) rather than the employees individually. Whilst this may be so, I do not think this provides a guide to the meaning of "*party to the dispute*" in s74(2) of the *MSIA*. This is because an individual employee, or a number of such employees, may nevertheless be represented by a registered organisation as their agent, even if that organisation is not considered to be a party to the dispute under s74(2) of the *MSIA*. This may occur under s31(1) of *the Act*, in combination with s51I of the *OSHA* and s102 of the *MSIA*.

64 In my opinion, neither s60 or s61 of *the Act* nor the constitutional rules of the respondent organisations leads to the conclusion that those organisations are a party to the dispute in terms of s74(2) of the *MSIA*, as held by the Tribunal. In my opinion, and with respect, s60 of *the Act* does not provide an organisation with the authority to act for parties in proceedings before the Tribunal or Commission. In my opinion, s60(1) simply provides for the incorporation of an organisation upon registration in the terms there specified. Section 60(2) of *the Act* provides that such an organisation "*may sue and be sued and may purchase, take on lease, hold, sell, lease, mortgage, exchange, and otherwise own, possess, and deal with any real or personal property*". In my opinion this section confirms, at least for the purposes of the Commission, that registered organisations have a separate legal personality from their members. (cf *CFMEU v Clarke*, referred to above.) Accordingly, registered organisations and their members are not, in effect, one and the same thing, as suggested in at least some of the submissions made by the respondents. As a separate legal entity, an organisation may represent its members but it is not the same legal entity as those members.

65 Section 61 of *the Act* provides that, upon registration, an organisation and its members are subject to the jurisdiction of the Industrial Appeal Court and the Commission. The section does not provide an organisation with the jurisdiction to bring or refer an application to the Commission or Tribunal. The authority for the taking of such a step must be found in other sections of *the Act* such as s29. In my opinion, the Tribunal was correct to say that the respondent organisations represented their members, but this does not lead to a conclusion that they are thereby a party to the disputes. In my opinion, there is a conceptual difference between being a party to a dispute and being a representative of a party or parties to such a dispute. Further, I do not accept the suggested distinction, relied upon by the AMWU, between a solicitor representing a client and union representing a member. (See [40] above). The union and the member may have coincident interests but this does not mean that the union is not separate from and representing the interests of its members, in disputes as to *MSIA* s74(2) entitlements, as opposed to being a party to the dispute.

66 Overall therefore, I do not think the context of the *MSIA*, the *OSHA* or *the Act* provide much assistance in the resolution of the present point of construction. (I have already referred to the appellants' argument about s68C of the *MSIA*.)

67 In my opinion, the purpose of s74(2) of the *MSIA* is to provide a mechanism for the resolution of a dispute of the type there described. That dispute is, in summary, as to whether and/or what pay or other benefits a person is entitled to under s74(1) of the *MSIA*. The mechanism of dispute resolution may only be invoked by those who are a "*party to the dispute*".

68 In some instances the word "*party*" may mean "*one who participates in some action or affair*" (*The Macquarie Dictionary*, 2nd edition, definition of "*party*", number 9). If so, the word "*party*" in s74(2) of the *MSIA* would be apt to include a union whose organiser or official was involved in a dispute on behalf of members. It may also then include a solicitor who was representing a client in relation to a claim for payments under s74 of the *MSIA*. In my opinion, however, for the reasons that follow, this is not the preferred meaning to be given to the word "*party*" in s74(2). The preferred meaning is that submitted by the appellants, being the parties "*immediately concerned*" in the dispute. In my opinion, a person/company is a party to the dispute by being "*immediately concerned*" if their rights and interests can be directly affected by the dispute. Accordingly, it is only the putative employee and employer who may be a party to the dispute under s74(2) of the *MSIA*. In my opinion, this construction best fits the text and context of s74(2) of the *MSIA*. The use of the word "*party*" in s74(2) should in my opinion be considered against the background that, in legal proceedings, a party is ordinarily somebody who has a direct interest in the outcome. In this instance this means, as stated, a putative employee or employer, but not an organisation representing the interests of members or potential members in the dispute. The preferred construction I have referred to assists the purpose of s74(2) as it provides that the parties, and only those parties, who are directly affected by the dispute may invoke the mechanism provided to resolve it.

69 It is appropriate to consider the consequences of the possible constructions of s74(2) of the *MSIA*, for the purpose of determining its proper meaning. (See, for example, *Statutory Interpretation in Australia*, DC Pearce and RS Geddes, 5th edition at [2.32] ff.) In this matter, a consequence of the preferred construction I have referred to is that, in cases where a number of employees are in dispute as to s74(1) entitlements, it may be that it will be necessary for individual employees to refer matters to the Tribunal, rather than any organisation to which they are members making a composite referral on their behalf. The latter may have the advantage of reducing the number of individual applications which would need to be made and, to that extent, assist the administration of the applications by the Tribunal. In my opinion, however, this issue of inconvenience is not of sufficient magnitude so as to lead to a construction of the relevant section other than that which I think is the correct meaning of the language as stated above. Additionally, the administrative burden which may be placed on the Tribunal by the necessity for a multiplicity of applications may be lessened by a consolidation of the matters pursuant to s27(1)(s) of *the Act*. Alternatively, it may be possible for a single employee to refer the matter to the Tribunal with any other employees involved in the same dispute being joined as parties pursuant to s27(1)(j) of *the Act*.

70 The construction of s74(2) of the *MSIA* in the manner that I have suggested does not lead, as argued by the AMWU, to an exclusion of organisations or unions from participation in the hearing and determination of a dispute by the Tribunal under s74(2) of the *MSIA*. As stated earlier, they may participate if leave is granted to intervene or as the agent representative of a member. They may on the same basis participate in any conciliation of the dispute.

71 I have also considered whether there was any significance in the use of the singular, "*a person*", in s74(2) of the *MSIA*. I considered whether the use of the singular meant that an organisation could not refer a dispute about multiple employees to the Tribunal as it was not a dispute about the entitlements of "*a person*". I note however that s10(c) of the *Interpretation Act* provides that in a written law "*words in the singular number include the plural*". Accordingly, I do not think the use of the singular word "*person*" has any relevance to the construction of s74(2).

72 In [46] above I have referred to the "*common practice*" argument of the CFMEU. In my opinion, the materials provided (the explanatory memoranda and second reading speeches of the Minister) are not sufficient for me to be satisfied that, in enacting s74 of the *MSIA* in the terms in which it did, the Parliament was aware of the "*common practice*" and intended to preserve that common practice by the use of the expression "*party to the dispute*" in s74(2) of the *MSIA*. The submission of the CFMEU is clearly distinguishable from an argument that the re-enactment of a provision after judicial consideration of its meaning gives rise to the inference that Parliament intended such a meaning to be continued to be applied by the courts. (See Pearce and Geddes at [3.39] ff.)

73 In [51] above, I have referred to the submissions of the CFMEU based on that organisation being a party to collective agreements which governed the employment relationship of its members at the sites which are involved in the present disputes. In my opinion, the CFMEU being a party to these agreements does not mean it is a party to the dispute about pay and entitlements owed to their members or potential members within s74(2) of the *MSIA*. In my opinion, the two things are conceptually different. The entitlements which are in dispute in the present appeals are entitlements under s74 of the *MSIA*. Although the quantification of those entitlements may be determined by reference to the collective agreements referred to, it is not those agreements which provide for the entitlement. The CFMEU (or other respondent organisations) being a party to the collective agreements does not, in my opinion, of itself make it a party to any dispute about entitlements under s74 of the *MSIA*.

74 As stated therefore, in my opinion, the respondent organisations were not "*any party to the dispute*" under s74(2) of the *MSIA*. Accordingly, the respondent organisations did not have the authority to refer the matters to the Tribunal under s74(2) of the *MSIA*. It follows that I would uphold grounds 1 and 2 of the appeals.

75 As a consequence, ground 3 does not need to be separately considered. I accept that there was no evidence of the constitutional rules of the respondents before the Tribunal. Accordingly, pursuant to s26(3) of *the Act*, the Tribunal should not have taken into account the content of those rules without first giving the parties the opportunity to make submissions about them.

Ground of Appeal 4

76 Given my conclusions on grounds 1 and 2, this ground does not require separate consideration. However, to the extent that this ground refers to the taking into account by the Tribunal of the constitutional rules of the respondents, I have referred to this aspect in the previous paragraph. In this instance, it is not necessary to consider the consequences of such an action having occurred given that I have accepted the submissions of the appellants that the Tribunal otherwise erred in its construction of s74(2) of the *MSIA*.

77 Ground 4 also refers to the Tribunal taking into account s60 and s61 of *the Act* without giving the parties any proper opportunity to be heard. In my opinion, at least in this instance, it was not necessary for the Tribunal to request submissions about s60 and s61 of *the Act* before taking them into account in its reasons for decision. The parties were aware that the issues before the Tribunal involved the construction of and/or combined effect of sections of the *MSIA*, the *OSHA* and *the Act*. It was not a breach of procedural fairness, in my opinion, for the Tribunal to take into account sections of *the Act* which were not specifically referred to in the submissions of the parties or discussions with them by the Tribunal at the hearing. In my opinion, this was not required by s26(3) of *the Act* or the common law rules of procedural fairness. The parties had the opportunity to make submissions on those sections of *the Act* they thought to be relevant or irrelevant to the jurisdictional issue.

Ground of Appeal 5

78 This ground is stated in terms of the Tribunal erring in finding that the respondents could make applications under s74(2) of the *MSIA* on behalf of unnamed persons who were not their members. Further consideration of this ground does not need to occur as I have found that the respondents could not, in any event, refer the matters to the Tribunal under s74(2) of the *MSIA*. It is also relevant to note however that neither of the applications were framed in terms of s72(1) and s74(1) of the *MSIA*. For

example, the applications did not set out that particular employees had the relevant belief and the reasonable grounds for the belief. Ordinarily however I envisage that such deficiencies could be cured by the provision of particulars.

Disposition of Appeals and Appropriate Orders

79 As set out above, I have accepted the primary submission of the appellants that the respondent organisations did not have the authority under s74(2) of the *MSIA* to refer the disputes to the Tribunal for hearing and determination. The consequences of accepting this submission remain to be considered.

80 During the hearing of the appeals there was some discussion as to whether the applications could be amended to replace the organisations named as the applicants with an employee who is a "*party to the dispute*" under s74(2) of the *MSIA*. The Tribunal possesses a power of amendment under s27(1)(l) of *the Act*. The powers of the Tribunal contained in s27(1) of *the Act* are available, as stated in that subsection, "*in relation to any matter before it*". It was submitted by the appellants however that the Tribunal could not exercise the powers set out in s27(1) of *the Act* in relation to a matter in which the Tribunal did not have jurisdiction. It was also submitted that, given the respondent organisations did not have the authority under s74(2) of the *MSIA* to refer the matters to the Tribunal, it lacked jurisdiction to hear and determine them and consequently exercise the powers under s27(1) of *the Act*.

81 At least with respect to the power of amendment I have referred to, I accept the appellants' submission that this may only be exercised in relation to a matter before the Tribunal, in the sense that the Tribunal is possessed of jurisdiction in the matter. I also accept the submission that the Tribunal did not have jurisdiction in relation to the matters because they were not referred to the Tribunal by a party having the legal authority to do so.

82 This conclusion is supported by the decision in *The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australian Branch v Monadelphous Group of Companies* (2000) 80 WAIG 611. There, the applicant union purported to bring a matter before the Commission pursuant to s44(9) of *the Act* in respect of a "*member*", Mr Wilson. The applicant union sought an order that Mr Wilson be employed by the respondent, alternatively that he receive compensation for loss, or alternatively again that he had been denied a benefit under his contract of service which was a three month fixed term contract of service with the respondent. The respondent raised as a preliminary point the competence of the applicant union to bring the application before the Commission. The submission was that the applicant union did not have the constitutional capacity to enrol Mr Wilson as a member and therefore under the terms of s29(1)(a)(ii) of *the Act*, when read with s44 of *the Act*, "*the application was incompetent*" (page 611). At page 613, Kenner C concluded that, on the evidence, Mr Wilson was not eligible to be enrolled as a member of the applicant union when the "*present industrial matter was before the Commission*". Kenner C stated therefore that the applicant union did not have "*standing to bring the matter to the Commission*". Kenner C concluded at page 613 that he upheld the respondent's submission; he did so as a matter of fact and law. In doing so, Kenner C said his conclusions did not preclude Mr Wilson from bringing an application to the Commission pursuant to s29(1)(b)(ii) of *the Act* in respect of an alleged denied contractual benefit. The result was that the application brought by the applicant union was dismissed. Although not stated precisely in these terms, it is clear that Kenner C thought the Commission lacked the jurisdiction to hear and determine an application referred to it by a party who had no legal authority to do so. Further, there was no suggestion in the reasons of Kenner C that the application could be validly amended so as to be brought by Mr Wilson with respect to the alleged denied contractual benefit claim. In my opinion, with respect, the reasoning of Kenner C is correct and ought to be followed in these appeals.

83 This conclusion is also supported by reference to s102(1) and (2) of the *MSIA*. These sections relevantly give the tribunal the jurisdiction to hear and determine a matter where, "*under*" s74(2), it is referred to the Tribunal. The present applications were not, in my opinion as stated above, referred to the Tribunal "*under*" s74(2) because they were not referred to the Tribunal by a "*party*" to the disputes. The structure of s102 is such that if a matter is not referred to the Tribunal "*under s74(2)*", as here, then the Tribunal does not possess the jurisdiction to hear and determine the matter.

84 There was also some discussion during the hearing of the appeals as to whether s28 of *the Act* had any relevant application. This provides, relevantly, that the powers conferred on the Tribunal "*may be exercised in relation to a matter at any time after the matter has been lodged in the [Tribunal] notwithstanding that the procedures prescribed under this Act have not at that time been complied with to the extent necessary to enable the matter to be heard and determined by the [Tribunal]*". By virtue of s102 of the *MSIA* and s51I of the *OSHA*, s28 of *the Act* would apply to any procedures prescribed under not only *the Act* but also the *MSIA* and the *OSHA*, relevant to referrals to the Tribunal under s74(2) of the *MSIA*. In my opinion however the contents of s28 of *the Act* do not assist the applications which were purportedly before the Tribunal. This is because "*prescribed*" in s28 of *the Act* is relevantly defined in s5 of the *Interpretation Act* to mean "*prescribed by or under the written law in which the word occurs*". The fact that a party not authorised by s74(2) of the *MSIA* has attempted to refer these applications to the Tribunal cannot be characterised as a non-compliance with a procedure prescribed under *the Act*, the *MSIA* or the *OSHA*. It is a matter of substance or legal authority rather than procedure. In my opinion, a matter of a lack of legal authority to refer the applications to the Tribunal is not curable by the powers provided in s27 and supplemented by s28 of *the Act*.

85 The AMWU also made a submission that, if the Full Bench did not accept its submissions on the point of construction, it should make an order that the AMWU be made an intervener to the applications; presumably in reliance upon the power provided to the Commission under s27(1)(k), s49(5)(b) and s49(6) of *the Act*. I am not satisfied in this instance that such an order could be made by the Full Bench. This is because, in my opinion, there are no matters which are properly before the Tribunal, instituted by a party who had the authority to refer a matter to the Tribunal and as to which the AMWU could be joined as an intervener. Indeed, as things stand the AMWU is a purported party to the applications. They could hardly be an intervener as well.

86 Following the hearing of the appeals, my associate, as directed by the Full Bench, wrote to the parties to request their written submissions on two questions. The questions were premised on the assumption that the respondent organisations were not a "*party to the dispute*" for the purposes of s74(2) of the *MSIA*, although the Full Bench had reached no such conclusion at that time. The questions were:-

1. As a matter of law, could the respondent organisations have referred the dispute/matter that their members were entitled to payments under s74 of the *MSIA* to the Commission under s29 of *the Act*, as an "*industrial matter*"?

2. If the answer to 1 is yes, are the applications which have been filed now capable of being amended so as to be properly before the Commission as part of its general jurisdiction?

87 The questions elicited a variety of responses from the parties. The appellants submitted that the answer to question 1 was no and that, even if the answer to question 1 was yes, the applications could not be amended so as to be properly before the Commission as part of its general jurisdiction. The AMWU gave the same answers to the questions, albeit for differently stated reasons. The CFMEU submitted that the answer to each question was yes. The CEPU submitted that the answer to question 1 was no; but if it was wrong and the answer to question 1 was yes, then the answer to question 2 was also yes.

88 The submissions made in answer to question 1 were quite diverse and raise some complex issues. In my opinion, it is best not to traverse these issues unless necessary to do so. This is in part because at least some of the submissions involve a consideration of the interaction between *the Act* and the *Workplace Relations Act*, with respect to the general jurisdiction of the Commission in the context of question 1. Prior to considering these issues, it would probably be necessary to have constitutional notices issued to the Commonwealth and State Attorneys General pursuant to s78B of the *Judiciary Act 1903* (Cth). The issuing of these notices, awaiting a response to them and the receipt of any submissions which an Attorney General may wish to make in response to their notice, would all involve a delay in the finalisation of these appeals. Again, it is preferable, in my opinion, not to so delay the finalisation of the appeals unless it is necessary to do so.

89 In my opinion, it is not necessary to take this path because, even if the answer to question 1 is yes, the answer to question 2 must be no. In part, this is because, as set out earlier, I am not of the opinion that there are matters properly before the Tribunal which can be amended by use of the powers contained in s27 of *the Act*.

90 Additionally, I accept the submission made by the appellants that there is no power available to the Tribunal to somehow transfer or "*cross-vest*" the present applications to become applications before the Commission proper as opposed to the Commission sitting as the Tribunal. The Commission sitting as the Tribunal exercises a distinct jurisdiction which is separate to that of the Commission proper. In its exercise of the jurisdiction provided to the Tribunal, the Commission sitting as the Tribunal has certain powers expressed in s102 of the *MSIA* and s51I and s51J of the *OSHA*. The legislature has not provided that the Tribunal is to simply sit as the Commission with all of the powers that the Commission possesses. For example, as referred to earlier in these reasons, the Tribunal possesses particular powers of conciliation as stated in s51J of the *OSHA* rather than the powers of conciliation provided to the Commission under *the Act* when sitting as the Commission. The jurisdictions of the Tribunal and the Commission have different scope and they possess powers from different statutory sources. The present applications were purportedly referred to the Tribunal under s74(2) of the *MSIA*. The applications purported to invoke the Tribunal's jurisdiction. Simply because the Tribunal is constituted by the Commission does not mean the Commission can ignore this fact and without more continue to hear and determine the applications as if referred to the Commission under s29 of *the Act*. Further, the powers given to the Tribunal do not include a power to amend and transfer or "*cross-vest*" an application purportedly referred to it to one before the Commission proper.

91 Accordingly, I do not think that the applications brought before the Tribunal are salvageable in the way postulated by question 2 of the Full Bench as set out above.

92 In my opinion, although it is somewhat regrettable, the conclusion I reach is that each of the applications brought before the Tribunal must be dismissed. This would not prevent employees who are parties to the disputes referred to in the applications lodging their own applications with the Tribunal.

93 In my opinion, the appropriate orders for the Full Bench to make in each appeal are:-

1. The appeal is allowed.

2. The declaration made by the Occupational Safety and Health Tribunal on 3 May 2006 is set aside.

3. The application to the Occupational Safety and Health Tribunal is dismissed.

94 In my opinion a minute of proposed orders pursuant to s35 of *the Act* should issue in these terms.

COMMISSIONER J H SMITH:

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

COMMISSIONER J L HARRISON:

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

2006 WAIRC 04717

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THIESS PTY LTD
	APPELLANT
	-and-
	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING & KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE M T RITTER, ACTING PRESIDENT
	COMMISSIONER J H SMITH
	COMMISSIONER J L HARRISON
DATE	TUESDAY, 11 JULY 2006
FILE NO/S	FBA 14 OF 2006
CITATION NO.	2006 WAIRC 04717

Decision	Appeal allowed, declaration made by OSHT set aside, application to OSHT dismissed
Appearances	
Appellant	Mr T Caspersz (of Counsel), by leave
Respondent	Mr T Stephenson (of Counsel), by leave, on behalf of the AFMEP&KU

Order

This matter having come on for hearing before the Full Bench on 13 June 2006, and having heard Mr T Caspersz (of Counsel), by leave, on behalf of the appellant, and Mr T Stephenson (of Counsel), by leave, on behalf of the respondent, and reasons for decision having been delivered on 6 July 2006, it is this day, 11 July 2006, ordered as follows:-

1. The appeal is allowed.
2. The declaration made by the Occupational Safety and Health Tribunal on 3 May 2006 is set aside.
3. The application to the Occupational Safety and Health Tribunal is dismissed.

By the Full Bench

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

2006 WAIRC 04718

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	O'DONNELL GRIFFIN PTY LTD, TOTAL CORROSION CONTROL, PERKINS BUILDERS, CIMECO GROUP PTY LTD, AUSCLAD GROUP OF COMPANIES LTD, THIESS KENTZ, CBI CONSTRUCTORS PTY LTD, AND THIESS PTY LTD
	APPELLANTS
	-and-
	COMMUNICATIONS, ELECTRICAL, ELECTRONICS, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING AND ELECTRICAL DIVISION, THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS, WA BRANCH, AND THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS
	RESPONDENTS
CORAM	FULL BENCH
	THE HONOURABLE M T RITTER, ACTING PRESIDENT
	COMMISSIONER J H SMITH
	COMMISSIONER J L HARRISON
DATE	TUESDAY, 11 JULY 2006
FILE NO/S	FBA 15 OF 2006
CITATION NO.	2006 WAIRC 04718

Decision	Appeal allowed, declaration by OSHT set aside, application to OSHT dismissed
Appearances	
Appellants	Mr T Caspersz (of Counsel), by leave
Respondent	Mr L Edmonds (of Counsel), by leave, on behalf of the CEEEIPPAWU, Mr T Stephenson (of Counsel), by leave, on behalf of the AFMEP&KU, and Mr G MacLean (of Counsel), by leave, on behalf of the CFMEU

Order

This matter having come on for hearing before the Full Bench on 13 June 2006, and having heard Mr T Caspersz (of Counsel), by leave, on behalf of the appellants, Mr L Edmonds (of Counsel), by leave, on behalf of the Communications, Electrical, Electronics, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division, Mr T Stephenson (of Counsel), by leave, on behalf of the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, WA Branch, and Mr G MacLean (of Counsel), by leave, on behalf of the Construction, Forestry, Mining and Energy Union of Workers, and reasons for decision having been delivered on 6 July 2006, it is this day, 11 July 2006, ordered as follows:-

1. The appeal is allowed.
2. The declaration made by the Occupational Safety and Health Tribunal on 3 May 2006 is set aside.
3. The application to the Occupational Safety and Health Tribunal is dismissed.

By the Full Bench

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

2006 WAIRC 05199

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SKILLED RAIL SERVICES PTY LTD **APPELLANT** **-and-** CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS **RESPONDENT**
CORAM	FULL BENCH THE HONOURABLE M T RITTER, ACTING PRESIDENT SENIOR COMMISSIONER J F GREGOR COMMISSIONER J H SMITH
HEARD	MONDAY, 26 JUNE 2006, TUESDAY, 27 JUNE 2006, THURSDAY, 29 JUNE 2006
DELIVERED	THURSDAY, 3 AUGUST 2006
FILE NO.	FBA 11 OF 2006
CITATION NO.	2006 WAIRC 05199

CatchWords	Industrial Law (WA) – Appeal against decision of the Commission – Application for new award – Whether in the public interest to make award – Effect of proclamation of *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) – Issues relating to duty of Commission to conciliate under the *Industrial Relations Act 1979* (WA) (as amended) – Wage Fixing Principles of the Commission in 2005 – Structural efficiency considerations – Leave entitlements – Appeal allowed – *Industrial Relations Act* 1979 (WA) (as amended), s6(b),(c), s6(ca), s26, s26(1)(a), s26(1)(d)(vi), s27(1)(a)(ii),(iv), s32, s32(1), s32(6), s32A, s32A(1), s36A(1), s49, s51(2) *Workplace Relations Act 1996*, s3, cl 34(1) Schedule 8, s171(3), s172(2), s178, s208, *Workplace Relations Amendment (Work Choices) Act 2005 (Cth)*, s89(3), s89A(2).
Decision	Appeal allowed, order made by the Commission suspended, matter remitted to the Commission for further hearing and determination
Appearances	
Appellant	Mr J. Blackburn (of Counsel), by leave
Respondent	Mr D. Schapper (of Counsel), by leave

Reasons for Decision

THE FULL BENCH:

The Appeal

1 This is an appeal which was instituted under s49 of the *Industrial Relations Act 1979* (WA) (*the Act*). It is an appeal against an order made by a single Commissioner on 17 March 2006. By that order the Commission made an award known as the *Iron Ore Production and Processing (Locomotive Drivers Rio Tinto Railway) Award 2006* (the award), in the terms of the schedule to the order and with effect on and from the date of the order.

2 The Commission by the same order also cancelled an interim award it had earlier issued in the same proceedings, named the *Iron Ore Production and Processing (Engine Drivers - Skilled Rail Services) Interim Award 2006* (A 5 of 2005).

The Award

3 The Area and Scope clause of the award is in the following terms:-

"*3. – AREA AND SCOPE*

(1) The 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."

4 The named parties to the award were set out in clause 14 of the award, as being the present respondent and appellant.

5 Clauses 6-10 of the award were those clauses which were largely focused upon in the hearing of the appeal. They are in the following terms:-

"*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."

6 The application for the award was made by the respondent on 9 September 2005. A notice of answer was filed by the appellant on 30 September 2005. In the notice of answer, the appellant opposed the application for the award.

7 On 21 December 2005 the Commission heard the issue as to whether an interim award should be made pursuant to s36A of *the Act* pending the hearing and determination of the claim for final relief.

8 On 23 December 2005 the Commission delivered oral reasons for the decision which it made to grant the interim award. These reasons were published in written form on 28 December 2005. The order making the interim award was published on 11 January 2006.

9 The claim for a final award was heard on 31 January and 1 February 2006.

10 On 7 March 2006 the Commission published its reasons for deciding that a final award should be made. A minute of proposed order was published on the same date. The parties were requested to advise in writing if they wished to speak to the minute of the proposed orders. The appellant indicated it did so and the matter was listed for a hearing to facilitate this. The issues raised at the speaking to the minutes hearing were dealt with by way of supplementary reasons for decision published on 17 March 2006. As indicated earlier, on the same date the Commission published the order and award which gives rise to the present appeal.

The Evidence

11 The oral evidence which was before the Commission was described in paragraphs [10]–[21] of the reasons for decision of the Commission published on 7 March 2006, in the following terms:-

"***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."

12 There were also a number of documents tendered by the parties which were referred to by the Commission in its reasons for decision.

The Notice of Appeal

13 The notice of appeal contained 15 grounds. At the hearing of the appeal the Full Bench was informed that grounds 4, 6, 12 and 15 were withdrawn. Grounds 3 and 7 were amended at the hearing of the appeal. The remaining live grounds of appeal, including the amended grounds 3 and 7, were as follows:-

"***Public interest***

*1 The Commission erred in failing to find that the making of an award was not in the public interest having regard to the legislative changes which would result from the proclamation of Schedule 1 of the Workplace Relations Amendment (Work Choices) Act 2005 (**the Work Choices Act**).*

PARTICULARS

(1) Skilled submitted that once the Work Choices Act took full effect:

(A) the award would cease to have effect as a state award and this Commission would have no further role in the determination of wages and conditions for the relevant employees or in settling any disputes which may arise;

(B) because all of the employees were on AWAs, the award terms would not be preserved as a notional agreement preserving state awards (NAPSA);

(C) the only NAPSA which might be created would be one incorporating any state laws applying to the AWA employees;

(D) any NAPSA would not be common rule. No NAPSA would come into operation in the case of new employers; and

(E) even if the state award rates were preserved as an Australian Pay and Classification Scale (APCS), and even that was unclear, they would not apply to existing employees - all of whom were covered by AWAs.

(2) Further, the making of a new award, particularly the award sought, would be directly contrary to the scheme and objects of the Work Choices Act which are concerned to:

(A) reduce the number of awards and remove state and regional differences; and

(B) ensure that awards contain minimum conditions of employment which do not act as a disincentive to bargaining at the workplace level.

2. The Commission in determining whether it would not be in the public interest to make an award gave insufficient weight to the cumulative effect of the impact of the Work Choices Act and:

(a) the fact that Skilled's employees were all covered by AWAs so that there were no employees to whom the award would apply;

(b) the fact that Pilbara Iron's locomotive drivers and other employees and employees of other contractors to Pilbara Iron were regulated by federal instruments; and

(c) the absence of any industrial disputation, demonstrated employee dissatisfaction or prior union activity in connection with the work sought to be covered by the award.

Conciliation

3 The Commission acted contrary to s 32 of the Act by proceeding to arbitrate the merits of the claim without being satisfied or in circumstances where it could not properly have been satisfied that the resolution of the matter would not be assisted by conciliation.

PARTICULARS

(1) Skilled informed the Commission that it considered and wished to argue that the making of an award was not in the public interest but that if the Commission rejected that argument and determined an award should be made, Skilled would wish to conciliate.

(2) In the circumstances there was no basis on which the Commission could properly have formed the view that conciliation would not have assisted the resolution of the matter.

(3) In proceeding to hear and determine the public interest and merit arguments at the same time the Commission deprived Skilled of the opportunity to conciliate in the event that the Commission rejected its public interest arguments.

Decision to make actual rates award

5. The Commission erred in making an actual rates award:

(a) by acting contrary to the Wage Fixing Principles:

(i) which required the Commission to make a safety net award; and

(ii) which required the Commission to apply Structural Efficiency Considerations which included the Minimum Rates Adjustment Principle;

(b) by failing to have regard to the need to encourage employers and employees to reach enterprise appropriate agreements and effectively removing the incentive and ground for such agreements;

(c) when there was no evidence or submissions to justify the making of an actual rates award (even if such an award could be made under Principle 11 without infringing the Wage Fixing Principles); and

(d) by failing to provide any or adequate reasons for its decision to make an actual rates award.

7. By awarding a rate of $1862 for a 38 hour week ($40.83 x 120% x 38 hours) the Commission:-

(a) failed in its obligation to determine an appropriate minimum rate;

(b) failed in its obligation to make a "safety net" award; and

(c) failed to have regard to the need to encourage employers and employees to reach enterprise appropriate agreements and effectively removed the incentive and ground for such agreements.

8. The Commission erred in failing to have regard or proper regard to the evidence of minimum rates (including minimum rates fixed in accordance with the MRA process) paid to locomotive drivers under other awards on the basis that the Commission was here considering rates and conditions to apply in the Pilbara when:

(a) the Commission's obligation was to apply the Wage Fixing Principles including the Minimum Rates Adjustment Principle;

(b) the Commission's obligation was to identify an appropriate minimum rates of pay; and

(c) any disabilities associated with the location of the work could be accommodated by the inclusion of the Commission's standard location allowance as it is in other common rule awards which apply throughout the State.

Decision to use BHP rates as a guide

9. The Commission erred in using the BHP Award rates as a guide when:

(a) the rates in the BHPB Award were not properly fixed minimum rates and the Commission in the making of a First Award was required to apply Structural Efficiency Considerations which included the Minimum Rates Adjustment Principle;

(b) the BHPB Award was the product of the almost unique circumstances of that case including the enterprise nature of that award, the nature of the history of industrial regulation at BHPB over many decades and BHPB's refusal to bargain collectively and could not simply be transposed to a common rule first award applying to labour hire employers in different factual circumstances;

(c) in using the BHPB Level 4 aggregate rate "as a guide" and then discounting that rate by 10% to arrive at the rate for the subject award, the Commission acted without evidence in that there was no evidence before the Commission to indicate the composition of the BHPB aggregate rates, how those rates had been arrived at or the particular penalties, allowances and disabilities for which they represented compensation. The absence of such evidence meant that the Commission could not properly be satisfied as to the relevance of those rates to the work to be covered by the award and was in no position to derive a rate for the subject award from the BHPB rates;

10. In awarding a rate which was only 10% less than the BHPB Level 4 aggregate rate, the discount being said to reflect the factors identified in the decision, the Commission failed to make any allowance or adequate allowance for the differences in shift rosters between the BHPB employees and the Skilled employees.

PARTICULARS

(1) The BHPB rate is an aggregate rate intended to compensate BHPB employees for, among other things, the inconveniences and disabilities of their particular shift roster.

(2) While there was no evidence before the Commission as to the particular composition of the BHPB aggregate rate, it is clear that the rate incorporates, among other things, overtime, shift, weekend and public holiday components appropriate to the 8 shifts on/6 shifts off 48 hours per week roster worked by the BHPB employees;

(3) Skilled employees who work a 14 shifts on/14 shifts off 42 hours per week roster work substantially less overtime and fewer shifts, weekends and public holidays;

(4) The Commission discounted the BHPB rate by 10% to allow for the factors he identified in his decision. They were the absence of a direct "like with like" comparison with BHPB, the circumstances of FIFO compared to residential work and inherent differences in the operations between Rio Tinto and BPHB rail operations;

(5) The Commission made no allowance, alternatively no adequate allowance, for the differences in shift rosters as between the BHPB employees and the Skilled employees;

(6) By awarding the BHPB rate (discounted only for those matters referred to in his decision) the Commission awarded an aggregate rate premised on an 8 shifts on/6 shifts off 48 hour week roster (and incorporating overtime, shift weekend and public holiday payments appropriate to that roster) to employees who, with one exception, worked 42 hours a week.

(7) Even if it could be said that the BHPB rate was an appropriate guide, which it was not, had the Commission properly taken account of the difference in shift rosters, it would have been necessary to further discount the rate awarded by an approximate 11%. That is, had the Commission had regard to the differences in overtime and penalties as between the BHPB 48 hour roster and the Skilled 42 hour roster, it would have found those differences of themselves warranted an approximate 11% discount to the BHPB rate before any allowance was made for the factors identified in the Commission's decision.

Single rate of pay

11. In awarding a single rate of pay to apply to all employees covered by the award the Commission erred in:

(a) failing to distinguish between work performed on the mainline and other work including the work performed by banker drivers (the rate awarded being based on the BHPB Level 4 rate for mainline drivers);

(b) awarding the same aggregate rate (which rate was intended to include compensation for all penalties and shift premiums) to employees who worked a 14 day on 14 day off 42 hour roster as to employees who worked a 14 day on 7 day off 56 hour roster;

(c) failing to provide reasons or adequate reasons for (a) or (b).

Long Service Leave

13. The Commission erred in awarding 13 weeks' long service leave after 10 years on the basis of the Rio Tinto industrial instruments when the Commission had earlier deprecated comparisons based on those 'consent' instruments and when the Long Service Leave General Order represents the standard for private sector employees and there was no evidence, alternatively no sufficient evidence, to warrant a departure from that standard.

Annual leave

14. The Commission erred in awarding 5 weeks' annual leave and an additional week for shift workers, on the basis of little or no evidence, when the award made was to apply to labour hire employers and the standard of this Commission is 4 weeks and an additional week for shift workers."

14 Due to the way in which some of the grounds of appeal were to be argued, it was necessary for notices to be issued to the Attorneys General of the Commonwealth, States and Territories pursuant to s78B of the *Judiciary Act 1903* (Cth). None of the Attorneys General indicated they wished to intervene in the appeal.

Public Interest – Grounds 1 and 2 of the Appeal

15 It is not disputed by the appellant that pursuant to s36A(1) of *the Act*, the onus lay on it to show that it would not be in the public interest to make the award. However, the appellant complains that the Commission at first instance erred in failing to find that the making of the award was not in the public interest having regard to the legislative changes which would result from the proclamation of Schedule 1 of the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) (*the Work*

Choices Act). Further the appellant says that the Commission should have exercised its discretion under s27(1)(a)(ii) and (iv) of *the Act* to dismiss the application for an award.

16 At the time the application for a final award was heard by the Commission on 31 January 2006 and 1 February 2006, *the Work Choices Act* had been enacted but not proclaimed. The Federal Government had, however, announced that it intended to proclaim *the Work Choices Act* in March 2006 (*Exhibit R1*). It was accepted by the Commission at first instance that the pending legislation was a relevant consideration as to whether he should exercise his discretion to make an award. (See, for example, paragraphs [38] and [39] of the reasons for decision).

17 The appellant argues the Commission gave insufficient weight to the effect of *the Work Choices Act* when it was not in dispute that:-

(a) The appellant was a constitutional corporation;

(b) At the time of hearing the appellant was the only employer within the scope of the proposed award;

(c) The appellant had a policy of employing its locomotive drivers on *Australian Workplace Agreements* (AWAs); or

(d) By the time of the hearing on 30 January 2006 and 1 February 2006 all of the appellant's relevant employees were engaged under AWAs.

18 The appellant submitted to the Commission that, in those circumstances, once Schedule 1 of *the Work Choices Act* was proclaimed:-

(a) Any award that was made in the proceedings would cease to have effect as a state award and the Commission would have no further role in the determination of wages and conditions for the relevant employees or in settling any disputes which may arise;

(b) Because all of the employees were on AWAs, the award terms would not be preserved as a *notional agreement preserving state awards* (NAPSA) – they would simply cease to have effect;

(c) The only NAPSA which might be created would be one incorporating any state laws applying to the AWA employees;

(d) Any NAPSA would not be common rule. No NAPSA would come into operation in the case of new employees; and

(e) Even if the State award rate was preserved as an *Australian Pay and Classification Scale* (APCS), and even that was unclear, they would not apply to existing employees – all of whom were covered by AWAs.

19 The gist of the appellant's submissions was that, because all of the employees were on AWAs, none of the terms of the proposed award would have a continued life in any format. However, the appellant concedes that the wage rate in the award could apply to new employees after the proclamation of *the Work Choices Act* as the award rate would be preserved as an APCS for new employees. (See clause 34(1), Schedule 8 of the *Workplace Relations Act 1996* (*the WR Act*)). However, the appellant says the other provisions of the award would not translate to the Federal jurisdiction in any form.

20 The appellant says the Commission must be taken to have decided the public interest issue on the basis that the appellant's analysis of the effect of *the Work Choices Act* was correct but that this effect was not a sufficient reason to find that the making of the award would not be in the public interest. (See paragraphs [38] and [39] of the reasons for decision delivered on 7 March 2006).

21 The appellant says the Commission failed to consider the submission that the making of a new award, particularly the award sought, would be directly contrary to the scheme and objects of *the Work Choices Act* which was concerned to:-

(a) reduce the number of awards and remove state and regional differences; and

(b) ensure that awards contain minimum conditions of employment which do not act as a disincentive to bargaining at the workplace level.

22 Further, the appellant contends that, in weighing the public interest the Commission ought to have had regard to the scheme and objects of *the Work Choices Act* and to the fact that *the Work Choices Act* would shortly exclude the operation of *the Act*, for all practical purposes, so far as the application was concerned.

23 In addition, the appellant says that for all practical purposes, the Commission was not engaged in making an award, but in setting a wage rate for employees of a constitutional corporation in circumstances where *the Work Choices Act* provided for that function to be performed by the Australian Fair Pay Commission. Viewed in that light, and having regard to the scheme and objects of *the Work Choices Act*, the making of an award that would last only a few weeks, and apply to no-one in that time, was contrary to the public interest.

24 In relation to ground 2 the appellant says even without *the Work Choices Act*, the appellant's employees, Pilbara Iron's own employees (including its 140 locomotive drivers) and employees of other contractors to the Pilbara Iron companies were already regulated by Federal instruments as a Full Bench of the Australian Industrial Relations Commission (the AIRC) had previously found it was in the public interest that employees of those companies who worked side by side be subject to a single source of industrial regulation. (See *AWU v Hamersley Iron Pty Ltd* (2004) 133 IR 417 at [58] and [129]). Consequently, the appellant submitted that it would be contrary to the public interest to make an award for other reasons including that there was no credible evidence:-

(a) of any industrial disputation;

(b) of the union previously representing the interests of employees sought to be covered by the award;

(c) of employees being dissatisfied with their terms and conditions; or

(d) that employees had requested the union to pursue an award.

25 On the contrary the appellant says the evidence of Mr Malpass and Mr Butler was that:-

(a) the appellant's employees had not indicated any dissatisfaction with their terms and conditions;

(b) the appellant had no difficulty finding employees to work for it at Pilbara Iron;

(c) morale was high;

(d) turnover was very low; and

(e) the respondent had not, other than by bringing these proceedings, previously sought to represent the interests of the appellant's employees.

26 The appellant argues that as the Commission dealt with several of the points raised in relation to the appellant's public interest argument, in turn and in disposing of each point before moving to the next point the Commission failed to consider the case as a whole. In particular, the appellant says by weighing each factor in isolation the Commission failed to consider whether the cumulative weight of the factors raised by the appellant was such that it was not in the public interest to make the award. Had the Commission weighed the case brought by the appellant as a whole, the appellant says the Commission ought to have found that it was not in the public interest to make a new award.

27 The respondent says that grounds 1 and 2 do not raise proper grounds of appeal. In particular that no error has been demonstrated within the principles enunciated in *House v The King* (1936) 55 CLR 499. Alternatively the respondent says the Commission did not give insufficient weight to the effect of *the Work Choices Act* and contends the award has effect in a number of different ways. Firstly, the respondent points out that the award is a common rule award of hybrid nature. It applies to one place of work (a railroad) and applies to any employer who is engaged in the industry of labour hire who employs locomotive drivers on that railroad. The respondent says the whole of the submissions in relation to *the Work Choices Act* proceeds on the assumption that only the appellant or corporations will be in the business of providing labour to which the award will apply. The respondent points out that there is no basis for such an assumption and it cannot be assumed that the industry described in the award will only be carried on in the future by corporations. Secondly, the respondent says that the appellant's submission overlooks the fact that if an AWA of a locomotive driver employed by the appellant is cancelled the terms of the award would apply pre-proclamation of *the Work Choices Act*, in its terms, or as a NAPSA post-proclamation. In addition, pre-proclamation of *the Work Choices Act*, the award would apply to new employees who entered into a workplace agreement for the purposes of the no disadvantage test and post *the Work Choices Act* the wage rate has effect as a floor for the negotiation of future AWAs as an APCS. Thirdly, the respondent says that the appellant's submissions overlook the prima facie requirement of s36A of *the Act* that an award be made. It is the Commission's duty to give effect to the provisions and scheme of *the Act* not *the Work Choices Act*. The public interest could never require the Commission to give effect to a Federal statutory scheme over *the Act* by which the Commission is constituted.

28 We do not agree with the respondent's submission that grounds 1 and 2 of the appeal do not raise valid grounds of appeal. In *Gronow v Gronow* (1979) 144 CLR 513 at 519-520 Stephen J with whom Mason and Wilson JJ agreed at 525-526 observed:-

> "*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 assessment of matters of weight*."
>
> (Aitken J at 537-538 made similar observations).

29 The appellant in this matter, contends that the Full Bench is in the same position as the Commission at first instance to make an assessment as to the weight to be attached to the matters raised, as the material findings of fact and law are not matters which rely upon the assessment of the credibility of any witness. While that may be so we do not find it necessary to determine this issue as we are not persuaded that the Commission erred in concluding that the appellant had not discharged its onus to persuade the Commission that in the public interest an award should not be made.

30 In relation to ground 1 we are not persuaded that the award will have no effect on the terms and conditions of employment of existing and future employees of the appellant post *the Work Choices Act*. Section 171(3) of *the WR Act* (s89(3) of *the Work Choices Act*) provides that Divisions 2 to 6 of Part 7 of *the WR Act* constitute the *Australian Fair Pay and Conditions Standard* (AFPCS). Section 172(2) of *the WR Act* (s89A(2) o *the Work Choices Act*) provides the AFPCS prevails over an AWA or a contract of employment that operates in relation to an employee to the extent the AFPCS is more favourable. By operation of s178 of *the WR Act* the award will be regarded as a *pre-reform State Wage instrument* and a *pre-reform non-federal wage instrument* which in turn is a *pre-reform wage instrument*. Pursuant to s208 of *the WR Act* (which is contained in Subdivision I of Division 2 of Part 7) the award is taken to be a preserved APCS and the preserved APCS is derived from the award as a pre-reform wage instrument. Consequently, until a new rate of pay is set by the Australian Fair Pay Commission which applies to employees whose conditions of employment are regulated by the provisions of *the WR Act* the award rate has effect as statutory minima. In addition we accept the respondent's submission that the award may have effect on its entire terms in the future if a labour hire agency that is not a constitutional corporation chooses to supply locomotive drivers in the industry to which the award applies. Further, we are not satisfied that the making of the award or the award sought by the respondent is contrary to the scheme and objects of *the Work Choices Act*. There is nothing in s3 of *the WR Act*, which sets out its principal

objects, to support this contention. Also, the provisions of *the WR Act* that provide for the continuing effect of State awards as APCS's or NAPSA's do not support the contention.

31 In relation to ground 2 we do not accept the contention that Commission did not give sufficient weight to the cumulative effect of the impact of *the Work Choices Act* and the other matters relied upon by the appellant. Just because the Commission considered each matter raised in separate paragraphs does not lead to the conclusion that it was in error or that it gave insufficient weight to the matters raised or that he did not consider the matters raised as a whole. (See paragraphs [44] and [46] of the reasons for decision delivered on 7 March 2006). Further it is apparent from its reasons at paragraphs [40] to [46] that the Commission:-

(a) rejected the appellant's contention that there were no employees to whom the award could apply;

(b) concluded that although Pilbara Iron's locomotive drivers and employees and other employees of other contractors to Pilbara Iron were regulated by Federal instruments he was able to take into account that post *the Work Choices Act* the AIRC would be unable to resolve the dispute; and

(c) found industrial disputation was not a necessary requirement for the exercise of the Commission's jurisdiction.

32 For these reasons we find that grounds 1 and 2 are not made out.

Ground 3 – Duty to Conciliate

33 The appellant contends the Commission at first instance acted contrary to s32 of *the Act* by proceeding to arbitrate the merits of the claim without being satisfied (or in the circumstances where it could not have been satisfied) that the resolution of the matter would not be assisted by conciliation. The appellant says that the consequence of the Commission proceeding to arbitrate when it was not entitled to do so was that it exceeded jurisdiction with the result that the decision must be regarded as void. In relation to this point we understand the submission made on behalf of the appellant by Mr Blackburn is that it is a pre-condition to a valid arbitration that the Commission either conciliate or be satisfied that the resolution of the matter would not be assisted by conciliation. In particular, the appellant argues s32(1) of *the Act* should be construed in the nature of a statutory bar whereby the failure to comply bars the remedy if the issue is pleaded or raised. (See *The Commonwealth v Mewett* (1997) 191 CLR 471 at 534-535 per Gummow and Kirby JJ; considered by Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ in *Berowra Holdings Pty Ltd v Gordon* [2006] HCA 32 at [20]).

34 The appellant informed the Commission at first instance prior to the Commission making a decision to expedite proceedings that whereas it opposed the making of an award on public interest grounds, that in the event that its public interest argument was rejected, it wished to enter into conciliation, including Commission assisted conciliation, as to the terms of any award (*Transcript, page 29, 7* December 2005). The appellant also sought to have its public interest argument dealt with as a preliminary issue prior to any hearing as to the merits.

35 On 9 December 2005, the Commission delivered reasons for a decision in which it determined that it would provide some expedition to the proceedings. The Commission programmed the hearing for an interim award on 20 December 2005 and listed the hearing for a substantive award in mid January 2006. (These dates were later changed.) The Commission` determined that the public interest issue should not be separated from a hearing as to the merits of the making of a final award. At paragraph [17] of its reasons for decision given on 9 December 2005, the Commission said:-

> "*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 [sic] 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 the matter before it.*"

36 The appellant argues that the Commission misdirected itself as to the facts and/or failed to have regard to a relevant consideration in that the appellant had informed the Commission of its preparedness to conciliate if the public interest and merits issues were separated and the public interest issue determined against it. The Commission nonetheless decided to hear and determine the public interest and merit arguments together and decided conciliation would not be availing. It is argued the Commission's reference to the "*to the stated position of the parties*" clearly misrepresented the appellant's position. In particular, the appellant submits the Commission was not justified in relying upon the appellant's notice of answer and counter-proposal as indicating that the appellant was opposed to the making of any award in its entirety, and therefore opposed to conciliation.

37 The appellant also submits there was no basis on which the Commission could properly have been satisfied that conciliation would not have assisted the resolution of the matter and the appellant was denied the opportunity to conciliate.

38 The appellant also argues the Commission applied the wrong test under s32(1) of *the Act* in deciding that it would proceed to arbitration. The full text of s32 of *the Act* is set out below. The appellant argued that the Commission must endeavour to resolve an industrial matter by conciliation unless satisfied "*that the resolution of the matter would not be assisted by so doing*". It is argued that this is a different test from that applied by the Commission. The test applied by the Commission was cast in positive terms rather that the negative terms of the section, it was argued. The submission was that the section refers to conciliation not assisting wheras the Commission applied a test of conciliation "*being availing*". In support of the submission the appellant relied upon the observations made by Brinsden J in *RRIA v AMWU* (1986) 66 WAIG 1553 at 1558 (Kennedy and Olney JJ agreeing)

39 The respondent argues that at all material times the appellant did not wish to conciliate. It says when the application was filed for a new award all of the appellant's employees terms and conditions of employment were covered by common law contracts and the appellant's response to the application was to offer the employees AWAs. The respondent also contends that even if it

be the case the appellant wanted to conciliate later (if its public interest argument was not accepted) it was still the case that at the time the Commission decided to matter, it had not conciliated. Further, it says that by this ground the appellant is in truth attacking the refusal of the Commission to split the issues and decide public interest issue first. The respondent also submits that, in effect, no incorrect test was applied by the Commission in deciding to proceed to arbitration.

40 Our reasoning on this ground is as follows. In *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 McHugh, Gummow, Kirby and Hayne JJ affirmed the well known principles that the primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute and the meaning of the provision must be determined by reference to the language of the instrument viewed as a whole.

41 Section 32 of *the Act* provides:-

> "*(1) Where an industrial matter has been referred to the Commission the Commission shall, unless it is satisfied that the resolution of the matter would not be assisted by so doing, endeavour to resolve the matter by conciliation.*
>
> *(2) In endeavouring to resolve an industrial matter by conciliation the Commission shall do all such things as appear to it to be right and proper to assist the parties to reach an agreement on terms for the resolution of the matter.*
>
> *(3) Without limiting the generality of subsection (2) the Commission may, for the purposes of that subsection —*
>
> *(a) arrange conferences of the parties or their representatives presided over by the Commission;*
>
> *(b) arrange for the parties or their representatives to confer among themselves at a conference at which the Commission is not present.*
>
> *(4) The Commission shall —*
>
> *(a) if it gives or makes a direction, order or declaration orally under subsection (3), reduce the direction, order or declaration to writing as soon as is practicable thereafter;*
>
> *(b) preface each direction, order or declaration given or made by it under subsection (3) —*
>
> *(i) if so given or made in writing, at the time of that giving or making; or*
>
> *(ii) if so given or made orally, at the time of the reduction of that direction, order or declaration to writing,*
>
> *with a preamble in writing setting out the circumstances which led to the giving or making of that direction, order or declaration; and*
>
> *(c) make the text of each direction, order or declaration given or made by it under subsection (3) and of the preamble thereto available to the parties as soon as is practicable after that giving or making.*
>
> *[(5) repealed]*
>
> *(6) Where the Commission does not endeavour to resolve a matter by conciliation or, having endeavoured to do so —*
>
> *(a) is satisfied that further resort to conciliation would be unavailing; or*
>
> *(b) is requested by all the parties to the proceedings to decide the matter by arbitration,*
>
> *the Commission may decide the matter by arbitration.*
>
> *(7) Where a matter is decided by arbitration the Commission shall endeavour to ensure that the matter is resolved on terms that could reasonably have been agreed between the parties in the first instance or by conciliation.*
>
> *(8) For the purposes of this section the Commission may —*
>
> *(a) 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 until conciliation or arbitration has resolved the matter;*
>
> *(ii) enable conciliation or arbitration to resolve the matter; or*
>
> *(iii) encourage the parties to exchange or divulge attitudes or information which in the opinion of the Commission would assist in the resolution of the matter;*
>
> *(b) give any direction or make any order or declaration which the Commission is otherwise authorised to give or make under this Act.*"

42 Section 32A of *the Act* provides:-

> *"(1) The functions of the Commission under this Act as to the resolution of matters by conciliation ("conciliation functions") and the determination of matters by arbitration ("arbitration functions") —*

> *(a) are to and may be performed at any time and from time to time as and when their performance is necessary or expedient; and*
>
> *(b) are not limited by any other provision of this Act.*
>
> *(2) Without limiting subsection (1), nothing in this Act prevents the performance of conciliation functions merely because arbitration functions are being or have been performed.*"

43 Section 6 of *the Act* provides in part:-

> "*The principal object of this Act are -…*
>
> *(b) to encourage, and provide means for, conciliation with a view to amicable agreement, thereby preventing and settling industrial disputes;*
>
> *(c) to provide means for preventing and settling industrial disputes not resolved by amicable agreement, including threatened, impending and probable industrial disputes, with the maximum of expedition and the minimum of legal form and technicality,…*"

44 In our opinion a failure of the Commission to conduct itself strictly in accordance with s32(1) of *the Act* does not, at least in all cases, lead to the conclusion that an arbitrated award is "*void*", as argued by the appellant. Section 32(1) of *the Act* requires that the Commission consider whether resolution of an industrial matter would not be assisted by conciliation. The section does not require that conciliation is always a precondition to arbitration. This is made plain by both s32(6) and s32A(1) of *the Act*. The contents of s32A(1) of *the Act* in providing that the arbitration function of the Commission may be performed when expedient and is not limited by any other section of *the Act* has the effect, in our opinion that a failure to strictly comply with the contents of s32(1) of *the Act* will not lead to an arbitration award being "*void*" in all cases. In our view the award was not "*void*" as argued by the appellant in this case. These opinions are consistent with the objects contained in ss6(b) and 6(c) of *the Act*, quoted above.

45 The Commission clearly considered whether the resolution of the matter would have been assisted by conciliation. In considering this issue it was entitled to take into account the contents of the appellant's notice of answer in which the appellant made an unequivocal statement that it opposed the application for an award and did not put forth any counter-proposal.

46 The only basis on which the appellant was prepared to conciliate was if its public interest argument was heard as a preliminary issue and a ruling was made rejecting the appellant's argument that the application for an award be dismissed in the public interest. (See Transcript pages 29 and 30 of proceedings on 7 December 2005). In the reasons for decision published on 9 December 2005 the Commission in effect rejected the appellant's conditional offer to conciliate as it determined that the public interest issues should not be separated from a hearing on the merits. Further the Commission explicitly left open the prospect of conciliation if the parties were to change their positions. It is conceded by the appellant that, after the Commission's reasons for decision were published on 9 December 2005 and prior to the arbitration as to the merits and public interest commencing on 31 January 2006, no steps were taken by the appellant to request the Commission to conciliate when such course of action was open to them under s32A of *the Act* and the Commission had in its reasons for decision issued an invitation to do so. Consequently we are not satisfied that the appellant was denied an opportunity to conciliate.

47 As to the appellant's submission that the Commission applied the wrong test in considering conciliation under s32A(1) of *the Act*, we are not satisfied that, even if the Commission did so, it was of any consequence in this matter. The appellant's position was in effect that unless the public interest argument was determined separately and first (and adversely to it), it was not prepared to conciliate. The Commission decided it would not determine the public interest argument first. Accordingly the position of the appellant was that it has not prepared to conciliate. In the circumstances of this case then the Commission could not have been other than satisfied that "*the resolution of the matter would not be assisted*" by conciliation. In making this point we recognize that whether the Commission will conciliate does not turn, under s32(1) of *the Act*, on whether a party "*believes honestly*" that the dispute could not be resolved by conciliation. (See *RRIA v AMWU* at 1559). This case involved however something qualitatively different, being as stated, in effect a constructive refusal to conciliate.

48 We are not satisfied that ground 3 is made out.

The Wage Principles/Appeal Grounds 5, 7 & 8

49 We deal with these grounds collectively.

50 To consider these grounds of appeal it is necessary to say something about principle 11 of the Commission's 2005 Wage Fixing Principles and the reasons for decision of the Commission in assessing the appropriate rates of pay for those people who would be covered by the award.

51 The Wage Fixing Principles of the Commission in 2005 were Schedule 2 to the General Order made by the Commission in Court Session on 4 July 2005. (See (2005) 85 WAIG 2101). The parties agreed that as the present application was an application for a new award, principle 11 of the Wage Fixing Principles applied. This is in the following terms:-

> "***11. <u>New Awards (including interim Awards) and Extensions to an existing Award</u>***
>
> *The following shall apply to the making of a new award (including an interim award) and an extension to an existing award:*
>
> *(a) In the making of a new award, the main consideration shall be that the award meets the needs of the particular industry or enterprise while ensuring that employees' interests are also properly taken into account. Structural efficiency considerations shall apply in the making of such an award.*

> *(b) Subject to section 36A(3) in the making of an interim award the Commission shall ensure that the award meets the needs of the particular industry or enterprise while ensuring that employees' interests are also properly taken into account. Structural efficiency considerations shall apply in the making of such an award.*
>
> *(c) A new award (including and interim award) shall have a clause providing for the minimum award wage [see Clause 9 of this Section] included in its terms.*
>
> *(d) In the extension of an existing award to new work or to award-free work the rates applicable to such work will be assessed by reference to the value of work already covered by the award, providing structural efficiency considerations including the minimum rates adjustment provisions where relevant have been applied to the award.*"

52 The General Order including the Wage Fixing Principles was made pursuant to the then s51(2) of *the Act*. The effect of the making of such a General Order upon the arbitral powers of the Commission was discussed by Nicholson J in *RRIA v AMWU and Others* (1993) 73 WAIG 1993 at 1999 in the following terms:-

> "*Where a General Order is made pursuant to [subsection 51(2) of the Act] it is made for the purpose of "giving effect to that National Wage Decision". The words "giving effect to" seem to me to indicate a legislative intention that the General Order is to be applied; that is, that it is to be given effect to. The making of a General Order therefore requires more than that the Commission act consistently with the Principles; it requires that the Commission apply those principles. …*
>
> *The position is, therefore, that the application before the Commissioner was only to be resolved by reference to the Principles.*"

53 Accordingly in determining the terms of the award the Commission was obliged to apply the Wage Fixing Principles, to the extent that a failure to do so would constitute error.

54 In its reasons for decision published on 7 March 2006 the Commission reviewed the arguments of the parties about the awards which were appropriate to base the terms and conditions of employment of the employees which would be covered by the award. This included a discussion of whether the *Rio Tinto Iron Ore Award 2004* (the Rio Tinto Award) was an appropriate industrial instrument for the Commission to have regard to in determining its rates of pay. Submissions were also made about the appropriateness of use of the *Iron Ore Production and Processing (BHP Billiton Iron Ore Pty Ltd) Award 2002* (the BHP Award).

55 At paragraph [56] of its reasons the Commission decided that the Rio Tinto Award was properly to be characterized as a consent award. In the following paragraph the Commission said that it was "*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*". At paragraph [58] the Commission said that it would therefore be cautious in its consideration of the terms of the Rio Tinto Award in these proceedings.

56 At paragraph [59] the Commission said that the central issue for determination was the rate of pay to be contained in the award. The Commission referred to the present respondent's submission that it should have regard to the aggregate salaries paid under the BHP Award for locomotive drivers, in particular the Level 4 driver, as the appropriate bench mark. The Commission also referred to the present appellant's submission that when one compared the fly in fly out rates under the Rio Tinto Award and the Robe River Certified Agreement the rates presently paid by the respondent were competitive. (These rates were $39.83 per hour). The submissions of the parties were further reviewed by the Commission in the paragraphs that followed in the reasons.

57 At paragraph [66] of its reasons the Commission commented as follows:-

> "*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*."

58 At paragraph [68] of its reasons the Commission made a finding that he was not satisfied the appellant'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*." The Commission then also referred to what it said were its requirements under *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.*"

59 The Commission then turned to consider what the appropriate and fair rate of pay was for the award. The Commission's reasons on this issue were expressed in paragraphs [69]-[71] of its reasons for decision as follows:-

> *"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."

60 Following this, the Commission made reference to the Wage Fixing Principles. At paragraph [73], the Commission commented that it was accepted that despite the terms of s26(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 not to do so would constitute error. Reference was made to the 1993 *RRIA* case cited earlier in these reasons. The Commission stated that the principles were to be applied. The Commission then discussed the requirements which followed from the application of principle 11 of the Wage Fixing Principles.

61 In paragraph [74] the Commission referred to the present appellant's submission that because of principle 11(a), any award made by the Commission would need to be structurally efficient, including the requirement for a minimum rates exercise. By contrast, the Commission referred to the submissions of the present respondent, that the reference to structural efficiency in principle 11(a) acts simply as a reminder that awards must be structurally efficient in that they should not contain provisions that are a hindrance to productivity.

62 The Commission's conclusions on this issue were expressed in paragraphs [77]-[79] which are as follows:-

"*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."

63 The Commission then considered the other terms of the award and said a minute of proposed orders would issue in the appropriate terms.

64 The main complaint of the appellant is that in making the award the Commission failed to follow the Minimum Rates Adjustment (MRA) process set out in the 1992 State Wage Case Decision and make an award containing properly fixed minimum rates with appropriate internal and external relativities. It was argued that this was required in the making of the first award under principle 11 of the Wage Fixing Principles. Second, and in the alternative, if the Commission was not required to strictly comply with the MRA process it was at least required to make a safety net award containing minimum rates. Third, if it was possible for the Commission to make an actual rates award under principle 11 it was not entitled to do so without good reason. It was submitted it was wrong of the Commission to say in its reasons (paragraph [68]) in effect that the main basis on which to assess wages was to provide *"an adequate and fair rate of wage or salary for the purposes of ss 6(ca) and 26(1)(d)(vi) of the Act."* In making such a finding it was argued the Commission failed to properly apply the Wage Fixing Principles and in particular the Structural Efficiency Principle.

65 The appellant argued the Commission was under a duty to apply the Structural Efficiency Principle. It argued structural efficiency considerations are paramount under principle 11(a) and include the MRA process in the making of a new award. The rates need to be fixed with the appropriate external relativities and in accordance with the MRA process which was and is an integral part of the Structural Efficiency Principle.

66 The appellant contended that the fact that the Structural Efficiency Principle has not since 1992 existed as a stand alone wage principle does not mean that the concepts embodied in the structural efficiency notion have been abandoned. The appellant argued structural efficiency as referred to in principle 11(a) is not a mere reminder that awards must be structurally efficient. It argued it is not the primary focus of principle 11(a) to consider employee interests and regard structural efficiency as secondary in focus. To the extent that the Commission did so it was in error, the appellant argued. It referred to paragraph [78] of the Commission's reasons in which it said:-

> *"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".*

67 The appellant argued that in making such a comment the Commission accepted the proposition that differences in the Federal and State legislation meant that first awards in the State jurisdiction were no longer required to operate as a true minimum safety net for enterprise bargaining. The appellant argued this was a misdirection.

68 The appellant submitted the Commission was wrong in concluding that these differences were such that it was not now required to make a minimum rates award. The appellant argued that the Commission did not indicate which differences it was relying on, and also it is an irrefutable fact that the State Wage Fixing Principles of 2005 under which this application was bought still continued to reflect the National Wage Principles and the Commission was obligated to apply them.

69 The appellant drew to the attention of the Full Bench, in some detail, the historical developments in the Wage Fixing Principles which arguably supported their submissions. In a number of State Wage Case decisions it was recognised that there will be employees who will be unable to reach agreements. The appellant argued the Wage Fixing Principles envisage that those employees are to be protected by safety net awards containing minimum rates and conditions and with the benefit of safety net adjustments. In such circumstances the Commission had a duty to apply the Wage Fixing Principles and make an award containing minimum terms and conditions, the appellant argued. It contended the Commission at first instance determined that the award rates were to reflect a fair adjustment to the rate of pay for employees concerned, consistent with the terms of *the Act*. It was submitted this demonstrated the Commission was not applying the Wage Fixing Principles but complying with what it perceived to be an obligation under *the Act*. It was argued the Wage Fixing Principles make it clear that s26 of *the Act* is one of the foremost drivers in determining whether or not to give effect to the National Wage Case. The contents of s26 of *the Act* were not, so the appellant argued, required to be applied by the Commission as if an element separate to the Wage Fixing Principles.

70 It was submitted by the appellant that if awards are made and varied in accordance with the Wage Fixing Principles including the MRA process then employees' interests will be adequately protected while at the same time maintaining an incentive to bargain. In this context it was argued there was no need for the Commission at first instance to step outside the Wage Fixing Principles or not to apply the MRA process and impose its own form of protection. It was argued there is nothing in *the Act* which renders the MRA process inappropriate or redundant or detracts from the notion that awards should operate as minimum safety net awards. It was argued that s26 of *the Act* is not inconsistent with MRA process. It was argued there was a requirement to make a minimum rates award. The appellant argued that awards in the State jurisdiction, in particular those in the private sector, have always provided for minimum rates of pay and conditions of employment. (See *The Honourable Minister for Education, Employment and Training, The Honourable Minister for Community Service and Others, The Honourable Premier of Western Australia and Others, and the Library Board of Western Australia and Others v The Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Branch* (1995) 75 WAIG 14).

71 The respondent, also in some detail, took the Full Bench to Wage Decisions of the State and Federal Commissions for the purpose of arguing that the Commission at first instance had correctly identified the roll of structural efficiency in determining a first award, in accordance with principle 11 of the Wage Fixing Principles. In particular the respondent submitted the Commission was correct in paragraph [78] of its reasons when it said that the reference to structural efficiency in principle 11(a) of the Wage Fixing Principles required that an award "*be structurally efficient, in the sense that it is not to contain any provisions that would be a barrier to productivity and efficiency*". The respondent argued that the flexibilities contained within the award determined by the Commission furthered this purpose and was not inconsistent with principle 11 of the Wage Fixing Principles. The respondent also argued that the award was properly described as a minimum rates award because it would be open to an employer to pay an employee above the rates prescribed in the award.

72 The determination of these grounds of appeal involves questions of construction with respect to principle 11(a) of the Wage Fixing Principles. In our view, "*structural efficiency considerations*" as referred to in Wage Fixing principle 11(a) are not a secondary consideration as indicted by the Commission in paragraph [77] of its reasons. In our opinion "*structural efficiency considerations*" are part of what is described in principle 11(a) as the main consideration, being that the award meets the needs of the particular industry or enterprise while ensuring that employees' interests are also properly taken into account.

73 We also note that principle 11(a) does not refer to the Structural Efficiency Principle but simply "*structural efficiency considerations*". There is therefore some ambiguity within the principle which has led to the differing arguments of the parties and the opinion expressed by the Commission in paragraph [78] of its reasons. Given the lack of clarity, it is permissible and relevant to have regard to the reasons of the Commission which accompanied the making of the General Order including the Wage Fixing Principles.

74 These reasons make it clear in our opinion that the reference to "*structural efficiency considerations"* in principle 11(a) is a reference to the Structural Efficiency Principle. This is because, at paragraph [32] of its reasons, the Commission in Court Session referred to a submission made by the Trades and Labour Council of Western Australia (TLC) that "*the reference in Principle 11 to the Structural Efficiency Principle should be deleted in so far as it refers to new awards*". The Commission in Court Session decided not to amend principle 11 from the form in which it had existed prior to the establishment of the 2005 Wage Fixing Principles. Further, if the Commission in Court Session was of the view that the Structural Efficiency Principle was not truly part of principle 11, as argued by the respondent and accepted by the Commission at first instance in this case, its reaction to the submission made by the TLC to it, would be that it was unnecessary to delete the Structural Efficiency Principle from principle 11 of the Wage Fixing Principles. The Commission in Court Session did not, however, do this. Instead it considered the submission and decided at paragraph [37] that to "*amend the Principle on the basis proposed by the TLC for new awards would depart from the fundamental and important purpose of the Structural Efficiency Principle and we are not convinced that it ought to be done*". Prior to coming to this opinion, the Commission in Court Session briefly reviewed the history of the Structural Efficiency Principle in the following terms:-

> "*33 We have considered the submission by the TLC and respond to it as follows. In the August 1998 National Wage Case Decision (Print H4000) the AIRC discontinued the Restructuring and Efficiency Principle and established the Structural Efficiency Principle "to facilitate the type of fundamental review essential to ensure that existing award structures are relevant to modern competitive requirements of industry and in the best interests of both management and workers".*
>
> *34 In its April 1991 National Wage Case Decision (Print K0300) the AIRC analysed the effectiveness to that point of the parties' efforts to implement the Structural Efficiency Principles and pointed to facts which gave rise to concern. It made observations such as: "The emphasis has been based on the classification restructuring, training and associated issues; other areas have been addressed but with less emphasis". It observed there is no limitation of the agenda available for structural efficiency exercises and in particular it observed that where the parties may have made substantial changes to the award there seems to have been little impact at the enterprise level. This, the AIRC emphasised was inconsistent with the Structural Efficiency Principle. It was not contemplated that award change alone could achieve the purpose of the Principle and that change must be applied as necessary at the workforce level in order to achieve real gains.*
>
> *35 In short, the AIRC opined that application of the Principle was an essential step towards institutional reform which was a prerequisite to a more flexible system of wage fixation. The focus therefore was that the purpose of the Principle was to create a structured approach which would cause the parties to assess objectively their efforts to date but with focus on the attention of management and employees on measures to improve efficiency and productivity at the workplace level.*
>
> *36 The underpinning philosophy of the Structural Efficiency Principle was therefore changed to efficiency and productivity at the workplace level. It was not merely that awards ought to be recast so that they were in some way internally structurally efficient. The Principle is not about how an award, including a first award, looks. It is about how businesses function in terms of efficiency and productivity at the workplace level. In the December 1992 State Wage Case ((1992) 72 WAIG 191) the Commission in Court Session endorsed with approval this understanding of the intent and purpose of the Principle.*"

75 Due to the reasons expressed by the Commission in Court Session, we are of the opinion that the Structural Efficiency Principle is being referred to in principle 11 and applies to the making of a first award. Accordingly, and with respect, the Commission was in error in deciding the meaning of "*structural efficiency considerations*" in principle 11(a) in paragraph [78] of its reasons. Accordingly, the Commission misdirected itself in determining the proper rates of pay of the employees to be covered by the award.

76 In our opinion the Wage Fixing Principles required the application of the Structural Efficiency Principle as described by Commissioner Scott in *The Independent Schools Salaried Officers Association of Western Australia, Industrial Union of Workers v Anglican Schools Commission (Inc) and Others* (2000) 80 WAIG 3198. Commissioner Scott dealt with the issue in considerable detail at paragraphs [21]-[28]. The Commission said as follows:-

> *[21] The Wage Fixation Principles are established in a regime where the award forms the safety net on which enterprise bargaining builds. This safety net sets the minimum rates and conditions which are to apply, and in the case of an industry award, sets those common rights and*

obligations which protect the parties and form the platform for parties, at enterprise level, to provide for their own needs. It is noted that a number of the existing Wage Fixation Principles deal with existing awards in that they refer to an award or agreement being varied or another award being made (Principle 2) as opposed to the making of a first award, which is specifically dealt with under Principle 11. Principle 10 – Making or Varying an Award or Issuing an Order Which Has the Effect of Varying Wages or Conditions Above or Below the Safety Net assumes that there is already in existence an award which provides a safety net. In the present case, this does not apply. This is an application for a first award. The employees who would be covered by it are award free. Therefore, Principle 11 – First Award and Extension to Existing award, in particular paragraphs (a) and (b), apply. This states:

"11. First Award and Extension to an existing Award

The following shall apply to the making of a first award and an extension to an existing award:

(a) In the making of a first award, the main consideration shall be that the award meets the needs of the particular industry or enterprise while ensuring that employees' interests are also properly taken into account. Structural Efficiency considerations shall apply in the making of such an award.

(b) A new award shall have a clause providing for the minimum adult award wage [see Principle 9] included in its terms."

[22] Paragraph (a) requires that structural efficiency considerations are to apply. The Structural Efficiency Principle has been in operation since 1988 (68 WAIG 2412). It states:

"Structural Efficiency

Increases in wages and salaries or improvements in conditions shall be justified if the union(s) party to an award formally agree(s) to co-operate positively in a fundamental review of that award with a view to implementing measures to improve the efficiency of industry and provide workers with access to more varied, fulfilling and better paid positions. The measures to be considered should include but not be limited to:

- *establishing skill-related career paths which provide an incentive for workers to continue to participate in skill formation;*
- *eliminating impediments to multi-skilling and broadening the range of tasks which a worker may be required to perform;*
- *creating appropriate relativities between different categories of workers within the award and at enterprise level;*
- *ensuring that working patterns and arrangements enhance flexibility and the efficiency of the industry;*
- *including properly fixed minimum rates for classifications in awards, related appropriately to one another, with any amounts in excess of these properly fixed minimum rates being expressed as supplementary payments;*
- *updating and/or rationalising the list of respondents to awards;*
- *addressing any cases where award provisions discriminate against sections of the work-force."*

[23] For a number of years the Wage Fixation Principles specified that the main consideration in the making of a first award was the existing rates and conditions. This is no longer the test to be applied by the Principles. Rather it is that set out in Principle 11 that the main consideration is that the Award meets the needs of the particular industry or enterprise while ensuring that employees' interests are also properly taken into account. This Award, being a first award, will establish the minimum rates of pay and conditions of employment and will be the safety net on which future enterprise bargaining agreements may be established. I note from my experience in dealing with this industry and from the Commission's records that many enterprise bargaining agreements come before the Commission for registration and it appears that a number of the psychologists and social workers who would be the subject of this Award have their rates of pay and conditions of employment linked to some existing enterprise bargaining agreements. The parties to this Award have a clear understanding of and experience in enterprise bargaining such that they would make use of the Award as a minimum conditions of employment award and as a safety net upon which to develop their enterprise bargaining.

