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CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

FULL BENCH—Appeals against decision of Commission—

2006 WAIRC 05458

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CORPUS CHRISTI COLLEGE
	APPELLANT
	-and-
	INDEPENDENT EDUCATION UNION OF WA
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE M T RITTER, ACTING PRESIDENT
	COMMISSIONER J H SMITH
	COMMISSIONER S WOOD
HEARD	MONDAY, 18 SEPTEMBER 2006
DELIVERED	THURSDAY, 21 SEPTEMBER 2006
FILE NO.	FBA 18 OF 2006
CITATION NO.	2006 WAIRC 05458

CatchWords	Industrial Law (WA) - Appeal against declaration of Commission - Whether application was 'industrial matter' - Issue of jurisdiction - Preconditions in s24 of the *Industrial Relations Act 1979* (WA) (as amended) not met - Appeal dismissed
Decision	Appeal dismissed
Appearances	
Appellant	Ms K Wroughton (of Counsel), by leave
Respondent	Ms M E McDiarmid (of Counsel), by leave

Reasons for Decision

(Ex tempore, edited from the transcript)

THE ACTING PRESIDENT:

1 Before the Full Bench today is a purported appeal against a declaration of the Commission made on 22 May 2006. The declaration was that the matter was within the jurisdiction of the Commission. The matter referred to was application No C 188 of 2005 which was lodged with the Commission on 2 November 2005.

2 The present appellant had submitted to the Commission that it lacked jurisdiction to deal with the application as it was not an "*industrial matter*" as defined in s7 of the *Industrial Relations Act 1979* (WA) (as amended) (*the Act*). Written submissions were made to the Commission by the parties on this issue.

3 The declaration made was in response to the challenge to the Commission's jurisdiction. The Commission gave reasons for decision on 18 May 2006 in which it determined that the application was an industrial matter.

4 The Commission clearly had jurisdiction to determine whether the application was an industrial matter.

5 Section 24(1) of *the Act* provides that the Commission has jurisdiction to determine in any proceedings before it whether any matter to which those proceedings relate is an industrial matter and a finding by the Commission on that question is, subject to s49 and s90, final and conclusive with respect to those proceedings. Section 24(2) however provides that a determination under subsection (1) is not a decision for the purposes of s49 or s90 unless and until those proceedings have been concluded; or leave to appeal is granted by the Commission making that determination.

6 In the present matter the proceedings have not been concluded and no leave to appeal has been granted by the Commission making the determination that the application is an industrial matter.

7 The jurisdiction of the Full Bench to determine appeals is provided for in s49 of *the Act*. Section 49(2) provides that subject to this section, an appeal lies to the Full Bench in the manner prescribed from any decision of the Commission. As stated however s24(2) of *the Act* provides that unless one of the two preconditions there set out are met a determination made under s24(1) of *the Act* is not a decision for the purposes of s49.

8 Accordingly as neither of the preconditions set out in s24(2) of *the Act* has occurred in this case the declaration made by the Commission on 22 May 2006 is not a decision for the purposes of s49 of *the Act*. The Full Bench does not have any other jurisdiction to hear and determine this appeal. The Full Bench does not therefore have jurisdiction to hear and determine the appeal which must therefore be dismissed.

9 We are advised that the application has been set down for hearing by the Commission on 19 and 20 October 2006. After the application has been determined the appellant will have rights of appeal under *the Act* if the application is determined against the appellant and they then wish to lodge an appeal against that decision. They may appeal at that time against the Commission's determination that the application is an industrial matter. That is an issue on which it is not appropriate to express any opinion at the present time.

10 The appellant submitted that the hearing of the appeal should be adjourned until the application has been heard and determined by the Commission. I do not accept that this is the appropriate course. This is because the Full Bench lacks jurisdiction to hear and determine the appeal which was instituted incompetently. No purpose therefore would be served by adjourning these proceedings. Accordingly for these reasons in my opinion the appeal must be dismissed.

COMMISSIONER J H SMITH:

11 I agree with the reasons given by the Acting President.

COMMISSIONER S WOOD:

12 I agree with the reasons and have nothing further to add.

2006 WAIRC 05440

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CORPUS CHRISTI COLLEGE
	APPELLANT
	-and-
	INDEPENDENT EDUCATION UNION OF WA
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE M T RITTER, ACTING PRESIDENT
	COMMISSIONER J H SMITH
	COMMISSIONER S WOOD
DATE	MONDAY, 18 SEPTEMBER 2006
FILE NO/S	FBA 18 OF 2006
CITATION NO.	2006 WAIRC 05440

Decision	Appeal dismissed
Appearances	
Appellant	Ms K Wroughton (of Counsel), by leave
Respondent	Ms M E McDiarmid (of Counsel), by leave

Order

This matter having come on for hearing before the Full Bench on 18 September 2006, and having heard Ms K Wroughton (of Counsel), by leave, on behalf of the appellant, and Ms M E McDiarmid (of Counsel), by leave, on behalf of the respondent, and reasons for decision having been given orally, it is this day, 18 September 2006, ordered that appeal No FBA 18 of 2006 is dismissed.

By the Full Bench

(Sgd.) M T RITTER,
Acting President.

[L.S.]

2006 WAIRC 05465

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PETER GRIERSON
	APPELLANT
	-and-
	INTERNATIONAL EXPORTERS PTY LTD
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE M T RITTER, ACTING PRESIDENT
	COMMISSIONER P E SCOTT
	COMMISSIONER J H SMITH
HEARD	THURSDAY, 7 SEPTEMBER 2006
DELIVERED	FRIDAY, 22 SEPTEMBER 2006
FILE NO.	FBA 19 OF 2006
CITATION NO.	2006 WAIRC 05465

CatchWords	Industrial Law (WA) - Appeal against order made by the Commission - Alleged harsh, oppressive or unfair dismissal - Whether Commission erred in finding appellant was not dismissed - Issues relating to witness credibility/reliability - Role of Full Bench in appeals against findings based on credibility of witnesses - Whether Commission properly considered the evidence before it - Whether Commission accepted glaringly improbable evidence - Appeal dismissed - *Industrial Relations Act 1979* (WA) (as amended) - s29(1)(b)(i), s49
Decision	Appeal dismissed
Appearances	
Appellant	Mr G McCorry, as agent
Respondent	Mr P Momber (of Counsel)

Reasons for Decision

THE ACTING PRESIDENT:

The Appeal

1 This is an appeal which has been instituted under s49 of the *Industrial Relations Act 1979* (WA) (as amended) (*the Act*). The appeal is against an order made by the Commission on 1 June 2006. The order was that the application before the Commission was dismissed for "*want of jurisdiction*".

2 The application which was before the Commission was referred by the appellant pursuant to s29(1)(b)(i) of *the Act* and sought an order in respect of the appellant's alleged harsh, oppressive or unfair dismissal from employment by the respondent. The Commission decided that it did not have jurisdiction because it found, after a hearing, that the appellant had not been dismissed but had resigned from his employment with the respondent. The Commission was obliged to dismiss the application because "*whether the [respondent] dismissed the [appellant] is a question concerning the existence of a condition precedent to the power of the Commission to deal with the matter*". (*Bone Densitometry Australia Pty Ltd (t/as Perth Bone Densitometry) v Lenny* (2006) 153 IR 117 per Le Miere J at [31]).

3 The appellant contends that the Commission erred in making the factual finding that the appellant was not dismissed from his employment. The appellant asserts that in coming to this conclusion the Commission overlooked, misconstrued or placed insufficient weight upon some of the evidence and accepted a version of events that was "*glaringly improbable*".

General Background and The Hearing before the Commission

4 The appellant was employed by the respondent as the general manager of an abattoir situated about 20 kilometres west of Gingin. He was employed in this position from September 2004 until 30 March 2005. On the latter date, in the evening, there was a meeting between the appellant, Mrs Stephanie Tucun and her husband Mr Tugomir Tucun. Mr and Mrs Tucun were

beneficiaries of the Mansar Family Trust (Mansar) which owned 25% of the shares in the respondent. Mr Tucun was also a trustee of Mansar and a director of the respondent. Mrs Tucun was the primary person representing the respondent in the running of the abattoir. It was at the meeting on 30 March 2005 that the appellant was dismissed, according to his evidence, or resigned, according to that of Mr and Mrs Tucun.

5 The hearing before the Commission took place on 13 October 2005 and 19 and 20 April 2006. At the conclusion of the hearing orders were made for written closing submissions. The Commission published its reasons for decision on 1 June 2006, the same date upon which the order dismissing the application was made.

The Evidence

6 At the hearing the appellant gave evidence in support of the application and called Mr Brian McAuliffe and Ms Nicole Williams to give evidence on his behalf. Mr McAuliffe became the general manager at the abattoir following the cessation of the appellant's employment. He commenced this employment the day after the appellant's employment ceased. Mr McAuliffe had been engaged by Mrs Tucun to become an employee of the respondent prior to the cessation of the appellant's employment. It was the respondent's case that Mr McAuliffe was initially engaged as a manager to assist but not replace the appellant. It was the appellant's case that the engagement of Mr McAuliffe was as a replacement for the appellant and that this showed the respondent was intending to terminate the appellant's employment on 30 March 2005.

7 Ms Williams was employed by the respondent at the relevant time as a cleaning supervisor at the abattoir. She gave evidence of a conversation with Mr Tucun after his meeting with the appellant on 30 March 2005 which left her with the impression that it was the respondent's decision to terminate the employment of the appellant. Ms Williams also gave evidence about an address by Mrs Tucun to the employees of the abattoir the next day which also left her with the impression that the respondent had decided to terminate the appellant's employment.

8 Mr and Mrs Tucun both gave evidence for the respondent. The respondent also called Dr James Godwin and Mr George Chalklen to give evidence. Dr Godwin was a veterinary officer employed by the Australian Quarantine and Inspection Service (AQIS) and based at the abattoir. Mr Chalklen was a contract meat inspector with AQIS also based at the abattoir. Neither Dr Godwin nor Mr Chalklen gave any evidence relevant to the issue of whether the appellant resigned or was dismissed from his employment.

9 The only three witnesses who gave first hand evidence about the crucial meeting on 30 March 2005 were the appellant and Mr and Mrs Tucun. The determination of the issue of whether the appellant was dismissed therefore depended upon the assessment and findings made by the Commission about the evidence given by the appellant and Mr and Mrs Tucun. At the meeting Mr and Mrs Tucun were accompanied by a security guard. He had been brought to the abattoir by Mr and Mrs Tucun, because, they said, they were concerned that the appellant may become irrational. They feared he might do so during the meeting because of some of his past behaviour and as they intended to raise with him issues of concern about the management of the abattoir. It is not entirely clear from the evidence whether the security guard was present at the meeting but neither the appellant nor the respondent called him to give evidence.

10 The appellant's evidence about the meeting and its immediate aftermath was as follows. (T35-37). The appellant said that he had left the abattoir in the afternoon of 30 March 2005 before returning at about 7 o'clock. He went into the office and saw Mr and Mrs Tucun and the security guard. The appellant said he did not know that Mr and Mrs Tucun were to attend at the abattoir that day. Mr and Mrs Tucun at the time ordinarily resided in Sydney. The appellant said he had spoken to Mrs Tucun that morning and she had not said she intended to come to the plant or Western Australia. The appellant said he was "*informed that my services with the company were effectively terminated as of then, and that the security guard would search my bag. I was asked to pack all my personal things, to clean out my desk, and that the security guard would drive me home*". (T36). The appellant said he was "*pissed off*" by this and said he told Mr and Mrs Tucun he could not believe the dismissal had occurred and that he had no notification of any dissatisfaction from Mr or Mrs Tucun or any other of the board members of the respondent. The appellant said in evidence that he had only received praise "*from the Board*" and as late as two weeks previously a part owner of the respondent was on site and had complimented the appellant on his work performance.

11 The appellant said that he had started to pack up his clothes and was upset. He refused the offer of transport to his home in Bayswater and telephoned his wife, informed her that he had been "*sacked*" and requested her to come and pick him up. Whilst waiting for his wife the appellant telephoned Dr Godwin and Mr Ian Wood, a fitter at the abattoir and informed them as to what occurred. The appellant then went into a different office and saw Mr and Mrs Tucun. Mr Tucun told the appellant how sorry he was and Mrs Tucun explained that they were told by other directors to terminate the appellant's employment. The appellant asked what were the reasons for the termination and these were explained to him by Mrs Tucun. The appellant took some diary notes of the reasons he was given. They were: failure to meet production targets; high cost of production; inability to get on with AQIS, "*Aus Meat*" and excessive staff turnover. (Aus Meat was referred to in the hearing as another regulator). The appellant said in evidence that there had not been any complaints about these issues to him before. The appellant said that he asked Mr and Mrs Tucun whether there was any question about his honesty or integrity and he was told that there was not.

12 The appellant said that in the conversation with Mr and Mrs Tucun he asked what "*severance pay they were paying me*" and Mrs Tucun said they were paying "*a month*". The appellant said he expressed his disagreement with this and said he told Mrs Tucun that he may go to the Industrial Commission as to which she said the appellant would not "*get a penny, we've had advice*".

13 The appellant said he then packed up his belongings at the abattoir and had a walk and conversation with the security guard. After this conversation the appellant's wife arrived on site and the appellant was asked to hand in keys to the front gate, abattoir and motor vehicle. The appellant then left the premises. He later received payment of one month's salary together with holiday pay. The appellant said that he was not told at any time during the course of his employment that it was in jeopardy. The appellant said to the contrary "*all I received from the directors was praise*". (T40). The appellant acknowledged in other evidence however that there had been problems at the abattoir prior to 30 March 2005.

14 Mrs Tucun, who was the first witness called by the respondent, gave the following evidence about the meeting on 30 March 2005. Mrs Tucun said that prior to this date there had been problems with the performance of the abattoir and the work of the appellant as general manager. Mrs Tucun said that she had discussed these problems with an industrial advisor Mr Merv Darcy. (Mr Darcy was also the advocate who appeared for the respondent at the hearing.) Mrs Tucun said Mr Darcy had given her advice prior to her coming to Perth with Mr Tucun. Mrs Tucun said she was advised to make some "*bullet points*" and that she needed to come to talk to the appellant to attempt to resolve the issues. (T116). Mrs Tucun said the "*plant was in absolutely diabolical trouble at this stage*". (T116). Mrs Tucun said Mr Darcy advised that she should speak to the appellant in front of a witness and that her husband would be a suitable witness. Accordingly they flew to Perth with the intention of speaking to the appellant about the problems. Mr and Mrs Tucun picked up the security guard and travelled to the plant together. On the way to the plant Mrs Tucun telephoned Mr Darcy to go through her notes again so that she could be sure they were dealing with the matter in a legal and appropriate way. Mrs Tucun said it was not her intention in attending at the plant to sack the appellant. Mrs Tucun said she knew from Mr Darcy that "*we were unable to sack [the appellant] and also we were unable to force his - - his resignation*". (T116). Mrs Tucun said that Mr Darcy had been very specific and clear about that point.

15 Mrs Tucun said that she and her husband and the security guard attended at the abattoir in the late afternoon. The workforce had left although the cleaning staff were still about the place. About five minutes later the appellant arrived and Mrs Tucun asked him if she could speak to him. The security guard waited in the reception area, the door was closed and they sat down to talk to the appellant. Mrs Tucun said that they had some serious concerns that they had come to talk to him about. The appellant was, according to Mrs Tucun, "*immediately defensive and kept asking what was the bottom line*". (T117). Mrs Tucun said the bottom line was that there were a number of issues to address. Mrs Tucun said the appellant continued to ask about the bottom line and that she insisted that they needed to sit down and go through some things. She said she told the appellant they were very concerned. Mrs Tucun said the appellant became very dismissive and within a short space of time said "*Oh, well I'll go now because I'll be blamed for the losses. The place is a lemon. It can't make much money*". (T117). Mrs Tucun said that they tried to appease the appellant and calm him down. Mrs Tucun said they would have preferred to work with him than to work against him but there was no calming him down. The appellant said "*No, I want to go*". Mrs Tucun said the appellant became very belligerent. Mrs Tucun said that they tried to discuss the matters they wished to with him and keep the appellant calm but he insisted that he wanted to go. Mrs Tucun said that they said to the appellant "*if you want to leave then you must leave. We'll pay you a month in lieu of notice*". Mrs Tucun said the appellant was half way out of his chair and sat down again and said he wanted more. Mrs Tucun said that they did not offer him any more. Mrs Tucun said that they told the appellant they were offering a month in lieu of notice and that was it. Mrs Tucun said Mr Tucun suggested to the appellant that he pack his personal belongings and that any other of his belongings would be delivered to him the following day.

16 Mrs Tucun was then asked in examination-in-chief whether she meant "*a month in lieu because you gave notice, or because you were giving an ex gratia payment*". Mrs Tucun answered they were "*giving an ex gratia …*" and her evidence was then interrupted by the Senior Commissioner who requested that Mr Darcy not ask leading questions. (T117).

17 Mrs Tucun then said that the appellant was told that the security guard would drive him home but the appellant did not accept this. He asked that his wife collect him. Prior to this he asked whether he could use the car he had been driving, for another month and was told no. Mrs Tucun said the appellant then became very hostile and the meeting was terminated and she and Mr Tucun went into the next office so that Mrs Tucun could write up notes of the meeting as per instructions she had received from Mr Darcy. Mrs Tucun said that about 45 minutes later the appellant came into the office where she was writing the notes and angrily asked about the issues they wanted to talk about. Mrs Tucun said she told the appellant that they had "*gone beyond that*" now. The appellant said he wanted to know what they were. Mrs Tucun said she started to go through the bullet points and the appellant was very dismissive. The appellant then said he wanted six months' pay or he would start saying things that they would not like. Mrs Tucun also gave evidence about the appellant's wife attending at the plant, a conversation with her and the appellant subsequently leaving the plant. Mrs Tucun said she had not had a conversation with the appellant since then.

18 Mr Tucun gave evidence that he and Mrs Tucun travelled to Western Australia on 30 March 2005. The purpose of the trip was to discuss with the appellant the problems they were having at the plant and licences with AQIS and Aus-Meat being in jeopardy. (T180). Mr Tucun said that they travelled to the plant together with a security guard. This was because of advice given by Mr Darcy consequent upon the concern of Mr and Mrs Tucun as to how the appellant may react. Mr Tucun said he thought they arrived at the plant at about 7:00pm. The appellant was not there at the time but he arrived some minutes later. Mr Tucun said they asked the appellant to go into his office and said they needed to discuss some issues that they had regarding the plant.

19 Mr Tucun said the appellant made it very difficult to go through the issues. The appellant had a very angry reaction when they said to him that they needed to discuss issues and said "*What's the bottom line? What's the bottom line?*". (T181). Mr Tucun said the appellant became very angry because they persisted with the comment that they needed to discuss issues. (T181). Mr Tucun said he could not remember the appellant's actual wording but the appellant said that: "*He'll go now*". Mr Tucun said the appellant said: "*The company was a lemon, that it's going to be very difficult to make a profit and when he goes he will probably get the blame for it*". (T181). Mr Tucun said it was difficult to talk to the appellant at that stage. Mr Tucun said the appellant said he was going to leave and then Mrs Tucun said to him that if he was going to leave they would pay him one month's salary. Mr Tucun said he thought the appellant made a comment about wanting to retain the car for a month to which Mrs Tucun said no that she was not willing to do that. Mr Tucun said: "*That was it. I mean we went into the next room because it was very difficult to talk to him. He was obviously very upset*". (T181).

20 Mr Tucun said that sometime after that, maybe an hour or so, the appellant came back and wanted to go through some of the "*so called bullet points that we had listed and we briefly discussed them with him*". Mr Tucun said that he was "*pretty sure*" that the appellant's response at that time was that he wanted six months' pay and if they did not come back to him within a week "*we'd be sorry for whatever reason but, yes, he was pushing for the six months payout*". (T181).

21 Mr Tucun said that the appellant then made some telephone calls including to his wife to come and pick him up. The appellant's wife attended at the abattoir about 45 minutes later and she had a conversation with Mr and Mrs Tucun.

22 Mr Tucun was asked in examination-in-chief whether "*there was no concoction after [the appellant] alleging [sic] being terminated, that you changed the story to suit that he resigned?*". (T182). Mr Tucun replied that "*you*" (Mr Darcy) "*gave us strict instructions and guidance not to bring about a termination action. We were very conscious of that all the way through this - - the whole episode so, no, there was no - -no termination. I - - I believe that [the appellant] brought about his own termination*". (T182).

23 Mr McAuliffe in evidence-in-chief said that he had been employed as the general manager of the abattoir from 31 March 2005. In answer to a question of who recruited you to "*that position*" he answered, Mrs Tucun. Asked when he had been recruited to "*that position*", Mr McAuliffe said "*probably a week or two weeks prior to that*". (T8). He said at that time it had not been agreed that he would commence on 31 March 2005. This was agreed in the last few days leading up to Easter. (The Commission was told Easter commenced on 27 March 2005.)

24 During cross-examination Mr McAuliffe said that he was first contacted about employment at the abattoir by Dr Godwin. Dr Godwin had given him a telephone number and said that Mrs Tucun would like to talk to him about his experience in the meat industry and "*stuff like that*". (T9). Mr McAuliffe said that he had resigned from employment with AQIS and Dr Godwin was aware of that and possibly thought he might be available to take on some work in the meat industry. At that stage there was no discussion of a job offer from Mrs Tucun. Mr McAuliffe said he telephoned Mrs Tucun probably within a day or two and they discussed his experience in the meat industry and future intentions. There was no offer for a job at that point. Mr McAuliffe said that he did not remember the following sequence of events "*particularly*", but was offered a job around 27 March 2005. (T10). Mr McAuliffe said he had probably given notice to finish with AQIS at Easter some eight weeks earlier and did not really want to be available for probably three to four weeks. He said he needed a bit of a holiday but then had a telephone call from Mrs Tucun just prior to Easter making the job offer and asking if he could "*bring it forward*". Mr McAuliffe said the job offer was "*managing the plant*". (T10). Mr McAuliffe said he was aware that the appellant was the general manager of the abattoir. Mr McAuliffe said he did not enquire as to what was going to happen (to the appellant) if he was employed there. Mr McAuliffe was asked whether he saw his job as manager and the appellant's position as general manager "*as distinct*". Mr McAuliffe answered "*possibly*" to this. (T11).