[24] The establishment of appropriate rates of pay and conditions of employment is not to be done by reference to comparative wage justice. Comparative wage justice has not been a method of fixing wages and conditions within the industrial relations system in Western Australia for some years. The focus has been on enterprise bargaining and structural efficiency. However, for the establishment of the safety net, appropriate minima must be established and the Structural Efficiency Principle sets out that appropriate wage relativities between different categories of employees within the award and at enterprise level, and the proper fixing of minimum rates for classifications and awards, related appropriately one to another, are to be considered. It is an

exercise which will require consideration of the duties and responsibilities of the positions and the circumstances under which the work is done. Guidance may be available from other awards and agreements for the purpose of properly establishing those rates and conditions. It is no longer appropriate to establish a nexus which will create linkages between awards which provide for flow-on. However, it is necessary, in the exercise of properly setting rates of pay and conditions of employment, to examine other rates of pay and conditions of employment of employees engaged in like capacities with like duties and responsibilities and in similar work environments.

[25] According to the information and the evidence before the Commission, many of the employers, in arriving at rates of pay for their employees, have taken account of a range of other rates and conditions including those applying to social workers and psychologists engaged in the government education sector, to teachers engaged in the independent schools sector, and to psychologists engaged in the NGSPS. There is a certain circularity about much of these comparisons. However, they all seem to provide some basis upon which to consider the salaries and conditions of employment to apply to professional persons engaged in, subject to what is to follow, relatively independent and, in some circumstances and some senses, relatively isolated positions. This Award will not cover a significant number of employees and the largest group being social workers engaged within the Catholic schools system.

[26] For the purpose of considering the appropriate approach to be taken to the establishment of an award to cover the terms and conditions of employees whose relationships with their employers was, until that point, award free, and for the purpose of considering some of the issues in dispute, it is necessary to set out some of the principles applicable to a first award. The principles regarding the making of an award are set out in the Reasons for Decision of Brinsden J. in Hamersley Iron Pty Limited -v- Association of Drafting, Supervisory and Technical Employees Western Australian Branch (IAC) 1984 (64 WAIG 852 at 853):

> *"No doubt where a union seeks an award for those persons over whom it has industrial coverage, and there is no bona fide opposition to it, a Commission will usually form the view that the substantial merits of the case require the making of an award but before reaching that conclusion it would need to consider all of the provisions of s.26(1) as, for example, the interested persons immediately concerned whether directly effected or not and where appropriate the interest of the community as a whole. I do not think it proper to erect as a proposition of law previous rulings that a union is prima facie entitled to an award. In all cases it will be necessary to reach the decision in light of the provisions of section 26 and it would seem that the union which desires an award would have the burden of establishing that on the substantial merits of the case an award should be made."*
>
> *(page 853)*

[27] It has been stated many times that the onus lies on the applicant in the making of a new award (94 CAR 579; 95 CAR 148; 43 QIG 205; 62 WAIG 2418; 63 WAIG 658; 64 WAIG 852). This means that before the Respondents have a case to answer, the Union needs to establish the basis for the terms it proposes to be granted. As noted later in these reasons in relation to a number of matters, the Commission has had to come to its conclusions without assistance of evidence from either side. In this type of jurisdiction, some flexibility is usually applied to enable some reasonable and fair conclusion. Without evidence, some assumptions may be necessary to enable conclusions to be reached.

[28] The purpose of an award is to provide industrial safeguards to protect both employees and employers. Rates of pay and conditions of employment which have been settled by agreement between other parties or between these parties in other circumstances are not an appropriate base upon which to establish, by arbitration, rates and conditions for these parties in these circumstances although they may be considered when they are "fair, proper and reasonable in all the circumstances" (AFMEPKIU -v- Anodisers WA and Others (CICS) 23 November 1998, Application No. 885 of 1997 (unpublished)) (Amalgamated Metal Workers and Shipwrights Union of Western Australia -v- Anchorage Butchers Pty Ltd (1982) 62 WAIG 1709) and (Municipal Officers Association and Melbourne Metropolitan Board of Works 165 CAR 478 @ 484 and re Transport Workers (Northern Territory) Award 1973 241 CAR 336). In this context, rates of pay and conditions contained within an enterprise bargaining agreement, consent award or consent award amendment may not be a useful guide. Awards which contain rates of pay which have been properly set through the minimum rates adjustment process, which have been properly assessed according to the appropriate criteria, and form an objective basis may be useful. Conditions of employment determined on their merits, having regard to all of the circumstances, can be relied upon for the purposes of arbitration. Otherwise, there is the need for the Commission to consider all of the circumstances including the merits of the case and determine the appropriate rates and conditions.

77 We agree with the exposition by Commissioner Scott that the principles need to be applied in this way when dealing with a first award as was the case here.

78 An examination of the award made indicates that it established a single minimum rate of wage to be paid to one classification of train driver employed by the respondent. The award is deficient because of this. There are for example no rates for locomotive drivers of bankers or yard drivers. An application of the Structural Efficiency Principle could well have led the Commission to the conclusion that such rates needed to be fixed.

79 The Commission at first instance faced issues very similar to those set out in paragraph [27] of Commissioner Scott's reasons. Ultimately the pay rates provided in an award must be fair, proper and reasonable in all of the circumstances. Rates and conditions contained within enterprise bargaining agreements, consent awards or consent award amendments are usually not a proper guide. Awards which contain rates of pay which have been properly set according to appropriate criteria form an objective basis and may be useful. Conditions of employment determined on their merits having regard to all of the circumstances can be relied upon for the purpose of arbitration, otherwise there is a need for the Commission to consider all of the circumstances including the merits of the case and determine the appropriate rates and conditions. This is to be done as part of the application of the Structural Efficiency Principle.

80 It seems to us that despite its misconception of the role of the Structural Efficiency Principle in principle 11(a), to some extent the Commission attempted to adopt this process. This is despite the fact that in our view the Commission misdescribed the position in saying the rates to be fixed in the award were other than minimum rates of pay. The Commission was not in error in not relying on consent awards. The Commission was entitled to conclude that the BHP Award rates which had been set by the Commission in Court Session had some relevance. We also note the Commission discounted the BHP Award rates for the reasons which are quoted above.

81 It seems that in establishing only one rate in the award the Commission did not comply with the Structural Efficiency Principle. Because they do not provide for all of the categories of driver the rates fixed do not establish a skill related career path which provides incentive for workers to participate in skill formation. As there is a lack of creation of the appropriate relativities between categories of workers within the award and at enterprise level there is a bar to ensuring that working patterns and arrangements enhance flexibility and efficiency in the industry. These are some of the effects of the application of the Structural Efficiency Principle which on the face of this award are not present.

82 For these reasons we uphold these grounds of appeal insofar as they assert the Commission was in error in failing to apply the Structural Efficiency Principle to the making of the award. The appropriate course is in our opinion to remit the matter to the Commission so that this may occur. This is a process which is appropriate to be carried out by the Commission at first instance. It is not something the Full Bench should engage in.

83 The appellant accepted that the Full Bench was bound to follow the Industrial Appeal Court decision of *BHP Billiton Iron Ore Pty Ltd v CFMEU* [2006] WASCA 49. This decision held that despite the impact of the Work Choices legislation on the jurisdiction of the Commission, a matter subject to appeal may presently still be remitted to the Commission at first instance for reconsideration.

84 The appellant did argue that if the appeal was allowed the application for the award should be dismissed. This submission depended in part upon which grounds of appeal the Full Bench might uphold. In our opinion, given the grounds of appeal allowed, we are of the view that remittal is the appropriate course. This view would not be altered by any acceptance of grounds of appeal 9-11 and 13-14.

Ground 9

85 This ground asserts that the Commission erred in using the BHP Award rates as a guide, for the reasons particularised in the ground. This ground is to some extent unnecessary to determine given the conclusions reached with respect to grounds 5, 7 and 8. The matter is to be remitted to the Commission so that the award can be determined in accordance with the Structural Efficiency Principle. In engaging in this exercise it would not be inappropriate in our opinion for the Commission to have regard to the rates paid under the BHP Award, so long as the Commission has regard to the particular facts and circumstances relevant to the setting of the BHP Award rates. These matters were taken into account by the Commission in paragraph [69] of the reasons for decision. If the BHP Award was to be considered by the Commission in the determination of the rates under the present award then the Commission should take into account whether there is evidence as to how those rates have been arrived at or the particular penalties, allowances and disabilities for which they represented compensation.

86 In all of the circumstances nothing more needs to be said about this ground.

Ground 10

87 This ground asserts that in awarding a rate which was only 10 percent less than the BHP Award Level 4 aggregate rate, the discounts being said to reflect the factors identified in the decision, the Commission failed to make any allowance or adequate allowance for the differences in shift rosters between the BHP employees and the appellant's employees.

88 In our opinion if the Commission is to have regard to the BHP Award rates in setting new rates under the award, it would be appropriate to make allowances for the differences in shift rosters between the BHP Award employees and the appellant's employees.

89 Again, in the circumstances nothing more needs to be said about this ground.

Ground 11

90 This ground asserts in the first instance that in awarding a single rate of pay to all employees covered by the award the Commission erred in failing to distinguish between work performed on the mainline and other work including the work performed by banker drivers. This issue has been referred to earlier in our reasons dealing with grounds 5, 7 and 8. In our opinion the award should have been structured so that there was a distinction between the work performed by the different categories of locomotive drivers. This issue can be addressed when the matter is remitted to the Commission at first instance.

91 Ground 11 also asserts that the Commission erred in awarding the same aggregate rate (which rate was intended to include compensation for all penalties and shift premiums) to employees who worked a 14 day on/14 day off 42 hour roster as to

employees who worked a 14 day on/7 day off 56 hour roster. In our opinion the rates to be awarded by the Commission when the matter is remitted to him should include some differentiation based on whether employees work a 14 day on/14 day off 42 hour roster or a 14 day on/7 day off 56 hour roster. This is because of the additional amount of overtime, shift and weekend penalties which an employee working a 56 hour roster would ordinarily incur over and above an employee working a 42 hour roster. Accordingly, there should be a wage difference between the aggregate wage of an employee working 42 hours a week and the aggregate wage of an employee working 56 hours a week.

92 Again, in the circumstances of remittal, nothing further needs to be said about this ground.

Leave Entitlements – Grounds 13 and 14

93 In these grounds the appellant asserts the Commission at first instance erred in awarding 13 weeks of long service leave after 10 years of service and in awarding 5 weeks of annual leave and an additional week for shift workers when the standard of the Commission is four weeks of annual and an additional week for shift workers.

94 In our opinion the issues of leave entitlements can be revisited when the matter is remitted to the Commission. However there is nothing unusual about long service leave and annual leave entitlements in the terms prescribed in the award by the Commission, for work which is done in the Pilbara region. By way of example one may have regard to, with respect to annual leave, clause 23(1)(a) of the *Metal Trades (General) Award 1966*, clause 23(6) of the *Public Service Award 1992*, clause 17(1)(a)(i) of the *Cargill Australian Limited – Salt Production and Processing Award 1988*, clause 9.2 of the *Dampier Salt Award 2004* and clause 22(1) of the *Iron Ore Production and Processing* (*Hamersley Iron Pty Ltd*) Award 1987. With respect to long service leave, examples are clause 34 of the *AWU Gold* (*Mining and Processing*) *Award* 1993, clause 9.4 of the *Dampier Salt Award* just cited and clause 24(6) of the just cited *Hamersley Iron Award*.

Conclusion

95 In our opinion, the appeal should be allowed, the order made by the Commission suspended and the matter remitted to the Commission for further hearing and determination. A minute of proposed orders will issue in those terms.

2006 WAIRC 05227

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SKILLED RAIL SERVICES PTY LTD
	APPELLANT
	-and-
	CONSTRUCTION, FORESTRY MINING AND ENERGY UNION OF WORKERS
	RESPONDENT
CORAM	FULL BENCH THE HONOURABLE M T RITTER, ACTING PRESIDENT SENIOR COMMISSIONER J F GREGOR COMMISSIONER J H SMITH
DATE	TUESDAY, 8 AUGUST 2006
FILE NO/S	FBA 11 OF 2006
CITATION NO.	2006 WAIRC 05227

Decision	Appeal allowed, order made by the Commission suspended, matter remitted to the Commission for further hearing and determination
Appearances	
Appellant	Mr J. Blackburn (of Counsel), by leave
Respondent	Mr D. Schapper (of Counsel), by leave

Order

This matter having come on for hearing before the Full Bench on 26, 27 and 29 June 2006, and having heard Mr J Blackburn (of Counsel), by leave, on behalf of the appellant, and Mr D Schapper (of Counsel), by leave, on behalf of the respondent, and reasons for decision having been delivered on 3 August 2006, it is this day, 8 August 2006, ordered as follows:-

1. The appeal is allowed.
2. The order made by the Commission on 17 March 2006 is suspended.
3. The matter is remitted to the Commission for further hearing and determination.

By the Full Bench

[L.S.]

(Sgd.) M T RITTER,
Acting President.

FULL BENCH—Unions—Application for Alteration of Rules—

2006 WAIRC 05131

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	UNITED FIREFIGHTERS UNION OF WESTERN AUSTRALIA **APPLICANT**
CORAM	FULL BENCH THE HONOURABLE M T RITTER, ACTING PRESIDENT COMMISSIONER J H SMITH COMMISSIONER J L HARRISON
HEARD	WEDNESDAY, 28 JUNE 2006
DELIVERED	TUESDAY, 25 JULY 2006
FILE NO.	FBM 1 OF 2006
CITATION NO.	2006 WAIRC 05131

CatchWords	Industrial Law (WA) – Application to amend rules of organisation by substitution of new set of rules – New rules relate to altering name of organisation and qualification of persons for membership – Incorrect form of rules included in application – Request Deputy Registrar to inform organisation to correct error – Statutory requirements of *Industrial Relations Act* 1979 (WA) (as amended) – Application granted – *Industrial Relations Act* 1979 (WA) (as amended), Division 4 of Part II, s26, s26(1)(a), s55, s55(2), (3), (4)(a), (b), (c), (d), (e), (5), s56, s58(3), s62(1), (2), (3), (4) – *Industrial Relations Commission Regulations* 2005, r69, r69(3), r70, r70(3)
Decision	Application granted
Appearances	
Applicant	Mr J Walker

Reasons for Decision

THE ACTING PRESIDENT:

The Application

1 The applicant is an organisation of employees that is registered under Division 4 of Part II of the *Industrial Relations Act 1979* (WA) (as amended) (*the Act*).

2 The applicant seeks to amend its rules by the substitution of a new set of rules (the new rules). The new rules contain alterations that relate to the name of the applicant and the qualification of persons for membership. Accordingly, pursuant to s62(2) of *the Act*, the applicant seeks the authorisation of the Full Bench for the Registrar of the Commission to register these alterations of the rules.

3 As stated, the applicant not only seeks to alter the rules relating to its name and qualification of persons for membership but to go further than this by the substitution of the new rules which cover additional matters. The alteration to the new rules, other than insofar as they relate to the name of the applicant and the qualification of persons for membership, would appear to have to comply with s62(3) of *the Act* before they may be registered and alteration takes effect pursuant to s62(1) of *the Act*.

4 An application to substitute a new set of rules, where the substitution alters the name of the organisation or qualification of persons for membership, must be made to the Full Bench in accordance with regulation 70 of the *Industrial Relations Commission Regulations 2005* (*the Regulations*). *The Regulations* do not, and probably could not, however have the effect that the applicant need not also comply with the requirements of s62(3) of *the Act* with respect to the new rules insofar as they affect matters other than an alteration of the name of the applicant and the qualification of persons for membership.

The Proposed Rule Changes

5 In both the existing and new rules, it is rule 1 which states the name of the applicant. In both the existing and new rules, it is rule 5 which sets out eligibility for membership.

6 Set out below are rules 1 and 5 of the rules of the applicant. The form in which they are set out shows the alterations which are sought to be made. This is indicated by the scoring out of any words to be deleted from the existing rules and by the inclusion in bold of words to be inserted into the new rules.

"1 – NAME

The name of the Union shall be the "United Firefighters Union of ~~Western~~ Australia ***West Australian Branch****""*

"5 - ELIGIBILITY

The conditions of eligibility for membership of the Union are as follows:

(a) The membership of the Union is unlimited in number.

(b) Any person who is employed in, or usually employed or appointed in or in connection with:

(1) The prevention, suppression or extinguishment of fires.

(2) The protection of life and property through the provision of rescue services at the scene of accidents, explosions or other emergencies other than in the capacity of a registered medical practitioner.

(3) The handling of spillages of toxic or hazardous materials and the disposal of those in emergency situations; or

(4) The sale, supply, installation, maintenance, repair and/or inspection of fire protection equipment other than fixed or semi-fixed fire protection systems;

shall be eligible for membership of the Union.

Without limiting the generality of the foregoing, membership of the Union shall include persons referred to in paragraph (b) above employed:

(i) By a Fire Brigades Board, Commission or Authority.

(ii) In the service of any public institution or Authority of the State Government the duties of which are not materially different to those of persons employed by a Fire Brigades Board, Commission or Authority.

(iii) In private industry, in any rank, grade or classification of industrial Firefighter or industrial Fireman or in any employment the duties of which are not materially different from the duties of one of these employments, or in any position in respect of which the duties are similar to those of persons employed by any Fire Brigades Board, Commission or Authority.

*(c) Any person who is an ~~elected~~ **appointed and employed Professional** Officer of the Union shall be eligible for membership of the Union.*

(d) Notwithstanding the provisions of Sub-Rule (b) the Union may at its discretion decline to admit to membership any person otherwise included within this Rule:

(1) Who does not make an application as required by the Rules, or

(2) Who does not pay the amount properly payable in respect of admission to membership, or

(3) Who is of general bad character.

(e) Provided, however, that the following persons shall not be eligible for membership of the Union:

(1) Persons engaged in the following industries or callings, namely: timber and saw milling industry; afforestation and silviculture; sugar growing; cane cutting; milling and refining; the manufacture of chemicals and gases; metalliferous mining; smelting; reducing and refining of ores; mining for brown coal including the extraction of the by-products; the search and/or drilling for hydrocarbons, the production, processing and transmission of hydrocarbons, the distillation of oils and all labour incidental thereto; as surface labourers engaged about or in connection with all brown coal mines; the manufacture and milling of paper and all employees other than craftsmen or engine drivers engaged in boring for water or oil or engaged in refining such oil or in the extraction of the oil products.

(2) Persons employed as licensed aircraft engineers or pilots in civil aviation.

(3) Persons employed in electrical, electronics or similar functions whether as tradespersons and their assistants or technicians or other sub-professional electrical or electronics employees however described in or in connection with the installation, maintenance, repair and/or inspection of fire protection or firefighting equipment.

(4) Persons engaged in any clerical capacity and/or engaged in the occupation of shorthand writers and typists and/or on calculating, billing or other machines designed to perform or assist in performing any clerical work whatsoever, provided that this exclusion shall not apply to persons engaged as uniformed employees of a public firefighting authority who are engaged as attendants, operators, supervisors or trainees in watchrooms or control rooms.

(5) All persons engaged as salaried Officers or in a professional, technical, sales, clerical and supervisory capacity employed by a gas company.

(6) Employees of the Department of Conversation(sic) and Land Management and Water Authority of Western Australia.

(7) Members of the Western Australian Police Force and the Australian Federal Police or any successor to those said Police Forces; of any persons who are in employment and/or training (including those designated or described as police cadets) being employment and/or training which leads directly to the employee and/or trainee being qualified for membership of any of the Police Forces specified in this paragraph.

(8) Persons eligible to be Members of the Administrative and Clerical Officers' Association pursuant to it's eligibility rules as at 11 November, 1988 as reproduced in Appendix "B" to these Rules except those persons eligible to be Members of the Federal Firefighters Union pursuant to its eligibility rule as at 11 November, 1988 as reproduced in Appendix "A" to these Rules.

(9) Persons eligible to be Members of the Health and Research Employees' Association of Australia pursuant to its eligibility rules as at 31 May, 1989, as reproduced in Appendix "C" of these Rules.

(10) Persons eligible to be Members of the Federal Municipal and Shire Council Employees' Union of Australia pursuant to its eligibility rule as at 11 November, 1988 as reproduced in Appendix "D" to these Rules.

(11) Persons eligible to be Members of the Municipal Officers' Association of Australia pursuant to its eligibility rule as at 11 November, 1988 as reproduced in Appendix "E" to these Rules.

(12) Any person employed by:

(i) The Crown in right of the State.

(ii) Any statutory body representing the Crown in right of the State; or

(iii) Any instrumentality or authority acting under the control of or on behalf of or in the interest of the Crown in right of the State; or

(iv) Any company or corporation in which at least fifty per centum of the issued shares are held by or for or on behalf of or in the interest of the Crown in right of the State or if there are no issued shares, in which the governing body by whatever name called includes nominees appointed by or on behalf of or in the interests of the Crown in right of the State;

other than by a Fire Brigades Board, Commission or Authority.

(13) Any person employed in an administrative, clerical or professional capacity (other than in any rank, grade or classification or Firefighter) by a Fire Brigades Board, Commission or Authority shall not be eligible for membership of the Union.

(14) Any person employed:

(a) By the Western Australian Bush Fires Board; or

(b) As storeman, store officer, general assistant and technical officer by the Western Australian Fire Brigades Board.

(15) Any person employed by the Australian Public Service, the service of any public institution or authority of the Australian Government whether such service as is the Australian Public Service or not."

7 The expression "*Professional Officer*" is defined in rule 2 of the new rules to mean "*a person appoint* [sic] *and employed by the Union to undertake either industrial relations or research work*".

The Factual Background

8 The application to the Full Bench was supported by a statutory declaration sworn by Mr David John Bowers on 20 April 2006 (the first statutory declaration). Mr Bowers is the secretary of the applicant and has held this position since October 2005. In circumstances which will be later set out, Mr Bowers swore a second statutory declaration on 5 July 2006 (the second statutory declaration). The application was also supported by a set of written submissions.

9 The first statutory declaration deposes to the reasons for seeking the new rules and the steps which have been taken to properly amend the rules of the applicant in accordance with those rules, *the Act* and *the Regulations*. I will set out below paragraphs [4] – [10] of the first statutory declaration. The reference to "*UFU of A*" in paragraph [4] is a reference to the United Firefighters Union of Australia. The date in the first dot point under paragraph [7] was acknowledged during the hearing to be incorrect. The date, as shown in attachment 5, should have been 29 March 2006. Paragraphs [4] – [10] of the first statutory declaration depose:-

"*4. Following a comprehensive review of the rules of the union's counterpart federal body, the UFUofA, the National Committee of Management in December 2005 adopted a range of rule changes to the national rules. Apart from a range of administrative changes the most significant rule change was a new requirement for candidates nominating for the positions of either Branch Secretary or Branch Assistant Secretary to be financial members of the union. Previously there was no requirement. The other significant change was to amend the eligibility rule to allow employed professional officers of the union eligibility to be members. Both of these changes required the State organisation to consider rule changes in the same terms to ensure the continued integrity of the unions section 71(2) counterpart certificate.*

5. A review of the State organisations rules was undertaken with a view to ensuring the continued direct alignment with the federal counterparts rules. It was also proposed that the State organisation adopt and align the name of the state organisation with the corresponding name

of the Branch of the federal counterpart. Operating under two separate names has caused administrative difficulties for some time.

6. *The State organisation's Committee of Management considered the proposed rule changes at a meeting held 8th March 2006. The Committee of Management authorised me to call a Special General Meeting to have the proposed rules presented for consideration of the membership of the union.*

7. *In accordance with UFUofWA rule 40 - Amendment of Rules and Section 62 Industrial Relations Act 1979 the following actions were taken by me to progress the proposed rule change and to ensure all reasonable steps were taken to adequately inform the members of the proposed rule alteration and the reasons therefor.*

   - *A notice was published in the West Australian newspaper on the 29th July 2003 advertising the time and date of the Special General Meeting called for the purpose of considering the proposed rule changes. (See attachment 5)*
   - *In accordance with UFUofWA rule 40 - Amendment of Rules, a copy of the notice for the Special General Meeting called for the purpose of considering the proposed rule changes was posted by ordinary mail to each workplace on the 27th March 2006 (See Attachment 6). A copy of the notice was placed on the notice board at the front of the Union Office. A copy of the notice was also sent by facsimile to all workplaces. The practice of this union is for all faxes sent by the union to be placed on workplace noticeboards.*

8. *At the Special General Meeting held 12th April 2006, a majority of financial members present approved the proposed new rules and authorised the Secretary to make application to the Western Australian Industrial Relations Commission to register the new rules in accordance with the decision of the meeting. Minutes of the meeting were distributed to all workplaces. And posted on the union's web site (See attachment 7)*

9. *The required quorum for a general meeting is one twentieth of the financial members of the Union. The financial membership at the time of the Special General Meeting 947 resulting in a quorum requirement of at least 48 members. The quorum requirement was met with 59 members attending.*

10. *In accordance with UFUofWA sub-rule (2) of rule 40 - Amendment of Rules and section 62 (b) of the Act, a notice publicising the rule change adopted by the general meeting, the reason therefor and advising that members can object to the proposed alteration by forwarding a written objection to the Registrar of the WAIRC within 14 days, was posted by ordinary mail to all workplaces and placed on the notice board at the front of the union office (See attachment 8).*"

10 Attachment 6 to the first statutory declaration was a notice headed "*Special General Meeting*", dated 21 March 2006 and signed by Mr Bowers. The notice advised that the applicant was to hold a Special General Meeting to consider changes to the rules of the applicant. The notice showed the date (12 April 2006), time and venue of the Special General Meeting. The notice said that copies of the proposed rule changes had been distributed to all workplaces and posted on the applicant's website. The notice also said that copies could also be obtained by telephoning the applicant, with the applicant's telephone number being provided. The notice also said that the "*purpose of the rule change is to update the current State bodies rules in line with recent changes to the National UFU Rules*". Attached to the notice was a document which showed with respect to each rule, on the same page (split down the middle) the existing rules of the applicant and the new rules.

11 The reference in paragraph [9] of the first statutory declaration to the quorum requirement for a Special General Meeting accurately summarises the contents of rule 14(4) of the applicant.

12 Attachment 8, referred to in paragraph [10] of the first statutory declaration, was a circular dated 13 April 2006 signed by Mr Bowers. The circular was headed "*Notice of Amendment of Union Rules*". The notice set out that, at the Special General Meeting held on 12 April 2006, it was resolved to adopt the new set of rules "*…for the State body of Union in accordance with the amendments endorsed by the meeting. The purpose of the rule changes are to continue the close alignment of the State rules with the National rules of the Union. This includes a change of name of the State body to the United Firefighters Union of Australia West Australian Branch.*" The circular then said that a copy of the new rules was attached. The circular also provided under the heading "*Objection to the Alteration*" that in, "*accordance with UFU of WA Rule 40 – Amendment of Rules, members can object to the proposed alteration by forwarding a written objection to*" the Registrar of the Commission. The address of the Commission registry was provided. The circular concluded by saying that any such objection should be made within 14 days of the date of the notice.

13 As stated in the first statutory declaration, it is rule 40 of the applicant which provides for the alteration of the rules. This rule in full is as follows:-

"***40 - AMENDMENT OF RULES***

(1) No amendment, repeal or alteration of the Rules of the Union shall be made unless the amendment, repeal or alteration has been passed and approved by a vote of the majority of Members of the Union present in person at a general meeting, special general meeting or annual general meeting of the Union so called by a minimum of fourteen (14) days previous notice specifying the time, place and detail and reason therefore of the amendment, repeal or alteration to be considered by the meeting has been given by publishing a copy of a notice

thereof in a newspaper circulating generally in the district in which the office of the Union is situated, by posting a copy of the notice in a conspicuous place outside that office and by posting a copy of the notice at all places of work.

(2) The Secretary shall publicise any Rule change adopted by a general meeting, special general or annual general meeting of the Union, the reasons therefore and that the Members or any of them can object to the proposed alteration by forwarding a written objection to the Registrar within 14 days after the date of resolution by written notices thereof being displayed and made available to the Members at the registered office of the Union and at all places of work and in other ways likely to come to the attention of Members.

(3) Notwithstanding anything contained in this Rule where the Branch is required by law to amend its Rules such amendment when endorsed by a simple majority of the Committee of Management shall be deemed to have been made in compliance with the procedural requirements of this Rule."

14 The word "*Registrar*" is defined in rule 2 to mean the "*Registrar of the Western Australian Industrial Relations Commission*".

15 Unfortunately, the version of the rules which was included as part of attachment 6 to the first statutory declaration did not contain the correct form of rule 40(1) of the rules. The same occurred with respect to attachment 2, which was said to be a certified copy of the new rules. In the version of rule 40(1) attached, the words "*detail and reason therefore of the amendment, repeal or alteration to be considered by*" were omitted from rule 40(1) and were replaced with the words "*objects of*". The discovery of this error was only made after the hearing of the application. The reason for the errors appears to be as follows. On 1 October 2003, the Commission registered an alteration to rule 40 of the applicant, following an application being made by the applicant to do so on 14 August 2003. The application sought to delete the then existing subrules (1) and (2) of rule 40 and insert two replacement subrules, in the terms reflected in the quotation of rule 40 above. One aspect of the amendment to rule 40(1) was the deletion of the words "*objects of*" and their replacement by the words "*detail and reason therefore of the amendment, repeal or alteration to be considered by*". It appears that this part of the amended rule 40(1) was not reproduced in attachments 2 and 6 to the first statutory declaration, although in other respects the amended rules 40(1) and (2) were reproduced. Fortunately, these errors do not appear fatal to the present application. This is because, as will be seen, the notice which was issued in purported compliance with rule 40(1), in setting out the "*objects of*" the meeting, set out in fact the "*detail and reason therefore of the amendment, repeal or alteration to be considered by*" the meeting. This is because these two requirements describe similar processes.

16 When the errors to attachments 2 and 6 were discovered, the Full Bench authorised Deputy Registrar Tuna to bring this to the attention of the applicant and to invite it to file documents correcting the errors. This occurred, and led to the filing of the second statutory declaration on 5 July 2006. The second statutory declaration aplogised for the errors in the attachments to the first statutory declaration. It also attached in effect, substitutes for the documents which were attachments 2 and 6 to the first statutory declaration. These attachments contain the correct version of rule 40 of the rules.

17 A notice of the application to the Full Bench to alter the rules was published in the Western Australian Industrial Gazette on 24 May 2006 ((2006) 86 WAIG 1168). The notice set out that an application had been made by the applicant to the Full Bench for the new rules to be substituted for the existing rules. The notice also set out that the proposed new set of substitute rules included rules which relate to a change of name and to the qualifications of persons for membership of the applicant. The existing rules and proposed rules with respect to the name of the applicant and eligibility of persons for membership were then set out. The notice provided that the matter had been listed before the Full Bench at 10.30 am on 28 June 2006 and provided that a copy of the rules of the applicant and the proposed set of substitute rules could be inspected at the address of the Commission registry. The notice also said that:-

"*Any organisation registered under the Industrial Relations Act 1979, or any person who satisfies the Full Bench that he/she has a sufficient interest or desires to object to the application may do so by filing a notice of objection in accordance with the Industrial Relations Commission Regulations 2005.*"

18 Neither prior to nor at the hearing of the application was any objection made by any person to the proposed rule alterations. Additionally, Mr Walker, who appeared for the applicant at the hearing, indicated that he was not aware of any objection having been made to the applicant about the application to substitute the new rules

The Statutory Requirements

19 I have earlier referred to the requirement for the application to be in accordance with regulation 70 of *the Regulations*. Regulation 70(3) provides that the provisions of regulation 69 apply with necessary modifications to an application to substitute a new set of rules, and in addition if the application is made to the Full Bench it must be accompanied by three copies of the new rules certified as being correct by the president of secretary of the organisation. This subregulation was complied with by the lodging with the office of the Registrar attachment 2 to the second statutory declaration. The documents specified in regulation 69(3) of *the Regulations* have also been lodged with the office of the Registrar, by the filing of the documents attached to the first and second statutory declarations.

20 As stated, the application is authorised by s62(2) of *the Act*. By s62(4) of *the Act*, s55, s56 and s58(3) of *the Act* "*apply, with such modifications as are necessary, to and in relation to an application by an organisation for alteration of a rule of a kind referred to in subsection (2)*".

21 Section 55(2) of *the Act* refers to the publication of, in this case and by reference to s62(4), a notice of the application of the alteration to the rules. As stated, this occurred by the publication of the notice in the Western Australian Industrial Gazette on 24 May 2006. Section 55(3) of *the Act* provides that an application shall not be listed for hearing before the Full Bench until the expiration of 30 days from the day on which the application of the notice referred to in s55(2) has occurred. This

subsection has been complied with, as the application was not heard until 28 June 2006, in excess of 30 days after the date of publication of the notice in the Western Australian Industrial Gazette.

22 By virtue of s62(4) of *the Act*, s55(4) applies to the present application "*with such modifications as are necessary*". Section 55(4) of *the Act* provides that the Full Bench shall refuse an application by an organisation unless it is satisfied that:

> "*(a) the application has been authorised in accordance with the rules of the organisation;*
>
> *(b) reasonable steps have been taken to adequately inform the members —*
>
> *(i) of the intention of the organisation to apply for registration;*
>
> *(ii) of the proposed rules of the organisation; and*
>
> *(iii) that the members or any of them may object to the making of the application or to those rules or any of them by forwarding a written objection to the Registrar,*
>
> *and having regard to the structure of the organisation and any other relevant circumstance, the members have been afforded a reasonable opportunity to make such an objection;*
>
> *(c) in relation to the members of the organisation —*
>
> *(i) less than 5% have objected to the making of the application or to those rules or any of them, as the case may be; or*
>
> *(ii) a majority of the members who voted in a ballot conducted in a manner approved by the Registrar has authorised or approved the making of the application and the proposed rules;*
>
> *(d) in relation to the alteration of the rules of the organisation, those rules provide for reasonable notice of any proposed alteration and reasons therefor to be given to the members of the organisation and for reasonable opportunity for the members to object to any such proposal; and*
>
> *(e) rules of the organisation relating to elections for office —*
>
> *(i) provide that the election shall be by secret ballot; and*
>
> *(ii) conform with the requirements of section 56(1),*
>
> *and are such as will ensure, as far as practicable, that no irregularity can occur in connection with the election.*"

23 Due to the contents of the first statutory declaration, I am satisfied the present application has been authorised in accordance with the rules of the applicant, thereby satisfying the requirements contained in s55(4)(a) of *the Act*, as necessarily modified. The rules alteration was passed and approved by a vote of the majority of members of the applicant present at the Special General Meeting which took place on 12 April 2006. This was in accordance with rule 40(1) of the rules of the applicant. Also, as required by that rule, a minimum of 14 days notice had been given, specifying the time, place, detail and reason for the alterations to be considered by the meeting by publishing a copy of the notice in a newspaper circulating generally in the district in which the office of the applicant is situated. The office of the applicant is situated in Mount Lawley and notice of the meeting was published in the West Australian newspaper on 29 March 2006. Notification on this date satisfied the requirement of "*a minimum of 14 days previous notice*" before the Special General Meeting. Also, the West Australian is plainly a newspaper circulating generally in the district in which the applicant's office is situated. The notice in the West Australian stated the "*purpose of the rule changes is to update the State Unions* [sic] *Rules and to include recent changes to the United Firefighters Union of Australia's Rules*". The notice said that copies of the proposed rules were available on the applicant's website, distributed to all workplaces and could be obtained from the applicant's office. Rule 40(1) also provides that a copy of the notice is to be posted in a conspicuous place outside the office of the applicant and by posting a copy of the notice at all places of work. The first statutory declaration establishes that this occurred.

24 It is a concern that the version of the rules which was made available to members contained the error in rule 40(1) noted earlier. In this case however I do not think this leads to the application not succeeding. This is because of the minor nature of the error, the fact that the subrule was in any event complied with and the lack of objection to the application.

25 The requirements of rule 40(2) were also complied with, as established by paragraph [10] of the first statutory declaration and attachment 8 to that statutory declaration.

26 The facts set out in the first statutory declaration also satisfy me that reasonable steps have been taken to adequately inform the members of the applicant of the three matters set out in s55(4)(b) of *the Act*, as necessarily modified for the purposes of considering a rule alteration application. Accordingly, I am satisfied that members of the applicant have been afforded a reasonable opportunity to make any objection to the proposed alteration of the rules.

27 With respect to s55(4)(c) of *the Act*, the facts set out in the first statutory declaration establish that less than 5% of the members of the applicant have objected to the alteration of the rules application. In fact, no-one has objected to the making of the rules alteration application. Accordingly, I am satisfied that the requirement contained in s55(4)(c) of *the Act* has been complied with.

28 I am also satisfied that s55(4)(d) of *the Act*, as necessarily modified, has been complied with. I make this finding on the basis of the contents of the rules relating to notice being provided to the members, set out earlier, and the actions referred to in the first statutory declaration which show what the applicant did to provide notice to members and a reasonable opportunity for those members to object to the proposed rule alterations.

29 The requirements of s55(4)(e) of *the Act* are not relevant to the present application.

30 Section 55(5) of *the Act* relevantly provides that:-

> "*…the Full Bench shall refuse an application by the organisation under this section if a registered organisation whose rules relating to membership enable it to enrol as a member some or all of the persons eligible, pursuant to the rules of the first-mentioned organisation, to be members of the first-mentioned organisation unless the Full Bench is satisfied that there is good reason, consistent with the objects prescribed in section 6, to permit registration.*"

31 This subsection does not apply to the present application.

32 Additionally, s56 of *the Act* is not relevant to the present application. Neither is s58(3) of *the Act*, which provides for applications for authorisation of exclusionary membership rules.

33 Due to all of the above, the statutory requirements relevant to the application for the alteration of the rules of the applicant have been complied with.

Conclusion

34 Section 62(2) of *the Act* does not set out any additional criteria to guide the Full Bench in determining whether to give the authorisation referred to. The Full Bench should act, of course, in accordance with s26 of *the Act* and, in particular, as provided for in s26(1)(a), according to equity, good conscience and the substantial merits of the case. In my opinion, these considerations lead to the conclusion that the application ought to be granted. This is because all of the statutory requirements have been complied with. The rules of the applicant authorise the alteration to the rules which are sought and no-one has objected to the application. The facts set out in the first statutory declaration indicate there are good reasons which support the alterations sought. I have earlier referred to the errors made in relation to the reproduction of rule 40(1) and my conclusion that this would not lead to the application failing.

35 Accordingly, in my opinion, the Full Bench ought to grant the application and authorise the Registrar to register the alteration to the rules of the applicant, as sought by the application, in accordance with s62(1) and (2) of *the Act*. A minute of proposed orders in accordance with s35 of *the Act* should issue in the appropriate terms.

COMMISSIONER J H SMITH:

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

COMMISSIONER J L HARRISON:

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

2006 WAIRC 05136

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	UNITED FIREFIGHTERS UNION OF WESTERN AUSTRALIA **APPLICANT**
CORAM	FULL BENCH THE HONOURABLE M T RITTER, ACTING PRESIDENT COMMISSIONER J H SMITH COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 26 JULY 2006
FILE NO/S	FBM 1 OF 2006
CITATION NO.	2006 WAIRC 05136

Decision	Application granted
Appearances	
Applicant	Mr J Walker

Order

This matter having come on for hearing before the Full Bench on 28 June 2006, and having heard Mr J Walker on behalf of the applicant, and reasons for decision having been delivered on 25 July 2006, it is this day, 26 July 2006, ordered that the Registrar be authorised to register the following alterations to the rules of the applicant:-

(1) That existing Rule 1 – Name be deleted and substituted therefor the following new Rule 1 – Name:-

"*1 – NAME*

The name of the Union shall be the "United Firefighters Union of Australia West Australian Branch."

(2) That existing Rule 5 – Eligibility be deleted and substituted therefor the following new Rule 5 – Eligibility:-

"5 - ELIGIBILITY

The conditions of eligibility for membership of the Union are as follows:

(a) The membership of the Union is unlimited in number.

(b) Any person who is employed in, or usually employed or appointed in or in connection with:

(1) The prevention, suppression or extinguishment of fires.

(2) The protection of life and property through the provision of rescue services at the scene of accidents, explosions or other emergencies other than in the capacity of a registered medical practitioner.

(3) The handling of spillages of toxic or hazardous materials and the disposal of those in emergency situations; or

(4) The sale, supply, installation, maintenance, repair and/or inspection of fire protection equipment other than fixed or semi-fixed fire protection systems;

shall be eligible for membership of the Union.

Without limiting the generality of the foregoing, membership of the Union shall include persons referred to in paragraph (b) above employed:

(i) By a Fire Brigades Board, Commission or Authority.

(ii) In the service of any public institution or Authority of the State Government the duties of which are not materially different to those of persons employed by a Fire Brigades Board, Commission or Authority.

(iii) In private industry, in any rank, grade or classification of industrial Firefighter or industrial Fireman or in any employment the duties of which are not materially different from the duties of one of these employments, or in any position in respect of which the duties are similar to those of persons employed by any Fire Brigades Board, Commission or Authority.

(c) Any person who is an appointed and employed Professional Officer of the Union shall be eligible for membership of the Union.

(d) Notwithstanding the provisions of Sub-Rule (b) the Union may at its discretion decline to admit to membership any person otherwise included within this Rule:

(1) Who does not make an application as required by the Rules, or

(2) Who does not pay the amount properly payable in respect of admission to membership, or

(3) Who is of general bad character.

(e) Provided, however, that the following persons shall not be eligible for membership of the Union:

(1) Persons engaged in the following industries or callings, namely: timber and saw milling industry; afforestation and silviculture; sugar growing; cane cutting; milling and refining; the manufacture of chemicals and gases; metalliferous mining; smelting; reducing and refining of ores; mining for brown coal including the extraction of the by-products; the search and/or drilling for hydrocarbons, the production, processing and transmission of hydrocarbons, the distillation of oils and all labour incidental thereto; as surface labourers engaged about or in connection with all brown coal mines; the manufacture and milling of paper and all employees other than craftsmen or engine drivers engaged in boring for water or oil or engaged in refining such oil or in the extraction of the oil products.

(2) Persons employed as licensed aircraft engineers or pilots in civil aviation.

(3) Persons employed in electrical, electronics or similar functions whether as tradespersons and their assistants or technicians or other sub-professional electrical or electronics employees however described in or in connection with the installation, maintenance, repair and/or inspection of fire protection or firefighting equipment.

(4) Persons engaged in any clerical capacity and/or engaged in the occupation of shorthand writers and typists and/or on calculating, billing or other machines designed to perform or assist in performing any clerical work whatsoever, provided that this exclusion shall not apply to persons engaged as uniformed employees of a

public firefighting authority who are engaged as attendants, operators, supervisors or trainees in watchrooms or control rooms.

(5) All persons engaged as salaried Officers or in a professional, technical, sales, clerical and supervisory capacity employed by a gas company.

(6) Employees of the Department of Conversation(sic) and Land Management and Water Authority of Western Australia.

(7) Members of the Western Australian Police Force and the Australian Federal Police or any successor to those said Police Forces; of any persons who are in employment and/or training (including those designated or described as police cadets) being employment and/or training which leads directly to the employee and/or trainee being qualified for membership of any of the Police Forces specified in this paragraph.

(8) Persons eligible to be Members of the Administrative and Clerical Officers' Association pursuant to it's eligibility rules as at 11 November, 1988 as reproduced in Appendix "B" to these Rules except those persons eligible to be Members of the Federal Firefighters Union pursuant to its eligibility rule as at 11 November, 1988 as reproduced in Appendix "A" to these Rules.

(9) Persons eligible to be Members of the Health and Research Employees' Association of Australia pursuant to its eligibility rules as at 31 May, 1989, as reproduced in Appendix "C" of these Rules.

(10) Persons eligible to be Members of the Federal Municipal and Shire Council Employees' Union of Australia pursuant to its eligibility rule as at 11 November, 1988 as reproduced in Appendix "D" to these Rules.

(11) Persons eligible to be Members of the Municipal Officers' Association of Australia pursuant to its eligibility rule as at 11 November, 1988 as reproduced in Appendix "E" to these Rules.

(12) Any person employed by:

(i) The Crown in right of the State.

(ii) Any statutory body representing the Crown in right of the State; or

(iii) Any instrumentality or authority acting under the control of or on behalf of or in the interest of the Crown in right of the State; or

(iv) Any company or corporation in which at least fifty per centum of the issued shares are held by or for or on behalf of or in the interest of the Crown in right of the State or if there are no issued shares, in which the governing body by whatever name called includes nominees appointed by or on behalf of or in the interests of the Crown in right of the State;

other than by a Fire Brigades Board, Commission or Authority.

(13) Any person employed in an administrative, clerical or professional capacity (other than in any rank, grade or classification or Firefighter) by a Fire Brigades Board, Commission or Authority shall not be eligible for membership of the Union.

(14) Any person employed:

(a) By the Western Australian Bush Fires Board; or

(b) As storeman, store officer, general assistant and technical officer by the Western Australian Fire Brigades Board.

(15) Any person employed by the Australian Public Service, the service of any public institution or authority of the Australian Government whether such service as is the Australian Public Service or not."

By the Full Bench

(Sgd.) M T RITTER,
Acting President.

[L.S.]

COMMISSION IN COURT SESSION—Awards/Agreements—Variation of—

2006 WAIRC 04600

METAL TRADES (GENERAL) AWARD 1966

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING & KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH AND THE COMMUNICATIONS, ELECTRICAL, ELECTRONIC, AND ENERGY INFORMATION, POSTAL, PLUMBING AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING AND ELECTRICAL DIVISION WA BRANCH
	APPLICANTS
	-v-
	ANODISERS W.A. AND OTHERS
	RESPONDENTS
CORAM	SENIOR COMMISSIONER J F GREGOR COMMISSIONER J H SMITH COMMISSIONER J L HARRISON
HEARD	TUESDAY, 11 MARCH 2003, TUESDAY, 14 DECEMBER 2004, WEDNESDAY, 27 APRIL 2005, THURSDAY, 28 APRIL 2005, MONDAY, 20 MARCH 2006, WEDNESDAY, 4 AUGUST 2004
DELIVERED	MONDAY, 26 JUNE 2006
FILE NO.	APPL 740 OF 2002
CITATION NO.	2006 WAIRC 04600

CatchWords	Award variation - casual loading – de-aggregating of components – increase granted - *Industrial Relations Act, 1979 s.26, s.40, s.40B*
Result	Casual loading granted
Representation	
Applicant	Mr L. Edmonds, of Counsel, for the Applicant Unions
Respondent	Mr J. Uphill for the Respondents and Mr G. McCorry intervening for the Motor Traders Association

Reasons for Decision

1 This application was originally filed in May 2002 by the application the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers – Western Australian Branch and the Communications, Electrical, Electronic and Energy Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division, WA Branch (the Unions) sought to vary the Metal Trades General Award 1966 (the Award) by:

- Increasing the casual loading from 20% to 25%
- Altering the provisions for part time and casual employment under the Award to give effect to the Decision of the Full Bench of the Australian Industrial Relations Commission in Print No. T4991 and
- Inserting new provisions in the Award for parental leave, carers leave and leave for jury service based on provisions contained in the Federal Metal Engineering and Associated Industries Award 1998.

2 The contention of the Unions is that the application is justified and allowable State Wage Fixing Principles as enunciated by the Commission in Court Session in the 2001 State Wage Case.

Background

3 The treatment of the application has been characterised by long periods during which the parties were inactive in dealing with the application. The Commission conducted proceedings on 11th March 2003 to ascertain how the discussions were progressing and the Commission issued Directions on various occasions. For instance on 12th March 2003 Direction 2003 WAIRC 07916 was issued which required that the parties and the intervenor should meet at the times and dates fixed for the purpose of exploring whether conciliation could resolve the application as the Commission was of the view that this application would not be listed until the parties advised the Commission that attempts to conciliate were unavailing. The parties also debated whether the Commission could deal with this application and as a result a hearing took place on 14th December 2002 during which the Commission was told that there were a number of procedural difficulties in dealing with the application. Most issues raised centred upon whether the Commission as constituted by a single Commissioner could deal with the matter. A further hearing was held on 4th August 2004 whereby the parties raised with the Commission that a s.40B review of the Metal Trades Award was taking place at that time, however the Commission was advised that little progress had been made in dealing with the application.

4 At a hearing held on 14th December 2004 the Commission determined that the application would have the effect of varying the wages or conditions above the safety net and therefore submissions were requested from the Unions concerning Principle 10 of the State Wage Fixing Principles. Under this Principle a party making a claim must support it with material justifying why the matter had not been progressed or finalised pursuant to s.41 of the *Industrial Relations Act, 1979* (the Act), why the matter had not been pursued under any other of the Principles set out in the Wage Principles and how in the discharge of its statutory

function to consider varying an award above or below the Safety Net that the Commission should take into account matters identified in s.26 of the Act.

5 The Unions submitted that they had used their best endeavours to advance their claim through enterprise bargaining and had been unsuccessful partly because the coverage of the award is extremely broad and covered many hundreds of employers with potential to employ many thousands of employees. It was therefore difficult in those circumstances to negotiate agreements.

6 The Unions also stated that the only Principle under which the claim could be advanced is Principle 10 and therefore none of the other Principles were relevant. The Unions claimed that the granting of the application would vary the award so the Safety Net reflects the changes that have occurred in economic, social and industrial conditions since the award was made and they submitted that productivity increases had already occurred and that work was being performed more effectively.

7 As a result of these submissions the Chief Commissioner allocated the matter to the Commission in Court Session as constituted for hearing and determination.

8 At the commencement of proceedings on 27th April 2005 the Commission was advised that the application insofar as it related to part time and casual workers and parental leave, carers leave, leave for jury service and the contract of service provisions would be put aside so that these proceedings would only deal with the issue of an increase to the casual loading in the Award from 20% to 25%. It was on this one issue that the Commission in Court Session heard the submissions of the parties.

Applicants submissions

9 The essential argument was that insofar as the requirements of Principle 10 were concerned the Unions had used their best endeavours to advance claims for the proposed change through bargaining and that this had been unsuccessful due to the extensive range of employers covered by the Award. Evidence was given by Mark Carl Goldsworthy, a Union Organiser, in support of these submissions. Mr Goldsworthy was cross examined by Mr Uphill who appeared for the Respondent employers. The purpose of the cross examination seemed to be directed to discovering just how strong the attempts had been by the Unions to try and achieve agreements and how casual employees are used in the industry. Mr Goldsworthy's evidence was that the percentage of casual employment as at July 2005 was around 30% of the workforce and was still rising. He offered the opinion to that the 'Casual' clause, as contained in the award, was hardly ever applied in practise and that since 1996 employers had tended to employ more casuals or at least what Mr Goldsworthy identified as persons that employers wanted to call casuals. Mr Goldsworthy stated that this tendency had been increasing and sometimes these employees are known as long term casuals or fulltime casuals.

10 Mr Edmonds, of Counsel, submitted to the Commission that the issues before the Commission had been previously ventilated in the Federal Commission over 12 days of hearings. Mr Edmonds stated that the Federal Commission considered voluminous amounts of evidence over a substantial amount of time and consumed a significant amount of the resources of both employers and employees. Mr Edmonds stated that organisations such as the Women's Electoral Lobby and the Human Rights and Equal Opportunity Commission also appeared. The Unions argued that because all of this information had been collected and analysed by the AIRC it was not the intention of the Unions to repeat the same exercise before this Commission. The Unions argued that the AIRC had made certain findings in relation to the engagement of casual employees and that even though it was conceded that the WAIRC must make up its own mind when deciding the application they claim that the findings of the Full Bench of the AIRC should be persuasive.

11 The Unions argued that the Commission should also be mindful of the findings made in subsequent applications before the Queensland Industrial Relations Commission and the Tasmanian Industrial Relations Commission which essentially flowed the findings of the Full Bench of the AIRC on in those States. It was conceded that the Federal Metal Trades Award applies in both of those States and that could be seen as a significant factor as to why the Queensland Industrial Relations Commission and the Tasmanian Industrial Relations Commission may have been persuaded to do the same. The Unions submit that these events are a relevant consideration for the Commission in determining this application and argues that the Commission should be endeavouring to ensure that workers employed in the metals and engineering industry in Western Australia are on a comparable set of conditions to those who are bound by similar awards in other States.

12 The second leg of the argument was that casual employment should not be a cheaper option for the employer than the cost of employing an employee on a fulltime basis. The nature of casual employment is that it should provide flexibility and the ability for employers to respond to changes in demand for their work but it should not be a cheaper option to engage people as casual employees to achieve that end. The Unions argue that casual employees suffer from lower wages, lower superannuation and lower conditions of employment around Australia compared to fulltime employees and that the loading of 25% for the casual employee restores some of the balance albeit not all of it.

13 Mr Edmonds developed his argument by reference to the quantities of annual leave recognised in the casual loading and he referred to clause 23 and 24 of the Award in this respect and he argued that a casual worker should receive equal pay for an equal number of days worked. He made similar suggestions in respect to long service leave and argued that this should be a right because a casual employed on a regular basis could never ever receive long service leave. Further, the adoption of long service leave as a component of casual loading was something that the AIRC had done in some of its awards for instance the Parcel Industry Award and the Graphic Arts Award.

14 Mr Edmonds also mentioned a so called transitional allowance being included in the casual loading to compensate employees for lost time between jobs. It was submitted by the Unions that there should be an element of deterrence to employers from using casual employees.

15 The Unions argue that when one aggregates all of these ingredients they came to a loading of well over 25% but the Unions would be happy to settle at this point for a 25% loading and would not pursue changes to the contract of service. Mr Edmonds went on to adumbrate upon additional components that he said should be taken into account, for example casual employees were less likely to receive superannuation benefits, carers' leave, parental leave or a number of other provisions that fulltime workers receive under the award. In Mr Edmonds submission the components of the loading could well be 18.8% for forgoing

annual leave, personal and sick leave, public holidays, 1.59% for annual leave loading, 10% for loss time and a general deterrence figure of 1.95% (Exhibit). On his calculations the casual loading would be 31.72%. That well and truly covers the 25% which has been fixed and would provide an equitable compensation for casuals than the current loading of 20%.

16 The Commission heard from Mr G. McCorry as an intervenor for the Motor Traders Association. He made submissions concerning the Wage Fixing Principles and the procedures that are required to be followed by the Commission. Mr McCorry was critical of the evidence of Mr Goldsworthy whose evidence he described as limited and he described as telling the admission by Mr Goldsworthy that 30% of people in industry are long term casuals and he questioned whether such persons were casuals in the true sense. He claims that in any event there had been no analysis of the decisions which had been made following the AIRC Metal Trades Decision to install a rate of 25% and argued that the issue of long term permanent casuals was simply not applicable in this State. However, Mr McCorry did not offer any evidence to prove this assertion. Mr McCorry then provided a detailed analysis of how the component parts of the rate ought be constructed and he said on behalf of his client that the Unions had not established a proper case under the Wage Fixing Principles. Mr McCorry mentioned that the 20% loading already meets the requirements of s.26(1)(d)(iv) of the Act and that it was not the role of the Commission to assist the Unions by doing their work to better protect the interest of members.

Respondents' submissions

17 The Commission heard submissions from Mr Uphill for the Respondents. Mr Uphill suggested that the situation in Queensland and Tasmania is vastly different to in Western Australia as there was a need there for those Commissions to adopt the casual loading from the Federal Award to maintain consistency because those employers who had the employees working under applicable State Metal Trades Award worked alongside employees covered by the Federal Metal Industry Award. Mr Uphill described as eminently sensible that similar occupational groups have their conditions ostensibly the same. Mr Uphill argued that the Federal Metal Industry Award does not apply in Western Australia and the Commission did not need to give consideration to differing loadings applying to tradespersons.

18 Mr Uphill described the submissions of the Unions as nothing but an attempt to flow on the casual loading of 25% which exists in the Metal Industry Award Federally to Western Australia and argued that the notion of comparative conditions is not a factor which has any force nor should it. Mr Uphill stated that it cannot be suggested that the Federal Metal Industry Award creates a precedent which binds this Commission to adopt in the same casual loading which exists in it and Mr Uphill's clients suggest that the movement in the Federal Metal Industry Award of a casual loading from 20 to 25% is not a sufficient reason fro this Commission to grant the same increase in this State.

19 Mr Uphill made detailed submissions about the Wage Principles and whether the matter should have been finalised by agreements under s.41 of the Act. He suggested by reference to Exhibit U1 that the Unions had been able to reach agreement with many companies on matters affecting the Metal Trades Award as this exhibit contained some three pages of agreements to which the Unions were party and which had been registered and a number of the agreements referred to a casual loading being paid to employees. The Respondents argued that whether the Unions have been successful or not in respect of negotiating a high casual loading is not a relevant consideration when the Commission applies Principle 10.

20 Mr Uphill addressed the provisions of s.26. He complained that the claim does not provide any improved efficiency in work and he suggested there needs to be a balance according to the provisions, but that was not achieved. Mr Uphill claimed that there is no merit in increasing the loading to 25% and that it was increased from 15 to 20% in 1974 at the same time as annual leave was increased from three to four weeks, and that this was preceded a year earlier by an annual leave loading of 17½% being introduced.

21 The Respondents then analysed the Decision of the Federal Commission and each of the components in the Federal Commission which make up the 25% was analysed. Mr Uphill provided criticism for each of those, concluding that the Federal Commission had a choice of a loading of 121.6 or 125.88 and they chose the higher and that this was not justified on the evidence before it. He finalised his submission on the basis that the material indicates the casual loading should not be increased. The Respondents argued, however, that if the Commission is persuaded to grant the claim the increase should be phased in so as to ease the burden on employers and this could be achieved by increasing the casual loading to 22.5% from the date the Award is amended and 25% a year later.

22 The Respondents called Mr John Andrew Nicolau who gave detailed evidence and provided an analysis of a survey which had been conducted by the Chamber of Commerce and he was subjected to cross examination about this survey. The information presented by Mr Nicolau (Exhibit U3) became very important to the outcome of this case as it contained data particularly relevant to the circumstances described in detail later in these Reasons.

23 The Commission considered the submissions in a preliminary way and on 11th May 2005 wrote to the parties in the following terms:

> "***RE: APPLICATION TO VARY METAL TRADES (GENERAL) AWARD 1966***
>
> On the 27th April 2005 the Commission in Court Session heard submissions from the parties and intervenor concerning the above application.
>
> Since receiving these submissions, the Commission in Court Session has given some preliminary consideration to the matter.
>
> All parties drew to the attention of the Commission in Court Session material presented to the Australian Industrial Relations Commission in *Re Metal Engineering & Associated Industries Award - Part 1* (2000) 110 IR 247 at [190] – [191];.(re Metal Engineering). In our opinion the parties have not provided enough information to allow the Commission in Court Session to properly assess and investigate the underlying assumptions upon which the Australian Industrial Relations Commission based its Decision in re Metal Engineering and the application of this decision to circumstances which exist in Western Australia.

Because of this, the Commission in Court Session has decided to invite the Union, the Chamber and the Intervenor to call evidence and or produce documentary evidence whether through an expert or otherwise to address the following:

(a) Whether the conclusion reached in the 2004 CCI survey that full time casuals work the same hours as full time employees was based on the same issues, matters and evidential material considered in the ABS material presented to the AIRC by the parties in *Re Metal Engineering.*

(b) Whether the CCI survey results constitute a sufficient representative sample of employers in Western Australia who engage casual and fulltime employees under the terms of the Award for this Commission to reach the conclusion that full time casuals work the same hours as fulltime employees in Western Australia;

(c) Whether unpublished or published ABS statistics in relation to Western Australia support the conclusions reached by the AIRC at paragraphs [190]-[191] or whether they support the conclusion reached in the 2004 CCI survey;

(d) The matters set out in s26 (1)(d)(ii) and (iii) and (vi) of the IR Act 1979 (the Act). In particular the parties are encouraged to provide any relevant unpublished or published ABS statistics, Treasury or other relevant documentation.

(e) The matters set out in s26(1)(d)(vi) of the Act.. In particular whether the information contained in Chart 3 of the 2004 CCI survey constitutes a sufficient sample and sufficient information on which conclusions can be reached relevant to this application and additional evidence or information which is to be adduced under paragraph (c) above which addresses this matter.

(f) The current levels of casual employment under the *Metal Trades (General) Award* in Western Australia compared with the level of casual employment under this Award in 1995 and 1985.

In due course the matter will be re-listed to allow the parties to address the above issues pursuant to the powers vested in the CIC Session under s27 of the Act."

24 On 20th March 2006 the Commission in Court Session foreshadowed to the parties that the matter would be re-listed to allow the parties to make comments and submissions upon the letter from the Commission.

25 Mr Edmonds made submissions concerning the ABS Publication Manufacturing Industry Code A221.5. He also addressed a document headed 'Skills Shortage in Western Australia' (Exhibit C). As for the CCI survey he criticised the sample size of 123 employers who engage 16,000 employees. There are, according to Mr Edmonds, some 28,000 employees in the industry. It is therefore open to conclude that the sample is not sufficiently large enough to allow the Commission to draw a conclusion from it; that is; fulltime casual workers work the same time that fulltime employees work in Western Australia.

26 The Unions provided some answers to the questions posed by the Commission but essentially the Commission in Court Session fell back on the submissions previously made that there should be an equivalent benefit to casual employees as accorded to permanent part time and permanent fulltime employees. The figure of 25% goes somewhere towards equalising the situation in the workforce.

27 Mr Uphill answered the questions of the Commission, he said that the ABS material was not material available to the AIRC. Mr Uphill submitted that there are casuals who do not work fulltime hours and that if the conclusions reached by the AIRC are extrapolated to those casuals who work significantly less than fulltime then it substantially inflates the casual loading.

28 In reply Mr Edmonds submitted that there are large bodies of precedent that recognise the itinerant nature of casual work which produces a debilitating uncertainty of income which has previously been recognised and compensated for in a loading by all Tribunals when determining casual loadings. Mr Edmonds argued that is also relevant to the length of employment of casual employees and there must be some recognition for the fact that as they are itinerant they usually suffer a significant level of lost time.

29 Mr Edmonds agreed with the Respondents that the issue as to whether or not fulltime and casual workers work the same number of hours as fulltime employees is misleading. Mr Edmonds argued that fulltime casual employees necessarily implies that they are working as a fulltime employee is often not the case there are a large number of casuals who are not fulltime casuals and do not get fulltime hours. He argued that casual need to be compensated for the uncertainty of their income and that there is a destabilising effect that style of work has upon their life. The Unions also agree that the purpose of the casual loading is not to put casuals in the same situation as full timers but to put them in a situation where they are equitably compensated for the different hours they work.

Finding and Conclusions

30 The Commission is aware that the incidence of casual employment is substantial and includes approximately 30% of employees employed under the Award and that many long term casual employees are paid at a lower base rate than their counterparts.

31 The Commission has been given a considerable volume of evidence to consider in these proceedings in relation to the Unions' claim, however the most substantial and directly relevant to the Award and the issue of casual loadings was that given in the proceedings by Mr Nicolau in relation to a survey of CCI members with employees employed under the Award (Exhibit U3 Metal Trades (General) Award Survey 2004). This evidence was subjected to cross examination and was not diminished by that. It is therefore the finding of this Commission that the findings of fact contained in the Metal Trades (General) Award Survey 2004 should be accepted. The key findings are:

1. An average of 6.2 days of sick leave is taken by fulltime employees each year.
2. Turnover of fulltime employees is 10% per year and only 23% of that 10% are terminated by their employer.
3. On average casual employees are employed for less than 3 months.

4. Casual employees work the same hours as fulltime employees.

32 It should be noted that to ensure consistency the CCI survey and analysis compares the benefits paid to fulltime and casual employees on the basis of service for one year. When assessing that information the loading can be calculated as follows:

(a) Annual leave, sick leave and public holidays:

Based on 260 working days per year fulltime employees receive pay for 20 days annual leave, 10 public holidays and 6.2 sick days which mean they work 223.8 days in a year.

$$\frac{36.2}{223.8} \times \frac{100}{1} = 16.18\%$$

(b) The value of annual leave loading is not in dispute between the parties:

= 1.59%

(c) As the turnover of fulltime employees is very low the calculation of the termination benefit of 0.7 days a year in Exhibit U3 should be accepted. When this amount is calculated as a percentage it is:

$$\frac{0.7}{260} \times \frac{100}{1} = 0.27\%$$

(d) As casual employees are on an average employed for very short periods it is legitimate for the Commission to compensate casual employees for the disability of uncertain, intermittent and insecure employment including the lack of entitlement to notice and for deterrence. At pages 304 to 305 of AIRC decision (110 IR 247) the AIRC assessed an amount of 10% for compensation for these matters and in doing so had regard to a decision of 5 members of the Victorian ERC in *Ministerial Reference Re: Minimum Wages for Casuals; Juniors and Piece Rate Categories* unreported VERC 2 July 1996 in which 10% was allocated for broken time, the intermittent nature of work, the lack of access to pt 5 Div 1 and the lack of entitlement to notice. The Victorian Bench concluded that the setting of rates for casuals should be approached on a sector by sector basis. Within the 10% amount the AIRC included for these matters they also included an amount based on evidence before it that casuals work 5% less than fulltime employees (broken time – see pages 316-319). CCI contend that the AIRC assessed the amount for broken time as 5% but the decision and table at pages 318-319 is not clear on that point.

(e) When the following matters are also considered an assessment of at least 8% for the disability of uncertain, intermittent and insecure employment including the lack of entitlement to notice and for deterring casual employment in preference to weekly employment can be justified in this case:

(i) Casuals are theoretically entitled to LSL but because of their usual precariously length of service they are extremely unlikely to gain the benefits of such leave;

(ii) Casual employees under Part 1 of the award are not entitled to redundancy pay or paid job search leave;

(iii) No assumption can be made about lack of training and promotion opportunities as there is no evidence before this Commission in relation to these issues;

(iv) From 27 March 2006 all eligible casual employees in Western Australia are entitled to parental leave;

(v) Casual employees who work for an employer for less than 30 days in a 12 month period do not receive superannuation (clause 33(1));

(vi) Casuals are entitled to two days bereavement leave each year (see *The Australian Workers' Union, West Australian Branch, Industrial Union of Workers v Kalgoorlie Consolidated Gold Mines Pty Ltd & Others* (2003) 83 WAIG 3596);

(vii) Casuals are not entitled to paid carers' leave.

33 The calculations which are set out in paragraphs (a), (b) and (c) are not disputed by employers represented by Mr Uphill. When the amounts are added together the casual loading can be assessed at 25.77%. In arriving at this amount we have not included in this amount a consideration for lost time which is unable to be calculated on the information before us.

34 It therefore follows that the West Australian data, independent of the federal data which allowed the AIRC to arrive out a figure of 25%, confirms that 25% should be the fair and appropriate casual loading. In determining that an amount of 25% is a fair and appropriate casual loading the Commission has also had regard to s.26 of the Act and the requirement on the Commission to act according to equity, good conscience and the substantial merits of the case.

35 For these reasons the Commission in Court Session will grant the application to amend the Metal Trades (General) Award by inserting a casual loading of 25%.

2006 WAIRC 05123

METAL TRADES (GENERAL) AWARD 1966

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING & KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH AND COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED SERVICES UNION OF AUSTRALIA
	APPLICANTS
	-v-
	ANODISERS W.A. AND OTHERS
	RESPONDENTS
CORAM	SENIOR COMMISSIONER J F GREGOR
	COMMISSIONER J H SMITH
	COMMISSIONER J L HARRISON
DATE	TUESDAY, 25TH JULY 2006
FILE NO.	APPL 740 OF 2002
CITATION NO.	2006 WAIRC 05123

Catchwords	**Variation of award – speaking to minutes – special circumstances justifying retrospective effect – Work Choices enables special circumstances – *Industrial Relations Act 1979* Ss 39, 40**
Result	Order amended. Retrospectivity granted.
Representation	
Applicant	Mr L. Edmonds, (of counsel), for the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia
	Mr D. Ellis (of counsel) for The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, WA Branch
Respondent	Mr J. Uphill for the Respondents

Supplementary Reasons for Decision

1 On 26th June 2006 the Commission issued its Reasons for Decision in this matter and the Applicant Unions requested a Speaking to the Minutes in relation to two issues.

2 The first related to paragraph 33 of the Decision and a potential typographical error where casual loading was shown as 25.77%. Having considered the matter the Commission in Court Session has decided that there is an error and the figure should read as 26.04%. The Reasons for Decision that issued on 26th June 2006 will be amended accordingly.

3 The next matter is one of more substance. The Applicant Unions argue that the Order be changed so that the Award is varied retrospectively. The power to do this in certain circumstances is to be found in s 40(4) of the *Industrial Relations Act, 1979* (the Act) which provides that s 39 applies to and in relation to an order made under s 40. S 39(3) of the Act gives the Commission power to give retrospective effect to whole or any part of [the] award if in its opinion there are special circumstances that make it fair and right so to do.

4 The Applicant Unions argue that the advent of the Workchoices legislation creates such a circumstance and the Unions therefore seek a retrospective order to 1st January 2006 amending the Award to apply the increase in the casual rate of pay from the first pay period on or after 26th June 2006.

5 The Respondents oppose the application. They say there is nothing special or unique in the legislative changes to the *Workplace Relations Act 1996*. Such changes are a usual feature of the industrial relations system and therefore there is nothing out of the ordinary to parties being required to adapt to legislative changes when they occur. In short there are no special circumstances the Commission needs to remediate so that it is fair and right to give retrospective effect to the variation.

6 In his Decision in *The Construction, Forestry, Mining Union of Workers v Skilled Rail Services Pty Ltd* (2006) 86 WAIG 1263 Commissioner S.K. Kenner addressed similar concepts when he dealt with an objection by the Respondent for expedition of the proceedings. In that case the Commission was not persuaded that some expedition to proceedings should not be provided. The Commissioner did so upon his analysis of the legitimate expectations of parties in proceedings befor the Commission to have the matters heard and determined under the existing legislation that is the *Act*. In this decision Kenner C reviewed the approach to these issues taking into account the consideration by Finkelstein J in *Warramunda* and by Burt CJ in *Re Minister for Minerals and Energy*. The learned Commissioner wrote as follows:

> 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.

7 The principle cited above is that a party invoking jurisdiction of the Commission is entitled to expect that the matter would be heard and determined on the basis of the law as it stood at the time of initiating proceedings. We cite this Decision as it indicates the importance of the changes brought about by the Workchoices legislation and effect of these changes on the Western Australian Industrial Relations Commission. It is wrong to say there is nothing out of the ordinary in these legislative amendments. Contrary to Mr Uphill's submission the Commission in Court Session believes that these legislative changes are unique and have a far reaching impact on the WA industrial relations system and cannot but create a special circumstance as set out in s 39 of the Act. On this basis the CICS believes that is fair and right to remediate by granting retrospective effect to the variation.

8 For those reasons the Commission in Court Session has decided to amend the Order so that it will operate from the date the matter was last heard, that is 20th March 2006, to provide that from the first pay period on or after 26th June 2006 casual employees employed under the Award shall be paid 25% of the ordinary rate in addition to the ordinary rate in accordance which he/she is employed.

9 A final order now issues.

2006 WAIRC 05129

METAL TRADES (GENERAL) AWARD 1966

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING & KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH AND ENERGY INFORMATION, POSTAL, PLUMBING AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING AND ELECTRICAL DIVISION WA BRANCH
	APPLICANT
	-v-
	ANODISERS W.A. AND OTHERS
	RESPONDENT
CORAM	SENIOR COMMISSIONER J F GREGOR
	COMMISSIONER J H SMITH
	COMMISSIONER J L HARRISON
DATE	TUESDAY, 25TH JULY 2006
FILE NO/S	APPL 740 OF 2002
CITATION NO.	2006 WAIRC 05129

Result Casual loading granted

Order

HAVING heard Mr L. Edmonds, of Counsel, who appeared on behalf of the Applicant Unions and Mr J. Uphill who appeared for the Respondents and Mr G. McCorry intervening on behalf of the Motor Traders Association, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby orders

THAT the Metal Trades (General) Award 1966 be varied in accordance with the following Schedule and that such variation will operate from 20th March 2006 to provide that from the first pay period on or after 26th June 2006 casual employees shall be paid 25% of the ordinary rate in addition to the ordinary rate in accordance which he/she is employed.

(Sgd.) J F GREGOR,
Senior Commissioner.

[L.S.] For and On Behalf of the Commission In Court Session.

SCHEDULE

1. Clause 31. – Wages and Supplementary Payment: Delete subclause (5) of this clause and insert in lieu the following:

(5) A casual employee shall be paid 25 per cent of the ordinary rate in addition to the ordinary rate for the calling in which he/she is employed.

2. Part II Construction Work: Clause 10. – Wages: Delete subclause (7) of this clause and insert in lieu the following:

(7) A casual employee shall be paid 25 per cent of the ordinary rate in addition to the ordinary rate for the calling in which he is employed.

2006 WAIRC 05128

METAL TRADES (GENERAL) AWARD 1966

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING & KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH AND COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED SERVICS UNION OF AUSTRALIA

APPLICANT

-v-

ANODISERS W.A.

RESPONDENT

CORAM SENIOR COMMISSIONER J F GREGOR
COMMISSIONER J H SMITH
COMMISSIONER J L HARRISON

DATE TUESDAY, 25TH JULY 2006

FILE NO/S APPL 740 OF 2002

CITATION NO. 2006 WAIRC 05128

Result Correction Order

Correction Order

WHEREAS on 26th June 2006 a decision in this matter was issued; and

WHEREAS an typographical error indicating casual loading of 25.77% was made in paragraph 33; and

WHEREAS paragraph 33 of the decision should have read:

"The calculations which are set out in paragraphs (a), (b) and (c) are not disputed by employers represented by Mr Uphill. When the amounts are added together the casual loading can be assessed at 26.04%. In arriving at this amount we have not included in this amount a consideration for lost time which is unable to be calculated on the information before us."

NOW THEREFORE the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby orders:

THAT paragraph 33 of the decision issued on 26th June 2006 be amended to read:

"The calculations which are set out in paragraphs (a), (b) and (c) are not disputed by employers represented by Mr Uphill. When the amounts are added together the casual loading can be assessed at 26.04%. In arriving at this amount we have not included in this amount a consideration for lost time which is unable to be calculated on the information before us."

(Sgd.) J F GREGOR,
Senior Commissioner.
[L.S.] For and On Behalf of the Commission In Court Session.