25 Mr McAuliffe said that he was told on 30 March 2005 that he was going to start the next day. Mr McAuliffe said he did not enquire as to the appellant's position because it was none of his business. Mr McAuliffe said that when he commenced at the plant the appellant was not present and that he did not specifically asked where the appellant was, "*but there was a bit of talk around the plant that there had been - - that he'd actually been removed from the plant the day before*". (T12). Mr McAuliffe was also asked about his experience in the meat industry. He said he had a strong understanding of regulatory issues but was probably not as strong in the production/finance issues because they were not his background. (T13).

26 In re-examination Mr McAuliffe was asked about his discussions with Mrs Tucun and what were the duties of the position he had agreed to take on. Mr McAuliffe said "*running the abattoir I suppose*". Mr McAuliffe also said he was to report to Mrs Tucun.

27 During cross-examination Mrs Tucun was asked about the appointment of Mr McAuliffe. Mrs Tucun agreed that Mr McAuliffe had been engaged two weeks prior to his commencement date. It was then put to Mrs Tucun in effect that it was questionable that she did not go to the abattoir to dismiss the appellant when Mr McAuliffe was going to start as manager the following day. Mrs Tucun answered that "*Mr McAuliffe was there in a managerial position to appease the regulators and also Mr Lindsay Taylor was going to remain at that plant to take charge of the outside. [The appellant's] terms and conditions would not have altered except we would have had people reporting back to us from that plant*". (T165). Mrs Tucun was asked in what capacity was Mr McAuliffe going to be reporting back to her and she answered as "*the person who was responsible for looking after the plant at that stage*". Mrs Tucun was asked: "*But the general manager was responsible*?", as to which she answered "*the general manager wasn't competent to look after the plant*". There was then some further questions and answers about Mr McAuliffe reporting to Mrs Tucun. Mrs Tucun was then asked whether this was discussed with the appellant at all. Mrs Tucun answered that they were "*about to discuss it*" with the appellant. (T166). A little later Mrs Tucun reiterated that Mr McAuliffe was appointed as a manager and "*his duties were to appease the regulators and report back to me*". (T168). Mrs Tucun was asked why her diary entries did not indicate she told the appellant that Mr McAuliffe was going to be coming to help him "*to do all this to appease the regulator*", and she answered that the appellant did not give them a chance to talk about anything. (T168-169).

28 Ms Williams' evidence-in-chief was that she was on duty on the evening of 30 March 2005 and saw the appellant who told her and a fellow employee that "*his job was no longer his job and he'd been sacked, and he thanked us for everything we had done and wished us all the best*". (T208). Ms Williams waited with the appellant until he left with his wife. Ms Williams then said she later met Mr Tucun at the plant who explained to her that the appellant's services were no longer required and there would be a new manager in the morning. Mr Tucun said that everybody's job would be safe and then the conversation ended.

29 Ms Williams then gave the following evidence which will be quoted because it was relied upon by the appellant in support of the appeal:-

> "*Did anything else happen that evening?---A man, Lindsay Taylor, and Alan, came into the building.*
>
> *Let me stop you there. Who's Alan?---Alan was a stockman at the abattoir.*
>
> *Okay. So they came into the building. How long after the Tucuns left?---Oh, not long. I - - it was about - - I think it was about 10 minutes after Peter left.*
>
> *Okay. And what happened?---He came into the slaughter floor where I was scrubbing the white pipe and told me that it was all for the better and that when I needed to get out at night*

> *that I would be locked in and I needed to go up to the stock shed and wake Alan up and he would let me out.*
>
> *And what were the - -*
>
> *MR DARCY: If I may object, this is hearsay.*
>
> *GREGOR SC: Thank you.*
>
> *MR McCORRY: And what was the procedure you usually followed to get out?---I would go and lock all the doors and all the offices, I would drive to the gate which was usually open, and lock it on my way out.*
>
> *Okay. And how did you get out this particular evening?---I had to drive up to a big shed where Alan was staying the night and took me over an hour to wake him up to be let out that night.*" (T209)

30 Mr Lindsay Taylor who was referred to in this evidence was according to other evidence given at hearing a livestock purchaser who bought livestock on behalf of Mansar.

31 Ms Williams said that the following day she went to the abattoir in the morning for a meeting attended by everybody who worked there together with Mr and Mrs Tucun and Mr McAuliffe. Ms Williams said that Mrs Tucun said that the appellant's "*services were no longer required and they introduced us to the new manager and that was pretty much it*". (T210).

32 In cross-examination Ms Williams was asked about the words used in the conversation with Mr Tucun on 30 March 2005. Ms Williams was asked whether she was definite that Mr Tucun said the appellant was no longer required. Ms Williams said that they were the words used as far as she could recall but added that it was long time ago. It was then put to Ms Williams that she was not definite and she agreed with that proposition. Ms Williams was asked whether she was told the appellant "*is leaving us*". Ms Williams said it was "*along the lines that he was not coming back and that it was their decision*". (T213).

33 Ms Williams was also asked about the words used by Mrs Tucun the next day. She agreed with the proposition that the words used by Mrs Tucun could have been that the appellant is "*not working with us*" or "*no longer going to be working here*". Ms Williams again added that it was a "*long long time ago*". It was then put to Ms Williams that she was not very clear in her memory of what transpired. Ms Williams said not "*the exact words but it was along the lines that they - - it was their decision to terminate or to not have [the appellant] back*". (T214).

34 During re-examination, Ms Williams was asked the following:-

> "*And my friend asked you some questions about how accurate your recollection of the words were and your answer was that you couldn't be sure of the exact words but you're sure it was their decision to not have [the appellant] back?*" (T217).

35 Ms Williams answered yes to this. It was not clear whether the question was directed to the conversation with Mr Tucun, the address to staff by Mrs Tucun, or both. Whatever the case, however, it is appropriate to state my opinion that the answer to such a leading question did not deserve any weight.

36 Mr and Mrs Tucun in their evidence denied using the words attributed to them by Ms Williams in her evidence, which suggested they terminated the appellant's employment.

The Reasons for Decision

37 The Commission commenced its reasons for decision with a general discussion about the application and the abattoir. The Commission then summarised the evidence of the appellant. Following this the Commission summarised the evidence of Mr McAuliffe and Ms Williams. The Commission then summarised the evidence of Mrs Tucun and Mr Tucun.

38 The Commission made some observations about the evidence given by the witnesses. Relevantly, this was as follows:-

> "*24 … The evidence of the Applicant himself is important. There is no doubt in my mind that he honestly believes all of what he said to the Commission. He believed in his version of the events. It is on cross examination clear that he is not a man who suffers fools gladly and is a strong and forceful character. His background in the meat industry which is a difficult industry gives testament to the type of character he is. It is obvious that if a Respondent had an operation which needed to be driven along to be successful that the Applicant was the ideal person to undertake such an activity. The Applicant is a credible witness and I so find.*
>
> *25 The evidence called on his behalf from Mr McAuliffe is also evidence which should be given weight; in fact, it is useful in assisting the Commission to determine what has happened in this matter. His evidence in that sense goes more to supporting the contentions of the Respondent than the Applicant. The evidence of Nicole Williams on behalf of the Applicant is credible but the reality is she adds very little weight to the Applicant's version of events because she admits that she cannot recall or might not even know the precise words used by the Respondent at the time of the dismissal.*
>
> *26 The main witness on behalf of the Respondent was Stephanie Tucun. As I have indicated earlier Mrs Tucun gave clear and concise evidence which was subject to vigorous attack by the Applicant's advocate. Much of what Mrs Tucun says is corroborated by the contemporaneous notes in her diary which I find should be given weight. Mrs Tucun's version of events survived that attack. I find that Stephanie Tucun is a witness of truth and her evidence is credible. Tugomir Tucun was less*

> *positive in his evidence. He is nevertheless credible. Dr Godwin and Mr Chalklen both gave evidence there is nothing to indicate their evidence is not credible.*
>
> *27 Where the Commission finds that all the witnesses are prima facie credible it must look to corroboration or other evidence which might help it distil the events in order to decide on the balance of probabilities what happened.*"

39 It is plain that in these reasons the Commission was using the word "*credible*" in the sense of meaning honest or not intentionally giving untrue or misleading evidence to the Commission. It was not used to connote both honesty and reliability.

40 The Commission then considered the evidence further under the heading "*Analysis and Conclusions*".

41 At paragraph [31] the Commission said that it accepted the evidence of Mr and Mrs Tucun that there had been difficulties with the accounting and general management of the abattoir and that they had in various conversations raised those with the appellant. The Commission said that it was able to draw the conclusion on the evidence that the respondent while uncomfortable with some of the accounting and management side of the abattoir, nevertheless needed a person of the appellant's character, skill and experience to continue to drive the operation. The Commission said it was not in their interests to replace him with someone else who did not have those particular character traits and therefore on the balance of probabilities their story about the engagement of Mr McAuliffe to in effect soften the dealings with regulators carried the ring of truth. In paragraph [31] the Commission said the close proximity of Mr McAuliffe's commencement to the so called dismissal did not detract from the probability that Mr McAuliffe's engagement was to provide backup management to deal with what had become strained relationships with the regulators. The Commission said that because of his experience Mr McAuliffe would have been an ideal person to do this. The Commission said that the "*story that he was employed for that purpose is one on which the balance of probabilities should be accepted*".

42 At paragraph [32] of its reasons the Commission referred to the respondent's position that they took advice as to how they should deal with the appellant. The Commission referred to the character and approach of the appellant as being well known and that he was a strong man and when confronted with someone telling him they did not like his method of management predicably could have a strong reaction. The Commission said in that context the engagement of the security officer to go with Mr and Mrs Tucun to the abattoir is one which could be understood.

43 At paragraph [33] the Commission said that on the balance of probabilities the Commission concluded that the respondent decided it had to change the management structure of its Gingin operations. This was because of a whole series of events which had occurred and in particular a more than usually strained relationship with the regulators. The Commission said that to ameliorate this strain they decided they would remove "*interface*" from the work done by the appellant and have it done by someone else. Hence, the Commission said, they approached Mr McAuliffe some weeks before they moved to raise the issue with the appellant.

44 At paragraph [34] of its reasons the Commission said that on 30 March 2005 Mr and Mrs Tucun went to the plant after having received advice as to how they ought to conduct themselves with the appellant. The Commission said it was open to conclude they took that advice because they anticipated the appellant would not take kindly to what they were going to do and that was to remove from him some of his work and give it to someone else. The Commission said it was open to conclude that when they tried to raise this with the appellant his response was that he thought they would try to dismiss him. The Commission said the evidence of Mr and Mrs Tucun about what happened at the meeting should be accepted on the balance of probabilities. The Commission said that nothing that happened later, for instance the memory of Ms Williams "*indicates that the [appellant] was dismissed*". The Commission said that there "*is sometimes a very fine line in these matters and one could appreciate the [appellant] being extremely distressed about what happened and having concluded in his own mind that he had been let go as it were, and using words to that effect to other people they [sic] spoke to at the time. That he knew he was going to leave was apparent from the fact that he returned to try to negotiate a better deal for himself after Stephanie Tucan had offered him a month's pay after he had resigned*".

45 The Commission concluded its reasons in paragraph [36] by saying that in "*all of the circumstances by fine balance the Commission has decided that there was not a termination in this matter and therefore the [appellant] has not the authority to refer this matter to the Commission*".

The Notice of Appeal

46 I have earlier set out the general basis upon which the appellant argued the appeal. This reflected the grounds of appeal which were as follows:-

> *"1) The learned Senior Commissioner failed to consider or to properly consider incontrovertible evidence that the Respondent had –*
>
> *a) recruited a replacement manager for the abattoir at least one week prior to the Appellant allegedly resigning, the commencement date of the replacement manager having been agreed to be the day after the Appellant allegedly resigned;*
>
> *b) canvassed with its advisors the amount of notice the Appellant was required to be given;*
>
> *c) arranged to have the abattoir locks changed and a night watchman appointed prior to the Appellant's alleged resignation;*
>
> *d) subsequently conveyed to the staff of the abattoir that it was the Respondent's decision that the Appellant was not working there any longer;*
>
> *e) admitted in its initial Notice of Answer and Counter Proposal that it had terminated the Appellant's employment;*

f) admitted in evidence that it told the Appellant he would be given pay in lieu of notice.

2) The learned Senior Commissioner failed to consider or to properly consider the glaring improbability of the totality of the Respondent's evidence about the circumstances of the Appellant's cessation of employment.

3) The learned Senior Commissioner erred in making findings of fact and drew inferences from those found facts relative to credibility that were not open on the evidence."

47 The appellant provided an extensive set of written submissions which were elaborated upon during the hearing of the appeal. The focus of the written submissions was upon those aspects of the evidence which the appellant contended were overlooked, misconstrued or had insufficient weight placed upon them by the Commission or showed the respondent's version of events was "*glaringly improbable*".

The Role of the Full Bench

48 I have set out earlier the Commission's assessment of the witnesses and its analysis of their evidence. The Commission decided the application the way in which it did because it accepted the evidence of Mr and Mrs Tucun about what happened at the meeting of 30 March 2005. From the Commission's reasons, in my opinion, it made this finding at least in significant part because of its assessment of the way in which Mr and Mrs Tucun and the latter in particular, gave their evidence. I say this because of the Commission's characterisation of the evidence of Mrs Tucun in paragraph [26] of its reasons as being "*clear and concise*". In the same paragraph the Commission said that Mrs Tucun's "*version of events*" survived what the Commission described as being a "*vigorous attack*" by the appellant's advocate. It is just after this that the Commission says that Mrs Tucun was a witness of truth and her evidence is credible. Mr Tucun was in the same paragraph described as being less positive in his evidence although nevertheless credible.

49 Where a factual finding is made at first instance in part because of the credibility of witnesses' evidence, including the way in which they gave their evidence, an appellant attempting to have the finding set aside on appeal faces a difficult although not insurmountable task.

50 The process involved for an intermediate appellate court in an appeal of this type was discussed by Steytler P in *Skinner v Broadbent* [2006] WASCA 2 at [32]-[37]. By reference to the relevant authorities, the President made a number of points which may be summarised as follows:-

(a) An appellate court has a disadvantage in assessing the credibility of witnesses to that of a trial court. As stated by Lord Sumner in *SS Hontestroom v SS Sagaporack* [1927] AC 37 at 47, unless it is shown that a trial court has misused its advantage the appeal court should not reverse conclusions reached, based on their own assessment of the evidence and the probabilities of the case.

(b) Kirby J criticised this approach in *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (In Liq)* (1999) 73 ALJR 306 at 327 [88].

(c) Despite this, caution must be exercised in overturning findings of fact based on the credibility of witnesses. In resolving a conflict of evidence the "*subtle influence of demeanour*" cannot be overlooked. (Citing McHugh J in *Jones v Hyde* (1989) 63 ALJR 349 at 351 and *Abalos v Australian Postal Commission* (1990) 171 CLR 167 at 179).

(d) Steytler P quoted the reasons of Brennan, Gaudron and McHugh JJ in *Devries v Australian National Railways Commission* (1993) 177 CLR 472 at 479 where their Honours said a finding of fact based on credibility is not to be set aside because an appellate court thinks the probabilities are against the finding. If the finding is to any substantial degree dependent upon the credibility of a witness, the finding must stand unless the trial judge has failed to use or palpably misused his advantage or acted on evidence inconsistent with facts incontrovertibly established by the evidence or which was glaringly improbable.

(e) Even allowing for the criticism by Kirby J of the words "*misused his advantage*", this is a strong reminder of the difficulties facing a person seeking to overturn a finding of this kind. As a matter of logic, experience and legal authority, the appellate court must respect the advantage of the primary decision maker. (Quoting *Suvaal v Cessnock City Council* (2003) 77 ALJR 1449 at 1462 [73] per McHugh and Kirby JJ).

(f) As stated by Gleeson CJ, Gummow and Kirby JJ in *Fox v Percy* (2003) 214 CLR 118, an appeal court must perform their statutory functions even when a trial judge has reached a conclusion by favouring the witnesses of one party over another. This may lead to the overturning of a finding where incontrovertible facts or uncontested testimony demonstrate the trial judge's conclusions are erroneous or the conclusion reached was glaringly improbable or contrary to compelling inferences.

(g) As stated by their Honours in *Fox v Percy*, recent research has cast doubt upon the ability of judges to tell truth from falsehood from the appearance of witnesses.

(h) When deciding between competing versions of facts it is necessary for a trial judge to explain why one version has been preferred to another.

(i) It is a trial judge's duty to consider all of the evidence in a case and where important or critical evidence is not referred to an appellate court may infer that it has been overlooked or not considered.

51 Although Steytler P dissented in *Skinner v Broadbent*, the reasons of the other members of the court (McLure and Pullin JJA) did not differ from the President's analysis of these issues. (See also *Lackovic v Insurance Commission (WA)* (2006) 31 WAR 460 per Buss JA at [65]-[67]; Steytler P and Pullin JA agreeing). In the authorities referred to by Steytler P in *Skinner v*

Broadbent there is reference to "*incontrovertible*" evidence and "*glaringly improbable*" versions of events, which are the words used in the grounds of appeal and submissions made by the appellant in this matter.

52 In paragraph [37] of *Skinner v Broadbent*, as referred to in (i) above, Steytler P referred to the duty to consider all of the evidence in a case and when important or critical evidence is not referred to, an appellate court may infer that it has been overlooked or that the trial judge failed to give consideration to it. The same principle applies with respect to the reasons of the Commission and the approach of the Full Bench. In paragraph [37], Steytler P referred to the reasons of Samuels JA in *Mifsud v Campbell* (1991) 21 NSWLR 725 at 728. On that page, Samuels JA said that "*a failure to refer to some of the evidence does not necessarily, whenever it occurs, indicate that the judge has failed to discharge the duty which rests upon him or her*". The situation was different if a judge were to "*ignore evidence critical to an issue in a case*". When that occurred his Honour said this tended to deny the fact and appearance of justice having been done and produced a mistrial.

Ground 1

53 In order to consider whether the Commission erred in making the factual finding which it did, it is necessary to consider and assess the evidence relied on and submissions made by the appellant. I will now discuss these. In doing so I will make observations on the points made by the appellant. It will then be necessary to consider their collective effect.

Mr McAuliffe

54 The appellant argued the Commission erred in its findings about the evidence of Mr McAuliffe and by failing to adequately take into account the evidence about his appointment.

55 In paragraph [25] of its reasons the Commission referred to the evidence of Mr McAuliffe. It was said that his evidence "*goes more to supporting the contentions of*" the respondent rather that the appellant. The Commission did not explain why it formed this opinion. It may be that the Commission thought this because Mr McAuliffe did not give any evidence of being told by Mrs Tucun that he was being engaged to replace the appellant. Additionally, at one point in his evidence Mr McAuliffe said he was engaged as a manager of the abattoir, he knew the appellant was employed as the general manager and that the two positions were "*possibly*" distinct. This aspect of Mr McAuliffe's evidence was referred to by the Commission at paragraph [14] of its reasons.

56 In paragraph [31] of its reasons the Commission said that it was not in the interests of the respondent to replace the appellant with Mr McAuliffe who did not have the "*particular character traits*" of the appellant. These were described in the same paragraph of the reasons as being the appellant's "*character, skill and experience to continue to drive the operation*". The appellant submitted that the Commission had erred in this paragraph as there was no evidence that Mr McAuliffe lacked these characteristics. Additionally it was submitted that this was an important finding because it was used by the Commission to support the acceptance of the evidence on behalf of the respondent about the basis upon which Mr McAuliffe was engaged.

57 I do not accept this criticism of the reasons of the Commission. As noted earlier, Mr McAuliffe did say that he lacked background in production issues and his stronger understanding was that of regulatory issues. In any event the Commission's observation that Mr McAuliffe did not have the relevant character traits of the appellant was relevant to an understanding of the perspective of Mr and Mrs Tucun on behalf of the respondent. There was no evidence before the Commission that Mr and Mrs Tucun understood that Mr McAuliffe had the relevant character traits at the time of his appointment. Therefore there was validity in the observation which the Commissioner made. The observation made by the Commission was as to what was in the interests of the respondent, represented by and based on the understanding of Mr and Mrs Tucun at the time. As there was no evidence that they knew Mr McAuliffe had the same character traits as the appellant, the Commission was not incorrect on the evidence to say it was not in their interests to replace the appellant with Mr McAuliffe.

58 The appellant also criticised the Commission's recitation of Mr McAuliffe's evidence at paragraph [14] of its reasons. In that paragraph the Commission said Mr McAuliffe's evidence was that he spoke to Mrs Tucun for the second time some eight weeks after the first occasion. As set out earlier, Mr McAuliffe's evidence was that the eight week time period was between his giving notice to finish with AQIS and the offer of employment from Mrs Tucun. In my opinion this is a minor point and did not affect the decision made by the Commission that there was no dismissal.

59 The appellant also submitted that Mr McAuliffe's evidence "*incontrovertibly*" established that he was recruited to be the general manager of the abattoir and not for some other position. In my opinion Mr McAuliffe's evidence did not incontrovertibly establish this fact. Although at one point Mr McAuliffe's evidence-in-chief seemed to be to the effect that he had been engaged by Mrs Tucun as the general manager prior to 30 March 2005, this point was undermined by his evidence in cross-examination. This was because in his cross-examination Mr McAuliffe said he was appointed as a manager and the appellant was the general manager and he saw the positions of manager and general manager as being possibly distinct.

60 It was also submitted that Mr McAuliffe's evidence was that he discussed with Mrs Tucun his proposed duties of running the abattoir and not the management of regulatory issues. The appellant submitted this undermined the evidence of Mrs Tucun as to the basis upon which Mr McAuliffe was engaged and that it was a piece of evidence which the Commission did not consider when deciding to accept the evidence of Mrs Tucun. In paragraph [14] of its reasons the Commission did refer to Mr McAuliffe's evidence that he was offered a job to manage the plant. This was not specifically referred to in the Commission's analysis of the evidence of Mr and Mrs Tucun at paragraph [31] and following but because of the Commission's earlier referral to this piece of evidence I do not draw the conclusion that it was overlooked by the Commission. In any event the issue about what duties Mr McAuliffe was engaged to do was not explored in any detail in the evidence.

61 In his written submissions at paragraph [16], the appellant referred to other aspects of Mr McAuliffe's evidence but in my opinion none of these submissions were very cogent. For example there was reference made to there being talk around the plant when Mr McAuliffe commenced on 31 March 2005 that the appellant had been removed the previous day. The Commission referred to this piece of evidence at paragraph [14] of its reasons but did not again refer to it in its assessment of whether the appellant was dismissed other than to say in paragraph [34] that nothing that happened later indicated the appellant was dismissed. It is unclear whether in saying this the Commission was referring to the evidence of Mr McAuliffe about the

talk around the plant. In any event however this generalised piece of evidence, clearly of a hearsay nature, did not have any cogency and does not undermine the finding made by the Commission that there was no dismissal.

62 The appellant also referred to the evidence of Mrs Tucun with respect to the appointment of Mr McAuliffe and said that her evidence "*incontrovertibly*" established she believed the appellant was not competent to manage the plant and that Mr McAuliffe was appointed to be the person who was responsible for looking after the plant and not the regulatory bodies. I have earlier set out a summary of Mrs Tucun's evidence on this issue. In my opinion the appellant's submission suffers from the deficiency of being selective in extracting parts of the evidence of Mrs Tucun without having regard to the whole of it. On consideration of the whole of the evidence in my opinion Mrs Tucun's evidence did not "*incontrovertibly"* establish those facts which the appellant alleges. In considering the evidence of Mrs Tucun as a whole, in my opinion, it did support the Commission's finding that Mr McAuliffe was employed as a manager to assist the respondent with its interaction with the regulatory bodies. The observation made by Mrs Tucun about the appellant not being competent to manage the plant must be seen in the context of her evidence as a whole. The effect of the evidence of Mrs Tucun was not that she believed the appellant was incompetent to remain in the position of general manager but that his deficiencies needed to be supplemented by other employees including Mr McAuliffe who was to be appointed in a managerial position to appease the regulators.

63 It is also unclear whether Mrs Tucun's answer as to the "*capacity*" that Mr McAuliffe was going to be reporting to her, quoted earlier was a reference to Mr McAuliffe or herself. In other words it is not clear that Mrs Tucun was indicating that it was Mr McAuliffe rather than herself who was responsible for looking after the plant. It may have been that Mrs Tucun meant that she was in a generalised sense looking after the plant and that her answer was referable to herself rather than Mr McAuliffe. I am not satisfied that this evidence from Mrs Tucun was a critical piece of evidence which the Commission failed to consider, therefore establishing error.

64 I am not satisfied that as submitted by the appellant the Commission failed to properly consider the evidence of Mr McAuliffe or what the appellant referred to as the admissions of Mrs Tucun.

The Evidence of Ms Williams

65 The appellant submitted the evidence of Ms Williams and Mr McAuliffe established that the abattoir staff were of the view, based on what they were told by Mr and Mrs Tucun, that the appellant did not voluntarily leave his employment. It was submitted that how Mr McAuliffe, Ms Williams and the other staff formed this view, if the accounts of Mr and Mrs Tucun about what they told Ms Williams and the staff on 30 and 31 March 2005 was accurate, was something the Commission did not give any serious consideration to. It was submitted the failure of Ms Williams to recall the exact words used was not a valid reason for her evidence to be "*completely disregarded*".

66 In my opinion, this submission overstates the evidence about the "*view*" of the abattoir staff. The evidence fell short of establishing the "*view*" of the staff was that the appellant did not leave his employment voluntarily.

67 I have already referred to the evidence of Mr McAuliffe about the talk around the plant on the morning of 31 March 2005. As stated earlier, in my opinion this was a piece of generalised and hearsay based evidence which did not demand serious consideration by the Commission in its reasons.

68 Ms Williams did not give evidence of any "*view of the staff*" about how the appellant ceased his employment. She gave evidence about what she was told by Mr Tucun on the evening of 30 March 2005, and what Mrs Tucun told the staff on 31 March 2005. This evidence was not however incontrovertible evidence that it was conveyed to the staff that it was the respondent's decision that the appellant's employment ceased, as asserted in ground (1)(d) of the notice of appeal. This is because the evidence of Ms Williams on these issues was somewhat uncertain and disputed by Mr and Mrs Tucun. It was the duty of the Commission to assess the weight of the evidence. In doing so it was open to the Commission to have regard to any uncertainties expressed by the witnesses during their evidence. In this case the Commission did not in my opinion completely disregard the evidence of Ms Williams because of her failure to recall the exact words used in the conversations she gave evidence about. The Commission did, as it was entitled to do, however, take this into account in assessing the weight or strength of her evidence, against that of Mr and Mrs Tucun.

69 The Commission referred to the evidence of Ms Williams three times in its reasons for decision.

70 The Commission first referred to the evidence of Ms Williams at paragraph [16] of its reasons. It was there recorded that Ms Williams "*told the Commission she had heard the [appellant] had parted company with the respondent but in cross-examination she admitted she did not hear the detail of that conversation or at least her memory was unclear about that*". The Commission said it appeared the "*source of her information was initially in a communication with either the [appellant] or Mr Tucun*". As to the latter point, Ms Williams' evidence was that she first heard from the appellant about the issue and then Mr Tucun. The use of the word "*initially*" suggests however that the Commission also had in mind Ms Williams' evidence about the later communication from Mrs Tucun the next day. The Commission was not inaccurate in saying that Ms Williams' memory of what she heard about the appellant parting company with the respondent was "*unclear*". This description applied to what Ms Williams said she heard both on 30 and 31 March 2005.

71 The Commission next referred to the evidence of Ms Williams in paragraph [25] of its reasons. The Commission said that Ms Williams' evidence was credible "*but the reality is she adds very little weight to the [appellant's] version of events because she admits that she cannot recall or might not even know the precise words used by the respondent at the time of the dismissal*".

72 At this point the Commission was, as required, assessing the weight of Ms Williams' evidence. The sentence is a little unclear in using the expression "*at the time of the dismissal*". This is because Ms Williams did not give evidence about hearing the words used at the meeting on 30 March 2005, when it was alleged the dismissal took place. She gave evidence as to what she was told by Mr Tucun later that night and what Mrs Tucun said to the staff the next day. In the context of the reasons as a whole, however, and in particular having regard to the third time when the Commission referred to Ms Williams' evidence, mentioned below, I am not satisfied the Commission misunderstood Ms Williams' evidence. The use of the expression "*at the*

time of" was, I accept, a reference to the time of the alleged dismissal generally, rather than specifically to the meeting on 30 March 2005.

73 In assessing the weight of Ms Williams' evidence the Commission referred to her lack of recollection of the precise words used "*by the respondent*" Again the use of the word "*respondent*" was a little imprecise, but in the context must mean the words used by Mr Tucun on 30 March 2005 and Mrs Tucun on 31 March 2005. As stated Ms Williams did lack recollection about the precise words used, and this was something the Commission was entitled to take into account in assessing the weight of her evidence. Also material, albeit not specifically referred to by the Commission, was the contrary evidence of Mr and Mrs Tucun. It is true that with respect to what she heard both on 30 and 31 March 2005, Ms Williams said it was "*along the lines*" that it was the respondent's decision to end the appellant's employment. This evidence however was non specific, impressionistic, and weakened by the uncertainties expressed elsewhere in Ms Williams' evidence. The Commission was in my opinion entitled to accord Ms Williams' evidence little weight for the reason expressed.

74 The final time when the Commission referred to the evidence of Ms Williams was in paragraph [34] of its reasons. As stated earlier, the Commission said that the evidence of Mr and Mrs Tucun about "*what occurred in the meeting should be accepted on the balance of probabilities. Nothing that happened later, for instance the memory of Nicole Williams indicates that the [appellant] was dismissed*". The word "*indicates*" is a word that has different shades of meaning. It can mean "*show*" which in the present context would mean establish or prove. It can also mean to be a sign of or to point to. (See *The Macquarie, Concise Dictionary, 2nd Edition*). In the context of the reasons as a whole I think the use of the word "*indicates*" in paragraph [34] of the Commission's reasons meant show or establish. Used in this sense there was no misdescription of the evidence of Ms Williams. It did not on its own show or establish the appellant was dismissed. However Ms Williams' evidence was relevant to the issue of whether there was a dismissal. If the Commission thought her evidence was reliable about what was said by Mr and Mrs Tucun then what they said could have been regarded as admissions being made on behalf of the respondent that there was a termination of the appellant's employment. The Commission assessed the reliability of Ms Williams' evidence however and accorded it little weight.

75 I have, as expressed above, some unease about the words used by the Commission to describe Ms Williams' evidence. Overall, however, I am not satisfied that the Commission did not properly understand and appropriately consider and weigh the evidence of Ms Williams as to what was said by Mr and Mrs Tucun. The result was that despite Ms Williams' evidence the Commission accepted on balance the evidence of Mr and Mrs Tucun about what happened at the meeting on 30 March 2005. I do not think the Commission erred in so concluding.

76 The appellant also asserted that Mrs Tucun's evidence about what happened at the meeting with the staff on the morning of 31 March 2005 was contradictory. The attention of the Full Bench was drawn to the evidence of Mrs Tucun in examination-in-chief when she said that at the meeting she and Mr Tucun introduced Mr McAuliffe and told the staff the appellant had decided to resign and had left. (T170). When later recalled to give further evidence, Mrs Tucun said she said at the meeting that the appellant had left the respondent. She was then asked, "*and no other statement?*". Mrs Tucun said in answer: "*no other statement. There was no inference whatsoever that [the appellant's] employment had been terminated other than he had left the employ of the company. That was all*". (T237). In my opinion any difference between these two pieces of evidence by Mrs Tucun was minor and was not something which the Commission was required to closely consider in the assessment of Mrs Tucun's evidence as a whole or with respect to an assessment of the evidence of Ms Williams about the meeting on 31 March 2005.

The Evidence About the Locks

77 At paragraph [29] above I have set out the evidence of Ms Williams relevant to this topic.

78 Mrs Tucun was not asked about the presence of Mr Taylor and the stockman Alan at the abattoir on the evening of 30 March 2005.

79 Mr Tucun was cross-examined on this issue. He said that Mr Taylor at the time lived approximately 20km from the abattoir. He said that he did not telephone Mr Taylor that evening but did not know whether Mrs Tucun did. Asked whether he could explain why Mr Taylor and Alan attended at the abattoir that night, Mr Tucun answered that they were "*both involved in livestock so I would assume that it was in regard to livestock*". (T240). On being further questioned Mr Tucun could not offer an explanation as to why this would have occurred about 10 o'clock in the evening. Asked as to why Ms Williams had to wake up Alan to let her out of the premises when her evidence was that prior to that she had a "*key to the padlock*", Mr Tucun said that he did not know and that Ms Williams would have to be asked about this. (T240). This was not a proper question to have put to Mr Tucun because the evidence of Ms Williams was not that she had a "*key to the padlock*". The next question put to Mr Tucun was also not a proper question. The question asked why there had been a "*change in padlocks and Alan's staying there and they have to see him to get out*". (T240). The question was not proper because the evidence did not establish there had been a change in any padlocks. Mr Tucun answered that he did not know anything about the padlocks. Mr Tucun also gave evidence that Alan had stayed at the abattoir on quite a few occasions. (T240).

80 The appellant submitted that there had been a "*changing of the padlocks and the installation of a night watchman at a late hour*". It was submitted that this was a relevant piece of evidence which was required to be considered by the Commission and that the Commission ought to have made what the appellant described as a *Jones v Dunkel* [(1959) 101 CLR 298] inference about the failure of the respondent to call Mr Taylor on this issue.

81 I do not accept any of these propositions. The evidence did not establish that there had been a change of the padlocks on 30 March 2005. The evidence of Ms Williams went no further than establishing there was a change of practice. This was that in the past the gate was usually open but on that night she would be locked in and need to wake Alan up to let her out. The evidence did not establish that Ms Williams formerly had a key to the lock. If the locking mechanism of the gate was a padlock and this was usually open, Ms Williams could as she said in her evidence, exit through the gate and lock it on her way out.

82 In my opinion the evidence about the locks was not a piece of evidence which the Commission was in error in failing to consider in its assessment of whether there was a dismissal.

The Notice of Answer and Counter Proposal

83 The respondent filed a Notice of Answer and Counter Proposal prior to the hearing by the Commission. This document said it was filed by the respondent, care of the Australian Meat Industry Council of WA. The document was signed by "*MJ Darcy*". The particulars to the document were in an attached schedule. The fourth and fifth paragraphs of the schedule were in the following terms:-

> "*The company became most concerned with matters raised by various government agencies and departments as to the operations at Gin Gin [sic] as their license for exporting meat to America was in jeopardy. On the 30th March 2005 a meeting was scheduled with two of the Directors of the Company to discuss their concerns with the applicant in relation to the operations at Gin Gin [sic]. On speaking with the applicant the Directors advised that they had a number of concerns, which they wish to discuss with the applicant. Many of these being, loses [sic] that were unsustainable, AQIS and AUS-Meat concerns and a number of other issues. However, the applicant became agitated and refused to discuss any issues and stated he did not wish to discuss anything and advised the Directors that the company was a lemon and that his creditability could be damaged by working there and that he would leave immediately.*
>
> *As the applicant refused to discuss any issues and stated he would leave immediately and was derogatory of the company and its operations, the respondents found themselves in no other position to advise the applicant that they would terminate his services and pay him one months wages in lieu of notice. This amount has been forwarded into the applicant's bank account accordingly.*"

84 It can be seen that there is some discrepancy between these two paragraphs in that the first asserts the appellant said "*he would leave immediately*" whereas in the second the respondent advised the appellant "*they would terminate his services*".

85 The appellant submitted on the appeal that the Commission had not properly taken into account how the document contained an assertion that the appellant had been terminated, when it was prepared by Mr Darcy and he was involved in advising Mr and Mrs Tucun that they could not at the meeting on 30 March 2005 terminate the appellant's employment. It is correct that this issue was not referred to in the reasons for decision of the Commission. In my opinion however this was something which was resolved during the course of the hearing and the Commission was not obliged to refer to it in its reasons.

86 During the cross-examination of the appellant on 13 October 2005 the version of events about the 30 March 2005 meeting, which was later given by Mr and Mrs Tucun in their evidence, was put to the appellant. (T85/86). The hearing on 13 October 2005 concluded when Mrs Tucun was part way through her evidence but she had not at that time given evidence about what happened at the meeting on 30 March 2005.

87 On 6 February 2006 the appellant brought an application before the Commission in part seeking orders that the respondent be directed to indicate exactly what its defence was. In this context the appellant referred to the fifth paragraph of the schedule to the Notice of Answer and Counter Proposal and contrasted it with the cross-examination of the appellant at T85. In response to this application, Mr Darcy referred to the fourth paragraph of the schedule and accepted the next (fifth) paragraph was a contradiction of this. Mr Darcy said that in the fourth paragraph it was clearly indicated that the appellant had offered to leave. (T106). Mr Darcy said of the fifth paragraph "*maybe the choice of words is probably not correct*". (T106). Mr Darcy then went on to say that it had always been the contention of the parties (presumably meaning the respondent) that the appellant "*did terminate*" (presumably meaning resign). Mr Darcy said this had been explained at the first conciliation conference. Mr Darcy also submitted that the words should have been used that the respondent accepted the appellant's termination (presumably meaning resignation). Mr Darcy accepted that those words had not been used in the schedule but said this had been the intent. The Senior Commissioner asked whether this clarified matters for the appellant's advocate. He answered that it did. (T106).

88 The issue was raised however with Mrs Tucun in her cross-examination on 19 April 2006. (T166). The fifth paragraph of the schedule to the Notice of Answer and Counter Proposal stating the respondent "*would terminate*" the appellant's services was put to Mrs Tucun. She said she could not comment on it and said "*I don't recall seeing*", before the appellant's advocate interjected with the next question. It was then put to Mrs Tucun that she gave instructions to Mr Darcy. Her response was "*I asked [sic] Mr Darcy to comment on that*". (T166). Mr Darcy then said he thought the matter had been dealt with previously and that as he had said at that time he made an error. Mr Darcy said he did the document on his own and had admitted he had made an error in the wording of the document and he thought the matter was clarified at the previous hearing where he had given an explanation of what had transpired. The Senior Commissioner then said that "*your friend knows as well as you do that they are not pleadings, and I know that too*". The Senior Commissioner then said that "*it doesn't help his cross-examination. Sounds really good to the audience, but it doesn't mean much*". (T167). The cross-examination then moved to another topic.

89 The issue arose again during the cross-examination of Mr Tucun. At the time of this cross-examination, Ms Williams had not as yet been called to give evidence but the appellant's advocate indicated he had a witness statement from her and wanted to cross-examination Mr Tucun about it. There was some discussion about when the witness statement had been provided to the respondent. During submissions on this issue the appellant's advocate said that it was not apparent until 6 or 7 February 2006 that there was any issue about whether or not the appellant was terminated. (T199). It was asserted that the Notice and Answer and Counter Proposal had "*made it clear that he was terminated*". It was submitted that it was not until Mrs Tucun gave evidence the appellant knew the respondent's position was that the appellant had resigned. Mr Darcy objected to this

statement and said the appellant's advocate had known of the respondent's position as it had been clearly stated at a conciliation conference. The Senior Commissioner then looked at and read from a report on the conference by a Deputy Registrar. The note which was read recorded the respondent's position as consistent with that which had been taken throughout the hearing. The appellant's advocate accepted the note of the conference. (T200). The cross-examination of Mr Tucun then moved on.

90 At the commencement of the hearing on the next day (20 April 2006), the appellant's advocate said he had taken the opportunity overnight to check his notes in relation to the conference and had not recorded anything about what the respondent's defence was. He indicated again however that he was prepared to accept what the Deputy Registrar had recorded at the conference. An apology was provided for any misleading of the Commission. This was accepted by the Senior Commissioner.

91 In my opinion the contradictory aspects of the Notice of Answer and Counter Proposal were explained by Mr Darcy during the course of the hearing. He said that the wording in the document was his and that he had made an error. There was no evidence the document was endorsed by Mr or Mrs Tucun. The contents of the document did not therefore reflect upon the credibility of Mr or Mrs Tucun. In the circumstances, how Mr Darcy made the error was not an issue which the Commission was required to entertain as possibly reflecting upon the credibility of Mr or Mrs Tucun.

92 In my opinion there is no cogency in this point.

Payment in Lieu of Notice

93 The evidence of Mrs Tucun was that she had taken advice from Mr Darcy prior to the meeting with the appellant on 30 March 2005. Mrs Tucun said she made notes of the points made by Mr Darcy in the page of her diary for 21 March 2005. One of the diary notes was "*1mth in lieu of notice (could do 2 wks)*". The appellant contended that this diary note was inconsistent with an intention not to terminate the employment of the appellant. Mrs Tucun was cross-examined about the diary entry. Mrs Tucun said that Mr Darcy had made it clear the respondent could not dismiss the appellant or force his resignation but that if the appellant chose to leave, Mr Darcy mentioned "*what would we have to pay him*". (T159). It was put to Mrs Tucun that Mr Darcy "*told you you could terminate him by giving him pay in lieu of notice*". This was not accepted. Mrs Tucun said Mr Darcy "*was very emphatic*" that the respondent could not terminate the appellant's employment and could not force his resignation. (T160). Asked again why the note referred to one month in lieu of notice, Mrs Tucun answered that it was in case the appellant chose to leave, that was what Mr Darcy felt he was entitled to. Mrs Tucun added that in fact, Mr Darcy said two weeks.

94 Mrs Tucun's evidence-in-chief about her conversation with the appellant as to what he would be paid upon his resignation at T117 has been summarised earlier.

95 The appellant submitted the evidence about payment in lieu of notice was important and had not been considered by the Commission.

96 In its reasons the Commission did record at paragraph [20] that Mrs Tucun's evidence was, after the appellant said he would leave immediately, that "*in accordance with the industrial advice she had been given she offered him one month's pay*". At paragraph [22] of the reasons the Commission in summarising Mr Tucun's evidence also referred to the advice taken by the respondent from their "*industrial advisors*" and that during the meeting with the appellant of 30 March 2005, it was said he was to be given a month's pay.

97 The Commission did not specifically discuss the cross-examination of Mrs Tucun on this issue in the reasons but as stated earlier said that it accepted her evidence despite the "*vigorous attack by the*" appellant's advocate.

98 I am not of the opinion that this issue was of such importance that it needed to be more specifically considered by the Commission. The note made by Mrs Tucun in her diary about payment in lieu of notice indicated that she discussed with Mr Darcy the possibility of the appellant's employment ceasing, as she admitted in her evidence. The note reflected what Mrs Tucun said Mr Darcy advised her she should do in the event that the appellant resigned. There was no evidence which contradicted this. The appellant argued that an experienced industrial relations practitioner would not have advised Mrs Tucun of any requirement to pay a month in lieu of notice if an employee resigned, or that the respondent could not terminate the appellant's employment. Quite apart from there being no evidence before the Commission as to Mr Darcy's level of knowledge and experience, I do not accept that the Commission could in effect take judicial notice that an experienced advisor would not, in the circumstances, have given this advice. Mrs Tucun's evidence about what she agreed to pay the appellant after he resigned from his employment and her description of it as being a payment "*in lieu*", was consistent with the advice she said she received from Mr Darcy and recorded in her diary. In my opinion the Commission was not required to consider this evidence more specifically than is recorded in the reasons.