PUBLIC SERVICE ARBITRATOR—Awards/Agreements—Variation of—

2006 WAIRC 05158

COUNTRY HIGH SCHOOL HOSTELS AUTHORITY RESIDENTIAL COLLEGE SUPERVISORY STAFF AWARD 2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COUNTRY HIGH SCHOOLS HOSTELS AUTHORITY
	-and-
	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER P E SCOTT
DATE	FRIDAY, 28 JULY 2006
FILE NO	P 28 OF 2006
CITATION NO.	2006 WAIRC 05158

Result Award Varied

Order

HAVING heard Mr T Boronovskis and with him Mr G Wibrow on behalf of the Country High Schools Hostels Authority and Mr M Finnegan and with him Ms L Jacobson on behalf of the Civil Service Association of Western Australia Incorporated, and by consent, the Public Service Arbitrator, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders:

THAT the Country High School Hostels Authority Residential College Supervisory Staff Award 2005 (No. PSA A 1 of 2005) be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 26th day of July 2006.

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

SCHEDULE

1. Clause 7. – Definitions: Delete subclause (n) of this clause and insert the following in lieu thereof:

(n) "Union" means the Civil Service Association of Western Australia Incorporated (the Association).

2. Clause 12. – Casual Employment:

A. Delete subclause (4) of this clause and insert the following in lieu thereof:

(4) The conditions of employment, leave and allowances provided under this Award, with the exception of bereavement and carer's leave, shall not apply to a casual employee. The hours worked by a casual employee shall be paid as per Schedule A – Salaries, of this Award. The rates include a 20% casual loading, but do not include the 25% loading allowance as per subclause (4) of clause 14. – Salaries, of this Award. However, where expenses are directly and necessarily incurred by a casual employee in the ordinary performance of their duties, he/she shall be entitled to reimbursement in accordance with the provisions of this Award.

B. After subclause (5) of this clause insert new subclause (6) as follows:

(6) Caring Responsibilities

(a) Subject to the evidentiary and notice requirements in Clause 33 – Carers Leave a casual employee shall be entitled to not be available to attend work or to leave work if they need to care for members of their immediate family or household who are sick and require care and support, or who require care due to an unexpected emergency, or the birth of a child.

(b) The employer and the casual employee shall agree on the period for which the casual employee will be entitled to not be available to attend work. In the absence of agreement, the employee is entitled to not be available to attend work for up to 48 hours (ie two days) per occasion. The casual employee is not entitled to any payment for the period of non-attendance.

(c) An employer must not fail to re-engage a casual employee because the casual employee accessed the entitlements provided for in this subclause. The rights of an employer to engage or not engage a casual employee are otherwise not affected.

3. Clause 16. – Purchased Leave – Deferred Salary Arrangement: After subclause (6) of this clause insert new heading and subclause (7) as follows:

Variation of the Arrangements

(7) As an alternative to subclause (5) of this clause, and only by mutual agreement of the employer and the employee, the provisions of the deferred arrangement may be varied subject to the following:

(a) the term of the arrangement will not extend beyond that contemplated by this clause,

(b) the variation will not result in any consequential monetary or related gain or loss to either the employer or the employee, and

(c) the percentage of salary to apply during the 12 months leave as specified in subclause 3 of this clause will be calculated as 80% of the average ordinary prescribed hours worked over the previous four years.

4. Clause 30. – Long Service Leave: After subclause (15) of this clause insert new subclause (16) as follows:

(16) Subject to having first cleared all other available leave, and subject to the operational requirements and approval of the employer, an employee may clear any accrued entitlement to long service leave in minimum periods of one (1) day.

5. Clause 37. – Cultural/Ceremonial Leave: Delete subclause (6) of this clause and insert the following in lieu thereof:

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

(a) the employee's annual leave entitlements

(b) the employee's accrued long service leave entitlements, but in full days only.

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

(d) short leave when entitlements under paragraphs (6)(a), (6)(b) and (6)(c) have been fully exhausted.

6. Clause 39. – Leave Without Pay: Delete this clause and insert the following in lieu thereof:

(1) Subject to the provisions of subclauses (2) and (3) of this clause, the employer may grant an employee leave without pay for any period and is responsible for that employee on their return.

(2) Subject to the provisions of subclause (3) every application for leave without pay will be considered on its merits and may be granted provided that the following conditions are met:

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

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

(3) An employee shall, upon request be entitled to two days unpaid personal (caring) leave.

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

6. Clause 41. – Parental Leave: Delete this clause and insert the following in lieu thereof:

(1) Definitions

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

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

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

"Public sector" means an employing authority as defined in Section 5 of the Public Sector Management Act 1994.

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

(2) Entitlement to Parental and Partner Leave

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

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

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

(b) An employee identified as the primary care giver of a child and who has completed twelve months continuous service in the Western Australian public sector shall be entitled to the following amounts of paid parental leave which will form part of the 52 week entitlement provided in paragraph (2)(a) of this clause:

(i) eight (8) weeks paid parental leave until 30 June 2006;

(ii) ten (10) weeks paid parental leave from 1 July 2006;

(iii twelve (12) weeks paid parental leave from 1 July 2007; and

(iv) fourteen (14) weeks paid parental leave from 1 July 2008.

(c) An employee may take the paid parental leave specified in paragraph (2)(b) at half pay for a period equal to twice the period to which the employee would otherwise be entitled.

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

(e) Paid parental leave for primary care purposes for any one birth or adoption shall not exceed the period specified in paragraphs (2)(b) and (2)(c) above.

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

(g) Parental leave may only be taken concurrently by an employee and his or her partner as provided for in subclause (3) or under special circumstances with the approval of the employer.

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

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

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

(3) Partner Leave

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

(b) The employee may request to extend the period of unpaid partner leave up to a maximum of eight weeks.

(4) Birth of a child

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

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

(5) Adoption of a child

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

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

(6) Other leave entitlements

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

(b) Subject to all other leave entitlements being exhausted an employee shall be entitled to apply for leave without pay following parental leave to extend their leave by up to two (2) years.

(c) The employer shall only refuse such a request on reasonable grounds related to the effect on the workplace or the employer’s business. Such grounds might include:

(i) cost;

(ii) lack of adequate replacement staff;

(iii) loss of efficiency; and

(iv) the impact on customer service.

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

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

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

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

(7) Notice and Variation

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

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

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

(8) Transfer to a Safe Job

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

(9) Communication during Parental Leave

(a) Where an employee is on parental leave and a definite decision has been made to introduce significant change at the workplace, the employer shall take reasonable steps to:

(i) make information available in relation to any significant effect the change will have on the status or responsibility level of the position the employee held before commencing parental leave; and

(ii) provide an opportunity for the employee to discuss any significant effect the change will have on the status or responsibility level of the position the employee held before commencing parental leave.

(b) The employee shall take reasonable steps to inform the employer about any significant matter that will affect the employee's decision regarding the duration of parental leave to be taken, whether the employee intends to return to work and whether the employee intends to return to work on a part-time basis.

(c) The employee shall also notify the employer of changes of address or other contact details which might affect the employer's capacity to comply with paragraph (9)(a).

(10) Replacement Employee

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

(11) Return to Work

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

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

(c) An employee may return on a part time or job-share basis to the substantive position occupied prior to the commencement of leave or to a different position at the same classification level in accordance with Clause 9. – Part-Time Employment of this Award.

(d) Employees who return to work on a part time basis have access to the right of reversion provisions of Clause 9. – Part-Time Employment of this Award.

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

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

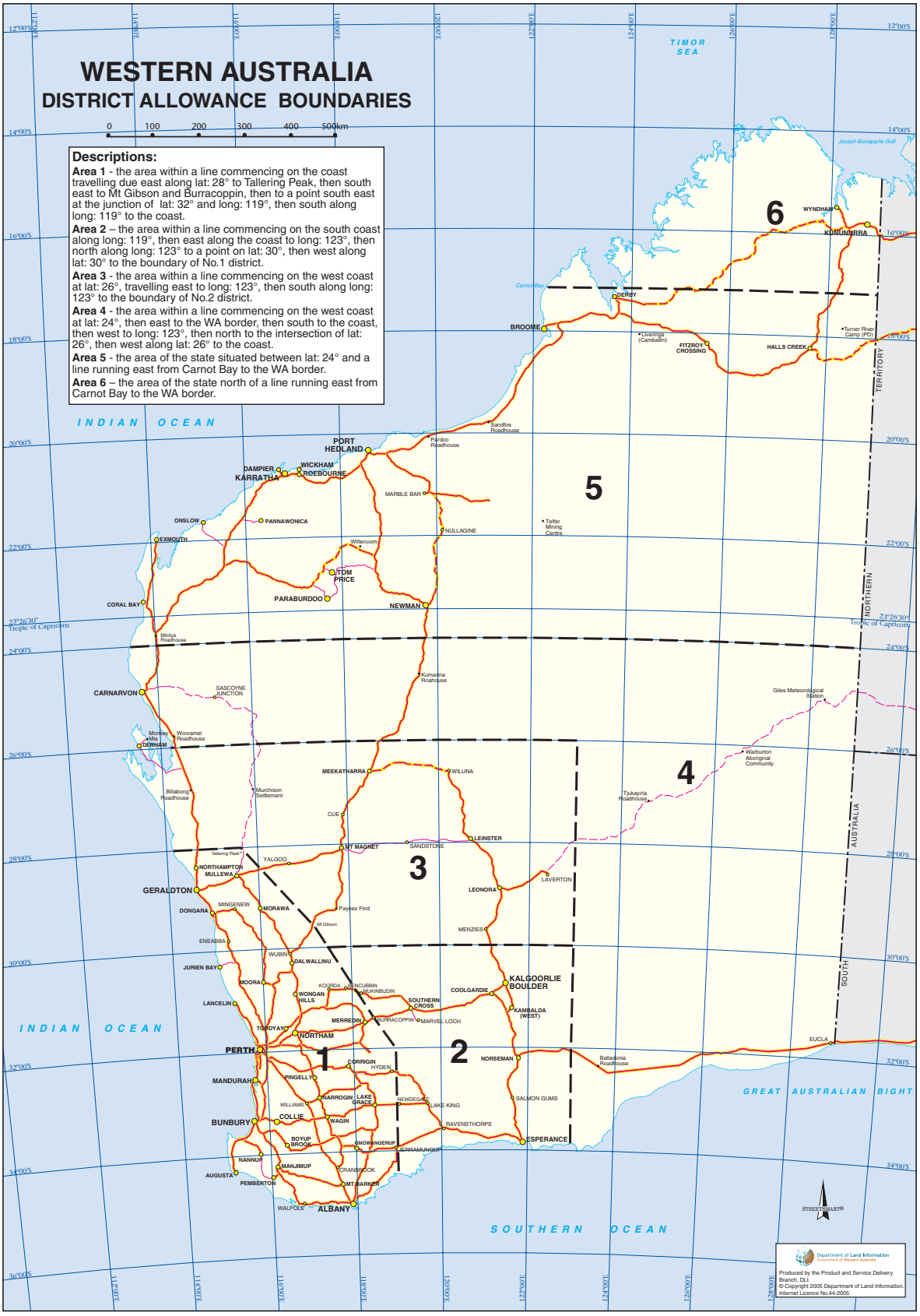
(b) Paid parental leave will count as qualifying service for all purposes of this Award. During paid parental leave at half pay all entitlements will accrue as if the employee had taken the entitlement to paid parental leave at full pay.

(c) Absence on unpaid parental leave shall not break the continuity of service of employees but shall not be taken into account in calculating the period of service for any purpose of this Award.

(d) An employee on parental leave may terminate employment at any time during the period of leave by written notice in accordance with subclause (3) of Clause 8. – Contract of Service of this Award.

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

6. Schedule B – District Allowance: Delete the District Allowance Map from this schedule and insert the new map as follows:



7. Schedule C – Motor Vehicle Allowance: Delete the Motor Vehicle Allowance Maps from this schedule and insert the new maps as follows:


WESTERN AUSTRALIA
MOTOR VEHICLE ALLOWANCE ZONES
0 100 200 300 400 500km
ZONE 4
North of 23.5° South Latitude
ZONE 3
Remainder of State
ZONE 2
ZONE 1
50 km Radius
INDIAN OCEAN
TIMOR SEA
SOUTHERN OCEAN
GREAT AUSTRALIAN BIGHT
TERRITORY
NORTHERN
SOUTH AUSTRALIA
WYNDHAM
KUNUNURRA
DERBY
BROOME
FITZROY CROSSING
HALLS CREEK
PORT HEDLAND
DAMPIER
KARRATHA
WICKHAM
ROEBOURNE
MARBLE BAR
NULLAGINE
ONSLOW
PANNAWONICA
EXMOUTH
TOM PRICE
PARABURDOO
NEWMAN
CORAL BAY
CARNARVON
GASCOYNE JUNCTION
DENHAM
MEEKATHARRA
WILUNA
CUE
MT MAGNET
SANDSTONE
LEINSTER
LEONORA
LAVERTON
MENZIES
NORTHAMPTON
MULLEWA
GERALDTON
MINGENEW
MORAWA
DONGARA
Paynes Find
ENEABBA
JURIEN BAY
DALWALLINU
WUBIN
MOORA
KOORDA
BENCUBBIN
WONGAN HILLS
MUKINBUDIN
LANCELIN
TODDAY
MERREDIN
NORTHAM
PERTH
MANDURAH
PINGELLY
CORRIGIN
HYDEN
NARROGIN
LAKE GRACE
WILLIAMS
COLLIE
WAGIN
BUNBURY
BOYUP BROOK
NANNUP
MANJIMUP
AUGUSTA
PEMBERTON
WALPOLE
ALBANY
CRANBROOK
MT BARKER
GNOWANGERUP
JERRAMUNGUP
NEWDEGATE
LAKE KING
RAVENSTHORPE
MUNGLINUP
ESPERANCE
SALMON GUMS
NORSEMAN
EUCLA
KALGOORLIE BOULDER
COOLGARDIE
KAMBALDA (WEST)
SOUTHERN CROSS
BULLFINCH
MARVEL LOCH
BURRACOPPIN
YALGOO
SANDSTONE
Shire of Wyndham - East Kimberley
Shire of Derby - West Kimberley
Shire of Broome
Shire of Halls Creek
Shire of East Pilbara
Shire of Roebourne
Shire of Ashburton
Shire of Exmouth
Shire of Carnarvon
Shire of Upper Gascoyne
Shire of Meekatharra
Shire of Wiluna
Shire of Murchison
Shire of Shark Bay
Shire of Leonora
Shire of Laverton
Shire of Menzies
Shire of Coolgardie
Shire of Esperance
Shire of Dundas
City of Kalgoorlie - Boulder
Shire of Ngaanyatjarraku
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WESTERN AUSTRALIA
MOTOR VEHICLE ALLOWANCE ZONES
ZONE 1
Metropolitan Area
50km Radius
ZONE 2
South West Land Division
ZONE 3
INDIAN
OCEAN
SOUTHERN
OCEAN
MEEKATHARRA
WILUNA
CUE
MT MAGNET
SANDSTONE
LEINSTER
YALGOO
NORTHAMPTON
MULLEWA
GERALDTON
LEONORA
DONGARA
MINGENEW
MORAWA
PAYNES FIND
PERENJORI
THREE SPRINGS
CARNAMAH
MENZIES
ENEABBA
COOROW
WUBIN
DALWALLINU
JURIEN BAY
MOORA
KALGOORLIE
BOULDER
COOLGARDIE
BENCUBBIN
KOORDA
WONGAN HILLS
MUKINBUDIN
BULLFINCH
LANCELIN
SOUTHERN CROSS
KAMBALDA (WEST)
TRAYNING
DOWERIN
NUNGARIN
WYALKATCHEM
GOOMALLING
BURRACOPPIN
GINGIN
MERREDIN
MARVEL LOCH
YANCHEP
TOODYAY
NORTHAM
CUNDERDIN
KELLERBERRIN
JOONDALUP
YORK
BRUCE ROCK
PERTH
QUAIRADING
NAREMBEEN
ARMADALE
BEVERLEY
NORSEMAN
ROCKINGHAM
CORRIGIN
BROOKTON
HYDEN
KONDININ
MANDURAH
PINGELLY
KULIN
PINJARRA
WICKEPIN
WAROONA
NARROGIN
SALMON GUMS
HARVEY
WILLIAMS
LAKE GRACE
NEWDEGATE
LAKE KING
WAGIN
DUMBLEYUNG
BUNBURY
COLLIE
DARKAN
NYABING
PINGRUP
RAVENSTHORPE
BUSSELTON
DONNYBROOK
KATANNING
MUNGLINUP
BOYUP BROOK
KOJONUP
BROOMEHILL
ESPERANCE
GNOWANGERUP
JERRAMUNGUP
MARGARET RIVER
NANNUP
BRIDGETOWN
BORDEN
MANJIMUP
CRANBROOK
AUGUSTA
PEMBERTON
ROCKY GULLY
MT BARKER
DENMARK
ALBANY
WALPOLE
0 50 100 150 200km
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2006 WAIRC 05164

DEPARTMENT FOR COMMUNITY DEVELOPMENT (FAMILY RESOURCE WORKERS, WELFARE ASSISTANTS AND PARENT HELPERS) AWARD 1990

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DEPARTMENT FOR COMMUNITY DEVELOPMENT
	-and-
	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER P E SCOTT
DATE	FRIDAY, 28 JULY 2006
FILE NO	P 27 OF 2006
CITATION NO.	2006 WAIRC 05164

Result Award Varied

Order

HAVING heard Mr T Boronovskis and with him Mr G Wibrow on behalf of the Department for Community Development and Mr M Finnegan and with him Ms L Jacobson on behalf of the Civil Service Association of Western Australia Incorporated, and by consent, the Public Service Arbitrator, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders:

THAT the Department for Community Development (Family Resource Workers, Welfare Assistants and Parent Helpers) Award 1990 (No. PSA A 1 of 1989) be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 26th day of July 2006.

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

SCHEDULE

1. Clause 2. – Arrangement: Delete 14. Purchased Leave - 48/52 Salary Arrangement and insert the following in lieu thereof:

14. Purchased Leave - 44/52 Salary Arrangement

2. Clause 5. – Definitions: Delete this clause and insert the following in lieu thereof:

(1) "Casual Employee" means an employee engaged by the hour for a period not exceeding one four week cycle in any period of engagement, or any employee employed as a casual on an hourly rate of pay by agreement between the Association and Employer.

(2) "De Facto Partner" means a relationship (other than a legal marriage) between two persons who live together in a 'marriage-like' relationship and includes same sex partners.

(3) "Director General" means the Director General, Department for Community Development.

(4) "Employee" means Family Resource Worker, Welfare Assistant or Parent Helper.

(5) "Employer" means the Director General, Department for Community Development.

(6) "Fixed Term Employee" means an employee who is employed on a part-time basis on a contract of service of specified duration.

(7) "Partner" means either spouse or de facto partner.

(8) "Part-Time Employment" means regular and continuing employment for a maximum of sixty hours per four week cycle.

(9) "Spouse" means a person who is lawfully married to that person.

(10) "Union" means the Civil Service Association of Western Australia Incorporated (the Association)

3. Clause 9. – Casual Employees: Delete this clause and insert the following in lieu thereof:

(1) A casual employee shall be paid for each hour worked at the appropriate salary rate contained in Schedule A - Salaries of this Award, in accordance with the following formula:

$$\frac{\text{Full-time Fortnightly Salary}}{76}$$

(2) In addition to the amount prescribed in subclause (1) of this clause, employees shall be entitled to a casual loading of 20 per cent to be inclusive of all annual leave, sick leave, long service leave and penalties, including weekend, shift and public holiday penalties but excluding those specifically mentioned in Clause 34. - District Allowance, Clause 35. - Motor Vehicle Allowance, and Clause 36. - Travelling Allowance of this Award.

(3) Conditions of employment, leave and allowances provided under the provisions of this Award shall not apply to a casual employee with the exception of bereavement and carer's leave. However, where expenses are directly and necessarily incurred by a casual employee in the ordinary performance of their duties, he/she shall be entitled to reimbursement in accordance with the provisions of this Award.

(4) Caring Responsibilities

(a) Subject to the evidentiary and notice requirements in Clause 24 – Carers Leave a casual employee shall be entitled to not be available to attend work or to leave work if they need to care for members of their immediate family or household who are sick and require care and support, or who require care due to an unexpected emergency, or the birth of a child.

(b) The employer and the casual employee shall agree on the period for which the casual employee will be entitled to not be available to attend work. In the absence of agreement, the employee is entitled to not be available to attend work for up to 48 hours (ie two days) per occasion. The casual employee is not entitled to any payment for the period of non-attendance.

(c) An employer must not fail to re-engage a casual employee because the casual employee accessed the entitlements provided for in this subclause. The rights of an employer to engage or not engage a casual employee are otherwise not affected.

4. Clause 14. - Purchased Leave - 48/52 Salary Arrangement: Delete the number, title and clause and insert the new number, title and clause as follows:

14. - PURCHASED LEAVE - 44/52 SALARY ARRANGEMENT

(1) The employer and an employee may agree to enter into an arrangement whereby the employee can purchase up to eight (8) weeks additional leave.

(2) The employer will assess each application for a 44/52 salary arrangement on its merits and give consideration to the personal circumstances of the employee seeking the arrangement.

(3) Where an employee is applying for purchased leave of between five (5) and eight (8) weeks the employer will give priority access to those employees with carer responsibilities.

(4) Access to this entitlement will be subject to the employee having satisfied the agency's accrued leave management policy.

(5) The employee can agree to take a reduced salary spread over the 52 weeks of the year and receive the following amounts of purchased leave:

Number of Weeks' Salary Spread Over 52 Weeks	**Number of Weeks' Purchased Leave**
44 weeks	8 weeks
45 weeks	7 weeks
46 weeks	6 weeks
47 weeks	5 weeks
48 weeks	4 weeks
49 weeks	3 weeks
50 weeks	2 weeks
51 weeks	1 week

(6) The purchased leave will not be able to be accrued. The employee is to be entitled to pay in lieu of the purchased leave not taken. In the event that the employee is unable to take such purchased leave, his/her salary will be adjusted on the last pay period in January to take account of the fact that time worked during the year was not included in the salary.

(7) Where an employee who is in receipt of an allowance provided for in Clause 19 - Higher Duties Allowance of the Award proceeds on any period of purchased leave the employee shall not be entitled to receive payment of the allowance for any period of purchased leave.

(8) In the event that a part time employee's ordinary working hours are varied during the year, the salary paid for such leave taken will be adjusted on the last pay in January to take into account any variations to the employee's ordinary working hours during the previous year.

5. Clause 15. - Purchased Leave - Deferred Salary Arrangement: After subclause (6) of this clause insert new heading and subclause (7) as follows

Variation of the Arrangements

(7) As an alternative to subclause (5) of this clause, and only by mutual agreement of the employer and the employee, the provisions of the deferred arrangement may be varied subject to the following:

(a) the term of the arrangement will not extend beyond that contemplated by this clause,

(b) the variation will not result in any consequential monetary or related gain or loss to either the employer or the employee, and

(c) the percentage of salary to apply during the 12 months leave as specified in subclause 3 of this clause will be calculated as 80% of the average ordinary prescribed hours worked over the previous four years.

6. Clause 16. - Annual Leave:

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

(5) (a) When the convenience of the Employer is served, the Employer may approve the deferment of the commencing date for taking annual leave, but such approval shall only remain in force for a period of one year.

(b) The Employer may renew the approval referred to in paragraph (a) of this subclause for a further period of a year or further periods of a year but so that an employee does not at any time accumulate more than three years entitlement.

(c) When the convenience of the Employer is served, the Employer may approve the deferment of the commencement date for taking leave so that an employee accumulates more than three years entitlement, subject to any condition which the Employer may determine.

(d) When an employee who has received approval to defer the commencement date for taking annual leave under paragraph (a), (b) or (c) of this subclause next proceeds on annual leave, the annual leave first accrued shall be the first leave taken.

(e) To assist employees in balancing their work and family responsibilities, an employee may elect, with the consent of the employer, to accrue and carry forward a maximum of two years annual leave from the date of the entitlement.

B. Delete subclause (11) of this clause and insert the following in lieu thereof:

(11) Subject to paragraph (5)(e) of this clause, and otherwise notwithstanding, the foregoing, the employer may direct an employee to take accrued annual leave and determine the date on which such leave shall commence. Should the employee not comply with the direction, disciplinary action may be taken against the employee.

7 Clause 18. – Long Service Leave

A. Delete subclause (3) of this clause and insert the following in lieu thereof:

(3) Employees may by agreement with their employer, clear any accrued entitlement to long service leave in minimum periods of one (1) day.

B. After subclause (12) of this clause insert new subclauses (13) and (14) as follows:

(13) Long Service Leave on Double Pay

(a) Employees may by agreement with their employer, access any portion of an accrued entitlement to long service leave on double pay for half the period accrued. In these circumstances the leave actually taken is 50 percent of the accrued entitlement accessed.

(b) Where employees proceed on long service leave on double pay in accordance with this subclause, the entitlement accessed is excised for the purpose of continuous service in accordance with subclause (5) of this clause.

(14) Cash Out of Accrued Long Service Leave Entitlement

(a) Employees may by agreement with their employer, cash out any portion of an accrued entitlement to long service leave, provided the employee proceeds on a minimum of ten (10) days annual leave in that calendar year.

(b) Where employees cash out any portion of an accrued entitlement to long service leave in accordance with this subclause, the entitlement accessed is excised for the purpose of continuous service in accordance with subclause (5) of this clause.

8. Clause 20. – Parental Leave: Delete this clause and insert the following in lieu thereof:

(1) Definitions

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

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

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

"Public sector" means an employing authority as defined in Section 5 of the Public Sector Management Act 1994.

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

(2) Entitlement to Parental and Partner Leave

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

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

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

(b) An employee identified as the primary care giver of a child and who has completed twelve months continuous service in the Western Australian public sector shall be entitled to the following amounts of paid parental leave which will form part of the 52 week entitlement provided in subclause (2)(a) of this clause:

(i) eight (8) weeks paid parental leave until 30 June 2006;

(ii) ten (10) weeks paid parental leave from 1 July 2006;

(iii twelve (12) weeks paid parental leave from 1 July 2007; and

(iv) fourteen (14) weeks paid parental leave from 1 July 2008.

(c) An employee may take the paid parental leave specified in paragraph (2)(b) at half pay for a period equal to twice the period to which the employee would otherwise be entitled

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

(e) Paid parental leave for primary care purposes for any one birth or adoption shall not exceed the period specified in paragraphs (2)(b) and (2)(c) above.

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

(g) Parental leave may only be taken concurrently by an employee and his or her partner as provided for in subclause (3) or under special circumstances with the approval of the employer.

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

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

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

(3) Partner Leave

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

(b) The employee may request to extend the period of unpaid partner leave up to a maximum of eight weeks.

(4) Birth of a child

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

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

(5) Adoption of a child

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

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

(6) Other leave entitlements

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

(b) Subject to all other leave entitlements being exhausted an employee shall be entitled to apply for leave without pay following parental leave to extend their leave by up to two (2) years.

(c) The employer shall only refuse such a request on reasonable grounds related to the effect on the workplace or the employer’s business. Such grounds might include:

(i) cost;

(ii) lack of adequate replacement staff;

(iii) loss of efficiency; and

(iv) the impact on customer service.

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

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

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

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

(7) Notice and Variation

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

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

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

(8) Transfer to a Safe Job

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

(9) Communication during Parental Leave

(a) Where an employee is on parental leave and a definite decision has been made to introduce significant change at the workplace, the employer shall take reasonable steps to:

(i) make information available in relation to any significant effect the change will have on the status or responsibility level of the position the employee held before commencing parental leave; and

(ii) provide an opportunity for the employee to discuss any significant effect the change will have on the status or responsibility level of the position the employee held before commencing parental leave.

(b) The employee shall take reasonable steps to inform the employer about any significant matter that will affect the employee's decision regarding the duration of parental leave to be taken, whether the employee intends to return to work and whether the employee intends to return to work on a part-time basis.

(c) The employee shall also notify the employer of changes of address or other contact details which might affect the employer's capacity to comply with subclause (9)(a).

(10) Replacement Employee

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

(11) Return to Work

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

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

(c) An employee may return on a part time or job-share basis to the substantive position occupied prior to the commencement of leave or to a different position at the same classification level in accordance with Clause 10. – Part-Time Employment of this Award.

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

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

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

(b) Paid parental leave will count as qualifying service for all purposes of this Award. During paid parental leave at half pay all entitlements will accrue as if the employee had taken the entitlement to paid parental leave at full pay.

(c) Absence on unpaid parental leave shall not break the continuity of service of employees but shall not be taken into account in calculating the period of service for any purpose of this Award.

(d) An employee on parental leave may terminate employment at any time during the period of leave by written notice in accordance with subclause (1) of Clause 8. – Contract of Service of this Award.

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

9. Clause 21. – Leave Without Pay: Delete this clause and insert the following in lieu thereof:

(1) Subject to the provisions of subclauses (2) and (3) of this clause, the employer may grant an employee leave without pay for any period and is responsible for that employee on their return.

(2) Subject to the provisions of subclause (3) every application for leave without pay will be considered on its merits and may be granted provided that the following conditions are met:

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

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

(3) An employee shall, upon request be entitled to two days unpaid personal (caring) leave.

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

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

10. Clause 26. – Cultural/Ceremonial Leave: Delete subclause (6) of this clause and insert the following in lieu thereof:

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

(a) the employee's annual leave entitlements

(b) the employee's accrued long service leave entitlements, but in full days only.

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

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

11. Schedule F – Expired General Agreement Salaries: Delete this schedule and insert the following in lieu thereof:

Classification Level	Annual Salary at the beginning of the first pay period on or after 26 February 2005 (Not to be subject to arbitrated safety net adjustments)
Level 1	
Under 17 yrs	15,361
17 yrs	17,952
18 yrs	20,940
19 yrs	24,238
20 yrs	27,219
1.1	29,901
1.2	30,821
1.3	31,741
1.4	32,655
1.5	33,575
1.6	34,495
1.7	35,552
1.8	36,284
1.9	37,366
LEVEL 2.1	38,661
2.2	39,655
2.3	40,699
2.4	41,803
2.5	42,957

2006 WAIRC 05166

GOVERNMENT OFFICERS SALARIES, ALLOWANCES AND CONDITIONS AWARD 1989

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ANIMAL RESOURCES AUTHORITY AND OTHERS
	APPLICANTS
	-v-
	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR COMMISSIONER P E SCOTT
DATE	FRIDAY, 28 JULY 2006
FILE NO	P 24 OF 2006
CITATION NO.	2006 WAIRC 05166

Result Award Varied

Order

HAVING heard Mr T Boronovskis and with him Mr G Wibrow on behalf of the Animal Resources Authority and Others and Mr M Finnegan and with him Ms L Jacobson on behalf of the Civil Service Association of Western Australia Incorporated, and by consent, the Public Service Arbitrator, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders:

THAT the Government Officers Salaries, Allowances and Conditions Award 1989 (No. PSA A 3 of 1989) be varied in accordance with the following Schedule and that such variation shall have effect on and from the 26th day of July 2006.

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

SCHEDULE

Clause11. – Salaries: Delete subclause (3) of this clause and insert the following in lieu thereof:

(3) Payment Of Salaries

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

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

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

(d) The hourly rate referred to in paragraph (c) of this subclause shall only be applied to an average of no more than 37.5 hours per week worked as ordinary hours under

(i) this award; or

(ii) a contract of employment subject to the provisions s 4H of the *Workplace Agreements Act 1993* as preserved by s 100 of the *Labour Relations Reform Act 2002*.

(e) Salaries shall be paid by direct funds transfer to the credit of an account nominated by the officer at a bank, building society or credit union approved by the Under Treasurer or an Accountable Officer.

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

2006 WAIRC 05163

GOVERNMENT OFFICERS (STATE GOVERNMENT INSURANCE COMMISSION) AWARD, 1987

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	INSURANCE COMMISSION OF WESTERN AUSTRALIA
	-and-
	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
CORAM	PUBLIC SERVICE ARBITRATOR COMMISSIONER P E SCOTT
DATE	FRIDAY, 28 JULY 2006
FILE NO	P 29 OF 2006
CITATION NO.	2006 WAIRC 05163

Result Award Varied

Order

HAVING heard Mr T Boronovskis and with him Mr G Wibrow on behalf of the Insurance Commission of Western Australia and Mr M Finnegan and with him Ms L Jacobson on behalf of the Civil Service Association of Western Australia Incorporated, and by consent, the Public Service Arbitrator, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders:

THAT the Government Officers (State Government Insurance Commission) Award, 1987 (No. PSA A 21 of 1986) be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 26th day of July 2006.

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

SCHEDULE

1. Clause 2 – Arrangement: Delete 47. Purchased Leave - 48/52 Salary Arrangement and insert the following in lieu thereof:

47. Purchased Leave - 44/52 Salary Arrangement

2. Clause 6. – Definitions

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

3. Clause 16 – Annual Leave: Delete subclause (2) of this clause and insert the following in lieu thereof:

(2) Entitlement

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

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

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

(d) To assist employees in balancing their work and family responsibilities, an employee may elect, with the consent of the employer, to accrue and carry forward a maximum of two years annual leave from the date of the entitlement.

4. Clause 18 – Long Service Leave:

A. Delete subclause (2) of this clause insert the following in lieu thereof:

(2) Employees may by agreement with their employer, clear any accrued entitlement to long service leave in minimum periods of one (1) day.

B. After subclause (13) of this clause insert new subclause (14) as follows:

(14) Pay Out of Accrued Long Service Leave Entitlement

(a) If an employee applies to receive payments rather than taking periods of accrued long service leave, such application may be approved by the employer, subject to the following:

(i) 10 consecutive days leave must be taken in a calendar year for any application to be approved;

(ii) payment in lieu of leave will not exceed the equivalent of 13 weeks long service leave in any one (1) calendar year. However, applications to have greater amounts of leave paid out will be considered by the employer where special circumstances exist; and

(iii) the payment will be made at the salary rate payable if the leave had been taken.

(b) The balance of long service leave entitlement remaining after any payout of leave must be taken within one (1) year of the entitlement becoming due.

(c) Periods of long service leave that are paid out are excised from continuous service for the purposes of determining the next long service leave accrual date.

5. Clause 21. – Parental Leave: Delete this clause and insert the following in lieu thereof:

(1) Definitions

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

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

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

"Public sector" means an employing authority as defined in Section 5 of the Public Sector Management Act 1994.

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

(2) Entitlement to Parental and Partner Leave

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

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

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

(b) An employee identified as the primary care giver of a child and who has completed twelve months continuous service in the Western Australian public sector shall be entitled to the following amounts of paid parental leave which will form part of the 52 week entitlement provided in subclause (2)(a) of this clause:

(i) eight (8) weeks paid parental leave until 30 June 2006;

(ii) ten (10) weeks paid parental leave from 1 July 2006;

(iii) twelve (12) weeks paid parental leave from 1 July 2007; and

(iv) fourteen (14) weeks paid parental leave from 1 July 2008.

(c) An employee may take the paid parental leave specified in paragraph (2)(b) at half pay for a period equal to twice the period to which the employee would otherwise be entitled

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

(e) Paid parental leave for primary care purposes for any one birth or adoption shall not exceed the period specified in paragraphs (2)(b) and (2)(c) above.

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

(g) Parental leave may only be taken concurrently by an employee and his or her partner as provided for in subclause (3) or under special circumstances with the approval of the employer.

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

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

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

(3) Partner Leave

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

(b) The employee may request to extend the period of unpaid partner leave up to a maximum of eight weeks.

(4) Birth of a child

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

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

(5) Adoption of a child

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

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

(6) Other leave entitlements

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

(b) Subject to all other leave entitlements being exhausted an employee shall be entitled to apply for leave without pay following parental leave to extend their leave by up to two (2) years.

(c) The employer shall only refuse such a request on reasonable grounds related to the effect on the Insurance Commission. Such grounds might include:

(i) cost;

(ii) lack of adequate replacement employees;

(iii) loss of efficiency; and

(iv) the impact on customer service.

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

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

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

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

(7) Notice and Variation

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

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

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

(8) Transfer to a Safe Job

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

(9) Communication during Parental Leave

(a) Where an employee is on parental leave and a definite decision has been made to introduce significant change at the workplace, the employer shall take reasonable steps to:

(i) make information available in relation to any significant effect the change will have on the status or responsibility level of the position the employee held before commencing parental leave; and

(ii) provide an opportunity for the employee to discuss any significant effect the change will have on the status or responsibility level of the position the employee held before commencing parental leave.

(b) The employee shall take reasonable steps to inform the employer about any significant matter that will affect the employee's decision regarding the duration of parental leave to be taken, whether the employee intends to return to work and whether the employee intends to return to work on a part-time basis.

(c) The employee shall also notify the employer of changes of address or other contact details which might affect the employer's capacity to comply with subclause (9) (a).

(10) Replacement Employee

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

(11) Return to Work

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

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

(c) An employee may return on a part time or job-share basis to the substantive position occupied prior to the commencement of leave or to a different position at the same classification level in accordance with Clause 10. – Part-Time Employment of this Award.

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

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

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

(b) Paid parental leave will count as qualifying service for all purposes of this Award. During paid parental leave at half pay all entitlements will accrue as if the employee had taken the entitlement to paid parental leave at full pay.

(c) Absence on unpaid parental leave shall not break the continuity of service of employees but shall not be taken into account in calculating the period of service for any purpose of this Award.

(d) An employee on parental leave may terminate employment at any time during the period of leave by written notice in accordance with subclause (2) of Clause 7. – Contract of Service of this Award.

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

6. Clause 22. – Leave Without Pay: Delete this clause and insert the following in lieu thereof:

(1) Subject to the provisions of subclauses (2) and (3) of this clause, the employer may grant an employee leave without pay for any period and is responsible for that employee on their return.

(2) Subject to the provisions of subclause (3) every application for leave without pay will be considered on its merits and may be granted provided that the following conditions are met:

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

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

(3) An employee shall, upon request be entitled to two days unpaid personal (caring) leave.

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

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

7. Clause 26. – Cultural/Ceremonial Leave: Delete subclause (6) of this clause and insert the following in lieu thereof:

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

(a) the employee's annual leave entitlements

(b) the employee's accrued long service leave entitlements, but in full days only.

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

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

8. Clause 47. - Purchased Leave - 44/52 Salary Arrangement: Delete the number, title and clause and insert new number, title and clause as follows:

47. - PURCHASED LEAVE - 44/52 SALARY ARRANGEMENT

(1) The employer and an employee may agree to enter into an arrangement whereby the employee can purchase up to eight (8) weeks additional leave. The employee can agree to take a reduced salary spread over the 52 weeks of the year and receive the following amounts of purchased leave.

Number of Weeks' Salary Spread Over 52 Weeks	**Number of Weeks' Purchased Leave**
44 weeks	8 weeks
45 weeks	7 weeks
46 weeks	6 weeks
47 weeks	5 weeks
48 weeks	4 weeks
49 weeks	3 weeks
50 weeks	2 weeks
51 weeks	1 week

(2) Where an employee is applying for purchased leave of between five (5) and eight (8) weeks the employer will give priority access to those employees with carer responsibilities.

(3) The additional purchased leave will not be able to be accrued. The employee is to be entitled to pay in lieu of the purchased leave not taken. In the event that the employee is unable to take such purchased leave, his/her salary will be adjusted at the completion of the agreed 12 month period to take account of the fact that time worked during the year was not included in the salary.

(4) In the event that a part time employee's ordinary working hours are varied during the year, the salary paid for such leave taken will be adjusted at the completion of the agreed 12 month period to take into account any variations to the employee's ordinary working hours during the previous year.

(5) Access to this entitlement will be subject to the employee having satisfied the Insurance Commission's accrued leave management policy.

(6) The employer will assess each application for a 44/52 salary arrangement on its merits and give consideration to the personal circumstances of the employee seeking the arrangement.

(7) Where an employee who is in receipt of an allowance provided for in Clause 35 - Higher Duties Allowance of the Award proceeds on any period of purchased leave the employee shall not be entitled to receive payment of the allowance for any period of purchased leave.

9. Clause 48. - Purchased Leave - Deferred Salary Arrangement: After subclause (6) of this clause insert new heading and subclause (7) as follows:

Variation of the Arrangements

(7) As an alternative to subclause (5) of this clause, and only by mutual agreement of the employer and the employee, the provisions of the deferred arrangement may be varied subject to the following:

(a) the term of the arrangement will not extend beyond that contemplated by this clause,

(b) the variation will not result in any consequential monetary or related gain or loss to either the employer or the employee, and

(c) the percentage of salary to apply during the 12 months leave as specified in subclause 3 of this clause will be calculated as 80% of the average ordinary prescribed hours worked over the previous four years.

10. Clause 50 – Casual Employment:

A. Delete subclause (3) of this clause and insert the following in lieu thereof:

(3) Conditions of Employment:

Conditions of employment, leave and allowances provided under the provisions of this Award shall not apply to a casual Employee with the exception of Bereavement and Carers Leave.

However, where expenses are directly and necessarily incurred by a casual employee in the ordinary performance of his/her duties, he/she shall be entitled to reimbursement in accordance with the provisions of this Award.

B. After subclause (6) of this clause insert new subclause (7) as follows:

(7) Caring Responsibilities

(a) Subject to the evidentiary and notice requirements in Clause 20 – Carers Leave a casual employee shall be entitled to not be available to attend work or to leave work if they need to care for members of their immediate family or household who are sick and require care and support, or who require care due to an unexpected emergency, or the birth of a child.

(b) The employer and the casual employee shall agree on the period for which the casual employee will be entitled to not be available to attend work. In the absence of agreement, the employee is entitled to not be available to attend work for up to 48 hours (ie two days) per occasion. The casual employee is not entitled to any payment for the period of non-attendance.

(c An employer must not fail to re-engage a casual employee because the casual employee accessed the entitlements provided for in this subclause. The rights of an employer to engage or not engage a casual employee are otherwise not affected.

11. Schedule D - Expired General Agreement Salaries: Delete this schedule and insert the following in lieu thereof:

Classification	**Annual Salary after 27 February 2005 (Not to be subject to arbitrated safety net adjustments)**
	Existing Salary Rates
LEVELS	**$ Per Annum**
Level 1	
Under 17 yrs	$15,361
17 yrs	$17,952
18 yrs	$20,940
19 yrs	$24,238

Classification	Annual Salary after 27 February 2005 (Not to be subject to arbitrated safety net adjustments)
	Existing Salary Rates
LEVELS	$ Per Annum
Level 1—*continued*	
20 yrs	$27,219
1.1	$29,901
1.2	$30,821
1.3	$31,741
1.4	$32,655
1.5	$33,575
1.6	$34,495
1.7	$35,552
1.8	$36,284
1.9	$37,366
LEVEL 2.1	$38,661
2.2	$39,655
2.3	$40,699
2.4	$41,803
2.5	$42,957
LEVEL 3.1	$44,543
3.2	$45,780
3.3	$47,054
3.4	$48,362
LEVEL 4.1	$50,156
4.2	$51,562
4.3	$53,008
LEVEL 5.1	$55,795
5.2	$57,677
5.3	$59,633
5.4	$61,664
LEVEL 6.1	$64,928
6.2	$67,148
6.3	$69,445
6.4	$71,898
LEVEL 7.1	$75,659
7.2	$78,260
7.3	$81,092
LEVEL 8.1	$85,693
8.2	$88,989
8.3	$93,076

Classification	Annual Salary after 27 February 2005 (Not to be subject to arbitrated safety net adjustments)
	Existing Salary Rates
LEVELS—*continued*	$ Per Annum
LEVEL 9.1	$98,180
9.2	$101,628
9.3	$105,561
CLASS 1	$111,509
CLASS 2	$117,458
CLASS 3	$123,402
CLASS 4	$129,350

2006 WAIRC 05165

PUBLIC SERVICE AWARD 1992

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES CURRICULUM COUNCIL OF WESTERN AUSTRALIA AND OTHERS

APPLICANTS

-v-

THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
COMMISSIONER P E SCOTT

DATE FRIDAY, 28 JULY 2006

FILE NO P 23 OF 2006

CITATION NO. 2006 WAIRC 05165

Result Award Varied

Order

HAVING heard Mr T Boronovskis and with him Mr G Wibrow on behalf of the Curriculum Council of Western Australia and Others and Mr M Finnegan and with him Ms L Jacobson on behalf of the Civil Service Association of Western Australia Incorporated, and by consent, the Public Service Arbitrator, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders:

THAT the Public Service Award 1992 (No. PSA A 4 of 1989) be varied in accordance with the following Schedule and that such variation shall have effect on and from the 26th day of July 2006.

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

SCHEDULE

Clause11. – Salaries: Delete subclause (3) of this clause and insert the following in lieu thereof:

(3) Payment Of Salaries

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

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

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

(d) The hourly rate referred to in paragraph (c) of this subclause shall only be applied to an average of no more than 37.5 hours per week worked as ordinary hours under

(i) this award; or

(ii) a contract of employment subject to the provisions s 4H of the *Workplace Agreements Act 1993* as preserved by s 100 of the *Labour Relations Reform Act 2002*.

(e) Salaries shall be paid by direct funds transfer to the credit of an account nominated by the officer at a bank, building society or credit union approved by the Under Treasurer or an Accountable Officer.

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

2006 WAIRC 05161

PUBLIC SERVICE AWARD 1992

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CURRICULUM COUNCIL OF WESTERN AUSTRALIA AND OTHERS
	-and-
	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER P E SCOTT
DATE	FRIDAY, 28 JULY 2006
FILE NO	P 26 OF 2006
CITATION NO.	2006 WAIRC 05161

Result Award Varied

Order

HAVING heard Mr T Boronovskis and with him Mr G Wibrow on behalf of the Curriculum Council of Western Australia and Others and Mr M Finnegan and with him Ms L Jacobson on behalf of the Civil Service Association of Western Australia Incorporated, and by consent, the Public Service Arbitrator, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders:

THAT the Public Service Award 1992 (No. PSA A 4 of 1989) be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 26th day of July 2006.

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

SCHEDULE

1. Clause 2. – Arrangement: Delete 13. Purchased Leave 48/52 Salary Arrangement and insert the following in lieu thereof:

13. Purchased Leave - 44/52 Salary Arrangement

2. Clause 4. – Scope: Delete paragraph (c) of this clause and insert the following in lieu thereof:

(c) A chief executive officer as defined in *section 3(1)* of the *Public Sector Management Act 1994.*

3. Clause 6. – Definitions: Delete this clause and insert the following in lieu thereof:

In this Award, the following expressions shall have the following meaning:-

"Administrative Instruction" means administrative instruction as defined by *Schedule 5* of the *Public Sector Management Act 1994.*

"Casual Officer" means an officer engaged by the hour for a period not exceeding one calendar month in any period of engagement, as determined by the employer.

"Chief Executive Officer" in relation to any officer employed in a Department, means the person immediately responsible for the general management of the Department to the Minister of the Crown for the time being administering the Department.

"De Facto Partner" means a relationship (other than a legal marriage) between two persons who live together in a 'marriage-like' relationship and includes same sex partners.

“Employees” means public service officers and executive officers employed in the Public Service under Part 3 and Part 8 of the Public Sector Management Act 1994.”

"Employer" and "Employing Authority" means employing authorities as defined by section 5 of the Public *Sector Management Act 1994.*

"Headquarters" means the place in which the principal work of an officer is carried out, as defined by the employer.

"Metropolitan Area" means that area within a radius of fifty (50) kilometres from the Perth City Railway Station.

"Officers" means public service officers and executive officers employed in the Public Service under *Part 3 and Part 8 of the Public Sector Management Act 1994.*

"Partner" means either spouse or defacto partner.

"Spouse" means a person who is lawfully married to that person.

“Union” means the Civil Service Association of Western Australia Incorporated (the Association).

4. Clause 10. – Casual Employment: Delete this clause and insert the following in lieu thereof:

(1) Salary

(a) A casual officer shall be paid for each hour worked at the appropriate classification contained in Clause 11. - Salaries or Clause 12. - Salaries Specified Callings of this Award in accordance with the following formula:

$$\frac{\text{Fortnightly Salary}}{75}$$

With the addition of twenty percent in lieu of annual leave, sick leave, long service leave and payment for public holidays.

(b) The provisions of subclause (3) (a) and (d) of Clause 11. - Salaries of this Award shall not apply to a casual officer.

(2) Conditions of Employment

(a) Conditions of employment, leave and allowances provided under the provisions of this Award shall not apply to a casual officer with the exception of bereavement and carers leave. However, where expenses are directly and necessarily incurred by a casual officer in the ordinary performance of their duties, he/she shall be entitled to reimbursement in accordance with the provisions of this Award.

(b) Nothing in this clause shall confer "permanent" or "fixed term contract" officer status within the meaning of Section 64 of the Public Sector Management Act 1994.

(c) The employment of a casual officer may be terminated at any time by the casual officer or the employer giving to the other, one hour's prior notice. In the event of an employer or casual officer failing to give the required notice, one hour's salary shall be paid or forfeited.

(d) The provisions of the Overtime Allowance in this Award do not apply to Casual Officers who are paid by the hour for each hour worked. Additional hours are paid at the normal casual rate.

(e) A casual officer shall be informed that their employment is casual and that they have no entitlement to paid leave, with the exception of bereavement leave before they are engaged.

(3) Caring Responsibilities

(a) Subject to the evidentiary and notice requirements in Clause 27 – Carers Leave a casual officer shall be entitled to not be available to attend work or to leave work if they need to care for members of their immediate family or household who are sick and require care and support, or who require care due to an unexpected emergency, or the birth of a child.

(b) The employer and the casual officer shall agree on the period for which the casual officer will be entitled to not be available to attend work. In the absence of agreement, the officer is entitled to not be available to attend work for up to 48 hours (ie two days) per occasion. The casual officer is not entitled to any payment for the period of non-attendance.

(c) An employer must not fail to re-engage a casual officer because the casual officer accessed the entitlements provided for in this subclause. The rights of an employer to engage or not engage a casual officer are otherwise not affected.

5. Clause 13. - Purchased Leave - 48/52 Salary Arrangement: Delete the number, title and clause and insert new number, title and clause as follows:

13. – PURCHASED LEAVE - 44/52 SALARY ARRANGEMENT

(1) The employer and an employee may agree to enter into an arrangement whereby the employee can purchase up to eight (8) weeks additional leave.

(2) The employer will assess each application for a 44/52 salary arrangement on its merits and give consideration to the personal circumstances of the employee seeking the arrangement.

(3) Where an employee is applying for purchased leave of between five (5) and eight (8) weeks the employer will give priority access to those employees with carer responsibilities.

(4) Access to this entitlement will be subject to the employee having satisfied the agency’s accrued leave management policy.

(5) The employee can agree to take a reduced salary spread over the 52 weeks of the year and receive the following amounts of purchased leave:

Number of Weeks’ Salary Spread Over 52 Weeks	**Number of Weeks’ Purchased Leave**
44 weeks	8 weeks
45 weeks	7 weeks
46 weeks	6 weeks

Number of Weeks' Salary Spread Over 52 Weeks—*continued*	**Number of Weeks' Purchased Leave**
47 weeks	5 weeks
48 weeks	4 weeks
49 weeks	3 weeks
50 weeks	2 weeks
51 weeks	1 week

(6) The purchased leave will not be able to be accrued. The employee is to be entitled to pay in lieu of the purchased leave not taken. In the event that the employee is unable to take such purchased leave, his/her salary will be adjusted on the last pay period in January to take account of the fact that time worked during the year was not included in the salary.

(7) Where an employee who is in receipt of an allowance provided for in Clause 19 - Higher Duties Allowance of the Award proceeds on any period of purchased leave the employee shall not be entitled to receive payment of the allowance for any period of purchased leave.

(8) In the event that a part time employee's ordinary working hours are varied during the year, the salary paid for such leave taken will be adjusted on the last pay in January to take into account any variations to the employee's ordinary working hours during the previous year.

6. Clause 14. - Purchased Leave - Deferred Salary Arrangement: After subclause (6) of this clause insert new heading and subclause (7) as follows:

Variation of the Arrangements

(7) As an alternative to subclause (5) of this clause, and only by mutual agreement of the employer and the employee, the provisions of the deferred arrangement may be varied subject to the following:

(a) the term of the arrangement will not extend beyond that contemplated by this clause,

(b) the variation will not result in any consequential monetary or related gain or loss to either the employer or the employee, and

(c) the percentage of salary to apply during the 12 months leave as specified in subclause 3 of this clause will be calculated as 80% of the average ordinary prescribed hours worked over the previous four years.

7. Clause 23. – Annual Leave:

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

(2) Entitlement

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

(b) To assist employees in balancing their work and family responsibilities, an employee may elect, with the consent of the employer, to accrue and carry forward a maximum of two years annual leave from the date of the entitlement.

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

(d) On written application, an officer shall be paid salary in advance when proceeding on annual leave.

(e) The provisions of this clause do not apply to Casual Officers.

B. Delete subclause (9) of this clause and insert the following in lieu thereof:

(9) Subject to paragraph (2) (b) of this clause, the employer may direct an officer to take accrued annual leave and may determine the date on which such leave shall commence. Should the officer not comply with the direction, disciplinary action may be taken against the officer.

8. Clause 25. – Long Service Leave:

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

(1) Each officer who has completed:

(a) A period of 7 years of continuous service in a permanent and/or fixed term contract capacity; or

(b) 10 years of continuous service in a temporary capacity;

shall be entitled to 13 weeks of long service leave on full pay.

Employees may by agreement with their employer, clear any accrued entitlement to long service leave in minimum periods of one (1) day.

B. After subclause (12) of this clause insert new subclauses (13) and (14) as follows:

(13) Long Service Leave on Double Pay

(a) Employees may by agreement with their employer, access any portion of an accrued entitlement to long service leave on double pay for half the period accrued. In these circumstances the leave actually taken is 50 percent of the accrued entitlement accessed.

(b) Where employees proceed on long service leave on double pay in accordance with this subclause, the entitlement accessed is excised for the purpose of continuous service in accordance with subclause (5) of this clause.

(14) Cash Out of Accrued Long Service Leave Entitlement

(a) Employees may by agreement with their employer, cash out any portion of an accrued entitlement to long service leave, provided the employee proceeds on a minimum of ten (10) days annual leave in that calendar year.

(b) Where employees cash out any portion of an accrued entitlement to long service leave in accordance with this subclause, the entitlement accessed is excised for the purpose of continuous service in accordance with subclause (5) of this clause.

9. Clause 28. – Parental Leave: Delete this clause and insert the following in lieu thereof:

(1) Definition

"Officer" includes full time, part time, permanent and fixed term contract officers.

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

"Replacement Officer" is an officer specifically engaged to replace an officer proceeding on parental leave.

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

"Public sector" means an employing authority as defined in Section 5 of the Public Sector Management Act 1994.

(2) Entitlement to Parental and Partner Leave

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

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

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

(b) An officer identified as the primary care giver of a child and who has completed twelve months continuous service in the Western Australian public sector shall be entitled to the following amounts of paid parental leave which will form part of the 52 week entitlement provided in paragraph (2)(a) of this clause:

(i) eight (8) weeks paid parental leave until 30 June 2006;

(ii) ten (10) weeks paid parental leave from 1 July 2006;

(iii) twelve (12) weeks paid parental leave from 1 July 2007; and

(iv) fourteen (14) weeks paid parental leave from 1 July 2008."

(c) An officer may take the paid parental leave specified in paragraph (2)(b) at half pay for a period equal to twice the period to which the employee would otherwise be entitled.

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

(e) Paid parental leave for primary care purposes for any one birth or adoption shall not exceed the period specified in paragraphs (2)(b) and (2)(c) above.

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

(g) Parental leave may only be taken concurrently by an officer and his or her partner as provided for in subclause (3) or under special circumstances with the approval of the employer.

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

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

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

(3) Partner Leave

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

(b) The officer may request to extend the period of unpaid partner leave up to a maximum of eight weeks.

(4) Birth of a child

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

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

(5) Adoption of a child

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

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

(6) Other leave entitlements

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

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

(c) The employer shall only refuse such a request on reasonable grounds related to the effect on the workplace or the employer’s business. Such grounds might include:

(i) cost;

(ii) lack of adequate replacement staff;

(iii) loss of efficiency; and

(iv) the impact on customer service.

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

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

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

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

(7) Notice and Variation

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

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

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

(8) Transfer to a Safe Job

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

(9) Communication during Parental Leave

(a) Where an officer is on parental leave and a definite decision has been made to introduce significant change at the workplace, the employer shall take reasonable steps to:

(i) make information available in relation to any significant effect the change will have on the status or responsibility level of the position the officer held before commencing parental leave; and

(ii) provide an opportunity for the officer to discuss any significant effect the change will have on the status or responsibility level of the position the officer held before commencing parental leave.

(b) The officer shall take reasonable steps to inform the employer about any significant matter that will affect the officer's decision regarding the duration of parental leave to be taken, whether the officer intends to return to work and whether the officer intends to return to work on a part-time basis.

(c) The officer shall also notify the employer of changes of address or other contact details which might affect the employer's capacity to comply with subclause (9)(a).

(10) Replacement Officer

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

(11) Return to Work

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

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

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

(d) An officer may return on a part time or job-share basis to the substantive position occupied prior to the commencement of leave or to a different position at the same classification level in accordance with Clause 9. – Part-Time Employment of this Award.

(e) Officers who return to work on a part time basis have access to the right of reversion provisions of Clause 9. – Part-Time Employment of this Award.

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

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

(b) Paid parental leave will count as qualifying service for all purposes of this Award. During paid parental leave at half pay all entitlements will accrue as if the officer had taken the entitlement to paid parental leave at full pay.

(c) Absence on unpaid parental leave shall not break the continuity of service of officers but shall not be taken into account in calculating the period of service for any purpose of this Award.

(d) An officer on parental leave may terminate employment at any time during the period of leave by written notice in accordance with subclause (3) of Clause 8. – Contract of Service of this Award.

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

10. Clause 29. – Leave Without Pay: Delete this clause and insert the following in lieu thereof:

(1) Subject to the provisions of subclauses (2) and (3) of this clause, the employer may grant an officer leave without pay for any period and is responsible for that officer on their return.

(2) Subject to the provisions of subclause (3) every application for leave without pay will be considered on its merits and may be granted provided that the following conditions are met:

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

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

(3) An officer shall, upon request be entitled to two days unpaid personal (caring) leave.

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

11. Clause 33. – Cultural/Ceremonial Leave: Delete this clause and insert the following in lieu thereof:

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

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

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

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

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

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

(a) the officer's annual leave entitlements

(b) the officer's accrued long service leave entitlements, but in full days only.

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

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

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

12. Schedule M – Expired General Agreement Salaries: Delete this schedule and insert the following in lieu thereof:

Salaries

Classification Level	Annual Salary at the beginning of the first pay period on or after 26 February 2005 (Not to be subject to arbitrated safety net adjustments)
	$
Level 1	
Under 17 yrs	15,361
17 yrs	17,952
18 yrs	20,940
19 yrs	24,238
20 yrs	27,219
1.1	29,901
1.2	30,821
1.3	31,741
1.4	32,655
1.5	33,575
1.6	34,495
1.7	35,552
1.8	36,284
1.9	37,366
LEVEL 2.1	38,661
2.2	39,655
2.3	40,699
2.4	41,803
2.5	42,957
LEVEL 3.1	44,543
3.2	45,780
3.3	47,054
3.4	48,362
LEVEL 4.1	50,156
4.2	51,562
4.3	53,008
LEVEL 5.1	55,795
5.2	57,677
5.3	59,633
5.4	61,664
LEVEL 6.1	64,928
6.2	67,148
6.3	69,445
6.4	71,898
LEVEL 7.1	75,659
7.2	78,260
7.3	81,092
LEVEL 8.1	85,693
8.2	88,989
8.3	93,076
LEVEL 9.1	98,180
9.2	101,628
9.3	105,561
CLASS 1	111,509
CLASS 2	117,458
CLASS 3	123,402
CLASS 4	129,350

Salaries – Specified Callings

Classification Level	Annual Salary at the beginning of the first pay period on or after 26 February 2005 (Not to be subject to arbitrated safety net adjustments)
	$
LEVEL 2/4	
1 st year	38,661
2 nd year	40,699
3 rd year	42,957
4 th year	45,780
5 th year	50,156
6 th year	53,008
LEVEL 5.1	55,795
5.2	57,677
5.3	59,633
5.4	61,664
LEVEL 6.1	64,928
6.2	67,148
6.3	69,445
6.4	71,898
LEVEL 7.1	75,659
7.2	78,260
7.3	81,092
LEVEL 8.1	85,693
8.2	88,989
8.3	93,076
LEVEL 9.1	98,180
9.2	101,628
9.3	105,561
CLASS 1	111,509
CLASS 2	117,458
CLASS 3	123,402
CLASS 4	129,350

AWARDS/AGREEMENTS AND ORDERS—Application for variation of—No variation resulting—

2006 WAIRC 04791

BREADCARTERS' (METROPOLITAN) AWARD NO. 35 OF 1963

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH

APPLICANT

-v-

BREAD MANUFACTURERS (PERTH AND SUBURBS) INDUSTRIAL UNION OF EMPLOYERS OF WESTERN AUSTRALIA AND OTHERS

RESPONDENTS

CORAM COMMISSIONER S M MAYMAN
DATE MONDAY, 24 JULY 2006
FILE NO APPL 518 OF 2005
CITATION NO. 2006 WAIRC 04791

Result Application discontinued
Representation
Applicant Mr N. Hodgson and Mr R. Burton
Respondents Mr D. Lee (as agent) on behalf of George Western Foods Ltd t/a Tip Top Bakeries
Ms M. Saraceni (of counsel) on behalf of the Baking Industry Employers' Association of WA

Order

WHEREAS an application was lodged in the Commission pursuant to Section 40 of the *Industrial Relations Act 1979*;

AND WHEREAS the matter was listed for a conference on 16 December 2005;

AND WHEREAS at the conclusion of the conference the matters remained unresolved between the parties;

AND WHEREAS on 1 February 2006 the applicant filed a Notice of Discontinuance in respect of the application;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders –

THAT this application be, and is hereby, discontinued.

(Sgd.) S M MAYMAN,
Commissioner.

[L.S.]

AGREEMENTS—Industrial—Retirement from—

2006 WAIRC 05246

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. 64 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

The Conservation Commission will cease to be a party to the Conservation Commission Agency Specific Agreement No. PSAAG 28 of 2003 on and from the 16th day of July 2006.

DATED at Perth this 7th day of August 2006.

J.A. SPURLING,
Registrar.

CANCELLATION OF—Awards/Agreements/Respondents—

2006 WAIRC 04788

BREADCARTERS (COUNTRY) AWARD 1976 NO. R 17 OF 1975

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TRANSPORT WORKERS' UNION OF AUSTRALIA, WA BRANCH
	APPLICANT
	-v-
	ACME BAKERY AND OTHERS
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 24 JULY 2006
FILE NO	APPL 525 OF 2005
CITATION NO.	2006 WAIRC 04788

Result	Application discontinued
Representation	
Applicant	Mr N Hodgson and Mr R Burton
Respondents	Ms M. Saraceni (of counsel) on behalf of the Baking Industry Employers' Association of WA

Order

WHEREAS an application was lodged in the Commission pursuant to Section 40 of the *Industrial Relations Act 1979*;

AND WHEREAS the matter was listed for a conference on 16 December 2005;

AND WHEREAS at the conclusion of the conference the matters remained unresolved between the parties;

AND WHEREAS on 1 February 2006 the applicant filed a Notice of Discontinuance in respect of the application;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders –

THAT this application be, and is hereby, discontinued.

(Sgd.) S M MAYMAN,
[L.S.] Commissioner.

2006 WAIRC 05190

THE TRANSPORT TRUST SALARIED OFFICERS' AWARD NO. 3 OF 1977

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	(COMMISSION'S OWN MOTION)
	APPLICANT
	-v-
	PUBLIC TRANSPORT AUTHORITY AND AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES
	RESPONDENTS
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	THURSDAY, 3 AUGUST 2006
FILE NO/S	APPL 60 OF 2006
CITATION NO.	2006 WAIRC 05190

Result Award cancelled

Order

WHEREAS the Commission, being of the opinion that there was no employee to whom the following award applied, did give notice on the 28th day of June, 2006 of an intention to make an order cancelling the award;

AND WHEREAS at the 31st day of July, 2006 there were no objections to the making of such an order;

NOW THEREFORE, I, the undersigned Chief Commissioner of the Western Australian Industrial Relations Commission, pursuant to the powers conferred by section 47 of the Act, do hereby order that the following award be cancelled:

THE TRANSPORT TRUST SALARIED OFFICERS'AWARD NO. 3 OF 1977

(Sgd.) A R BEECH,
[L.S.] Chief Commissioner.

INDUSTRIAL MAGISTRATE—Claims before—

2006 WAIRC 05238

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	TIM BARTON
	ClAIMANT
	-v-
	ROCOM PTY LTD
	RESPONDENT
CORAM	INDUSTRIAL MAGISTRATE G. CICCHINI
HEARD	WEDNESDAY, 19 JULY 2006, WEDNESDAY, 7 DECEMBER 2005, MONDAY, 30 JANUARY 2006, WEDNESDAY, 15 MARCH 2006, WEDNESDAY, 28 JUNE 2006
DELIVERED	WEDNESDAY, 19 JULY 2006
FILE NO.	M 129 OF 2005
CITATION NO.	2006 WAIRC 05238

CatchWords	Resignation by employee; notice of termination; non-acceptance of notice of termination; termination by employer; payment in lieu of notice; contractual benefit; enforcement of Metal Trades (General) Award 1966.
Legislation	*Industrial Relations Act 1979* *Metal Trades (General) Award 1966*
Result	Claim dismissed
Representation	
Claimant	Mr J G Kitto, of Counsel, of *Kitto & Kitto*, Barristers & Solicitors appeared for the Claimant
Respondent	Mr R H Gifford of the *Motor Trade Association of Western Australia (Inc)* appeared as agent for the Respondent.

REASONS FOR DECISION

The Facts

1 The Claimant commenced employment with the Respondent as a motor mechanic on 1 July 2004. It is common ground that his employment with the Respondent was regulated by the ***Metal Trades (General) Award 1966*** (the Award).

2 On the morning of Friday, 17 June 2005 the Claimant handed a post-dated letter of resignation to Richard Dobson, the Respondent's service manager. The letter dated 20 June 2005 stated:

> *To whom it may concern. I here by* (sic) *give 2 full working weeks notice, ie 10 days, to terminate my employment with Barbagallos. Friday the 1st of July 2005 being my last day at work.*
>
> *Many thanks, yours sincerely.*

3 The Claimant testified that he gave two weeks' notice because that was what he understood was required. He thought that because he was paid on a fortnightly basis, he should give two weeks' notice of termination. He said that he handed over his resignation on Friday, 17 June 2005 rather than on Monday, 20 June 2005 so as to give his employer as much time as possible to find his replacement, in the knowledge that good mechanics were hard to find.

4 Upon receiving the letter of resignation from the Claimant, Mr Dobson was informed by the Claimant that he was resigning to take up a position with *Roadbend Motors*. *Roadbend Motors* is considered by the Respondent to be its direct competitor. Mr Dobson, having taken the letter of resignation from the Claimant, told him to "*leave it with him*" and that Mr Dobson would get back to him later in the day. Mr Dobson then conferred with his supervisor Mr Todd Perejuan.

5 Upon receiving the Claimant's letter of resignation Mr Perejuan noticed that it had been post-dated. He contacted the Respondent's payroll office and discovered that if the Claimant was to work out the entire period of his notice it would take him into his second year of employment. That had relevance because that would entitle him to work out two weeks rather than the one week which was prescribed by the Award. Mr Perejuan did not want the Claimant to continue working for the Respondent for any longer than necessary. His prospective employment with the Respondent's competitor created commercial sensitivity. Furthermore Mr Perejuan was not happy about the Claimant's resignation for other reasons. Indeed the Claimant had been highly regarded and was seen as a long term prospect. The Respondent had invested in him by sending him over to Sydney so that he could participate in a specialised training course. The skills acquired during such training and whilst on the job for the Respondent would as a consequence of the Claimant's decision fall to the benefit of the Respondent's competitor. In the circumstances it was decided that the Claimant should not be permitted to continue to work for the Respondent. Consequently at about 4.00 pm that day Mr Dobson called the Claimant into his office and informed him that he was terminated with immediate effect. He was paid out his entitlements which included one week's pay in lieu of notice.

6 The Claimant departed the Respondent's premises and returned the following Monday in order to pick up his tools and return his uniform. As it turned out the Claimant was able to bring forward the commencement of his employment with his new employer resulting in no loss of income.

The Claim

7 The Claimant asserts that he was entitled to receive two weeks' pay in lieu of notice because his employment with the Respondent was to continue during the period of the notice and could only end on 1 July 2005 barring his summary dismissal for other reasons, in which case, he would forfeit any entitlement to payment.

8 Further the Claimant contends that the post-dating of the notice is of little or no significance because the Claimant was entitled in any event to remain in employment until 1 July 2005 thereby entitling him to two weeks' pay in lieu of notice. It is argued that the Respondent, in terminating his employment as it did, attempted to lessen the term of the Claimant's employment so as to deny the Claimant the extra week's pay in lieu of notice.

Response

9 The Respondent argues that the obligation upon either party to provide notice of termination of a contract of employment is prescribed by clause 6 of the Award. Whilst subclause 6(1)(a) does allow a party to give a greater period of notice than that prescribed in subclause 6(2)(a), the subclause does not impose an obligation upon the other party to accept the greater period of notice. The Respondent's action was in effect to decline to accept the greater period of notice. It follows that because the Claimant's service was, at termination on 17 June 2005, less than one year the relevant period of notice required to be provided by the Respondent was one week. The Respondent contends that it has satisfied its obligations by paying the Claimant one week's pay in lieu of notice.

Determination

10 The facts in this matter are not in issue. Accordingly, the matters in issue are to be determined upon the application of the law to those undisputed facts. Such requires a consideration of the relevant Award provisions. I set out those provisions:

6. - CONTRACT OF SERVICE

(1) (a) A contract of service to which Part 1 - GENERAL of this award applies may be terminated in accordance with the provisions of this clause and not otherwise but this subclause does not operate so as to prevent any party to a contract from giving a greater period of notice than is hereinafter prescribed, nor to affect an employer's right to dismiss an employee without notice for conduct that justifies instant dismissal, including malingering, inefficiency or neglect of duty, and an employee so dismissed shall be paid for the time worked up to the time of dismissal only.

(b) Subject to the provisions of this clause, a party to a contract of service may, on any day give to the other party the appropriate period of notice of termination of the contract prescribed in subclause (2) of this clause and the contract terminates when that period expires.

(2) Notice of Termination by Employer

(a) In order to terminate the employment of an employee (other than a casual employee) the employer shall give the employee the following notice -

PERIOD OF CONTINUOUS SERVICE	*PERIOD OF NOTICE*
During the first month	*1 day*
More than one month but 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 who at the date of termination has completed two years' continuous service with the employer, shall be entitled to one week's notice in addition to the notice prescribed in paragraph (a) of this subclause.

(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. Provided that employment may be terminated by part of the period of the 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) . . .

(f) . . .

(g) . . .

(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 employee forfeits the entitlement to any moneys owing to the employee under this award except to the extent that those moneys exceed the ordinary wages for the required period of notice.

11 It will be obvious from the aforementioned provisions that subclause 6(2)(a) prescribes the periods of notice to be given for the termination of a contract of employment. Although that provision relates to termination by an employer, it has equal application to termination by an employee by virtue of subclause 6(3)(a). Notwithstanding the provision of those prescribed periods, subclause 6(1)(a) states that a party to a contract of employment is not prevented from giving a greater period of notice than that prescribed. The circumstance in which that may occur is in issue. Whether it can occur in the manner in which the Claimant gave notice or whether it can only occur in pursuance of a term of a contract of employment as was the case in ***Kilminster v Sun Newspapers Ltd (1931) 46 CLR 284*** is a matter to be determined.

12 If it was the case that the Claimant was entitled to give a greater period of notice than that prescribed by subclause 6(2)(a) of the Award, the question would remain as to whether the Respondent was entitled to refuse to accept such notice of termination. The Respondent suggests that it was not obligated to accept that greater period of notice. Its position is in conformity with what Kennedy C said in ***Clive Brown v John Dawkins 69 WAIG 709***. She said:

> *The facts of the termination of the contract of employment are as follows. Brown gave Dawkins notice of his intention to terminate the contract of employment by way of a letter dated 22 September 1988. It was not disputed by the respondent that this notice was received on that date or that the notice period was to have effect from that date. It follows that under the terms of the contract of employment the giving of notice on 22 September 1988 would have resulted in the termination of the contract at the end of one week (seven days) from that day. That is to say that*

> *29 September 1988 would have been the last day on which the contract was on foot but Brown explicitly stated in his letter of resignation that the notice period would be up to and including 30 September, 1988; that is, one week and one day. In my view this can only be construed as a proposal by Brown to extend the notice period required by one day. It was open to Dawkins to reject this proposed variation in the terms of the contract. There is no evidence that Dawkins responded formally to this proposal at the time it was put or subsequently or in any way. In the context of the fact that Brown went on working on that notice after 22 September, 1988 implies that Dawkins accepted Brown's proposal that the notice period be extended by one day. Thus, it being an agreed variation in the terms of the contract between both parties were bound by it.*

13 With all due respect, I do not accept that the aforementioned statement in so far as it relates to the rejection of the notice is correct. Indeed the authorities make it clear that a valid notice of termination will operate according to its terms. The issue of the non-acceptance of a notice of termination is discussed by Macken, O'Grady, Sappideen and Warburton in their text entitled **"Law of Employment 5th Edition".** With reference to the leading authorities the learned authors say, at page 177:

> *At times an employer or employee "refuses to accept" a notice of termination of employment. In the absence of special situations, Windeyer J has pointed out: "expressions such as the tendering and acceptance of a resignation, although commonly used, are merely linguistic courtesies". Provided a notice is valid, a purported refusal to accept it cannot alter the legal situation, and the notice will operate to end the contract when the period specified therein expires, or is due to expire, unless the contract is properly ended in the meantime by some other independent cause, such as summary dismissal of the employee for misconduct, or unless the notice is withdrawn by mutual agreement.*

14 I respectfully agree with their statement as to the law. A notice can only be validly given if there is legal foundation for its issue. Such might arise from a statutory provision, at common law or by agreement. In this instance if the notice was validly given it operated according to its terms. The period of notice given was ostensibly reasonable. The period of notice could not in this instance of itself vitiate the validity of the notice. It follows therefore that if the notice was validly given it operated so as to conclude the contract of employment on 1 July 2005. In those circumstance the Respondent would have been bound to pay the Claimant until, and including, that date subject to an earlier determination of the contract of employment for some proper reason.