99 The appellant also made submissions about another point noted by Mrs Tucun in the record of advice given by Mr Darcy. Noted as point 5 was: "*protect computers, paperwork, plant integrity*". Point 6 was "*guard?*". Mrs Tucun was cross-examined about why Mr Darcy had recommended they take a guard. Mrs Tucun answered that "*given the volatility of [the appellant's] personality, and given the incidents that happened at the plant as they were reported to me, Mr Darcy suggested that we protect the plant and the computers and the paperwork should [the appellant] go out of control again*". (T159). This evidence was consistent with other evidence given about the appellant's volatility and other incidents that had occurred. Mrs Tucun was not further cross-examined on this issue. Given her explanation, I am not satisfied that point 5 of the note sufficiently indicated a discussion with Mr Darcy about, or an intention on behalf of Mrs Tucun to, terminate the employment so as to require explicit consideration by the Commission.

Conclusion - Ground 1

100 I have now considered each piece of evidence relied on in support of this ground. I do not think they lead to a conclusion that the ground should be upheld. The ground does not gain any strength either from a collective consideration of them.

101 I do not think the evidence and submissions relied upon by the appellant, considered as a whole, demonstrate the Commission erred in failing to properly consider the evidence or in finding there was no dismissal.

102 In my opinion ground 1 has not been established.

Ground 2 - Glaring Improbability of Mr and Mrs Tucun's Evidence

103 As set out earlier, the second ground of appeal was in effect that the evidence of Mr and Mrs Tucun about the circumstances of the appellant's cessation of employment was glaringly improbable and the Commission had therefore erred in accepting it.

104 Again it is necessary to consider each of the aspects of the evidence relied upon by the appellant in support of this ground. They will need to be assessed both individually and for their cumulative effect.

Appellant's Character

105 Firstly, it was submitted it was improbable that a person with the character of the appellant would have decided to resign simply because Mr and Mrs Tucun wanted to discuss with him questions relating to their serious concerns. It was submitted that this was inconsistent with the appellant's character as the respondent had attempted to portray in the appellant's cross-examination and the evidence of Mrs Tucun including her discussions with Dr Godwin and other people. It was submitted that the intent was to "*show the appellant as an intimidating bully who gets knives thrown at him, tried to run down a management representative in a utility, failed to respond at all adequately to telephoned concerns for a month and was so apoplectic in nature they felt he was at risk of a stroke or heart attack or likely to harm someone*". In my opinion this point is not established. It is correct that part of the respondent's case was that the appellant behaved unpredictably and erratically at times. His decision to resign from employment at the commencement of the meeting on 30 March 2005 was not however inconsistent with this. It was consistent with a person of unpredictable behaviour. In my opinion this point does not demonstrate any glaring improbability of the evidence of Mr or Mrs Tucun.

Mrs Tucun's Diary Notes

106 The appellant also made submissions about Mrs Tucun's diary notes of what she intended to and did discuss with the appellant at the meeting on 30 March 2005. Reference was made to T157 where Mrs Tucun was cross-examined about her diary entry of the points of concern which she intended to raise with the appellant. When questioned about her note as to production targets, Mrs Tucun said that Mr Tucun could give more specific answers and also said that "*we compiled these bullets points together*". Mrs Tucun said that she wrote the bullet points in conjunction with Mr Tucun. (T158).

107 The appellant submitted this evidence was not supported by that of Mr Tucun. Reference was made to his cross-examination at T183. During this evidence Mr Tucun said he had no input into the diary entries on the page for 30 March 2005. These were the notes made by Mrs Tucun about the intended discussion points with the appellant. Mr Tucun also said that he believed these notes were made after the meeting with the appellant. (T184). Mr Tucun also gave evidence however that the items noted by Mrs Tucun were discussed between them over a period of time. In my opinion this is not a major point which does not seriously impair the evidence of Mr or Mrs Tucun.

108 It was also submitted that Mr Tucun did not support Mrs Tucun's evidence about when she made the diary notes of the meeting with the appellant on 30 March 2005. Mrs Tucun's evidence was that these notes were made immediately after the cessation of the first part of that meeting. Mr Tucun's evidence was somewhat imprecise about when Mrs Tucun made the notes of the meeting. Under cross-examination at T195 he said that he could not remember but presumed the notes were made that night in the diary. He said he remembered Mrs Tucun making notes and he helped her with compiling the notes. He said however that he could not remember whether she wrote the notes on "*a paper first and then put it on here. I can't remember*". (T195). It was then put to Mr Tucun that she might have written the notes on a pad and then transferred it later. Mr Tucun answered that he could not remember.

109 This evidence falls short of any contradiction between the evidence of Mr Tucun and that of Mrs Tucun. Mr Tucun's lack of recollection and suggestion of the possibility that the notes could have been written on another piece of paper and then transferred into the diary did not undermine Mrs Tucun's evidence on this issue. The evidence did not undermine the finding of the Commission that the notes made by Mrs Tucun were almost contemporaneous and "*corroborative*" and should be given weight. (Reasons at paragraph [26]).

110 The appellant also cast doubt upon the reliability of the evidence of Mrs Tucun because of the lack of diary notes about other matters of importance at or around the same period of time. It was argued in effect that this was inconsistent with Mrs Tucun's description that her diary notes were contemporaneous and comprehensive. Reference was made to the evidence-in-chief of Mrs Tucun at T106. Mrs Tucun was asked as to whether she kept a "*conclusive diary of day-to-day events with regards*" to the operations at the abattoir. Mrs Tucun's answer was simply that "*I kept a diary*". Mrs Tucun agreed with the proposition that she recorded day-to-day issues in relation to the management of the operations. She agreed with the proposition that they were "*pretty comprehensive type notes that you maintained*". (T106). Mrs Tucun also agreed that the notes were made at the time the telephone conversations and discussions were held. It was submitted that Mrs Tucun's credibility was undermined by the fact that there were not extensive notes made in her diary as to important matters before and after 30 March 2005. Mrs Tucun accepted in her evidence that on this basis the notes were not "*comprehensive, contemporaneous, day-to-day diary entries in relation to issues at the plant*". (T137). Mrs Tucun then said that she really started making notes from the date she became aware there was a problem with the appellant which occurred on 25 February 2005.

111 Mrs Tucun was also asked about the lack of diary notes for the period subsequent to the cessation of the appellant's employment. Mrs Tucun said she did not always make notes of events happening in relation to the new general manager but she added she got a number of written reports from him as well. (T157).

112 Mrs Tucun was also cross-examined about her lack of notes as to the appointment of Mr McAuliffe. Mrs Tucun said she did not recall why there were no entries in her diary about her discussions with Mr McAuliffe and the terms of his employment. (T168).

113 In my opinion the lack of diary entries on these issues is not a sufficiently important point to seriously undermine Mrs Tucun's evidence about the purpose of the appointment of Mr McAuliffe or what happened at the meeting with the appellant on 30 March 2005.

114 Mrs Tucun was also asked about the lack of diary entries prior to 25 February 2005. She explained that up until that point the respondent thought the plant was in very good hands. (T137). In my opinion this answer satisfactorily answers the criticism by the appellant as to the lack of notes made by Mrs Tucun prior to 25 February 2005.

115 There were other points made in the appellant's written submissions about the lack of record in Mrs Tucun's notes about a number of matters. They are set out in paragraph [57] of the written submissions. I have considered each of these but in my opinion they do not individually or cumulatively have the effect that the believability of Mrs Tucun's evidence was seriously impaired.

116 In making this statement I have regard to the fact that the diary notes do record the following (the notes use the word "*Peter*" to describe the appellant):-

(a) On 3 March 2005 there is a note of a conversation with the appellant. It indicates questions being asked by Mrs Tucun about staff training and AQIS. There was also an enquiry about "*7 pallets (1300) sheepskins thrown away – rotten*". The notes record the appellant not discussing the matter, "*had to go*".

(b) On the same date there is a note of an enquiry to the appellant as to whether he needed help or advice from a Mr Dave Arnold. The note records that the appellant became cross and said "*everybody is an expert + he doesn't need help*". The note also records that the appellant "*had to go*".

(c) On 4 March 2005 there is another note of a conversation which makes reference to the appellant having "*no time to do skins*". The note records the appellant as being erratic and cranky. The note records the appellant being told of "*losses to mid Feb over 125,000*". The note records the appellant being evasive about the 7 pallets of rotten skins. "*Suggested advice from Dave Arnold*" is also recorded, and the appellant saying "*no interest*". The note also records "*asked about AQIS and Aus-Meat*". The note records the appellant advising "*they are happy*". The note also records "*asked about another re-work – said hard to get labour in Gingin*". This note also records the appellant as being "*very cranky*".

(d) On 8 March 2005 there is a record of a conversation with the appellant in which animal welfare issues were mentioned. Other production issues were recorded as being discussed.

(e) On 9 March 2005 there is a record of a conversation with the appellant where he was told "*AQIS not happy – said "piss anty"*". The note also records "*I am very worried – wouldn't discuss getting annoyed*".

(f) On another page of the diary on which the date is not reproduced, there is a record of a conversation with the appellant where Mrs Tucun records her expression of concern about a lack of hygiene. The appellant responded according to the record "*unable to get labour – no one wants to work*".

(g) On 18 March 2005 there is a record of conversation with the appellant about him being very upset with "*Lindsay*". This note records that the appellant "*raved on approx 10 minutes with no break (almost incoherent with rage)*". The note records Mrs Tucun encouraged the appellant to settle down.

(h) On 19 March 2005 there is a record of a conversation with the appellant about 30 minutes later with it being noted that the appellant was a different person. The note records the appellant as saying "*not to tell Lindsay about what was said*". The note records Mrs Tucun told the appellant to go home and was concerned about his health.

(i) On 23 March 2005 there is a record of a conversation with the appellant in which Mrs Tucun told him she was worried about the quality of product numbers and his health. The notes records the appellant seemed to be agitated and saying he was fine and wanting to know who had been talking.

117 It was also submitted that Mr McAuliffe was not listed in the things recorded in Mrs Tucun's diary that she and Mr Tucun wished to discuss with the appellant. Whilst this is relevant to assessing Mrs Tucun's evidence it is not of major importance in my opinion.

118 It was also submitted that the omission from the diary entry of the advice received from Mr Darcy of any reference to putting the appellant on notice of the possible consequences of not addressing the concerns Mr and Mrs Tucun allegedly held, compellingly suggested that an intention to terminate the appellant's employment had been formed. In my opinion this conclusion does not follow. It could be equally argued that a lack of any note about an intention to terminate the employment of the appellant suggests that no such intention was formed at the time of taking the advice from Mr Darcy. The point raised is an equivocal one and does not assist in establishing a lack of acceptability of the evidence of Mr and Mrs Tucun.

Lack of Documents

119 The appellant also asserts there was a lack of explanation from the respondent as to why there was not other documented evidence of the respondent's concerns about the appellant's management of the abattoir. For example, it was submitted there were no faxes, e-mails or memorandums sent to the appellant raising any of these concerns. Mr Tucun was asked about this and said that they were discussing matters with the appellant and also did not want to provide him with all of the information because they did not want to discourage him. Mr Tucun said that he used to tell the appellant the results were ugly but did not want to provide him with the magnitude of the losses. (T187). The tenor of Mrs Tucun's evidence was also that her practice was to raise matters with the appellant in discussions rather than in written form. In my opinion this point does not render her evidence or that of Mr Tucun as lacking in reliability.

The Appellant's Non Involvement in Engaging Mr McAuliffe

120 The appellant also submits that there was no reasonable explanation why, if the appellant had authority with respect to hiring staff, as had been the evidence of Mrs Tucun (T128), that the appellant was not involved with Mrs Tucun in the recruitment of Mr McAuliffe to assist the appellant and appease the regulators. Mrs Tucun's evidence was that this matter was to be raised in the meeting with the appellant on 30 March 2005. (T168). By this time however Mr McAuliffe had already been engaged. I accept it might be thought unusual that the issue of Mr McAuliffe's appointment was not discussed with the appellant. However this needs to be considered in the context of Mrs Tucun's evidence about her concern for the state of the abattoir and the appellant and his lack of receptiveness to suggestions of assistance. In those circumstances it is not improbable that Mrs Tucun would engage the services of Mr McAuliffe and then seek to discuss with the appellant at the meeting on 30 March 2005 the particular role he was to play.

Unannounced Arrival

121 The appellant also argued there was no reasonable explanation as to why Mr and Mrs Tucun arrived at the abattoir unannounced to see the appellant to discuss their concerns. Mrs Tucun gave evidence about this in cross-examination at T152. She agreed that although she had spoken to the appellant on the morning of 30 March 2005 on the telephone from Sydney she did not tell him they were coming to Perth. She said she "*felt it was important to go and speak to [the appellant] face to face*". Mrs Tucun went to continue with this answer but was interrupted with a question: "S*urprise him?*". Mrs Tucun answered: "*Not surprise him but sit down and talk to him calmly and get some direct answers*". (T152). Mr Tucun does not seem to have been cross-examined about this. I accept that Mrs Tucun's evidence does not entirely explain why no notice was given to the appellant of the meeting of 30 March 2005. This does not of itself or in combination with other factors persuade me however that her evidence was glaringly improbable. Mrs Tucun said she wanted to speak with the appellant face to face about these matters. If she advised him by telephone in advance that she wanted to meet with the appellant it is quite likely that the discussion would have moved on to what those matters were. This would have created difficulties for Mrs Tucun. Also if she had sent written notice of the intended meeting with the appellant to him it may have also lead to an enquiry as to what it was about.

The Points Raised in Ground 1

122 The appellant also relied upon points made earlier in these reasons such as the evidence of Ms Williams, the evidence about the locks, the diary notes of the advice given by Mr Darcy, Mrs Tucun's evidence about giving the appellant one month's pay in lieu of notice and the evidence from Mr and Mrs Tucun they were given instructions by Mr Darcy that they could not terminate the appellant's employment to support the contention that Mr and Mrs Tucun's evidence was glaringly improbable. In my opinion none of these pieces of evidence individually, collectively or together with the other points referred to in this ground leads to the conclusion that the Commission erred in accepting the evidence of Mr and Mrs Tucun, on the basis that it was glaringly improbable.

Conclusion – Ground 2

123 After giving consideration to all of the points raised, taken together, I do not think they show the Commission erred in accepting the evidence of Mr and Mrs Tucun that there was no dismissal. In my opinion, their evidence has not been shown to be glaringly improbable. This ground therefore is not established.

Ground 3 - Evidence and Credibility of Witnesses

124 The written submissions on this ground repeat points referred to earlier about the Commission's findings with respect to Mr McAuliffe's lack of the appellant's character traits and the evidence that he was recruited to be the general manager. These issues do not require separate consideration to that given earlier. The ground is not established in my opinion.

Conclusion

125 For the reasons set out above in my opinion none of the grounds of appeal have been established and the appeal must therefore be dismissed.

COMMISSIONER P E SCOTT:

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

COMMISSIONER J H SMITH:

127 I have had the benefit of reading the reasons to be published by the Acting President. For the reasons his Honour gives, I agree the Appeal should be dismissed and I have nothing further to add.

2006 WAIRC 05464

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PETER GRIERSON
	APPELLANT
	-and-
	INTERNATIONAL EXPORTERS PTY LTD
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE M T RITTER, ACTING PRESIDENT
	COMMISSIONER P E SCOTT
	COMMISSIONER J H SMITH
DELIVERED	FRIDAY, 22 SEPTEMBER 2006
FILE NO	FBA 19 OF 2006
CITATION NO.	2006 WAIRC 05464

Decision	Appeal dismissed
Appearances	
Appellant	Mr G McCorry, as agent
Respondent	Mr P Momber (of Counsel)

Order

This matter having come on for hearing before the Full Bench on 7 September 2006, and having heard Mr G McCorry, as agent, on behalf of the appellant, and Mr P Momber (of Counsel) on behalf of the respondent, and reasons for decision having been delivered on 22 September 2006, it is this day, 22 September 2006, ordered that appeal No FBA 19 of 2006 is dismissed.

By the Full Bench

[L.S.]

(Sgd.) M T RITTER,
Acting President.

2006 WAIRC 05438

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WORKSAFE WESTERN AUSTRALIA COMMISSIONER
	APPELLANT
	-and-
	ANTHONY AND SONS PTY LTD T/A OCEANIC CRUISES
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE M T RITTER, ACTING PRESIDENT
	COMMISSIONER P E SCOTT
	COMMISSIONER S WOOD
HEARD	FRIDAY, 8 SEPTEMBER 2006
DELIVERED	MONDAY, 18 SEPTEMBER 2006
FILE NO.	FBA 23 OF 2006
CITATION NO.	2006 WAIRC 05438

CatchWords	Industrial Law (WA) - Appeal against declaration made by the Occupational Safety and Health Tribunal - Whether Tribunal has jurisdictin to extend 7 day time period in s51A(2) of the *Occuapational Safety and Health Act 1984* (WA) - Referral of matters to Tribunal for review under s51A(1) - Issue of statutory construction - Limited jurisdiction conferred on Tribunal to "*hear and determine matters*" within specified time period - Appeal allowed – *Industrial Relations Act 1979* (WA) (as amended), s26(1)-(3), s27(1)(n), s49, s49(2a), s113(1)(d)(ii)(I), *Occupational Safety and Health Act 1984* (WA), s22(1)(a), s48(1)(a), (2)(d), (4), s49(1), (5), s51(2)(b), (6), (7), s51AA, s51A(1), (2), (4), (7), s51G(2), s51I - *Industrial Relations Commission Regulations 2005*, r36, r97
Decision	Appeal allowed, declaration made by the Occupational Safety and Health Tribunal varied
Appearances	
Appellant	Ms L Eddy (of Counsel), by leave
Respondent	Captain P Douglas

Reasons for Decision

THE ACTING PRESIDENT:

The Appeal

1 The present appeal has been instituted under s51I of the *Occupational Safety and Health Act 1984* (WA) (*the OSH Act*) and s49 of the *Industrial Relations Act 1979* (WA) (as amended) (*the Act*). The appeal is against a declaration made by the Occupational Safety and Health Tribunal (the Tribunal) on 28 June 2006.

2 The declaration of the Tribunal was that:-

> "*The Occupational Safety and Health Tribunal has the power to consider an application to extend the 7 day period for lodging a s 51A application*."

3 A "*s51A application*" is the referral of a matter to the Tribunal pursuant to s51A(1) of *the OSH Act*. The "*7 day period*" referred to in the declaration is that specified in s51A(2) of *the OSH Act.*

4 The issue which was determined by the declaration made by the Tribunal was raised as a jurisdictional issue by the appellant. The issue of whether, in these proceedings, a reference was made outside the 7 day time period specified in s51A(2) of *the OSH Act* has not as yet been determined by the Tribunal. The appellant concedes this may well be a live issue, but it is not one which the Full Bench is required to consider for the purposes of determining the appeal.

5 In short, the point at issue in the appeal is whether the Tribunal misconstrued *the OSH Act* and *the Act* in deciding that the Tribunal had the jurisdiction and power to entertain an application to extend the 7 day time period specified in s51A(2) of *the OSH Act*. The appellant contends the Tribunal does not have the power to extend the 7 day time limit. Accordingly it is submitted that the Tribunal does not have the jurisdiction to determine a referral to it, purportedly under s51A(1), outside the 7 day period specified in s51A(2) of *the OSH Act*.

6 The respondent did not make any substantive submissions to the Full Bench on the jurisdictional issue.

Leave to Appeal

7 The appellant acknowledges that the declaration made by the Tribunal was a "*finding*" for the purposes of s49(2a) of *the Act*. The word "*finding*" is defined in s7 of *the Act* to mean a "*decision, determination or ruling made in the course of proceedings that does not finally decide, determine or dispose of the matter to which the proceedings relate*". The declaration made by the Tribunal is of this character. Section 49(2a) of *the Act* therefore provides that 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*".

8 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 of 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.*"

9 The appellant submits the public interest requirement is satisfied because the proposed appeal raises an important question of jurisdiction which has not previously been considered by the Full Bench. It is submitted that the appellant, who has the responsibility for the administration of *the OSH Act* and for authorising prosecutions under that Act, needs to have certainty in relation to whether there is power to extend time to make a referral under s51A of *the OSH Act*. It is also submitted that

persons to whom improvement notices are issued need to know with certainty whether the time limit for referring an improvement notice to the Tribunal for review can be extended. It is also submitted that employees and other people whose safety may potentially be affected by a contravention of the obligations under *the OSH Act* at a workplace have an interest in knowing whether they can confidently expect compliance with an improvement notice, issued by the appellant, after the expiry of the 7 day time limit for referring the improvement notice to the Tribunal for review.

10 In my opinion, the issue raised in the present matter is of sufficient importance to lead to the conclusion that an appeal should lie under s49(2a) of *the Act*. This is because it is about the limits of the jurisdiction of the Tribunal in the context of a referral to it under s51A of *the OSH Act*, with respect to an improvement notice. It is in the public interest that the Full Bench consider and determine the jurisdictional issue.

Factual and Procedural Background

11 The background to the appeal may be shortly stated. An inspector appointed under *the OSH Act* issued an improvement notice to the respondent on 5 January 2006. The improvement notice required the respondent to remedy what the inspector believed to be a contravention of s22(1)(a) of *the OSH Act* by 1 February 2006.

12 On 9 January 2006 Captain Peter Douglas, of Douglas Comp-Pete Marine Consultants, on behalf of the respondent wrote to the appellant requesting that the improvement notice be rescinded.

13 By letter dated 1 February 2006 from the appellant to Captain Douglas, the appellant informed the respondent of her decision to affirm the improvement notice. By the same letter the appellant agreed to modify the date for compliance to 5.00pm on 2 March 2006.

14 Captain Douglas replied to the appellant by letter dated 10 February 2006. This letter made further submissions and requested the appellant review her original decision. No reply to this letter was received by 14 March 2006. Accordingly on that date Captain Douglas sent another letter to the appellant enclosing a copy of the letter dated 10 February 2006 in case the same had been mislaid.

15 On 21 March 2006 the appellant responded to the letter dated 10 February 2006. In this letter the appellant said she was not able to further review the decision she had made. The letter said that *the OSH Act* "*specifically requires an appeal of my decision to be lodged with the Occupational Safety and Health Tribunal within seven days of the issuance of my decision*". The letter also stated that whilst reserving the right to act upon a breach of the improvement notice and take appropriate action, the appellant was prepared to amend the compliance date of the notice to 5:00pm on 31 March 2006.