15 In my view the Respondent had the opportunity to protect its commercial interests if it had any concerns in that regard by paying out the Claimant his two weeks' notice period without requiring him to attend work. However it did not do that, but rather decided to terminate his employment immediately and pay him one week's pay in lieu of notice. In my view the Respondent's actions were specifically aimed at denying the Claimant payment for the second week of his notice period. It seems that the Respondent attempted to render nugatory the Claimant's ability to claim for the second week of his notice period. Whether or not the Claimant was entitled to payment in lieu of his second week of notice and whether he was entitled to bring his claim within this jurisdiction remains to be determined.

16 The jurisdictional issue is pivotal. In that regard I posed the following questions with respect to which I invited written submissions in response. The questions posed were:

1. Is (the) claim . . . , made pursuant to section 83 of the Industrial Relations Act 1979 (the Act), justiciable by the Industrial Magistrates Court?
2. Is (the) claim . . . a contractual benefits claim that is only justiciable pursuant to Section 29 of the Act?

17 In their written submissions the parties were in agreement that this Court has jurisdiction to hear and determine the Claim. Both parties brought to my attention the decision of the Western Australian Industrial Relations Commission (the WAIRC) in ***Tim Barton v Alf Barbagallo and the Trustee for Barbagallo Investments Trust ABN 78 181 648 205 and Rocom Pty Ltd CAN 008 919 462 (2005) 85 WAIG 3788.*** In that matter Wood C dealt with the Claimant's contractual entitlements claim made pursuant to section 29 of the ***Industrial Relations Act 1979*** (the Act). He also considered the Claimant's application to amend his claim so as to bring an unfair dismissal claim out of time. His application to amend was rejected and the section 29 application was dismissed for want of jurisdiction. At paragraph 11 (page 3790) of his reasons for his decision Wood C said,

> *It is plain then having regard to s.83 of the Act that, given Mr Barton's employment is governed by an award, and given the claim is for a denied contractual benefit of notice, that the claim must fail for want of jurisdiction. It is the case that any claim for notice in excess of the award may be considered by the Commission. However, this is only if there is a contractual basis to that claim outside of the award. No such submission was made. An order will issue dismissing the application for want of jurisdiction.*

18 It is apparent from reading Wood C's reasons that he did not, given the concessions made by Counsel for the applicant, specifically consider clause 6 of the Award. With respect, had he been drawn to do so, he might have determined that the issue of whether the notice given by the Claimant was within the Award was not free from doubt. It seems that all concerned proceeded on the basis that the giving of the two weeks' notice by the Claimant to the Respondent was an award entitlement. Indeed such is reaffirmed by Counsel for the Claimant in his written submissions received on 12 July 2006.

19 The Respondent in written submissions also delivered on 12 July 2006 asserts that the claim cannot be one based on a denied contractual entitlement because the evidence would not support a finding that it was an express, or alternatively, an implied term of the contract of employment that the Claimant was entitled to give two weeks' notice of termination. It says that the Claimant's employment was regulated by the Award and that the notice periods set out in the Award are those which were applicable to the parties.

20 With all due respect to the Respondent, whether or not there is evidence of an express or implied term of the contract of employment which enabled the Claimant to give notice as he did is a matter of fact which does not impinge on the jurisdictional issue that I need to consider. Such may be pleaded in defence to a claim based on a contractual entitlement. However, I need to consider whether the Award itself, outside of the contract between the parties, conferred an ability on the part of the Claimant to give two weeks' notice of termination rather than the one week's notice of termination as provided for

in subclause 6(2)(a) and whether such is enforceable pursuant to section 83 of the Act. If so, the Claim may be maintainable. If not then I will be without jurisdiction notwithstanding the views of the parties. They cannot confer upon this Court jurisdiction that it does not otherwise have.

21 Subclause 6(1)(a) of the Award does not prescribe notice periods. The mandatory minimum notice periods are those prescribed in subclause 6(2)(a). In my view all it does is to preserve the right that a party might otherwise have so as not "*to prevent*" a party from giving a greater period of notice than that prescribed. It facilitates the provision of a greater notice period where there is some legal basis for doing so. It does not lay the foundation for the issue of a notice giving a greater period of notice than that prescribed. It is not a provision which empowers but rather one which facilitates such a notice where the legal foundation for it already exists. Surely it cannot operate to enable either party without legal foundation to unilaterally dictate the period of notice. It seems to me that the provision does no more than to provide for what was decided in ***Kilminster v Sun Newspapers Ltd*** **(**supra). In the headnote of the report of that matter the facts are recited as follows:

> *The plaintiff entered the service of the defendant company, a newspaper proprietor, to work as journalist in Sydney under an agreement made in Canada by which it was provided that he should remain in that service until the expiration of reasonable notice to be given by either party, salary being fixed on a yearly basis. After entering upon his duties he became a member of an industrial organization which subsequently applied for, and obtained from the Commonwealth Court of Conciliation and Arbitration, an award covering his calling. Clause 22 of the award provided that "the employment of a member . . . shall not without just cause in law be terminated by either party unless," in the case of the plaintiff, "two months' notice of such termination shall have been given." The defendant company gave to the plaintiff two months' notice of its intention to terminate his employment.*

22 The plaintiff brought an action for damages on the ground that such notice was not "*reasonable notice*" as required by the agreement. In their joint judgement the High Court of Australia constituted by Duffy CJ, Starke, Dixon and McTiernan JJ said at 289:

> *We are all of the opinion that the provisions of clause 22 of the award merely mean that the employment shall not be put an end to unless notice as therein prescribed shall be given, and they do not interfere with the rights of the parties with respect to longer notice by contract or otherwise.*

23 An award does not supersede the contract. All it can do is to reshape the contract in the terms of the award. The award does not make the contract. It only prescribes the law in relation to which the contract is made. The award does not have the effect of cutting down the more beneficial provisions of the contract to the minimum conditions prescribed in the award. Accordingly I find that subclause 6(1)(a) does no more than to make it clear that longer periods than those prescribed in the Award as minimum periods may be given when the parties agree to do so. To find otherwise would lead to potentially absurd results with such periods of notice, unilaterally given, capable of being totally disproportionate to the length of service.

24 Further, and in any event, section 83 of the Act only enables a claim to be made to this Court to enforce an award "*where a person contravenes or fails to comply with any provision of an award*". What has the Respondent done in contravention of the Award? How has it failed to comply with the Award? The Respondent has seemingly complied with the requirements of subclause 6(2) of the Award. That was its sole obligation with respect to notice.

Conclusion

25 I am of the view that section 83 of the Act can have no application to subclause 6(1)(a) in so far as the provision of a longer period of notice is concerned because it does not impose any requirement or obligation upon the Respondent. Subclause 6(1)(a) merely operates to make it clear that the Award does not prevent the giving of longer periods of notice than those prescribed where there is a legal basis for doing so. It facilitates more beneficial periods of notice than those prescribed by the Award where a party is legally empowered to give such greater period of notice. It does not of itself create the legal foundation for the giving of a greater period of notice. It is not an empowerment provision. It seems therefore, that absent any power contained in the Award, the greater period of notice given could only have resulted from an agreement whether express or implied. There was no other legal basis for it. In those circumstances any claim in that regard can only be determined by the WAIRC as a contractual entitlement dispute.

26 The Claim made pursuant to section 83 of the Act is not maintainable.

G Cicchini
Industrial Magistrate

2006 WAIRC 05222

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

PARTIES	IAN PHILLIP BUTLER
	CLAIMANT
	-v-
	STARPAC CORPORATION PTY LTD
	RESPONDENT
CORAM	INDUSTRIAL MAGISTRATE W.G. TARR
HEARD	WEDNESDAY, 5 JULY 2006, WEDNESDAY, 26 JULY 2006
DELIVERED	WEDNESDAY, 26 JULY 2006
CLAIM NO.	M 26 OF 2006
CITATION NO.	2006 WAIRC 05222

CatchWords	Skin classer; Termination of Employment, Introduction of Change and Redundancy General Order 2005; Redundancy, Payment of Notice; Sick Leave; Rostered Days Off.
Legislation	Industrial Relations Act 1979. Termination of Employment, Introduction of Change and Redundancy General Order 2005. Minimum Conditions of Employment Act 1993. Wool, Hide and Skin Store Employees' Award No 8 of 1966.
Result	Claim allowed in relation to payment for rostered days off. Otherwise dismissed.
Representation	
Applicant	Mr I P Butler appeared in person
Respondent	Mr G Pugh appeared for the Respondent

REASONS FOR DECISION

(These reasons are the reasons delivered extemporaneously by His Honour which have been extracted from the transcript of proceedings and edited.)

Background

1 The Claimant commenced employment with the Respondent as a Skin Classer in or about November 1999. After some five years service he was terminated on 28 December 2005. By this claim, lodged on 28 February 2006, the Claimant seeks the payment of the balance of his entitlement to a redundancy payment pursuant to the *Termination of Employment, Introduction of Change and Redundancy General Order 2005*, a General Order issued by the Western Australian Industrial Relations Commission on 1 June 2005 to take effect from 1 August 2005. The Claimant also seeks, pursuant to the provisions of the *Wool, Hide and Skin Store Employees' Award No 8 of 1966*, the payment of one week's pay in lieu of notice and payment for two rostered days off (RDOs) which were paid to him when he was entitled to paid sick leave.

Determination

2 It is to be noted that the provisions of the General Order under which payment for redundancy is claimed is intended to apply in the case of a bona fide redundancy. I have heard the evidence of the Respondent that for some time there has been some dissatisfaction with the performance of the Claimant, although the Claimant takes issue with that evidence. I have heard from Mr Pugh, who is a Director of the Respondent, and he has explained that it was not easy to speak to the Claimant about his performance and this is often a problem where there is some breakdown in the relationship between employee and employer. It seems to me to be unsatisfactory that the Claimant was advised by telephone of his termination by Ms Kitchen, the Administration Manager of the Respondent. I would have thought that it would have been more appropriate for the Respondent to make contact with the Claimant at work and give him notice in person, but for the reasons that Mr Pugh has set out that did not happen.

3 On the separation certificate provided to the Claimant it does indicate that the termination occurred because of a shortage of work or a redundancy. Ms Kitchen said that it was she that completed that form and she claims to have made a mistake. It is not uncommon for employers to try and soften the blow for employees by not describing on the separation certificate that someone was dismissed because of misconduct or unsatisfactory work performance. She said she made a mistake, and the evidence before me is that the Claimant was dismissed because of his lack of performance and not due to a redundancy.

4 It seems to me credible evidence that there is a shortage of employees in this industry and that it is difficult to get employees, and had the Claimant's performance been up to the standard required, then he would have still been there. That is what I am picking up from the evidence.

5 The Claimant has not taken issue with the fact that he was telephoned by Ms Kitchen and told that he was fired. They were the words that she said she used and the Claimant has not challenged that. The Claimant's response was, "I've been expecting it". There was no discussion. I think the employer was remiss in not documenting any unsatisfactory performance, but that has not been done and some reason has been given for that.

6 It does seem on the evidence before me that the Claimant was dismissed, not because there was no work for him but because his performance was not up to the standard required. That is the evidence I have heard from the employer, from Ms Kitchen and from Mr Darren O'Donnell, the Manager of Perth Hide & Skin Exports, who employs the Respondent to do the work that it does. Eighty per cent of the work done by the Respondent is for Perth Hide & Skin Exports.

7 Mr O'Donnell has given evidence that there was a percentage increase in the hides that were of the better standard when the Claimant stopped doing classing work. He was taken off that because it would seem that his work was not up to the standard that was required.

8 I think I can only come to one conclusion, and that is that the Claimant was not dismissed as a result of a bona fide redundancy. The Claimant was dismissed because his performance was not up to scratch, so that part of the claim must fail.

9 The claim in relation to the payment of one week's pay in lieu of notice must fail because it is apparent, on the evidence, that that payment has been made to the Claimant.

10 It does seem on the evidence presented by the Claimant in relation to the RDOs that there may be some merit in his claim. It does seem as though the Claimant should have been entitled to sick leave for the 4 days in question. The witnesses from the Respondent have not brought any evidence which supports what they are saying in relation to that, so I am prepared to make an order in relation to the two days payment claimed.

11 Accordingly, there will be an order that the Respondent pay to the Claimant the sum of $280, including tax of $58, and the claim will otherwise be dismissed.

WG Tarr
Industrial Magistrate

2006 WAIRC 05262

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

PARTIES	CYNTHIA ELLEN CURRIE
	CLAIMANT
	-v-
	DIGITAL DOCUMENTS CO (W.A.) PTY LTD
	RESPONDENT
CORAM	INDUSTRIAL MAGISTRATE G. CICCHINI
HEARD	WEDNESDAY, 2 AUGUST 2006, THURSDAY, 6 JULY 2006
DELIVERED	WEDNESDAY, 2 AUGUST 2006
CLAIM NO.	M 23 OF 2006
CITATION NO.	2006 WAIRC 05262

CatchWords	Commercial traveller; salesperson; Commercial Travellers and Sales Representatives' Award; probation; substantially away from employer's place of business; vehicle allowance; generalia specialibus non derogant; private contract; contracting out of an award; section 114 Industrial Relations Act 1979
Legislation	*Industrial Relations Act 1979* Commercial Travellers and Sales Representatives' Award 1978
Cases referred to in decision	*James Turner Roofing Pty Ltd v Christopher Lawrence Peters 83 WAIG 427* *Ware v O'Donnell Griffin (Television Services) Pty Ltd (1971) AR (NSW) 18* *J Fenwick and Company Pty Limited and others v Merchant Service Guild of Australia and others (1973) 150 CAR 99* *Montuolo v Amcor Packaging (Augsralia Pty Ltd trading as Amcor Flexibles Australais) (1999) 79 WAIG 2647* *Doropoulos v Transport Workers Union of Australia, WA Branch (1989) 69 WAIG 1290.* *Federated Clerks Union v Cary (1977) 57 WAIG 585.* *Hungry Jacks Pty Limited and others v GeoffreyWilkins and others 71 WAIG 1751*
Cases also cited	*James Austin Fuller v North Beach Bowling Club 83 WAIG 1133* *Electrical Trades Union of Workers of Australia (WA Branch), Perth v Signlite Pty Ltd*
Result	Claim alleging underpayment proved.
Representation	
Claimant	Ms C E Currie appeared in person
Respondent	Mr O Moon of Oliver Moon and Associates appeared as agent.

REASONS FOR DECISION

The Claimant's Appointment

1 In March 2004 the Claimant was introduced to the Respondent by her job provider. The Respondent at that time was seeking the services of a travelling sales representative. The Claimant was interviewed for that position by the Respondent's director, Mr William Blake. During the interview the Claimant was advised that the position entailed the sale and distribution of print and photocopied materials which included brochures, pamphlets, books, business cards and the like. She was told that the job necessitated "*cold calling*". The Claimant asserts that during the interview Mr Blake told her that he felt that she should service certain areas within the metropolitan area which he considered to be under serviced. Mr Blake on the other hand suggests that he informed the Claimant that her efforts should be concentrated on the Perth Central Business District (CBD). Indeed that was the area that he wanted her to service.

2 The Claimant testified that Mr Blake explained to her during interview what her job entailed. He explained that her function necessitated the use of a motor vehicle to attend clients, to do cold calls, to pick up supplies, to meet with graphic artists, to take proofs of documents created to clients, to organise any changes that might be necessary, to facilitate the production of what was required and then deliver the product. The Claimant testified that because she lacked experience and had no contacts within the industry she was told that to begin with she would be given a few inactive customer accounts to follow up on.

3 The Claimant testified that during the interview she was asked whether she had a reliable car to which she replied that she did. That drew the comment *"you will need it"*. Mr Blake on the other hand suggests in his testimony that the Claimant was

specifically advised that she was to take public transport to service her clients in the CBD. He said that, given the proximity of the Respondent's head office at Burswood to the CBD and the availability of public transport in that area, the use of a motor vehicle was unnecessary.

4 During the interview the Claimant was told that she would be required to work Mondays to Fridays from 8.30 am to 5.00 pm. She was advised that her commencing salary would be $25,000.00 per annum plus commission on the attainment of certain sales targets.

5 The Claimant was subsequently offered the position which she accepted. The terms and conditions of the Claimant's employment were reduced to writing in a letter dated 31 March 2004 (see exhibit 4) which was handed to the Claimant on her first day at work being the 31 March 2004. On 6 April 2004 the Claimant formally accepted, in writing, the terms and conditions set out in the letter. The terms and conditions set out in the letter provided inter alia as follows.

> . . .
>
> *Your commencing salary will be $25,000 per annum (includes a car allowance) and will be paid fortnightly by bank transfer. Base salary is paid one week in advance and one week in arrears. You're (sic) on target commission earnings for the first three months will be $3,750 based on an achieved quarter target of $36,000 invoiced revenue ($12,000.00 per month). Your commission payment will be assessed according to the percentage of achieved revenue against target i.e. Month one revenue $9,000.00 = 75% x $1250.00 = $937.50 and so on. Any revenue results that exceed the $36,000.00 will attract an additional payment of 5%. Also, provided that the full revenue result over the three month period is achieved then full payment of the amount ($3,750.00) will be made retrospectively.*
>
> . . .
>
> *In terms of basic business practices the company expects you to understand and accept that the only way to succeed will be through maintaining a consistently high level of activity in the field. Specifically, once assigned to a territory, you will be required to complete a minimum number of faces to face calls per day. It is expected that your activity will lead to the achievement of revenue targets. Management will review your performances against this commitment at least weekly, via accurate data provided by you from your Diary and/or Territory management forms. These diary/forms will be given to you upon commencement and its use explained by your Manager.*
>
> *We will review your performance three months after date of commencement with regard to future employment prospects with Digital Documents. Should any aspect of your performance be unsatisfactory your employment may be terminated at this time. Once a full time position is offered to and accepted by you we will offer a complete remuneration package similar to that of other persons employed in the same position with our company.*
>
> . . .

It was the case that neither party at that stage contemplated the application of the ***Commercial Travellers and Sales Representatives Award 1978 (***the Award).

Commencement

6 The Claimant commenced working for the Respondent on 31 March 2004 and carried out her functions as discussed during the interview. She testified that she was paid at the rate of $961.40 per fortnight exclusive of commissions. From time to time she also received commissions but continues to be uncertain as to how those commissions paid were calculated.

7 The written agreement provided that there would be a review of the Claimant's performance three months after the date of commencement. The purpose of the review was to determine whether a permanent full time position would be offered. It is open to infer that the Claimant was to be on probation for the first three months of her employment. It suffices to say that the review did not occur when it was supposed to have been conducted. In fact Mr Blake conducted a review at the end of July 2004 in consequence of which he purported to extend the Claimant's probationary period for a further month. By that time the Claimant had already been in the Respondent's employment for about four months. Mr Blake confirmed his decision in that regard in a memo to the Claimant dated 10 August 2004. On 19 August 2004 the Claimant acknowledged the Respondent's memorandum detailing the extension of the probationary period.

8 The Claimant testified that throughout the period of her employment with the Respondent she carried out the tasks that were required of her. She serviced clients throughout the metropolitan area from Brigadoon to Canning Vale. She had to necessarily use her vehicle in the performance of her duties. The use of public transport to carry out such duties was neither feasible nor practicable. The Claimant asserts that other than time spent in the office for sales preparation, she was on the road constantly, attending to sales, servicing customers and picking up and dropping off items for Mr Blake, other sales representatives or the office generally. She felt like a "gopher" in doing those tasks for others.

The Dispute

9 In about March 2005 the Claimant, in discussions with a friend, apprehended that she may have been underpaid. After making enquiries through "*Wageline"* she spoke to Mr Blake about it. Mr Blake said he would have the Respondent's accountant sort it out. That, however, did not eventuate. In the end the Claimant decided to leave her employment with the Respondent. Her employment ceased on Friday 29 April 2005.

10 The Claimant asserts that the Award regulated her employment with the Respondent. She says that she should have, as a commercial traveller, been paid $561.20 per week instead of that which she received, resulting in an underpayment of $80.50 per week amounting to a total underpayment of $4,508.00 over the fifty six weeks of her employment. She asserts further that she should have also been paid $147.10 per week by way of a vehicle allowance. She claims an amount of $8,237.60 being the

value of the vehicle allowance which she alleges she was entitled to for the fifty six weeks of her employment, but which was not paid.

11 The Respondent on the other hand contends that the Claimant was not a commercial traveller as defined in the Award. It says that her employment was subject to, and regulated by, the written agreement entered into by the parties which was a private agreement and not subject to the provisions of the Award.

12 The Respondent says that even if the Claimant's work was regulated by the Award, which is denied, that her claim is defective in any event because the first nine months of her employment was subject to probation thereby reducing her entitlement to $460.90 for the first 9.3 weeks of her employment and to $477.00 for the next 30 weeks of her employment. Accordingly it follows that the Claimant was over paid $4,608.38.

13 With respect to the claim for a vehicle allowance the Respondent asserts that the Claimant was allocated a sales area, which was the CBD and that she was informed at interview that any requirement to use her car would be minimal. She was expected to travel to the CBD by train, and then in the CBD by City Clipper. The cost of train travel would be reimbursed.

14 The Respondent admits (in the outline of defence) that the Claimant was, from time to time, required to use her car to pick up and deliver artwork, pick up and deliver supplies and deliver finished work but says that the Claimant was entitled to reimbursement for such and would have been reimbursed had she provided receipts or made a claim for such vehicle expenses. The Respondent points out that on one occasion the Claimant was paid fuel money out of petty cash which was demonstrative of the arrangement. The Claimant says in that regard that she was given money to pay for fuel after she made it known that she could not undertake a delivery, as instructed, because she had no fuel and no money. She was given money out of petty cash to facilitate the delivery required by the Respondent.

Mr Blake's Evidence

15 Mr Blake is the Respondent's Managing Director. He testified that the Respondent is in the business of providing photocopying services. The Respondent which formerly operated from its Perth Mill Street office had, over a four year period, built up customers in the CBD. A significant reason for choosing to relocate its business premises to Burswood was its proximity to the CBD and major transport routes and public transport. Given that the Respondent was anxious to maintain its customers in the CBD it decided to recruit a trainee sales person to specifically service that area.

16 The Claimant was successful in her application and was appointed as a sales representative. She was told that she was to service the CBD by public transport. In that regard she had to do "cold calling" and in some instances re-establish old accounts. Some existing accounts would be handed to her. No written instructions were given to her in that regard, however, it was something spoken about at interview and later reinforced during sales meetings. He said that it was intended that the Claimant be reimbursed for the cost of public transport use.

17 Mr Blake was taken to comment about the reference in the written agreement to a car allowance. He said that the reference to a car allowance in brackets as set out therein was deliberately expressed that way so as to demonstrate that the use of a vehicle was only a minor aspect of the Claimant's work.

18 Mr Blake testified that the Claimant spent a considerable portion of her time in the office. That was an issue of concern and discussion. Notwithstanding that, he acknowledged that time spent in the office was necessary. He said that "doing paperwork, follow-up work, (making) telephone calls" was essential. He continued that "if you don't do the before work, you're not going to succeed when you go out into the field".

19 Mr Blake testified that he did not discuss the issue of the Claimant's car with her except on one occasion when he asked, *"Why aren't you out?"* The Claimant is said to have replied, "*Because my car is playing up*". He said that although at regular sales meetings the issue of servicing areas such as Fremantle, Canning Vale, and Maddington were discussed, the Claimant was never instructed to go to those areas. The greatest opportunity for the Claimant was the CBD.

20 Mr Blake suggested that the Claimant was not good at her job. He said that she had been allocated one particular account in the CBD which had taken him a month to win but which was lost following customer complaints about the Claimant's performance. Mr Blake opined that, given the low sales figures achieved by the Claimant, that she would have only spent twenty per cent of her time on the road. The lack of time on the road resulted in poor sales figures.

21 Mr Blake rejected the contention that it had only been *"suggested"* to the Claimant that she service the CBD maintaining that she had been directed in that regard.

Evidence of Witnesses Called by the Claimant

22 The Claimant called two witnesses in support of her claim. They were Grant Thompson and Ken Cashmore. Grant Thompson worked for the Respondent for three months in the same role as the Claimant commencing on 25 February 2005. He testified that he left the Respondent's employment because he could not afford the fuel costs involved in carrying out his job. He said that his job could not be done without a car. He was never reimbursed for petrol expenses incurred in carrying out his duties. He estimated that he spent about eighty percent of his time out of the office and on the road. When cross examined Mr Thompson was shown the petty cash ledger (see exhibit 12) which showed that he was reimbursed petrol money on one occasion. He said that he did not recall receiving any petrol money. He said that he did not even know he could claim the same. I note that exhibit 12 appears to be a document prepared by the Respondent for the purpose of this hearing. It does not contain any acknowledgment from the alleged recipients that they received the same. The accuracy of the document is accordingly subject to contest. Given the contest it is apparent that exhibit 12 alone cannot establish that on 1 April 2005 Mr Thompson received out of petty cash money for fuel.

23 Mr Cashmore formerly worked in the production section of the Respondent business. He retired following the Claimant's departure. He testified that he knew the Claimant to be, at the material time, a sales representative. Mr Cashmore testified that he saw that the Claimant used her car to "*pick up plates*" and to "*deliver jobs*".

Evidence of Other Witnesses Called by the Respondent

24 In addition to Mr Blake the Respondent called three witnesses. They were its Sales Manager Harry Dover, its Production Manager Douglas Mason and Deborah Blake, being Mr Blake's wife who was and continues to be responsible for the Respondent's administration.

25 Mr Dover's evidence was that the Claimant worked in the sales area. Given that she was new to the industry she was helped and encouraged. He testified that weekly sales meetings were held. During those meetings the sales figures of all sales persons were put up on a whiteboard and discussed. The Claimant's sales figures were low. He testified that the Respondent wanted the Claimant to go out and develop business in the CBD. Mr Dover gave her some of his clients and encouraged her to do cold calling. To his knowledge the Claimant was to service the CBD and East Perth area. Mr Dover testified that the Claimant's vehicle was unreliable and prone to failure. He picked her up from her home a few times because her vehicle was in a state of disrepair.

26 Mr Mason testified that he observed the Claimant at the office on a daily basis but was unable to estimate the proportion of her work day spent at the office. Furthermore, he told the Court that although he was, at the material time, responsible for the administration of petty cash he could not say conclusively by looking at exhibit 12 that payments were made as indicated therein. He could only assume that the document was accurate. He conceded however that there were no documents produced to acknowledge receipt of petty cash by those who received the same. He also acknowledged that none of the other sales representatives ever made claims from petty cash for petrol money.

27 Deborah Blake testified concerning the various documents she generated in an administrative capacity relating to the Claimant's employment. She produced some documents specifically for the purpose of this hearing. In a document entitled sales comparison (see exhibit 13) she set out the sales earnings of the Respondent's salespeople during the material period and subsequent. It suffices to say that the earnings of sales people subsequent to the Claimant's termination are not relevant to my consideration. Furthermore, the sales comparison is otherwise of little assistance. The Claimant's sales over the material period, when compared against sales of very experienced colleagues, are of little moment. The figures alone do not establish anything with respect to the Claimant's work. Of themselves, the figures are meaningless. In any event the document provides a distorted view of the Claimant's earnings for the Respondent. The sales comparison suggests that the Claimant earned $44,842.80 by way of sales between 1 April 2004 and 30 April 2005, however, when questioned about it Mrs Blake disclosed that such sum consisted of the amount of sales she believed the Claimant brought in from new clients. Her total sales from existing but dormant clients and new clients in fact amounted to in excess of $70,000.

28 Mrs Blake produced a payroll activity statement for the period 1 January 2004 to 30 June 2005 which disclosed that the Claimant had in fact been paid $31,985.50 in wages during that period.

29 It suffices to say that much of Mrs Blake's evidence related to documents produced which are of a self serving nature with respect to which little weight attaches.

Findings

30 I find that in March 2004 Mr William Blake, the Managing Director of the Respondent, interviewed the Claimant for the position of trainee sales person. I am satisfied that during interview the Claimant, who had no previous experience within the industry, was advised that the position with respect to which she was being interviewed entailed the sale and distribution of print and photocopied material. I accept the Claimant's evidence that she was told that she would be required to service areas which were under serviced. I accept also that there was during interview a discussion about the CBD but I find that the Claimant was not instructed to service that area. I accept that Mr Blake advised the Claimant that he thought that her best opportunities were in that area. That did not amount to an instruction that she was to service that area. Further I find that there was no discussion during interview about the utilisation of public transport in the performance of the Claimant's duties. Mr Blake's contention in that regard is inconsistent with what is contained in the Claimant's letter of appointment concerning a car allowance. If the situation was as Mr Blake says it was; why would there have been any reference to a car allowance? The reference to a car allowance reflects as being true what the Claimant said about what she was told. She was asked whether she had a reliable vehicle because she would need it. Indeed in its defence the Respondent admitted that from time to time the Claimant was required to use her car to pick up and deliver artwork, pick up and deliver supplies and deliver finished work however I find its requirements of the Claimant with respect to the use of a motor vehicle amounted to more than that.

31 Ms Currie carried out a substantial amount of work outside the CBD. I accept her evidence that she in fact serviced clients from Brigadoon to Canning Vale. I also accept that she was encouraged to source new clients outside of the metropolitan area. The fact that the Claimant serviced clients outside of the CBD must have been manifest to Mr Blake from the sales records in the possession of the Respondent. The servicing of such clients outside the CBD could only have been achieved by the use of a motor vehicle.

32 I find that the use of a motor vehicle was a necessary and integral part of the performance by the Claimant of her duties as reflected in the Respondent's outline of defence and in the written agreement. Had that not been the case, reference to a vehicle would have been totally unnecessary. I accept the Claimant's evidence in preference to Mr Blake's evidence. The documentary evidence supports her contentions. The written agreement prepared by Mr Blake does not instruct the Claimant to service a particular territory nor does it confirm any prior arrangement in that regard. It refers to the prospective assignment of a territory. Further it appears from the evidence of Mr Thompson and Mr Dover that the Respondent's operating systems were such as to necessitate the use of motor vehicles.

33 Further I find that the Claimant was never advised that she could recover out of pocket transport expenses from petty cash. I am fortified in that view because there is no reference to that contained the Claimant's detailed letter of appointment. Furthermore, Mr Mason's evidence is indicative of the fact that sales representatives did not routinely recover fuel costs from petty cash. In the one instance that the Claimant was paid fuel money out of petty cash, it occurred so as to facilitate the Respondent's requirement. It was a one off situation which I accept occurred in the circumstances described by the Claimant.

34 I reject Mr Blake's evidence concerning the use of public transport. His letter to the Claimant dated 31 March 2004, detailing the terms and conditions of employment, contra-indicates the use of public transport. The letter makes it clear that the Claimant's salary included a car allowance. If the routine use of a car was not envisaged, why then would that provision have been included? If the intention was that the Claimant be paid out of petty cash for the casual use of her motor vehicle, then surely that would have been expressed in writing. The fact that it was not so expressed supports that there was no such arrangement. It is apparent that the use of a motor vehicle was discussed during interview. The confirmatory letter makes reference to a car allowance because the use of a vehicle was required. It could not serve any other purpose. I reject Mr Blake's explanation as to why reference was made within the letter. His evidence in that regard is not accepted.

35 In the end I find that the Claimant was engaged as a salesperson with respect to which she had to necessarily, in the performance of her duties, use her own motor vehicle. She was not instructed, either orally or otherwise, to service the CBD by public transport. She in fact serviced clients throughout the city and metropolitan area and in doing so used her vehicle, of which fact the Respondent was or should have been aware. At no time was the Claimant paid a separate vehicle allowance because the same was incorporated into her salary.

Determination

36 One of the grounds raised in response to the Claim was that the Claimant's employment was subject to a private contract, taking it outside of the scope of the Award. It is suggested ***that James Turner Roofing Pty Ltd v Christopher Lawrence Peters 83 WAIG 427 (James Turner Roofing***) is authority for the proposition that where such private agreement exists that this Court will not have jurisdiction to hear and determine the matter. With all due respect, *James Turner Roofing* did not determine that to be so. The "private agreement" discussed therein related to the payment of over award rates. The Industrial Appeal Court did not decide that parties to a contract of employment could by private agreement contract out of an award. The minimum conditions provided in an Award cannot be undermined even by agreement. Section 114 of ***the Industrial Relations Act 1979*** (the Act) which prohibits contracting out states:

> **114. Prohibition of contracting out**
>
> *(1) Subject to this Act, a person shall not be freed or discharged from any liability or penalty or from the obligation of any award, industrial agreement or order of the Commission by reason of any contract made or entered into by him or on his behalf, and every contract, in so far as it purports to annul or vary such award, industrial agreement or order of the Commission, shall, to that extent, be null and void without prejudice to the other provisions of the contract which shall be deemed to be severable from any provisions hereby annulled.*
>
> *(2) Each employee shall be entitled to be paid by his employer in accordance with any award, industrial agreement or order of the Commission binding on his employer and applicable to him and to the work performed, notwithstanding any contract or pretended contract to the contrary, and the employee may recover as wages the amount to which he is hereby declared entitled in any court of competent jurisdiction, but every action for the recovery of any such amount shall be commenced within 6 years from the time when the cause of action arose, and the employee is not entitled to recovery of wages under this subsection and otherwise, in respect of the same period.*

37 The pivotal issue to be determined is whether the Award regulated the employment of the Claimant. The scope provision of the Award provides:

> *3. - SCOPE*
>
> *This award shall apply to all workers employed in the callings listed in Clause 7. - Wages hereof by employers engaged in the industries set out in the schedule to this award.*

38 If the Claimant establishes, on the balance of probabilities, that the scope provision of the Award includes both her and the Respondent, then the Award will have application by virtue of "common rule" as provided for in section 37 of the Act

39 The Claimant asserts that she was at all material times a "***Commercial Traveller / Sales Representative***", being a calling within clause 7 of the Award. She also asserts that the Respondent was at all material times engaged in an industry set out in the schedule to the Award. I have no difficulty in concluding that the Respondent was at all material times engaged in the printing supplies industry, being an industry mentioned in the schedule. The question remains as to whether the Claimant was a ***"Commercial Traveller / Sales Representative***" as defined in clause 6 of the Award.

40 Subclause 6(1) of the Award provides:

> *6. - DEFINITIONS*
>
> *(1) "Commercial Traveller/Sales Representative" shall mean a worker who is employed:*
>
> *(a) away from or substantially away from his employer's place of business; and*
>
> *(b) wholly or mainly for the purpose of soliciting orders or promoting business;*
>
> *but shall not include:*
>
> *(i) persons selling Motor Vehicles or attachments or Motor Cycles;*
>
> *(ii) persons eligible to be members of the Western Australian Shop Assistants' and Warehouse Employees' Industrial Union of Workers, Perth, in accordance with the rules of that Union as they existed on 1st March, 1979; or*
>
> *(iii) persons employed in the calling of Motor Vehicle drivers wholly or mainly for the purpose of delivering goods to retail establishments.*

41 The exclusionary provisions of the subclause have no application to the Claimant. Can it be said however that the duties she was required to carry out whilst working for the Respondent brought her within the definition of "*Commercial Traveller / Sales Representative"?* In that regard the Respondent submits that she was not "*substantially away from her employer's place of business"* and further that she was not employed "*wholly or mainly for the purpose of soliciting orders or promoting business"*. In that regard the Respondent produced copies of telephone accounts (exhibit 11) relating to the mobile phone used by the Claimant in her employment to demonstrate that the Claimant remained at the Respondent's place of business for lengthy periods each day. That was to reinforce Mr Blake's testimony to that effect. Although a perusal of exhibit 11 establishes that the Claimant spent time within the office each work day, the same cannot be used to determine the exact amount of time or proportion of time spent thereat. There is no empirical data which enables such quantification of time. The fact that the Claimant spent time in the office does not of itself exclude her from the calling of *Commercial Traveller / Sales Representative.* The Claimant had to necessarily spend some time in the office as is reflected in Mr Blake's evidence. He said that the doing of paperwork, follow up work and the making of telephone calls was essential. As he said, "*If you don't do the before work, you're not going to succeed when you go out into the field"*.

42 There can be no question that the Claimant was mainly employed for the purpose of soliciting orders and promoting business, but can it be said that in the performance of her duties she was substantially away from the Respondent's place of business? It is axiomatic that the amount of time that the Claimant was away from the Respondent's place of business varied from day to day. Time spent in the office was certainly a necessary and integral part of the Claimant's duties. The extent to which she spent time in the office cannot be determined with any degree of accuracy given that there was no record kept of the hours spent at the office. It is open to subjective assessment.

43 In considering whether the Claimant was substantially away from the Respondent's place of business, a practical approach needs to be taken. As His Honour Sheldon J said in ***Ware v O'Donnell Griffin (Television Services) Pty Ltd (1971) AR (NSW) 18,***

> *. . . (it was) not merely a matter of quantifying the time spent on the various elements of work performed . . .*

but it was necessary to take into account as a relevant consideration:

> *. . . the quality of the different types of work done . . .*

44 In ***J Fenwick and Company Pty Limited and others v Merchant Service Guild of Australia and others (1973) 150 CAR 99*** Ludeke J said at 101-102:

> *To ascertain the course of the calling of particular employees, it is not enough merely to make a quantitative assessment of time spent in carrying out various duties. In my opinion, not only should the nature of the work done by the class of employees be examined but it is equally relevant to consider the circumstances in which they are employed to do the work; if a worker is required by his employer to carry out diverse duties, the inquiry should be directed to ascertaining the principal purpose for which the worker is employed.*

45 A similar approach has been adopted by the Western Australian Industrial Relations Commission. In that regard I refer to the decision of Kenner C in ***Montuolo v Amcor Packaging (Australia) Pty Ltd trading as Amcor Flexibles Australasia (1999) 79 WAIG 2647.*** In his decision Kenner C referred to the decision of the Full Bench of the Western Australian Industrial Relations Commission in *Doropoulos v Transport Workers Union of Australia, WA Branch (1989) 69 WAIG 1290* in which reference was made to the test of "major and substantial employment" and in referring to ***Federated Clerks Union v Cary (1977) 57 WAIG 585*** the Full Bench observed at 1293:

> *Thus, incorporated in the consideration of major and substantial employment on that authority, are questions of substantial nature of the employment, the substance of it, and the purpose to be achieved by it. One has to look at the contract or evidence of it, and obtain a comprehensive picture of the whole of the employment to enable one to apply Burt J's test.*

46 A qualitative assessment of the Claimant's duties results in a finding that she was required to be both in the field and in the office. The requirement to be away in the field was something more than incidental to her function. Indeed it was her primary requirement upon which everything else depended but she could only perform that function if she spent time in the office doing the necessary preparation and follow up work. Accordingly a quantification of the relative times spent in the field and in the office is in those circumstances unnecessary. Even if the Claimant was at the Respondent's office for lengthy periods, it does not detract from the fact that she was required to be and was substantially away from the office in the performance of her job. That was the only way she could and did carry out her job. The sales figures alone do not support the Respondent's contention that the Claimant was not substantially away from its place of business. I accept that the Claimant was, because of her newness to the industry, the salesperson most likely to be involved in the less remunerative sales. That in part helps to explain the low sales figures. The fact that her figures were comparatively low does not of itself enable the conclusion to be reached that she was mainly in the office. In any event I accept her evidence that she was constantly on the road. I accept as being accurate her estimation that she spent eighty per cent of her time away from the office. I found Ms Currie to be a credible witness and I prefer her evidence to that of Mr Blake.

47 The Respondent argues that the Claimant does not fit the Award definition of "Commercial Traveller / Sales Representative" because she carried out some duties which were not in keeping with soliciting orders or promoting business. In my view all of the Claimant's work was a facet of soliciting orders and promoting business. The necessary groundwork and follow up are all part and parcel of a salesperson's job and can only be aimed at promoting business.

48 "*Promote*" is defined in the Shorter Oxford Dictionary to mean:

> *To further the growth, development, progress, or establishment of (anything), to further, advance, encourage.*

49 Indeed such measures were a necessary and important part of the sales work. It amounted to promotion of business. It facilitated the growth, development and advancement of business. In any event even if it could be said that she was not wholly employed in that capacity, it remains the case that she was mainly employed for the purpose of soliciting orders and promoting business.

50 The Respondent submits that the callings defined in the Award are specific and should not be interpreted as being of a general nature so as to extend the totality of the work performed by the Claimant. Accordingly, the application of the doctrine "generalia specialibus non derogant" (general things or words do not derogate from special things or words) as referred to in ***Hungry Jacks Pty Limited and others v Geoffrey Wilkins and others 71 WAIG 1751*** applies. It is argued that the application of that doctrine to the facts in this matter draws the conclusion that the Award does not apply to the Claimant. With all due respect I do not concur with that submission. The doctrine has application where there is a need to give meaning to competing statutory provisions. That is not the case here. All that needs to be done in this matter is to determine the question of fact as to whether the Claimant falls within the definition in the Award of *"Commercial Traveller / Sales Representative"*. I find that she was, at all material times, within that classification.

51 Having determined that the Award governed the terms and conditions of the Claimant's employment with the Respondent, it follows that I need to consider whether the Respondent has breached the Award as alleged.

52 The Claimant worked for the Respondent from 31 March 2004 until 29 April 2005 being a total of fifty six weeks and three days. For part of that time she was on probation. The Respondent suggests that she was on probation for the first nine months of her employment because of the definition of *"Probationary Traveller /Sales Representative"* in subclause 6(2) of the Award which states:

> *(2) "Probationary Traveller/Sales Representative" shall mean a worker engaged in the occupation of a commercial traveller/sales representative, but who has had less than nine months' experience as a Commercial Traveller/Sales Representative.*

53 I disagree with the Respondent's contention. All that definition does is to encompass a "*Traveller / Sales Representative*" with less than nine month's experience being on probation. *A Commercial Traveller* with more than nine month's experience cannot be on probation for the purposes of the Award. That provision dictates that new employees just starting out and with little experience within the industry will attract a lower wage for the period of probation agreed. It does not mean that such a person is on probation for nine months. Those who have more than nine months experience do not have to prove themselves. Their experience enables them to start off on full pay.

54 I find that the Claimant was on probation for the first three months of her employment as indicated in the confirmatory letter dated 31 March 2004. The period of probation ended on 1 July 2004. The purported retrospective extension of the probation period to four months by memo dated 10 August 2004 was of no effect. The authorities make it clear that an extension of the probation period cannot occur after the probation period has ended. The purported extension of the probationary period to four months occurred after the four months period had elapsed in any event. The Claimant was therefore on probation for thirteen weeks and two days with the balance of forty three weeks and one day being served as a permanent full-time employee.

55 The Claimant was paid $480.70 per week for each week of her employment; however she was only entitled to $460.90 per week until 3 June 2004 being nine weeks and two days. She was in fact paid a total of $4518.58 during that period when she was only entitled to $4332.46 representing an overpayment of $186.12. From 4 June 2004 until 1 July 2004 (four weeks) the Claimant was only entitled to receive $477.00 per week. Accordingly, she was overpaid $14.80 for that period. She was overpaid a total of $200.92 whilst on probation.

56 The Claimant should have been paid $561.20 per week for the remaining forty three weeks and one day amounting to $24,243.84 but was only paid $20,766.24, leaving a shortfall of $3,477.60 from which, applying the principles enunciated in James Turner Roofing, must be deducted the overpayment of $200.92 leaving a shortfall of $3,276.68. Further the Claimant should have been paid out her annual leave entitlements at the higher rate; however, because she has not claimed for such, I do not propose to do anything in that regard except to note it.

57 Finally, given that the Claimant was during the course of her employment required to use her motor vehicle in the performance of her duties, she was entitled, pursuant to subclause 10(2) of the Award, to payment of a vehicle allowance each pay period. The allowance to which she was entitled consisted of a flat amount plus kilometrage however none was paid. The Claimant does not pursue any claim for kilometrage but claims the weekly allowance. The allowance is severable and claimable in the manner claimed. The fact that the Claimant's vehicle may have been in a state of disrepair for a day or two does not preclude her from recovering the allowance for the entire period claimed. I accept that the Claimant used a Honda Accord in the performance of her duties. There is no evidence before the Court as to the engine capacity of that vehicle. Given the lack of evidence in that regard, I proceed on the basis that the rate claimed is the appropriate rate because it is the lowest available. I note also that the Respondent has not taken issue with that rate. What is in dispute is the Respondent's liability to pay the allowance however I have found against the Respondent in that regard. It accordingly follows that an amount of $147.56 is payable for each of the fifty six weeks claimed totalling $8,263.36.

58 I find that the Claimant has been underpaid $11,540.04. I propose to make an order for the payment of such amount. I will now invite the parties to address me as to the orders to be made.

G Cicchini
Industrial Magistrate

2006 WAIRC 05229

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

PARTIES	ANTHONY RAYMOND FISK
	CLAIMANT
	-v-
	SSS AUTO PARTS
	RESPONDENT
CORAM	INDUSTRIAL MAGISTRATE G. CICCHINI
HEARD	THURSDAY, 29 JUNE 2006, WEDNESDAY, 19 JULY 2006, THURSDAY, 23 FEBRUARY 2006, WEDNESDAY, 31 MAY 2006
DELIVERED	WEDNESDAY, 19 JULY 2006
CLAIM NO.	M 127 OF 2005
CITATION NO.	2006 WAIRC 05229

CatchWords	**Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977; classification; Storeman Operator Grade II; substantial performance; forklift driver; *in charge* allowance, overtime**
Legislation	**Industrial Relations Act 1979.** **Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977**
Cases referred to *in decision*	*Ware v O'Donnell Griffin (Television Services) Pty Ltd (1971) AR (NSW) 18.* *J Fenwick and Co v Merchant Service Guild of Australia (1973) 150 CAR 99.* *Montuolo v Amcor Packaging (Australia) Pty Ltd trading as Amcor Flexibles Australasia (1999) 79 WAIG 2647.* *Doropoulos v Transport Workers Union of Australia, WA Branch (1989) 69 WAIG 1290.*
Cases also cited	Federated Clerks Union v Cary (1977) 57 WAIG 585.
Result	Claim allowed
Representation	
Claimant	Mr M Cox, of Counsel, *of Employment law Centre of WA (Inc)* appeared for the Claimant.
Respondent	Mr R H Gifford of the *Motor Trade Association of Western Australia (Inc)* appeared as agent for the Respondent.

REASONS FOR DECISION

Background

1 In March 2004 the Claimant's job provider introduced him to the Respondent. The Claimant had stores experience, computer skills and a recently acquired forklift "*ticket*" which made him suitable for appointment as a part-time stores person. The Claimant was interviewed on 18 March 2004 and accepted a position as a part-time driver / stores person on the basis that the job was likely to evolve into a full-time position when the Respondent expanded its operations.

2 Initially the Claimant worked as a delivery driver and would help out in the warehouse during any breaks in delivery duties. Then in late May 2004 he was offered a full-time stores position which he accepted. There is no dispute that the Claimant's employment from that time onwards was regulated by the ***Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977*** (the Award).

Claimant's Evidence

3 The Claimant testified that, upon his appointment to the full-time stores position, he was given the responsibility of opening the premises. In that regard he was required to open the gate and doors and to disarm the alarm. He would then turn on all the lights of the retail premises at the front of the building before moving into the stores area at the back.

4 Initially he was not required to use a forklift very often whilst carrying out his full-time stores duty. The amount of time that he spent on a forklift in that initial stage varied greatly. On occasions he was only required to drive a forklift for half an hour per day. That was because stock levels had been kept low in anticipation of the major extension that was soon to take place.

5 The Claimant testified that he had been instructed by Simon Emery who was second in charge of operations as to what was required within the warehouse. That, however, was no more than an orientation process. Indeed Mr Emery did not supervise him and he was very much left to his own devices. Notwithstanding that, he did from time to time seek Mr Emery's guidance on account of his "*phenomenal*" knowledge of auto parts and vehicles. The Claimant testified that Mr Emery's wealth of knowledge made him conducive to sales. Customers would routinely want to speak to him because of his knowledge. The importance of Mr Emery's role is also reflected by the fact that the Respondent's managing director, George Chia, would usually leave at lunch times at which times Mr Emery would take over the running of the business in his absence.

6 The Claimant started work at 7.30 am and finished at 4.00 pm each day. He worked Mondays through to Fridays but not Saturdays despite the Respondent suggesting to him that he work on Saturdays for cash. He usually took a short break at about

7 8.30 am followed by a lunch break between 11.30 am and 12.00 noon. No other breaks were taken. His hours of work were not formally recorded. He did not receive payslips indicating hours worked. Furthermore no separate record was kept of the hours he spent driving a forklift.

8 The Claimant testified that no-one spent as much time on the forklift as he. He said that he used the forklift in the ordinary course of his duties to unload vehicle parts from the "*twenty foot*" and the "*forty foot*" sea containers which were regularly delivered to the warehouse. The containers usually took half a day to empty. In one instance the contents of a forty foot container took three days to unload and store given the size and intricate nature of the genuine parts received. Apart from the unloading of sea containers, the forklift was used to unload and reload *"TNT Pallecons"*, to transport stock about the warehouse, to remove packaging to the appropriate area and to do all other things necessary and incidental to the operation of the warehouse.

9 The Claimant testified that when he first started that the Respondent's premises consisted of a front office with a one thousand square metre warehouse at its rear containing three levels of auto parts stored on shelves. There was also a back area where old second hand auto parts and packaging materials were stored. Adjacent to the premises was a vacant block where the new warehouse addition was to be constructed. The addition would effectively double the size of the existing warehouse. It is not clear from the evidence as to when construction of the warehouse addition started but the Claimant says that construction of the same was completed in about late August 2004. During the construction phase stock levels were kept low and the delivery of stock containers was delayed.

10 The Claimant testified that upon completion of the extension all stock from the old section was moved to the new section and that the existing shelving in the old section was deconstructed so as to facilitate the erection of new shelving. He was involved in the process by driving a forklift to relocate stock and to deconstruct shelving. He said that the process required him to drive the forklift for substantial periods and, on occasions, for the whole day. That, combined with the arrival within a relatively short period of time of numerous containers that had been held back awaiting the completion of the construction process, resulted in an extremely heavy workload from September 2004 onwards. His workload was at all times high and stressful. Consequently he was under a great deal of pressure particularly given the responsibilities thrust onto him by Mr Chia. Not only was he in charge of the warehouse but the relocation process as

11 Ultimately in February 2005 the Claimant took annual leave followed by a period of sick leave before resigning. He testified that his resignation resulted from his position becoming intolerable after he had complained about the Respondent using unlicensed employees to drive forklifts. Following his resignation he discovered that he had not been paid in accordance with the Award and brought this claim.

The Respondent's Evidence

12 The Respondent called only one witness, being Simon Emery. Mr Emery testified that he is a "*stores supervisor*" with the Respondent; a position which he has held for most of the fourteen years that he has worked for the Respondent.

13 Mr Emery said that he was, at the relevant times, in charge of the warehouse and that the Claimant worked under his supervision. He said that his main responsibility was the warehouse and that he was not involved in sales to the extent suggested by the Claimant. Indeed the sales aspect of the business was left to dedicated salespeople employed by the Respondent. His main concern was to ensure that all stock that arrived was identified and labelled correctly and stored appropriately. He kept an eye on the warehouse staff to ensure that their functions were correctly carried out. That was so notwithstanding that his office was located within the front office. He said he kept an eye on what happened within the warehouse through a window next to his desk looking into the warehouse area. Mr Emery testified that he left the Claimant to his own devices in carrying out his necessary functions in the warehouse. Those functions, on occasions, required the use of a forklift.

14 Mr Emery confirmed that the Claimant was placed in charge of the relocation process. The Claimant was assisted in the relocation process by casual staff under the Claimant's direction. Mr Emery estimated that the relocation process and the restocking of the warehouse took some two to three months but could not be more precise.

15 Mr Emery's evidence was that there were a number of employees who could operate forklifts; of which he was one. He operated forklifts on a regular basis. Often there was more than just one forklift in operation. He testified that the unloading of containers and pallecons was a relatively quick process. He said that the pallecons, received at the rate of one a week or one a fortnight, only took ten minutes to unload. Similarly sea containers took in the order of half an hour or less to unload. In some extreme circumstances the unloading of the containers may take an hour. He said that the use of the forklift during such process would not be for any more than twenty minutes. He said he never spent half a day on the forklift.

16 When cross-examined, Mr Emery conceded that he did not directly supervise the Claimant and further that he was aware that some employees who were not licensed to drive a forklift did, in fact, do so.

Findings

17 I find that the Claimant was, between 28 May 2004 and 6 March 2005, employed as a full-time stores person by the Respondent which at all material times traded as SSS Auto Parts (WA). The Claimant and the Respondent were during that period bound by the Award. I find that the Claimant was in charge of the warehouse operations both generally and also with respect to the relocation process. I accept the Claimant's evidence in that regard which is supported by the documentary evidence (see exhibits 5 and 9). In emails sent to staff George Chia referred to the Claimant as being the person in charge of warehousing. He also indicated that other employees were to "*assist*" the Claimant. The Claimant was left to his own devices in his capacity as storeman in charge and was not directly instructed by Mr Emery. I accept that as a necessary part of the performance of his duties the Claimant was required to drive a forklift. I reject the Respondent's contention that the requirement to drive a forklift was incidental to the Claimant's functions. I find that the driving of the forklift was an important and necessary requirement in the execution of his duties. I find that the Claimant drove a forklift for very substantial periods during the relocation and restocking period which I accept started in about September 2004 and continued on until after

Christmas 2004. I find that the relocation and restocking process merged into one continuous process. The influx of the higher than usual number of sea containers commencing in about September 2004 resulted from the need to build up stock levels from the low levels maintained leading up to relocation. The completion of the extension resulted in a surge of work in the warehouse which continued beyond Christmas 2004. It is axiomatic that the Claimant was required to use the forklift for extended periods during this time to facilitate the Respondent's requirements. I accept the Claimant's evidence in that regard because the prevailing situation he described was far more probable than that portrayed by Mr Emery. I find Mr Emery's evidence to be unacceptable. I gained the firm view from what he said and how he gave his evidence that his testimony was slanted in such a way as to protect the Respondent's interest. I agree with Counsel for the Claimant's submissions in that regard.

18 Further I accept the Claimant's submission that the unloading of containers and pallecons, together with his other necessary stores duties outside of the relocation and restocking period, required him to drive a forklift for more than half an hour per day. I accept that the use of the forklift varied from day to day dependent upon the tasks at hand but invariably his use of the forklift was significant and not merely incidental.

19 I accept the Claimant's testimony as to his hours worked and payments received. I further accept that the substituted schedule produced on the first day of the hearing accurately represents such things.

20 It follows that I find that the Claimant worked from 7.30 am to 4.00 pm Monday to Friday, with a half hour for lunch, amounting to forty hours per week and not the thirty eight hours provided by the Award. It is the case that the Claimant has not been paid for the overtime he has worked. The Respondent, on the final day of the hearing, conceded the claim for overtime but takes issue with the quantum on the basis that the Claimant's claim in that regard is made with respect to the wrong classification. It says he was at all material times a *storeman* and not a *Storeman Operator Grade II*.

21 Finally, the Respondent concedes that it failed to pay the increased Award rate from 4 June 2004 until 9 July 2004.

Determination

22 The issues requiring determination are:

1) Whether the Claimant was employed as a *Storeman Operator Grade II*; and

2) Whether the Claimant was required by his employer to be in charge of the warehouse; and

3) Whether the Claimant was required to perform higher duties.

23 Pursuant to subclause 6(2) of the Award, *Storeman Operator Grade II* is defined to mean:

> *. . . a worker employed as such carrying out the duties of a storeman who is substantially required to operate the following mechanical equipment in the performance of his duties:*
>
> *(a) Ride-on power operated forklift*
>
> . . .

24 There is no dispute about the fact that the Claimant was required to operate a forklift, however, the Respondent maintains that such did not constitute a substantial requirement of his employment but rather was incidental thereto. As indicated earlier I do not accept that to be the case. The evidence establishes that the Claimant was required to operate a forklift on an ongoing basis as part of his duties. Indeed he could not perform his duties without using a forklift. Although the Claimant's use of the forklift varied from day to day it was nevertheless substantial. That is so whether or not he spent more than half his time at work driving a forklift. As His Honour Sheldon J said in ***Ware v O'Donnell Griffin (Television Services) Pty Ltd (1971) AR (NSW) 18*** a practical approach needs to be taken. In His Honour's opinion it was:

> *. . . not merely a matter of quantifying the time spent on the various elements of work performed . . .*

25 but it was necessary to take into account as a relevant consideration:

> *. . . the quality of the different types of work done . . .*

26 In ***J Fenwick and Company Pty Limited and others v Merchant Service Guild of Australia and others (1973) 150 CAR 99*** Ludeke J said at 101-102:

> *To ascertain the course of the calling of particular employees, it is not enough merely to make a quantitative assessment of time spent in carrying out various duties. In my opinion, not only should the nature of the work done by the class of employees be examined but it is equally relevant to consider the circumstances in which they are employed to do the work; if a worker is required by his employer to carry out diverse duties, the inquiry should be directed to ascertaining the principal purpose for which the worker is employed.*

27 A similar approach has been adopted by the Western Australian Industrial Relations Commission. In that regard I refer to the decision of Kenner C in ***Montuolo v Amcor Packaging (Australia) Pty Ltd trading as Amcor Flexibles Australasia (1999) 79 WAIG 2647.*** In his decision Kenner C referred to the decision of the Full Bench of the Western Australian Industrial Relations Commission in ***Doropoulos v Transport Workers Union of Australia, WA Branch (1989) 69 WAIG 1290*** in which reference was made to the test of "*major and substantial employment*" and in referring to ***Federated Clerks Union v Cary (1977) 57 WAIG 585*** the Full Bench observed at 1293:

> *Thus, incorporated in the consideration of major and substantial employment on that authority, are questions of substantial nature of the employment, the substance of it, and the purpose to be achieved by it. One has to look at the contract or evidence of it, and obtain a comprehensive picture of the whole of the employment to enable one to apply Burt J's test.*

28 A qualitative assessment of the Claimant's duties results in a finding that he was substantially required to operate a forklift; being something more than incidental to his function. Put another way his function as storeman, as an integral part, required the driving of a forklift. In those circumstances it is unnecessary to determine with any specificity the proportion of the Claimant's time as a storeman spent operating a forklift. Quantification in an exact amount is, in those circumstances, unnecessary. Furthermore, even if the Claimant did spend less than half his time operating the forklift, it does not detract from the fact that he was substantially required to operate a forklift to perform his job. He could only properly carry out his job by driving a forklift. There can be no question that the Claimant was, at the material times, a *Storeman Operator Grade II* as defined in the Award and should have been paid as such. His duties went well beyond that of a "*storeman*" as defined in the Award.

29 In any event, if I had found against the Claimant with respect to the issue of classification, it would have been the case that he would have been entitled to recover, pursuant to clause 28 Part III (1)(b) of the Award, an amount of sixty three cents per hour for each hour that he was required to operate a ride-on power operated forklift. When operating the forklift in such circumstances the Claimant was performing work to which a higher rate applied. Clause 18 of the Award (Higher Duties) had application to his circumstances. It provides:

18. - HIGHER DUTIES

A worker who is required to do work, which is entitled to a higher rate under this award, other than that which he or she usually performs shall be entitled to payment at the higher rate while so employed. Provided that where no record is kept in the time and wages record of the actual times upon which the worker is engaged on such higher grade work, the worker shall be paid for the whole day at the rate prescribed for the highest function performed.

30 Given that the Respondent did not keep a record of the actual times the Claimant worked on higher duties, the Claimant was entitled to be paid at the higher rate for the whole day. In this instance the Claimant would have been entitled to the higher rate for the whole day of each day that he worked.

31 Finally I turn to consider the claim for an in charge allowance. Subclause 28(2) of the Award provides:

(2) An employee in (1) - (5) above who is required by the employer to be in charge of a shop, store or warehouse or other employees shall be paid an in charge allowance for all purposes of the award calculated as follows:

(a) if placed in charge of a shop, store or warehouse with no other employees or if placed in charge of less than three other employees -

3.4% of the rate specified in subclause (1) - (5) above, as appropriate

(b) if placed in charge of three or more other employees but less than ten other employees -

6.2% of the rate specified in subclause (1) - (5) above, as appropriate

(c) if placed in charge of ten or more other employees -

11.2% of the rate specified in subclause (1) - (5) above, as appropriate

32 The Claimant was at all material times an employee to which the aforementioned subclause applied by virtue of his position as a *Storeman Operator Grade II* as provided for in subclause 28(1) of the Award.

33 The Claimant was appointed by Mr George Chia to be in charge of warehousing. Mr Chia's email to staff dated 20 September 2004 (see exhibit 5) reflects that to be the case. Indeed the Claimant's status as being responsible for warehousing can be traced back to as early as 17 July 2004 when Mr Chia, by email sent to staff, made it clear that warehousing was the Claimant's responsibility and that he should enforce the appropriate standards with respect to employees working in that area. Furthermore there can be no issue about the fact that the Claimant was in charge during the warehouse extension, refit and relocation. A consideration of the rosters (see exhibit 9) together with the Claimant's evidence reflects that he had responsibility for and was in charge of employees throughout and particularly during the relocation period. I accept that from appointment until termination the Claimant was usually in charge of less than three employees except for the relocation period (late August to mid October 2004) when he was in charge of more than three but less than ten employees. The documentary evidence overwhelmingly establishes that to be the case. Mr Emery's role as supervisor did not preclude the Claimant from being in charge of other employees. Even accepting Mr Emery's evidence about his role, it does not establish that he had an exclusive supervisory role. Indeed that evidence does no more than to establish that he was the Claimant's superior. It does not of itself demonstrate that the Claimant was not in charge of other employees.

34 In conclusion, I am satisfied on the balance of probabilities that the Claimant was at all material times employed as a *Storeman Operator Grade II* who was in charge of other employees. The Claimant should have, at all material times, been remunerated in accordance with the rate applicable to a "*Storeman Operator Grade II*" and he should have been paid an in charge allowance, however, that did not occur. It follows that I am satisfied that the claim, in so far as it is not conceded, is made out. I accept the Claimant's substituted schedule as accurately reflecting the underpayments suffered for each pay period, amounting to $3,295.11.

35 I will now hear from the parties as to the appropriate orders.

G Cicchini
Industrial Magistrate

2006 WAIRC 05239

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WAYNE HANCOCK
	CLAIMANT
	-v-
	NU-TECH ENGINEERING PTY LTD
	RESPONDENT
CORAM	INDUSTRIAL MAGISTRATE W.G. TARR
HEARD	FRIDAY, 30 JUNE 2006, TUESDAY, 20 DECEMBER 2005, WEDNESDAY, 21 JUNE 2006
DELIVERED	FRIDAY, 30 JUNE 2006
CLAIM NO.	M 132 OF 2005
CITATION NO.	2006 WAIRC 05239

CatchWords	Breach of award; Alleged failure to pay accrued annual leave, sick leave and public holidays; hourly rate in excess of award entitlement.
Legislation	Industrial Relations Act 1979 Minimum Condition of Employment Act 1993 Metal Trades (General) Award 1966
Cases referred to in decision	*James Turner Roofing Pty Ltd v Peters 83 WAIG 427*
Result	Claim dismissed
Representation	
Claimant	Mr G McCorry of *Labourline – Industrial and Workplace Relations Consulting* appeard as agent for the Claimant
Respondent	Mr B R Jackson (of Counsel) instructed by *Gadens Lawyers* appeared for the Respondent

REASONS FOR DECISION

The Claim

1 The claim in these proceedings is brought pursuant to the provisions of section 83 of the ***Industrial Relations Act 1979*** and alleges that the Respondent has failed to comply with the provisions of the ***Metal Trades (General) Award 1966*** (the Award) or, in the alternative, the ***Minimum Conditions of Employment Act 1993*** (the MCEA).

2 In particular the allegation is that the Claimant was not paid his annual leave entitlements following the cessation of his employment and was underpaid sick leave and public holiday entitlements. The period covered in the claim is from the 1 July 2002 to the 8 April 2005.

The Parties

3 The Respondent is an incorporated company which carries on business as a manufacturer and repairer of generally heavy engineering equipment for the mining industry in the State of Western Australia.

4 The Claimant is a sheet metal worker by trade and was employed by the Respondent as an engineering tradesperson performing welding duties. He commenced employment with the Respondent's business some time in 1996 or 1997 through a labour hire company and worked for six to twelve months on that basis before leaving. He was later offered employment by the Respondent, or more correctly the Respondent's predecessor, and according to Mr Paul Rakich, a director of the Respondent, on a subcontract basis. In 1999, after some concerns with the bone fides of the subcontract arrangement with the Respondent's employees, it was decided to introduce workplace agreements and on 1 January 2000 the Respondent and Claimant signed a workplace agreement. The agreement was made pursuant to the provisions of the *Workplace Agreements Act 1994* (now repealed) but was not lodged for registration under the Act.

The Agreement

5 The workplace agreement in clause 3 provided for "*Rate and Hours of Work*" as follows:

> *The ordinary hours shall be the first 8 hours worked per day Monday to Friday*
>
> *Ordinary rate of pay will incorporate three items*
>
> *Base Rate $15.00 p/h*
>
> *Holiday Rate $1.25 p/h*
>
> *Performance Bonus $1.75 p/h*
>
> *Rate of pay for ordinary hours shall be paid at the rate of $18 per hour.*
>
> *Hours worked in excess of the ordinary hours above shall be paid at the rate of $26 per hour.*

> *These hourly rates may be changed at any time during the course of the agreement but only by mutual consent. Because of economic factors the rates may be altered up or down by* (sic) *at no time may they be lowered below the award hourly rate. Changes made to these rates shall in no way change the meaning or intention of the remainder of the agreement.*

6 Clause 4 dealt with annual leave and provided:

> *A total of 160 hours at award rate has been added to the annual earnings based on a 40 hour week times 48 weeks. Then divide the total by 1920 hours (40 hours × 48 weeks) to arrive at the flat rate for ordinary hours payment.*
>
> *This means the employee is being paid holiday pay while working and therefore no other claim can be made against Nu-Tech for failure to cover the above entitlement.*

7 The agreement provided for public holidays and sick leave to be paid at eight hours per day at a rate of $15.00 per hour.

8 With the demise of State workplace agreements, the Respondent prepared an Australian Workplace Agreement (AWA) for each of its employees pursuant to the provisions of the *Workplace Relations Act 1996* (the WRA) and the Claimant signed the agreement on 2 September 2004 (exhibit C).

9 There was a suggestion in the Claimant's evidence and in his submissions that he signed both agreements under duress. I do not accept that to be the case. The Claimant had been earlier employed as a subcontractor at $20.00 per hour and averaged about $1000.00 per week. I accept the evidence of the Respondent that the rates of pay in the agreement were calculated so employees would not be worse off. I also accept the Respondent's evidence that he was not trying to exploit his employees and that he wanted to be fair to them and, in any event, needed to pay fair and reasonable rates to keep his workforce in a competitive industry.

10 As with the State workplace agreement the AWA was not certified under the then provisions of the WRA and no application was made to have the AWA certified.

11 It has been argued that because the agreements were not registered or certified they are null and void and cannot be relied upon. The effect of non registration or certification can only be that they are unable to be enforced or used in any way contemplated by the relevant workplace agreement legislation. Both agreements may be used as evidence as to the terms of the contract of employment between the parties. It is common in employer and employee relationships for there to be contracts of employment even where they are bound by an award. Where there is inconsistency in the contract with an award provision, the award provision applies. For example clause 6 of the Award contemplates a contract of service and sets out the period of notice to be given when the contract is terminated.

12 Sub clause 6(1) allows for parties to a contract giving a greater period of notice but requires notice as set out hereunder.

PERIOD OF CONTINUOUS SERVICE	*PERIOD OF NOTICE*
During the first month	*1 day*
More than one month but 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*

13 The provision of one days notice in clause 2 of the workplace agreement signed 1 January 2000 is not in accordance with the provisions of the Award and unenforceable by the employer who, notwithstanding that clause in the agreement, is bound by the Award.

14 Likewise there is nothing in the Award which prevents an employer and employee from agreeing to over-award payments.

15 The Award provides for the minimum amount an employee must be paid in relation to ordinary hours, overtime and the other monitory entitlements depending on the employee's classification.

16 I find that the workplace agreement and the AWA set out the terms of the employment contract between the Claimant and the Respondent from the date they were signed.

17 There is evidence that the Respondent changed entities sometime in 2002, however I find that the business continued to be run in effect by Mr Rakich who was a director of both companies and was effectively unchanged. The change from Nu-Tech Engineering (Australia) Pty Ltd to Nu-Tech Engineering Pty Ltd, was to preserve assets after the failing of a business customer and apparently went unnoticed by the Claimant who continued to work under the same conditions.

18 I find that the terms of employment agreed continued notwithstanding the change in the entity of the employer.

19 It has been agreed that the parties herein are bound by the Award and I understand the Respondent is not disputing that the Claimant had not taken the 420.92 hours of annual leave at the time of his resignation, and that the Claimant was absent on sick leave or public holidays for 160 hours during the period of the claim.

20 It is in dispute that the Claimant was not paid for those hours of annual leave and that he was underpaid for sick leave and public holidays. The Respondent argues that by agreement with the Claimant he was paid in advance for his annual leave by an increased and quantified amount in his hourly rate. ***James Turner Roofing Pty Ltd v Peters (2003) 83 WAIG 427*** is the most recent authoritative case which has considered the issue of a breach of an award where underpayment has been alleged. In that case His Honour Anderson J said:

For myself, I can see no basis upon which the amount due upon enforcement of an award can be calculated by reference to any hourly rate which is not the rate prescribed in the award. This is not to say that an employer and an employee may not enter into an over-award agreement, ie an agreement, express or implied, most of the content of which is supplied by the terms of the award but with agreed additions. There is no reason why parties cannot contract by reference to the terms and conditions of an award. So for example, an employer might offer employment expressly or impliedly on the basis that the employee is to receive all of the benefits of the award save that instead of the ordinary hourly base rate prescribed by the award, a higher base rate will be paid. But then the employee who complains of a breach of the obligation to pay at the higher rate is not seeking to enforce the award but is seeking to enforce the agreement: ***Amalgamated Collieries of WA Ltd v True*** *(1938) 59 CLR 417 per Evatt J at 434 and Dixon J at 431. See also (1940) 62 CLR 451 (Privy Council) per Lord Russell at 455. The failure to pay at the agreed rate would be a breach of the agreement, not a breach of the award.*

21 In relation to annual leave, the Award provides in clause 23 for any employee to be allowed four consecutive weeks leave with payment annually. By agreement the leave may be taken in shorter periods. The clause provides in (3)(b)(i) that:

An employee before going on leave shall be paid the wages the employee would have received in respect of the ordinary time the employee would have worked had the employee not been on leave during the relevant period.

22 Clause 13 provides that ordinary hours:

shall be an average of 38 hours with a work cycle not exceeding seven consecutive days.

23 Subclause (6)(a) creates an entitlement to an employee whose employment is terminated before he has taken leave due to him, to be paid in accordance with subclause (3)(i) in lieu of so much leave as has not been taken.

24 The MCEA provides for paid annual leave consistent with that provided for in the Award. Section 24 allows for payment before the period of leave commences, provided any request by an employee is in writing.

25 In this case, in regards to annual leave, the parties entered into an agreement which provided for an hourly rate which included a component to cover annual leave. That arrangement was accepted by the Claimant who was not paid when he took leave during his employment with the Respondent. I accept the Respondent's evidence that the arrangement was put in place at the Claimant's request so that he could continue to receive a weekly amount similar to that paid when he was employed through a labour hire company and when he was later employed as a "*subcontractor*".

26 I have not heard evidence as to the rates payable under the Award beyond the rates shown in the consolidated Award dated 6 January 1997. Using those rates and the formula set out in the State workplace agreement, it was demonstrated that the amount paid to the Claimant for annual leave was well in excess of the amount payable under the Award as was the ordinary hour's rate and the overtime rate.

27 Following ***James Turner Roofing v Peters*** (supra), in any claim alleging a breach of an award, any calculation required to determine any underpayment must be done using the Award rates and not the over award rate set out in any agreement, as the Claimant has used in his Particulars of Claim.

28 In any event on the evidence before me I find that the Claimant was paid for the accrued annual leave and he was paid for the sick leave and public holidays at a rate which is prima facie above the award rate.

29 The claim will therefore be dismissed.

WG Tarr
Industrial Magistrate

2006 WAIRC 05237

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KATHERINE SAMPSON; KATHERINE SAMPSON **CLAIMANT** **-v-** SPRING 99 PTY LTD, ABN: 14086 935 104; SPRING 2002 PTY LTD, ABN: 20 097 097 455 **RESPONDENT**
CORAM	INDUSTRIAL MAGISTRATE G. CICCHINI
HEARD	WEDNESDAY, 2 AUGUST 2006, THURSDAY, 13 JULY 2006, WEDNESDAY, 15 FEBRUARY 2006, THURSDAY, 1 JUNE 2006
DELIVERED	WEDNESDAY, 2 AUGUST 2006
CLAIM NO.	M 152 OF 2005, M 153 OF 2005
CITATION NO.	2006 WAIRC 05237

CatchWords	Cessation of workplace agreement; casual employee; successive engagements; Food and Beverage Attendant; supervisor; appropriate level of training; higher duties.
Legislation	Workplace Agreements Act 1993. Minimum Conditions of Employment Act 1993 Public and Bank Holidays Act 1972 Labour Relations Reform Act 1972 Restaurant, Tearooms and Catering Workers' Award 1979
Cases referred to in decision	*Fowler v Anthony & Sons Pty Ltd T/As Oceanic Cruises (2004) 84 WAIG 3855*
Cases also cited	*Anthony and Sons Pty Ltd T/A Oceanic Cruises v Fowler (2005) 85 WAIG 1899* *Doyle v Anthony & Sons Pty Ltd T/A Oceanic Cruises (2006) 86 WAIG 123*
Result	Claims made out in principle
Representation	
Claimant	Mr G McCorry of *Labourline – Industrial and Workplace Relations Consulting* appeared as agent for the Claimant
Respondent	Mr D Johnson of *Workplace Relations and Management Consultants* appeared as agent for the Respondent

REASONS FOR DECISION

Background

1 In about August of 2002 the Respondent, Spring 99 Pty Ltd trading as ***Terrazza Applecross***, advertised for casual waitpersons to be employed at its restaurant. The Claimant responded to the advertisement and was interviewed for the position. There is a dispute between the relevant parties as to who interviewed the Claimant. The Claimant asserts she was interviewed by the Respondent's Manager, Bradley Treasure but he denies having interviewed her. In any event the Claimant was successful in her application for employment and on or about 19 August 2002, she, in accordance with the provisions of the ***Workplace Agreements Act 1993*** (the WPAA), entered into a Workplace Agreement (the Agreement) with Spring 99 Pty Ltd. The Agreement was duly registered on 22 August 2002. It was a term of the Agreement that it would apply for two years from the date of the signing of the same.