16 Captain Douglas wrote a reply to this letter dated 22 March 2006.

17 On 26 March 2006 Captain Douglas wrote a letter which was addressed to the "*Chairman/Manager, Occupational Safety and Health Tribunal*". This letter set out a brief narrative of the events and amongst other things requested a "*hearing on this matter*". It appears however that the letter was not sent to or lodged with the Tribunal by Captain Douglas. Instead the letter seems to have been received by the Department of Consumer and Employment Protection and then forwarded to the Tribunal. It seems that the letter so forwarded was received by the Tribunal on 30 March 2006.

18 After correspondence between the Tribunal and the parties about the jurisdictional issue, the Tribunal listed the issue for hearing on 21 April 2006. At the end of this hearing the Tribunal reserved its decision. The Tribunal published reasons for decision on 23 June 2006, which led to the making of the declaration quoted earlier.

Statutory Framework

19 Part VI of *the OSH Act* is about improvement and prohibition notices. Specifically s48 provides that inspectors may issue improvement notices. Relevant to the present appeal, s48(1)(a) of *the OSH Act* provides that where an inspector is of the opinion that a person is contravening any provision of *the OSH Act* the inspector may issue to the person an improvement notice requiring the person to remedy the contravention.

20 Section 48(2) of *the OSH Act* sets out the contents of an improvement notice. Section 48(2)(d) sets out the notice shall "*specify the time before which the person is required, to remedy the contravention or likely contravention or the matters or activities occasioning the contravention or likely contravention*".

21 Section 48(4) of *the OSH Act* provides that subject to s51 and s51A of *the OSH Act*, if a person is issued with an improvement notice and does not comply with the notice within the time specified in it, the person commits an offence.

22 Section 49 of *the OSH Act* is about the issuing by inspectors of prohibition notices. A prohibition notice may only be issued by an inspector pursuant to s49(1) of *the OSH Act* where the inspector is "*of the opinion that an activity is occurring or may occur at a workplace which activity involves or will involve a risk of imminent and serious injury to, or imminent and serious harm to the health of, any person*". In these circumstances the "*inspector may issue to a person that is or will be carrying on the activity, or a person that has or may be reasonably presumed to have control over the activity, a prohibition notice prohibiting the carrying on of the activity until an inspector is satisfied that the matters which give or will give rise to the risk are remedied*". Section 49(5) of *the OSH Act* again provides that subject to s51 and s51A, if a person issued with a prohibition notice does not comply with the notice, the person commits an offence.

23 Section 51 of *the OSH Act* is about the review of improvement or prohibition notices by the appellant. It is in the following terms:-

> "***51. Review of notices***
>
> *(1) An improvement notice or prohibition notice may, in accordance with this section, be referred for review to the Commissioner by —*
>
> *(a) the person issued with the notice; or*
>
> *(b) the employer (if any) of the person issued with the notice.*

(2) A reference under subsection (1) may be made in the prescribed form —

(a) in the case of an improvement notice, within the time specified in the notice as the time before which the notice is required to be complied with;

(b) in the case of a prohibition notice, within 7 days of the issue of the notice or such further time as may be allowed by the Commissioner.

[(3) and (4) repealed]

(5) On the reference under this section of an improvement notice or a prohibition notice for review, the Commissioner shall inquire into the circumstances relating to the notice and may —

(a) affirm the notice;

(b) affirm the notice with such modifications as seem appropriate; or

(c) cancel the notice,

and, subject to section 51A, the notice shall have effect or, as the case may be, cease to have effect, accordingly.

(6) The Commissioner shall give to the person that referred the matter for review, and to any other person that was entitled under subsection (1) to refer the notice for review, a notice in writing of the decision on the reference and of the reasons for that decision.

(6a) In dealing with a reference for the review of a prohibition notice the Commissioner may refer to an expert chosen by the Commissioner such matters as appear appropriate and may accept the advice of that expert.

(7) Pending the decision on a reference under this section for the review of a notice, the operation of the notice shall —

(a) in the case of an improvement notice, be suspended; and

(b) in the case of a prohibition notice, continue, subject to any decision to the contrary made by the Commissioner."

24 It is noted that s51(2) of *the OSH Act* sets out time limits for the referral for review to the appellant. In the case of an improvement notice the time limit is the time specified in the notice as the time before which the notice is required to be complied with. With respect to a prohibition notice, the time limit is "*7 days of the issue of the notice or such further time as may be allowed by the Commissioner*". It is also noted that s51(7) provides in the case of an improvement notice that the notice is suspended pending the decision on a reference under the section.

25 Section 51AA of *the OSH Act* provides a power for the appellant to cancel an improvement or prohibition notice.

26 Section 51A of *the OSH Act*, which is pivotal to the present appeal, is in the following terms:-

"***51A. Further review of notices***

(1) A person issued with notice of a decision under section 51(6) may, if not satisfied with the Commissioner's decision, refer the matter in accordance with subsection (2) to the Tribunal for further review.

(2) A reference under subsection (1) may be made in the prescribed form within 7 days of the issue of the notice under section 51(6).

(3) A review of a decision made under section 51 shall be in the nature of a rehearing.

(4) The Tribunal shall act as quickly as is practicable in determining a matter referred under this section.

(5) On a reference under subsection (1) the Tribunal shall inquire into the circumstances relating to the notice and may —

(a) affirm the decision of the Commissioner;

(b) affirm the decision of the Commissioner with such modifications as seem appropriate; or

(c) revoke the decision of the Commissioner and make such other decision with respect to the notice as seems fit,

and the notice shall have effect or, as the case may be, cease to have effect accordingly.

[(6) repealed]

(7) Pending the decision on a reference under this section, irrespective of the decision of the Commissioner under section 51, the operation of the notice in respect of which the reference is made shall —

(a) in the case of an improvement notice, be suspended; and

> *(b) in the case of a prohibition notice, continue, subject to any decision to the contrary made by the Tribunal.*"

27 The word "*Tribunal*" is defined in s3 of *the OSH Act* to have the meaning given to that term in s51G(2) of *the OSH Act*.

28 Section 51A(2) of *the OSH Act* sets out the time limit central to the present appeal. There is no express power given to the Tribunal in s51A or elsewhere in *the OSH Act* to extend this time. Section 51A(7) replicates s51(7) as to the suspension of the operation of an improvement notice pending the decision on a reference.

29 Section 51G of *the OSH Act* is in the following terms:-

> "***51G. Industrial Relations Commission sitting as the Occupational Safety and Health Tribunal***
>
> *(1) By this subsection the Commission has jurisdiction to hear and determine matters that may be referred for determination under sections 28(2), 30(6), 30A(4), 31(11), 34(1), 35(3), 35C, 39G(1), (2) and (3) and 51A(1).*
>
> *(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.*"

30 Of the sections set out in s51G(1) of *the OSH Act*, under which matters may be referred to the Tribunal, only s51A(1) has, by virtue of s51A(2), an expressed time limit within which the reference may be made.

31 Section 51I of *the OSH Act* is also relevant and is in the following terms:-

> ***"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.*"

The Reasons of the Tribunal

32 In its reasons for decision the Tribunal set out the submissions made by the present appellant. The Tribunal then referred to the Full Bench decision in *Arpad Security Agency Pty Ltd v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous WA Branch* (1989) 69 WAIG 1287. In that decision the Full Bench determined that there was power to extend the time limit expressed in *the Act* for instituting an appeal to the Full Bench. The Tribunal in its reasons set out some observations of the Full Bench in the *Arpad* decision about extensions of time generally. The Tribunal then referred to *Re Coldham and Others*; *ex parte Australian Building Construction Employees' and Builders Labourers' Federation* (1985) 159 CLR 522, a decision relied upon in the reasons in *Arpad*. The Tribunal then further referred to and quoted from the reasons in both *Arpad* and *Coldham*.

33 The conclusions of the Tribunal are expressed in paragraphs [26] and [27] of its reasons in the following terms:-

> "*26 On the authorities cited in these reasons for decision the Tribunal finds that there is power under the Act to extend the time for filing a s 51A application. The Tribunal has had regard for a number of factors:*
>
> *(a) Power to extend time can be exercised after the time as prescribed in the Act;*
>
> *(b) The Tribunal has had regard for the objects of the Act, s 26(1) and s 27(1) of the IR Act in reaching its finding; and*
>
> *(c) Having regard for the general provisions referred to in the Act and the IR Act (as per (b) above) s 51A(2) cannot be considered as a barrier to the Tribunal extending time within which to file an application for further review of either an improvement notice or a prohibition notice.*
>
> *27 The Tribunal finds it does have the power to issue an order extending that time which a s 51A referral can be filed. The Tribunal finds that power exists after the 7 day period prescribed under s 51A(2) has expired. A declaration will issue accordingly.*"

34 I note that the reasons of the Tribunal do not specifically set out the source of the power to extend the 7 day time period contained in s51A(2) of *the OSH Act*.

Analysis

35 The issue in the appeal is whether the Tribunal was correct to decide that it had power to extend the time limit in s51A(2) of *the OSH Act* for the making of a reference under s51A(1). The issue to be determined is one of statutory construction. The process is to ascertain the intention of the legislature, having regard to the text of *the OSH Act*, considered as a whole. (*Project Blue Sky Inc and Others v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69]; *Wilson v Anderson and Others* (2002) 213 CLR 401 at [8]).

36 It is necessary to consider the purpose of the time period specified in s51A(2) of *the OSH Act*, the limits placed on the jurisdiction of the Tribunal and the powers of the Tribunal expressed in *the OSH Act* and *the Act*. I have already set out the statutory framework of *the OSH Act* relevant to the issue and review of improvement notices. The objects of *the Act* are also relevant and will be referred to below. It is important that the Tribunal is not given any express power in *the OSH Act* to extend the 7 day time period specified in s51A(2).

37 The jurisdiction of the Tribunal in the present type of matter is circumscribed by the contents of s51G(1) and s51A(1) of *the OSH Act*. Section 51G(1) gives the Commission, sitting as the Tribunal, a limited jurisdiction to "*hear and determine matters*". It is limited to the "*matters*" set out in s51G(1). These are the "*matters*" which "*may be referred for determination under*" the sections of *the OSH Act* there specified, including s51A(1).

38 In s51A(1) of *the OSH Act* the "*matter*" is the non-satisfaction with the appellant's decision under s51(6) of *the OSH Act*, of the person who has been issued with the notice of the decision. The referral of that matter to the Tribunal "*under*" s51A(1) of *the OSH Act* is however limited by s51A(2) of *the OSH Act*. This provides that a reference under s51A(1) "*may be made … within 7 days of the issue of the notice under section 51(6)*" of *the OSH Act*.

39 Although s51A(2) of *the OSH Act* is couched in permissive terms, in my opinion it provides for a limited entitlement. It is an entitlement to make a reference limited, with respect to time, to taking this action within the specified 7 day period. Put slightly differently the subsection does not provide for any entitlement upon a person to refer a matter to the Tribunal under s51A(1) of *the OSH Act*, outside the 7 day period specified in s51A(2). Accordingly as a matter "*under*" s51A(1) may only be referred to the Tribunal "*for determination*" if the reference is made within the 7 day time period specified in s51A(2) of *the OSH Act*, the Tribunal does not have jurisdiction under s51G to hear and determine a matter of this type referred to it outside this time period. As a matter of statutory construction therefore the making of a reference within the 7 day time period is an "*essential preliminary to the exercise of the [Tribunal's] jurisdiction*". (See *Aurion Gold v Bilos* [2004] WASCA 270 per McLure J at [28]; and see also *Berowra Holdings Pty Ltd v Gordon* (2006) 80 ALJR 1214 at [20]).

40 This construction of s51G(1) and s51A of *the OSH Act* is consistent with the objects of *the OSH Act* and its purpose in providing for the issuing and review of prohibition and improvement notices. It has the effect that whilst a person may seek a review by the Tribunal of the relevant decision, this must be done within 7 days. A tight time frame is provided, given the subject matter of improvement and prohibition notices. The objects of *the OSH Act* as set out in s5 include "*to promote and secure the safety and health of persons at work*" and "*to protect persons at work against hazards*". The issue of improvement and prohibition notices, with time limited review rights, is one method by which *the OSH Act* attempts to achieve these aims.

41 As set out earlier, improvement notices are issued under s48(1) of *the OSH Act* where an inspector is of the opinion that a person has contravened or is contravening a provision of *the OSH Act*.

42 Section 48(2)(d) provides that the improvement notice is to specify the time before which a person is required to remedy the contravention of *the OSH Act*. The doing of things within a specified time is therefore part of the nature of an improvement notice as created by *the OSH Act*. The same applies with respect to the seeking of a review of an improvement notice by the appellant.

43 Section 51(2) of *the OSH Act* provides that in the case of an improvement notice a reference to the appellant for review may be made within the time specified in the notice as the time before which the notice is required to be complied with. This may be contrasted to a prohibition notice which under s51(2)(b) of *the OSH Act* may be referred to the appellant for review within 7 days of the issue of the notice or such further time as may be allowed by the appellant. It is significant that *the OSH Act* here expressly provides for the possibility of an extension of time, whereas there is no such power given to the Tribunal under s51A or s51G of *the OSH Act*. Also, the time limit contained within s51(2) of *the OSH Act* is important because s51(7) provides that the operation of an improvement notice is suspended pending the decision on a reference under that section.

44 The same consequence applies with respect to a reference to the Tribunal under s51A(1) of *the OSH Act*, by virtue of s51A(7). This again indicates the importance, in the scheme of *the Act*, of review proceedings occurring within a timely fashion. This is reinforced by s51A(4) of *the OSH Act* which provides that the Tribunal "*shall act as quickly as is practicable in determining a matter referred under this section*".

45 The suspension of the operation of an improvement notice by s51A(7) of *the OSH Act* is pending "*the decision on a reference under this section*". Again, a reference "*under the section*" is one made within the 7 days specified in s51A(2). Section 51A(7) does not contemplate the status of an improvement notice when a reference is made outside the 7 day time period, pending or after the determination of an application to extend time. This supports the conclusion that the Tribunal does not have power to extend time. This is because if such a power existed, it would be expected that the legislature would have provided for the consequences of the making of an application to, and order by the Tribunal, to extend time, upon the status of an improvement notice.

46 The scheme of *the OSH Act* with respect to improvement notices is therefore consistent with a person having an entitlement, limited to a period of 7 days, to make a reference to the Tribunal with respect to a matter under s51A(1) of *the OSH Act*.

47 The present issue was considered to some extent by Parker J in *Re Bartholomaeus*, unreported, Supreme Court of WA, Lib No 970567, 20 October 1997. At that time the scheme of *the OSH Act* was that there was jurisdiction given to Safety and Health Magistrates to hear and determine, amongst other things, references made under s51A of *the OSH Act*. Section 51A(2) was in the same terms as presently. As described by Parker J, *the OSH Act* also then provided in s51C(3) that, except as otherwise prescribed by or under *the OSH Act*, the powers and the practice and procedure to be observed by a Magistrate when hearing and determining any matter referred under *the OSH Act* was as provided for in the *Local Courts Act 1904*. At the time of the decision in *Re Bartholomaeus*, the Commission did not have any jurisdiction under s51A or s51G of *the OSH Act*.

48 In *Re Bartholomaeus*, the reference was not made to the Safety and Health Magistrate within the 7 day time period. The point was taken before the Magistrate who purported to extend the 7 day time limit. Parker J decided that the Magistrate had committed a jurisdictional error in so doing. At page 4 of his reasons Parker J said:-

> "*There is no provision in the Occupational Safety and Health Act itself for the extension of that time and, indeed, the scheme of the Act would appear to support the view that the prescription of 7 days was intended as the limit of the time within which a reference might be made under that provision.*"

49 Parker J had earlier said that the *Local Courts Act 1904* did not contain a provision allowing "*time to be extended for the issue of originating process*". Parker J further observed at page 5 of his reasons that the relevant reference may be made "*only if that is done within 7 days, and if that does not occur there is no capacity for a reference to be heard and determined by a Health and Safety Magistrate*". His Honour stated that it was "*a requirement of the exercise of the relevant jurisdiction by a Health and Safety Magistrate that there be a reference within 7 days of the issue of the notice*".

50 These observations by Parker J in *Re Bartholomaeus* are consistent with and support the opinions I have set out earlier.

51 Additionally when s51A and s51G of *the OSH Act* were amended and inserted by the *Occupational Safety and Health Legislation Amendment and Repeal Act 2004*, to give the Tribunal jurisdiction, there was no amendment to s51A(2) of *the OSH Act*. This may be taken, after the decision in *Re Bartholomaeus*, as a type of legislative approval of the construction of s51A(2) contained in that decision. (See D C Pearce and R S Geddes, *Statutory Interpretation in Australia*, 6th Edition 2006, page 108). Certainly there is nothing in the second reading speech to indicate there was any intent to change the effect of the decision of *Re Bartholomaeus*, which is not mentioned in the second reading speech.

52 As referred to earlier the Tribunal held that it contained a power to extend the 7 day time limit. The reasons of the Tribunal seem to indicate that this power existed within s26 or s27 of *the Act*, although there was no precise specification as to what the power was or how it applied to the jurisdiction of the Tribunal.

53 Section 51I(1) of *the OSH Act* has been quoted earlier. This provides that sections of *the Act* including s26(1)-(3) and s27 apply "*to the exercise of the jurisdiction … conferred by section 51G*", with the modifications set out in s51I(1). The sections of *the Act* listed in s51I(1) apply to the "*exercise of*" the jurisdiction conferred by s51G. They cannot be used to extend the jurisdiction of the Tribunal. Therefore the sections of *the Act* listed in s51I(1), including s27(1)(n), cannot be used to extend the 7 day time period specified in s51A(2) of *the OSH Act* which is incorporated as a jurisdictional prerequisite into s51G(1) of *the OSH Act*.

54 The same conclusion follows with respect to regulation 36 of the *Industrial Relations Commission Regulations 2005* (*the Regulations*) which applies to the practice and procedure of the Tribunal by virtue of s51I(1)(a) of *the OSH Act*, s113(1)(d)(ii)(I) of *the Act* and regulation 97 of *the Regulations*.

55 As set out earlier the Tribunal was influenced by the *Arpad* decision of the Full Bench in coming to its conclusion. In my opinion however the issue determined by the Full Bench in *Arpad* is distinguishable from the present issue. The *Arpad* decision did not determine the powers of the Commission, sitting as the Tribunal, with respect to the jurisdiction limited by s51G and s51A of *the OSH Act*. The *Arpad* decision does not therefore, with respect, compel or support the conclusion reached by the Tribunal in light of the specific provisions of *the OSH Act*.

Conclusion

56 For the reasons set out above I am of the respectful opinion that the Tribunal erred in deciding that it had power to extend the 7 day time limit. Accordingly in my opinion the following orders should be made:-

1. The appeal is allowed.
2. The declaration made by the Occupational Safety and Health Tribunal on 28 June 2006 is varied by the substitution of the following declaration:-

> The Occupational Safety and Health Tribunal does not have the power to consider an application to extend the 7 day period for making a reference under s 51A of the Occupational Safety and Health Act 1984.

57 In my opinion a minute of proposed orders should issue in these terms.

COMMISSIONER P E SCOTT:

58 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 S WOOD:

59 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 05452

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WORKSAFE WESTERN AUSTRALIA COMMISSIONER
	APPELLANT
	-and-
	ANTHONY AND SONS PTY LTD T/A OCEANIC CRUISES
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE M T RITTER, ACTING PRESIDENT
	COMMISSIONER P E SCOTT
	COMMISSIONER S WOOD
DATE	THURSDAY, 21 SEPTEMBER 2006
FILE NO/S	FBA 23 OF 2006
CITATION NO.	2006 WAIRC 05452

Decision	Appeal allowed, declaration made by the Occupational Safety and Health Tribunal varied
Appearances	
Appellant	Ms L Eddy (of Counsel)
Respondent	Captain P Douglas

Order

This matter having come on for hearing before the Full Bench on 8 September 2006, and having heard Ms L Eddy (of Counsel), on behalf of the appellant, and Captain P Douglas on behalf of the respondent, and reasons for decision having been delivered on 18 September 2006, it is this day, 21 September 2006, ordered as follows:-

1. The appeal is allowed.
2. The declaration made by the Occupational Safety and Health Tribunal on 28 June 2006 is varied by the substitution of the following declaration:-

> The Occupational Safety and Health Tribunal does not have the power to consider an application to extend the 7 day period for making a reference under s 51A of the Occupational Safety and Health Act 1984.

By the Full Bench

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

FULL BENCH—Appeals against decision of Industrial Magistrate—

2006 WAIRC 05413

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NEKROS PTY LTD
	APPELLANT
	-and-
	ROSANNE BAKER
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE M T RITTER, ACTING PRESIDENT
	COMMISSIONER S J KENNER
	COMMISSIONER J L HARRISON
HEARD	FRIDAY, 1 SEPTEMBER 2006
DELIVERED	MONDAY, 11 SEPTEMBER 2006
FILE NO.	FBA 21 OF 2006
CITATION NO.	2006 WAIRC 05413

CatchWords	Industrial Law (WA) - Application for order under regulation 42(b) of the *Industrial Magistrates Courts (General Jurisdiction) Regulations 2005* - Terms of regulation 42 - Whether Full Bench had jurisdiction to make order sought - Whether sufficient circumstances existed for Full Bench to make an order under regulation 42(b) - Whether appellant was in a position to satisfy judgment made by the Industrial Magistrate - Undertaking given by appellant that asset will not be transferred until satisfaction of judgment - Application dismissed - *Industrial Relations Act 1979* (WA) (as amended), s84, s113(3) - *Industrial Magistrates Courts (General Jurisdiction) Regulations 2005*, r4, r42
Decision	Application dismissed
Appearances	
Appellant	Mr P Momber (of Counsel), by leave
Respondent	Mr S Kemp (of Counsel), by leave

Reasons for Decision

THE FULL BENCH:

Background

1 On 15 June 2006 the Industrial Magistrate's Court made an order that the present appellant pay to the present respondent $37,598.62 within 14 days. This was the amount which the Industrial Magistrate's Court determined that the respondent was owed, in lieu of long service leave, pursuant to the *Long Service Leave Act 1958* (WA) upon the termination of her employment.