The Claimant's Evidence

2 In August 2002 the Claimant commenced working at ***Terrazza Applecross***, a café/restaurant situated at the corner of Canning Highway and Kearns Crescent in Applecross. She worked thereat three times a week in accordance with a roster published two weeks in advance, however, she did not work regular hours or times. Despite having previous experience as a waitperson she was initially required to work under supervision but later that changed. She was required to wear a uniform when working as a waitperson. The uniform distinguished the wait staff from the managers and supervisors who were not required to wear a uniform. It was part of her duties to take orders, serve food and drinks and to attend to the needs of patrons. On occasions she received money for payment of accounts which she then took to the till. The Claimant described the café/restaurant as being busy. Indeed it was particularly busy on Friday and Saturday nights when double sittings facilitated the high demand.

3 The applicant asserts that about six months after she commenced working at ***Terrazza Applecross*** she was given a manager's code which permitted her to give discounts, to void the till and do other things more in keeping with a senior or management employee. That evidenced her manager's trust in her. The Claimant, as a senior waitperson, took bookings, greeted patrons, attended to the walk-in customers, allocated customers to their tables, assisted other staff and was responsible for waiting upon customers for large section of the restaurant. Her responsibilities also included the training of new staff.

4 When the Claimant first started working at ***Terrazza Applecross*** she recorded her start and finish times using a manual time clock system, however, not long after she started, a new system was introduced whereby the clocking on and off of staff was recorded by use of a computerised touch screen, which was also used to record orders and charges made for the provision of food and beverages.

5 ***Terrazza Nedlands*** is a café/ restaurant owned and operated by Spring 2002 Pty Ltd. Spring 99 Pty Ltd and Spring 2002 Pty Ltd have common directors. Bradley Treasure, it seems, works for both companies. The companies have a common administration operating out of the same building. In May 2004 the Claimant attended

6 ***Terrazza Nedlands*** and saw Bradley Treasure sitting at a table with Oscar and Jonathon Lazuardi whom she described as being the owners of the business. She proceeded to sit with them and enter into discussion. During the discussion she was offered the position of supervisor at ***Terrazza Nedlands*** which she accepted. The Claimant understood that her appointment as supervisor also related to ***Terrazza Applecross*** because she was instructed to continue working thereat as required. She thereafter worked as a supervisor at both places. Given that her work for Spring 2002 Pty Ltd was for a different legal entity, the Claimant declared her ***Terrazza Nedlands*** job as a second job and accordingly paid a higher rate of tax on earnings from that job. She received a small wage increase for being a supervisor. The position also attracted certain privileges including the provision of a meal during long shifts and the use of a reserved parking bay for employees in supervisory or management positions. Further as a supervisor she was not required to wear a uniform. That distinguished her from other staff.

7 ***Terrazza Nedlands*** was larger and newer than ***Terrazza Applecross*** but was not as busy. Her duties as supervisor thereat included the responsibility of opening up which necessitated disarming the alarm and inputting the safe access codes. She prepared the till for the day's takings. She took bookings, including any function bookings, and allocated the staff their jobs. If she had the time she would also set up tables and attend to other aspects of preparation. Her role involved the delegation of functions and the supervision of staff. Whilst working at ***Terrazza Nedlands*** her start and finish times were recorded electronically.

8 The Claimant asserts that she was well regarded by her employers. Indeed at the 2004 Christmas function for the Morley, Applecross and Nedlands *Terrazza* café/restaurants, special mention was made during an awards presentation, at which she received an award, as to how well she had performed in her supervisor's role in the preceding six months.

9 In March 2005 the Claimant was late to work at Nedlands after being stuck in traffic. She was spoken to in that regard. That led to disagreement between her and Mr Treasure resulting in her being invited to leave her job, which she did. The documentary evidence indicates that her last completed shift for ***Terrazza Nedlands*** was worked on 16 March 2005. The Claimant subsequently worked out her rostered shifts at ***Terrazza Applecross***. Her last day of work at that place occurred on 19 March 2005.

10 On or about 4 April 2005, the Claimant was given an electronic copy of a reference prepared by Chris Pond, ***Terrazza Applecross'*** then manager. A hard copy of the reference has been produced to the Court. It suffices to say that the reference remains unsigned. The significance of it to these proceedings is that it confirms that the Claimant was employed as a supervisor at ***Terrazza Applecross***.

11 The Claimant asserts that the shift summary records (exhibits 3 and 4) reflect the shifts that she worked for both employers during the material period.

12 When cross-examined, the Claimant denied that she was interviewed by Mark Jones regarding the advertised position. She said that Mr Jones was at the material time a supervisor and not an assistant manager. She maintained that Mr Treasure interviewed her. Further she acknowledged that during the course of her employment with the Respondents that she was asked to sign an Australian Workplace Agreement, but refused to do so. The Claimant also conceded that she took breaks during her shifts and that such would be electronically recorded.

13 The Claimant, when cross-examined, also confirmed that following her appointment to ***Terrazza Nedlands*** she was told that she was to continue to work at ***Terrazza Applecross*** albeit to a limited extent. She said that she was told, when appointed a supervisor, that she would not have to wear a uniform. She testified that when she subsequently discussed the issue of her status with Chris Pond he confirmed that she was a supervisor. That was consistent with her being paid, as from May 2004, at the same rate for her work irrespective of where she worked.

14 The Claimant testified that she made it clear to Mr Treasure during the course of her employment that she was of the view that she was not being appropriately paid but conceded nevertheless that at no time during the course of her employment did she assert that the Respondents had failed to comply with the ***Restaurant, Tearoom and Catering Workers Award 1979*** (the Award).

15 Finally the Claimant conceded during cross-examination that she had not received any formal training as a supervisor, nor had she been formally assessed by a qualified skills assessor as having the necessary skills of a supervisor.

Evidence of Christopher Jeffrey Bergin

16 Christopher Bergin works for the Respondents. He is a waiter and bartender. He has worked both at ***Terrazza Applecross*** and ***Terrazza Nedlands***. He worked at those places whilst the Claimant was also employed at each place. He said that the Claimant was, at the relevant times, both a co-worker and supervisor.

17 He happened to be working at ***Terrazza Nedlands*** in May of 2004 when he overheard a conversation between the Claimant, Bradley Treasure, Jonathon Lazuardi and Oscar Lazuardi in which the Claimant was offered the position of supervisor. He testified that following the Claimant's appointment as supervisor in May 2004 she no longer performed wait duties but rather attended to duties of a supervisor in allocating sections, instructing and directing staff as to what to do and manning the till. Further, she did not wear a uniform which was consistent with her supervisor's position. He observed her to work for both ***Terrazza Applecross*** and ***Terrazza Nedlands*** in her capacity as supervisor.

18 Mr Bergin recalled also the 2004 Christmas party at which the Claimant received an award and commendation for her efforts.

19 Mr Bergin, confirmed when cross-examined that Mr Treasure left *Terrazza Applecross* at the time that *Terrazza Nedlands* opened, at which time Mark Jones took over as Manager of *Terrazza Applecross*. Further with respect to the conversation that he overheard, he confirmed that he only heard the Claimant being offered a position of supervisor at *Terrazza Nedlands*. *Terrazza Applecross* was not mentioned. Notwithstanding that, it was the case that the Claimant, from May 2004, worked as a supervisor at *Terrazza Applecross* on weekends.

Evidence of Adam Raymond Pearce

20 Mr Pearce is currently a waiter and bartender working at Black Tom's, West Perth. He formerly worked at ***Terrazza Nedlands*** during which time the Claimant was his supervisor. Other than establish the fact that the Claimant was, at the relevant time, his supervisor his testimony does not take the matter further.

Evidence of Bradley Philip Treasure

21 Mr Treasure testified that he is the "*Terrazza Group Manager*". He has the day to day responsibility of managing company developments and attending to the management of company activities. He oversees all managers and assistant managers at each of the *Terrazza* establishments.

22 He said that he worked at ***Terrazza Applecross*** in 2002 but relocated to Nedlands on

23 1 November 2002 to set up what was formerly known as ***Minsky's Tavern*** **as** ***Terrazza Nedlands*****.** When he left to do that, Mark Jones took over his position at Applecross. He said he had little to do with ***Terrazza Applecross*** subsequent to his move. He says that it was Mr Jones who interviewed the Claimant and not him. He said that his only involvement with respect to the Claimant's initial engagement was to sign the Agreement.

24 He testified that each café/restaurant manager looked after staff issues. Competent senior staff were given extra responsibilities to reflect their level of experience. Some staff were regarded as a "*senior*" whilst others took on a supervisory role. Supervisors were not required to have any particular qualification, nor were they formally assessed to achieve such a position.

25 Mr Treasure said that in about February 2003, the forty to sixty staff members then working for the group were offered Australian Workplace Agreements (AWAs). All of the staff signed their respective AWAs except for the Claimant who "*slipped through*". Sometime after May 2004 the Claimant was offered an AWA and discussions were held concerning the same but in the end the Claimant did not enter into one.

26 Mr Treasure testified that in May 2004 when he together with Mr Jonathon Lazuardi and Oscar Lazuardi met with the Claimant that the Claimant was offered the position of supervisor of ***Terrazza Nedlands*** only. He said that there was no discussion about her role at ***Terrazza Applecross*** except that her continued employment thereat was to be secondary to the requirements of ***Terrazza Nedlands***. Her focus was to be on ***Terrazza Nedlands***. She was not appointed as a supervisor at ***Terrazza Applecross*** as there was no need for another supervisor at that place. It had not come to his attention that the Claimant had been working as a supervisor at ***Terrazza Applecross*** and he had never been advised of such by Mr Pond. Neither had there been any suggestion that Mr Pond had promoted the Claimant to the position of supervisor. Notwithstanding that, Mr Treasure acknowledged that the Claimant was receiving the same rate of pay for her work at ***Terrazza Applecross*** as was the case for ***Terrazza Nedlands*****.** He said that occurred for administrative convenience to lessen complexity and confusion.

27 Mr Treasure was shown the reference purportedly prepared by Mr Pond and said that the format of the letter is not in keeping with *Terrazza* letterhead. His evidence is suggestive of the fact that the letter was manufactured to assist the Claimant in this matter. Further, and in any event, even if the same was prepared by Mr Pond it was prepared contrary to "*Terrazza policy*" and without the necessary approval, he said.

28 Mr Treasure testified that the dispute which led to the Claimant's termination resulted from her turning up late on repeated occasions. He confronted her about it because it impacted on his commitments. The Claimant took umbrage at that. She then took the opportunity to inform him that she was not prepared to do the work for $16.00 per hour. He then told her that if she was not happy with the situation she could leave, whereupon she made her way to the door slammed it shut behind her and left. She did not return for her next rostered shift.

29 Mr Treasure was next taken to consider the staff summary records produced to the Court by the Claimant. He said that they are not accurate because the staff end times shown thereon may not necessarily reflect the Claimant's actual cessation time but rather the time that the computer system was closed down for the night. He testified that such is apparent when a comparison is made between the *Simplex Employee Time Report* available and the *Employee Shift Summaries* for any given day. In that regard he produced an incomplete set of manual time cards (*Simplex Employee Time Report*) which record the Claimant's start and finish times for the period between 9 September 2002 and 18 May 2003 (exhibit 6) which can be utilised to make the comparison. The comparison of the two sets of records reflects inconsistency. In most instances the manual cards show an earlier cessation time than that recorded on the computer system. The manual record maintained by the Claimant is said to be the most accurate record. Difficulty arises however where there is no manual record of times worked. In such circumstances the only available record is the *Shift Summaries*.

30 Finally, with respect to the issue of uniforms, Mr Treasure took issue with the Claimant's contention that all wait staff had to wear a uniform. He said that the requirement to wear a uniform was not strictly enforced.

31 When cross-examined, Mr Treasure conceded that the times recorded on the *Shift Summaries* from May 2003 and onwards could be relied upon to represent the Claimant's start and finish times. He explained that the negative inputs shown in the summaries reflected breaks taken during shifts. Such breaks measured in time were deducted in order to achieve the calculation of the actual time worked by the Claimant for any given shift. He was asked why it was that he had not previously produced the *Simplex* cards. He said in that regard that he had never been asked for them.

32 Mr Treasure maintained under cross-examination that he did not interview the Claimant. In doing so he corrected his earlier evidence that he had started working at Nedlands on 1 November 2002 by saying that he actually started at that place a year earlier in November 2001. Although he remained responsible for the overall operation of ***Terrazza Applecross*** he did not attend to its day to day management, which included the hiring of staff. Such rested with Mark Jones.

33 Mr Treasure conceded when cross-examined that the Claimant was at the material times a senior waitperson responsible for a large section of ***Terrazza Applecross***. He denied however that she performed any management type functions. He said some staff were authorised to give discounts and that such a function was not indicative of supervisory responsibility.

34 Mr Treasure was next asked if he had made any assessment of the Claimant to determine whether she was suitable for appointment as supervisor. He said that he had done so for his own purposes but added that he had not made any formal assessment as he was not accredited to do so. He is not an accredited assessor.

35 The next issue with respect to which Mr Treasure was cross-examined related to the payment to the Claimant subsequent to her appointment as supervisor at ***Terrazza Nedlands*** of the same rate of pay irrespective of where she worked. He maintained in that regard that she was paid the same rate for administrative convenience notwithstanding the fact that she worked for separate entities. Mr Treasure pointed out that the payroll was done in the same office.

36 With respect to the Claimant's work at ***Terrazza Applecross*** post May 2004, Mr Treasure acknowledged that he could not say whether or not the Claimant was called upon to perform supervisory duties when other supervisors may not have been available.

37 Finally, Mr Treasure conceded that the Claimant performed her function as supervisor at ***Terrazza Nedlands*** to his satisfaction.

Factual Findings

38 I find that in about August 2002 the Claimant responded to a newspaper advertisement seeking the services of a waitperson to work at ***Terrazza Applecross***. I find that she was interviewed for that position by Mr Treasure. It is more probable than not that the Claimant would have a more accurate recollection thereof given that as an applicant the experience of the interview is far more unique than would be the case for someone like Mr Treasure who would be involved in the same more routinely. Further, given the confusion in Mr Treasure's mind as to when it was that he commenced at ***Terrazza Nedlands***, I prefer the Claimant's evidence on that issue. It is the case that having made that finding little turns on it.

39 I find that the Claimant commenced employment as a casual waitperson with ***Terrazza Applecross*** on 12 August 2002 and that she entered into the Agreement on 19 August 2002 which was duly registered on 22 August 2002. The Agreement was for two years. From the commencement of her employment until May 2003, the Claimant's start and finish times were recorded manually by use of the *Simplex* time cards. Thereafter her start and finish times were recorded electronically and can only be ascertained from the shift summaries produced by the Respondents.

40 I find that the Claimant worked as a waitperson at ***Terrazza Applecross*** for the first six months before taking on increased responsibilities and becoming a senior employee. Her role for the first six months was consistent with that of a Food and Beverage Attendant, Grade 2 as defined in subclause 6(4) of the Award and thereafter until May 2004 her duties were consistent with a Food and Beverage Attendant Grade 3, as defined in subclause 6(5) of the Award. I am satisfied on the balance of probabilities that such was the case because of the evidence given by the Claimant as supported by Mr Bergin.

41 I find that from May 2004 the Claimant worked as a supervisor at both ***Terrazza Applecross*** and ***Terrazza Nedlands***. The Claimant's evidence in that regard is supported by Mr Bergin. Furthermore the payment to the Claimant of the same rate of pay irrespective of where she worked is also demonstrative of the fact that she worked as a supervisor at ***Terrazza Applecross*** as well as ***Terrazza Nedlands***. The Respondents appointed the Claimant to be a supervisor notwithstanding that she did not possess any particular qualification or training, other than on the job training, to perform that function.

42 I find that in March 2005 the Claimant ceased working for ***Terrazza Nedlands*** and ***Terrazza Applecross.***

Issues

43 The Respondent in claim M 153 of 2005 (***Terrazza Nedlands***) does not admit that it employed the Claimant and puts her to proof in that regard. Further the Respondent says that if a finding is made that the Respondent, Spring 2002 Pty Ltd, employed the Claimant that the Award did not apply to her employment in any event in which case the Claimant was correctly paid in accordance with her contract of employment. The Respondent says that in the event that the Court finds that the Award did apply then the total amount of underpayments amounts to $1625.00 and not the $4703.68 claimed.

44 The Respondent in claim M 152 of 2005 (***Terrazza Applecross***) asserts that the Agreement entered into between the Claimant and the Respondent continued in operation until terminated by force of section 4C of the WPAA on 15 March 2003. The Respondent says that on termination of the Agreement, the terms of the Agreement continued to apply as a condition of employment pursuant to section 4H of the WPAA and that the Award bound the employer and employee to the extent provided in that section. The Claimant on the other hand asserts that by operation of subsections 14(1) and 14(2) of the WPAA, the Agreement could in fact and in law only apply to the engagement of the Claimant until the cessation of the first engagement as a casual employee, and that thereafter each successive engagement was subject to the provisions of the Award. The Claimant asserts that the Award had application from 1 September 2002 and that she worked for ***Terrazza Applecross*** variously as a Food and Beverage Attendant Grade 2, Food and Beverage Attendant Grade 3 and a Food and Beverage Supervisor being classifications within the Award. The Claimant asserts that the Respondent failed to pay her the correct entitlement and was accordingly underpaid $4827.06.

45 The Respondent denies that the Claimant was engaged as a Food and Beverage Attendant Grade 3 and further denies that the Claimant was a Food and Beverage Supervisor. The Respondent contends that the Claimant does not fall within those classifications because she did not have the "*appropriate level of training*" as defined in the Award to bring her within the terms of the classification in each instance. Notwithstanding that, the Respondent concedes that the Claimant was underpaid $1847.78 during the period of her employment

46 The parties have asked that I do not, at this stage, determine the number of hours worked by the Claimant, but rather decide the pivotal issues of whether or not the Award applied and if so, the extent to which it applied and further, whether the Claimant falls within the classifications contained within the Award for all or any part of her employment.

Respondents' Submissions

47 The Respondents contend that section 14 of the WPAA does not have application to this matter because the provision is predicated on the contract of employment coming to an end. It provides:

> ***Termination of contract of employment***
>
> *14. (1) Where a contract of employment of an employee comes to an end a workplace agreement that governs that contract no longer applies to that person except where an agreement under subsection (2) provides otherwise.*

(2) An employer and a person who is employed by the employer may agree in writing that a specified workplace agreement is to apply to that person as an employee of that employer during a specified period, not exceeding 12 months, regardless of the number of separate contracts of employment between them that come into existence during that period.

(3) Subsection (1) does not affect rights or obligations under a workplace agreement that are to take effect after termination of employment.

48 The Respondent, Spring 99 Pty Ltd, says that the Claimant was engaged in an on-going contract of employment notwithstanding the casual nature of her employment. She had continuing employment which could not come to an end other than by the giving of notice as provided for in the Agreement. This Respondent says that it was possible for there to have been an ongoing contract of employment governing the Claimant's casual employment and that such is consistent with the decision of Smith C of the Western Australian Industrial Relations Commission in ***Fowler v Anthony & Sons Pty Ltd. T/As Oceanic Cruises (2004) 84 WAIG 3855 (Fowler).*** It follows therefore that the Agreement only came to an end on 15 March 2003 by force of the ***Labour Relations Reform Act 2002 No 20 of 2002.***

49 Moving to the issue of the claim for payment of a loading for working on public holidays the Respondents say that the Claimant cannot succeed. It submits that clause 17 (public holidays) of the Award does not apply to casual employees by virtue of subclause 17(4). The Respondents argues that the provisions of the ***Minimum Conditions of Employment Act 1993*** (the MCEA) apply where the Award fails to make provision for casual employees working on public holidays. In that regard the MCEA provides for the observance of specified public holidays. Its provisions, unlike the Award, do not allow for the substitution of public holidays nor do they enable public holidays to be observed on days other than the actual day upon which they fall. Accordingly, the Respondents contend that where the Claimant has worked on a day observed in lieu of the public holiday, that the same is not to be treated as a public holiday. In this instance the Respondents say that the Claimant is not entitled to be paid at penalty rates for the Mondays worked when such were observed as holidays in lieu of New Years Day and Australia Day.

50 Another issue addressed by the Respondents in submissions is that of classification. The Respondents submit that the Claimant could never be classed as a Food and Beverage Attendant Grade 3 or a Food and Beverage Supervisor because such classifications are predicated upon the Claimant having the "*appropriate level of training*".

51 "*Appropriate level of training*" is defined in subclause 6(21) of the Award in the following way:

(21) ***Appropriate level of Training*** *means –*

(a) completion of a training course and the employee qualifying for an appropriate certificate relevant to the employee's particular classification; or

(b) that the employee's skills have been assessed to be at least the equivalent of those attained through the suitable course described in paragraph (a) of this subclause assessment to be undertaken by a qualified skills assessor.

52 Given that the Claimant has no formal training and given also that she has not been assessed by a qualified skills assessor, she is said to fall outside the classifications in the Award for all the work she undertook following the first six months of employment. Furthermore the Respondents contend that the higher duties clause of the Award does not assist her in her attempt to be paid as a Food and Beverage Attendant Grade 3 or a Food and Beverage Supervisor. Relevantly it provides

25. – HIGHER DUTIES

(1) Any worker performing work for two or more hours in any day on duties carrying a higher prescribed rate of wage than that in which he is engaged, shall be paid the higher wage for the time so employed, provided that where a worker is engaged for more than half of one day or shift on duties carrying a higher rate he shall be paid the higher rate for such day or shift.

(2) Any worker who is required to perform duties carrying a lower prescribed rate of wage, shall do so without any loss of pay.

53 In essence, the Respondents argue in that regard that the Claimant cannot be said to have been carrying out higher duties because she was in reality, only performing the work that she was employed to do. In other words she was not carrying out higher duties at all. Furthermore the Respondents contend that the Claimant could not have, in the performance of her duties, attracted the higher duties provision absent the qualifications which were necessary to enable her to perform the duties of a Food and Beverage Attendant Grade 3 or a Food and Beverage Supervisor as defined. The argument is that the Claimant cannot be paid for performing higher duties for a position she is not qualified to hold.

54 The Respondents argue that where the Claimant's functions and duties fell outside the Award classification that the Award could not apply. They argue that most of the work carried out by the Claimant for the Respondents was not covered by the Award.

Claimant's Submissions

The Claimant submits that the Court is only called upon to resolve the following issues:

55 The status of the Workplace Agreement between the end of September 2002 and March 2003;

56 The Claimant's employment classification at ***Terrazza Nedlands*** between May 2004 and March 2005; and

57 The Claimant's duties and classification at ***Terrazza Applecross*** between May 2003 and March 2005.

58 She also says that the other issue raised by the Respondents relating to substituted public holidays is not relevant because none of the public holidays worked by the Claimant fall into the category of substituted public holidays.

59 Addressing the issue relating to the Agreement, the Claimant drew the Court's attention to subsections 14(1) and 14(2) of the WPAA. The Claimant argues that subsection 14(1) makes it clear that when a contract of employment comes to an end, any workplace agreement that governs that contract no longer applies. Subsection 14(2) makes specific provision for persons who are at common law casual employees. The parties in such instances can agree in writing that a workplace agreement is to apply to multiple contracts during a specific period not exceeding twelve months. The Claimant says that her contract of employment was not a single ongoing contract of indefinite duration but rather a casual one. Consequently there is a manifest inconsistency in the Agreement itself because on the one hand the Agreement purports to cover the duration of her employment and on the other hand it says that the Agreement is for two years. Given that her employment was not constituted by a single ongoing contract of employment over two years, the relevant provisions of the Agreement are repugnant. The manifest inconsistency is apparent within subclause 4(a) of the Agreement itself which provides:

> *4(a) The duration of this Agreement shall relate to the contract of employment of the employees mentioned in Schedule 1 "Parties" of this Agreement. The term of this Agreement shall be two (2) years from the date of signing.*

60 The two sentences of that subclause are repugnant because the Claimant's contract of employment was not a single ongoing contract of indefinite duration but rather a casual one. Her initial contract of employment ended after the first fortnight rostered period of work. The Claimant argues that when one applies the usual rules of construction relating to repugnant provisions the first appearing provision will be operative and the latter will be of no effect. That results in the Agreement having lasted as long as the Claimant's first contract of employment which came to an end after the first fortnightly rostered period of work. That is also consistent with subclause 4(c) of the Agreement which provides:

> *4(c) This Agreement shall terminate with the cessation of work by the employee with the employer mentioned in this Agreement.*

61 The Agreement cannot be construed as one that applies to multiple contracts of employment for a period exceeding twelve months because such does not satisfy subsection 14(2) of the WPAA. A single contract covering a number of predetermined (rostered) shifts can quite properly be described as a casual contract of employment that comes to an end at the completion of that rostered period.

62 The Claimant contends that at the completion of her first fortnight's work at ***Terrazza Applecross*** the Agreement ceased to apply and each successive contract of employment was regulated by the Award.

63 The Claimant asserts that she was a supervisor at both ***Terrazza Nedlands*** and ***Terrazza Applecross*** from May 2004 until her employment ceased in March 2005. She says that the Respondents' argument concerning her inability to fall within the Award classification is not maintainable because employees are paid for what they do and not for the skills that they possess. It is argued in any event that the contention that the Claimant was not assessed by a qualified skills assessor is not correct. The Claimant says that Mr Treasure satisfied the definition of *"a qualified skills assessor"* because he assessed her skills to be suitable for appointment as a supervisor. Given that he has the responsibility for directing and training of staff, it cannot be said that he does not have the necessary experience or ability to assess skills. The Award does not require the assessor to have formal qualifications. It requires the person to be qualified. It does not define "*qualified*". Without more "*qualified*" simply means "*recognised as being capable of doing something; being possessed of qualities or accomplishments which fit one for some function or office*". The owners of the restaurant have recognised Mr Treasure's capabilities in training and directing staff. It follows that he is, for the purpose of the Award, a qualified skills assessor.

64 Finally the Claimant asserts that clause 25 being the *"Higher Duties"* clause of the Award entitled her to be paid as a Food and Beverage Attendant Grade 3 and as a Supervisor notwithstanding any failure on her part to strictly meet the requirements of such classifications. She argues that the Respondents' contention concerning the non-applicability of the clause is not maintainable because the wording therein makes it clear that it relates to the performance of higher duties. The work carried out by the Claimant was at the material times perfectly consistent with the duties of a Food and Beverage Attendant Grade 3 and Food and Beverage Supervisor as defined in clause 6 of the Award. The Claimant performed those higher duties and accordingly is entitled to the benefits conferred by clause 25.

Determination

65 I refer to the findings of fact previously made and incorporate the same in my determination.

Workplace Agreement

66 There can be no doubt that the Claimant's employment with both Respondents was casual in nature. When the Claimant first started with *Terrazza Applecross* there was no guarantee or expectation of continuity of employment. It was open to the Claimant and her employer not to re-engage in employment after the cessation of each rostered period. Their position was different to the circumstances of the parties in *Fowler* (supra). In that matter there was a reasonable mutual expectation of continuity of employment, whereas in this matter there was not. The Claimant's employment lacked permanency. She only had work insofar as her roster dictated. The compilation of the rosters was driven by the needs of her employer. Accordingly the types of considerations in *Fowler* simply did not apply. I reject the Respondents' argument in that regard.

67 The Claimant's employment was intrinsically casual and certainly could not be described as ongoing. It follows that the Agreement came to an end when the Claimant completed her first rostered fortnightly period of work which ended her contract of employment. Subclause 14(1) of the WPAA operated at that stage to terminate the Agreement given that the parties had not entered into an agreement as contemplated by subsection 14(2) of the WPAA.

68 It suffices that I indicate that I am in broad agreement with the Claimant's submissions made with respect to the issue. The Agreement came to an end when the Claimant completed her first fortnight's work for Spring 99 Pty Ltd. Thereafter the Award regulated her employment.

Classification

69 The Respondents contend that the Claimant could never have been classified as a Food and Beverage Attendant Grade 3 or a Food and Beverage Supervisor because those classifications are predicated upon the attainment of an *"appropriate level of training"* as defined in subclause 6(21) of the Award. To attain the *"appropriate level of training"*, the Claimant was required to have either completed a training course qualifying her for a certificate or, alternatively, been assessed by a qualified skills assessor to possess skills equivalent to those attained through a suitable course.

70 There is common ground that the first limb of the meaning of "*appropriate level of training*" referred to in subclause 6(21)(a) of the Award has no application because it is conceded that the Claimant has never completed a training course, however, the Claimant argues that she fits within the terms of the definition in subclause 6(21)(b) of the Award because she was assessed by Mr Treasure to possess skills suitable for appointment. It is argued Mr Treasure was qualified to make such assessment.

71 I reject the Claimant's arguments for the following reasons.

72 It is abundantly clear that employees classified as a Food and Beverage Attendant Grade 3 or as a Food and Beverage Supervisor must have the "*appropriate level of training.*" That is a fundamental pre-requisite for the attainment of the relevant classifications. It is not sufficient that an employee merely engage in doing those things required of a Food and Beverage Attendant Grade 3 or of a Food and Beverage Supervisor. Doing those things or being responsible for those things does not satisfy the definition. Accordingly, given that the Claimant has never completed a training course qualifying her for an appropriate certificate relevant to the classifications, the only way she can satisfy the definition of *"appropriate level of training"* is to prove that she was assessed by a qualified skills assessor to possess at least the equivalent skills of those attained through a suitable course

73 I find however that the Claimant was never assessed by Mr Treasure to possess skills "*at least the equivalent of those attained through the suitable course*" (see clause 6(21) of the Award). The assessment process necessarily imports knowledge of the training course and the skills outcomes achieved by completion of such course. There is no evidence that Mr Treasure possessed such knowledge about any course or courses, its or their structure, or the nature of the skills required to qualify for an appropriate certificate. A qualified skills assessor must have knowledge about those things so to enable him or her to conclude that the skills of an employee are at least the equivalent of those attained through a suitable course. Given that the evidence does not support a finding that Mr Treasure possessed such knowledge, it follows that it has not been proved that he was a qualified skills assessor. It could not have been sufficient for Mr Treasure, in general terms and without regard to the course of training, to have regarded the Claimant to be suitable for appointment to the position of Supervisor as defined in the Award. That did not satisfy the requirements of the Award.

74 I accept the Respondents' submission that the Claimant has failed to prove that she comes within the classifications of Food and Beverage Assistant Grade 3 and Food and Beverage Supervisor.

Higher Duties

75 Clause 25 of the Award provides that any worker who for two hours or more on any day performs duties carrying a higher prescribed rate of wage than that otherwise applicable is to be paid at that higher rate for the period of time worked performing those duties. The only proviso is that if a worker is engaged for more than half a day or shift on duties carrying a higher rate of pay then the higher rate is to be paid for such day or shift.

76 It is noted that the higher duties clause is predicated upon the *"performance of work"*. It is not limited to or contingent upon a worker possessing any particular qualification. In this matter, the fact that the Claimant did not possess the qualification required of the relevant classifications is of no moment so far as the higher duties claim is concerned. So long as the Claimant performed those functions for the requisite periods she was entitled to payment of the higher rate of pay.

77 The Respondents argue that the Claimant cannot be entitled to the higher duties rate in the performance of her normal duties. I reject that argument because it is quite apparent that the Claimant could not have, at the material times, been engaged as a Food and Beverage Assistant Grade 3 or a Food and Beverage Supervisor because she lacked the necessary qualification for such appointment. Accordingly she was not, when carrying out the duties of a Food and Beverage Assistant Grade 3 or a Food and Beverage Supervisor, performing her normal duties. She was in fact performing higher duties.

78 I am in agreement with the submissions made by the Claimant with respect to this issue. I find that the Claimant is entitled to the higher duties rate of pay for each occasion that she has performed higher duties. Given that she performed such duties for the whole of her shifts she is entitled to payment at the higher rate for each shift worked.

Substituted Public Holidays

79 The only remaining issue is that raised by the Respondents relating to substituted public holidays. I concur with the Claimant in finding that the issue is not relevant to my considerations. It appears that none of the public holidays worked and claimed by the Claimant fall into the category of substituted public holidays.

Conclusion

80 The claims in so far as they are not conceded are made out in principle. In accordance with what was proposed by the parties I will leave it to them to calculate the hours worked by the Claimant. That might lead to agreement concerning the quantum of underpayment.

G. Cicchini
Industrial Magistrate

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2006 WAIRC 05198

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TIMOTHY CLARKE
	APPLICANT
	-v-
	COMMERCIAL SEWING (WA) PTY LTD
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
HEARD	TUESDAY, 4 JULY 2006
DELIVERED	FRIDAY, 4 AUGUST 2006
FILE NO.	APPL 910 OF 2005
CITATION NO.	2006 WAIRC 05198

CatchWords	Termination of employment - Harsh, oppressive and unfair dismissal - Dismissal occurred during period of probationary employment - Principles applied - Applicant harshly, oppressively and unfairly dismissed - *Industrial Relations Act 1979* (WA) s 29(1)(b)(i)
Result	Order that the Respondent pay the Applicant $4,392.38 (gross)
Representation	
Applicant	In person
Respondent	Mr M Edwards

Reasons for Decision

1 Timothy John Clarke ("the Applicant") claims that he was harshly, oppressively or unfairly dismissed by Commercial Sewing (WA) Pty Ltd ("the Respondent") on Tuesday, 16 August 2005. The Applicant's claim is made under s 29(1)(b)(i) of the *Industrial Relations Act 1979* ("the Act").

2 The Applicant was employed for a short period by the Respondent. During mid 2005, the Applicant was seeking employment as part of his rehabilitation from a head injury he received in 1988. Sometime in 2004, the Applicant purchased products from the Respondent. When he did so met the Respondent's Managing Director, Mr Michael Edwards who gave the Applicant some practical advice. The Applicant found Mr Edwards to be an agreeable sort of person.

3 During 2005, the Applicant was assisted by the State Head Injury Unit to obtain work and attempted to obtain employment through the Rocky Bay Employment Services. The Applicant says that the limitations from his head injury are somewhat nebulous. His head injury has left him with a functional deficit which interferes with his decision making capacity or it sometimes interferes with his ability to rationalise matters. The Applicant ultimately wanted to and still wants to become a bricklayer. In mid 2005, he was informed by the Rocky Bay Employment Services about a five week bricklaying course which was to commence sometime in October 2005. The Applicant wished to do the course but decided to seek employment in the meantime, so he went to the Respondent's premises, spoke to Mr Edwards and told him he wanted to work with his company to learn some skills. At that time the Applicant had in mind that after he had completed the bricklaying course he may be able continue to work for the Respondent on a casual basis. The Applicant told Mr Edwards that he wanted to attend the bricklaying course in mid October 2005, so he would only be available for work until the course commenced. The Applicant also spoke to Mr Edwards about his head injury. Mr Edwards told the Applicant he was prepared to employ him and said that he wanted to discuss the matter with the Rocky Bay Employment Services' representatives.

4 The Applicant and Mr Edwards met with representatives from the Rocky Bay Employment Services on Monday, 1 August 2006. The duties required of the Applicant were to cut webbing, sort webbing, cut and make up cable and blanks for hose restraints and general duties. The job was assessed by the Rocky Bay Employment Service representatives as safe for the Applicant to carry out. Accordingly, it was agreed that the Applicant would be employed. The Respondent usually requires all its employees to commence work at 7:00 am each morning. However, Mr Edwards agreed to accommodate the Applicant's family commitments. The Applicant and his wife had just had their fifth child and he needed to be at home for the family each morning, so it was agreed that the Applicant would commence work at 9:00 am each day. The terms and conditions of the Applicant's employment were reduced to writing by a representative of the Rocky Bay Employment Services in a document titled "Job Analysis" (*Exhibit 2*). That document records that the Applicant was to be employed as a factory hand, he was to work 30 hours a week and be paid $19,953.49 per annum or $382.50 a week or $12.75 per hour. The document also records that the Applicant was to undergo a three month probationary training period. A Work Sampling Information form was also completed (*Exhibit 1*) which records the Applicant's hours of work as 9:00 am to 4:00 pm from Monday to Friday, with a lunchbreak from 12:00 noon to 12:30 pm each day. It was also agreed that the Applicant would commence a five day trial from Monday, 1 August 2005. The Applicant offered to work for free during that week but Mr Edwards told the Applicant that he would give him $200 for working that week. The Applicant asked Mr Edwards if that money could be held in credit so he could use it to purchase materials and Mr Edwards agreed.

5 The Applicant successfully completed his five day trial and was paid as an employee from 8 August 2005. On Friday, 12 August 2005, the Applicant started work two hours early because he was leaving two hours early that afternoon for a weekend with his family. Before he left, the Applicant received his pay advice and noticed he was paid a net amount of $330

in wages which equated to a gross amount of $380. The Applicant testified that the amount was under what he had anticipated, as he had done a rough calculation of what he thought he would be paid. He spoke to Mr Edwards and told him he did not think his pay was right and Mr Edwards responded by telling the Applicant, "Well, there's the door," meaning he could leave if he wanted to. The Applicant said to Mr Edwards, "I am not making any point of saying I'm gonna leave but I'm saying the pay's not right." When cross-examined, the Applicant conceded that he told Mr Edwards that he thought he was worth $15.00 per hour and that Mr Edwards told him he was not worth that, as he was doing a junior's job. The Applicant told Mr Edwards he would speak to Mr Ian Dandy and Mr Robert Notley from the Rocky Bay Employment Services about the matter. The Applicant discussed the matter briefly with Mr Notley who told him that it was "his call" whether he wanted to continue to work but he was unable to contact Mr Dandy. The Applicant also discussed the matter with his wife and they decided that he should continue to work for three months on a permanent part-time basis because it was not worth "rocking the boat" for a few extra dollars a week. The Applicant later spoke to Mr Edwards about the issue again on Monday, 15 August 2005. Mr Edwards told the Applicant that if he wished he could change his status to a casual employee. The Applicant told Mr Edwards that he had not heard from Mr Notley or Mr Dandy and he did not know what to do, so he would leave the issue until he had spoken to Mr Notley. On the following day, which was the day the Applicant was dismissed, Mr Edwards asked the Applicant again if he would consider working as a casual employee. Mr Edwards explained to the Applicant what the benefits were, that he (the Applicant) could work when he wanted to work and for how long he wanted to work but he would not be paid holiday pay or sick leave.

6 During that day the Applicant asked two workers for tasks, they gave him some work but there was not much to do. At about 3:00 pm or 3:30 pm the Applicant went into Mr Edwards' office. Mr Edwards was busy at the computer. The Applicant excused himself and said to Mr Edwards, "I'm going to knock off a bit earlier today. There's very little to do out on the floor." The Applicant testified that before he finished his sentence, Mr Edwards glared at him and said in an aggressive manner, "You what?" and the Applicant told him again, "I am going to knock off early today" and Mr Edwards said, "You don't tell me anything. You go half an hour earlier and don't come back." The Applicant said, "Michael hang on a sec." Mr Edwards said, "I will not hang on" and got out of his chair and yelled "get out". Mr Edwards did not listen to what he (the Applicant) had to say and repeatedly told him to go, so the Applicant left and went home. The Applicant says that he felt completely "rattled" and was taken by surprise by Mr Edward's action. The Applicant says that he worked hard for the Respondent and was punctual. He says he was only late on one occasion for work by 10 minutes and he made that time up in a break.

7 After the Applicant left the Respondent's premises, he telephoned a government advice line about being dismissed. He explained that he wanted to keep working, so he was told to telephone Mr Edwards and ask for his job back. The Applicant did that but Mr Edwards declined and would not discuss the matter. The Applicant spoke to the advice line again and was told to ask Mr Edwards the reasons for his termination. The Applicant telephoned Mr Edwards again and Mr Edwards told him he would not respond to a request for reasons.

8 The Applicant then made further enquiries about the bricklaying course. Mr Dandy told him the course was not being organised until later in 2005 and said he would get back to the Applicant but he did not do so. The Applicant by that time had "fallen out" with those who were assisting him at the Rocky Bay Employment Services. He says that he thought that Mr Dandy's "nose was out of joint" because Mr Dandy had, prior to the Applicant commencing employment with the Respondent, wanted to place the Applicant in factory work and the Applicant wanted to pursue a trade. However, the Applicant made his own enquires about the bricklaying course and discovered that the course was commencing much earlier than he had been told by Mr Dandy. The Applicant commenced the bricklaying course in mid September 2005. When he tried to get funding for the course, an inquiry was made to the Rocky Bay Employment Services by Centrelink and the Applicant was informed by the Centrelink inquirer that the Rocky Bay Employment Services were very disappointed that he (the Applicant) had "quit" the job with the Respondent.

9 In early October 2005, during the middle of the bricklaying course the Applicant had an appendectomy. Consequently, he was unable to complete the work experience to finish the course. The Applicant is still seeking to be trained as a bricklayer and he is presently waiting for a Master Builders bricklaying course to commence some time in mid 2006 which he says would be more suitable for him. The Applicant concedes that he has not looked for other work.

10 The Applicant says it was his intention to work three months for the Respondent and because of that, he had committed to paying for his wife and two of his children to travel to New Zealand. When Mr Edwards dismissed the Applicant, the Applicant had already agreed to pay for the tickets to New Zealand which had been purchased by his mother-in-law. This caused him financial difficulties. The Applicant says that he would have worked for the Respondent for three months, as it was unlikely he would have known the bricklaying course was to commence in September 2005, as he only found out about it at the last minute.

11 When the Applicant was cross-examined, a report about the assessment of his work capacity prepared by Rocky Bay Employment Services was put to him. The Applicant said that he had not seen that report before and he disagreed with some of the matters contained in the report.

12 The Applicant maintained in his evidence that he was employed on a permanent basis for three months. However, although he agreed that he was employed on trial for that period, he said that he only expected to be terminated if he was not performing well in his work.

13 Mr Edwards testified that he has been employed in the Respondent's business for 33 years and he is the Managing Director and owner of the business. At the time the Applicant walked into the Respondent's premises off the street looking for work, they were short staffed and had a vacancy for a junior and for a senior. Mr Edwards says that the Applicant was not suitable for the senior position, as it was a sewing position but he was happy to employ the Applicant in the junior position once Mr Notley and Mr Dandy assessed the work as being safe for the Applicant to carry out.

14 In the Respondent's notice of answer and counter-proposal, Mr Edwards stated that he pays all his new employees $500 a week for working 42 hours per week for the first three months or reduced on a pro rata basis depending on the hours they

work. Mr Edwards testified that when he met the Applicant, it was agreed that the Applicant would earn $400 a week less tax exclusive of superannuation, plus sick leave and holiday pay. Further, he agreed that the pay rate set out in the Job Analysis form (*Exhibit 2*) was correct. Mr Edwards, however, says the hours in that form were incorrect as the Applicant was to work 32 hours a week not 30 hours a week.

15 Mr Edwards says that he terminated the Applicant's employment because the Applicant was stubborn about the pay issue and after the Applicant told him (Mr Edwards) that he (the Applicant) was going to leave early that "broke the camel's back". Mr Edwards said that if the Applicant had asked him if he could leave early, gave him some notice that he was going to leave early and had asked politely, meaning if the Applicant requested if he could leave early rather than telling him (Mr Edwards) that he was leaving early, he would have allowed the Applicant to leave early on that day.

16 Mr Edwards testified that he works in the office, runs the sales part of the business and has very little to do on the factory floor. Consequently, Mr Edwards says he does not know whether the Applicant performed well in his work as he left such matters to the factory manager. However, Mr Edwards did not contend at any time that the Applicant's performance was substandard in any way.

17 Mr Edwards testified that the Applicant told him on Friday, 12 August 2004, he was not happy with the amount he received in his pay, he was worth more and he wanted to be paid more. Mr Edwards says that he told the Applicant that he was not worth what he was asking for and it wasn't what was agreed. On the following Monday they had another conversation about the matter. Mr Edwards told the Applicant that his demand was stupid because he (Mr Edwards) could have a junior doing the Applicant's job and he told the Applicant that the only way they could resolve the issue was that he (Mr Edwards) could employ him (the Applicant) as a casual but he would not be paid sick leave or annual leave and that would take his pay to $16.00 or $17.00 per hour. Mr Edwards told the Applicant he would not use him (the Applicant) as often, as he would no longer be employed on a full-time basis. Mr Edwards says that the Applicant said that he would go home and think about it.

18 On the following day, the Applicant came into the office at about 2:00 pm and told Mr Edwards he was still not happy about it, so Mr Edwards told the Applicant that there was the door but the Applicant told him (Mr Edwards) that he did not want to leave. Some time later, the Applicant came back into Mr Edwards' office and said that he was going early. Mr Edwards said that the Applicant did not request whether he could leave early. He testified that although he could not recollect the exact words he (Mr Edwards) said, he responded by telling the Applicant, "There's the door, out. Go early, don't come back." When cross-examined, Mr Edwards conceded that he did not listen to the Applicant and that he was not interested in what the Applicant had to say. Mr Edwards also conceded that he gave the Applicant no opportunity to explain. Mr Edwards said that it was his understanding that because he had employed the Applicant on trial for three months he could terminate the Applicant's employment at any time during that period and there was no requirement to pay the Applicant any period of notice. Mr Edward also testified that he could not understand why the Applicant would say there was nothing to do on that afternoon, as there was always work to do, as they have to work Saturdays.

19 In cross-examination it was put to Mr Edwards that he should have paid the Applicant $414.38 for working 32.5 hours a week or $408 for 32 hours a week. Mr Edwards testified in response that he did not pay the Applicant for the Friday of the first week he worked because he left early on that day. However, when it was put to Mr Edwards that the Applicant came in two hours early that day, so he could leave two hours early, Mr Edwards said he did not recall whether that had occurred. Mr Edwards also testified that he explained to the Applicant that after the Applicant was employed for three months he would be paid $550 a week if he worked 42 hours.

Legal Principles

20 The question to be determined by the Commission, is whether the Respondent exercised its legal right to dismiss the Applicant in such a way that the right has been exercised harshly or oppressively against the employee as to amount to an abuse of that right (see *Miles and Ors trading as The Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385 at 386).

21 The onus is on the Applicant to prove that the dismissal was unfair on the balance of probabilities. However, there is an evidential onus upon the employer to prove in a case of summary dismissal that the dismissal is justified (*Newmont Australia Ltd v The Australian Workers' Union, Western Australian Branch, Industrial Union of Workers* (1988) 68 WAIG 677 at 679). In this matter it cannot be disputed that the Applicant was summarily dismissed.

Conclusion

22 The Respondent has adduced no reliable evidence that the termination of the Applicant's employment was justified. Having heard the evidence given by the Applicant and Mr Edwards and having observed them both carefully where their evidence departs, I prefer the evidence given by the Applicant to the evidence given by the Respondent. The Applicant gave his evidence in an open and consistent manner. Whilst I did not find Mr Edwards to be a dishonest witness, his evidence about the rate of pay and the hours worked by the Applicant was vague and inconsistent. It is not in dispute that the Work Sampling Information form (*Exhibit 1*) correctly records the Applicant's hours of work, which total 32.5 a week. It is conceded by the Respondent that the Job Analysis (*Exhibit 2*) records that the Applicant was to be paid an hourly rate of $12.75, which meant that the Applicant should have been paid $414.38 (gross) on Friday, 12 August 2005. Clearly the Applicant's assumption on Friday, 12 August 2005 that his pay was incorrect was right. It is apparent Mr Edwards wrongly assumed that the Applicant had been paid correctly and regarded the Applicant's approach about his pay as unreasonable when plainly it was Mr Edward's response that was unreasonable. Further, I am not satisfied that Mr Edwards was justified in dismissing the Applicant. The Applicant told Mr Edward that there was very little to do on the floor. If there was work to be carried out then Mr Edwards should have directed the Applicant to work that needed to be carried out or to the person or persons in the factory who could have provided the Applicant with work, yet clearly Mr Edwards did not do this and instead reacted irrationally and unreasonably.

23 For these reasons I will make a declaration that the Applicant was harshly, oppressively and unfairly dismissed.

Compensation

24 As the Applicant's performance was not an issue between the parties, I am satisfied that the Applicant would have remained employed until the end of the trial period. I accept the Applicant's evidence that he would not have known that the bricklaying course was to commence mid September 2005, if his employment had not been terminated. The Applicant's trial commenced on Monday, 1 August 2005 and would have concluded on Friday, 28 October 2005. I am satisfied that the Applicant sought to mitigate his loss by seeking to train as a bricklayer. Compensation will be assessed from Wednesday, 17 August 2006 to Friday, 28 October 2006 on the basis of $12.75 per hour for 32.5 hours per week or 6.5 hours per day which is a gross amount of $4,392.38.

2006 WAIRC 05232

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TIMOTHY CLARKE
	APPLICANT
	-v-
	COMMERCIAL SEWING (WA) PTY LTD
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	WEDNESDAY, 9 AUGUST 2006
FILE NO/S	APPL 910 OF 2005
CITATION NO.	2006 WAIRC 05232

Result	Declaration and order made
Representation	
Applicant	In person
Respondent	Mr M Edwards

Order

HAVING heard the Applicant and Mr Edwards on behalf of the Respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby:

(1) DECLARES that the Applicant was harshly, oppressively and unfairly dismissed.

(2) ORDERS that the Respondent pay to the Applicant within 14 days of the date of this order the sum of $4,392.38 (gross) as compensation.

(3) ORDERS that the application is otherwise hereby dismissed.

[L.S.] (Sgd.) J H SMITH, Commissioner.

2006 WAIRC 05202

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WALTER ALFRED EDOM
	APPLICANT
	-v-
	VISION SURVEYS PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
HEARD	THURSDAY, 22 JUNE 2006
DELIVERED	FRIDAY, 4 AUGUST 2006
FILE NO.	U 291 OF 2006
CITATION NO.	2006 WAIRC 05202

Catchwords	Industrial law - Termination of employment - Harsh, oppressive and unfair dismissal - Dismissal during period of probationary employment - Issues in relation to the performance of the applicant - Principles applied - Applicant not harshly, oppressively or unfairly dismissed - Application dismissed - *Industrial Relations Act 1979* (WA) s 23A(2), s 29(1)(b)(i).
Result	Order issued
Representation	
Applicant	In person
Respondent	Mr S Colam

Reasons for Decision

1 This applicant claims that on or about 21 February 2006 he was dismissed harshly, oppressively and unfairly by the respondent. The applicant now brings these proceedings under s 29(1)(b)(i) of the Industrial Relations Act 1979 ("the Act"). He claims compensation for his loss and injury sustained as a result of the dismissal, and not reinstatement, because he considers he would be unfairly treated again by the respondent.

Factual Background

2 The essential facts are these. The applicant was employed by the respondent as a Project Manager/Surveyor in accordance with a contract of employment tendered as exhibit A1. It was common ground that the applicant was employed on a probationary basis for the first three months of the employment relationship. The written contract of employment also specified that the period of probation would also constitute a three month fixed term contract of employment after which the employment would automatically come to an end.

3 The applicant testified that his employment arose from an approach by letter to him by the respondent's director, Mr Colam, dated 17 January 2006 which was tendered as exhibit A2. This letter, which was according to Mr Colam sent to all licensed surveyors, invited expressions of interest for employment with the respondent. The applicant responded to this expression of interest which led to a meeting between himself and Mr Colam at a cafe in Scarborough in Western Australia some time in late January 2006. At that meeting the applicant testified he told Mr Colam that whilst he was a licensed surveyor he had not practised for some time. The applicant also said he told Mr Colam that he did not have a current practising certificate.

4 The terms of this conversation were in dispute. It was Mr Colam's evidence that at this meeting he had prepared a list of some five questions and during the course of the interview Mr Colam noted the applicant's answers. Mr Colam asked the applicant whether he had any health issues and he said he did not. He also asked him whether he had any criminal record, convictions, police matters or "court issues" to be disclosed, to which the applicant replied he had none. Mr Colam said he also asked the applicant whether he was able to undertake legal surveys involving re-pegs, subdivisions, strata titles etc. The applicant informed him that he could perform that work and that he was licensed surveyor. Mr Colam said that the applicant did not disclose to him that his practising certificate was not current. Mr Colam also said that the applicant informed him that his previous employer had no difficulty with his surveying standards. The applicant was also asked about his computer skills to which he responded they were "fine" but he was a "bit rusty". He also said his client liaison skills and communication skills were good.

5 According to Mr Colam, the applicant emphasised that he was desperate for employment and referred to his mother being ill and in a nursing home.

6 Mr Colam testified that after this initial interview he had some reservations about the applicant. However, some days later, the applicant came to the respondent's premises and said he was very keen to start work. On this basis, the respondent elected to according to Mr Colam, "give the applicant a chance" and he was offered and he accepted employment.

7 The applicant commenced employment on 1 February 2006. It appears that not long after the commencement of the employment relationship some difficulties arose. The applicant testified that he had problems with various surveying instruments used by the respondent which he had not used previously. This caused some delays in jobs being completed. The applicant also said he had the assistance of Mr Colam's father in law but alleged that his competency as a surveyor's assistant was questionable and caused some difficulties. The applicant also complained that the respondent's computing system was not easy to use. It was the applicant's testimony that he had not operated as a licensed surveyor for some time and was as he put it, "trying to get back up to pace". The applicant admitted that he received some complaints from Mr Colam about his work performance, in particular his ability to complete jobs in a timely manner.

8 These issues seemed to have come to a head on 21 February 2006. According to the applicant, on this day which was a very hot day, there were a number of jobs performed. He was at that time working with a new survey instrument with which he was not familiar. At the end of the day, when travelling with Mr Colam back to the respondent's office, the applicant during the course of conversation informed Mr Colam that he was on anti-depressants. According to the applicant, this did not appear to concern Mr Colam. It was in this same conversation that Mr Colam informed the applicant that he was not able to complete the surveying work fast enough and things were not working out. The applicant said he was never informed that his employment might be terminated. It was common ground that the applicant left his employment that day and was paid salary in lieu of notice. The applicant complained that he really never knew why his employment came to an end.

9 As is often that case in matters of this kind, Mr Colam's version of events was somewhat different. He said that the applicant misled him at the time of his engagement. A copy of Mr Colam's hand written notes of the interview with the applicant were tendered as exhibit R4. These notes were not challenged by the applicant. Mr Colam testified that he was never made aware by the applicant that he did not have a current practising certificate and he accepted the applicant's assurances that he was fully able to undertake all aspects of surveying work. Additionally, the applicant represented that his computing skills were adequate and that he took the applicant's answers to the other questions put during the interview, as being truthful.

10 According to Mr Colam, not long after the employment commenced, the applicant's ability to complete simple surveys was put in question. Tendered as exhibits R2 and R3 were copies of diagrams and notes of surveys conducted by the applicant at two jobs, being Cantle Street and Shipley Way as exhibit R2. Mr Colam said he found this work almost incomprehensible to understand. Importantly also from the respondent's point of view, Mr Colam testified that the applicant took excessively long periods of time to complete jobs that an experienced surveyor could do in a much shorter period of time. Mr Colam also said that when his father in law was working with the applicant as his assistant, the

applicant was intimidating and aggressive towards him and that his father in law refused to further work with the applicant.

11 Additionally, Mr Colam said the applicant's computer and communication skills were poor and overall, being a small business, the respondent simply did not have the capacity or time to train the applicant so that he could perform to the required standard. Mr Colam testified that on one occasion when he raised these concerns with the applicant, the applicant became aggressive with him and pushed his surveying certificate close to Mr Colam's face.

12 After about three weeks of employment, Mr Colam concluded that the applicant was not able to work to the standard required by the respondent and over the weekend prior to 21 February 2006, he resolved to not proceed with the applicant's employment. In this regard, Mr Colam confirmed the tenor of the conversation referred to in the applicant's evidence that they had on the afternoon of 21 February. Mr Colam said that he informed the applicant that the working arrangement simply was not satisfactory and he gave the applicant the option to work out his notice however the applicant elected to leave that day.

13 As to the applicant's complaint he was never informed of the reason for his dismissal, Mr Colam testified that he wrote two letters to the applicant dated 22 February 2006. In the second letter, tendered as exhibit R1, Mr Colam referred to the applicant's level of skill as being found wanting and that the respondent was not in a position to provide on the job training to assist.

Consideration

14 As noted above, it was common ground that the applicant was employed on a probationary basis for the initial three months of his employment. Being on probation, it is the law in this jurisdiction that during this period both employer and employee may assess whether the relationship is one that ought be ongoing and that termination of probationary employment can be effected more easily than the case of permanent employment: *Hutchinson v Cable Sands (WA) Pty Ltd* (1999) 79 WAIG 951. This to an extent is reflected in s 23A(2) of the Act, which provides that a period of probationary employment is to be taken into account by the Commission in considering whether a dismissal is harsh, oppressive or unfair.

15 In this case I accept the evidence of Mr Colam, supported by the notes he made at the time of his initial interview with the applicant, that the applicant presented to him as a fully qualified surveyor who would be capable of adequately undertaking the range of tasks required of him. Furthermore, I prefer Mr Colam's evidence that the applicant did not disclose to him that he did not have a current practising certificate at the time of his employment. Had he done so, in my opinion, it would have been more likely that not, that this would have been noted by Mr Colam on exhibit R4 when they were discussing his background and experience for the position.

16 The applicant appears to accept that there were some difficulties during the course of his employment. He also accepts that these issues were raised with him by Mr Colam, which is consistent with Mr Colam's testimony. Whilst I am satisfied that Mr Colam did not in express terms indicate to the applicant that his employment would be at risk unless the performance issues could be rectified, I am well satisfied that the applicant was on notice during the course of the three weeks or thereabouts of his employment, that the respondent had genuine concerns about his capacity to perform the work as required by it. It also stands to reason that in a small firm such as the respondent, having engaged a person believing that person to be fully capable of performing all the work required of a licensed surveyor, that it may not be in a position to provide in effect, further on the job training in all of the circumstances.

17 Having considered all of the evidence before the Commission, and accepting that the applicant felt aggrieved that his employment with the respondent was brought to an end, given its probationary nature, it was quite apparent to me that the employment relationship between the applicant and the respondent was not going to be successful. I am not persuaded on balance that the termination of the applicant's employment in these circumstances was harsh, oppressive or unfair.

18 For these reasons the application must be dismissed.

2006 WAIRC 05203

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WALTER ALFRED EDOM
	APPLICANT
	-v-
	VISION SURVEYS PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 4 AUGUST 2006
FILE NO/S	U 291 OF 2006
CITATION NO.	2006 WAIRC 05203

Result	Order issued
Representation	
Applicant	In person
Respondent	Mr S Colam

Order

HAVING heard Mr W Edom in person and Mr S Colam on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 ("the Act") hereby orders –

THAT the application be and is hereby dismissed.

(Sgd.) S J KENNER,
[L.S.] Commissioner.

2006 WAIRC 05187

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOSEPH GADECKI
	APPLICANT
	-v-
	BIDVEST FOOD SERVICE
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
HEARD	FRIDAY, 30 JUNE 2006
DELIVERED	THURSDAY, 3 AUGUST 2006
FILE NO.	B 279 OF 2006
CITATION NO.	2006 WAIRC 05187

Catchwords	Contractual benefits claim - Claim for a benefit under contract of employment – Accrued annual leave - Application upheld – Industrial Relations Act 1979 (WA) 29(1)(b)(ii)
Result	Upheld and order issued
Representation	
Applicant	Mr J Gadecki on his own behalf
Respondent	Mr C Miller

Reasons for Decision

1 This is an application by Joseph Gadecki ("the applicant") pursuant to s29(1)(b)(ii) of the *Industrial Relations Act 1979* ("the Act") seeking benefits due to him under his contract of employment with Bidvest Food Services ("the respondent").

Change of name of respondent

2 At the commencement of the proceedings it became clear that the respondent had been incorrectly named and as a result the applicant sought leave to amend the respondent's name. Given the respondent's consent to this course of action and the Commission's powers under s27(1) of the Act and having formed the view that it was appropriate in the circumstances to grant the amendment I propose to issue an order that Bidvest Food Service be deleted as the named respondent in this application and be substituted with Bidvest Australia.

3 It was not in dispute that on 20 January 2001 the applicant commenced employment as a delivery driver with Bos Air Supplies and the applicant retained this position when Bos Air Supplies was taken over by the respondent in October 2002. The applicant delivered food products, he worked 40 hours per week and he was paid a weekly wage of $566.54 gross. The applicant remained employed by the respondent until 10 March 2006 when a workers' compensation claim in relation to an injury the applicant sustained on 18 November 2002 was settled between the parties.

The claim

4 The applicant is claiming $7001.61 gross in outstanding annual leave entitlements under his contract of employment with the respondent. The applicant claims that this amount is the balance between the annual leave that he accrued whilst receiving workers' compensation payments and the annual leave entitlements he was paid at termination which accrued prior to ceasing his duties with the respondent on 6 January 2003. The applicant's claim is based on information contained on his pay slips for the period March 2003 through to March 2006, which detailed the amount of annual leave he was accumulating during the period he received workers' compensation payments. The applicant's pay slips also included the annual leave entitlements which accrued prior to the applicant receiving workers' compensation payments (see Exhibit A1).

Applicant's evidence

5 The applicant stated that after the respondent took over Bos Air Supplies, its then Chief Executive Officer ("CEO") Mr Brian Trelore became the respondent's CEO. The applicant gave evidence that he sustained a work place injury on 18 November 2002 which led to back problems and he eventually required a hip replacement. The applicant stated that after sustaining this injury he undertook light duties at work until 6 January 2003 when he went on annual leave for two weeks. The applicant stated that during his period of annual leave he had a telephone conversation with Mr Trelore on 14 January 2003. The applicant stated they discussed his injuries, that his prospects of returning to normal duties was not good and the applicant stated that Mr Trelore told him that if the applicant went onto workers' compensation payments his normal entitlements would

continue to accrue. The applicant understood this to be the ongoing accumulation of his sick leave and annual leave entitlements and he believed that Mr Trelore instructed the person who paid him about these accruals as his annual leave accruals continued to appear on his payslips. Even though the applicant understood that superannuation payments were also to be made by the respondent during this time, this did not occur.

6 The applicant tendered five pay slips dated 20 March 2003, 7 October 2004, 18 August 2005, 21 February 2006, and 7 March 2006. The applicant stated that the payslips confirm that as at 10 March 2006 he had accumulated 644.93 hours in annual leave entitlements and based on working 40 hours per week and earning $566.54 gross per week this equated to him being owed $9138.65. The applicant stated that he did not factor in leave loading into this amount. The applicant stated that when he was terminated the respondent paid him $2137.04 gross for 150.58 hours in annual leave entitlements which he had accumulated prior to him commencing his workers' compensation payments. The applicant is therefore claiming the balance of $7001.61 gross.

7 The respondent did not call any evidence.

Submissions

8 The applicant submitted that he was surprised that Mr Trelore was not called by the respondent to give evidence as he could have given evidence about his agreement with the applicant about the accumulation of his annual leave entitlements. The applicant argued that his contract of employment was not covered by any award and the applicant submitted that the only agreement he had with the respondent when he commenced employment was that he would work 40 hours per week, he would be paid above award wages and he would be paid overtime after working 40 hours each week. The applicant stated that when the respondent took over Bos Air Supplies he was verbally advised that his terms and conditions would remain the same.

9 The respondent submitted that it was unaware of the nature of any discussions which took place between the applicant and Mr Trelore in January 2003 about the applicant accumulating annual leave entitlements whilst receiving workers' compensation payments. The respondent claims that the applicant is not entitled to the annual leave entitlements the applicant is claiming and relies on Clause 6.1.5 of the *Transport Workers' (General) Award No. 10 of 1961* ("the Award") which it claims applied to the applicant's employment in support of this assertion. Clause 6.1.5 reads as follows:

> "6.1.5 Any time in respect of which an employee is absent from work, except on paid leave as prescribed by this Award, shall not count for the purpose of determining their right to annual leave."

Findings and conclusions

10 I accept the evidence given by the applicant in these proceedings without reservation as in my view his evidence was given honestly and to the best of his recollection and some of his evidence was corroborated by documentation tendered during the hearing.

11 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).

12 I accept that the applicant was employed as a delivery driver by the respondent until his workers' compensation claim was settled on 10 March 2006. I find that after the applicant sustained a work place injury on 18 November 2002 he undertook light duties with the respondent until he took a period of annual leave from 6 January 2003 to 20 January 2003. I find that on or about 14 January 2003 the applicant had a discussion with the respondent's CEO Mr Trelore about the applicant going onto workers' compensation payments as a result of the injury he sustained on 18 November 2002. As I accept the applicant's evidence I find that the applicant was told by Mr Trelore that he would accrue his normal entitlements during the period he was to be paid workers' compensation and I find that as a result of this arrangement the annual leave entitlements accruing to the applicant were detailed on the applicant's pay slips for the period the applicant was in receipt of workers' compensation payments. I therefore conclude that the annual leave entitlements that the applicant accrued during the period 20 January 2003 through to 10 March 2006 formed part of his contract of employment with the respondent and is an entitlement which is due to the applicant. Whilst not all of the relevant payslips were tendered by the applicant I accept the applicant's evidence that he regularly received payslips from the respondent confirming his annual leave accrual over the three years that he was in receipt of workers' compensation payments and that the rate of accumulation reflects annual leave entitlements accruing for the period February 2003 through to March 2006.

13 In reaching the conclusion that there was an arrangement between Mr Trelore and the applicant that the applicant would be entitled to accrue annual leave during a period of workers' compensation I note that there was no evidence contradicting the applicant's evidence in this regard as the respondent did not call Mr Trelore to give evidence. When applying the rule in *Browne v Dunn* (1893) 6 LR 67 it is my view that the failure to call Mr Trelore can be regarded as his evidence not being supportive of the respondent's case.

14 There was no evidence before the Commission that the applicant's terms and conditions of employment were governed by the Award. In any event I note that Clause 1.7 of the Award allows an employee and employer to vary the terms of the Award with respect to wages and conditions as long as the employee is no worse off than the Award.

15 In summary I conclude that the applicant was an employee of the respondent for the relevant period and is owed the amount that he is claiming under his contract of employment with the respondent for annual leave entitlements due to him in the amount of $7,001.61. I accept that this figure is correct on the basis that the applicant had accrued $9138.65 in annual leave entitlements by the time he was terminated on 10 March 2006 based on the rate of accumulation of four weeks per year, the

applicant's weekly rate of pay being $566.54 gross and the applicant working a 40 hour week and $2137.04 in annual leave entitlements was paid to the applicant at termination as confirmed on his final payslip.

16 A minute of proposed order will now issue for the respondent to pay the applicant the amount due.

2006 WAIRC 05243

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOSEPH GADECKI
	APPLICANT
	-v-
	BIDVEST AUSTRALIA
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 9 AUGUST 2006
FILE NO/S	B 279 OF 2006
CITATION NO.	2006 WAIRC 05243

Result	Upheld order issued

Order

HAVING HEARD Mr J Gadecki on his own behalf and Mr C Miller 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 Bidvest Australia be substituted in lieu thereof.
2. DECLARES that the respondent denied the applicant a benefit under his contract of employment.
3. ORDERS that the respondent pay Joseph Gadecki $7,001.61 gross within seven (7) days of the date of this order.

[L.S.]

(Sgd.) J L HARRISON,
Commissioner.

2006 WAIRC 05149

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KEVIN LAWLESS
	APPLICANT
	-v-
	ATTORNEY GENERAL DEPT.
	RESPONDENT
CORAM	COMMISSIONER P E SCOTT
HEARD	FRIDAY, 30 JUNE 2006, MONDAY, 17 JULY 2006
DELIVERED	FRIDAY, 28 JULY 2006
FILE NO.	U 371 OF 2006
CITATION NO.	2006 WAIRC 05149

CatchWords	Industrial law (WA) – Claim of harsh, oppressive and unfair dismissal – Application referred outside of 28 day time limit – No relationship of employee and employer - No dismissal - Application has no prospect of success – Application dismissed – *Industrial Relations Act 1979* (WA) s.29(1)(b)(i), (2) and (3)
Result	Application for application to be received more than 28 days after the date of dismissal dismissed
Representation	
Applicant	In person
Respondent	Mr D Matthews (of counsel)

Reasons for Decision

1 The applicant claims that he has been harshly, oppressively or unfairly dismissed by the respondent. He says that dismissal occurred on 2 March 2006. The application was lodged with the Registrar on 19 May 2006 and accordingly is lodged beyond the 28 days allowable by s.29(2) of the Industrial Relations Act 1979 ("the Act") which requires that the application be made not later than 28 days after the day on which the employee's employment terminated.

2 The Commission convened a hearing on Monday, 17 July 2006 for the purpose of hearing whether it ought to receive the application out of time in accordance with provisions of s.29(3) of the Act.

3 During the course of his submissions, the applicant made clear that his employer had been The Trinity Building Group Pty Ltd, a subcontractor to John Holland Constructions, working at the Central Law Courts Complex building site. The applicant says that he previously brought a claim of unfair dismissal against The Trinity Building Group Pty Ltd (application U 185 of 2006) and asked that the Commission take account of the decision in that matter. That decision by Kenner C. [2006 WAIRC 04416], was that the application be dismissed on the basis that:

> "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."

4 In the hearing of the matter before me on 17 July 2006, as noted above, the applicant maintained that The Trinity Building Group Pty Ltd had been his employer, however, his concern, he says, is that his employer was directed by a third party to dismiss him and he wishes to challenge that third party's decision.

5 The respondent says that, in accordance with the decision of the Industrial Appeal Court in *Malik v Paul Albert, Director General, Department of Education Western Australia* [2004] WASCA 51, part of the tests to be applied in the consideration of whether the Commission ought receive an application out of time is the requirement that the merits be considered, and referred in particular to the Reasons for Decision of His Honour Steytler J. that:

> "It is, of course, difficult to imagine that it would ever be unfair to an applicant to deny him or her the right to lodge a referral out of time where it was positively shown that the applicant had no prospect of success." (paragraph 25)

6 In that same case, Heenan J. said:

> "But for a late claim to be accepted it seems to me that it will in most cases, if not in every case, require some demonstration, whether by acknowledgement, tacit or express, or by the production of evidence, that there is merit in the claim in the sense that it enjoys some prospects of success in the sense already described. (paragraph 68)

7 The respondent says that this application has no prospects of success on the basis that the respondent was never the employer of the applicant and, accordingly, there was no dismissal by the respondent. The respondent relies both on the applicant's own acknowledgements that his employer had been The Trinity Building Group Pty Ltd and its own evidence in the form of an affidavit of Paul Darren Wilding, the Acting Director of Human Resources for the Department of the Attorney General. Mr Wilding's evidence was that he had conducted a search of the Department's personnel and payroll system which includes the name of all employees of the Attorney General and found no match with the names of "Lawless" or "K Lawless". His evidence was that "to the best of my information, knowledge and belief, no person by the name of Kevin Lawless has ever been employed by the Department of the Attorney General."

Conclusions

8 For a claim of unfair dismissal to be considered requires that there has been a relationship of employer and employee between the applicant and the respondent. The applicant needs to have been dismissed by the respondent for there to be a proper claim before the Commission. In this case it is agreed that the applicant was not employed by the respondent but was employed by The Trinity Building Group Pty Ltd.

9 Accordingly, there was no relationship of employer and employee and no dismissal upon which to found the application. In those circumstances, the application has no prospect of success. Applying the dicta of *Malik v Paul Albert* (supra) where such a referral would have no prospect of success the Commission ought not exercise its discretion to receive the application out of time. Accordingly, the application will not be received out of time.

2006 WAIRC 05150

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KEVIN LAWLESS
	APPLICANT
	-v-
	ATTORNEY GENERAL DEPT.
	RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE	FRIDAY, 28 JULY 2006
FILE NO	U 371 OF 2006
CITATION NO.	2006 WAIRC 05150

Result	Application for application to be received more than 28 days after the date of dismissal dismissed.

Order

HAVING heard the applicant on his own behalf and Mr D Matthews (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders:

THAT the application to receive application out of time be and is hereby dismissed.

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

2006 WAIRC 05197

	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	WEDNESDAY, 2 AUGUST 2006
FILE NO/S	U 252 OF 2005
CITATION NO.	2006 WAIRC 05197

Result	Order issued to amend the name of the respondent
Representation	
Applicant	In person
Respondent	Ms R J Lee (of counsel)

Order

Having heard the Applicant in person and Ms Lee, of counsel on behalf of the Respondent, the Commission pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders —

THAT the name of the Respondent be deleted and that be substituted therefor the name, NMHG Distribution Pty Limited ABN 14 053 370 291 trading as Hyster West.

(Sgd.) J H SMITH,
[L.S.] Commissioner.

2006 WAIRC 05219

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	DAVID GRAHAM MAGUIRE
	APPLICANT
	-v-
	NMHG DISTRIBUTION PTY LIMITED ABN 14 053 370 291 TRADING AS HYSTER WEST
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
HEARD	THURSDAY, 15 JUNE 2006, FRIDAY, 16 JUNE 2006
DELIVERED	WEDNESDAY, 9 AUGUST 2006
FILE NO.	U 252 OF 2005
CITATION NO.	2006 WAIRC 05219

CatchWords	Termination of employment - Harsh, oppressive and unfair dismissal - Principles applied - Dismissal not unfair - Application dismissed - *Industrial Relations Act 1979* (WA) s 29(1)(b)(i)
Result	Application dismissed
Representation	
Applicant	In person
Respondent	Ms R J Lee (of counsel)

Reasons for Decision

1 David Graham Maguire ("the Applicant") claims that he was harshly, oppressively or unfairly dismissed by NMHG Distribution Pty Limited ABN 14 053 370 291 trading as Hyster West ("the Respondent") on 8 November 2005. The Applicant's claim is made under s 29(1)(b)(i) of the *Industrial Relations Act 1979* ("the Act").

Background

2 The Applicant was employed by the Respondent as a salesperson. He commenced employment with the Respondent on 24 February 2003. His job was to sell new and used forklifts. It is common ground that the Applicant was consistently the Respondent's highest performing sales representative in the Asia-Pacific region.

3 The Applicant was paid a base salary of $36,000 per annum plus commission. He was also paid superannuation of nine percent. In the 12 months preceding the termination of his employment he earnt $184,444 in salary and commission. It was also a condition of the Applicant's employment that he be provided with a fully maintained motor vehicle. It is common ground that the value to the Applicant of the private use of the motor vehicle was $18,000 per annum.

4 The Applicant says that his employment was unfairly terminated following an incident on 2 November 2005. On that day he had a telephone conversation with Maureen John who is employed by the Respondent in the Sydney accounts department about a client's cheque that had bounced. The Respondent says that during the course of that incident the Applicant was abusive to Ms John. The Applicant says that he simply told Ms John that she had come through to the wrong department and she needed to speak to another person in the Perth office, Nicola Langton. The Applicant then put Ms John on hold and Ms Langton picked up the call. The Applicant says that at no time during the conversation was he abusive to Ms John. The Applicant says that he was dismissed because Trevor Hughes, who had been the General Manager of Hyster West for a short period of time, took a personal dislike to him. In particular, he says Mr Hughes felt intimidated by the Applicant's knowledge of the business and he (the Applicant) was a threat to Mr Hughes' authority. He also says that the large amount of commission he was earning was a problem for the Respondent and was a factor that influenced his termination. He says that if he had remained employed his earning capacity would have been substantially reduced as the Respondent changed its commission structure after the Applicant's employment was terminated.

5 The Respondent says that the incident on 2 November 2005 constituted a breach of the Respondent's code of corporate conduct. The Respondent says it terminated the Applicant's employment because the incident was one of numerous breaches by the Applicant of the Respondent's code of corporate conduct over a long period of time.

6 The Respondent say the Applicant's behaviour was unacceptable and breached the Respondent's code of corporate conduct on the following occasions:

(a) On 23 March 2004, the Applicant said that he had a "root lined up at this house" while showing colleagues in the Respondent's office a photograph of the backyard of a fellow employee. The Respondent said that this resulted in an oral warning to the Applicant at the time the event occurred and a written warning which was given to the Applicant on 23 November 2004 (*Exhibit 2*);

(b) On 6 October 2004, the Applicant and another employee of Hyster West, Lucie Salat, were involved in a loud disagreement in the Respondent's office. This resulted in the Applicant and Ms Salat being counselled and being sent an email from Mr Geoff Pratt, who was at that time the General Manager of Hyster West, on 6 October 2004, in which the Applicant and Ms Salat were informed that their behaviour was totally unacceptable and unprofessional;

(c) In the week commencing 14 November 2004, the Applicant participated in a training course in Brisbane. Whilst on that trip and at dinner with colleagues the Applicant referred to a colleague born in Asia by a racially derogatory term. During the course he swapped identities with another salesperson employed in the Respondent's office of Hyster West, Mr Alan Davies. As a result of this incident the Applicant was served with a final warning (*Exhibit 3*) and the Applicant was required to sign two written letters of apology to colleagues in the Eastern States;

(d) In mid to late 2004, the Applicant spoke to an employee of a client, Perth Print, in an inappropriate manner which resulted in Mr Pratt writing a letter of apology to the Chief Executive Officer of Perth Print advising him that the Applicant had been counselled in relation to the incident and apologising for the Applicant's conduct;

(e) On 4 February 2005, the Applicant sent an email to Angelo Chiappini, the Respondent's Hyster West Operations Manager. The email sent by the Applicant contained inappropriate language;

(f) On 18 and 23 March 2005, the Applicant sent two emails to a fellow employee in which he used inappropriate language;

(g) On or about 28 April 2005, a temporary female employee employed in the Respondent's Perth office, Ms Michelle Jamieson, complained to Mr Pratt about the Applicant's attitude and the way the Applicant had spoken to her. After Mr Pratt had advised the Applicant of the complaint the Applicant told Ms Jamieson that if she had a problem with him (the Applicant) that she should talk to him about it first. As a result of this conversation, the Respondent says Ms Jamieson left the Respondent's employment (*Exhibit M*);

(h) On 10 May 2005, the Applicant complained to Mr Pratt that commissions payable for sales in 2004 had not been paid. Mr Pratt informed that the Applicant that his style of communication in his emails about this issue was unhelpful, inappropriate and unacceptable and if repeated may lead to disciplinary action (*Exhibit N*);

(i) Between June and August 2005, the Applicant sent a number of inappropriate emails to fellow employees (*Exhibit P*). The Respondent says these emails breached its email policy (*Exhibit E*);

(j) On 13 and 14 July 2005, the Applicant sent abusive emails to another employee of the Respondent, Steven Smith;

(k) On 2 November 2005, the Applicant swore in audible range of Ms John and was obnoxious to Ms John on the telephone;

(l) On 8 November 2005, after the Applicant was informed that his employment has been terminated by Trevor Hughes, the Applicant discarded 150 of the Respondent's client files in a dumpster at the rear of the Respondent's premises (*Exhibit X*);

(m) On 10 November 2005, the Applicant forwarded an email to Mr Davies with pictures of a damaged car and a message "Where does Trevor live???" (*Exhibit U*).

7 When the Applicant commenced employment with the Respondent he was provided with a copy of the Respondent's code of corporate conduct which was in operation in February 2003 (*Exhibit C*). It was an express term of the Applicant's contract of employment (*Exhibit A*) that he sign a certificate to acknowledge his understanding of the contents of the code of corporate conduct. The Applicant did that on 21 February 2003. In the certificate the Applicant stated that he understood how the code applied to him and he agreed to fully comply with each provision (*Exhibit B*). Under the heading: VIII Employment-Related Practices, under subheading: Harassment – Statement of Company Philosophy, the code of corporate conduct stated that the company is committed to maintaining a professional and collegial work environment in which all individuals are treated with respect and dignity. The policy prohibited any sexual harassment including the inappropriate use of sexually explicit language or the display in the workplace of sexually suggestive objects or pictures. Further, the policy prohibited harassing behaviour by company employees, whether in the workplace or in any business-related setting outside the workplace including, but not limited to, business trips, interaction with clients, vendors or customers, and business-related social events. When cross-examined about the corporate code of conduct the Applicant testified that although he agreed he had signed the certificate he did not recall doing so and he did not read the code as he did not have time to read it. The Applicant, however, conceded that Mr Pratt had referred to the code of corporate conduct a couple of times.

The Evidence about the Alleged Incidents

8 The Applicant complained generally in his evidence that the Respondent employed a series of General Managers of Hyster West during the course of his employment who were incompetent. The Applicant testified that the only General Manager that was not incompetent was Matthew Thomas. Mr Thomas was the General Manager when the Applicant was first employed. Mr Thomas ceased to be the Respondent's General Manager of Hyster West sometime before February 2004. Mr Alan Davies gave evidence on behalf of the Applicant. He also gave evidence that he regarded Mr Thomas as an excellent manager. Mr Davies was initially employed as the Field Service Mechanic for Hyster West then he became the Field Service Coordinator and later the After Market Sales Representative. Mr Davies was employed by the Respondent for a period of five years. He says that during that period he worked under six General Managers of Hyster West. Mr Davies testified that all the salespersons referred to the Respondent's organisation in Western Australia as a "revolving door" and the General Manager was referred to as the "annual manager" and the General Manager's office was referred to as the "departure lounge". Both Mr Davies and the Applicant testified that whilst Mr Pratt was General Manager, the Applicant ran "a book" on how long he would last in the position. When cross-examined about this issue the Applicant denied that he had considered the General Managers to be merely "clerks" with a General Manager title. However, he later agreed that he had sent an email on 6 July 2005 seeking a pay increase in which he described the General Managers employed at Hyster West as clerks with a General Manager title (*Exhibit Q*).

9 In relation to the warning the Applicant received in respect of the incident on 23 March 2004, the Applicant testified that he worked with Alex Kitto, who tried to get him (the Applicant) to "bite" for months. Mr Kitto's wife was also employed by the Respondent as a receptionist. She asked the Applicant to develop some photographs on his laptop. He downloaded a photograph of Mr Kitto's backyard and printed it off. He took the picture to a toolbox meeting and told employees at the meeting that he had a "root" lined up at this house if anybody can identify it and handed the picture around at the meeting. The Applicant testified that Mr Kitto "blew a fuse", when he saw it was his home. Graham Turner who was the Operations Manager at the time and Maurice Hayes who was at that time the General Manager of Hyster West, asked the Applicant for an explanation. The Applicant says that Mr Turner and Mr Hayes "giggled about it" and told the Applicant that he can't do that anymore and that he might receive a letter about the matter. The Applicant says he did not receive a warning letter about the incident until late November 2004. The warning letter was from Mr Turner and dated the 23 November 2004 (*Exhibit 2*). He received this letter after he attended the training course in Brisbane.

10 In relation to the argument that the Applicant had with Ms Salat on 6 October 2004, Ms Salat was the Respondent's Hire Coordinator at Hyster West. The Applicant testified that relationships were tense in the Perth office at that time but he contends that the dispute he had with Ms Salat was resolved amicably.

11 In the week commencing 15 November 2004, the Applicant and Mr Davies attended a training course with the Respondent's employees from other States. The course was about selling techniques. Mr Davies testified that when the Applicant and he were on the plane travelling to Brisbane, they decided to swap identities because the other people at the course had not met the Applicant or himself. Mr Davies said that they kept up the pretence on the first day at the course and on the following day they came clean after being warned to do so by Peter Furolo, one of the Respondent's Managers. Mr Davies said that everyone laughed about it and at the end of the course he was presented a "certificate for confusion". One evening during the course the Applicant and Mr Davies were out to dinner with other course members. The Applicant testified that he "supposedly" abused a colleague, Khoi Nguyen. He said that Mr Nguyen called him a "pommy cunt" and he (the Applicant) called Mr Nguyen a "gook". The Applicant testified that a lot of alcohol was drunk on that evening and the person who took offence to his (the Applicant's) comment was another employee, Damian Russo. Mr Davies testified that during the course of the evening they were all laughing and joking when having their meal but Mr Russo did not join in and moved to another table. Mr Davies testified that Mr Nguyen did not mind the Applicant calling him a "gook" and a group of them, including Mr Nguyen and the Applicant, all went out to a nightclub after the conversation. The following Monday when the Applicant and Mr Davies returned to Perth, Mr Pratt called them into Mr Pratt's office. Mr Davies testified that he could not recall exactly what Mr Pratt said but he recalled that he was pretty upset about what they had done and he told Mr Davies that he would deal with him later. Mr Davies says, however, that Mr Pratt dealt with the Applicant immediately. Mr Pratt informed the Applicant that he had received a complaint from Mr Nguyen and Mr Russo and that they both wanted an apology for the Applicant's conduct.

Mr Davies testified that Mr Pratt asked the Applicant what had happened. The Applicant refused to write an apology so Mr Pratt drafted written apologies to Mr Nguyen and Mr Russo and the Applicant signed them. The Applicant testified that he signed the two letters as Mr Pratt told him if he did so "it would all go away". He tendered into evidence a document which he says is a reference from the course facilitator (*Exhibit 5*). The Applicant later received a final written warning on 23 November 2004 about his conduct whilst on the course (*Exhibit 3*). When cross-examined about this document he conceded he laminated the document and put it up at his workstation. He, however, denied that he kept it on his desk as some kind of "trophy".

12 In relation to the complaint that was received from Perth Print in late 2004, the Applicant testified that Mr Pratt spoke to him and told him that he had received a complaint from Perth Print but he did not say very much about it. The Applicant testified that Mr Pratt just wanted the matter to go away so a letter was written apologising for his (the Applicant's) behaviour. The Applicant, however, denied that he had used bad language or spoke inappropriately to anyone at Perth Print. When cross-examined about this matter, the Applicant said that when you sell the volume of forklifts that the Respondent was selling, there was going to be some small amounts of conflict. However, the Applicant denied that his manner of dealing with people can sometimes be abrupt or inappropriate.

13 In relation to the email the Applicant sent to Mr Chiappini on 4 February 2005, the Applicant says that because he was selling in excess of twenty forklifts a month the workshop was having difficulties in delivering that number to the clients as they were understaffed and inferiorly managed. He said there was frustration in the workshop and this was all due to bad management by Mr Pratt. He says Mr Chiappini was frustrated and so was Ms Salat. When a copy of the email was put to the Applicant, he said that he did not agree that his behaviour was unacceptable. In the email the Applicant stated:

> "Angelo .. GOD of safety .. I didn't take to your attitude re the remote device on the front of the A150 !!! Warren Bone has purchased in the past 8 months probably 6 trucks .. and you question my expertise at asking the correct questions etc . Mate I suggest you ring Warren Bone and tell him you refuse to put his remote devise [sic] on his new truck and question him about how he runs his business re OH&S issues again as I have already done and covered this and if you think im [sic] going to put up with your questioning of what i do and how i conduct myself think again Angelo , i am not one of your grease monkeys . PLEASE NOW DO WHAT YOU HAVE BEEN REQUESTED TO DO BY THE CUSTOMER … HE PAYS YOURS AND MY WAGES !!

(*Exhibit J*)

14 On the following day Mr Chiappini forwarded the Applicant's email to Mr Pratt in an email and stated that the email was for discussion and indicated that the Applicant's email was totally unacceptable. Mr Pratt took disciplinary proceedings against the Applicant by convening a meeting between the Applicant and Mr Chiappini. In a handwritten note on the email which appears to be written by Mr Pratt, Mr Pratt stated that the Applicant had been told that his email was totally unacceptable and that his assessment was that Mr Chiappini had been under a lot of pressure, that he is a good guy and easy to get along with and normally is tolerant of "Dave's ways". Mr Pratt also stated that the Applicant was "himself" and he did not expect Mr Chiappini to "push back". He also noted that he warned the Applicant verbally not to send these types of emails again and that after two to three hours of negotiation including cooling off, Mr Chiappini and the Applicant shook hands and agreed to let the incident go (*Exhibit 5*). The Applicant testified that Mr Pratt had told him that he was going to write an email to over east about his behaviour as he (the Applicant) did not respect people and business. The Applicant testified that he thought Mr Pratt constantly sent emails about his (the Applicant's) behaviour to Mr Graham Turner in the Eastern States because Mr Pratt was inexperienced in managing people. In addition, the Applicant says that Mr Pratt was not a people person and that Mr Pratt's way of controlling people was to email them. The Applicant, however, denies that he did not respect people in the business or that he was in conflict with Mr Chiappini. Whilst he agreed when cross-examined that Mr Chiappini found the contents of the email unacceptable he did not believe this behaviour was unacceptable. Mr Chiappini subsequently left the employment of the Respondent. The Applicant tended a copy of a statement made by Mr Chiappini in the nature of a reference. The document is dated 5 April 2006 and is addressed To Whom It May Concern. The document states:

> "I have worked with Dave Maguire from August 2003 through to August 2005. During this period we worked well together however, there had been several altercations with which we sat down to discuss why those situations had arisen. In all instances Dave Maguire had the intentions of the customer as his first priority and was driven to deliver the best possible deal or delivery time whether it was a new or used forklift, service or parts/accessories.
>
> Obvious evidence of this is seen in his performance figures from a national perspective and as WA is a smaller market to other states; Dave was either first or second in the national sales figures regularly. He also received special mention in relation to his performance during senior management meetings and operations reviews by Donna Baxter and Graeme Turner.
>
> During our discussions of previous altercations, I emphasized how we need to work as [sic] team to deliver the best result for all customers external and internal and how this benefits Hyster West and the overall WA market. Dave had responded well and his relationship with staff and technicians was good. He is very passionate in his work and always emphasized to me that he always had the customer in mind.
>
> At each point, we sat down to discuss problems or altercations and generally they can be resolved.
>
> Regards
>
> Angelo Chiappini
>
> (Former Operations Manager, NMHG t/a Hyster West)

(*Exhibit 6*)

15 On 18 and 23 March 2005, the Applicant sent emails to Mina Soliman who works for the Respondent's wholesale department. In the email sent on 18 March 2005, the Applicant stated:

"Subject: sped items

MINA … SPED ON CABS ETC !!! MAKE IT HAPPEN IM SAT HERE LIKE A STALE FART IN A BOTTLE WAITIN … COME ON GET YOUR ACT TOGETHER ……..

Dave Maguire

Shyster [sic] West"

(*Exhibit L*)

16 On 23 March 2005 the Applicant stated:

"Subject: answer your phone!!!!!!!!!!!!!!!!!!!

Mina how was lunch .. a QUESTION FOR YOU PLEASE . DISCUSS WITH CHRIS WILMORE THE ISSUE OF A STROBE LIGHT ON THE 7 TONNERS AND ALSO THE ISSUE OF A SEALED ALTERNATOR AS WE TALKED ABOUT GET BACK TO ME AS WILMORE IS TRYING TO STIR THE SHIT !!!!!

Dave Maguire

Hyster West"

(*Exhibit L*)

17 When asked about these emails the Applicant's response was that he sent the emails because Mr Soliman was not responding to his requests for work to be done for a deal worth $1.3 million.

18 In relation to the complaint that Mr Pratt received from Ms Jamieson, the Applicant conceded that he spoke to Ms Jamieson about the complaint she made and asked her to talk to him (the Applicant) first if there was a problem. The Applicant said that Ms Jamieson was employed as a casual for a week, she came from an agency and she asked to be placed elsewhere because she did not "fit the role" required of her. The Applicant testified that Mr Pratt employed a series of professional assistants that did not stay and there was an unacceptable turnover of staff in the office."

19 Mr Pratt sent the Applicant an email about this matter on 13 May 2005.

"David,

Following on from our discussion yesterday in my office. I need to confirm to you in writing that the reason the last temp (Michelle Jamieson) gave for leaving was being made to feel very uncomfortable in the way you spoke to her and generally your attitude towards her. This was relayed to me from Maggie Badkin of Kelly Services in two telephone conversations. One of these was when I was travelling on leave on Friday 29th April, which she knew I was, and still felt she needed to advise me as Michelle had just spoken to her and was very upset according to her. Michelle decided not to return after that day.

You will recall I spoke with you that week on Thursday the 28th April to advise you of a complaint she had made to me about your attitude towards her and the way you had spoken to her. She felt uncomfortable and wanted to report this to me. I asked you at that time to take her feelings into consideration. I now understand both via Maggie Badkin and then confirmed by you yesterday, that you approached her about the complaint she had made to tell her that if she had a problem with you then she should talk with you first. This is not a very acceptable manner to handle a person who has just made a complaint about you and probably precipitated her departure.

I do not believe that you handled the situation very well and are very concerned about this incident and your behaviour towards her.

I have a new person commencing in this role on Monday. If there is any similar complaint from her or any other employee, contractor or customer in respect of how you treat them / talk to them then I will not hesitate in progressing disciplinary action."

(*Exhibit M*)

20 The Applicant tendered into evidence copies of three references from co-employees. These were written by Matt Thomas, Jeremy Tullett and Ian Cundy (*Exhibit* 9). He also produced five references from customers of the Respondent (*Exhibit 10*).

21 In May 2005, the Applicant says that Mr Pratt refused to pay him $15,000 in commissions that was owed. On 10 May 2005, the Applicant sent Mr Pratt an email about overdue commissions for sales in 2004. The Applicant says in the email that he had sent all the necessary information to Mr Pratt at the beginning of April 2005 and had informed Mr Pratt in numerous emails that he was making his claim for the extra commission for the year of 2004 in his April 2005 claim. The Applicant in his email on 10 May 2005 at 10:14 pm said:

"I am not satisfied with the time it is taking to approve this simple claim. This is $11,000.00 which I have earned and I want to know why you are making it so hard for me to obtain this money? This whole delaying tactic you are playing is creating tension in the office between ourselves to the detriment of the business and is now a source of concern to some other employees who are losing faith in your integrity."

(*Exhibit N*)

22 In the email, the Applicant referred to earlier emails which he had sent to Mr Pratt about this issue. Exhibit 7 contains a copy of those emails. On Monday, 9 May 2005 at 9:07 am the Applicant sent Mr Pratt an email titled subject "No time!!!" in which he said:

"Geoff, please confirm in writing if you will be sorting out my 2004 claim for April .. thankyou !!

Dave Maguire"

(*Exhibit* 7)

23 Mr Pratt replied as follows at 10:48 am on 9 May 2005:

> "Dave,
>
> As discussed with you I will require your normal commission claim for April for approval in Mays payroll. I will review the backdated claim as soon as possible as a separate exercise.
>
> Geoff"

(*Exhibit 7*)

24 The Applicant then responded at 12:06 pm on 9 May 2005 as follows:

> "NO WAY GEOFF !!! this is unfair and you have had more than enough time to do what you have to do!!! this was not discussed I am entitled under my contract of employment to get this money .. you are now messing with my livelihood Geoff!!!
>
> Dave Maguire"

(*Exhibit 7*)

25 Mr Pratt then responded to that email on 10 May at 8:07 am as follows:

> "Please submit your normal monthly claim for April's sales in the regular fashion as I requested when we spoke last week. This is due today. I will review and approve in the general course of business as I do every month.
>
> On the back pay claim I will review & approve this, subject to confirmation of details and final ok from HR due to the unusual nature of the claim, when I can get to it. I will not be rushed into approving this claim without the proper due diligence. I will attempt to have this completed for this months pay run.
>
> Please ensure that all old sales not yet claimed are claimed in full by Mays claim due on June 10th at the latest. I note that you have a tendency not to claim all the sales you have made in prior months and to sometimes make claims for these some months after the official sale. I expect all sales made and recorded in our accounts in one month to be claimed by the 10th day in the next month for inclusion in that months payroll. Late claims will only be accepted with my prior approval or if they are late due to some acceptable reason outside of your control. Otherwise I will not be approving them. You have until June 10th to bring your claims up to date.
>
> Regards
>
> GEOFF PRATT
>
> General Manager
>
> Hyster West"

(*Exhibit 7)*

26 The Respondent tended into evidence a large bundle of emails which were sent by the Applicant to various people in the Respondent's office which clearly breach the Respondent's corporate code of conduct and the Respondent's email policy. Some of these emails contained pornographic material or could be described as offensive. The Applicant did not address these emails in his evidence other than to say that everyone in the office sent emails of this kind and, in fact, the Applicant and Mr Davies both testified that was common amongst all employees to send inappropriate emails and that they had both seen a pornographic email sent to the Applicant by Mr Hughes. When Ms John gave evidence she conceded that she had sent inappropriate emails which breached the corporate code of conduct. However, no copies of emails sent by her were tended into evidence by either party. Mr Trevor Hughes also conceded that he had sent two emails to the Applicant which could be deemed inappropriate as he was trying to develop a relationship with the sales team. However, he denied ever having sent an email the content of which could be described as pornographic.

27 In early July 2005 the Applicant was seeking an increase in his base rate of pay. On 13 July 2005, the Applicant emailed Steven Smith, a Human Resources specialist employed by the Respondent in New South Wales. The email sought information as to what was happening about his prior request and he (the Applicant) asked Mr Smith to let him know what he had to sort out and what he was going to do in the near future. The first email sent by the Applicant was polite. In response Mr Smith stated in an email that it was not something that he was able to approve and he had referred the matter to Chris and Brian. He also suggested to the Applicant the best course of action would be to contact Brian Michie. The Applicant responded by asking who is Mr Michie. Mr Smith responded the same day and advised the Applicant that Mr Michie was the General Manager of Hyster Australia, the person Mr Pratt reports to. On the same day the Applicant responded by saying, "Steve, I think I am wasting my time even bothering its [sic] all to [sic] hard, thanks for nothing !!!! I will become a 6 truck a month sales rep with no brain . you know the saying .. you pay peanuts you get monkeys !!! well say hello to another NACCO chimp !!" (*Exhibit R*)

28 Mr Smith responded again on the same day in a polite manner and stated the thanks for nothing call was inappropriate and advised the Applicant again that if he wanted further assistance in this matter the best way forward was to go down the proper channel and speak to his manager or his manager's manager first and reiterated that the human resources role is not to make a decision as the authority lay with his manager. On the following day the Applicant responded to that last email by stating:

> "HOW THE HELL DO YOU TALK TO [sic] GUY WHO YOU HAVENT BEEN INTRODUCED TOO [sic]!!!!! And Steve !!! the money doesn't motivate me .. 6 trucks is easy and that's all I want!! I have 2.5 million dollars worth of orders up already …mate this whole business here is in the toilet and just needs someone to push the flush!!!! Could happen next week . then I get a payout .. please put us out of our misery and push hard for the extra crap that's in the pan .. sorry this is not corporate but its how I and every one here feels ..Morale cant get any lower
>
> Cheers
>
> Dave Maguire"

(*Exhibit R*)

29 Mr Smith responded to that last email by stating:

> "Once again your use of language is inappropriate.
>
> Let me reiterate I have no control over this you need to have this discussion with Brian Michie.
>
> Brian can be contacted by phone or email. If you do not feel comfortable talking to him by phone until after you have met Brian then send him an email as you have done to me on many occasions."

(*Exhibit R*)

The Applicant's Performance Reviews

30 It is an express term of the Applicant's employment contract that performance reviews are to be conducted annually. The first review was conducted on 27 February 2004. When a copy of the performance management process review form was put to the Applicant, although the Applicant agreed that he had signed it, he denied that he had seen any of the comments in it. He says he signed a blank form for Mr Hayes to complete. In particular, the Applicant denied that he had seen any of the negative comments in that report. In particular, in the page that is headed "Behavior Standards", the Applicant denies that he and his supervisor had rated his performance in relation to teamwork and communications as unsatisfactory and that in relation to leadership he needed improvement. It is apparent, however, from that report that the Applicant's sales performance was regarded as exceptional by Mr Hayes. (*Exhibit G*)

31 The Applicant was also cross-examined about a review of his performance which was conducted and completed in February 2005. The Applicant conceded that he had signed a performance management process report form in February 2005 but he said that he had not seen all the pages of the report. However, he conceded that he had written some comments on the report. In particular, he had written "not so" against Mr Pratt's comment that he (the Applicant) needs regular monitoring and checking as things tend to fall between the cracks. He also agreed that he had seen the page in which Mr Pratt commented that two warnings were given during the year which revolved around inappropriate behaviour and the comment that the Applicant must improve his communication and take into account how other people will react to his verbal and written style and content and make appropriate changes. The Applicant also agreed that he had seen the page that indicated that "paperwork" was not his strong point.

Final Incident that led to the Applicant's Termination of Employment

32 The Applicant testified that on Wednesday, 2 November 2005, he received a telephone call from an unknown female person who did not introduce herself and told him that she asking about a bounced cheque. The Applicant told her he did not know what she was talking about and he asked who was he talking to and he was told, "Don't be stupid you know who it is." She started on about the cheque again, so he told the person that she had come through to the wrong department and she needed to speak to Nicola Langton, the professional assistant to the sales representatives. He then put the phone down, pressed hold and Ms Langton picked up the call. The Applicant agreed that it was part of his job to help the Respondent get in the money for goods delivered but he says he was not responsible for outstanding accounts, Ms Langton was.

33 Maureen John gave evidence on behalf of the Respondent about the telephone call on 2 November 2005. Part of her job is to look after the accounts of three branches including Hyster West. She is located in Sydney. Each week she does a trial balance for each branch manager and she collects any outstanding debts for Hyster West. Ms John testified that if there is any difficulty obtaining funds then she often speaks to the salesperson who sold the equipment in an endeavour to obtain the funds. She said that sometimes the salesperson visits the debtor and makes arrangements for the money to be paid. Ms John said that prior to 2 November 2005 she had spoken to the Applicant less than ten times. She says that on each occasion she had spoken to him she always found him to be very abrupt. On 2 November 2005, she required assistance with two outstanding Hyster West accounts. Ms John says she had spoken to Ms Langton and to Mr Pratt about these accounts and told them that the customers were not returning her calls. On 2 November 2005, Ms John telephoned Ms Langton and spoke to her about the matter. Ms Langton asked whether she (Ms John) wanted to speak to the Applicant, as he was the salesperson who had sold the units. Ms John told Ms Langton that yes, she did, Ms John then heard in the background the Applicant say, "Why the fuck does she want to speak to me?" Ms John testified that she was very upset when she heard this. She then spoke to the Applicant on the telephone and he told her that it was not his job to be collecting money for her. She said his manner was very rude and he asked, "Why are you asking me to do this? It is your job." and he hung up. When cross-examined Ms John agreed that she did not introduce herself to the Applicant but she says she did not do so because she heard Ms Langton say, "Dave, it's Maureen on the phone. She needs to talk to you." Ms John denied that she said to the Applicant, "You know who it is, stupid." Ms John maintained in her evidence that she did not telephone Hyster West to speak to the Applicant but Ms Langton suggested that she speak to him as the sales had been made by the Applicant. Ms John said that she was very upset about the Applicant's manner. At no time did Ms John say that the Applicant swore at her whilst he was on the telephone. Ms John reported the matter to her credit manager who told her to report the matter to Mr Hughes. Ms John then made a complaint to Mr Hughes by telephone on 3 November 2005. He asked her to send him an email about the matter. Ms John set out the details of the outstanding accounts in her email (see *Exhibit V*). When Ms John was cross-examined, it was put to her that she had sent or received a number of emails of a sexual nature. Ms John testified that she had done so but said they were in the nature of joking material and she distinguished the Applicant's conduct by saying that she is not used to such language being spoken to her.

34 Mr Davies, whose desk was located beside the Applicant's desk, testified that he heard the Applicant answer a telephone call on 2 November 2005. He did not hear what the other person said but he says at no time did the Applicant raise his voice or swear. He said he heard the Applicant say, "You have the wrong person or department and I should not be dealing with this." When cross-examined Mr Davies agreed that the Applicant swore in the office, but said that they all did and it was common practice to use such language in the industry. When asked in cross-examination about the conversation on 2 November 2005 he said he could not say how many telephone calls the Applicant received on that day. However, when it was put to Mr Davies that the Applicant said prior to picking up the phone, "What the fuck does she want?" Mr Davies conceded that the Applicant

said something like that to Ms Langton. The Applicant, however, denied he had done so. Mr Davies maintained that the Applicant did not swear or raise his voice when the Applicant answered the call.

35 Trevor Hughes gave evidence on behalf of the Respondent. He was appointed the General Manager of Hyster West on 15 August 2005. Prior to being employed by the Respondent he had been State Manager of two organisations. Mr Hughes has a background in engineering. When Mr Hughes was recruited for the position of General Manager of Hyster West, he was told that there were a number of issues he would have to deal with in the Western Australian branch. In particular, he was told that there was discontent within the dealership and a lack of morale. He was told that there were "people problems" but no specific information was given to him. When he accepted the position he was told there was one individual who was employed in the Western Australian office who was an interesting character who would be a handful to manage and that was the Applicant.

36 Mr Hughes testified that when he commenced employment with the Respondent he had no intention of terminating the Applicant's employment. In the first five weeks after he started work, he had no issues with the Applicant. However, over time he became more and more aware of the Applicant's history of conflicts and complete disregard of the corporate code of conduct. Mr Hughes testified that the Applicant's general style was that if he did not get what he wanted he was first forthright and then outwardly aggressive.

37 In September 2005, Mr Hughes travelled with the Applicant and another salesperson, Mr Kevin Ware, to Sydney. He says they left on Monday which was a public holiday so he could develop a relationship with the Applicant and Mr Ware. Whilst they were away and at dinner the Applicant told him (Mr Hughes) that he had emptied his personnel file out so that Mr Hughes could not see what he (the Applicant) had been up to in the past. Mr Hughes said that at that time whilst he wanted the Applicant to be on side, he wanted to see what was in the Applicant's personnel file. So Mr Hughes contacted the Human Resources Department in Sydney and asked for copies all documents from the Applicant's personnel file. Mr Hughes testified that when he received and read copies of documents from the Applicant's personnel file sometime in September 2005 he was shocked about the Applicant's complete disregard for the code of corporate conduct and about some of the incidents the Applicant had been allowed to get away with.

38 Mr Hughes says that constant issues arose in the office in relation to the Applicant. Mr Hughes said that the Applicant's attitude was to look for any opportunity to succeed and he would do anything to get a deal. In particular, the Applicant was very blatant about selling trucks in Mr Ware's territory. Mr Hughes said that the Applicant had a nickname which was "Teflon" because he could get away with things and nothing would stick to him. Mr Hughes said that the Applicant commonly referred to himself by that name. When the Applicant gave evidence he denied that his nickname was "Teflon man" or that he sold out of his allocated area which was the southern Perth region.

39 When cross-examined Mr Hughes conceded that he had been told that the Applicant was the most successful salesperson in Australia and he conceded that they had discussed in Sydney that the Applicant was a "protected species". Mr Hughes said that he did not doubt the Applicant's sales ability. He said, however, that the drive to make money made the Applicant aggressive and the Applicant was the most overtly aggressive salesperson that he had ever encountered in his career. He said the Applicant's general attitude was that he was only "out for Dave" and he would look for any opportunity to succeed in what he was doing at the expense of anybody else. So long as he got the deal it did not matter what he did to get it.

40 On the morning of 2 November 2005, Mr Hughes said that when he was sitting in his office he heard raised voices coming from the sales office area which is immediately outside his office. He said that he could hear the Applicant having a very irate conversation with someone. He assumed the Applicant was speaking on the telephone but he did not know for sure because he did not hear anything being said in return. Mr Hughes said that the Applicant regularly had irate conversations with people. Mr Hughes later received a telephone call from Ms John to say that she was very upset about a conversation she had with the Applicant and Mr Hughes and he asked her to elaborate on what was said. Ms John told Mr Hughes that the Applicant had used inappropriate language to her and she felt quite upset about that. Mr Hughes then contacted Ms John's boss, Deidre Williams, and asked her if she was aware of what had happened and she said she was, that Ms John had complained to her and Ms John was genuinely upset about the conversation. Mr Hughes later received an email from Ms John outlining the conversation she had with the Applicant and what the argument was about (*Exhibit V*). After Mr Hughes received that email he contacted Chris Gildersleeve, the Respondent's Human Resource Manager, and forwarded Ms John's email to him and outlined what his (Mr Hughes) concerns were with the Applicant and asked if he could proceed to terminate the Applicant's employment. A couple of days later Mr Gildersleeve contacted Mr Hughes and informed Mr Hughes that he had discussed the matter in detail with the Managing Director, Donna Baxter, who had given Mr Hughes approval to proceed with the termination of the Applicant's employment.

41 On 8 November 2005, when the Applicant arrived at work, Mr Hughes asked to see him. When he went into Mr Hughes office, the Applicant says Mr Hughes told him that he had breached the code of conduct again, that a complaint had been made by Ms John and he was terminated. He also testified that Mr Hughes said the decision to terminate him had come from the top. When the Applicant was questioned about this issue in cross-examination he conceded that he might have said to Mr Hughes initially, "Am I in trouble?" The Applicant was told he would be paid a month's pay in lieu of notice and threw 150 client files in a dumpster outside the office including the Austral Bricks file. When asked about this matter in cross-examination he said he was told to clear his desk so he cleared it as requested.

42 Mr Hughes says that when he asked the Applicant to come into his (Mr Hughes') office the Applicant told him, "You had better make it quick because I am just about to leave." Mr Hughes said that this was a common response by the Applicant as he usually comes in early, gets a few things together in his office and leaves to do his calls for the day. Mr Hughes says that he asked the Applicant to close the door and to sit down at the conference table in his (Mr Hughes') office. Mr Hughes said that he then asked the Applicant to give his version of events of what was said in the conversation with Ms John. Mr Hughes testified that the Applicant denied Ms John's version of events that he (Mr Hughes) presented, and insisted that it was a lie and did not happen. Mr Hughes testified that he believed Ms John's version of events because it was the usual behaviour for the Applicant to get stuck into someone in that manner. Mr Hughes says that he told the Applicant that he believed Ms John's version of events and he told the Applicant that his employment was terminated. Mr Hughes said that the Applicant was

visibly shocked at what had been said and it was clear that he was not expecting to be terminated. Mr Hughes said that the Applicant jumped out of the chair and went and asked Ms Langton to come into Mr Hughes' office. The Applicant asked Ms Langton to tell Mr Hughes what happened on the day he was talking to Ms John. Mr Hughes testified that he did not say anything to Ms Langton and she simply said, "I don't think Dave said that." Mr Hughes testified that Ms Langton had a very good relationship with the Applicant and he thought that she was very intimidated by the situation.

43 Mr Hughes then asked the Applicant to, "Get your stuff together as quickly as you can and leave today." The next thing Mr Hughes was aware of was that the Applicant had left the office. The Applicant returned about 1:00 o'clock in the afternoon and stayed in the office until about 3:30 pm. Before the Applicant left the office Mr Hughes gave the Applicant a termination letter in which he was informed that he would be paid one month's pay in lieu of notice. The Applicant was also given a termination checklist which he completed and returned to Mr Hughes.

44 After the Applicant left the office, Mr Ware informed Mr Hughes that he had seen the Applicant walking around the back of the office with an armful of folders. Mr Ware went outside and found client files in the dumpster behind the office. Mr Hughes went outside the building, climbed into the dumpster and retrieved all the files. Mr Hughes said that there was one file that was missing and that was the Austral Bricks file. It was a major contract that was due to be delivered. Mr Hughes said that they were unable to find all the relevant information about the particular contract and were consequently not able to deliver the order correctly. As a result they lost a subsequent tender of over $1 million worth of new business. When cross-examined the Applicant put to Mr Hughes that he (Mr Hughes) should have asked the Applicant to talk about the Austral Bricks contract and received a debrief on the account as it was a major account for the company. Mr Hughes denied that was necessary and said it would not have been an issue if the documentation had been in the office. The Applicant then put to Mr Hughes that the documentation was still at the Respondent's office and Mr Hughes said in response that they were unable to find it.

45 The Applicant says that after his employment was terminated, Mr Hughes defamed him by sending the following email to all employees at Hyster West:

> "Subject: David Maguire
>
> Effective immediately David Maguire is not to be allowed in any area of the Hyster West Canning Vale site.
>
> If he enters any area of the facility he must be asked to leave immediately, should he not leave voluntarily the matter must be referred to either myself or Mike immediately. I don't believe it will be necessary but should it be a [sic] required the Police will be called to remove him.
>
> I respectfully ask that you all treat this matter with seriousness that is intended.
>
> Thank you & regards,
>
> Trevor Hughes
>
> General Manager – Hyster West"

(*Exhibit 13*)

46 Mr Hughes said that the reason why he sent that email was because after the Applicant's employment was terminated the Applicant came to the office on a number of occasions and was very aggressive towards him (Mr Hughes).

47 When asked whether his (the Applicant's) aggression to Ms John was the reason for termination, Mr Hughes said no, that was a one-off incident and the termination was because of repeated breaches of the corporate code of conduct which the Applicant had no regard for whatsoever. When asked why he (the Applicant) had not been sacked before, Mr Hughes said the only reason why the Applicant had not been sacked before was because of his sales performance.

The Office Environment

48 It is common ground that the Applicant worked in a sales office with five people which was quite small. Immediately located next to the sales office was the General Manager's office and a doorway to the workshop.

49 Mr Davies testified that Mr Hayes was a caretaker General Manager, but the business seemed to improve under his leadership. Mr Davies also had a poor opinion of Mr Pratt. He says that there was a great deal of pressure in the office and there were issues getting work through the workshop. Mr Davies testified that Mr Pratt said that he was going to resolve the problems in the workshop but he never did. Mr Davies says that under Mr Pratt there was no leadership and morale was extremely low. He also said that everyone felt that Mr Pratt was in "caretaker mode". Mr Davies also said that there was constant turnover of professional assistants to the General Manager. It was his opinion that Mr Pratt did not employ the correct persons for the job and Ms Jamieson was an example of that.

50 When Mr Pratt left, Mr Hughes was employed as the General Manager. Mr Davies testified that they thought that "Mr Hughes would be the answer". However, just before Christmas 2005 the Field Service Coordinator left and Mr Davies was asked to carry out that job together with his existing position of After Market Sales Representative. Mr Davies initially refused. Mr Davies says that at that time he was carrying out the work of two people because the After Market Sales Representative for the northern area was away, so he was looking after both the north and south areas. He was later persuaded to carry out the job of Field Service Coordinator because Mr Hughes paid him a lump sum to do the extra work. Mr Davies carried out that position for a couple of months and went on leave in early January 2006. When he returned he reviewed his situation and decided he was not satisfied with his employment and resigned on 7 April 2006.

51 Jeremy Tullett gave evidence on behalf of the Applicant. Mr Tullett is also an ex-employee of the Respondent. He was employed for four years and six months. Mr Tullett was employed as Field Service Technician. He says that during the time he was employed he worked under eight General Managers. He also says that Mr Thomas was the best General Manager that they had. Mr Thomas offered Mr Tullett the temporary position of Workshop Supervisor/Leading Hand. Mr Tullett also testified that Mr Pratt was a very hard man to deal with. Mr Tullett says that Mr Pratt did not understand the forklift industry

and how to prioritise work and he asked a lot of Mr Tullett that he (Mr Tullett) was not capable of delivering. In particular, Mr Tullett had little experience with computers. Mr Tullett says that both Mr Pratt and Mr Chiappini put him (Mr Tullett) under a lot of pressure and as a result transferred him to spare parts. Mr Tullett applied for a position as a spare parts interpreter in spare parts but Mr Pratt wanted Mr Tullett to go back onto the shop floor. Mr Tullett refused and resigned. He says that there was a lot of pressure in the workshop and some people did not work and others did all of the work. He also complained about the volume of work. He said that when there was an excessive amount of sales and if promises were made to clients that could not be kept, the clients would ring the workshop and complain. Mr Tullett says that when the Applicant became a salesperson the work increased but the numbers of employees in the workshop decreased which had resulted in increased pressure. Mr Tullett says that the Applicant was passionate about his work and never saw him do wrong by anyone. When cross-examined Mr Tullett conceded that he had received three written warnings about his conduct prior to resigning.

52 Ian Cundy also gave evidence on behalf of the Applicant. He was employed by the Respondent for eight years as a Hyster Field Service Mechanic under ten General Managers. He resigned three days prior to the hearing of this matter commencing on 15 June 2006. He said that he resigned because he was dissatisfied with his employment, that he was not getting anywhere and was probably going backwards. He also said that he resigned because of safety issues. Mr Cundy said that he was the Respondent's Safety Officer and he continually raised the same unresolved safety issues for two years. Mr Cundy says that he had never seen the amount of equipment that was turned over while the Applicant was employed when compared to other salespersons. Mr Cundy described the Applicant as a person who tried to get the spirit and some smiling faces back into the company. Mr Cundy said that there was a very high turnover of employees in the Respondent's Western Australian branch whilst he was employed because people were not happy and the Respondent took people for granted. When cross-examined Mr Cundy conceded that on 24 May 2006, his employment was suspended for alleged misconduct and during a disciplinary meeting relating to those allegations he had resigned.

53 Mr Hughes testified that since the Applicant's employment was terminated the atmosphere in the Hyster West office has improved and there is no tension in the office. He said that if the Applicant was reemployed a number of people would potentially leave and he (Mr Hughes) would leave the business if the Applicant was reemployed.

Other Matters

54 The Applicant agreed that he sought to find other employment in August 2005. He said that he did so because he found it very difficult to work for the Respondent.

55 After the Applicant's employment was terminated he obtained work in a boat yard for two to three months assisting the owner to sell the business. For that work he was paid about $1,000 (gross) each week. He then obtained a position with Clark Equipment but he left after eight weeks after the employer found out he had a claim for unfair dismissal against the Respondent. Whilst employed by Clark Equipment the Applicant earnt $4,000 to $5,000 (gross). The Applicant was then employed in human resources work for six weeks and earnt $1000 (gross) as week. Two weeks before the hearing commenced on 15 June 2006, the Applicant commenced work selling capital equipment on a salary package of $50,000 per annum. That position does not entitle the Applicant to payment of commissions. The Applicant is seeking to be reinstated to his former position with the Respondent.

Credibility

56 Having observed each witness giving evidence carefully, I am satisfied that in respect of most matters each witness gave their evidence truthfully.

57 The Applicant openly admitted his behaviour complained of by the Respondent. He, however, says his behaviour should not be interpreted as abusive but as an integral part of ensuring deals were done and commitments to clients were kept. For the reasons set out below, I do not accept his submission that his behaviour was acceptable. Further, although I accept most of what he had to say I reject his evidence that he was not rude or abusive to Ms John and I prefer her evidence as to what was said prior to and during the telephone conversation that occurred on 2 November 2005. Ms John's version of events is corroborated by Mr Davies. Clearly what set the tone of the telephone conversation was the aggressive statement made by the Applicant, "What the fuck does she want?" Although it is clear that the Applicant did not swear at Ms John once he picked up the phone, he was uncooperative and he terminated the conversation with Ms John without warning. This behaviour is consistent with the Applicant's demeanour which is revealed in the incident admitted by him on 6 October 2004 (the argument with Ms Salat), the email sent to Mr Chiappini (on 4 February 2005), the emails sent to Mr Soliman (on 18 and 23 March 2005), the emails to Mr Pratt about commissions (on 10 May 2005) and emails sent to Mr Smith (on 13 and 14 July 2005). I do not doubt that the Applicant had good relationships with some people who include Mr Davies, Ms Langton, Mr Tullett and Mr Cundy. Further, it is clear to me that the Applicant can behave politely and appropriately if he chooses to do so as he did so during the hearing of this matter. Although, Mr Davies, Mr Tullett and Mr Cundy are disgruntled ex-employees of the Respondent, I found their evidence to be credible. However, I did not find the evidence of Mr Tullett and Mr Cundy to be of any assistance in determining whether the Applicant was unfairly dismissed. Although their evidence establishes that during the period Mr Pratt was employed the office and workshop were dysfunctional, that fact does not excuse the Applicant's behaviour.

58 In relation to Mr Hughes, I generally found him to be a credible witness other than his evidence about the two emails he sent to the Applicant which he conceded that in sending them his action could have breached the Respondent's email policy. Both the Applicant and Mr Davies testified that Mr Hughes had sent an email, the contents of which contained pornographic material. The Applicant put to Mr Hughes a description of the contents of the email. Whilst Mr Hughes denied the email contained the contents described, Mr Hughes gave no evidence about the material contained in the two emails which he described as may be deemed inappropriate. In relation to this issue only, I prefer the evidence given by the Applicant and Mr Davies to the evidence given by Mr Hughes. The only other matter where Mr Hughes' evidence substantially departed from the Applicant's was in relation to whether Mr Hughes gave the Applicant an opportunity to respond to the complaint by Ms John. I prefer Mr Hughes' evidence about what was discussed on 8 November 2005, when the Applicant was informed that his employment

was terminated. Mr Hughes' evidence in relation to this issue was not challenged in cross-examination nor was his evidence about the Applicant bringing in Ms Langton into Mr Hughes' office to corroborate the Applicant's version of events of the telephone conversation. However, I did not find Mr Hughes' evidence about hearing the Applicant speaking on the telephone on 2 November 2005 helpful. As Mr Hughes did not hear what was said, I do not accept it can be inferred that the conversation Mr Hughes overheard in the sense of hearing the Applicant raising his voice was the conversation the Applicant had with Ms John.

Legal Principles

59 It was a term of the Applicant's contract of employment (*Exhibit A*) that the Applicant's employment could be terminated by the giving of four weeks' notice or payment of four weeks' salary in lieu of such notice. The Applicant was in fact paid one month's salary in lieu of notice (*Exhibit 11*). Consequently, the dismissal was not at law summary.

60 The onus is on the Applicant to prove that the dismissal was unfair on the balance of probabilities. The question to be determined by the Commission, is whether the Respondent exercised its legal right to dismiss the Applicant in such a way that the right has been exercised harshly or oppressively against the employee as to amount to an abuse of that right (see *Miles and Ors trading as The Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385 at 386).

61 An employer can justify a dismissal at common law by reference to facts not known at the time of dismissal where those facts concern circumstances in existence when the decision was made (*Lane v Arrowcrest Group Pty Ltd* (*t/as ROH Alloy Wheels)* (1990) 27 FCR 427 at 456; see also *Robe River Iron Associates v The Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia - Western Australian Branch and Ors* (1995) 75 WAIG 813).

62 As to whether the use of abusive language in the workplace can constitute grounds for dismissal Salmon C in *The Shop, Distributive and Allied Employees' Association of Western Australia v David MacGuire t/as Handy Dans Discount Hardware and Hire* (1992) 73 WAIG 195 considered the observations of Edmund Davies LJ that:

> "In Wilson vs Racher (Court of Appeal) [1974] ICR 428, the use of bad language by an employee towards his employer was the central issue in the matter under consideration. Edmund Davies LJ made the following observation, which is of a general kind, at p.430:
>
> > What would today be regarded as almost an attitude of Czar-serf, which is to be found in some of the older cases where a dismissed employee failed to recover damages, would, I venture to think, be decided differently today. We have by now come to realise that a contract of service imposes upon the parties a duty of mutual respect."

63 In *Railway Appeal Board* (1999) 21 WAR 1 at [79] (9) Malcolm CJ observed that the use of bad language by an employee does not necessarily justify termination of the contract of employment. In particular he said:

> "Insulting or objectionable language may constitute misconduct depending on the standards of conduct and language used in everyday intercourse, in particular, at that workplace and accounting for the 'give and take atmosphere' of the modern workplace: see *Drury v BHP Refractories Pty Ltd* (1995) 62 IR 467 at 473, which refers to *BHP v SUA* [1975] AILR par 255; *Wilson v Racher* [1974] ICR 428; *FLAIEU (NSW) v Ettalong Beach War Memorial Club Ltd* [1977] AILR par 259; *John Lysaght (Australia) Pty Ltd v Federated Ironworkers Association* (1973) 15 AILR par 323; *Farley v Lums* (1917) 19 WALR 117; *Pepper v Webb* [1969] 1 WLR 514."

64 In the "Law of Employment" (5th ed) the learned authors, Macken O'Grady Sappideen Warburton, point out at 213-214:

> "The use of insulting and objectionable language may constitute misconduct. The standard is not that of the dainty and genteel but the standard applying in the 'give and take atmosphere' of the modern workplace. If abusive language is common at the workplace its use by an employee would not normally be regarded as sufficiently serious to warrant dismissal unless it is directed to challenging the authority of a supervisor. This is on the basis that abuse may justify dismissal where it interferes with the proper performance of the employment. Insult is very often coupled with disobedience and insolence and rarely is there a single act but usually a course of conduct culminating in a final showdown. Illustrative is the case of *Pepper v Webb* [1969] 1 WLR 514 where the plaintiff was employed as gardener. Over a period of three months, his work deteriorated and he became inefficient. On the day of dismissal he was directed to put in some plants, which he refused to do retorting "I couldn't care less about your bloody greenhouse and your sodding garden." Although viewed singly his conduct would not have justified dismissal, the course of misconduct was held to be sufficiently serious to justify immediate dismissal."

65 The onus of proof lies on the Applicant that he was harshly, oppressively or unfairly dismissed.

Conclusion

66 With the exception of the alleged breaches of the corporate code set out in sub-paragraphs (g) and (i) of paragraph 6 of these reasons for decision, I am satisfied that the Respondent was entitled to rely upon the conduct referred to in paragraph 6 to make or justify its decision to dismiss the Applicant. As to sub-paragraph (g), I am not satisfied that Ms Jamieson ceased her placement at the Respondent's business because of the conduct of the Applicant. In relation to paragraph 6(i), the evidence establishes that many employees of the Respondent breached the Respondent's code of corporate practice by sending inappropriate emails. It seems this practice was widespread and nothing was done by the Respondent to advise the Applicant or any other employee that such conduct should cease.

67 I am satisfied that the Applicant had been warned that his behaviour was not acceptable and that any further unacceptable conduct may lead to his termination. On 23 November 2004, Mr Turner wrote in the letter of warning about the incident that occurred on 23 March 2004:

> "I indicated to you that this type of behaviour was not acceptable and would not be tolerated by either myself or NMHG. I also indicated to you that NMHG's Code of Conduct was very clear in respect of this type of behaviour.
>
> The complainant does not wish to see you lose your job over this matter however the employee involved is quite rightly not prepared to continue to put up with this type of behaviour.
>
> Accordingly, I confirm my advice to you at our meeting to stop this behaviour and further instruct you to cease and desist in such behaviour. You should also note that failure to immediately terminate this type of behaviour will lead to a termination of your employment."

(*Exhibit 2*)

68 On the same day the Applicant received a letter headed "Final Warning" about his conduct at the training course in Brisbane. In that letter Mr Pratt wrote:

> "G Turner advised you in discussions on 23rd March 2004 that your conduct in the workplace was unacceptable. You have been advised during our discussion on 23rd November that any further unacceptable conduct in the workplace will lead to the immediate termination of your employment."

(*Exhibit 3*)

69 On 8 February 2005, Mr Pratt recorded in the Applicant's Performance Management Process Signature Sheet that:

> "David is a master salesperson who is let down sometimes by poor behaviour towards customers & peers. Two warnings in the year, some verbal & written complaints from customers and challenges in managing David on a routine basis are the areas he needs to improve on in 2005.
>
> Dave could be a beacon & leader to other salespeople in the country and to his peers but his challenge is to correct some inappropriate behaviour and understand better how others sometimes negatively react to him."

(*Exhibit K*)

70 The Applicant, however, failed to correct his behaviour and that is reflected in the emails sent by him on 18 and 23 March 2005, 10 May 2005 and 13 and 14 July 2005.

71 It is clear that the Applicant had no intention of modifying his behaviour and he thought he would never be dismissed because of his behaviour. His conduct in laminating the "final warning" is the mark of a person who is defiant.

72 Whilst swearing within audible range of and at Ms John would not be justifiable cause to dismiss the Applicant if this conduct was an isolated incident, the Applicant's conduct on 2 November 2005 was a repetition of the type of behaviour that he had been warned on numerous occasions was not acceptable and should cease and is one of a number of incidents where the Applicant breached his duty to his employer of mutual respect. Further, the Applicant's action of throwing 150 client files into a dumpster and the threatening email he sent to Mr Davies which was directed at Mr Hughes on 10 November 2005 would have justified the Respondent's decision to dismiss the Applicant.

73 Even if I was to make a finding that the Applicant was unfairly dismissed, I would not make an order that he be reinstated as the Applicant does not acknowledge that any of his behaviour at any time was unacceptable.

74 For these reasons I will make an order that the application be dismissed.

2006 WAIRC 05221

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DAVID GRAHAM MAGUIRE
	APPLICANT
	-v-
	NMHG DISTRIBUTION PTY LIMITED ABN 14 053 370 291 TRADING AS HYSTER WEST
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	WEDNESDAY, 9 AUGUST 2006
FILE NO/S	U 252 OF 2005
CITATION NO.	2006 WAIRC 05221

Result	Dismissed
Representation	
Applicant	In person
Respondent	Ms R J Lee (of counsel)

Order

HAVING heard the Applicant in person and Ms Lee, of counsel on behalf of the Respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders —

THAT the s 29(1)(b)(i) application be and is hereby dismissed.

(Sgd.) J H SMITH,
[L.S.] Commissioner.

2006 WAIRC 05193

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RHIANNA JADE MCLAUGHLIN
	APPLICANT
	-v-
	CENTREPOINT MEATS
	RESPONDENT
CORAM	COMMISSIONER S WOOD
HEARD	TUESDAY, 25 JULY 2006
DELIVERED	THURSDAY, 3 AUGUST 2006
FILE NO.	U 100 OF 2005
CITATION NO.	2006 WAIRC 05193

CatchWords	Termination of employment – Employment status – Summary dismissal – Allegation of theft – Investigation – Credibility of witnesses – Casual employment – Reasonable view formed
Result	Application dismissed
Representation	
Applicant	Mr T Solomon as agent
Respondent	Mr M Barrett–Lennard of Counsel

Reasons for Decision

1 This is an application pursuant to section 29(1)(b)(i) of the Industrial Relations Act 1979 ("the Act"). Ms McLaughlin was employed to make doughnuts and serve customers in a stall in the Centrepoint Shopping Centre, Midland. Ms McLaughlin was dismissed summarily on 5 October 2005 for alleged stealing. The manager of the business, Pam, was directed by the owner, Ms Dunnachie, on the evening of 4 October 2005 to dismiss Ms McLaughlin the next day. The applicant says that she did not steal from her employer. The applicant says also that there was no inquiry or discussion about the alleged stealing. She was simply told to leave and told wrongly that she had been caught on video and that the video was with the Midland Police.

2 The respondent says that Ms Lisa Johnson, the sister of Ms Dunnachie, saw Ms McLaughlin take a $50 note from the till and place it in her apron. Ms Johnson saw this happen at about 2pm on 4 October 2005. She was standing in the queue at Woolworths at that time and would have been about 6 metres from Ms McLaughlin. She says that the applicant lifted the coin tray out of the till and took a $50 note. Such notes were kept under the tray and on occasion employees would take cash to buy required goods at Woolworths. Ms Johnson says that she did not think much of the action at that time, but later reported it to her sister. Ms Dunnachie asked that a reconciliation of the till be undertaken. It was found that the till was down $100.

3 The contest is whether Ms McLaughlin stole the money or not. The investigation into the matter and the procedure adopted in dismissing Ms Mclaughlin are also relevant. There was evidence as to work performance and the past history of Ms McLaughlin. These points are not relevant other than for the purposes of establishing credibility. It is the clear evidence of Ms Dunnachie that she was giving Ms McLaughlin a go and would have continued with her employment longer but for the alleged incident of stealing. There is also a contest as to whether the applicant's employment was casual in nature. I will deal with this issue later.

4 The issue of credibility is crucial to the determination of the matter. The situation is simply that the respondent says that Ms McLaughlin took the money and Ms McLaughlin in turn strenuously denies the allegation. Having seen Ms Dunnachie, Ms Johnson and Ms McLaughlin give evidence I consider it more probable that Ms Johnson did in fact see Ms McLaughlin take money from the till and put it in her apron. I say this for the following reasons.

5 Ms Dunnachie was a good witness. She had no direct knowledge of whether money was taken from the business. She simply accepted the word of her sister, asked that a reconciliation be undertaken, accepted the advice of her mother that the till was short $100 and then directed that Ms McLaughlin be dismissed. She based her decision on the report of the incident by Ms Johnson and the fact, in her mind, that the till was $100 short on that day. The applicant challenges whether the till was actually short and complains that the records are either somehow incomplete or that the transaction statements are somehow inadequate. I am not persuaded by this challenge. This is a small business and the process of reconciliation was described by Ms Johnson. It is a straightforward process of totalling the till and checking that against the take. Account is taken of the receipts or monies paid for Woolworths or deliveries. Ms Johnson gave evidence that the till recorded sales of about $470

dollars and yet contained only about $370. I accept this evidence as reasonable and plausible. I am convinced that the till was down $100 on that day, and I so find.

6 Evidence was given that the till was down on other days, however, never to the extent of $100. Evidence was also given as to how these shortfalls could have arisen. There is no suggestion that Ms McLaughlin was responsible for such shortfalls or alternatively that there was anything untoward about these shortfalls. The concern is simply concentrated on the reconciliation of the till undertaken on 4 October 2005.

7 Ms Dunnachie also had no direct role in the recruitment of Ms McLaughlin, other than to endorse her employment with the manager. She can give no direct evidence as to what the applicant was told about her terms and conditions of employment. She says, however, that Ms McLaughlin would have been on trial for about 2 to 3 months and that she was employed as a casual. This is the usual practice for the business and Ms McLaughlin had to learn the work. Ms Dunnachie says that Ms McLaughlin was given a go and that, in her discussions with Pam, she was advised that Ms McLaughlin did not perform certain tasks very well. Although the accounts book was not tendered by either party, the evidence uncontested is that Pam wrote in that book several critical comments about Ms McLaughlin's performance. Mr Barrett-Lennard submitted that Pam was not called to give evidence as she no longer works for the business and resides in Queensland. I do not draw any negative inference from the fact that the respondent did not bring forward the then manager to give evidence. There was an air of caution or concern expressed in the evidence of Ms Dunnachie about Ms McLaughlin. However, Ms Dunnachie did not express any real animosity toward Ms McLaughlin.

8 Counsel for the respondent submitted validly that in weighing the evidence the Commission should assess whether there was any reason for the respondent to make up a story that Ms McLaughlin had taken the money. He submitted that the respondent could simply have terminated the services of Ms McLaughlin. Ms McLaughlin when challenged on her evidence said quite passionately that she had not taken any money. She queried whether anyone could seriously think that she would put herself through the whole exercise of having the matter heard before the Commission, if in fact she had taken the money.

9 It is the case that the real difference in evidence which needs to be considered is that of Ms Johnson and Ms McLaughlin. Ms Johnson is quite specific. She says that she saw the applicant lift the coin tray, remove a $50 note (which she identified by the colour), and then put the note in her apron. This occurred at approximately 2:00 pm. The apron has one pocket at the front. Ms McLaughlin denies this. She says that the till would have obstructed any view because it comes up to the rib cage. Mr Solomon for the applicant made an earlier submission that Ms McLaughlin was standing side on. However, this is not the evidence of the applicant. Ms McLaughlin says that she simply was not wearing an apron at that time. She only wears an apron to make the doughnuts and these are typically made in the morning, or if they require more doughnuts, later in the day. She says that she does not wear an apron when she serves customers. Ms McLaughlin produced the pair of black pants which she says that she wore on that day. It is common ground that the pants which were produced have no pockets in them.

10 Put simply either Ms Johnson is to be believed or Ms McLaughlin is to be believed. It is not possible to accept both accounts as simply differing recollections. Either Ms McLaughlin put money from the till in her apron or she was not wearing an apron and Ms Johnson is simply making up a story. This is the crucial evidence to reconcile. I am less concerned with the evidence that Ms Johnson only saw Ms McLaughlin take a $50 note when $100 was found missing. I am less concerned with the submission that somehow it is not proven that the till was actually down or that money may not have been taken from the till. Likewise, with the exception that the allegations were not put to the applicant, I am not concerned with the submission that there was no adequate investigation. This is a small business and the evidence is that a proper reconciliation of the till was undertaken. I am not clear as to what other investigation could have been undertaken, given the evidence of Ms Johnson. The allegation of stealing should have been put to the applicant. It is an aspect of unfairness not to have done so. However, it appears a logical conclusion that having seen an employee pocket money from the till, and the till is down, then it was that person who caused the deficit. This is as opposed to another employee or a simple mistake of giving change, ringing up the till or some other reason. It is also the case that the amount of the deficit is much larger than any other previous deficit.

11 There was some small degree of animosity in the evidence of Ms Johnson toward Ms McLaughlin. Ms Johnson does make adverse comment on Ms McLaughlin's work capacities. There is no evidence though that there was ever an occasion of conflict between the two women. Ms Johnson says that she did not think overly about the incident when she first saw Ms McLaughlin put the $50 note in her apron. I infer from this that Ms McLaughlin was not immediately considered to be acting dubiously by Ms Johnson. However, Ms Johnson reported the matter to her sister later. She was not questioned as to why she did not report the incident earlier or confront Ms McLaughlin about the matter. I do not consider that Ms Johnson's evidence was damaged in any way. I accept her evidence.

12 I do not accept the evidence of Ms McLaughlin. She says that she considered and was told by Pam that she was doing a good job. This does not sit comfortably with the written comments by Pam. The applicant's agent accepted [Exhibit R2] as the summary of hours worked. Ms McLaughlin got into difficulty when cross-examined about her hours and then disputed that [Exhibit R2] was in fact correct. She was adamant that she worked consistently long hours and reinforced this by reference to her regular transportation arrangements. If her working arrangements had married with these transport arrangements then this would have meant that she had worked considerably more hours per week than those indicated in [Exhibit R2]. I consider that it is most likely that [Exhibit R2] is a true reflection of the hours worked. This was produced in an effort to redress any underpayment. The issue of payment was not under challenge.

13 Ms McLaughlin's evidence as to when she wore an apron is not convincing. The evidence is that she was not wearing an apron because she only wore one to make doughnuts and this happened in the morning. She was said to have been seen taking the money in the afternoon. She was asked and admitted that she could make doughnuts at other times if they were required. This was typically if they ran out.

14 There is then the evidence of the applicant as to whether her employment was casual or otherwise. She says that she was told by Pam that she would be on trial for a week. She says that she filled out [Exhibit R1] within a matter of days. The tax declaration is dated 16 September 2005. Ms McLaughlin's agent submitted that she commenced employment in the week prior to this. The respondent submitted that the applicant commenced in the week ending 16 September 2005. In the accounts book Pam has written, "10/9/05 – Rhianna Trial", and "17/9/05 – give her a bit more time". This is the evidence of Ms

Dunnachie under cross-examination. Weighing the factors up I consider that the more likely scenario is that Ms McLaughlin knew her employment was casual and filled out the form accordingly. I do not go to all the criteria needed to decide whether Ms McLaughlin was casual, including the award, as it is not necessary to do so.

15 Ms McLaughlin was clear in her evidence that typically customers did not proffer $50 notes. It is a doughnut business and the price of goods does not demand such large notes. The till tape [Exhibit R3] shows that $50 was proffered at 1.58 pm and 2.58 pm on 4 October 2005 and the customers received change of $44 and $45 respectively. It would suggest therefore that the business did take at least two $50 notes on that day.

16 Having seen Ms Dunnachie, Ms Johnson and Ms McLaughlin give evidence and for the reasons expressed I prefer the evidence on behalf of the respondent to that of the applicant. I find that it is more probable that Ms Johnson saw Ms McLaughlin take money from the till and place it in her apron.

17 It was reasonable in my view for the respondent to form the view that Ms McLaughlin was responsible for the till being short on 4 October 2005. The respondent should have put these allegations to the applicant and considered what the applicant had to say. However, this procedural issue does not overcome the substantive point that it was reasonable for the respondent to believe that the applicant had wrongly taken money from the business. The applicant says that Pam said she had been caught on video tape. If this is so then Pam should not have done this and that is an aspect of unfairness. It does not overcome the substantive difficulty the applicant faces. Having regard for the principles in *Undercliffe Nursing Home –v- Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* 65 WAIG 385, I consider that it was not unfair or harsh to dismiss Ms McLaughlin in all the circumstances. I would therefore dismiss the application.

2006 WAIRC 05194

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RHIANNA JADE MCLAUGHLIN
	APPLICANT
	-v-
	CENTREPOINT MEATS
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	THURSDAY, 3 AUGUST 2006
FILE NO	U 100 OF 2005
CITATION NO.	2006 WAIRC 05194

Result	Application dismissed
Representation	
Applicant	Mr T Solomon as agent
Respondent	Mr M Barrett-Lennard of Counsel

Order

HAVING heard Mr T Solomon on behalf of the applicant and Mr M Barrett-Lennard of Counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders:

THAT the application be and is hereby dismissed.

[L.S.]

(Sgd.) S WOOD,
Commissioner.

2006 WAIRC 04786

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	EDWARD MICHAEL
	APPLICANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION AND TRAINING
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
HEARD	20 AND 21 APRIL 2006
WRITTEN SUBMISSIONS	15 MAY 2006
DELIVERED	MONDAY, 24 JULY 2006
FILE NO.	U 116 OF 2005
CITATION NO.	2006 WAIRC 04786

Catchwords	Termination of employment - Harsh, oppressive and unfair dismissal - Issues in relation to applicant's performance - Procedural fairness considered –Principles applied - Applicant not harshly, oppressively and unfairly dismissed - Application dismissed - *Industrial Relations Act 1979* (WA) s 29(1)(b)(i) – *Public Sector Management Act 1994* (WA) s78, s 79(3) and (5)
Result	Dismissed
Representation	
Applicant	Mr S Millman (of counsel)
Respondent	Mr D Barnes

Reasons for Decision

1 This is an application by Edward Michael ("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 Department of Education and Training ("the respondent") on 21 September 2005. The respondent denies that the applicant was unfairly terminated.

Background

2 The applicant was employed by the respondent as a full time teacher at John Willcock College ("the College") in Geraldton at the start of the 2004 school year. As the College only enrols Year 8 and Year 9 students the applicant taught mathematics to these year groups. On 20 May 2004 the applicant was formally advised by the College Principal, Mr Pilkington that he was not performing to a satisfactory level. The applicant was then subject to two Performance Improvement Plans ("PIP") between 14 June and 28 July 2004 ("PIP 1") and 30 July and 27 August 2004 ("PIP 2") respectively. PIP 2 lasted sixteen of the required twenty days because the applicant became unwell during the last week of PIP 2 and when he returned to the College on 31 August 2005 he was involved in an incident which led to him being directed to attend the local District Office. The applicant did not return to the College after this date. The applicant taught at Pinjarra Senior High School ("PSHS") from 26 April 2005 onwards and by letter dated 5 July 2005 the applicant was advised that the respondent intended to terminate his employment. Prior to the applicant's termination he was given the opportunity to provide written submissions about the respondent's intended actions and on 9 August 2005 his representative did so on his behalf (Exhibits R1/41 and 33-36).

3 The applicant is seeking reinstatement to his former position and compensation for lost remuneration.

4 The respondent prepared a file of relevant documentation (Exhibit R1).

Applicant's evidence

5 The applicant completed a Bachelor of Science and Education in Cairo and taught for a number of years in Egypt prior to coming to Australia in late 1990. In 1999 the applicant taught at Mount Magnet District High School ("MMDHS") for approximately six months and in 2003 he taught during Terms 3 and 4 at Katanning Senior High School ("KSHS") teaching mathematics across years nine to twelve. The applicant tendered two references relevant to his appointment at KSHS (Exhibit R1/537 and 538).

6 The applicant gave evidence that as early as his third day at the College his relationship with his head of department Ms Jillian Stewart was poor. The applicant gave evidence that he was aware that Ms Stewart and his sub-school leader Ms Barbara Carey complained to the College's Principal Mr Kevin Pilkington about communication difficulties between them and the applicant.

7 The applicant gave evidence that in March 2004 Ms Stewart approached him and told him that his salary was 'too big' and she advised him to change to part time teaching to allow him time to prepare for lessons. In response the applicant told Ms Stewart that he was an experienced teacher and that he had plenty of time to do his job properly. The applicant stated that Ms Stewart then advised him that she would check his lesson plans. The applicant stated that he was the only teacher required to submit his lesson plans to Ms Stewart and the applicant gave evidence that he told Mr Pilkington about Ms Stewart's comments. The applicant stated that during March and April 2004 he had difficulties with Ms Stewart about how to teach his classes and he stated that Ms Stewart was critical of his lessons. The applicant stated that Ms Stewart attended one of his lessons and took it over and as a result he became anxious and upset. The applicant stated that Ms Stewart continued to review his lessons and required him to submit his lesson plans to her twenty four hours in advance of the lesson. The applicant stated that he was told off on one occasion when he did not submit a lesson plan 24 hours prior to the lesson that he was to undertake the following Monday. The applicant stated that it was sometimes difficult to give his lesson plans to Ms Stewart prior to each lesson as he was often busy.

8 The applicant stated that he was hurt when Ms Stewart told him how to teach each lesson and he felt bad when Ms Stewart criticised him and the applicant stated that Ms Stewart tried to destroy every point he made about how to teach his students. The applicant maintained that Ms Stewart did not understand the teaching methods he used and he claimed that she did not make any positive comments about his teaching. The applicant maintained that Ms Stewart was against him because he was earning a high income.

9 The applicant stated that Ms Stewart did not give him a syllabus or a programme to follow and the applicant stated that another teacher described Ms Stewart as a 'crazy lady and we don't know what she wants to do'. The applicant stated that Ms Stewart continued to judge his teaching and never accepted his lesson plans and 'she never do anything' (transcript page 42).

10 The applicant stated that around the end of March 2004 he complained to Mr Pilkington about Ms Stewart and Ms Carey's treatment of him and Mr Pilkington then arranged for the applicant to have a meeting with the Deputy Principal Ms Kathy Pilkington. The applicant stated that he told Ms Pilkington that he wanted to move to another sub-school and was told that he

could not do so. The applicant stated that Ms Pilkington told him that she was sorry that Ms Stewart and Ms Carey were treating him badly and that she would try to fix this problem. The applicant stated that two weeks after this meeting with Ms Pilkington she had meetings with the applicant and Ms Stewart and the applicant and Ms Carey.

11 The applicant stated that there were internal difficulties within his sub-school because of personality conflicts between staff.

12 The applicant stated that once he had to leave the school to attend the bank and after this absence he was required to notify the school of his absence and sign off to that effect which he did. The applicant stated that he was then advised by Ms Carey not to leave the school without notifying her. The applicant stated that he was subject to an action plan in relation to this issue and targets were also agreed between the applicant, Ms Stewart, Ms Carey and Ms Pilkington to improve outcomes for his students (Exhibit R1/489). The applicant stated that it was difficult for him to teach because he had to adhere to these provisions. The applicant maintained that all of his actions were constantly being reported to Mr Pilkington and the applicant stated that because of this he was depressed and took medication. The applicant claimed that his line managers had a plan to destroy him and to kick him out of the school. The applicant stated that he had no hope of continuing at the school after seeing Ms Stewart and Ms Pilkington talking after reviewing one of his lessons instead of independently assessing his lesson.

13 The applicant maintained that Ms Stewart told him to change the way in which he taught and not to use textbooks when teaching his students. The applicant also maintained that Ms Stewart was unable to impart basic knowledge to students.

14 The applicant stated that from the start of Term 1, 2004 he felt stressed and he believed that his capacity to teach was destroyed by the actions of both Ms Stewart and Ms Carey. The applicant stated that he was not given any support by Ms Carey when disciplining students and he gave an example of an incident when he removed a laptop computer from a student for one week and an incident where a student swore at the applicant and was suspended by the Principal. The applicant stated that Ms Carey overturned the decision to suspend the student who swore at him and he claimed that this student then gave the applicant a hard time. Ms Carey also returned the laptop computer to the student after one day and this resulted in the student not respecting him after this. The applicant maintained that Ms Carey was duplicitous towards the applicant.

15 The applicant stated that at the start of Term 2, 2004 he worked with other colleagues to prepare year 8 and 9 teaching programmes and he stated that Ms Stewart refused to accept these programmes.