2 On 5 July 2006 the appellant filed a notice of appeal to the Full Bench against the order made by the Industrial Magistrate's Court.

3 The grounds of appeal in essence assert that the entitlement of the respondent was wrongly calculated by the Industrial Magistrate as a matter of law.

4 Regulation 42 of the *Industrial Magistrates Courts (General Jurisdiction) Regulations 2005* is in the following terms:-

> "***42. Judgments suspended***
>
> *A judgment is suspended —*
>
> *(a) until 21 days after the making of the judgment; or*
>
> *(b) if an appeal is lodged with the Full Bench and the Full Bench has not ordered otherwise, until that appeal is heard and determined.*"

5 The word "*judgment*" is defined in regulation 4 of the *Industrial Magistrates Courts (General Jurisdiction) Regulations 2005*. The definition is that it "*includes an order under the Act section 83E imposing a penalty*". The reference to "*the Act*" is a reference to the *Industrial Relations Act 1979* (WA) (as amended) (*the Act*).

6 The order for payment made by the Industrial Magistrate is clearly a judgment for the purpose of regulation 42. The scheme of regulation 42 is that if an appeal is lodged with the Full Bench, a judgment is suspended until the appeal is heard and determined "*and the Full Bench has not ordered otherwise*". The present application before the Full Bench is for such an order.

The Application, Affidavit in Support and Answer

7 The application was made by the respondent on 21 August 2006. The orders which were sought by the respondent were set out in Schedule A to the application in the following terms:-

> "*The respondent seeks orders under Regulation 42 (b) of the Industrial Magistrates Courts (General Jurisdiction) Regulations 2005 that:*
>
> *1. The judgment granted in the Industrial Magistrates Court on 15 June 2006 shall not be suspended under Regulation 42 of the Industrial Magistrates Courts (General Jurisdiction) Regulations 2005.*
>
> *2. The appellant shall, within 7 days of the date of this order, pay the sum of $14,802.07 to the respondent.*
>
> *3. The appellant shall, within 7 days of the date of this order, pay the sum of $22,796.55 into a bank account ("the Account") offering the best obtainable interest rates on the terms set out below.*
>
> *2. The Account shall be in the joint names of and justly administered by the appellant and respondent or their nominees on behalf of the parties.*
>
> *3. If any dispute arises as to the administration of the Account the dispute shall be referred to the Registrar of the Western Australian Industrial Relations Commission, whose decision in the matter shall be binding and final.*

> *4. All liability for taxes or charges of any kind which might become due and payable in respect of the Account shall be discharged by the appellant who shall indemnify the respondent against any claim in respect of the Account.*
>
> *5. All administration expenses in respect of the Account shall be paid forthwith by the appellant.*
>
> *6. In the event of the appeal herein being dismissed, the monies, including any interest earned, in the Account shall be paid forthwith without any deductions to the respondent.*
>
> *7. In the event of the appeal herein being successful, the monies, including any interest earned, in the Account shall be paid forthwith to the appellant.*
>
> *8. There be liberty to apply on 48 hours notice in relation to the clarification of this order or for any ancillary orders or directions necessary to achieve what this order requires.*" (The irregular numbering is as in the schedule)

8 In the notice of appeal the appellant pleaded that if the Industrial Magistrate had properly calculated the respondent's entitlement she would have been awarded an amount of $14,802.07. This was the reason for the inclusion of this amount in proposed order 2. At the hearing of the application the appellant obtained the leave of the Full Bench to amend the amount of $14,802.07 in the notice of appeal to that of $11,325.60. It is now the appellant's contention that this was the amount which should have been awarded to the respondent by the Industrial Magistrate. Accordingly, the present application proceeded on the basis that the amounts of $11,325.60 and $26,273.02 respectively were the amounts in proposed orders 2 and 3 of Schedule A to the application.

9 The basis of the present application was set out in Schedule B to the application. The contents of this schedule were essentially repeated in an affidavit sworn by the respondent on 18 August 2006. The affidavit is in the following terms:-

> "*1. I am the respondent in this appeal.*
>
> *2. On 15 June 2006 an order was made in the Industrial Magistrates Court that the Applicant pay me the sum of $37,598.62 ("the Judgment") in respect of pro-rata long service leave owing to me in consequence of the termination of my employment with the appellant.*
>
> *3. The appellant:*
>
> *(a) Is a limited liability company owned by Mr Peter Hollow and his wife;*
>
> *(b) Carried on business as Real Estate Agents under the name "Hollow & Darcy Real Estate" (the 'Business');*
>
> *(c) Employed me as a sales representative in the Business from 9 June 1994 to 31 December 2004.*
>
> *4. At all relevant times the appellant was, and to the best of my knowledge still is, the registered and beneficial owner of a property situated at 2 Bushell Place in Ardross ("the Property").*
>
> *5. Since my employment terminated:*
>
> *(a) The appellant has ceased trading as Real Estate Agents under the name "Hollow & Darcy Real Estate";*
>
> *(b) The appellant has, to the best of my knowledge and belief, become a dormant company;*
>
> *(c) Mr Hollow informed me that he has reached a financial settlement with his wife in the matter of his divorce from her in terms of which the Property is to be transferred from the appellant to him (Mr Peter Hollow) personally.*
>
> *6. To the best of my knowledge and belief the Property is the only asset owned by the appellant.*
>
> *7. The transfer of the Property to Mr Hollow will most likely occur before the judgment in this appeal is delivered.*
>
> *8. It is therefore likely that, if the appellant is unsuccessful on appeal, it will have no financial resources or assets that can be attached to meet the judgment.*
>
> *9. Even if the appeal is successful, the appellant acknowledges that it will still owe me $14,802.07. In that event it is also likely that it will have no financial resources or assets that can be attached to meet the judgment.*"

10 The position of the appellant was contained in its answer which was filed on 29 August 2006. Paragraph 1-5 of the answer are in the following terms:-

> *"1. The Appellant is entitled to the protection provided by Regulation 42(b) of the Industrial Magistrates Courts (General Jurisdiction) Regulations 2005 unless special circumstances exist.*
>
> *2. The Respondent (Applicant) has not established that special circumstances exist, which would require the Full Bench to make any other order.*
>
> *3. Within 7 days the Appellant will pay to the Respondent $11,325.60 which it believes should the appeal be successful, either the Full Bench or the Industrial Magistrate will decide the Respondent is entitled to.*
>
> *4. Alternatively and in any event, the Appellant will satisfy any judgment in excess of the sum referred to in paragraph 3 hereof made by the Full Bench or the Industrial Magistrates Court including the sum which has been appealed against.*
>
> *5. The sum referred to in paragraph 2, 8 and 9(b) of the Schedule of the Notice of Appeal is incorrect and should be $11,325.60 and the Appellant will move that the Notice of Appeal should be so amended to reflect this sum.*"

The Submissions

11 Essentially, the respondent's argument was that unless orders were made in the terms sought, there was a significant risk that the appellant would not be in a position to satisfy the judgment made by the Industrial Magistrate, whether or not the appeal was ultimately upheld or dismissed by the Full Bench. Further, it was argued that this was an appropriate reason for the Full Bench to exercise the jurisdiction contained in regulation 42 of the *Industrial Magistrates Courts (General Jurisdiction) Regulations 2005*.

12 The appellant did not file any affidavit in answer to the affidavit filed by the respondent. During oral submissions the appellant's counsel seemed to accept that the facts as deposed to by the respondent were correct. To some extent, this concession overcomes the deficiencies of the affidavit of the respondent in that, for example, the basis of her belief as contained in paragraph 6 of the affidavit is not set out. The appellant's position was that it was unnecessary for the Full Bench to make the orders sought. This was because the appellant has no intention of not satisfying the judgment made by the Industrial Magistrate, whether or not it is varied by any order of the Full Bench. The appellant had, prior to the hearing, forwarded to the respondent's solicitors a cheque for $11,325.60 in part satisfaction of the judgment. As set out above, this amount is not disputed in the appeal. The appellant's counsel submitted the appellant was intending and would be able to pay any additional amount owing to the respondent after the hearing and determination of the appeal. The appellant submitted therefore that it was unnecessary for the Full Bench to make the orders sought by the application.

13 Upon being questioned by the Full Bench, counsel for the appellant agreed that paragraph 4 of the answer was in effect an undertaking by the appellant to the Full Bench to satisfy the judgment of the Industrial Magistrate's Court after the hearing and determination of the appeal.

14 At the conclusion of the hearing of the application, the Full Bench invited the appellant's counsel to provide on behalf of his client an additional undertaking with respect to the matter. The Full Bench then reserved its decision.

15 On 4 September 2006 a letter dated 1 September 2006 by the appellant's solicitor was received by facsimile by the Acting President's associate. The letter is in the following terms:-

> "*We wish to confirm our advice to the Associate to the Full Bench given at the conclusion of the hearing of the Full Bench on 1 September 2006, in that we have instructions from our client Peter Hollow the sole director of Nekros Pty Ltd, that the asset, the subject of the Respondent's application, will not be transferred out of the company until the judgment of the Full Bench or the Industrial Magistrate's Court is ultimately satisfied after a determination by either or both of these courts.*"

16 In our opinion the letter constitutes an undertaking by the appellant and Mr Hollow that the asset will not be transferred until the satisfaction of the judgment.

Jurisdiction

17 During the hearing of the application an issue was raised as to whether the Full Bench had the jurisdiction to make the order sought by the respondent. It was noted that no jurisdiction or power to this effect is given to the Full Bench under s84 of *the Act* which provides for an appeal to the Full Bench from a decision of the Industrial Magistrate's Court.

18 The *Industrial Magistrates Courts (General Jurisdiction) Regulations 2005* appear to have been made pursuant to s113(3) of *the Act*. This is in the following terms:-

> "*The Governor may make regulations for the purpose of regulating the practice and procedure before an industrial magistrate's court, for and incidental to the exercise of its powers and jurisdiction under this Act, and prescribing the costs to be allowed in proceedings before an industrial magistrate's court, and the fees to be paid, and the allowances to witnesses in respect thereof and the enforcement of a judgment, order, direction, or other decision of an industrial magistrate's court.*"

19 It can be seen that s113(3) empowers the Governor, amongst other things to "*make regulations for the purpose of regulating … the enforcement of a judgment*" of an Industrial Magistrate's Court. In our opinion regulation 42 regulates the enforcement of a judgment of the Industrial Magistrate's Court. It does so by providing for the conditional suspension of a judgment. Whilst a judgment is suspended, it cannot be enforced. One basis upon which the conditional suspension of a judgment can be removed is if, pending the determination of an appeal, the Full Bench orders "*otherwise*". In our opinion such an order has the character of being about the enforcement of a judgment. Accordingly in our opinion the regulation is made pursuant to the authority given in s113(3) of *the Act* and the Full Bench has the jurisdiction and power to make an order of the type apprehended by regulation 42(b).

Disposition of the Application

20 Whether it is appropriate to make an order in the present circumstances is however another matter. In our opinion the respondent is correct in asserting that where there is a sufficient risk of an appellant not being able to satisfy a judgment, after the determination of an appeal, this can be an appropriate reason for the Full Bench to make an order under regulation 42(b). In our opinion however it is not appropriate for the Full Bench to make such an order in the present case. This is because of the undertakings given by the appellant and a director of the appellant and the payment of the amount of $11,325.60 which has already occurred. The latter event to some extent demonstrates the bona fides of the appellant in asserting that it will satisfy any judgment which is outstanding after the determination of the appeal.

21 The respondent's concern, grounding the application, is based upon the risk of non satisfaction of the judgment because of the impending transfer of the real property referred to in the respondent's affidavit. The appellant has undertaken, itself and through its director, not to transfer this asset pending the determination of the appeal. Given this, there is an insufficient basis for the concerns of the respondent, so that it is not appropriate in our opinion for the Full Bench to make the orders sought. Put slightly differently, on the present evidence, it is not demonstrated that there is a risk of non satisfaction of the judgment of sufficient significance so as to require the intervention of the Full Bench.

22 Accordingly in our opinion the application should be dismissed.

2006 WAIRC 05412

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NEKROS PTY LTD
	APPELLANT
	-and-
	ROSANNE BAKER
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE M T RITTER, ACTING PRESIDENT
	COMMISSIONER S J KENNER
	COMMISSIONER J L HARRISON
DATE	MONDAY, 11 SEPTEMBER 2006
FILE NO/S	FBA 21 OF 2006
CITATION NO.	2006 WAIRC 05412

Decision	Application dismissed
Appearances	
Appellant	Mr P Momber (of Counsel), by leave
Respondent	Mr S Kemp (of Counsel), by leave

Order

The respondent's application for an order under regulation 42(b) of the *Industrial Magistrates Courts (General Jurisdiction) Regulations 2005* having come on for hearing before the Full Bench on 1 September 2006, and having heard Mr P Momber (of Counsel), by leave, on behalf of the appellant, and Mr S Kemp (of Counsel), by leave, on behalf of the respondent, and reasons for decision having been delivered on 11 September 2006, it is this day, 11 September 2006, ordered that the application be dismissed.

By the Full Bench

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

AWARDS/AGREEMENTS—Application for—

2006 WAIRC 05495

IRON ORE PRODUCTION & PROCESSING (LOCOMOTIVE DRIVERS) AWARD 2006

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS
	APPLICANT
	-v-
	SKILLED GROUP LTD, SKILLED RAIL SERVICES PTY LTD, INTEGRATED GROUP LTD
	RESPONDENTS
CORAM	COMMISSIONER S WOOD
HEARD	THURSDAY, 7 SEPTEMBER 2006, WEDNESDAY, 13 SEPTEMBER 2006, TUESDAY, 19 SEPTEMBER 2006
DELIVERED	TUESDAY, 26 SEPTEMBER 2006
FILE NO.	A 3 OF 2005
CITATION NO.	2006 WAIRC 05495

CatchWords	New Award – Remitted matter – Interpretation of Wage Fixing Principles - Structural Efficiency Principle – Minimum Rates Adjustment Process – Federal Awards – Classifications – Rosters – New award made
Result	Award issued
Representation	
Applicant	Mr D Schapper of Counsel on behalf of the applicant
Respondent	Mr J Blackburn of Counsel and with him Mr M Borlase as agent on behalf of Skilled Rail Services
	Mr N Ellery of Counsel on behalf of Integrated Group Ltd

Reasons for Decision

Introduction

1 This matter concerns the making of an award for locomotive drivers who operate on the BHP Billiton Iron Ore Pty Ltd (BHPB) railroad ("the railroad") and are not employed by BHPB. In other words employees of labour hire companies. An award was made on 27 February 2006 and, for the reasons expressed, adopted the classifications and pay rates in the BHPB Award. That decision, as it relates to clauses 2.1, 2.3 and 3 of that award, was overturned by order of the Full Bench on 5 September 2006.

2 The Full Bench found that the Commission had erred in applying the BHPB award rates, described the application of those rates as 'unsafe' and of 'limited use'. The Full Bench said that the Commission should have considered a range of other awards and specified those awards. The Full Bench referred to the decision of Scott C 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 and said the Commission, as presently constituted, did not 'adopt the process required by the Structural Efficiency Principle' approach.

3 The awards were *The ARG Employment Pty Ltd Interim Award 2003*, *The Locomotive Operations Award 2002*, *The Building Construction Industry (NT) Award*, *The Manildra Group – Rail, Tram and Bus Union Rail Operations Award 2001*, *The AWU (Victorian Public Sector) Award 2001*, *The Western Australian Civil Contracting Award 1998*, *The AWU Construction and Maintenance Award 2002*, *The West Coast Wilderness Railway Award 2004*, and *The Locomotive Enginemen's New South Wales Award 2002*.

4 In summary, the applicant submits, on remittal, that the process the Commission undertook has been found to be in error. However, if the Commission undertakes the correct structural efficiency process then the Commission will find that the awards mentioned have no relevance, for various reasons. The Commission will find that the BHPB award provides the only basis for a proper comparison as the work duties, responsibilities and environment of the drivers covered by the award are identical to drivers covered by the BHPB award.

5 In summary, the respondents submit, on remittal, that it is the first award mentioned, the ARG award, for which the Commission should have particular regard and the Commission, like Larkin C in the ARG award, should undertake a minimum rates adjustment process. The respondents say also that this process, if undertaken correctly, will lead to a properly set minimum rate with relativity, and that the Commission in this matter cannot establish an aggregate rate because the applicant has not led sufficient evidence.

6 There are other submissions which I will deal with later.

7 The decision of Scott C, as quoted by the Full Bench, states:

"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.

Evidence

8 Mr Johncock, the CFMEU convenor in Port Hedland, gave evidence that he is a locomotive driver and has been employed by BHPB for approximately 20 years. He says that there are 20 contractors (locomotive drivers) at BHPB. He does not know how many are employed by either Integrated or Skilled. Eight of these contractors are union members; 5 from Skilled and 3 from Integrated. Three of the 20 workers work trains, 11 spot the dumpers in the Nelson Point Yard. They are now being trained to work the Mainline. He described the role of dumper spotting and referred to them as "dumper dudes". He says they perform the full Yard duties, except for locotrol.

9 Mr Johncock says the rates of pay, "from what I've been told", are for Yard either $40 an hour with $120 living away from home allowance, or $42 an hour with $100 allowance, he does not know the work train rates. The Mainline drivers are paid up to $60.30 an hour. One contractor is full-time, the others are casual. They are all on fly in/fly out and most of them have a 12on/12off roster. He says that Mr Gibbons recently worked 36 out of 38 days. The work of contractors is organised exactly the same as BHPB drivers; they are on the same BHPB rosters. The rosters are done by the roster co-ordinator at BHPB. They are supervised in the Yard by the BHPB controller or supervisor and on the Mainline they are under the direction of the Train Controller. For discipline matters they are dealt with by their respective employers, and paid by them.

10 Mr Johncock says the union wants contractors paid evenly with BHPB workers doing the same work. Mr Johncock says Level 5 driving at BHPB involves locotrol. The Yard driver now uses locotrol on the Mainline to Bing which is 20 kilometres from the Yard. Mr Johncock expressed concern that BHPB might get rid of employees and use contractors on lesser rates of pay. He says that casual employees are too scared to report matters that should be reported.

11 Under cross examination Mr Johncock confirmed that the hourly rates to which he referred were all up casual rates. He says the Integrated drivers on the Mainline are paid $60.30 per hour. He agreed that it may be the case that Skilled do not pay a living away from home allowance. He says the matters not reported are matters such as rubbish in the locomotive and lack of air-conditioning.

12 Evidence was given by Mr Graham Butler, Manager for Skilled Rail Services Pty Ltd, tendered as a witness statement [Exhibit Skilled 5]. His responsibilities include the management and supply of Locomotive Drivers to Pacific National, Australian Railway Group, Pilbara Iron and BHPB, business development within Skilled Rail and all training associated with Locomotive Drivers.

13 He says, "In Western Australia Skilled Rail provides Locomotive Drivers to Pilbara Iron, BHPB, Pacific National and Australian Rail Group. The Locomotive Drivers are provided as either Yard Drivers, Construction Drivers, Banker Drivers or Main Line Drivers."

14 Skilled supplies 8 Yard Drivers, 3 Construction Drivers and 2 Main Line Drivers to BHPB. There are generic classifications or descriptions which are fairly standard across Australia. Skilled only recently began to supply Main Line Drivers to BHPB to cover employees absent on long term sickness. These two drivers are currently undergoing training to acquire the additional road knowledge required to drive on the main line.

15 He covered the duties of the drivers at BHPB employed by Skilled as follows:

"**Yard drivers**

Yard drivers are restricted to yard operations only. These are shunting of trains, setting up rakes of wagons for servicing, unloading/loading and pre departure duties. These employees usually require around 4 weeks' minimal training following their initial 12 months traineeship. Due to limitations on competencies this is the ideal level to bring in base drivers with limited experience.

Yard drivers are not certified to perform main line duties. They do not have the skill or experience to deliver train handling techniques or sufficient exposure to main line trains. Operating mainline trains requires more skill with precise judgment and high risk hence the higher rates of pay. Operating within the confines of a yard would be considered minimal risk.

Construction drivers

These employees perform ballasting and rail drops. These tasks require higher skills than in the yard as most trains are operating on mainline however the trains are small in length and are not considered high risk compared to a 300 car ore train. These employees also have lesser duties than mainline drivers. These duties are generally operating ballast and work trains etc. These drivers usually operate trains under closed sections under the direction of a track-work supervisor. A closed section can be a new section of track not yet commissioned for use. It takes approximately 6 - 8 weeks of training as a second person to achieve the road knowledge required to conduct these duties.

Employees engaged and performing work at this level often perform work in 2 man operation of trains which reduces the responsibility and tasks required. The reason 2 man operation of trains is used is they often operate in closed sections with no Automatic Train Protection **(ATP).** If ATP is not operative then trains are to consist of driver and assisting driver.

Often trains are propelling in sections which requires a pilot to precede the movement. Work trains are generally around 3000 to 4000 tonnes which is around 10% of what a fully loaded Iron Ore Train would weigh. A work train would propel at around 5 km/ph when dropping rail or ballast compared to an iron ore train maintaining a speed of around 70km/ph over undulating terrain. The train handling skills to operate a fully loaded iron train are significantly greater than dropping ballast at 5km/ph.

Main line drivers

Main line driver is the highest level of competence as specific road knowledge and train handling procedures must be maintained in order to safely transport the product. Road knowledge (i.e. knowledge of the track and terrain) is essential and sometimes would take around 6 - 12 months to achieve. Main line drivers must also have an understanding of buff and draught forces affecting draw gear stresses.

Subject to acquiring the road knowledge specific to a particular line, and the requirement to use locotrol at BHPB, the basic competencies required of a mainline driver are the same and a competent mainline driver can transport any freight on any system.

Only BHPB drivers are required to use locotrol and this is reflected in there being 2 rates for main line drivers at BHPB. Locotrol is not used anywhere else in Western Australia or, to my knowledge, Australia.

Skilled drivers engaged to work on the BHPB mainline must complete a 3-4 day locotrol course.

The locotrol course in included in a 2 ½ -3 week induction which includes safeworking.