16 The applicant stated that Mr Pilkington observed one of his lessons and told him that his students were bored and the applicant maintained that the Principal never supported him and told him that he was a bad teacher.

17 The applicant stated that after he was advised that his performance was unsatisfactory Ms Pilkington did not allow him to meet with his union representative in the first two teaching periods on the day the representative attended the College and he was told he would have to meet in the third period as he was not teaching in this period. The applicant stated that this meant that they only met for 45 minutes which was insufficient.

18 The applicant claimed that complaints made against him by parents and students related to the same three students. The applicant believed that he was being discriminated against as he was not treated the same way by his line managers as other teachers when students misbehaved. The applicant stated that on a number of occasions he felt victimised, particularly when Ms Pilkington preferred the accounts of students about the applicant's interactions with them. At one point the applicant complained to Mr Pilkington about Ms Pilkington and Ms Stewart and asked that he be given a new line manager.

19 The applicant maintained that during 2004 his performance improved and this was reflected in a letter from a parent who had previously complained about him and the applicant maintained that Ms Pilkington had asked this student's parents to lodge the initial complaint against him.

20 The applicant stated that Mr Pilkington removed Ms Pilkington from reviewing his classes after he complained about her and he stated that he did not trust Ms Vicki Jack who replaced Ms Pilkington.

21 The applicant acknowledged that he gave reports to his students before they were reviewed by Ms Carey but he claimed that he was unaware of an instruction that Ms Carey needed to review them prior to giving them to his students. The applicant completed a written account of the situation in relation to these reports (Exhibit R1/322-325).

22 The applicant stated that in the period prior to ceasing work at the College he had a number of days off due to stress and the applicant stated that after he was taken to hospital by an ambulance on 23 August 2004 he had one week off work because of illness.

23 The applicant stated that when he returned to teach at the College on 31 August 2004 Mr Pilkington told him that he could not be left alone in the classroom. The applicant stated that he initially resisted this directive but he stated that when Mr Pilkington told him that he had received a directive that the applicant was not to be left alone he accepted having an assistant teacher. The applicant stated that soon after he returned to the College on this date he read complaints made about him by a colleague Mr Saul Molina. The applicant stated that he wanted to discuss Mr Molina's complaints about him with Mr Pilkington however Mr Pilkington told him to leave the school and he was told to report to Ms Jack at the District Office. The applicant stated that he later visited a general practitioner who declared him unfit for work due to work-related stress.

24 On 2 March 2005 the applicant attended a consultant psychiatrist (see Exhibit R1/568-9).

25 The applicant agreed that he was on a PIP when he was at PSHS in 2005 and he claimed that he was told by the Principal of PSHS that his performance was excellent.

26 The applicant stated that in 2005 he was interviewed by Mr Peter Burgess who completed a report about his performance at the College and the applicant stated that he did not trust him and he believed that he was part of the respondent's strategy to terminate him.

27 Under cross-examination the applicant maintained that an assistant who sat in on his classes at the College was used to gather evidence against him.

28 The applicant was asked about a letter written on his behalf by the State School Teachers' Union ("the SSTU") in December 2001 about his employment at MMDHS (Exhibit R1/508). The applicant stated that he had not seen the letter before and he stated that the reference in this letter to his performance being unsatisfactory at MMDHS was incorrect and he stated that if this was the case he would not have been re-employed by the respondent. The applicant maintained that he left his position at MMDHS because of a non-work related conflict with another staff member, that his departure had nothing to do with his performance and that he was not provided with any documentation about his performance.

29 The applicant agreed that he was given an induction when he commenced at the College and he stated that he was aware of how the College was organised and run. The applicant was aware that in March 2004 a parent complained about him.

30 The applicant stated that after he commenced employment at the College he spoke to Mr Pilkington on an informal basis about his health but he could not remember the exact dates of those discussions and he stated that on a number of occasions he told Mr Pilkington that he was stressed and this was affecting his ability to undertake his work. The applicant was asked to detail any documents that supported his view that he was being harassed, bullied and treated unfairly by staff at the College and the applicant cited as an example the time that Ms Stewart told him 'monkey see monkey do' in relation to using a text book when teaching mathematics.

31 The applicant maintained that a lesson plan dated 3 August 2004 was not signed by him and when asked if the signature on this plan was a forgery the applicant stated that it may be (see Exhibit R1/346-347).

32 The applicant understood that he would be appointed to a long term position at PSHS at the end of 2005.

Respondent's evidence

33 Mr Pilkington has been the Principal at the College for approximately three years and he was previously the Principal of Albany Senior High School. Mr Pilkington has taught for 31 years. Mr Pilkington stated that the College has five sub-schools consisting of year eight and nine students and has five sub-school leaders as well as Heads of Learning Areas for each main subject area. The College has approximately 700 students and three Deputy Principals one of whom was the respondent's partner Ms Pilkington. Mr Pilkington stated that the role of the sub-school leaders was to induct and support teachers about managing student behaviour, to liaise with parents and to support students. Mr Pilkington stated that teachers at the College worked collaboratively and that a substantial amount of support was given to teachers.

34 Mr Pilkington stated that early in Term 1, 2004 the applicant was experiencing difficulties and Mr Pilkington stated that he was aware of this from feedback he was given by the applicant's line managers and from his own observations. Mr Pilkington stated that later in Term 1, 2004 he also received informal complaints from parents about the applicant.

35 Mr Pilkington understood that the applicant was inducted in the usual manner by Ms Stewart and Ms Carey and the applicant was therefore aware of the day to day processes and procedures expected of him. Mr Pilkington understood that when the applicant started to experience difficulties Ms Stewart had weekly meetings with him and the applicant was advised to view the classes of other teachers.

36 Mr Pilkington stated that the applicant was given the opportunity to undertake professional development courses but he did not avail himself of this option.

37 Mr Pilkington stated that in Term 1, 2004 the applicant was subject to the College's normal performance management processes and he stated that by the end of Term 1, 2004 the applicant's performance had not improved.

38 Mr Pilkington stated that the applicant saw him as a mentor and that in Term 1, 2004 he had a good relationship with the applicant, they had many discussions and he tried to assist the applicant on an informal basis.

39 Mr Pilkington stated that when the applicant's performance did not improve and the applicant made no effort to act on the advice given to him to improve his performance he formally notified the applicant on 20 May 2004 that his performance was substandard and the applicant was invited to respond to Mr Pilkington's views about his performance (see Exhibit R1/451-456). Mr Pilkington stated that as the applicant's response did not acknowledge the concerns raised by Mr Pilkington he then instructed Ms Stewart to liaise with the applicant to agree on a PIP. Mr Pilkington stated that even though the applicant's performance was deficient in five areas he chose the two most critical areas for the applicant to concentrate on.

40 Mr Pilkington stated that a meeting was held with the applicant on 29 July 2004 to review his progress and the applicant was advised that his performance remained unsatisfactory and the applicant was advised on 2 August 2004 in writing that he was to be subject to a further review period from 30 July 2004 through to 27 August 2004. Mr Pilkington stated that when the applicant returned to the College on 31 August 2004 he wanted to have a meeting with him to discuss the completion of his PIP which still had four days to run because the applicant had been on sick leave during PIP 2. Mr Pilkington stated that he was instructed by his District Office to arrange for the applicant to have a support person in his classes and did so and advised the applicant of this when he returned to the College. Mr Pilkington stated that he had left some documents in the applicant's pigeon hole for him to review on his return including a complaint about the applicant made by Mr Molina. Mr Pilkington stated that after the applicant read Mr Molina's complaint he entered Mr Pilkington's office and abused him using foul language. Mr Pilkington stated that Ms Jack was visiting from the District Office at the time and after she heard the applicant abusing Mr Pilkington she called the District Director who contacted Mr Pilkington on his mobile phone and told Mr Pilkington to stand the applicant down with immediate effect and to escort him off the premises which he did. Mr Pilkington stated that because the applicant had been removed from the College as a result of this incident the applicant was unable to complete the four remaining days of PIP 2. Mr Pilkington stated that soon after this incident he wrote to the applicant confirming the events of 31 August 2004 and he advised the applicant that he had not demonstrated satisfactory performance and that he would recommend to the Director General that the applicant's performance be investigated (see Exhibit R1/241).

41 Mr Pilkington stated that the applicant was required to notify Ms Carey when he left the College during the day because he was often absent during his non-teaching hours and returned late to his classes. Mr Pilkington stated that this requirement only applied to the applicant and no other staff member.

42 Mr Pilkington stated that even though he has a background in teaching English and Drama he believed he was capable of assessing and giving feedback to teachers teaching in different subject areas. Mr Pilkington stated that he reviewed one of the applicant's lessons on 11 August 2004 at short notice after Ms Pilkington had been removed from the applicant's PIP process. Mr Pilkington stated that the applicant had asked that both Ms Stewart and Ms Pilkington be removed from assessing him as part of his PIP and after consulting his District Director, Ms Pilkington was removed from the process for the purpose of transparency even though Mr Pilkington believed that she was a highly experienced mathematics teacher who was capable and competent to give feedback to the applicant. Mr Pilkington stated that Ms Pilkington's removal from the PIP process was confirmed in a letter to the applicant dated 18 August 2004 (Exhibit R1/296-7). Mr Pilkington stated that Ms Jack was then brought in to view some of the applicant's classes in place of Ms Pilkington.

43 Mr Pilkington stated that the applicant raised his health issues with him and the applicant said he found the process and people involved stressful.

44 Mr Pilkington denied that he solicited complaints about the applicant from parents and Mr Pilkington stated that the College policy in relation to complaints was that if a parent had a problem he or she should first approach the teacher concerned. Mr Pilkington stated that complaints about teachers rarely came to him directly. Mr Pilkington stated that it was rare that complaints about teachers were received in Term 1 and Mr Pilkington stated that he had some informal complaints about the applicant in late Term 1, 2004 and these complaints became more serious in Term 2, 2004. Mr Pilkington was aware of a group of girls who fell out with the applicant and as a result at one point there was a cluster of complaints made about the applicant at the same time.

45 Under cross-examination Mr Pilkington stated that in Term 1, 2004 the applicant's line managers raised issues with him about the applicant's literacy level and he stated that he discussed this issue with the applicant in a friendly and supportive way. Mr Pilkington stated that he refused to transfer the applicant to another sub-school because it was difficult to swap teachers, there was a need to keep a gender balance in sub-schools, it meant swapping the applicant with another teacher and too many students would be inconvenienced.

46 Mr Pilkington stated that during the time that the applicant was at the College he had a number of informal discussions with the applicant over and above what he would normally have with other teachers.

47 Mr Pilkington stated that if the applicant's performance had been satisfactory in the two areas specified in his PIP he would not have remained on the PIP even though he was experiencing difficulties in three other areas.

48 Mr Pilkington acknowledged that the applicant was intelligent and had a good grasp of mathematical concepts and he stated that he once advised the applicant that he would be a good teacher at University level or TAFE.

49 Mr Pilkington stated that he had managed approximately six teachers under the respondent's Managing Unsatisfactory and Substandard Performance of Teaching Staff and School Administrators document ("the Policy") and he stated that two of these teachers improved their performance and two teachers left teaching. Mr Pilkington confirmed that he told the applicant that at best the applicant had the ability of a graduate teacher. Mr Pilkington stated that he believed that twenty days was a sufficient period for a teacher to make attempts to improve his or her performance or at least endeavour to show a desire to improve.

50 Mr Pilkington commented on the College's processes when a parent lodged a complaint about a teacher. Mr Pilkington stated that after he received a verbal complaint he would ask a parent to put the complaint in writing if the parent wished to pursue the matter further.

51 Mr Pilkington stated that the applicant was treated as a new teacher when he commenced employment at the College and he was monitored under the College's normal performance management processes.

52 Ms Pilkington has taught for twenty eight years, twenty of those as a classroom teacher in the area of mathematics and she has previously worked as a Deputy Principal at North Albany Senior High School and the College. Ms Pilkington is currently a Deputy Principal at Geraldton Senior College. Ms Pilkington was Ms Stewart's line manager when the applicant commenced employment at the College.

53 Ms Pilkington stated that she first had concerns about the applicant when he did not attend assembly on the day school commenced in 2004. Ms Pilkington stated that in the first few weeks of Term 1, 2004 Ms Stewart raised concerns with her about the applicant and they discussed appropriate support for him. Ms Pilkington stated that she was aware that in Term 1 the applicant was given a substantial amount of support by Ms Stewart and that he was able to access sample lesson plans. When an assessment of the applicant's performance became more formal Ms Pilkington reviewed pre-arranged lessons given by the applicant. Ms Pilkington stated that at the time she reviewed the applicant's lesson plans prior to him conducting these lessons to give the applicant feedback, she then viewed the lessons and provided constructive comments to the applicant about the lesson. Ms Pilkington stated that a lesson plan template was agreed between the applicant and Ms Stewart to assist the applicant (see Exhibit R1/346).

54 Ms Pilkington stated that she reviewed a lesson plan of a lesson the applicant was to give on 11 August 2004.

55 Ms Pilkington stated that even though the applicant was required to submit his lesson plans to her prior to the day of the lesson he did not do so and this made it difficult to give him feedback and she stated that on most occasions the applicant did not complete the necessary self-evaluations of the lessons he gave.

56 Ms Pilkington stated that the applicant had a meeting with his union representative Ms Mary Franklin on the day she was scheduled to be at the College. Ms Pilkington stated that she asked staff members to give her notice several days in advance if they wished to have a meeting with their union representative so that a specific time could be set aside. Ms Pilkington stated

that the applicant was allocated to meet with Ms Franklin during his Duty Other Than Teaching ("DOTT") time and Ms Pilkington stated that she refused the applicant's request to meet Ms Franklin during his class time as this required the use of a relief teacher. Ms Pilkington stated that the applicant was not denied the opportunity to meet Ms Franklin and she understood that he met with her during a double period comprising 106 minutes.

57 Ms Pilkington stated that she did not solicit complaints from parents about the applicant and she stated that she was not aware of any students ganging up on the applicant. Ms Pilkington stated that she did not recall meeting three students to discuss the applicant and leaving them alone in an interview room and Ms Pilkington stated that she did not undermine teachers when they disciplined students. Ms Pilkington stated that her role was to support staff as well as students and she was an arbiter in the process and she was required to investigate both sides of the story. Ms Pilkington stated that after verbal complaints were made to her about the applicant she told the parents concerned that if they wanted to take the matter further they needed to write to the Principal. Ms Pilkington could not recall specific students complaining about the applicant but she stated that when students had issues with a teacher she asked them to write out their complaints so that their issues were clear.

58 Ms Pilkington stated that the applicant was not prepared to achieve the aims of his PIP and she believed the applicant focussed on putting obstacles in the way of improving his performance.

59 Ms Pilkington could not recall having a meeting with the applicant in Term 1, 2004 to discuss his complaints about Ms Stewart and Ms Carey. Ms Pilkington stated that she had many discussions with the applicant and that most were about his personal life and problems.

60 Ms Pilkington stated that she was concerned about the applicant's level of English and Ms Pilkington was aware that the applicant had difficulty at times reading and understanding English. Ms Pilkington stated that she had discussions with Ms Stewart about this issue.

61 Ms Pilkington stated that the applicant had poor classroom management because he was poorly prepared.

62 Ms Pilkington stated that on the day the applicant was taken to hospital by ambulance on 23 August 2004 he was agitated and anxious and wanted a cigarette even though smoking was banned at the College. Ms Pilkington stated that she located a cigarette for the applicant and when the applicant stated that he was having difficulty lighting the cigarette she told the applicant that she would hold the cigarette for him but not light it.

63 Ms Stewart has been employed by the respondent for 33 years and she has a science degree majoring in maths and psychology and has a Masters of Educational Administration. Ms Stewart has been the Head of Department of Mathematics at the College since 1998, she line manages all maths teachers at the College and Ms Stewart stated that she links up early with teachers who are new to the College particularly overseas trained teachers, as well as graduates.

64 Ms Stewart stated that at the start of each year she notifies teachers about the required curriculum framework and did so with the applicant. Ms Stewart stated that she organised weekly review meetings with the applicant to go over any concerns he may have had. Ms Stewart stated that she was also aware that beginning teachers need assistance constructing programmes and developing weekly and daily lesson plans and she therefore dealt with these issues with the applicant at these meetings.

65 Ms Stewart stated that she was unaware if the applicant was subject to any racial vilification by his students.

66 Ms Stewart stated that on 20 February 2004 she started to document her discussions with the applicant because she felt that he did not understand the feedback and advice that she was giving him. Ms Stewart stated that in March 2004 she asked the applicant whether he had any issues with reading and understanding the information given to him and she maintained that the applicant said he was not experiencing any problems. Ms Stewart stated that maths teachers at the College met weekly and she stated that they worked within a friendly and supportive environment where teachers were willing to share their ideas. Ms Stewart stated that the applicant had access to lesson plans on the computer relevant to the curriculum framework, computer support activities as well as two resource files and library resources. Sets of textbooks were also in classrooms to assist the applicant with his lessons.

67 Ms Stewart stated that after concerns arose about the applicant's performance she arranged to view some of the applicant's lessons to assist him and Ms Stewart made summaries of these lesson reviews (see Exhibit R1/499-503). Ms Stewart stated that the applicant was given useful feedback but he did not act on suggestions or even remember some of this feedback and that as a result an action plan was developed in April 2004 as one of the strategies to assist the applicant (see Exhibit R1/489). Ms Stewart stated that this plan was not successful and concerns about the applicant's performance remained.

68 Ms Stewart stated that she played a key role in the applicant's PIP which was finalised on 10 June 2004. Ms Stewart stated the PIP was manageable and that sufficient resources were available to the applicant to deal with his performance problems.

69 Ms Stewart stated that during the applicant's PIP feedback was given to him by Ms Deb Stone who was specially trained to assist teachers experiencing classroom management problems (Exhibit R1/427-428).

70 Ms Stewart stated that she did not raise the applicant's accent or level of English with anyone at the College and that the issues were more to do with the manner in which the applicant presented his lessons, not his accent.

71 Ms Stewart stated that it was her view that a teacher could not teach the current curriculum from one textbook. Ms Stewart stated that she did not discourage the applicant from using textbooks but she made the applicant aware of a number of useful resources including computer resources, library and classroom text book sets that he could use. Ms Stewart maintained that she did not tell the applicant not to use text books and she said three sets of texts books were available for the applicant to use. Ms Stewart stated that it was not her role to provide the applicant with lesson plans as this was part of his role as a teacher. Ms Stewart stated that it was unnecessary that other teachers provide her with lesson plans as she was aware that they were being accountable. Ms Stewart maintained that as the applicant was often confused during her meetings with him she wrote down what they had discussed for the applicant. Ms Stewart stated that even though the applicant had the opportunity to

review other maths teachers' classes and relief would have been provided for him and Ms Stewart provided the applicant with the timetables of other maths teachers the applicant did not avail himself of this option.

72 Ms Stewart stated that she was aware that a number of teachers collaborated on a teaching programme for Term 2, 2004 including the applicant and she stated that she was happy with the programme that was developed. Ms Stewart maintained that she did not tell the applicant not to teach from this programme.

73 Ms Stewart stated that she did not advise the applicant to work part time and Ms Stewart stated that even though she was aware of the applicant's salary she claimed she did not raise the issue of the applicant's salary with him.

74 Ms Stewart stated that she observed seven of the applicant's lessons and took notes about these lessons and after each lesson she typed out her observations to give to the applicant. Ms Stewart stated that she gave the applicant 7 to 10 days notice of which lessons would be reviewed by her and other teachers and Ms Stewart stated that even though the applicant was required to submit lesson plans two days before each lesson he did not do so. Ms Stewart stated that the applicant had a good knowledge of mathematics and that his problem was teaching and imparting this knowledge to students.

75 Ms Stewart stated that whilst observing one of the applicant's classes in Term 1, 2004 she started teaching the students because the lesson had faltered and the students did not have any work to do for approximately twenty minutes. Ms Stewart stated that she did not undermine the applicant and that she wanted the applicant to succeed as a teacher. Ms Stewart stated that she had a discussion with the applicant about teaching the topic of square roots and she showed him a teaching method for this concept which had been successful in the past for her and she did not believe she was being critical of the applicant when discussing this concept with him. Ms Stewart stated that the applicant was given supportive advice at all times and Ms Stewart stated that whenever a suggestion was made about how the applicant could improve his performance he took it as a personal criticism.

76 Ms Stewart maintained that the applicant failed as a teacher because he was unable to make the connection between the content he had to teach and where students were at and that as a result students became disengaged and the PIP put in place for the applicant specifically sought to address these issues.

77 Ms Jack was the manager of operations for the respondent's Midwest District Office in 2004 and she has had extensive experience in education as a secondary science and mathematics specialist and giving support to teachers, she has worked at the tertiary level and has taught mathematics to difficult and disengaged students. Ms Jack is currently the District Director of the Pilbara Education District.

78 Ms Jack stated that in August 2004 she was asked by her District Director to provide an independent assessment of the applicant's classroom management and teaching and learning strategies and that as a result she reviewed two of his lessons (Exhibit R1/286-289). Ms Jack stated that she arranged which lessons to review with the applicant prior to the lesson taking place and Ms Jack stated that even though the applicant had an understanding of mathematical concepts he was teaching he had difficulty engaging students in learning and as a result had classroom management difficulties. Ms Jack stated that when she had a discussion with the applicant after she observed his lessons the applicant was initially calm however he then became agitated. Ms Jack stated that this behaviour was in line with observations from the local member of parliament Mr Shane Hill about the applicant and she understood that Ms Franklin would not deal with the applicant on a one on one basis any longer because of his behaviour (see Exhibit R1/201). Ms Jack stated that after observing one of the applicant's lessons she gave him written feedback about the lesson and told the applicant that some students were not listening to him. Ms Jack stated that she did not tell the applicant that he was not suited to be a high school teacher. Ms Jack stated that at the end of one of the lessons she observed, two students spoke to her and said that they had asked to be moved to another class. Ms Jack stated that every time the applicant requested documents from her they were provided and she was aware that the applicant had a meeting with the District Director after he requested this meeting.

79 Ms Meredyth McLarty has been a teacher for 32 years and was the acting Principal at PSHS when the applicant commenced teaching there on 26 April 2005. Ms McLarty stated that special consideration was given to the applicant's situation when he commenced teaching at PSHS. Ms McLarty stated that because of the applicant's prior performance issues the applicant was given two year nine classes to assist in his preparation and he had the assistance of a supernumerary teacher and she stated that teachers at PSHS were not aware that this teacher was allocated to assist the applicant. At the time the applicant ceased working at PSHS Ms McLarty was of the view that the applicant's performance was not satisfactory. Ms McLarty confirmed that the applicant was subject to a PIP when he was at PSHS.

80 Mr Burgess has had extensive experience undertaking investigations under the *Public Sector Management Act 1994* ("the PSM Act") during the last six years. He has a Bachelor of Business qualification majoring in Human Resource Management and Industrial Relations as well as a Masters Degree Business Administration. At the end of 2004 he was contracted by the respondent's Complaints Management Unit to investigate the applicant's performance and even though he was instructed to commence this process on 10 December 2004 as he had difficulty contacting the applicant and due to the applicant's illness he was instructed not to pursue interviewing the applicant until after the applicant commenced employment at PSHS on 26 April 2005. Mr Burgess stated that on 18 May 2005 he interviewed the applicant and gave him a copy of his statement on that date and the applicant reviewed the statement and returned it on or about 13 June 2005. Mr Burgess stated that when he commenced his interview with the applicant he was initially agitated but he soon calmed down. Mr Burgess stated that during his investigation he found no evidence of collusion or bias against the applicant by teachers at the College.

81 Under cross-examination Mr Burgess stated that he did not provide the applicant with background documentation given to him by the respondent nor did he provide the applicant with copies of witnesses' statements of the persons he interviewed as these were confidential. Mr Burgess stated that his normal practice was to interview the person the subject of the investigation last unless someone else is identified by that person for further interview. The report completed by Mr Burgess is at Exhibit R1/45-158.

Submissions

Applicant's submissions

82 The applicant argues that the respondent's decision to terminate him was unfair.

83 The applicant submits that he was employed by the respondent from 1999 through to September 2005 under a number of rolling fixed term contracts and therefore had an ongoing expectation of employment with the respondent.

84 The applicant argues that a number of issues contributed to him experiencing difficulties at the College. The applicant argues that soon after he commenced employment at the College at the start of 2004 he experienced difficulties with Ms Stewart and Ms Carey and these problems made it difficult to work at the College and had a resultant negative impact on his performance. The applicant claims that Mr Pilkington never addressed his concerns about his line managers, he argues that Mr Pilkington treated him unfairly when he denied him a transfer to a different sub-school and the applicant claims that he received contradictory information from Mr Pilkington about his teaching ability. The applicant argues that Ms Pilkington invited students to complain about him, he believed that Ms Pilkington was deliberately looking for reasons to criticise him and the applicant claims that Ms Pilkington's evidence was deliberately framed to paint the applicant in the worst light possible and that she made up evidence. Concerns about the applicant's standard of English literacy were never addressed by the College as he did not undergo any training or professional development or receive any assistance to improve his level of English and the applicant believes that his treatment at the College negatively impacted on his health. The applicant argues that after he was advised by Ms Stewart to work part time and refused to do so Ms Stewart reviewed the applicant's classes closely. The applicant was upset by the requirement to provide Ms Stewart with lesson plans for each lesson he taught and this contributed to a difficult working environment for the applicant. The applicant also argues that Ms Stewart made no effort to overcome her communication breakdown with the applicant. The applicant was further disadvantaged as he was not provided with a programme or syllabus and Ms Stewart ordered the applicant not to use the mathematics textbook. The applicant argues that he was undermined when Ms Stewart criticised his teaching which in one instance occurred during of one of the applicant's classes and the applicant argues that his attempts to discipline students were undermined by Ms Carey. The applicant claims that criticisms levelled against him were trivial and minor and argues that he was singled out because he was the only person who had to seek permission from his sub-school leader to leave the school premises. The applicant argues that the decision not to transfer him to an alternative sub-school was inflexible and the applicant claims that he was unable to participate in any off campus professional development. The applicant also argues that the professional development that was offered to the applicant was of a general nature and not specific to the respondent's concerns about the applicant's teaching.

85 The applicant submits that the evidence given by the applicant's line managers was disingenuous when they stated that their aim was to assist the applicant to become a satisfactory teacher and the applicant claims that he was given insufficient support to improve his teaching.

86 The applicant argues that Ms Jack lacked sufficient independence to be involved in the applicant's PIP process and the applicant argues that as Ms McLarty did not observe any of the classes taught by the applicant she was therefore unable to comment about his performance.

87 The applicant argues that the failure to call Ms Carey as a witness invites an inference that the evidence that she was likely to give would have damaged the respondent's case and applicant argues in the alternative as there was no evidence to contradict the applicant's evidence about his interactions with Ms Carey the applicant's evidence must be accepted. The applicant argues that this is also the case for Ms Beth Aitken who was the applicant's Principal at PSHS.

88 The applicant argues that the respondent failed to provide the mandated minimum number of days for the PIP and claims that the outcome of the PIP was pre-determined.

89 The applicant submits that the respondent failed to take into account a number of relevant considerations when deciding to terminate him. The applicant was a very experienced teacher who was well versed in the area of mathematics, the applicant's difficulty in developing a rapport with students was due to a lack of support when disciplining students and constant petty criticisms and the respondent failed to take into account the lack of support networks available to the applicant in Geraldton and at the College. The respondent also failed to take into account the stress related condition that the applicant was suffering and the effect that the applicant's medical condition was having on his ability to perform his duties, the availability of alternative remedies and the applicant's improved performance whilst teaching at PSHS. The applicant argues that a number of considerations should have been taken into account by the respondent when deciding to terminate the applicant including Ms Pilkington's antipathy towards the applicant as evidenced by her lack of support and efforts to invite complaints from students about the applicant and the applicant argues that there was an apprehension of bias on Ms Pilkington's part and that she supported the efforts of her friend Ms Stewart in undermining the applicant and persuading her husband Mr Pilkington to assist in achieving the predetermined outcome of the applicant's PIP. Even though Ms Pilkington was removed from the PIP process this occurred late in the PIP process.

90 The applicant argues that he was disadvantaged as Mr Burgess did not provide any of the witness statements to him, the applicant claims that Mr Burgess was not sufficiently independent to conduct a proper review and the applicant maintains that a complaint made by a parent at the College should not have been investigated as part of the review undertaken by Mr Burgess.

91 The applicant argues that prior to reaching a decision to terminate him the respondent did not adequately consider the applicant's future employment prospects which are substantially reduced given that the respondent is the largest employer of teachers in the State. The applicant argues that the respondent failed to make use of alternative remedies and failed to provide the applicant with particulars about the basis upon which a decision was made to terminate him. The applicant submits that his difficulty teaching Year 8 and 9 students ought to have been taken into account when determining an appropriate penalty, for example allowing the applicant to teach upper school classes in another school.

92 The applicant is seeking reinstatement of his employment and compensation for loss of earnings.

93 The applicant requests an opportunity to make submissions about final orders if the Commission finds that he has been unfairly terminated.

Respondent's submissions

94 The respondent argues that it had good reason to terminate the applicant and did so using an appropriate process. The respondent maintains that it was appropriate to terminate the applicant as he was unable to demonstrate the capacity to discharge the inherent functions of a teacher and the obligations on him pursuant to s64 of the *School Education Act 1999*.

95 The respondent argues that the applicant was subject to an extensive, fair and well supported process which was designed to address significant concerns about the applicant's inability to undertake his duties and there was no corroboration of the applicant's claim that he was a victim of a process designed to undermine him or that he was treated unfairly. The respondent argues that despite assistance and support the applicant failed to demonstrate any significant improvement in his performance and on this basis the respondent had no alternative but to terminate the applicant.

96 The respondent argues that the applicant was not disadvantaged by the non receipt of annexures to Mr Burgess' report as he was given these documents as an attachment to a letter from Mr Alby Huts to the applicant dated 10 December 2004 and the respondent argues that Mr Burgess did not place any significance on the complaint by a parent that the applicant claims should not have been investigated.

97 The respondent argues that there was no bias shown against the applicant during his time at the College as a result of the close personal relationship between a number of the teachers at the College and the respondent argues that there is no documentation associated with the applicant's difficulties at the College confirming any bias. The respondent claims that as five different employees monitored the applicant's performance this demonstrated the efficacy of the process. Furthermore, Ms Pilkington was removed from the process in August 2004 at the applicant's request and an experienced maths teacher from outside of the College provided an independent review of the applicant's performance.

98 The respondent's witnesses from the College testified that at all times the aim of the applicant's PIP was to support the applicant to become a satisfactory teacher and a range of steps were taken to ensure a positive outcome for the applicant. The respondent argues that the applicant was offered both general professional development courses and courses which would specifically address concerns that had been raised with him and claims that the applicant did not avail himself of these opportunities.

99 The respondent argues that the applicant did not formally raise the issue of his health problems contributing to his poor performance at any time with his line managers and that any reference the applicant did make to health issues was made in passing and the respondent maintains that when the applicant raised concerns about his health it was never raised as an issue that would impact on the process relating to the management of his performance.

100 The respondent maintains that the applicant was subject to a reasonable performance review process and the respondent argues that the reduction of four days of the applicant's PIP 2 was unavoidable and arose as a result of the applicant's actions as he was unable to return to the College after 31 August 2004. The respondent argues that it was not possible for the applicant to complete PIP 2 because of his altercation with Mr Pilkington and the resultant direction that he remain away from the College. There was therefore no opportunity for PIP 2 to run its full course. Notwithstanding the lack of four extra days for the applicant to improve his performance the respondent argues that this did not materially affect the process as there was no evidence that improvements had been noticed in the applicant's performance during PIP 1 and PIP 2. The respondent maintains that the applicant was fully informed about the respondent's concerns about his performance during the PIP process and the time leading up to his termination and he was given the right of reply at each stage of this process.

101 The respondent argues that Ms Stewart and Ms Carey worked hard to support the applicant and there was no evidence to support the applicant's claim that Ms Stewart advised him to switch to part time employment. The applicant was only required to submit lesson plans once formal procedures for the managing of his unsatisfactory performance commenced and Ms Stewart gave evidence that the applicant was encouraged to use text books. Ms Stewart gave evidence that the applicant was offered support to improve his English but he chose not to take up this option and the respondent argues that the allegations concerning the applicant's teaching difficulties centred on the core functions of teaching and did not relate to his command of English. Additionally, the applicant was required to seek permission from his sub-school leader to leave the school because he continually breached his duty of care by returning late to the school grounds.

102 The respondent argues that Mr Pilkington had a reasonable basis not to transfer the applicant to a different sub-school and this refusal did not have a negative impact on the applicant being able to demonstrate being a successful teacher. The respondent argues that the evidence does not sustain the applicant's argument that parental complaints against the applicant were solicited and Mr Pilkington's reference to advising parents to put their complaints in writing was an explanation about the College's policy when complaints are made about teachers.

103 The respondent argues that the evidence demonstrates that the applicant experienced similar difficulties at PSHS that he experienced at the College and the respondent argues that Ms McLarty was in a position to make an accurate and unbiased judgement as to the applicant's teaching capabilities when he taught at PSHS.

104 The respondent argues that the process adopted to review the applicant's performance and assist him to improve during PIP 1 and PIP 2 ended with the applicant not being able to demonstrate any capacity to discharge the inherent functions of a teacher and on this basis the respondent had no option but to terminate the applicant.

Findings and conclusions

Credibility

105 I listened carefully to the evidence given by each witness and closely observed each witness.

106 I have concerns about the evidence given by the applicant. In my view the applicant was not convincing when he claimed that the support given to him by his line managers to assist him with his performance was inappropriate and that his performance was constantly being unfairly criticised. I find that the weight of evidence on this issue is against the applicant's claim given the substantial amount of documentation given to the applicant detailing feedback and strategies designed to assist the applicant to improve his performance which in my view were based on realistic assessments of the applicant's performance. I also doubt the applicant's evidence that he was denied access to resources to effectively teach his classes as again the weight of evidence in this regard was against the applicant. The applicant made a number of assertions about being poorly treated by his line managers at the College yet no evidence was tendered to corroborate these claims and there was no written or oral evidence supporting the applicant's claim that his line managers at the College were acting in concert to conspire against him to ensure that he did not succeed. In my view the applicant was deliberately not forthcoming when giving evidence in chief about his interactions with Mr Pilkington on 31 August 2004 which indicates that the applicant was not being candid when giving evidence about this incident (see Exhibit R1/241). Additionally, the applicant's claim that his teaching performance whilst at PSHS was excellent was not supported by the documents relevant to the period he taught at PSHS (see Exhibit R1/554, 543-553, 541-554, 533-4, 526-530, 522, 521, 520, 518-19, 517,514-15). I also doubt the applicant's claim that he did not sign a lesson plan dated 3 August 2004 as his signature on this document is similar to his signature on other relevant documents (transcript page 93). In the circumstances I doubt the veracity of the evidence given by the applicant.

107 I find that the evidence given by all of the respondent's witnesses in these proceedings was given honestly and to the best of their recollection and in my view each witness gave evidence which was considered and furthermore was consistent with the evidence given by other witnesses for the respondent. Also a significant amount of documentary evidence supported the evidence given by these witnesses. On this basis I have no hesitation accepting their evidence.

108 In the circumstances where there is any inconsistency in the evidence given by the applicant and the respondent's witnesses I have no hesitation in preferring the evidence given by the respondent's witnesses.

109 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.

110 In *Geoffrey Johnston v Ron Mance, Acting Director General of Department of Education* (2002) 83 WAIG 1553 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."

111 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.

112 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(5) 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."

113 The applicant had been employed by the respondent for less than two years when he commenced at the College and it appears therefore that the applicant was on probation when he was terminated (see Clause 12 of the *Government School Teachers' and School Administrators' Certified Agreement 2004*). 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)."

114 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."

115 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).

116 In *Public Employment Industrial Relations Authority v Ors v Public Service Association of New South Wales (re Scorzelli and Ors)* (1993) 49 IR 169 at 184 the issue of the requirement to adhere to mandatory provisions contained in statutes and regulations covering the Public Sector was canvassed. In this decision, the Full Court concluded:

> "In our opinion the requirement of cl 27(2) to provide particulars is mandatory having regard to the purpose and nature of the whole scheme; that scheme reflects the seriousness of the subject matter of disciplinary action and its consequences The structure of the process afforded by the *PSM Act* and Regulation, namely, the division of the process into a preliminary inquiry (before or after a charge is made), the provision of a report of the results of the inquiry and, if it is decided to proceed further with the inquiry, the notification to the officer in writing of the charge (or any amended or further charge) *AND* the particulars thereof *AND* a copy of the report *BEFORE* proceeding further with the inquiry make it abundantly clear that it is fundamental and a condition precedent to subsequent action that the prior procedures be scrupulously observed. Indeed it may be considered that the legislative scheme is overly detailed and intricate. But that simply confirms the importance which the legislation attaches to the subject matter. The scheme is obviously designed to ensure that the officer concerned is given every opportunity of answering any allegations and/or charges made and that they are thoroughly investigated. For those purposes to be fulfilled it is necessary for the officer to be fully aware of the precise charge and its component particulars so that the officer may properly defend or answer them. In our opinion, the legislative scheme offers a more streamlined, less legalistic, procedure than that which obtained under the *Public Service Act* 1979, but it cannot be construed as imposing no, or only a partial, duty to comply with its requirements, breach of which could result in a slipshod, "cavalier" ((sic) to use Hunt J's adjective in *Etherton v Public Service Board* [1983] 2 NSWLR 297; 6 IR 323 attitude to procedure."

117 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.

118 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 I find that it was appropriate for the applicant's line managers at the College to determine that the applicant's performance was substandard in the areas of teaching skills, planning and preparation, professional characteristics, assessing and reporting on student outcomes and classroom management skills and that as at 31 August 2004 it was open to Mr Pilkington to refer the issue of the applicant's substandard performance to the respondent for further consideration. I am also of the view that after the issue of the applicant's substandard performance was referred to the respondent by Mr Pilkington, the respondent dealt with the issues surrounding the applicant's substandard performance in line with the requirements under the PSM Act and the respondent reviewed relevant documentation about the applicant's performance including the report completed by Mr Burgess and I find that the respondent took into account relevant considerations prior to determining that it was appropriate to terminate the applicant due to his substandard performance.

119 Paragraph 2 sets out the background to this application.

120 I find that prior to coming to Australia in late 1990 the applicant taught mathematics for a number of years in Egypt and I accept that the applicant has qualifications in the area of mathematics.

121 It was not in dispute that the applicant was initially appointed by the respondent as a temporary teacher at MMDHS from 17 May 1999 to 22 December 1999 and this was extended to 19 December 2001 on 11 August 1999 (see Exhibits R1/509 and 510). However, it appears that the applicant's temporary contract was terminated at the end of 1999 due to an unsatisfactory performance report (Exhibit R1/508). Even though the applicant gave evidence that his performance at MMDHS was not unsatisfactory given my views on witness credit I reject this claim. The applicant next taught at KSHS for five months on two fixed term contracts (21 July 2003 to 19 December 2003). I find that the applicant was then appointed on a two year fixed term contract to teach mathematics at the College from 29 January 2004 onwards however the applicant only remained at the College until 31 August 2004 when he was stood down by the respondent.

122 I find that immediately after commencing employment at the College the applicant's immediate line manager Ms Stewart gave the applicant the standard induction for new teachers and she also gave the applicant extra support in Term 1, 2004 as the applicant was to some extent unfamiliar with teaching in Western Australia. I find that this support consisted of Ms Stewart regularly spending time with the applicant to assist him to become familiar with College procedures and to ensure that the applicant was aware of what was expected of him as a mathematics teacher with respect to lesson planning and classroom management.

123 I find that early in 2004 it became apparent to the applicant's line managers, specifically Ms Stewart, Ms Pilkington and Ms Carey that the applicant was experiencing difficulties with his teaching and ensuring that his students were appropriately managed. I find that when these deficiencies became apparent the applicant was given a substantial amount of support and useful feedback by experienced and qualified teachers under the College's standard performance management processes. I also find that given the applicant's lack of response to instructions and feedback Ms Stewart recorded the expectations required of the applicant and gave the applicant copies of this documentation. I also find that Ms Carey and Ms Pilkington gave the applicant assistance with his lesson planning and feedback in order to improve his performance and meet the needs of his

students (see Exhibits R1/499-503, 490-98, 489, 467, and 466) and I find that Mr Pilkington also assisted the applicant in Term 1, 2004 with both personal and professional issues.

124 I find that in addition to feedback and support designed to assist the applicant to improve his performance he was given a substantial amount of assistance by his line managers to help him to cope with the general demands of teaching at the College including issues such as report writing. I find that the applicant's line managers, in particular Mr Pilkington, Ms Pilkington and Ms Stewart handled issues relating to the applicant's personal and teaching issues in a considered, sympathetic and professional manner and even though Mr Pilkington rejected the applicant's request to transfer to a different sub-school I accept Mr Pilkington's evidence that this move would have been disruptive to both staff and students.

125 I find that by May 2004 it became apparent to the applicant's line managers that the extensive support, feedback and assistance already given to the applicant had not resulted in the required improvements and the applicant was continuing to experience difficulties with his teaching particularly in the area of classroom management and ensuring that students were learning the requisite curricula and in meeting the general requirements of a teacher at the College. I find that as a result Mr Pilkington decided that the applicant should be subject to a PIP which commenced on 14 June 2004 and continued until 27 August 2004. I find that even though Mr Pilkington had serious concerns about the applicant's performance in five main areas – planning and preparation, assessing and reporting on student outcomes, teaching skills, classroom management skills and professional characteristics – he decided to allow the applicant to focus on two of these areas during the PIP process and I accept Mr Pilkington's evidence that if the applicant showed improvement in these two areas the PIP process would have ceased and the applicant would have continued teaching at the College.

126 I find that the respondent complied with the requirements under the Policy when handling both of the applicant's PIP periods. The Policy states that when a PIP is established it shall address identified areas of unsatisfactory performance and assist the employee to obtain a satisfactory standard of performance. 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 for the duration of the 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 the applicant's PIP was finalised in consultation with the applicant and with the applicant having the assistance of a support person and I find that his PIP was specifically designed to assist the applicant to meet the required performance standards in the two areas identified. I find that the assistance available to the applicant during his PIP formed part of a co-ordinated and systematic process which was designed, in collaboration with the applicant, to assist the applicant to improve his performance in the required areas. I find that Ms Pilkington, Ms Stewart and Ms Jack provided appropriate and relevant feedback to the applicant during his PIP so that he could improve his performance within the required timeframes and that Ms Stone, who was specifically trained to assist teachers with classroom management difficulties, also gave feedback to the applicant (see Exhibits R1/444-5, 441, 439, 433-5, 432, 429-431, 427-8, 426, 411-14, 409-10, 408, 403-5, 401, 398-400, 387-97, 374-86, 364-71, 363, 362, 356-60, 354, 354A, 353, 346-51, 339-342, 338, 336, 332-4, 331, 328-30, 326, 321, 312-18, 310, 304-7, 298-9, 296-7, 292 and 286-90). I find that whilst at the College and in particular during the PIP process the applicant was given the opportunity and time to review lessons given by other teachers but he failed to avail himself of this assistance and I also find that as part of the monitoring and support process undertaken by the applicant's line managers to assist the applicant, he was required to submit lesson plans to Ms Pilkington and Ms Stewart for feedback prior to giving his lessons, however notwithstanding this support in most instances the applicant failed to comply with this requirement.

127 I reject the applicant's complaint that because of the reduced timeframe of PIP 2 he was denied a proper opportunity to demonstrate the required improvements in his performance. I find that the applicant was given an adequate timeframe to improve his performance during both PIP 1 and PIP 2 and it is my view that the reduced timeframe of PIP 2 did not disadvantage the applicant. As at 31 August 2004 the applicant had already been given the benefit of 36 days of monitoring, support and feedback to improve his performance before he left the College on 31 August 2004, as opposed to the standard 20 days, and based on Mr Pilkington's assessment of the applicant's performance in his letter to the applicant dated 31 August 2004 I find that during this extended PIP timeframe the applicant made little if any progress in the required areas. Furthermore, I find that it was because of the applicant's poor behaviour and lack of co-operation that eventuated in the applicant failing to complete PIP 2. I accept the evidence given by Mr Pilkington that the applicant returned to school on 31 August 2004 after having a week off on sick leave after an altercation with a parent and that soon after commencing work that day the applicant became upset after becoming aware of a complaint made about him by a fellow maths teacher, Mr Molina. I find that the applicant left his classroom and went to Mr Pilkington's office and abused and threatened Mr Pilkington using foul language. I find that when Ms Jack overheard this altercation she phoned the District Director who contacted Mr Pilkington on his mobile phone and told Mr Pilkington to stand the applicant down from teaching at the College with immediate effect and to escort him off the premises, which he did. In the circumstances it is my view that the applicant cannot now complain about his inability to complete the full period of PIP 2. It is also clear from documentation tendered in these proceedings that the applicant was not allowed to return to the College as the respondent had a concern for the welfare of the applicant's students and his colleagues given the applicant's aggressive and threatening behaviour towards Mr Pilkington (see Exhibit R1/214, 219-20, 229, 232, 240, 241 and 244-50). In any event I find that the applicant's performance would not have improved to the required standard if he had worked the four remaining days of PIP 2 as there was no evidence that the applicant had demonstrated any improvements in his performance up to 31 August 2004 whilst undergoing PIP 1 and PIP 2.

128 I find that the applicant was afforded procedural fairness during the PIP process. I find that the applicant was given the opportunity to discuss feedback about his lessons with his line managers after they reviewed his lessons and I find that the applicant had a support person in attendance at the meeting to review his performance held on 29 July 2004. The applicant also had a meeting with a SSTU representative to discuss his situation and I accept Ms Pilkington's evidence that she did not make it difficult for the applicant to seek out and obtain assistance from his union representative. In the event the applicant gave evidence that he had a meeting with Ms Franklin for 40 minutes and Ms Pilkington gave evidence that the applicant met Ms Franklin for nearly two hours.

129 I reject the applicant's claim that his line managers at the College conspired against him to ensure that he was unable to perform successfully at the College and that as a result he had no chance of convincing his line managers that his performance could improve. I find that apart from these claims by the applicant, whose evidence I have found to lack credibility, there was no evidence that there was any conspiracy between Mr Pilkington and Ms Pilkington notwithstanding their close relationship, nor any collusion between Ms Pilkington and Ms Stewart to disadvantage the applicant. In any event, and at the applicant's request, Ms Pilkington was removed from the PIP process and replaced by Ms Jack who I regard to be a suitably qualified and independent person to give the applicant feedback. I find that Ms Jack was sufficiently removed from the process to be able to make an objective assessment about the applicant's performance and it was her view that the applicant's performance was unsatisfactory after observing two of his lessons (see Exhibit R1/286-89). I also reject the applicant's claim that he was not supported when disciplining students as there was no evidence to verify these claims. I do not consider the applicant's health to be a major issue which negatively impacted on his performance as there was no evidence that this was a serious issue until the applicant's altercation with Mr Jackson on 23 August 2004. Even though the applicant's health deteriorated towards the end of PIP 2 I conclude that by this stage the applicant had been given sufficient time to address any performance concerns and issues. The applicant gave evidence that he felt stressed by the PIP process however it is my view the applicant must take some responsibility for this situation given his lack of co-operation with what was expected of him during the PIP process. I also take into account that there was no evidence tendered at the hearing confirming that the applicant had been in receipt of workers' compensation payments as a result of the actions of the respondent or the way in which he was treated by his line managers whilst at the College.

130 The applicant made a number of claims about poor treatment by his line managers at the College and he claimed that as a result this resulted in him experiencing difficulties at the College and he therefore claimed that the problems he experienced teaching his student were not of his own making. I find on the evidence that the applicant had difficulty accepting useful and positive feedback about how he could improve his performance and it is my view that the applicant was reluctant to meet a number of the expectations required of him with respect to his teaching. I also find that the applicant made little effort to comply with College procedures and processes as evidenced by his refusal at times to return to the College in time for his lessons when he left the college to attend to personal matters and I reject the applicant's assertion that he was singled out by having to let Ms Carey know that he was leaving the College during work time. In reaching this view I accept Mr Pilkington's evidence that the requirement on the applicant to advise Ms Carey when he was leaving and returning to the school arose because the applicant was often absent from the College during his DOTT time and when he returned he was sometimes late for his classes.

131 I reject the applicant's claim that the College should have arranged for the applicant to attend a specific professional development course to improve his level of English literacy as I accept Ms Stewart's evidence that the applicant's communication problems mainly related to the way in which the applicant presented his lessons and not his accent. Additionally, it is my view that after reviewing documentation generated by the applicant during his time at the College in response to issues raised with him by his line managers at the College that the applicant had a reasonable grasp of English (see Exhibit R1/566-7, 565, 532, 442-3, 414-25, 335, 327, 322-25, 271-79, 253-5, 225-7, 195-6, 191, 186-7 and 179-85).

132 I find that during the applicant's time at the College, including Term 1, 2004, a number of verbal and written complaints were made about the ineffectiveness of the applicant's teaching by a number of parents which in my view supports Mr Pilkington's conclusion that the applicant was experiencing ongoing performance difficulties (see Exhibits R1/461-5, 343, 337, 303, 269-70, and 266). I accept Mr Pilkington's evidence that parents complained to him about the applicant and that the applicant was informed about these complaints and I also accept Mr Pilkington's evidence that it was unusual for parents to complain about a teacher in Term 1 of a school year. I reject the applicant's claim that the only complaints made against him by parents and students related to one group of students who were effectively ganging up on him as I accept Mr Pilkington's evidence that over a reasonably lengthy period of time a number of other parents approached him with complaints about the applicant. I also find on the evidence that none of the applicant's line managers, including Mr Pilkington, solicited complaints from parents about the applicant and that the applicant's line managers did not undermine the applicant when dealing with disciplinary issues concerning the applicant's students.

133 I reject the applicant's claim that he had an ongoing expectation of work with the respondent as he was employed by the respondent on a series of fixed term contracts as the applicant was not employed by the respondent on end to end contracts prior to commencing employment at the College. In any event the applicant's ongoing employment with the respondent was subject to the applicant demonstrating satisfactory performance.

134 The applicant maintained that the failure to call Ms Carey to give evidence should invite the Commission to infer that her evidence would have been unhelpful or in the alternative the applicant's evidence about his interactions with Ms Carey should be accepted. As I have serious concerns about the credibility of the applicant's evidence in general I do not accept the applicant's evidence about his interactions with Ms Carey. In reaching this view I also take into account that the weight of evidence is against the applicant in relation to his views about how he was treated by his line managers at the College.

135 I accept Mr Pilkington's evidence that the applicant's performance had not improved to a satisfactory standard as at 31 August 2004 and I therefore find that it was open to Mr Pilkington to determine that the applicant's performance was substandard in the areas of teaching skills, planning and preparation, professional characteristics, assessing and reporting on student outcomes and classroom management skills and that the applicant's substandard performance should be referred to the respondent for consideration.

136 I reject the applicant's claim that his performance at PSHS was satisfactory. I find that documentation tendered at the hearing confirmed that the applicant was unable to fulfil a range of day to day requirements on him as a teacher when he taught at PSHS (see Exhibits R1/514-522, 526-30, 533-4 and 541-55). In my view these documents clearly indicate that the applicant was experiencing performance difficulties at PSHS similar to the performance issues he had at the College and some

documents also confirm that the applicant had difficulty accepting feedback and advice about his lessons which was also the case during the applicant's time at the College.

137 The agreement provides at Clause 12.1 that all employees appointed by the respondent shall be employed on probation for a period not exceeding two years, with an option to extend this period for two further terms. The applicant had been employed by the respondent for approximately twelve months prior to being appointed at the College and I therefore find that the applicant was on probation during 2004. When applying the authorities relevant to probationary employment I find that the applicant was given sufficient opportunity and support to demonstrate that he was able to fulfil the teaching and professional standards required of him at the College and that he was given sufficient feedback and assistance to meet these requirements. I find that the applicant also had the opportunity to attend professional development sessions to assist him with his teaching and could review other teachers' lessons however the applicant did not avail himself of these opportunities. In all of the circumstances it is my view that the applicant has not demonstrated that his probationary status warranted the respondent continuing to employ him as at 21 September 2005. In reaching this view I also take into account that the applicant had prior experience teaching mathematics as he had taught in this area for several years prior to coming to Australia. In the alternative if the applicant was not on probation at the time he was terminated I find that in any even the applicant's performance was substandard and in the circumstances it was therefore open to the respondent to terminate the applicant.

138 I find that the process undertaken by the respondent in order to review and effect the applicant's termination in the main conformed with the required statutory elements and that some minor omissions in the process were not such as to invalidate the whole process. I find that as required under s79(5) of the PSM Act an investigation was undertaken by Mr Burgess into whether or not the applicant's performance was substandard. I accept that Mr Burgess interviewed the applicant using a fair process and that after the interview the applicant was given a copy of this statement to review and to make any alterations. Even though Mr Burgess did not provide the applicant with background documents provided to him by the respondent this was not raised as an issue by the applicant. In any event the assertion by the respondent's representative that these documents were sent to the applicant in December 2004 prior to being interviewed by Mr Burgess was not contested by the applicant. I accept that Mr Burgess did not place any reliance on the applicant's altercation with a parent, Mr Jackson, when forming the view that the applicant's performance was substandard and I conclude that Mr Burgess' investigation was completed in an independent and unbiased manner. I have some difficulty that the witness statements of the persons whom Mr Burgess interviewed were not provided to the applicant, however as all of the persons Mr Burgess interviewed gave evidence in these proceedings I find that this issue has since been overtaken.

139 I find that after the respondent received the report of the investigation undertaken by Mr Burgess it reviewed the findings made by Mr Burgess and documentation relevant to the applicant's performance and behaviour and determined that the applicant should be terminated. After reaching this conclusion the applicant was then given the opportunity to respond to this decision and to the issue of penalty and did so on 9 August 2005 (see Exhibit R1/33). I find that after receiving this correspondence and considering the issues raised by the applicant it remained open for the respondent to determine that in all of the circumstances the applicant should be terminated as the applicant's performance at the College had been substandard in two critical areas and the standard of the applicant's performance remained questionable in three other areas planning and preparation, professional characteristics and assessing and reporting on student outcomes which are fundamental to being a successful teacher. In any event I find on the evidence that notwithstanding that the applicant's performance was substandard it was open for the respondent to terminate the applicant for gross misconduct as it is my view that the applicant misconducted himself and breached his contractual obligations to the respondent when he abused and threatened Mr Pilkington using foul language on 31 August 2004. I have reached this conclusion on the basis that it is my view that the applicant's actions towards Mr Pilkington on this date were inappropriate, unprovoked and unwarranted.

140 In the circumstances and when applying the relevant authorities I find that the applicant's claim that he has been unfairly terminated is without merit and should be dismissed.

2006 WAIRC 04787

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	EDWARD MICHAEL
	APPLICANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION AND TRAINING
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	MONDAY, 24 JULY 2006
FILE NO/S	U 116 OF 2005
CITATION NO.	2006 WAIRC 04787

Result	Dismissed

Order

HAVING HEARD Mr S Millman of counsel on behalf of the applicant and Mr D Barnes on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders –

THAT the application be and is hereby dismissed.

(Sgd.) J L HARRISON,
[L.S.] Commissioner.

2006 WAIRC 04774

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JACLYN PEACH
	APPLICANT
	-v-
	SUN BLOCK BLINDS
	RESPONDENT
CORAM	COMMISSIONER S WOOD
HEARD	WEDNESDAY, 28 JUNE 2006
DELIVERED	FRIDAY, 14 JULY 2006
FILE NO.	B 307 OF 2006
CITATION NO.	2006 WAIRC 04774

CatchWords	Contractual benefits claim - Entitlements under contract of employment - Commission - Counterclaim - Industrial Relations Act 1979 (WA) s.29(1)(b)(ii)
Result	Commission to be paid
Representation	
Applicant	Ms J Peach
Respondent	Mr J Clark

Reasons for Decision

1 This is an application made pursuant to s.29(1)(b)(ii) of the *Industrial Relations Act 1979* ("the Act"). The applicant particularised her claim as follows:

Customer	Invoice number	Amount
Twin Palm Holdings	5394	745.00
I Palgrave	5402	3422.00
W Taylor	5408	667.27
M Wood	5411	3149.05
J Clarke	5415	1710.91
S Hegarty	5418	1724.55
E Rodgers	5419	359.09
Weightman	5427	4220.00
Ameduri Developments	5437	6669.08
S Edwards	5438	3118.18
J Reid	5440	552.73
P Creighton	5441	3269.09
J Austin	5444	1688.00
J Austin	5444	759.00
G Robertson	5453	5589.10
D Van Oosten	5455	1460.00
I Nelson	5460	304.55
V Murphy	5464	759.09
N Stewart	5489	1418.18
B Shore	5490	2954.55
P MacPherson	5494	347.27
M Newsome	5498	1185.45
D Sykes	5499	1058.18
S Low	5503	522.73
Silverton & Pitt	5517	1996.36
F Dawson	5520	5935.45
K Browne	5524	354.55
J Webb	5526	2746.25

Customer—*continued*	**Invoice number**	**Amount**
Craike	5528	7013.64
AJM Constructions	5530	3401.07
J Tomas	5531	1797.00
M Thomas	5535	994.55
D Slade	5539	266.36
K Vigus	5541	3246.36
D Del Borrello	5544	1500.00
S Fernback	5551	1790.91
N Pateman	5557	1318.18
D Hannah	5558	3371.82
J & S Richmond	5560	1197.27
J & S Richmond	5561	347.27
Schwenke Young Real Estate	5570	2166.36
Schwenke Young Real Estate	5571	2318.18
Schwenke Young Real Estate	5572	2008.18
S Blakeley	5577	1875.45
Sterrett	5585	1623.00
J Halliday	5589	1750.00
F Rika	5595	1811.82
D Moir	5598	1524.55
AA Decorators	5600	1411.82
A Ward	5602	1622.73
G Fareone	5603	1635.45
I Dillon	5606	990.91
Lamond	5608	2778.00
L Cathcart	5609	438.18
V Fisher	5613	13.85
M Taylor	5616	677.27
L Bosman	5622	242.73
S Harling	5624	425.59
K Leete	5628	1562.73
Gangemi	5630	4854.55
L Ruah	5636	9.25
McGowan	5639	1496.36
C Lippiat	5644	1196.36
Passamani	5656	3939.09
Not including GST		Total $123,302.50
		x 3% $3699.07

2 Both parties agree that the contract provided for commission payable of 3% on the sale. The respondent, following a directions hearing which the respondent failed to attend, was directed to provide the contract to the Commission. This was not produced. I do not need to recite all of the evidence, it can be summarised as follows. Mr Clark, the respondent's Sales Manager, represented the respondent at hearing. He says that incentives are paid to sales staff on the successful completion of a sale. If an error occurs in a sale, which has been caused by the sales consultant, then the commission is not payable. He says that all of the commissions claimed are not payable. He says also that the respondent is continuing their investigation into Ms Peach's sales and that the respondent may pursue its own 'legal agenda'.

3 In the respondent's view, the claims fall into categories as follows:

Paperwork: 5314, 5413, 5437, 5411, 5444, 5418

Misquote: 5528, 5558, 5656, 5517, 5531

Problem in sale: 5576, 5600, 5644, 5526, 5453

No commission sale: 5598, 5602, 5606, 5608

Work done by another consultant: 5402, 5415, 5455, 5460, 5520, 5530, 5557, 5585,

All other claims are not disputed (Transcript p.28), except that the respondent says they are not due because there are other matters under investigation, which have caused the respondent problems or costs, and these would offset the claimed amounts.

4 This means that those claims specified are not payable, in the respondent's view, because either Ms Peach did not complete properly the paperwork, misquoted the sale, a problem (eg. a wrong colour) arose in the sale, the sale was a clearance sale where no commission was payable, or the sale belonged to another sales person.

5 Mr Clark says that the sales people know that if they cause a problem with a job, that is their responsibility, then they do not get paid for the job. The sales people are told this. He admits that the applicant has not been told this at this point in time, "on these particular jobs" (Transcript p.30). Ms Peach says that she understood that if there was an error she would be paid commission on the remainder of the profit. She says that she was never told that she would be penalised by having money deducted from another job; or if an error was made down the track (eg. in fitting) that she would be penalised for that. Mr

Clark says that the respondent seeks to counterclaim for damages from the applicant which at this stage amounts to $3,300. This seems to relate to monetary loss and loss of goodwill.

6 Ms Peach says that the claim includes all her sales for which she was not paid commission, whether or not the job was fitted at the time her employment ceased. She says that Mr Clark told her at that time that she would not be paid commission until all the jobs were fitted. Ms Peach says that any errors made on a job 'down the track' could hardly be her responsibility. She denies that there were errors in her paperwork which led to losses on jobs. She says that customers signed for the goods ordered. Ms Peach says that when another sales consultant left, Emil (i.e. the Manager) told her that she could have all of Jenny's jobs. She says also that she was never told that she would not get commission on clearance sales. She says that she was paid a lower wage than other sales persons and she accepted that as she would receive a 3% commission.

CONCLUSION

7 This matter satisfies each of the criteria required for a claim pursuant to s.29(1)(b)(ii). The Full Bench in *Hotcopper Australia Ltd v David Saab* 81 WAIG 2704 @2707 specified those criteria as follows:

> "The limitations (and/or conditions precedent to the exercise of jurisdiction and/or power) include the following:-
>
> (a) The claim must relate to an "industrial matter", as defined in s.7 of the Act.
>
> (b) The claim must be made by an "employee", as defined in s.7 of the Act.
>
> (c) The benefit claimed must be a contractual benefit, i.e. the claimant must be entitled to the claim under his/her contract of service.
>
> (d) The subject contract must be a contract of service.
>
> (e) The benefit must not arise under an award or order of the Commission.
>
> (f) The benefit must have been denied by the employer.
>
> (See also the discussion of the nature of s.29(1)(b)(ii) claims in *Ahern v AFTPI* 79 WAIG 1867 (FB).)"

8 I have no difficulty in accepting the applicant's evidence over that of the respondent. Ms Peach responded credibly to all questions put by Mr Clark. She says that she was told by Emil that she could have Jenny's jobs. She says that she was never told that she would suffer a deduction from commission for errors in jobs relating to fitting, or errors made by others. I accept this evidence. She rightly challenged the respondent to produce all the paperwork and she knew the details of each of the jobs that were covered. I am persuaded by Ms Peach's evidence.

9 The respondent in turn does not challenge directly several of the jobs, but says that they should not be paid as they are still investigating matters and wish to counterclaim for $3,300 for unspecified damages and loss to reputation. Yet the respondent says that they are still investigating the jobs. The respondent does not produce the contract as directed. I would not be surprised to find that there is no mention in the contract of any deductions from commission payments; albeit the applicant honestly says that she understood there could be deductions for her direct errors, though not those of others. She denies that she made errors on the jobs for which she claims.

10 It is clear that the applicant was paid some commissions during her employment. However, I find that the respondent has wrongly withheld each of the commissions that the applicant now claims. I have inspected the paperwork provided by the respondent and can find nothing to sustain the evidence of the respondent; except that some of the handwriting is not that of the applicant. Ms Peach agrees but says that those jobs were given to her. It would appear also that the paperwork presented to the Commission by the respondent is not complete. This complaint by the applicant is valid.

11 I find that the amounts claimed are due to the applicant under her contract of employment and that the amounts claimed have been denied to the applicant. Accordingly, I would order that the respondent pay to the applicant, within 7 days of the date of the order, the sum of $3,699.07, less any tax which is due to the Commissioner of Taxation.

2006 WAIRC 05195

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JACLYN PEACH
	APPLICANT
	-v-
	SUN BLOCK BLINDS
	RESPONDENT
CORAM	COMMISSIONER S WOOD
HEARD	WEDNESDAY, 2 AUGUST 2006
DELIVERED	WEDNESDAY, 2 AUGUST 2006
FILE NO.	B 307 OF 2006
CITATION NO.	2006 WAIRC 05195

Catchwords	Contractual benefits – Application to reopen – Speaking to the minutes – New evidence – unlikely to affect outcome – Application refused – Order issued.
Result	Application to re open dismissed
Representation	
Applicant	Ms J Peach
Respondent	Mr T Mijatovic of Counsel

Supplementary Reasons for Decision

(Given extemporaneously and supplemented)

1 The respondent applied, by letter dated 21 July 2006, to re-open the hearing following the issue of a Minute of Proposed Order and Reasons for Decision on 14 July 2006. This application was heard on 2 August 2006.

2 Mr Mijatovic, counsel for the respondent, submitted that the matter should be re-opened because there had been little delay, there would be limited prejudice for the applicant, there was new evidence to be led which would materially affect the result, the respondent had not been legally represented at hearing, there was a strong case for set-off and the applicant's own evidence supports the view that errors by her could be deducted from commission payments.

3 The additional evidence which the respondent sought to adduce was attached to their letter and included the signed contract of employment of 9 December 2005, a document entitled "Sales Incentive and Commission Structure" dated March 2006 which the respondent says is an agreed variation to the contract and was handed to the applicant on 13 March 2006, a memorandum headed "Showroom Protocol" which the respondent says is relevant to the contract and a spreadsheet relating to the applicant's commission payments with comments incorporated. The respondent submitted that this document highlighted the errors of the applicant and was relevant to a claim for set-off.

4 The applicant opposed the application and submitted that the "Sales Incentive and Commission Structure" document was not signed by her, there is no proof that she accepted the document and she left the respondent's employment shortly thereafter. She submitted that she had never seen the "Showroom Protocol" document. She submitted also that the respondent was seeking the hearing because they had not been legally represented previously, the case raised by the respondent in correspondence (*Iain Lawless v Ghirardi Restaurant Pty Ltd (ACN 081 550 469)* 81 WAIG 1222) had no relevance, the respondent had not previously followed the Commission's direction, and she left her employment soon after a dispute over Job #5411, where the client changed her mind and Mr Clark did not support her. She contacted Mr Clark about her commissions following her departure and the only change since that time has been that more jobs have now been completed.

5 The respondent submitted in reply that the "Showroom Protocol" was provided to the applicant at the commencement of her employment.

6 I rejected the application to re-open and gave reasons for so doing at that time. I do not need to re-iterate those reasons here, however, I reserved my right to add to those reasons and do so now.

7 In *Metwally v University of Wollongong* (1985) 60 ALR 68, the High Court held:

> "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."

8 The principles to be considered were enunciated by Wolff CJ in *Watson v Metropolitan (Perth) Passenger Transport Trust* [1965] WAR 88:

> "There is a dearth of authority as to the circumstances in which the court should reopen the evidence after the trial has concluded. I consider that a court should be cautious in doing so and should admit fresh evidence of this nature only when it is so material that the interests of justice require it, and the evidence if believed would most probably affect the result, and further that the evidence could not by reasonable diligence have been discovered before."

9 It is the case that both parties had the opportunity to be represented at first hearing and were not. This is not a matter that should now serve as a basis for a re-hearing. More relevantly, the respondent, it is conceded, had in their possession all of the 'new evidence', at the time of first hearing, which they now seek to present. The respondent may not have completed all their enquiries, but this is simply a lack of preparation for hearing, as opposed to not having access to the information or evidence. In fact, the respondent was directed by the Commission to bring to the first hearing the contract of employment and for what ever reason chose not to. They are then bound by their case.

10 The new evidence is said to comprise the contract. I note that the actual signed contract simply confirms the basis of the commission payments which was not in dispute at first hearing. The additional documents are then said to have relevance, are part of the contract and could affect the outcome of the matter. The "Showroom Protocol" sheds no further light on commission payments. The "Sales Incentives and Commission Structure" document is unsigned, is said to have been handed to the applicant and is said to be agreed with the applicant. These are the instructions provided to counsel for the respondent. The applicant submits, without being required to give evidence, that this document was not agreed.

11 I am content to accept that the document did not form part of the contract. I have dealt previously with the credibility of the applicant. This document could have been presented to the Commission by the respondent at first hearing. The respondent argued at first hearing that monies should be deducted for errors. This was a key issue in dispute. Seemingly, this document if it were part of the contract supports that argument. However, the document does substantially more than that. It provides that commission will only be payable for sales which exceed $15,000 (excluding GST) for the trading week. This supposed change to the contract is of itself a substantial, negative variation to the contract for the applicant; leaving aside and purported

deductions. I am not surprised then that the applicant left the respondent's employment some 4 days after being presented with the document. I consider that the document is no more than an attempt to vary the contract unilaterally. I note also that the document does not purport to operate retrospectively. If it were then to be an effective part of the contract it should only relate to errors on negligence on the part of the applicant committed after 13 March 2006. It is hard to believe that even if the document was part of the contract, and I do not accept this, then all the jobs claimed come under the new restrictions. I do not consider that the "new evidence" is likely to affect the result or that justice requires that the matter be re-opened.

12 The respondent seeks to make something of the applicant's acceptance at first hearing that she could have had deductions for errors. The applicant also gave evidence that she did make the errors and it was not correct to ascribe various alleged changes of customer requirements or paperwork defects to her. She complained rightly that the paperwork which the respondent sought to rely on was not complete. In other words, it did not provide the full picture. This was a matter vented at first hearing and determined. I doubt that the spreadsheet now provided takes me any further. The respondent also claims that this is relevant to its counterclaim or set-off. I do not accept this submission. The supposed claim for set-off was ill-formed and made during the course of giving evidence at the first hearing. The respondent had every opportunity to formalise such a claim in advance of the first hearing and for proper discovery to be directed prior to that. They chose not to do so and not to attend. In any event as decided at first hearing, I accept the validity of the applicant's claim. I doubt the validity and impact of the supposed variation to the contract, which is the basis for the counterclaim. I would dismiss the application to re-open.

13 The respondent sought at hearing that the time limit to pay the applicant commission be extended from 7 to 21 days, the applicant made no submission on this point. The time limit was subsequently extended.

14 An order will now issue.

2006 WAIRC 05189

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JACLYN PEACH
	APPLICANT
	-v-
	SUN BLOCK BLINDS
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	WEDNESDAY, 2 AUGUST 2006
FILE NO	B 307 OF 2006
CITATION NO.	2006 WAIRC 05189

Result	Commission to be paid
Representation	
Applicant	Ms J Peach
Respondent	Mr T Mijatovic of Counsel

Order

HAVING heard Ms J Peach on her own behalf and Mr T Mijatovic 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 said respondent do hereby pay within 21 days of this order, as and by way of denied contractual entitlement the amount of $3,699.07 to Jaclyn Peach, less any taxation that may be payable to the Commissioner of Taxation.

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

2006 WAIRC 04765

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GARY PHILLIPS
	APPLICANT
	-v-
	TR7 PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	THURSDAY, 13 JULY 2006
FILE NO.	B 320 OF 2006
CITATION NO.	2006 WAIRC 04765

CatchWords	Industrial Relations Act 1979 s.29(1)(b)(ii) – Jurisdictional challenge – Workplace Relations Amendment (Work Choices) Act 2005, Section 16(1) - Workplace Relations Regulations 2006, Chapter 2, Part 1, Division 2, Regulation 1.2(2), 1.2(4), – Constitutional corporation – Law of Contracts as State Law – Loan Agreement.
Representation	
Applicant	Ms J Kenny of Counsel
Respondent	Mr G Bartlett of Counsel

Reasons for Decision

1 This is a claim pursuant to s.29(1)(b)(ii) of the *Industrial Relations Act 1979* ("the Act") lodged in the Commission on 11 April 2006. Mr Phillips claims a sum of $30,000 for commission payments which he says are due under clause 5 of his employment contract. Mr Phillips says he received a salary of $50,000 per annum, plus commission payments, whilst working as an Executive Recruitment Consultant for the respondent between February 2005 and April 2006. He says the commission payments were due for the quarter ending 31 December 2005. The applicant says the respondent acknowledged the commission was due, part paid the commission, and the figure claimed represents the remaining unpaid component. The applicant entered into a 'loan' arrangement for this amount. The applicant requested that the 'loan' be terminated and the amount paid when the applicant resigned his employment.

2 The respondent's Notice of Answer and Counterproposal lodged in the Commission on 23 May 2006 states that the respondent is a constitutional corporation, the claim was lodged after the *Workplace Relations (Work Choices) Act 2005* ("Work Choices") commenced and the Commission therefore does not have jurisdiction. The respondent submits:

> "(c) Section 29(1)(b)(ii) of the IR Act provides an employee with a statutory cause of action in circumstances where the employee alleges that they have been denied a contractual entitlement by their employer. It does not impose any prima facie obligation on an employer;
>
> (d) Section 29(1)(b)(ii) of the IR Act was excluded from operation in relation to the Respondent on and from Monday, 27 March 2006 by virtue of section 16 of the WR Act;"

3 By letter dated 25 May 2006 the Commission directed the parties to provide written submissions on jurisdiction. The respondent was directed also to provide material which identified the respondent as a constitutional corporation. The respondent forwarded its submission on 9 July 2006. The applicant forwarded his submissions on 23 June 2006.

4 The applicant agrees that the respondent is a constitutional corporation and falls within the definition of employer under Work Choices. The applicant does not agree that the effect of s.16 of Work Choices, in concert with the Regulations, is to exclude this application from the Commission's jurisdiction. The relevant federal legislative provisions are s.16 and Regulations 1.2(2) and 1.2(4). They read as follows:

Section 16(1) of Work Choices states:

> "16. Act excludes some State and Territory laws
>
> (1) This Act is intended to apply to the exclusion of all 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;
>
> (b) a law that applies to employment generally and deals with leave other than long service leave;
>
> (c) a law providing for a court or tribunal constituted by a law of the State or Territory to make an order in relation to equal remuneration for work of equal value (as defined in section 623);
>
> (d) a law providing for the variation or setting aside of rights and obligations arising under a contract of employment, or another arrangement for employment, that a court or tribunal finds is unfair;
>
> (e) a law that entitles a representative of a trade union to enter premises."

Regulations 1.2(2) and 1.2(4) of Chapter 2 of the *Workplace Relations Regulations 2006* provides:

> "*Rights and obligations — general*
>
> (2) Subsection 16 (1) does not apply to a law of a State or Territory (including a law relating to appeals) to the extent to which it relates to compliance with an obligation:
>
> (a) under:
>
> (i) that law; or
>
> (ii) another law of a State or Territory;
>
> which would otherwise be excluded by subsection 16 (1) of the Act; and
>
> (b) in respect of an act or omission which occurred prior to the reform commencement."
>
> "*Termination of employment*
>
> (4) Subsection 16 (1) does not apply to a law of a State or Territory (including a law relating to appeals) to the extent to which it relates to a termination of employment that occurred before the reform commencement."