After that the drivers go out as a second man learning the road for 3-6 months before being assessed by BHPB as competent. During this period the drivers learn specific road knowledge and train handling on those roads.

Significantly, the BHPB trains are generally of a fixed length and weight (they are either full or empty). The rakes are 110 cars each and trains either have one or two rakes. Because the length and weight of the BHPB trains are constant they are easier to drive. Less skill and judgment is needed in comparison with driving trains at ARG and Pacific National.

Drivers at ARG and Pacific National (see below) drive trains of differing length and weights and must therefore rely more on their own judgment. Track gradients, speed restrictions and variance of commodity also contribute to a higher level of skill being required to drive trains at ARG and Pacific National."

16 Mr Butler referred to the signalling systems at BHPB and said, "those systems are very common and proven in the industry, however no higher skill level or competence is required."

17 He referred to the roster of Skilled's drivers as follows:

"Skilled's construction drivers at BHPB all work a 14 day on - 14 day off roster averaging 42 hours a week. These drivers work 12 hours shifts averaging 42 hours a week and only work days. Skilled's yard drivers (dumper/spotters) all work a 12 shift on - 12 shift off roster. These drivers work 12 hours shifts for 6 days (6 am start) then 6 nights. The average number of hours per week under this roster is again 42. Skilled's 2 main line drivers are currently working 10 hours a day while being trained up on the mainline. Their starting and finishing times are currently variable as they are going out as second men learning the road."

18 He referred to their rates of pay as follows:

"At Pilbara Iron and BHPB Skilled pays an all-in rate based on the employee's classification and roster cycle.

Due to the fact that Skilled Employees often work on different arrangements to those of clients' employees and in different circumstances, this often results in significantly different earnings for employees and rates of pay being structured into their terms and conditions of employment.

For example, BHPB's award employees work an average of 48 hours a week. Their aggregate rate therefore includes an amount of overtime to compensate them for that requirement. Skilled's employees at BHPB and Pilbara Iron work an average of 42 hours a week. If our drivers were working a 48 hour per week roster the rate would significantly increase as the rate would then have to reflect the additional overtime worked.

All employees of Skilled Rail engaged as Locomotive Drivers who are performing work at BHPB are employed under Australian Workplace Agreements (AWAs)."

19 Mr Butler says,

"In my opinion the Kalgoorlie to Esperance line is the most difficult line for train handling due to the undulating track geometry. This corridor is iron ore specific, hauling iron ore from Koolyanobbing to the port of Esperance. Trains used to haul iron ore on this line are of a broadly similar length (2 kms) to those used at BHPB and Pilbara Iron. It is the track geometry more than anything else which determines the degree of difficulty in train handling. In my opinion, and except for the requirement to use locotrol at BHPB, a higher level of skill is required by Skilled drivers on the Kalgoorlie to Esperance line than on either the BHPB or Pilbara Iron sites."

20 He says:

"The different weight, length and load configurations on Pacific National and ARG lines requires drivers to exercise a greater degree of skill and judgment than drivers on the BHPB line. As stated, the BHPB trains are of a fixed length and weight (they are either full or empty) making them easier to drive."

21 In relation to training he says:

"The only additional training required when a Skilled driver is moved to a new location at the same level of competency consists of safe-working induction training and learning the road.

As explained, a Skilled driver who moves to BHPB to drive on the main line driver must complete a 2 ½ - 3 week induction (mainly comprising safe working and a 3-4 day locotrol course). After that the driver goes out as a second man learning the road for 3-6 months before being assessed by BHPB as competent.

If the Skilled driver moves to BHPB as a Yard or Construction Driver, the amount of additional training required is much less (between 4 and 8 weeks as explained above)."

22 He says importantly:

"The reason pay rates are high in the Pilbara is that it is hard to attract people to move to these remote locations. Rent in the Pilbara is around $600 - $800 per week for an average house. The cost of living is significantly higher than anywhere locally to Perth."

23 He says that Skilled drivers do not use locotrol. Locotrol course takes three or four days to complete. This is followed by some practical training on the line. There is no great deal of difference between the skills for train driving and locotrol train driving. Locotrol only operates at BHPB. Mr Butler says that gradients on the Esperance line are 1 in 35 as opposed to more gentle gradient on the BHPB line of 1 in 45. The Esperance line has more undulated terrain with lots of bends. There are 35

speed restrictions between Esperance and Koolyanobbing. BHPB railroad has few speed restrictions. The axle loads for both lines are similar.

24 Mr Butler says that some Skilled drivers like to have their own room and hence are paid a living subsidy.

25 Under cross-examination Mr Butler says that he has not used locotrol for himself. Skilled drivers are paid different rates of pay. The rates are as follows:

ARG:	$24.50 per hour for mainline (two man operation) – Monday to Friday
	Weekend operation - $28.00 per hour.
Pilbara Iron:	yard - $36.86 per hour
	Construction /mainline $41.30 per hour
BHPB:	Dumper spotter yard $42 per hour
	Construction $48 per hour
	Mainline $54 per hour

26 All of these rates are casual. They incorporate casual loading. At Pilbara Iron employees are paid a completion bonus in addition to these rates. At ARG there is an addition of 9% on top of the rate for driver only operation.

27 Mr Butler accepts that the dumper spotting is part of the yard duties. They are trained to do dumpers spotting and upskill for other yard duties. Mr Butler agrees that the work of Skilled drivers on the mainline is the same as BHPB drivers at Level 5. All workers he provides are supervised by BHPB supervisors. Mr Butler says that Mr Gibson, a dumper spotter works a shift of 12 on / 12 off.

28 The Commission asked Mr Butler some questions. Mr Butler says that the BHPB rate of 54 dollars is for Level 5, locotrol, mainline driver only, associated penalties for public holiday, weekend work and shift. The Pilbara rate is similarly for mainline driver only shift penalty and weekend and public holiday penalties. The ARG rate at $24.50 includes the shift penalty. After 12 hours in barracks employees are paid. At ARG they work a 12 hour shift. They have variable start times. Mr Butler says that living and working in Pilbara is significantly different. He says living in Port Hedland is different from living in Karratha and Dampier. The difference between the BHPB rate and Pilbara Iron rate is due to living in Port Hedland and locotrol.

29 In re-examination Mr Butler says that Skilled have regard to the different rates at different clients work. They do not wish to have too much disparity between the employees and the customers' rates. The rates listed were all total payments. Completion bonus at Pilbara Iron is 9 or 10% a year. ARG are rostered for 38 hour week and there is some overtime if you go over the rostered shift.

30 The following Exhibits were tendered upon remittal:

CFMEU 6 – Schedule 1 Aggregate Wages which is extracted from the Iron Ore Production and Processing (BHP Billiton Iron Ore Pty Ltd) Award 2002

SKILLED 4 – a document entitled Skilled Rail's proposed classification structure

SKILLED 5 – the witness statement of Graham Robert Butler

SKILLED 6 – a five page document representing Australian Railroad Group's website and a two page media release dated 25 September 2003.

SKILLED 7 – a document entitled Table of award rates for locomotive drivers driver only mainline.

Applicant's Case

31 The applicant's prime submission is that the Commission erred in the process of setting rates by not following the Structural Efficiency Principles (SEP). If the proper process is followed, and relevant awards are considered, the same conclusion can be reached properly as found in the first hearing. The methodology by which the decision was reached was wrong, not the result. The Commission has determined that the applicant union is prima facie entitled to an Award. Mr Schapper referred to the Full Bench's comments about the description by Scott C in *ISSOA case* of the Structural efficiency tasks. He said in this case, unlike in the *ISSOA case*, there has been no enterprise bargaining and the respondents have resisted. He submitted that the crucial passage from the decision of Scott C was:

> "And so she then goes on to deal with what is the process of determining appropriate minimum rates. And she says:
>
> > 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.

32 Mr Schapper submitted that regard for the BHPB Award is required as the work duties, responsibilities and environment are identical to the person sought to be covered by this award. He says consent awards are of no weight in the comparison required by the SEP. He referred to statements of the Full Bench in *Skilled Rail Services Pty Ltd v Construction, Forestry, Mining and Energy Union of Workers* 86 WAIG 2509, which said:

> "So quite clearly in respect of Commissioner Kenner's decision to make an award for contract employees at Pilbara Iron, the Full Bench found there was no error in him relying on or using or obtaining guidance from the BHP award. And further, that there was no error in him declining to draw much, if any, significance from the consent arrangements that were in place at Pilbara Iron for their own direct employees.

> And so that being the case, Commissioner, in respect of the utilisation of the BHP award for the purposes of making a Pilbara Iron Contractors Award, it can hardly be the case in making this award for contractors at BHP that it would be wrong to rely on or refer to the BHP award, particularly having regard to the passages from Commissioner Scott's reasons that I have referred to" (Transcript p.498).

33 He went on to say that these comments apply to contractors of Pilbara Iron, so it can hardly be wrong to refer to the BHPB Award for contractors at BHPB. However, the awards cited by the Full Bench and attached to the written submission by Skilled on appeal should have been considered by the Commission.

34 Mr Schapper submitted, in response, to a question from the Commission about how the Commission should view paragraph 97 of the Full Bench decision, as follows:

> "WOOD C: - - prefer them at the end? Can I take you back to paragraph 97 and at - - and not going away from your submissions in respect of the question of redoing the process and doing it properly in accordance with the decision of Scott C, but my question is - does not paragraph 97 in making that - - or going about that process in the proper fashion, doesn't paragraph 97 in the reasons take it - - a view of the BHP award one step further and take a particular view. And then the question would be, if it does so, am I now bound by that view.
>
> MR SCHAPPER: The gravamen of this decision is that you must set the rates in accordance with the process described. That's the dominant gravamen of the decision. They - - the Full Bench has indicated its view about the weight to be attached to this factor and the weight to be attached to the fact that Integrated and Skilled set their rates according to the client and their view about the lack of weight or lack of consideration of the applicability of the other awards. So there's three factors, specific factors the Full Bench has identified. But they have not purported to exercise the discretion themselves obviously and they've said this. in a general sense, is the way in which it is to be done, the Scott process.
>
> So what we say is, given that they've made some observations on the weight or the application or otherwise of three particular matters and they have simply described the process that must be gone through in a general overall sense and directed that that be done again, if on a proper application of the general process they have described one comes to the conclusion that the BHP award is the only source of guidance that is reasonably available in determining rates for this award, then that is consistent with the decision of the Full Bench notwithstanding the statement that the rates were of limited use because of the particular facts and circumstances" (Transcript p.514-515).
>
> ……
>
> "If you go through the process, the spot process, and you say, "Well, the only award that has been identified with - - after proper examination that is applicable that I may have regard to is the BHP award, if that's the only award that I can have regard to and I have regard to it and apply it" are you prevented by what is said in paragraph 97 from doing that, given that they've said you've placed too much weight on it. Now there's apparently a contradiction there, but in reality there isn't because the essence of the Commission's, the Full Bench's decision, is do the process. They've made some observations along the way about their view as to the weight to be attached to the two factors and the failure to have regard to the other awards but at the end of the day those are matters which are necessarily subject - - subjugated to the propriety of the process overall which must be undergone. So we say that there's no contradiction and you are not confined in particular in carrying out and giving effect to the Scott process in the use to which you can put the BHP award by what is written in paragraph 97" (Transcript p.515-516).

35 Mr Schapper dealt with the Awards referenced in the Full Bench's decision at paragraph 94. He submitted that under the state wage fixing principles it was not permissible to have regard to the federal awards. All of the awards mentioned are federal awards. The decision of the Industrial Appeal Court in *BHP Billiton Iron Ore Pty Ltd v AFMEPKIU & Others* 86 WAIG 1477 means the principles are interpreted in the same manner as any statutory instrument. Hence reference to awards or agreements in the Principles is only a reference to State instruments.

36 Alternatively, there is an absence of regard in the past, in the Pilbara Iron Ore industry, for the awards mentioned. The awards were also set in an entirely different statutory context and Principles. The Pilbara work environment is entirely different. Mr Schapper referred to the provisions under which the ARG Award was made. The Federal first award principle is different to that in this State. He says:

> "It's an exercise which turns almost entirely, Commissioner, on fixing the rate for ARG employees according to rates that have been fixed in some other awards of the Federal Commission". (Transcript p.526).

37 Larkin C set a minimum rate for the locomotive driver at 118.5% of the C10 classification in the Metal Trades Award. Mr Schapper submitted that the process adopted by Scott C of comparing like duties, responsibilities and environment does not require an identification of the relationship of key classifications as in the ARG award. This is an antiquated process which the Federal Commission was bound to take. The task required by the Full Bench is not a minimum rates adjustment process; it is what is fair, proper and reasonable in all the circumstances.

38 Mr Schapper referred to the kilowatt, distance and guaranteed payments in the ARG Award and other allowances as being not indicative of a structurally efficient award. Each of the other awards, except the AWU Construction and Maintenance Award and the WA Civil Contracting Award do not even apply in Western Australia. These two awards apply in the iron ore industry or in mining. This then leaves only the BHPB Award for comparison. The Pilbara Iron Ore award and the Robe River Certified Agreement are consent arrangements and hence are of little value for comparison purposes.

39 These awards are not applicable at all and should be "disregarded in their entirety". Mr Schapper described the BHPB Award as an enterprise award but stated that the award sought is also enterprise in nature as it applies only to the BHPB railroad. The respondent's have refused to negotiate an enterprise agreement. BHPB drivers on AWA's who work FIFO receive an 8% premium to Award drivers.

40 Mr Schapper submitted that the Full Bench said that the Commission placed too much weight on the BHPB Award and on how the respondents set their rates of pay. The Commission should have considered other awards. Mr Schapper returned to the reasons of the Full Bench about the BHPB Award having established through principle 10 (not 11) as, "a distinction without a difference". The main consideration in making the award was the needs of the industry and employees, same as Principle 11. Structural efficiency considerations were paramount. Mr Schapper quoted passages from the Commission in Court Session decision in *AFMEPKIU v BHP Iron Ore Limited & Others* 82 WAIG 2033 @ 2045 as follows:

> "Since the mid-80s enterprise bargaining has been the focus of the industrial relationship at BHP. With the failure to continue that process, the spotlight returns to the award. The enterprise-specific award must fulfil the dual requirements of protecting employees as a safety net and providing the employer with a structurally efficient framework within which efficiencies and productivity improvements can be pursued.
>
> …….
>
> It should reflect developments under the process of structural form that's been going on for the last 15 years. The award cannot harbour inefficient practices in the expectation that at some time in the future those matters may be addressed under another EBA. The wage fixing principles now recognise the particular nature of the enterprise-specific award. Where agreement can be reached, the award can be varied under principle 10 without recourse to the commission in court session. In effect, the enterprise award can be the EBA.
>
> ……
>
> With the restoration of the primacy of the enterprise award, wage rates must reflect the work - - the worth of work in the structurally efficient environment free from restrictive work practices. In the enterprise award, it must effectively identify what would otherwise have been specified as the commitments to efficiency and productivity outcomes under an EBA. In this respect the wage rate must be commensurate with the scope of benefits the employer can achieve in managing the structurally efficient workplace." (transcript p.510)

41 He emphasised that the Commission, in making the BHPB award, have given full regard to the SEP. He submitted that the Pilbara annual leave standard in this application was not overturned by the Full Bench. Annual leave the applicant is entitled to in an award, that matter having come through the appeal process. The terms of the award, having gone through the proper process, should be the BHPB Award terms. Mr Schapper submitted that it is not for the applicant to establish what the terms of the award should be in any 'literal' sense. The power of the Commission under s.26(4) to grant relief in different terms remains. If the applicant fails to convince the Commission that the BHPB rates should apply, then the Commission should still make an award. To make an award in terms other than the BHPB award terms will impugn the security of employment for BHPB employees. Mr Schapper advised that the BHPB rates of pay had been increased since first hearing [Exhibit CFMEU 6].

Respondent's case

42 The respondents applied then for the application to be dismissed pursuant to s.27(1) of the Act. They submitted that the onus lay with the applicant to justify the terms of the award it seeks. The applicant had sought at second instance what it sought at first instance, and which was denied. Hence there is no case to answer as the applicant has failed to establish the basis for the terms it seeks. The basis of the case is so 'unsatisfactory' it should not be acted upon. Scott C in her decision at paragraph 27 made plain that the applicant must first do this before the respondent has a case to answer (see *Ruane v Woodside Offshore Petroleum* (1991) 71 WAIG 913). The respondents submitted also that there was not sufficient time to fairly deal with the case, so it should not be heard at all. The award would apply to no one after 26 September 2006. Mr Blackburn for Skilled submitted that almost all the matters submitted by the applicant were put before the Full Bench, except the proposition that federal awards cannot be looked at and that the AIRC awards are not structurally efficient because they contain allowances. The Full Bench said the Commission did not set properly fixed minimum rate; i.e. the minimum rates adjustment principle. The Full Bench criticised a resort to comparative wage justice, and a view that the BHPB work had been valued properly (Principle 10). Mr Blackburn referred to the 1992 State Wage Fixing Principles which states, "The minimum rates adjustment process is a requirement of the structural efficiency principle". He referred to the purpose being not to leave it to individual Commissioners because the situation would be that of the "Chancellor's foot". This is a reference to individual differences being displayed. The SEP was adopted in 1988 to provide more equitable and rationale wage fixing.

43 He submitted that when the Commission provided guidance as to the SEP task they referred specifically to awards of other jurisdictions for comparison purposes. Mr Blackburn submitted that minimum rates and supplementary payments could be expressed together. He agreed that Scott C had not identified a particular key minimum classification. He submitted that Integrated and Skilled were never invited to negotiate a collective agreement. The BHPB rates were unsafe to adopt, according to the Full Bench, because they were aggregate rates and there was no evidence as to their composition. Mr Blackburn referred to an earlier submission by Mr Schapper on this point. He submitted that the rate in the BHPB award does not apply to FIFO drivers. Mr Blackburn submitted that the applicant had brought no evidence to assist the Commission to apply the SEP. Mr Blackburn submitted, "the applicant knows that it cannot justify its claim and for that reason has elected to simply disregard the decision of the Full Bench". He referred to this as an abuse of process.

44 Mr Blackburn submitted that it was not realistic that the matter could be fairly and properly determined in the limited timeframe (i.e. 26 September 2006) and hence should not proceed. He reiterated his application for site inspections of the Koolyanobbing-Esperance line and submitted that the environment and conditions were more onerous there than on BHPB railroad due to the differing gradients and speed restrictions on track.

45 Mr Ellery for Integrated supported and adopted the submissions of Skilled. He referred the Commission to paragraphs 122 and 123 of the Full Bench decision concerning Integrated's appeal; namely the Commission erred in adopting the overtime rates in the BHPB award.

46 Mr Schapper in reply went through the reason why Mr Blackburn's submission was wrong, namely that the minimum rates adjustment process was mandatory. He referred to the decision of Scott C and to areas which the Commission 'may be useful' rather than being a requirement.

47 I did not accede to the respondent's application to dismiss the matter. In my view aspects of the applicant's submissions were arguable and in any event the Commission was tasked with undertaking the Structural Efficiency exercise, comparing awards, and deciding rates and other matters. It is the case that rates may be then derived, which are not as claimed, but may be awarded.

48 Mr Blackburn for Skilled submitted that the onus was upon the applicant to prove the terms of the award they seek. The respondent would rely on the decision of Larkin C which engaged in a thorough process of assessing awards and applying the minimum rates adjustment principle. Larkin C set the minimum rate for locomotive driver of a 118.5% of the Fitters rate [Exhibit Skilled 7]. The rates which the applicant seeks are the aggregate rates and there is not enough evidence to support these rates. In addition, the rates set would need to cater for the different rosters which are worked of which there is evidence before the Commission. Components in the aggregate rate would need to be identified and quantified. This is unless the applicant sought the standard location allowance arrangements as provided by the Commission. As there is no evidence the Commission is only entitled to use a minimum rate with casual loading and overtime penalty. The Classification structure proposed by the respondent is at Exhibit Skilled 4.

49 Mr Blackburn submitted that the Full Bench had decided that the Commission must apply the minimum rates adjustment exercise with supplementary payments as part of the SEP. Even though Scott C did not follow this approach in her decision. State wage principles of 1992 specify this exercise.

50 Mr Blackburn displayed a table of comments of Full Bench arising in Skilled 1 and Skilled 2. He took the Commission to each of those comments. He submitted there was no prohibition to using consent awards. The consent awards identified are indicative and show that the rates set by Larkin C are within the ball park, and in fact, are in front of industry. The Full Bench gave clear guidance in relation to the use of the BHPB award. The applicant's submission that it is merely a matter of process is wrong. The findings in the Full Bench are quite specific and the statements are not merely obiter. Apart from the instructions of the Full Bench concerning the use of the BHPB award, the BHPB award cannot be used as there is no evidence as to what the aggregate rate applies to. The BHPB award applies to a 48 hour week. This must include shift, weekend and public holiday penalties, but the components are not transparent. The arguments for the respondents in respect of overtime and the BHPB award were also adopted by the Full Bench. The respondent rejects any notion as put in the applicant's letter of 11 September 2006 that because the previous Commission in Court Session reduced the hours of drivers from 50 to 48 per week, this has any bearing on this matter. The applicant's submission is essentially that the Commission should ignore the Full Bench decision.

51 Mr Blackburn submitted that the Commission was required to set pay rates that are fair and reasonable in all the circumstances. This is achieved by applying the SEP. There is no tension between the SEP and the objects of the Act. The 1991 State wage case principles, 71 WAIG 1723, made it plain that minimum rates adjustment exercise is an integral part of the SEP package. It provides a set of relativities and stops spiralling wages. The 1992 state wage, 72 WAIG 198 @ 199, made a distinction between minimum rates and pay rates awards. It stated it was a requirement of SEP that awards would be subject to the minimum rates adjustment process. This is explained in the appendix. The appendix shows that awards with various jurisdictions have been used. The applicant's proposition of not having regard to federal awards is wrong. Mr Blackburn also refers to the 2003 and 2004 principles indicating there was no tension between section 26 of the Act and the principles. His view is that the principles are binding upon the Commission.