5 The applicant says that the act or omission occurred on 31 December 2005 when the payment became due or, at least no later than 15 March 2006, when the respondent acknowledged by letter its obligation to pay the cash, waived the 'loan' agreement, and agreed to pay the debt subject to the completion of certain investigations. This payment was never made. The applicant submits by letter dated 24 May 2006, when the jurisdictional obligation was first raised, that:

> "Clearly, there can be no dispute that the applicant's claim relates to compliance with an obligation in respect of an act or omission which occurred prior to the reform commencement".

The applicant relies on Regulation 1.2(2) in coming to this conclusion.

6 The respondent, in written submissions, submits that s.29(1)(b)(ii) was excluded by Work Choices on 27 March 2006 as the Act was excluded from operation for employers who are constitutional corporations. The application was brought after the commencement of Work Choices and hence is outside the Commission's jurisdiction. The exemption provided in Regulation 1.2(2) does not apply as, "the Application does not relate to the compliance with an obligation under the IR Act or another law of a State or Territory".

7 Section 29(1)(b)(ii) does not provide a statutory obligation on an employer to actually comply with the contractual terms between the employer and employee; it provides a statutory course of action for contractual breach. This course of action is separate and additional to that which exists under common law. Section 29(1)(b)(ii) does not give statutory force to the contractual obligation, as opposed to s.41 which gives statutory force to industrial agreements. The obligation arises out of the contract itself, not a statute.

8 The common law of contracts is a law of the Commonwealth and not the States. Hence the common law is beyond the scope of Regulation 1.2(2). In any event, a common law action may be taken in the civil courts. The jurisdiction of the Commission is a limited one, namely to hear denied contractual benefit claims. This jurisdiction no longer applies in respect to the respondent due to Work Choices.

9 In any event, the application is beyond the Commission's jurisdiction as the parties made a loan agreement. This matter is beyond the contract of employment. The respondent submits that the applicant had commenced proceedings in the civil courts for recovery of the same debt and should not be allowed to pursue the matter in multiple jurisdictions.

10 The applicant, in written submission, denies that he has commenced proceedings in the civil courts for the same debt. The applicant has filed an amended claim to include a claim for unpaid wages from 13 to 16 March 2006, 20 days holiday pay and 16 days notice. The respondent opposes leave being granted to amend the claim prior to the Commission deciding the jurisdictional objection.

11 The applicant submits that the claim relates to compliance with an obligation under another law of a State, as opposed to an obligation under the Act. The employment contract is part of the law of contract which is a law of the State. The Commission is the venue for hearing the claim pursuant to s.29(1)(b)(ii) of the Act. The applicant agrees that the obligation arises from the contract itself, not from a statutory obligation under the Act, such as under s.41 agreements.

12 The applicant says that the law of contract was imported from the common law of England. In 1901 when the Commonwealth constitution was enacted the Colonies became States and the common law became a State law. The legislative powers of the Commonwealth were and are constrained by s.51 of the Constitution. The applicant states:

> "26. The Constitution does not include a power to make laws for the peace, order and good government of the Commonwealth with respect to contracts.
>
> 27. Section 108 of the Constitution specifically provides:
>
> > *"Every law in force in a Colony which has become or becomes a State, and in relation to any matter within the powers of the Parliament of the Commonwealth, shall subject to this Constitution continue in force I the State, and until provision is made in that behalf by the Parliament of the Commonwealth, the Parliament of the State shall have such powers of alteration and of repeal in respect of any such law as the Parliament of the Colony has until the Colony became a State.*
>
> 28. Accordingly, the Applicant submits that the common law is not beyond the scope of Regulation 1.2(2)."

13 Regulation 1.2(4) applies also as the benefits arise on termination.

14 The loan arrangement is not material, the commissions were never paid. The claim includes also a claim for unpaid wages, unrelated to the loan agreement.

ISSUES AND CONCLUSIONS

15 There is a contest as to whether the applicant has commenced proceedings in another jurisdiction for the same debt. This matter is easily answered by the production of the relevant application, if it exists. Such an application has not been put before me and hence I would not at this stage refrain from further hearing the matter.

16 There is a contest also about the validity and importance (in terms of jurisdiction) of a loan agreement. The respondent submitted that this agreement is beyond the contract of employment and hence beyond the jurisdiction of the Commission. Again this document has not, at this point, been put before me by either party and hence I am not able to determine whether it is relevant, valid or has bearing on whether I am dealing with an industrial matter (see *Hotcopper Australia Ltd v SAAB* [2002] 82 WAIG 2020), and hence within jurisdiction.

17 I will deal then with the request to amend the claim to include wages, annual leave and notice. If I do not have jurisdiction to deal with the claim, for the reasons argued, then I do not have jurisdiction to grant leave to amend the claim (s.27(1)(l)).

However, for the purposes of dealing with the prime jurisdictional arguments I will assume, without deciding, that the application includes a claim for unpaid commission, wages, annual leave and notice.

18 The submissions of the parties centre on whether Work Choices provides that the application may be heard by the Commission by virtue of the specific exclusions in Regulations 1.2(2) and 1.2(4). Regulation 1.2(2) deals with "Rights and obligations – general" and Regulation 1.2(4) deals with "Termination of employment".

19 I note that each of the benefits claimed is said to arise from the contract of employment (see applicant's letter of 21 June 2006 and the amended claim). The annual leave and notice benefits are not said to arise from any statutory provision (eg the *Minimum Conditions of Employment Act 1993* or s.170CM of the *Federal Act*, now s.661(2) of Work Choices).

20 With respect to Regulation 1.2(4) the application is a claim for denied contractual benefits; it is not an application for unfair dismissal. The applicant says that the benefits of wages, annual leave and notice, referred to collectively as "wages", all "relate to the Applicant's termination of employment" and hence fall within Regulation 1.2(4). The termination occurred prior to Work Choices. It is not clear to me how they relate to a termination of employment, as opposed to benefits during employment, except perhaps 'notice' which of course is activated upon termination or a notice to terminate. Nevertheless, 'termination of employment' within Work Choices must be seen to relate to a dismissal, i.e. a termination at the initiative of the employer. This is made clear by Part 12, Division 4, s.642 of Work Choices (see *AFMEPKIU v BHP Billiton Iron Ore Pty Ltd* (unreported 2006 WAIRC 04716)). In my view, this is the matter which Regulation 1.2(4) is meant to cover. It is also clear by virtue of s.635 that, Division 4 – Termination of employment, deals with what can be termed unfair or unlawful terminations by an employer. This is not the subject matter of this application. Regulation 1.2(4) therefore has no relevance for this application.

21 I would add for completeness that the applicant in a letter dated 24 May 2006 states, "the applicant's employment was terminated on 10th March 2005". The application states the date on which the employment relationship ended as 10 April 2006, as does the amended application lodged on 23 June 2006. By letter dated 21 June 2006, counsel for the applicant foreshadowed the amendments to the claim and stated, "our client gave 4 weeks written notice to TR7 by a letter dated 13 March 2007 and TR7 the notice given in writing by a letter dated 15 March 2007".

22 I do not know from this, the date of the termination of the employment relationship, or whether the relationship was terminated by the employer. The relationship of course must have been terminated at the hands of the employer for a claim for unfair dismissal to be enlivened in this jurisdiction. However, the benefits claimed are benefits under the contract of employment.

23 Regulation 1.2(2) requires that the act or omission must have occurred prior to the commencement of Work Choices, i.e. 27 March 2006. The act or omission is the non-payment of the benefit which, if payable, the applicant identifies correctly as being due by 31 December 2005 or no later than the date of termination. I assume this date to be 16 March 2006, but make no finding at this point. Therefore, this aspect of the Regulation is satisfied. Whilst the application was lodged on 11 April 2006, after the commencement of Work Choices, the act or omission predates the commencement.

24 The Regulation requires also that Work Choices does not apply to a law of a State, "to the extent to which it relates to compliance with an obligation" under that law or another law of the State. The obligation is the obligation to pay the benefit arising from the contract of employment. The parties agree on this. The jurisdiction exercised by the Commission is pursuant to s.23(1) (see *HotCopper v SAAB* (op cit); *Matthews v Cool or Cosy Pty Ltd* 84 WAIG 199). The applicant has a right to seek a remedy under s.29(1)(b)(ii). There is no aspect of the Act, as far as this application is concerned, which causes an obligation to pay. Both parties agree on this point.

25 The point of difference is that the applicant submits that the obligation arises under 'another law'. Counsel for the applicant submits that the obligation arises under 'another law of a State', being the common law of the State. The respondent says, "The IR Act does not confer a general jurisdiction on the Commission to hear and determine common law claims".

26 The jurisdiction is a limited jurisdiction to hear and determine denied contractual benefit claims within prescribed limits. The applicant submits, "the common law was a Colonial law and became State law when the Constitution was enacted". The applicant then went on to explain why he says, "the common law is not beyond the scope of Regulation 1.2(2)". Within the context of Work Choices, I do not agree with this submission. In my view, when one looks at the construction of s.16 and Regulation 1.2(2) of Work Choices, and the legislation as a whole, a reference to a State law in Work Choices is a reference to a statute of the State, not the common law.

27 Regulation 1.2(2) provides that some limited pre-existing matters may still be heard by the Commission. In this case the obligation under a law concerns 'that law' or 'another law' and requires that these laws are laws "which would otherwise be excluded by subsection 16(1) of the Act". Section 16(1)(a) to (e) identifies the laws to be excluded. Subsection (1)(a) concerns a State or Territory industrial law. Section (4) of Work Choices defines a State or Territory industrial law as:

> ***"State or Territory industrial law*** means:
>
> (a) any of the following State Acts:
>
> (i) the *Industrial Relations Act 1996* of New South Wales;
>
> (ii) the *Industrial Relations Act 1999* of Queensland;
>
> (iii) the *Industrial Relations Act 1979* of Western Australia;
>
> (iv) the *Fair Work Act 1994* of South Australia;
>
> (v) the *Industrial Relations Act 1984* of Tasmania; or

(b) an Act of a State or Territory that applies to employment generally and has one or more of the following as its main purpose or one or more of its main purposes:

(i) regulating workplace relations (including industrial matters, industrial disputes and industrial action, within the ordinary meaning of those expressions);

(ii) providing for the determination of terms and conditions of employment;

(iii) providing for the making and enforcement of agreements determining terms and conditions of employment;

(iv) providing for rights and remedies connected with the termination of employment;

(v) prohibiting conduct that relates to the fact that a person either is, or is not, a member of an industrial association (as defined in section 240); or

(c) an instrument made under an Act described in paragraph (a) or (b), so far as the instrument is of a legislative character; or

(d) a law that:

(i) is a law of a State or Territory; and

(ii) is prescribed by regulations for the purposes of this paragraph."

28 The Act is identified specifically in clause (a)(iii). Clauses (b) and (c) refer to an 'Act of a State' or 'an instrument made under an Act'. Section 38 of the *Acts Interpretation Act 1901* refers in part to, "An Act passed by the Parliament of a State may be referred to by the term 'State Act'". Clause (d) relates to a law of a State which is prescribed by the regulations. The remainder of section 16(1) (b) to (e), relates to specific matters, namely 'leave other than long service leave', 'equal remuneration for work', varying right in unfair contracts, or rights of a union representative to enter premises. I would add that sections 16(2) and 16(6) have no application in this matter. In my view, the construction of section 16, and indeed if one looks more broadly at Work Choices, is to define specifically statutes of State Parliaments which are excluded or alternatively matters regulated in the employment relationship by such statutes. I therefore do not consider that this application, on the submission of the parties, is covered by Regulation 1.2(2).

29 For the reasons expressed above I do not consider this application falls within the exemptions provided by Regulations 1.2(2) or 1.2(4). On the submissions before me, if I comprehend them correctly, I would find that I do not have jurisdiction to hear the application. I say it in this way because the argument, at least in relation to Regulation 1.2(2), appears to be confined to whether the application can be said to fall within the scope of that Regulation (paragraphs 2 and 4 of the respondent's submission, paragraph 28 of the applicant's submission). This is as opposed to whether the application is beyond the scope of Work Choices (see paragraphs 37 to 39 of a recent decision of Kenner C in *Donna Laura Leo v Community Choice Financial Services Pty Ltd & Ors* (unreported 2006 WAIRC 04720)). However, I am concerned as to whether the Commission's letter of 25 May 2006 could be seen to have had the effect of limiting the parties' arguments in any way to simply a matter of interpretation. The applicant's letter of 24 May 2006, and on their face, paragraphs 3, 25 and 26 of the applicant's submissions, appear to suggest a broader issue. Therefore, before I conclude my reasoning on the issue of jurisdiction, and before I issue any order, I will call the matter on for mention to ascertain whether the parties require properly any further submission.

2006 WAIRC 05142

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GARY PHILLIPS
	APPLICANT
	-v-
	TR7 PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	THURSDAY, 27 JULY 2006
FILE NO	B 320 OF 2006
CITATION NO.	2006 WAIRC 05142

Result	Application discontinued
Representation	
Applicant	Ms J Kenny of Counsel
Respondent	Mr G Bartlett of Counsel

Order

WHEREAS this is an application pursuant to section 29(1)(b)(ii) of the Industrial Relations Act 1979; and

WHEREAS the applicant advised the Commission on 17 July 2006 that he wanted to discontinue the application; and

WHEREAS the parties have waived their rights to speak to the Minutes of Proposed Order pursuant to s.35(4) of the Industrial Relations Act 1979;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders –

THAT the application be and is hereby discontinued.

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

2006 WAIRC 05141

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ANTHONY WALTER SHIPWAY
	APPLICANT
	-v-
	DOREEN STOPFORTH & WILLIAM ROBERT STOPFORTH
	RESPONDENT
CORAM	SENIOR COMMISSIONER J F GREGOR
HEARD	TUESDAY, 4 JULY 2006
DELIVERED	THURSDAY 26TH JULY 2006
FILE NO.	APPL 872 OF 2005
CITATION NO.	2006 WAIRC 05141

CatchWords	**Termination of employment – unfair dismissal – failure to prosecute claim - dismissed**
Result	Dismissed for want of prosecution
Representation	
Applicant	No appearance on behalf of the Applicant
Respondent	Ms S. Auburn, of Counsel, on behalf of the Respondent

Reasons for Decision

1 This Application to the Commission was filed on 19th August 2005. It was subject to a conference between the parties before Deputy Registrar Wickham on 5th October 2005.

2 The Commission was advised by Mr Eagle, who was then the Counsel of record for Anthony Walter Shipway ("the Applicant") that he had not heard from his client, notwithstanding that he had left numerous messages, and that in the circumstances he was unable to proceed. The Counsel of record at that time for Doreen Stopforth and William Robert Stopforth ("the Respondent") was Mr K. Prunty of Clement and Company.

3 The Commission was advised later that Clement and Company were no longer the solicitor for the Respondent, but Mr Prunty appeared nevertheless instructed by a new firm. Later, too, the Commission was advised that Mr Eagle was no longer counsel for the Applicant.

4 Thereafter the Commission, on a number of occasions tried to ascertain from the Applicant whether he intended to proceed and for all intents and purposes that appeared to be his purpose. As late as 21 November 2005 the Commission was told that he had intended calling 21 witnesses. This intention caused a number of inquiries to be made by the Commission about the necessity for that number of witnesses.

5 On or about 13th December 2005 the Commission instructed that Madam Associate enquire with the parties their response to the Commission determining a jurisdictional point by way of written submissions. If that was not possible and evidence is necessary, that could be done in June 2006 in Broome with the jurisdictional point be determined on one day and if jurisdiction was found the issue proper heard on the following day. This last suggestion appeared to be the way the parties wished to proceed with the matter.

6 We have now reached the hearing day. The Commission caused to be served upon the Applicant on 29th March 2006 a Notice of Hearing. The file shows that notice was served in accordance with the *Industrial Relations Act, 1979* (the Act) by prepaid post and the Commission is able to declare that was good service for the purposes of the Act.

7 The Commission has convened at the time and place specified in the said notice, and there is no appearance on behalf of the Applicant. It appears that from early in the proceeding the Applicant's commitment to this application was problematical. His Counsel of record even had trouble communicating with him.

8 There has been no change to the Applicant's attitude to properly pursuing the claim and finally he has not appeared on the date the matter is listed to be heard. Therefore, in accordance with the powers vested in s.27(1) of the Act and in particular s.27(1)(a)(ii) and (iv) the matter be dismissed for want of prosecution.

2006 WAIRC 05143

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ANTHONY WALTER SHIPWAY
	APPLICANT
	-v-
	DOREEN STOPFORTH & WILLIAM ROBERT STOPFORTH
	RESPONDENT
CORAM	SENIOR COMMISSIONER J F GREGOR
DATE	THURSDAY, 27 JULY 2006
FILE NO/S	APPL 872 OF 2005
CITATION NO.	2006 WAIRC 05143

Result Dismissed

Order

HAVING heard Ms S Auburn, of Counsel, who appeared 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 dismissed for want of prosecution.

[L.S.]

(Sgd.) J F GREGOR,
Senior Commissioner.

2006 WAIRC 05168

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WAYNE SHORTLAND
	APPLICANT
	-v-
	LOMBARDI NOMINEES PTY LTD T/AS HOWARD PORTER
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
HEARD	MONDAY, 10 JULY 2006
DELIVERED	MONDAY, 31 JULY 2006
FILE NO.	U 135 OF 2005
CITATION NO.	2006 WAIRC 05168

CatchWords	Termination of employment - Harsh, oppressive and unfair dismissal - Application referred outside of 28 day time limit - Relevant principles applied - Commission not satisfied that the discretion should be exercised - Acceptance referral out of time refused - *Industrial Relations Act 1979* (WA) s 27(1)(c), s 29(1)(b)(i) & s 29(3); and *Workers' Compensation and Injury Management Act 1981* s 84A & s 84AA
Result	Application to extend time under s 29(3) of the *Industrial Relations Act 1979* dismissed
Representation	
Applicant	Mr R W Clohessy (as agent)
Respondent	Mr R H Gifford (as agent on behalf of the Respondent)

Reasons for Decision

1 The Applicant filed a claim under s 29(1)(b)(i) of the *Industrial Relations Act 1979* ("the Act") on 20 October 2005. The Applicant's case is set out in the Applicant's notice of application. Attached to the notice of application is a detailed Statement of Claim in which it is stated as follows:

"1 The Applicant was employed by the Respondent as Storeman on the 20th May 2004.

2 On the 11th November 2004 he was appointed to the position as a Purchasing Officer.

3 On the 21st January 2005 the Applicant commenced 2 weeks annual leave.

4 On the 7th February 2005 the Respondent without reference to the Applicant appointed a new Purchasing Officer.

5 On 8th February 2005 the Applicant returned to work following the completion of his annual leave and was informed by the Respondent of his demotion from his position as Purchasing Officer.

6 The Applicant thereupon commenced proceedings in the Western Australian Industrial Relations Commission in Application 185 of 2005 alleging that he had been unfairly dismissed from his position of Purchasing Officer.

7 The application proceeded to a Conciliation Conference before Commissioner S M Mayman on the 17th March 2005.

8 At that conference the Respondent made alterative [sic] offers as follows:

8.1 The Respondent would provide to the Applicant a written apology and make a payment of $5,000 gross on condition of the Applicant resigning from the Respondent's company altogether; or

8.2 The Respondent would provide to the Applicant a written apology and a guarantee that it would offer training for an alternative position which meets the Applicant's aspirations.

9 The conference was adjourned to enable the Applicant to consider his position.

10 The Applicant in due course informed the Respondent's Agent Mr Glenn Miller of the Motor Trade Association that he would accept offer no.1.

11 The Motor Trade Association informed the Applicant that the Respondent had withdrawn the offer the day before.

12 The Applicant became distressed by the circumstances, and became incapacitated for work because of the stress, and consulted a medical practitioner.

13 The Applicant made a claim against the Respondent for entitlements during the period of incapacity under *Workers Compensation and Injury Management Act* ('the Act').

14 The Respondent was insured pursuant to the provisions of the Act and the insurer was Allianz Insurance Limited.

15 The claim for entitlements was denied by the Respondent's insurer, and after a period of time came before a Conciliation Officer pursuant to the Act on the 2nd August 2005 when an agreement was reached to settle the claim by way of Deed of Settlement and Release.

16 It was a condition of the settlement that the Applicant tender his resignation from the employment of the Respondent.

17 The Applicant signed a letter of resignation addressed to the Respondent dated 11th August 2005 to take effect upon the registration of the Deed of Release with Workcover.

18 The Deed of Release was not registered with Workcover so on the 4th October 2005, the Applicant sent a letter of resignation to take effect immediately. (The letter in the ordinary course of post would have reached the respondent on the 5th October 2005.)

19 The Applicant asserts that the termination of his employment through resignation came about by the conduct of the Respondent in that it:

19.1 Unfairly demoted him from the position of Purchasing Officer during the period when he was on annual leave without any warnings or any previous indications that he was not suitable for the position (which is denied by the Applicant in any event);

19.2 Offered to resolve the matter of demotion by providing the Applicant with a monetary compensation in the sum of $5,000, together with his resignation;

19.3 Upon acceptance of that offer by the Applicant, the Respondent unfairly and without due regard to the status of the offer withdrew it. This offer had been made in the conciliation process within the jurisdiction of the Western Australian Industrial Relations Commission. The Respondent proceeded to treat the Applicant unfairly, harshly and oppressively causing him to suffer stress, and anxiety and become incapacitated for work, such that he was obliged to make an application pursuant to the Act.

20 The Applicant does not seek reinstatement as the mutual trust between the parties has been destroyed, and seeks compensation to the maximum available under the s.29 of the *Industrial Relations Act* namely 6 months pay, in the total sum of $20,500."

2 On 13 April 2006, the Commission delivered reasons for decision in relation to a preliminary issue as to whether estoppel by deed or conduct should bar the Applicant's claim. In that hearing the issue was raised as to whether the Applicant's application was out of time as he had provided two notices of resignation to the Respondent. The first notice of resignation was signed by the Applicant on 11 August 2005. The second notice of resignation was signed by the Applicant on 3 October 2005. On 13 April 2006 (2006) 86 WAIG 1135 at [30] I found that the Applicant's employment was terminated when the notice signed by the Applicant on 11 August 2005 was accepted by the Respondent. In the hearing on 3 February 2006, Mr Giulio Lombardi, a joint Managing Director of the Respondent, testified that when he received the notice of resignation dated 11 August 2005, he accepted it. He did not, however, give evidence about the date he received the notice of resignation. Consequently, the matter was listed for hearing as to whether the application was out of time and if so whether an extension of time should be granted.

3 On 10 July 2006, the Applicant elected not to give any evidence but submissions were made on his behalf as to why the application was within time and alternatively, if the application was filed out of time that an extension of time should be granted.

4 Mr Gifford on behalf of the Respondent, called Mr Lombardi to give evidence on 10 July 2006. Mr Lombardi testified that he received from the Respondent's workers' compensation insurer, Allianz Australia Insurance Limited, a letter dated 15 August 2005, enclosing a copy of the deed of settlement and release and memorandum of consent orders. The letter also stated that "We also enclosed the original Resignation letter from Mr W Shortland for your files." Mr Lombardi testified that he spoke to a representative from Allianz Australia Insurance Limited the day before he received the letter and was advised that the deed of settlement for the workers' compensation claim had been finalised. He says that he did not recall that the letter was delayed. Accordingly, it is argued on behalf of the Respondent that the notice of resignation dated 11 August 2005 was accepted by Mr Lombardi on behalf of the Respondent when Mr Lombardi received the notice in the ordinary course of post which would have been on 16 August 2005.

5 It was argued on behalf of the Applicant that the Applicant's claim was filed within time. The basis on which this argument is made is not completely clear. It is contended on behalf of the Applicant that time runs from when the Applicant had the ability to return to work which is said to have occurred after he had received 22 weeks of weekly payments of compensation. It was contended (without evidence) that the Applicant had been paid weekly payments of compensation from some time in April 2005. This contention, however, seems unlikely as paragraph 15 of the Statement of Claim pleads the workers' compensation claim was denied and Ms Courthope from Allianz Australia Insurance Limited gave evidence that was the case. It was also said that a pro rata annual leave payment was received by the Applicant some time in February 2006 as a result of the Applicant's resignation. It was also contended from the bar table without any evidence that superannuation contributions were paid by the Respondent on 1 April 2006 and the amounts were calculated until March 2006.

6 Alternatively, it was contended on behalf of the Applicant that even if the claim is out of time that the Applicant's employment was terminated contrary to ss 84A and 84AA of the *Workers' Compensation and Injury Management Act 1981* ("the WC Act"). Section 84A has been repealed but s 84AA provides:

> "(1) Where a worker who has been incapacitated by injury attains partial or total capacity for work in the 12 months from the day the worker becomes entitled to receive weekly payments of compensation from the employer, the employer shall provide to the worker —
>
> (a) the position the worker held immediately before that day if it is reasonably practicable to provide that position to the worker; or
>
> (b) if the position is not available, or if the worker does not have the capacity to work in that position, a position —
>
> (i) for which the worker is qualified; and
>
> (ii) that the worker is capable of performing,
>
> most comparable in status and pay to the position mentioned in paragraph (a).
>
> Penalty: $5 000.
>
> (2) The requirement to provide a position mentioned in subsection (1)(a) or (b) does not apply if the employer proves that the worker was dismissed on the ground of serious or wilful misconduct.
>
> (3) Where, immediately before the day mentioned in subsection (1), the worker was acting in, or performing on a temporary basis the duties of, the position mentioned in paragraph (a) of that subsection, that subsection applies only in respect of the position held by the worker before taking the acting or temporary position.
>
> (4) For the purpose of calculating the 12 months mentioned in subsection (1), any period of total capacity for work is not to be included."

7 It is also contended on behalf of the Applicant that the Applicant sought advice about the history of his previous claim to the Commission (APPL 185 of 2005) which was discontinued by the Applicant as well as the subsequent claim for workers' compensation payments. It is said on behalf of the Applicant that when this history was recited that he (the Applicant) was advised to submit a claim for unfair dismissal which was filed on 20 October 2005 by Workclaims Australia who acted as agent for the Applicant in APPL 185 of 2005 and also acted for the Applicant when he made his workers' compensation claim.

8 It was also argued on behalf of the Applicant that the Respondent did not respond to the Applicant's notice of resignation dated 11 August 2005. It is said that the resignation was not voluntary and was in accordance with the Respondent's request that the Applicant tender his resignation.

9 A submission was also made on behalf of the Applicant that if the Respondent had not withdrawn its offer to settle application APPL 185 of 2005 that the claim now before the Commission would not been instituted. Further, it said that if leave is not granted the Applicant will be denied a hearing as to whether the Respondent unfairly demoted him from his position of purchasing officer on 7 February 2005 which led to APPL 185 of 2005 being filed.

10 The Respondent says that Mr Lombardi's evidence establishes that the application is out of time by about a period of nine weeks. The Respondent acknowledges that although the Commission has the power to extend time, it says the Commission should not exercise its discretion to do so when the principles enunciated in *Brodie-Hanns v MTV Publishing Ltd* (1995) 67 IR 298 approved by the Industrial Appeal Court in *Malik v Paul Albert, Director General, Department of Education of Western Australian* (2004) 84 WAIG 683 are applied.

11 The Respondent says that it was a condition of the agreement reached to settle the workers' compensation claim on 2 August 2005 that the Applicant tender his resignation. This submission, however, is contrary to the finding made by me on 13 April 2006. However, I agree it is open on Mr Lombardi's evidence and on the matters pleaded in the Applicant's Statement of

Claim at paragraph [16] that a separate agreement that the Applicant tender his resignation was reached at the conference before a conciliation officer of Workcover on 2 August 2005.

12 The Respondent contends that the Applicant's submission of a second resignation dated 3 October 2005 was a contrivance to enable this application to be brought within time for unfair dismissal under the Act. The Respondent says that the Applicant's resignation dated 11 August 2005 was freely given and the Applicant would be unable to establish on the basis of the matters before the Commission that he was constructively dismissed.

13 As to prejudice, the Respondent says that as the Commission has no power to make an order for the cost of the services of an agent, the Respondent would suffer a detriment if the Applicant's claim is to proceed and not be dismissed.

14 The Respondent says that there is no connection between the demotion which occurred on 7 February 2005 and the Applicant submitting a resignation on 11 August 2005. In particular, it is argued that the resignation was not a response to the demotion. Further, the Respondent says that even if it is relevant that the evidence given by Mr Lombardi on 3 February 2006 establishes that there was a fair basis for demoting the Applicant. Finally the Respondent says that the Applicant's claim is vexatious, should be dismissed and an order for costs should be made in the Respondent's favour.

Conclusion

15 In *Malik v Paul Albert, Director General, Department of Education of Western Australia* (op cit), Heenan J with whom Steytler J agreed held at [74] that the principles enunciated by Marshall J in *Brodie-Hanns v MTV Publishing Ltd* (op cit), should be applied when the Commission is considering whether to accept a referral of a claim for unfair dismissal out of time under s 29(3) of the Act. Marshall J in *Brodie-Hanns v MTV Publishing Ltd* (op cit) set out these principles when considering whether to extend time to bring an application as follows:–

> "1. Special circumstances are not necessary but the Court must be positively satisfied that the prescribed period should be extended. The prima facie position is that the time limit should be complied with unless there is an acceptable explanation of the delay which makes it equitable to so extend.
>
> 2. Action taken by the applicant to contest the termination, other than applying under the Act will be relevant. It will show that the decision to terminate is actively contested. It may favour the granting of an extension of time.
>
> 3. Prejudice to the respondent including prejudice caused by delay will go against the granting of an extension of time.
>
> 4. The mere absence of prejudice to the respondent is an insufficient basis to grant an extension of time.
>
> 5. The merits of the substantive application may be taken into account in determining whether to grant an extension of time.
>
> 6. Consideration of fairness as between the applicant and other persons in a like position are relevant to the exercise of the Court's discretion."

16 In relation to fairness, Heenan J in *Malik v Paul Albert, Director General, Department of Education of Western Australia* (op cit) after citing the forementioned principles went on to observe:–

> "I accept that the concept of fairness is central to a decision whether or not to accept an application under s 29 which is out of time but, with all respect, I cannot accept the submission which was put in this case that it is fairness to the applicant which is either the sole or principal concern. Fairness in this situation involves fairness to all, obviously to the applicant and to his or her former employer, but also to the public interest and to the due and efficient administration of the jurisdiction of the Commission which should not be burdened with unmeritorious stale claims."

17 Whilst the merits of the Applicant's claim may or may not be relevant, Steytler J at [25], in *Malik v Paul Albert, Director General, Department of Education of Western Australia* (op cit), observed:–

> "The Commissioner is empowered to accept a late referral if it would be 'unfair' not to do so and, while an assessment of the merits 'in a fairly rough and ready way' (see *Jackamarra v* Krakouer (1998) 195 CLR 516 at [9]) will often be an important consideration, there is nothing in the words of s 29(3) which imports any obligation on the part of an applicant, to establish any degree of merit (and it should not be overlooked, in this regard, that the Commission is given broad powers to dismiss a matter summarily under s 27(1)(a) of the Act). It is, of course, difficult to imagine that it would ever be unfair to an applicant to deny him or her the right to lodge a referral out of time where it was positively shown that the applicant had no prospect of success."

18 Having considered all of the evidence given in this matter on 3 February 2006 and Exhibits 1 to 8, I determined on 10 July 2005 that the I would not exercise my discretion to make an order extending time to bring an application under s 29(1)(b)(i) of the Act. The reasons why I reached this conclusion are as follows:

(a) I am not satisfied that the Applicant has provided an acceptable explanation for the delay which makes is equitable to so extend. Although it could have been contended that the Applicant was mistaken about when his resignation became effective, as he tendered a second resignation on 3 October 2005, no evidence was given on behalf of the Applicant that he was so mistaken.

(b) Even if I am wrong about reaching the conclusion in paragraph (a) it is plain that the Applicant took no steps to contest the termination at the time he submitted his resignation. To the contrary the evidence given on 3 February 2006 and the matters pleaded in the Applicant's detailed Statement of Claim could lead to an inference being drawn that the Applicant's resignation was voluntary. The Respondent's representative, Ms Courthope raised the issue whether the Applicant wished to resign with the conciliation officer and not in the presence of the Applicant. The Applicant was represented on 2 August 2005 by Mr Mullally from Workclaims Australia when the agreement to resign was reached and

the Applicant's agreement was conveyed to the Respondent at arms length by the conciliation officer. In my opinion s 84AA of the WC Act would have no application.

(c) In relation to the issue of prejudice, I am not satisfied that the Respondent would be prejudiced if this matter proceeds as I am not satisfied that the incurring of costs of representation is a relevant matter to be taken into account in considering prejudice when the Commission is determining whether to extend time under s 29(3) of the Act.

(d) As to the merits of the Applicant's claim the authorities make it clear that the merits may be taken into account. Whilst the Applicant has given no evidence about the merits of his claim the matters pleaded in the Statement of Claim and the argument put forth on behalf of the Applicant on 10 July 2006 makes it plain that the Applicant's case has little if any merit. The Applicant's case has been put forth on the basis that an alleged unfairness arose in relation to the Applicant's demotion on 7 February 2005. The action in relation to the demotion was the subject of application APPL 185 of 2005. APPL 185 of 2005 was discontinued by the Applicant after the offer to settle that claim was withdrawn by the Respondent.

(e) In relation to considerations of fairness, as to between the Applicant and other persons in a like position the Commission is required to consider the public interest. If the Applicant wanted to have his demotion reviewed by the Commission, he should have pursued APPL 185 of 2005 but he did not do so. It is apparent that in these proceedings that the Applicant is attempting to revive application APPL 185 of 2005 which has been discontinued. In my view it is not in the public interest to deal with a claim when it seeks to revive an earlier claim that has ceased to be actionable by an order of this Commission.

19 For these reasons I determined I would make an order dismissing the Applicant's application.

20 The Respondent seeks an order against the Applicant for costs of the Respondent on an indemnity basis. Pursuant to s 27(1)(c) of the Act the Commission is empowered to "order any party to the matter to pay to any other party such costs and expenses including expenses of witnesses as are specified in the order, but so that no costs shall be allowed for the services of any legal practitioner, or agent". The test to be applied in awarding of costs under s 27(1)(c) of the Act is set out in *Brailey v Mendex Pty Ltd t/a Mair & Co Maylands* (1992) 73 WAIG 26 in which the Full Bench held at 27:

> "The question is what does the phrase 'costs and expenses' mean? 'Costs', as defined above, includes all of the expenses. No costs are allowed for the services of a legal practitioner or agent. Thus, the professional costs element is eliminated.
>
> The application, too, must be determined under s.26 of the Act. However, part of that equity and good conscience includes what is settled law in industrial matters that costs ought not be awarded, except in extreme cases, (eg) where proceedings have been instituted without reasonable cause (see *Hospital and Benevolent Homes Award* (1983) AILR 409 where costs were awarded in a matter where the applicant terminated the proceedings after putting the respondent to the expense of defending without obtaining an order)."

21 In my view it cannot be said that this is an extreme case so as to warrant an order for costs. This case does not fall within that category.

2006 WAIRC 05169

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WAYNE SHORTLAND
	APPLICANT
	-v-
	LOMBARDI NOMINEES PTY LTD T/AS HOWARD PORTER
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	MONDAY, 31 JULY 2006
FILE NO/S	U 135 OF 2005
CITATION NO.	2006 WAIRC 05169

Result	Dismissed
Representation	
Applicant	Mr R W Clohessy (as agent)
Respondent	Mr R H Gifford (as agent on behalf of the Respondent)

Order

HAVING heard Mr Clohessy, as agent on behalf of the Applicant and Mr Gifford as agent on behalf of the Respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders –

THAT the application be and is hereby dismissed.

[L.S.]

(Sgd.) J H SMITH,
Commissioner.

2006 WAIRC 05184

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JASON SCOTT STEPHENSON
	APPLICANT
	-v-
	ALUMINIUM SPECIALTIES
	RESPONDENT
CORAM	SENIOR COMMISSIONER J F GREGOR
HEARD	WEDNESDAY, 28 JUNE 2006, TUESDAY, 18 APRIL 2006
DELIVERED	THURSDAY, 3 AUGUST 2006
FILE NO.	U 113 OF 2006
CITATION NO.	2006 WAIRC 05184

CatchWords	Termination of employment – unfair dismissal - fighting in the workplace – serious misconduct - *Industrial Relations Act, 1979*
Result	Dismissed
Representation	
Applicant	Mr J.S. Stephenson appeared on his own behalf
Respondent	Mr J. Brits, of Counsel, appeared on behalf of the Respondent

Reasons for Decision

1 On 13th February 2006 Jason Scott Stephenson (the Applicant) applied to the Commission for orders arising from what he claims was an unfair termination of his employment with Aluminium Specialties (the Respondent) on or about 25th January 2006.

2 The Applicant says he was employed as a truck driver. On the evidence he could have been employed as a storeman who drives a truck as this appears to be the way that the Respondent operates its business. The Respondent is a distribution centre which on-sells industry aluminium extrusions and hardware products to building sites. These products are held in the Respondent's premises in Malaga and upon orders from clients delivery loads are made up each morning for delivery by motor vehicle to building sites and other places. The Respondent has a procedure by which the loads are identified by dockets which constitute a manifest for a load. These dockets are given to the driver of the truck who under the supervision of a more senior employee, loads the truck. The trucks are brought into a loading bay area and it is from this area that they depart once the load for the particular run has been checked.

3 The Respondent has an employment employee relations policy for its group. Amongst the policies is one relating to discipline which is essentially built around the concept that procedural fairness and substantive fairness is to be achieved by following methods of inquiry that are fair and consistent. It requires the substantive facts in a case to be established such that the decision whatever it is is justified. The manager in applying the policy is to consider a number of factors which include amongst other things evidence of the issues, previous instructions, the person's employment history, nature and degree of previous warnings, severity of the issue at hand, any defence offered by the employee, any delays between the event and subsequent disciplinary action and whether there was ever adequate opportunity given for employment. There are some provisions relating to witnessing of interview records and an opportunity for suspension on pay.

4 In particular the policy has specific provisions in relation to serious misconduct. In termination generally there is a requirement for careful investigations and level of performance and repeated incidences of misconduct need to be taken into account. But the policy clearly specifies that acts which constitute serious misconduct are to be dealt with by summary dismissal. The policy describes what is serious misconduct for the purposes of the policy, it includes but is not limited to theft, assault, wilful disobedience, improper abuse of language, dishonest or fraudulent behaviour, fighting in the workplace. The policy requires that if any of these acts occur an interview is to be conducted between the manager and the employee with witnesses from each party where appropriate. There is a process which provides for certainty as to how these matters will be handled in the company.

5 On 25th January 2006 there was an incident at the premises starting with an argument or altercation between the Applicant and his immediate supervisor Graham Torpy. The relationship between the Applicant and Mr Torpy had been less than peaceful. Mr Torpy had complained about the Applicant's behaviour to the warehouse manager Andrew Collin Griffiths. Mr Griffiths was aware of some tension between the two men. He had spoken to the Applicant and asked him to cooperate with Mr Torpy.

6 However on 25th January 2006 the Applicant claims that he came into work and there were delays in loading. He found that the vehicle he was to drive was not properly loaded and he removed the dockets to another place and began to work on them. Mr Torpy came along and demanded the dockets back and removed them from the possession of the Applicant. Apparently, according to the evidence of Mr Tim Garbett that is not an unusual event and he would have handed over the dockets without any difficulty because he considered dealing with him to be within the province of the supervisor, in this case Mr Torpy.

7 The story as to what happened then between the men varies. The Applicant says that Mr Torpy used swear words to him, the two men were some place apart but moved quickly together and there was a physical clash between them. His version of

events is that Mr Torpy was the perpetrator and he did no more than defend himself. After the incident occurred the two men were taken to the office of Mr Griffiths. Mr Griffiths told the men that he would investigate the matter. He then interviewed four persons who were witnesses to the events. Suffice to say that the conclusions that he drew from the evidence collected was that the aggressor at all stages was the Applicant, he had instigated the clash with Mr Torpy; had travelled some distance towards him and had attempted to strike Mr Torpy and both men were restrained by others who were close. Tim Garbett restrained the Applicant while Mr Cory John Maas another employee storeman, restrained Mr Torpy.

8 It appeared that after the investigation by the Warehouse Manager the Applicant was told his services would be terminated in accordance with the Respondent's termination pollicy. He became upset and was taken to see the plant manager, Gary John Miller. Mr Miller then undertook to make his own investigation. He did so by viewing security camera footage and by checking the investigation which had been undertaken by Mr Griffiths. Before this happened it is alleged that there was another attempt by the Applicant to assault Mr Torpy with an iron bar. He was restrained by the Workshop Manager, there was some contradiction in the evidence here, the Applicant concedes that he picked up the bar but he put it down himself. Mr Griffiths says that he had to remove the bar from the Applicant's possession. Thereafter Mr Miller conducted an investigation again, he informed the Applicant that he had now confirmed with the witnesses that the fight had been started by the Applicant and his termination was confirmed. When the men left the office the Respondent says that the Applicant uttered death threats to Mr Torpy and made signs that he would cut his throat.

9 The Applicant's services were terminated; he was given a week's pay in lieu of notice.

10 The Applicant represented himself in the proceedings which took place before the Commission on 28th June 2006. It was clear that he was having difficulty in doing so and the Commission offered what assistance it could. He opted not to give any evidence himself but he did call evidence from three witnesses.

11 As indicated earlier the Commission heard evidence from Mr Miller the plant manager and Mr Griffiths the warehouse manager on behalf of the Respondent. It also had direct evidence from Graham Torpy who was the acting leading hand at the time and involved in the matter. He was cross examined at length by the Applicant. Evidence was also taken on behalf of the Respondent from Timothy Garbett who is also a storeman and had observed the events being present in the loading dock when they happened. The Applicant then called evidence from Cory John Maas and Aaron West Knitter. Final evidence was taken from Craig Andrew Smith.

12 The Commission has had the opportunity of considering all of the evidence that has been put on behalf of both the Respondent and the Applicant. The witnesses all appear to be truthful people and there was no doubt about their credibility.

13 The evidence in an overwhelming fashion points to the story being on the balance of probabilities something along the following lines. The Applicant had some problems with Graham Torpy and Mr Torpy raised those with the warehouse manager who had tried to resolve them. On 25th January 2006 the Applicant appeared for work, his truck was not ready and then he removed the load documentation to a place where it was not normally kept. Graham Torpy realised this and recovered the documents. He could well have used some swear words while doing so. Whatever happened, thereafter the Applicant was incensed and the clear evidence of all the witnesses heard by this Commission, is that he instigated a physical contact with Mr Torpy by either running at him or moving in a brisk fashion towards him. Mr Torpy put his hands over his head to protect himself and the Applicant on the balance of probabilities tried to punch him. The blows landed upon Mr Torpy's raised arms. The Applicant was restrained by a workmate, and in the process of restraint more than likely had his shirt torn off.

14 Thereafter the Respondent caused an investigation to be made. The Applicant was sent off on a job outside the works while this took place but the investigation proceeded almost immediately. The overwhelming evidence gathered by the warehouse manager Mr Griffiths in his investigation was that the assault upon Mr Torpy was perpetrated by the Applicant and was contrary to the policy relating to fighting in the workplace.

15 The company allowed a review of the investigation involving the Applicant and the plant manager became satisfied that the investigation carried out was appropriate and came up with the right answer. Even after that or during the course of it the Applicant indulged upon further serious misconduct in breach of his contract of employment in that he took up an iron bar and conducted himself in a way which would leave Mr Torpy to believe that he intended to strike him with it. The Applicant says he put the bar down; whether he did or did not is immaterial, what is important is that he took up the bar and admits that he did so. It is also open to find on the balance of probabilities that he uttered death threats upon Mr Torpy as they left the office.

16 All of this behaviour which I find occurred was gross and was serious misconduct in the terms that are described in the Respondent's policy in this matter. The Applicant involved himself in an assault and he indulged in fighting in the workplace. If he was provoked by Mr Torpy by the use of bad language his assault upon Mr Torpy was disproportionate to the provocation and was serious misconduct. It was also serious misconduct to take up an iron bar as if he was to assault Mr Torpy with it and to threaten to kill him.

17 The Respondent is required under its policy and by the law see *Hooper v Bi-Lo (1992)* 53 IR 224 *et al* that such investigation is to be conducted without delay, as it was in this place. The investigation does not need to be conducted with the same quality of professionalism as an investigation by the Police or a lawyer, but it must be thorough and reasonable. This investigation was.

18 The Applicant in this matter called a series of witnesses, none of whom supported his contentions; nor did the Applicant give evidence under oath. The Commission is left with evidence from the witnesses from both the Respondent and the Applicant all of which is at odds with the story that the Applicant urges upon the Commission. During the proceedings the Commission adjourned for a short period to allow the Applicant time to recover his composure. His conduct before the court was indicative of a person who could well indulge in angry behaviour and therefore the findings of the investigation into his conduct on the day in that context is not surprising.

19 The Commission is to ensure in conducting an enquiry such as this that there has been a fair go all round as described in *Undercliffe Nursing Home v Federated Miscellaneous Workers Union (1985)* 65 WAIG 385, and there clearly has been. The Respondent acted in accordance with its policy and the law in conducting the investigations and in making a summary termination. It has not acted unfairly in that context and therefore this application will be dismissed.

2006 WAIRC 05186

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JASON SCOTT STEPHENSON
	APPLICANT
	-v-
	ALUMINIUM SPECIALTIES
	RESPONDENT
CORAM	SENIOR COMMISSIONER J F GREGOR
DATE	THURSDAY, 3 AUGUST 2006
FILE NO/S	U 113 OF 2006
CITATION NO.	2006 WAIRC 05186

Result Dismissed

Order

HAVING heard Mr J.S. Stephenson on his own behalf and Mr J. Brits, of Counsel, on behalf of the Respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby orders:

THAT the application be, and is hereby dismissed.

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

SECTION 29(1)(B)—Notation of—

Parties		Number	Commissioner	Result
Aaron James Brisbane	Atomic Power Pty Ltd	APPL 729/2005	Commissioner S M Mayman	Application discontinued
Brian Goodwin	SDEA Nominees Pty Ltd trading as Southern Districts Estate Agency	B 373/2006	Commissioner J L Harrison	Withdrawn by leave
Carmelo Murace	Citadel Products	U 166/2006	Commissioner S Wood	Application discontinued
Clive Phillip Aldridge	BGC Residential	U 407/2006	Commissioner S Wood	Application discontinued
Darren Leslie Bell	Nick Ward - Noosa Designs (previously Ultimo Designs)	B 293/2006	Commissioner S Wood	Application dismissed for want of prosecution
David William Burns	Jill Ross	U 226/2006	Commissioner S Wood	Application discontinued
Dean Boyd Marston	Elloise Pty Ltd t/a Remax Preferred	B 120/2006	Commissioner S Wood	Application dismissed for want of prosecution
Dominique Monteleone	AMP Capital Investors Limited ACN 001777591	APPL 324/2005	Commissioner J L Harrison	Discontinued
Elizabeth Muriel Blayney	Department for Community Development	U 403/2006	Commissioner P E Scott	Application Dismissed

Parties		Number	Commissioner	Result
Ernest Anthony Roberts	Australian Railway Group Pty Ltd	U 369/2006	Commissioner S M Mayman	Application withdrawn
Gareth Adams	Snagfu Pty Ltd t/as Leopard Controls	U 66/2006	Commissioner S Wood	Application discontinued
Graham Dudley Milne	Puntukurnu Aboriginal Medical Services	U 87/2006	Commissioner S Wood	Application dismissed for want of prosecution
Jana Maree Brady	Zomp Shoez	U 264/2006	Commissioner S M Mayman	Application discontinued
Kate Emily Purcell	Anthony Hiscox As Manager "Krazy Tees"	U 53/2006	Commissioner S M Mayman	Application discontinued
Kristina Rose McDougall	Termipest Pty Ltd - Mr Rodney Smith	B 416/2006	Commissioner J L Harrison	Discontinued
Kylie (Mr) Southcombe	Greatstone Corporation Pty Ltd T/as Brumbys Ellenbrook	B 297/2006	Commissioner J L Harrison	Discontinued
Lenny Katich	Brian Sheehy, Houghton Wine Company (A Division of Hardy Wine Company Limited. A Constellation Company)	U 101/2006	Commissioner J L Harrison	Discontinued
Lorena Dacil Rodriguez	Como Hotel	U 149/2006	Commissioner J L Harrison	Discontinued
Lori Janine Chandler	Spotless Company	U 18/2006	Commissioner S M Mayman	Application discontinued
Lynda Anderson	Pacific Industrial Company	B 344/2006	Commissioner P E Scott	Application Dismissed
Melissa Jennifer Ombrasine	Northland Fresh	U 278/2006	Commissioner P E Scott	Application Dismissed
Michael Kane	Express Labour Hire	B 306/2006	Chief Commissioner A R Beech	Application struck out
Natalie Jane Howkins	Johnsen Quality Bakeries Pty Ltd	U 65/2006	Commissioner S M Mayman	Application discontinued
Paul John Lawrence	Lord Forrest Nominees Pty Ltd	U 49/2006	Commissioner S Wood	Application discontinued
Peter Justin Lucas	Cobey Industries	U 284/2006	Commissioner S Wood	Application discontinued
Peter Michael Wallis	Ultimate Automotive Centre	U 235/2006	Commissioner S Wood	Application discontinued
Peter Michael Wallis	Ultimate Automotive Centre	B 374/2006	Commissioner S Wood	Application discontinued
Phil Heaton	Hugall & Hoile Ltd	B 379/2006	Commissioner S J Kenner	Application discontinued by leave
Reena Galoria	Christie's for Hair	U 236/2006	Commissioner J L Harrison	Discontinued
Richelle Lea Flaws	Bedshed Mandurah North	U 198/2006	Commissioner S M Mayman	Application discontinued
Royden Philander	Valery Avery	U 245/2006	Commissioner J L Harrison	Discontinued
Russell Paul Cominelli	Cataby Holdings Pty Ltd	U 23/2006	Commissioner S M Mayman	Application discontinued
Samuel A Raven	Busit Australia	U 242/2006	Commissioner J L Harrison	Discontinued
Sergio Motroni	European Foods Wholesalers Pty Ltd	U 255/2006	Commissioner J L Harrison	Discontinued

Parties		Number	Commissioner	Result
Stacey Phyllis Okamoto	Myalup Beach Caravan Park & Indian Ocean Retreat Aloisin Ouschan & Lorenz Ouschan	U 168/2006	Commissioner S Wood	Application discontinued
Suraj Verma	CPE Recruitment Group	U 292/2006	Commissioner S J Kenner	Discontinued
Vance James Pollard	Myalup Beach Caravan Park & Indian Ocean Retreat Aloisin Ouschan & Lorenz Ouschan	U 167/2006	Commissioner S Wood	Application discontinued
Vanessa Louise Minervini	Terrex Pty Ltd t/a Terrex Seismic	B 365/2006	Commissioner S M Mayman	Application discontinued
Zoran Risteski	Felav Pty Ltd T/A M GP & M Nanovich	B 375/2006	Commissioner S Wood	Application discontinued

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
A/Chief Executive Officer, Public Transport Authority of Western Australia, Public Transport Centre	The Australian Rail, Tram and Bus Industry Union	Wood C	C 186/2003	6/08/2003 8/08/2003 20/08/2003 30/10/2003 4/11/2003 22/11/2003	Dispute regarding change to transit guards roster	Concluded
Anthony & Sons Pty Ltd t/as Oceanic Cruises	Australian Maritime Officers Union (FEDERAL)	Wood C	C 206/2004	25/10/2004 22/11/2004 22/11/2004 23/11/2004 24/11/2004 25/11/2004 20/12/2004 10/02/2005	Intended strike action by Union	Concluded
Anthony & Sons Pty Ltd t/as Oceanic Cruises	Seamen's Union of Australia, West Australian Branch	Wood C	C 203/2004	25/10/2004 22/11/2004 22/11/2004 23/11/2004 24/11/2004 25/11/2004 20/12/2004 10/02/2005	Union strike action	Concluded
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union of Australia, Engineering & Electrical Div.	ABB Australia Pty Ltd	Gregor SC	C 70/2006	2/08/2006	Dispute regarding redundancy entitlements	Concluded

Parties		Commissioner	Conference Number	Dates	Matter	Result
Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	Morgan Family Trust (ABN 82 824 632 520) t/as Mulberry Tree Child Care Centre Gosnells	Harrison C	C 34/2006	21/03/2006	Dispute regarding dismissal of employee	Concluded
Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	Dr Neale Fong, Director General, Department of Health	Scott C	C 16/2006	7/03/2006	Dispute regarding termination of employment of union member	Concluded
The State School Teachers Union of W.A.(Incorporated)	The Director General, Department of Education and Training	Harrison C	C 54/2006	28/04/2006	Dispute regarding the refusal of further employment of union member	Discontinued

CORRECTIONS—

2006 WAIRC 05180

SCOTCH COLLEGE (ENTERPRISE BARGAINING) AGREEMENT 2004

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES SCOTCH COLLEGE AND THE INDEPENDENT EDUCATION UNION OF WESTERN AUSTRALIA,UNION OF EMPLOYEES

APPLICANT

-v-

(NOT APPLICABLE)

RESPONDENT

CORAM COMMISSIONER J L HARRISON
DATE TUESDAY, 1 AUGUST 2006
FILE NO. AG 59 OF 2006
CITATION NO. 2006 WAIRC 05180

Result Correction order issued

Correction Order

WHEREAS on 4 May 2006 the Scotch College (Enterprise Bargaining) Agreement 2004 ("the Agreement") was registered in the Commission; and

WHEREAS by letter dated 21 June 2006 the Independent Education Union of Western Australia, Union of Employees ("the Union") informed the Commission that there was an error in the Agreement as a copy of the *Independent Schools' Teachers' Award 1976 (No R 27 of 1976)* effective as at the date of the registration of the Agreement, as referred to in Clause 7. – Relationship to Parent Award of the Agreement, was not attached to the Agreement when the application was lodged; and

WHEREAS the Union requested that a correction order issue; and

WHEREAS on 31 July 2006 Scotch College consented to a correction order issuing in the terms sought by the Union; and

WHEREAS the Commission agreed to issue a Correcting Order;

NOW THEREFORE the Commission, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders:

THAT the Scotch College (Enterprise Bargaining) Agreement 2004 be corrected by adding as Appendix 2 a copy of the *Independent Schools' Teachers' Award 1976 (No R 27 of 1976)* as provided to the Commission by the Union in its letter dated 21 June 2006.

(Sgd.) J L HARRISON,
Commissioner.

[L.S.]

PROCEDURAL DIRECTIONS AND ORDERS—

2006 WAIRC 05244

WAIVER OF REDUNDANCY PAYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LUBECK NOMINEES PTY LTD T/AS PAT KELEHER ELECTRICAL
	APPLICANT
	-v-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 9 AUGUST 2006
FILE NO/S	APPL 982 OF 2005
CITATION NO.	2006 WAIRC 05244

Result Discontinued

Order

WHEREAS this is an application pursuant to the *Industrial Relations Act 1979* ("the Act") for an exemption from the payment of redundancy pay to an employee under Clause 38 – Redundancy of the *Electrical Contracting Industry Award R 22 of 1978* ("the Award") and Clause 39 – Liberty to Apply of the Award; and

WHEREAS the applicant and the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division, WA Branch provided written submissions to the Commission in relation to the application and the matter was set down for hearing and determination on 8 August 2006; and

WHEREAS on 3 August 2006 the Commission was advised by the applicant that it did not wish to proceed with the matter; and

WHEREAS on 4 August 2006 the applicant filed a Notice of Discontinuance in respect of the application and the hearing was vacated;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the Act, hereby orders:

THAT this application be, and is hereby discontinued.

(Sgd.) J L HARRISON,
[L.S.] Commissioner.

2006 WAIRC 04782

DISPUTE REGARDING ALLEGATIONS MADE AGAINST UNION MEMBER.

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA (INCORPORATED)
	APPELLANT
	-v-
	COMMISSIONER, DEPARTMENT OF CORRECTIVE SERVICES
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR COMMISSIONER P E SCOTT
DATE	THURSDAY, 20 JULY 2006
FILE NO	PSAC 21 OF 2006
CITATION NO.	2006 WAIRC 04782

Result Recommendation Issued

Recommendation

WHEREAS this is an application pursuant to Section 44 of the Industrial Relations Act 1979; and

WHEREAS on Thursday, the 20th day of July 2006, the Public Service Arbitrator ("the Arbitrator") convened a conference for the purpose of conciliating between the parties; and

WHEREAS the Arbitrator issued a recommendation for the resolution of the dispute between the parties,

NOW THEREFORE the Commission, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby recommends:

1. THAT Mr Amourous, the subject of the application, is to respond, in writing, to the allegations which have been put to him by the respondent within 7 days of the conference convened on Thursday, the 20th day of July 2006; and
2. THAT the Respondent complete its investigation and advise Mr Amourous of the outcome within 14 days of receiving Mr Amourous' response; and
3. THAT if the allegations which have been put to Mr Amourous are not substantiated the Respondent will reinstate a period of leave which has been taken by Mr Amourous.

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

2006 WAIRC 05234

DISPUTE REGARDING ALLEGATIONS MADE AGAINST UNION MEMBER.

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA (INCORPORATED)

APPELLANT

-v-

COMMISSIONER, DEPARTMENT OF CORRECTIVE SERVICES

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
COMMISSIONER P E SCOTT
DATE TUESDAY, 8 AUGUST 2006
FILE NO PSAC 21 OF 2006
CITATION NO. 2006 WAIRC 05234

Result Recommendation Issued

Recommendation

WHEREAS this is an application pursuant to Section 44 of the Industrial Relations Act 1979; and

WHEREAS on Tuesday, the 8th day of August 2006, the Public Service Arbitrator ("the Arbitrator") convened a conference for the purpose of conciliating between the parties; and

WHEREAS the Arbitrator issued a recommendation for the resolution of the dispute between the parties,

NOW THEREFORE the Commission, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby recommends:

THAT the Respondent complete its investigation into allegations against Mr Amourous and advise Mr Amourous of the outcome by no later than 5.00pm on Tuesday, the 22nd day of August 2006.

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

2006 WAIRC 05214

DISPUTE REGARDING RATES OF PAY

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

APPLICANT

-v-

MINISTER FOR CORRECTIVE SERVICES

RESPONDENT

CORAM COMMISSIONER P E SCOTT
DATE MONDAY, 7 AUGUST 2006
FILE NO. PSAC 22 OF 2006
CITATION NO. 2006 WAIRC 05214

Result Declaration and Order Issued

Declaration and Order

WHEREAS this is an application pursuant to Section 44 of the Industrial Relations Act 1979; and

WHEREAS on Monday, the 7th day of August 2006, a conference was convened for the purpose of conciliation and to deal with interlocutory matters; and

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred under the Industrial Relations Act 1979, and by consent, hereby:

1. DECLARES that the Minister for Corrective Services is the employer of the Aboriginal Visitors, the subject of this application.

2. ORDERS:

   a. That the conference scheduled for Tuesday, the 8th day of August 2006 be adjourned; and

   b. That the summons to the Minister for Corrective Services be, and is hereby, discharged.

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

ENTERPRISE BARGAINING AGREEMENT—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Country High School Hostels Authority Residential College Supervisory Staff General Agreement 2006 PSAAG 9/2006	28/07/2006	Country High School Hostels Authority	The Civil Service Association Of Western Australia Incorporated	Commissioner P E Scott	Agreement Registered
Department for Community Development (Family Resource Workers, Welfare Assistants and Parent Helpers) General Agreement 2006 PSAAG 8/2006	28/07/2006	Department for Community Development	The Civil Service Association Of Western Australia Incorporated	Commissioner P E Scott	Agreement Registered
Government Officers (Insurance Commission of Western Australia) General Agreement 2006 PSAAG 10/2006	28/07/2006	Insurance Commission of Western Australia	The Civil Service Association Of Western Australia Incorporated	Commissioner P E Scott	Agreement Registered
Government Officers Salaries, Allowances and Conditions General Agreement 2006 PSAAG 6/2006	28/07/2006	Animal Resources Authority and Others	The Civil Service Association Of Western Australia Incorporated	Commissioner P E Scott	Agreement Registered
Public Service General Agreement 2006 PSAAG 7/2006	28/07/2006	Curriculum Council of Western Australia and Others	The Civil Service Association Of Western Australia Incorporated	Commissioner P E Scott	Agreement Registered

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
School Education Act Employees' (Teachers and Administrators) General Agreement 2006 AG 63/2006	4/08/2006	Director General For The Department of Education and Training And The State School Teacher's Union of WA (Inc)	(Not Applicable)	Commissioner J L Harrison	Agreement registered
Scotch College Administrative and Technical Officers (Enterprise Bargaining) Agreement 2005 AG 62/2006	3/08/2006	Independent Education Union of Western Australia, Union of Employees and Scotch College	(Not Applicable)	Commissioner J L Harrison	Agreement registered

PUBLIC SERVICE APPEAL BOARD—

2006 WAIRC 05134

AGAINST THE DECISION TO TERMINATE MADE ON 17/3/2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES STEPHEN BAKER

APPELLANT

-v-

DIRECTOR-GENERAL, DISABILITY SERVICES COMMISSION

RESPONDENT

CORAM PUBLIC SERVICE APPEAL BOARD
COMMISSIONER P E SCOTT - CHAIRMAN
MR KEITH TAYLOR - BOARD MEMBER
MR CLINTON FLOATE - BOARD MEMBER

DATE WEDNESDAY, 26 JULY 2006

FILE NO PSAB 6 OF 2005

CITATION NO. 2006 WAIRC 05134

Result Appeal Dismissed

Order

WHEREAS this is an appeal to the Public Service Appeal Board ("the Board") filed with the Registrar on the 6th day of April 2005; and

WHEREAS on the 27th day of April 2005, the Respondent filed a Notice of Answer and Counter Proposal and on the 28th day of April 2005 served it upon the Appellant; and

WHEREAS the Board received no further communication from the Appellant; and

WHEREAS on the 27th day of June 2006, at the direction of the Board, the Associate to the Board, wrote to the appellant noting that more than a year had passed since the filing of the Notice of Appeal and directing the Appellant to advise of his intentions in writing regarding the appeal by no later than 4.00pm, Tuesday, the 18th day of July 2006. The letter also advised that if he did not provide that advice in the required time it may be assumed that he did not wish to proceed with the appeal and an order may issue for its dismissal; and

WHEREAS on Friday, the 30th day of June 2006, the Appellant telephoned the Associate who advised that he did not intend to continue with the appeal but was not aware that he needed to file a Notice of Discontinuance. The appellant advised that he was on leave but would endeavour to send the form as soon as possible; and

WHEREAS by 4.00pm on Tuesday, the 18th day of July 2006, the Appellant had not advised of his intentions in writing as directed by the letter of the 27th day of June 2006, nor had he filed the Notice of Discontinuance; and

WHEREAS the Board is of the view that in all the circumstances the appeal ought be dismissed.

NOW THEREFORE, the Public Service Appeal Board, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders:

THAT this appeal be, and is hereby dismissed.

(Sgd.) P E SCOTT,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2006 WAIRC 05224

APPEAL AGAINST THE DECISION OF BULLYING, HARRASSMENT AND NON RENEWAL OF CONTRACT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KYLIE OLIVER
	APPELLANT
	-v-
	MALCOLM GOFF, MANAGING DIRECTOR, CHALLENGER TAFE
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER P E SCOTT - CHAIRMAN
	MR T RYNN - BOARD MEMBER
	MR K TRENT - BOARD MEMBER
HEARD	
DELIVERED	TUESDAY, 8 AUGUST 2006
FILE NO.	PSAB 3 OF 2006
CITATION NO.	2006 WAIRC 05224

CatchWords	Industrial Law (WA) - Appeal against non-renewal of appellant's contract - Whether PSAB has jurisdiction - Appellant was not dismissed - Refusal to employ or refusal to re-employ - PSAB has no jurisdiction - Appeal dismissed - *Industrial Relations Act 1979* (WA) s.23(1); (2)(a) and (b); s.29(1)(b)(ii); and s.80I(1)(e) and (3) - *Public Sector Management Act 1994* s.9 and s.52 - *Workplace Agreements Act 1993*
Result	Appeal Dismissed
Representation	
Applicant	In person
Respondent	Ms A Young

Reasons for Decision

1 These are the unanimous reasons for decision of the Public Service Appeal Board ("the PSAB").

2 A Notice of Appeal to Public Service Appeal Board was lodged by the appellant on 3 March 2006. The Appeal is said to be against the decision "of bullying & harassment, the non renewal of my contract" and is said to have been made on 27 February 2006, on the grounds of "bullying & harassment, the non renewal of my contract."

3 The respondent filed a Notice of Answer and Counter Proposal on 20 April 2006, which stated:

> "Ms Oliver ceased employment with Challenger TAFE on 31 December 2005.
>
> College policy Q10.001/4 point 5.7.4, states "The employee's employment with the College ceases on the expiry date prescribed in their contract. Unless specified otherwise in the contract, further employment at the College is subject to the person being selected for an advertised position on a competitive basis."
>
> Ms Oliver was employed on a 6-month fixed term contact commencing 13 December 2004 with a cessation date of 30 June 2005 "after which a new contract may be offered." The contract was renewed for a further six months until 31 December 2005.
>
> At the end of the contract period, the position was advertised in accordance with College policy.
>
> The Respondent submits:
>
> The Commission lacks jurisdiction to hear and determine this matter.
>
> - The application is out of time as it was not made within the 21 day time limit prescribed by Regulation 107(2) of the Industrial Relations Commission Regulations 2005.

- The decision on which this appeal is based was not a decision to dismiss but was a failure to offer to employ and that a failure to offer a contract of employment does not constitute dismissal.
- The employment contract lapsed due to the effluxion of time.

The Respondent denies any unfairness procedural or otherwise in the failure to offer a contract of employment to Ms Oliver."

4 On 23 May 2006, at the direction of the PSAB, the Associate to the PSAB wrote to the appellant in the following terms, formal parts omitted:

"I am directed to write to you by the Public Service Appeal Board ("PSAB") to which this appeal has been allocated.

The PSAB notes that in the Form 11 – Notice of Appeal to Public Service Appeal Board filed by you, in that part of the form where you are to set the decision against which you appeal, you have recorded:

"of bullying and harassment, the non renewal of my contract."

In its Form 5 – Notice of Answer and Counter Proposal, the respondent says that the PSAB lacks jurisdiction to deal with your appeal for a number of reasons. Two of those reasons are:

"• The decision on which this appeal is based was not a decision to dismiss but was a failure to offer to employ and that a failure to offer a contract of employment does not constitute dismissal.

• The employment contract lapsed due to the effluxion of time."

The PSAB's jurisdiction is set out in s.80I of the Industrial Relations Act 1979, a copy of which is attached for your information. Section 80I also makes reference to various sections of the Public Sector Management Act 1994, to which you might also wish to refer.

Prior to considering the issue of whether to accept this appeal beyond the 21 days allowed for its referral to the PSAB, and prior to hearing the merits of your appeal, it is necessary for the PSAB to consider whether it has jurisdiction to deal with the appeal.

Accordingly, the PSAB directs that you put to the PSAB in writing any submission you wish to make as to whether or not the PSAB has jurisdiction to deal with your appeal. Such submission is to be made within 21 days of the date of this letter. The respondent will then have 21 days in which to respond to any submission you may make.

You should be aware that if no submission is received from you within 21 days, the PSAB may consider that you do not intend to proceed with the appeal and may dismiss it without further reference to you. Therefore, should you wish to proceed it is essential that you respond to the issue of jurisdiction within 21 days.

Should you have any queries please contact me on 9420 4484. Please be aware that I am unable to provide you with advice other than in respect of procedural matters."

5 By letter dated 29 May 2006, the appellant responded to the PSAB in writing. This submission defined workplace bullying and outlined allegations of bullying directed at her. The appellant acknowledged that she was not dismissed but says that she was not given the opportunity to have her contract renewed and there was a failure to offer a contract. She says that "At the end of the contract if ongoing work is available, employers should consider offering employees this employment." She noted that she was not given an opportunity to be taken from the appointment pool when the job was advertised.

6 As to the jurisdiction of the Commission, the appellant cited s.23 of the Industrial Relations Act 1979 ("the IR Act"), subsections (1), (2)(a) and (b) and referred to the requirement of the Public Sector Standards that the process be "open, competitive and free of bias, unlawful discrimination, nepotism or patronage. The decisions need to be transparent and capable of review. Termination decisions must be fair and all entitlements must be provided." She also referred to the General Principles of Human Resource Management and to the requirements of s.9 of the Public Sector Management Act 1994 ("PSM Act") dealing with the General Principles of Official Conduct.

7 The final aspect of the appellant's submission was that she was ill in October and November 2005 and combined with various medical appointments and being placed on medication, she was unable to forward her appeal to the Commission. Once her condition stabilised, she was strong enough to forward the application. She notes the provisions for extensions of time for such applications to be filed and that there is no time limit in respect of filing a claim for contractual entitlements made pursuant to s.29(1)(b)(ii) of the IR Act. The appellant also makes reference to enforcement proceedings pursuant to the IR Act and the Workplace Agreements Act 1993.

8 The respondent filed its submission on 22 June 2006, which in effect reiterated the Notice of Answer and Counter Proposal and also responded to the aspects of the submission made by the appellant dealing with jurisdiction.

Conclusions

9 The PSAB has jurisdiction as defined by s.80I of the IR Act. Its jurisdiction is limited by the legislation and there is a requirement for it to deal with those matters only. The appellant was a government officer. According to s.80I(1)(e) of the IR Act, and subject to s.52 of the PSM Act and subsection 3 of s.80I, (neither of which is relevant), the PSAB has jurisdiction to hear and determine an appeal by a government officer who occupies a position carrying a salary lower than the prescribed salary against the decision of the employer that the government officer be dismissed. That is the limitation upon the PSAB's jurisdiction. Unless there was a dismissal, there is no jurisdiction.

10 The appellant does not argue that she was dismissed, and it is clear that there was no dismissal.

11 It is quite clear that whilst the appellant might wish to challenge the respondent's decision not to offer her further employment, the uncontroverted statement of the appellant is that her contract was not renewed. This does not constitute a dismissal. It may constitute a refusal to employ or to re-employ but that is not a matter with which the PSAB can deal. (see *Ronald Thomas Bellamy v Chairman, Public Service Board* (1986) 66 WAIG 1579 (FB))

12 As there was no decision to dismiss, there is no capacity for the PSAB to hear the appeal. Accordingly, the appeal ought be dismissed as the PSAB has no jurisdiction to deal with it.

2006 WAIRC 05223

APPEAL AGAINST THE DECISION OF BULLYING, HARRASSMENT AND NON RENEWAL OF CONTRACT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KYLIE OLIVER
	APPELLANT
	-v-
	MALCOLM GOFF, MANAGING DIRECTOR CHALLENGER TAFE
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER P E SCOTT - CHAIRMAN
	MR T RYNN - BOARD MEMBER
	MR K TRENT - BOARD MEMBER
DATE	TUESDAY, 8 AUGUST 2006
FILE NO	PSAB 3 OF 2006
CITATION NO.	2006 WAIRC 05223

Result Appeal Dismissed

Order

HAVING heard, by way of written submissions, the appellant on her own behalf and Ms A Young on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders:

THAT this appeal be, and is hereby dismissed.

(Sgd.) P E SCOTT,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

RECLASSIFICATION APPEALS—Notation of—

File Number	Appellant	Respondent	Commissioner	Decision	Finalisation Date
PSA 41/2005	Doreen Linda Mcardle	Department of Justice	Scott C	Reclassification Appeal Dismissed	4/08/2006
PSA 51/2005	Carmel Scott	Minister for Health in his incorporated capacity under s7 of the Hospital and Health Services Act1927 as the WA Country Health Service	Scott C	Adjourned	28/07/2006
PSA 131/2004	Robert Claude Bycroft	Sir Charles Gairdner Hospital	Scott C	Withdrawn by leave	31/07/2006

File Number	Appellant	Respondent	Commissioner	Decision	Finalisation Date
PSA 132/2004	Maxwell Douglas Richmond	Sir Charles Gairdner Hospital	Scott C	Withdrawn by leave	31/07/2006
PSA 133/2004	Sharyn Elizabeth Houghton	Sir Charles Gairdner Hospital	Scott C	Withdrawn by leave	31/07/2006

OCCUPATIONAL SAFETY AND HEALTH ACT—Matters Dealt With—

2006 WAIRC 04776

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-

UNITED GROUP INFRASTRUCTURE PTY LTD

RESPONDENT

CORAM CHIEF COMMISSIONER A R BEECH
DATE TUESDAY, 18 JULY 2006
FILE NO/S OSHT 14 OF 2005
CITATION NO. 2006 WAIRC 04776

Result Matter dismissed
Representation
Applicant Mr D Ellis (of counsel)
Respondent Mr G Paull (of counsel)

Order

WHEREAS on 12 December 2005 the applicant referred a dispute to the Occupational Safety and Health Tribunal ("the Tribunal") pursuant to section 74(2) of the *Mines Safety and Inspection Act, 1994*;

AND WHEREAS the respondent submitted that the matter be dismissed as a result of the decision of the Full Bench in FBA 14 and 15 of 2005 delivered on 6 July 2006;

AND WHEREAS the applicant sought leave to withdraw the matter;

AND WHEREAS the Tribunal is satisfied that the issue of jurisdiction raised in this matter is the same as the issues of jurisdiction determined in the above Full Bench decision;

AND HAVING HEARD Mr D Ellis, of counsel on behalf of the applicant and Mr G Paull, of counsel on behalf of the respondent;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under section 102(3) of the *Mines Safety and Inspection Act, 1994* and section 27(1)(a)(iv) of the *Industrial Relations Act, 1979* hereby order –

THAT the application be dismissed for want of jurisdiction.

(Sgd.) A R BEECH,
[L.S.] Chief Commissioner.