52 Mr Blackburn submitted that the applicant's attempts to distinguish this matter from Scott C decision on the basis that the respondents have refused to bargain is incorrect. This argument was used before the Full Bench. The truth is that Skilled was not invited to negotiate an enterprise agreement. This common rule award cannot be arbitrated under principle 10. The applicant has no case or their case has not been made out. If the Commission chooses not to dismiss the application on that basis then the matter should be based on the award as decided by Larkin C. The ARG award applies to ARG's operations in Western Australia and New South Wales. ARG is the third largest carrier of iron ore in Western Australia [Exhibit Skilled 6]. The decisions of Larkin C are at PR 917909 and 926550. Mr Blackburn referred to the reasoning of Larkin C at paragraphs 203 – 257, 282-286 in the first decision and paragraphs 84-116 and 141 onwards in the second decision. In the case ARG the respondent sought a rate for locomotive drivers of the C-10 rate. The applicant sought a rate of 130% of the C10 rate. The Commission decided that the relativity should be 118.5%. Larkin C compared ARG rail drivers in the Engineman's award. The Commissioner found that the drivers at ARG had no greater or lesser skills than drivers in other states in Australia.

53 Mr Blackburn gave the ARG rate for a locomotive driver as at 9 August 2005 as $678.50. In addition to this there is a 9% increase for driver only operation. There is also a 9% increase for mainline driving. Exhibit Skilled 7 shows a table of relativities. Construction drivers display a lesser level of skill and responsibility. Mr Butler's evidence in this regard is not contradicted. It should be accepted. Locotrol rates brings a driver from level 4 to level 5, is gained after a 3 to 4 day course. Skilled has been forced into taking account of client's pay rates in that BHPB rates are unduly high.

54 Mr Blackburn went through various awards (see Exhibit Skilled 7). Not much emphasis could be placed on the locomotive engine drivers award in New South Wales. The relativity in the locomotive drivers Victorian award 2001 is 142%. This relativity is the highest of any award. The Iron Ore Hamersley award covers 3 decisions. The relativity in that award is approximately 136.6%. These awards display that the ARG rate is appropriate. Mr Blackburn described the applicant's submissions as to the ARG award as being fatuous.

55 Mr Blackburn submitted that there was no evidence in respect to allowances, including shift allowance and hence the Commission cannot arbitrate these matters. There is not enough material before the Commission to make up an aggregate rate. Mr Blackburn submitted that the conditions in the Pilbara are different but not so as to warrant such a large increase. Mr Butler's evidence is that driving on the Esperance line is harder. His evidence has to be accepted. There is no other

comparative evidence. The difference in locations can be covered by the standard location allowance of the Commission. There is no evidence to set other allowances. The applicant has made no case for a location allowance.

56 Mr Blackburn submitted that the evidence of Mr Johncock was that the use of contractors undermined BHPB workers. This does not sit comfortably with the number of Skilled workers on the mainline and the fact that these are fill ins for long term sicknesses (evidence of Mr Butler). The Commission found in the first decision that there was no evidence of BHPB employees being undermined. There has been no further evidence.

57 Mr Blackburn submitted that the aggregate rate of pay has to be linked to a specific roster. Hence the aggregate rate of pay would have to be different for different rosters. The different components would have to be specified and determined.

58 Mr Blackburn submitted that due to sections 178 and 208 of the WorkChoices legislation, only the base rate of pay would be preserved hence it is only necessary to make a base rate of pay.

59 Mr Ellery for Integrated submitted that the applicant has essentially asked the Commission to ignore the Full Bench decision. The applicant's submission that the Commission could follow the SEP and come to the same outcome is wrong. The applicant's submission that the BHPB rate is properly valued is counter to paragraph 96 of the Full Bench decision.

60 Integrated was not invited to partake in any enterprise bargaining negotiations. Mr Ellery said that the applicant had not addressed at all paragraphs 122 or 123 of the Full Bench decision in relation to overtime. The applicant has the onus to establish the terms of the award and has failed to do so. It is up to the applicant how they choose to run their case.

61 Mr Schapper in reply submitted that the Full Bench decision had indicated that the Commission had engaged in comparative wage justice exercise and hence set aside the award of the Commission to do the SEP exercise properly. If the Commission does this it will come to the same conclusion. Courtesy of subsequent state wage cases the minimum rate and supplementary payments can be combined into one. When the Full Bench adopted Scott C's decision they did not adopt the process undertaken by Larkin C. This award was put before the Full Bench and the Full Bench indicated that the ARG award was one of the awards to consider. The applicant disputes the heavy emphasis placed on the judgment of Larkin C by Skilled. Mr Schapper said the SEP process is not simply the process of minimum rates adjustment. The Full Bench said that full consideration is required. The ARG award applies to the transport industry, not the iron ore industry or the mining industry. The 2002 decision of the Commission in Court which established the BHPB award applied the structural efficiency concept. The ARG award is a remote comparison for all workers at BHPB. Mr Schapper referred to the Commission in Court Session which changed the hours for a BHPB driver from 50 to 48. He submitted that the award was not broken up by the Commission and should not now be broken up. He submitted the roster was the same for Skilled workers, being a 12 hour roster as it is for BHPB workers. The BHPB award does include FIFO arrangements. The BHPB award rates are in an environment which is identical to that in which Skilled workers perform their work.

Conclusions

62 The respondents' submission as to what is preserved or not preserved by WorkChoices has no relevance to the exercise the Commission has to undertake. I am not governed by those provisions.

63 Let me say at the outset that the applicant is correct in describing the work duties, responsibilities and environment of drivers under this award as being identical to that of drivers under the BHPB award. This matter has been covered in my earlier decisions. The only additional evidence led is that of Mr Johncock and Mr Butler. This does not change the picture of drivers working on the BHPB mainline under locotrol, or on work trains or in the yard. They are obviously qualified locomotive drivers; they are then trained further by BHPB staff, supervised by BHPB staff, are placed on the BHPB roster and perform the work otherwise undertaken by BHPB drivers.

64 Skilled drivers operate as "dumper dudes" according to Mr Johncock. This might suggest that they perform a more limited range of yard duties. However, this is a product of work requirements and training and these employees of Skilled are being trained up for further duties. As for conditions the drivers employed by Integrated and Skilled operate on a fly in/fly out basis, they work different shift rosters and at times different hours to the BHPB award drivers. The shift rosters are either 42, 46 or 48 average hours per week. BHPB award drivers average 48 hours per week on their rosters. Integrated and Skilled drivers are paid less than the BHPB drivers, even though the evidence for Integrated and Skilled, most recently stated by Mr Butler, is that these employers attempt to pay wages having regard for the client where the drivers work, so that the rates of pay are not too dissimilar. It would seem this policy is adopted for common sense human resource reasons. In other words, people generally do not like getting paid a lot less than others in the same workplace when they are doing the same work.

65 There were a number of arguments raised by the respondents as to why the matter should be dismissed. The respondents raised before the Full Bench the issue of whether there would be sufficient time for the Commission on remittal, to hear the matter in a fair and proper manner. The Full Bench indicated that the Commission could determine the course of the matter. The respondents renewed the submission before the Commission and sought that the matter be dismissed. I rejected this submission. In my view if the matter lacks time to be heard fairly then effectively it would simply be "stayed" by the onset of the relevant WorkChoices provisions. They submitted that the Commission had until 26 September 2006, under WorkChoices, to make an award which would apply to the respondents. The respondents submitted that the Commission is required to afford the parties procedural fairness with a fair opportunity to prepare and present their case. They referred to the decision in *Jupp v Computer Power Group Ltd & Another* (1994) 122 ALR 711. The respondents submitted, in effect, that the applicant should present its case in detail before the respondents be required to respond. I accepted this submission, given the history of the matter and recent correspondence from the applicant (see transcript p.469 as quoted by Mr Ellery) and scheduled the matter accordingly. It is my clear view that the respondents have had a fair hearing and a fair opportunity to present their case notwithstanding the submission of Mr Blackburn.

66 The respondents requested the Commission conduct site inspections at the Koolyanobbing to Esperance iron ore line. The respondents submitted that whilst the Commission had previously refused an application for site inspections on the basis of familiarity with the BHPB railroad, the Full Bench had directed the Commission to consider the appropriateness of the rates in

the other minimum rates awards previously tendered by Skilled. The respondents submitted that the level of skill and responsibility exercised by Yard and Mainline drivers on this line is at least equivalent to, if not greater than, that displayed by Skilled drivers at BHPB. This is the evidence of Mr Butler. The respondents submitted that they also wish the Commission to observe the conditions under which work is performed. The conditions are more erroneous by virtue of different track gradients, speed restrictions and 'so forth' than conditions on BHPB railroad. I rejected this application on the basis that the matters said to be relevant by inspection could properly be led in evidence. Speed and gradient variations and duties can easily be described. I do not need to see and experience them to know their possible impact.

67 The applicant submitted that the Principles should be read and interpreted as any other statutory instrument. Hence reference to "award" or "agreement" in the Principles would mean simply a State award or agreement, not a federal instrument. The words of the Principles should be given their ordinary meaning, unless on a plain reading there is ambiguity; then extrinsic sources may be used. Whilst this submission at first blush has some appeal, the Principles to my knowledge have never been applied in such a limited manner. Mr Blackburn referred to the awards mentioned as an attachment or schedule to the 1992 State Wage Case, some which are federal awards, to counter the applicant's argument. I do not accept the applicant's argument. It would impose an unnecessarily restrictive approach to wage fixing and one not sponsored by the Commission generally.

68 The applicant submitted also that federal awards could not be used for comparison as they were made under differently constructed Principles and subject to the strictures of a different Act. This is not a reason not to use federal awards. It is a reason to be careful in assessing the awards to ensure that as best as possible a like with like comparison is obtained. The applicant submitted also that consent awards are of little assistance in a comparison exercise. I accept this point and it has been covered by Scott C in her decision at paragraph 28, and the Full Bench in Skilled 1 at paragraphs 79 and 80.

69 The applicant submitted that the respondents had been resistant to enterprise bargaining. The importance being how could one establish viable rates of pay as a minimum, with room for enterprise bargaining, if enterprise bargaining was not possible? Both respondents rejected this submission and submitted that the applicant had not approached them for this purpose. This issue is slightly different to the issue of conciliation covered in my earlier reasons. However, my earlier comments concerning the approach of the respondents to conciliation are still relevant. In fact, the respondents could have at any stage sought conciliation before the Commission, even on remittal, and have not chosen that path. I do not know whether the applicant specifically proposed an enterprise agreement, but I do know that the regulation of this workforce by an award has been strenuously opposed by the respondents at all times. In fact, the energies of Skilled, and more latterly Integrated who have been in support of Skilled, have been directed towards preventing an award being made. Given the history of the matter I doubt greatly that an enterprise agreement could have been achieved. I note also that the declared preference of both respondents is to engage their employees under AWAs.

70 Leaving aside the various submissions by the respondents that the application should be dismissed, the prime focus of the respondents' submissions was that the Commission was mandated to apply the Structural Efficiency principle and this included the minimum rates adjustment process. This involves establishing a minimum rate of pay for each classification in percentage relativity to others. Mr Blackburn submitted that supplementary payments could be expressed together with minimum rates but the relativity of the locomotive driver, in effect to the C10 rate in the Metal Trades General Award, should be established. He encouraged the Commission to adopt the process followed by Larkin C in the ARG Award. She established a relativity of 118.5%. He used other awards to illustrate that this figure was within the "ballpark" for a locomotive driver across industries.

71 The Full Bench referred to the decision of Scott C in the *ISSOA* case with approval as to the application of the structural efficiency principle. I note that the parties before Scott C had a history of enterprise bargaining, which is not present in this matter. However, there is no suggestion in the *ISSOA* case that a minimum wage with fixed relativities set in relation to the C10 rate, was established. One only has to look at clause 14 of the award made in that matter to understand that the technical approach sponsored by Mr Blackburn was not applied in that decision. Clause 14 displays the 'minimum annual rate of salary payable' without reference to either an internal or external relativity. I say this of course not as a criticism of the decision of the Commissioner, but as a counter to the view taken by Mr Blackburn that this technical process of set minimum rates (with or without separately expressed supplementary payments) and in expressed relative terms to other key classification points in industry, is a mandate of the principles. The Principles do require consideration of structural efficiency, which is a broader notion than the technical mandate proposed by Skilled and Integrated. The Full Bench has endorsed the decision of Scott C and referred the description of the process to be followed to the Commission. This process, as evidenced by the reasoning of, and award made by the learned Commissioner, does not lead to the path Mr Blackburn submits strenuously the Commission must follow.

72 This does not speak against the structural efficiency process. It is a necessary process and involves a proper consideration of the efficiency and productivity of the workplace, and balances this with fairness to the employees. It is a mandatory process for the Commission in matters such as this, and the process is of course consistent with the objects of the Act, in particular s.6(af).

73 Mr Schapper also submitted that in the application, although a common rule award is sought, in effect the award is enterprise in nature as it relates only to the BHPB railroad. I do not see the award claim in this light, but in terms of any flow-on implications (which is a consideration behind the Structural Efficiency Principles), those are not apparent as the award is quite limited in scope, applies only to employers who at this time are contracted to BHPB, and only to employees or those employees who work on that railroad in the Pilbara.

74 The Full Bench upheld grounds of appeal in FBA 8 of 2006 (Skilled Rail Service) and FBA 7 of 2006 (Integrated Group Ltd); *Integrated Group Limited t/as Integrated Workforce v Construction, Forestry, Mining and Energy Union of* Workers *and Skilled Rail Services Pty Ltd; Skilled Rail Services Pty Ltd v Construction, Forestry, Mining and Energy Union of Workers and Integrated Group Limited* 2006 WAIRC 05366. I will refer to this decision as *Skilled 2*, the Full Bench in this decision make reference to their earlier reasons in FBA 11 of 2006 as *Skilled 1*(*Skilled Rail Services Pty Ltd v Construction, Forestry, Mining and Energy Union of Workers* 86 WAIG 2509).

75 In FBA 8 of 2006, Ground 5 was upheld which related to "The Commission erred in deciding to adopt and award the rates taken from the BHPB award:" there are 9 sub grounds which seek to show error in the decision. The Full Bench found that grounds 5(a), (b), (c), (d) and (e) had been established. In regards to (f) the Full Bench said: "In our opinion, the applicability of the BHPB award rates to employees engaged on a fly in/fly out basis was not adequately considered by the Commission at first instance" (paragraph 110). In regards to ground (g) and (h) the Full Bench state "do not need detailed consideration in our opinion (paragraph 112), "We do not think it necessary to say anything more about these grounds" (paragraph 113). In relation to ground (i) the Full Bench states "In our respectful opinion however in awarding the BHPB award rates in large part because Integrated and Skilled adjusted their rates of pay depending upon who their client was, the Commission placed too much weight on this factor" (paragraph 115)

76 Ground 6 is also established by reference to the Full Bench's statement that "In our opinion the grounds do not raise any additional issues to grounds of appeal 5(c), (d) and (e) and need not be separately considered" (paragraph 116). The other grounds of Appeal in FBA 8 relating to Public Interest, Conciliation, Annual Leave, Site Inspections and the Scope clause were not established. Ground 3 was withdrawn.

77 In FBA 7 of 2006 the Full Bench upheld grounds 4 "Error in declining to perform a minimum rates exercise", ground 5 "Error in awarding BHP Billiton Award rates and other Employment Conditions", specifically in relation to 5.1 Rates and ground 5.4 in relation to Overtime. All other grounds of appeal related to Publishing varied area and scope provisions (ground 1), Public interest considerations (ground 2), error in assessing proof (ground 3),and grounds 5.2 Penalty rates, 5.3 Casual employment and 6.5 Annual leave were not established.

78 Hence, as stated, the majority of the award issued by the Commission at first instance remains intact with the exception of clauses 2.1, 2.3 and 3. These are of course the core provisions of the award.

79 In relation to clause 3 – Overtime, I will adopt the suggested provision of the respondents. This is a more typical provision for awards. The respondents suggest time and a half for the first two hours, and double time thereafter. This should be applied for hours additional to the rostered shift.

80 In relation to clause 2.3, I do not accept the classification structure proposed by the respondents. The respondents proposed four different classifications, i.e. yard, construction, mainline and mainline with locotrol. It is in fact a structure which works against the structural efficiency principle by unnecessarily decomposing the duties of skill levels. This principle has as a key focus the institution of skilled based career structures. As part of that process then classifications, not just the career structures, should be broad enough to allow for the adoption of a variety of duties subject to adequate training. They should not be focussed narrowly. I am not convinced by any further evidence or submission that the descriptions of the work as covered in my earlier decision are in anyway wrong. I am content to simplify the classification structure and institute a two tiered classification structure. The first level to cover yard and construction work. The second level to cover mainline work. Of course at BHPB mainline work necessarily involves the use of locotrol.

81 This then leaves the core provision, namely pay rates. These rates must be sensitive to the differing rosters of 42, 46 and 48 average hours per week. The Full Bench in its reasons for decision in *Skilled 1* stated:

> "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".
>
> "85 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".
>
> "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".

82 The Full Bench in *Skilled 2* says as follows:

> "89 In the present matter, the Commission did not purport to be applying the Structural Efficiency Principle in the making of the award and the setting of the pay rates contained within the award. In our respectful opinion, the Commission thereby erred.
>
> 90 In *Skilled No 1*, the Full Bench expressed its view that the process involved in the application of the Structural Efficiency Principle was accurately described in paragraphs [21]-[28] of the reasons of Scott C 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 (*the ISSOA case*).
>
> …….
>
> 92 …..This is because, at least, the Commission did not comply with the fifth dot point because, in our opinion, it did not set "*properly fixed minimum rates*".

93 Paragraph [24] of the reasons of Scott C in *the ISSOA case* describes how this should be done. As stated by Scott C, guidance should be obtained from other awards and agreements for the purpose of properly establishing rates and conditions. Additionally in paragraph [28] Scott C refers to 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 forming an objective basis being useful for the Commission to consider.

94 In the present case, the Commission focussed upon the rates set in the BHPB award. For reasons which will be elaborated upon later, the Commission was, with respect, in error in doing this In addition, there were a number of other awards before the Commission. These awards were set out in an attachment to the written submissions of Skilled on the appeal. They were *The ARG Employment Pty Ltd Interim Award 2003*, *The Locomotive Operations Award 2002*, *The Building Construction Industry (NT) Award*, *The Manildra Group – Rail, Tram and Bus Union Rail Operations Award 2001*, *The AWU (Victorian Public Sector) Award 2001*, *The Western Australian Civil Contracting Award 1998*, *The AWU Construction and Maintenance Award 2002*, *The West Coast Wilderness Railway Award 2004*, and *The Locomotive Enginemen's New South Wales Award 2002*. In our opinion the Commission ought to have but did not adequately consider the applicability of these awards in the setting of the pay rates in the present award. These awards should have been considered by the Commission in the manner discussed by Scott C in paragraphs [24] and [28] of her reasons in *the ISSOA case*, to determine the appropriate rates for the skill levels being engaged in by the employees to be covered by the award. In our respectful opinion the Commission at first instance erred by engaging in a type of comparative wage justice which was not appropriate for the reasons explained by Scott C in paragraph [24] of her reasons in *the ISSOA case*.

95 In our opinion therefore ground 5(a) of FBA 8 of 2006 has been established. This is because the Commission failed to properly apply the Wage Fixing Principles. In particular in setting the rates of pay it did not adopt the process required by the Structural Efficiency Principle as we have earlier described.

96 Also, the Commission was in error in paragraph [59] of the January reasons in saying that the work under consideration had been properly valued and expressed in the BHPB award. This is because the BHPB award did not contain rates which were assessed in accordance with the Structural Efficiency Principle, required by Wage Fixing Principle 11. This is because it was arbitrated pursuant to Wage Fixing Principle 10 as being applicable to a single enterprise award. (See *AFMEPKIU v BHP Billiton Iron Ore Pty Ltd* (2002) 82 WAIG 2033 at [95]; *CFMEU v BHP Billiton Iron Ore* (2004) 84 WAIG 3219 at [110]).

97 Additionally, in our opinion, the BHPB award rates were of limited use because of the particular facts, circumstances and history which led to the making of the BHPB award. (For example see *AFMEPKIU v BHP Billiton Iron Ore Pty Ltd* (2002) 82 WAIG 2033 at [74], [127](f); *CFMEU v BHP Billiton Iron Ore* (2004) 84 WAIG 3219 at [45]-[50], [93]-[96], [106]). As quoted earlier, the Commission referred to this in the November reasons, but in our opinion the issue was ignored to an impermissible level in the January reasons and in the setting of the rates in the award. In *Dampier Salt Ltd v AWU* (2004) 84 WAIG 2780 at [53] the Commission in Court Session properly in our respectful opinion observed the limitations of the use of the BHPB award given that it "*turned upon its specific facts and the nature of the history of industrial regulation at the relevant employer's operation over many decades*".

98 We also accept the submission made by Skilled that the arbitration leading to the BHPB award was influenced by the enterprise nature of that award, BHPB's refusal to negotiate a collective agreement, the worth of the work being assessed by reference to other employees engaged under AWAs, and productivity improvements which had been achieved and would be likely to be achieved in the future by BHPB.

101 The history of the EBAs prior to the making of the BHPB award again highlights in our opinion the particular history of employee relations at BHPB which were relevant to the making of the BHPB award but provide a reason why it was unsafe for the Commission to adopt the BHPB award rates. A lack of clarity as to the composition of the BHPB award rates was a reason why, in our respectful opinion, the Commission ought not to have given the weight it did to the rates of pay in the BHPB award

106…… Whilst in our opinion this means that the table is not as cogent as it might otherwise have been, it again highlights the difficulty of the Commission applying the BHPB award rates to the different rosters and shifts worked by the employees of Integrated and Skilled.

110 In our opinion, the applicability of the BHPB award rates to employees engaged on a fly in/fly out basis was not adequately considered by the Commission at first instance

112 . It is correct that a purpose of making an award is to provide an appropriate safety net of pay rates and conditions. In our opinion this safety net would have been established if the Commission had engaged in the making of a first award in accordance with Wage Fixing Principle 11, as referred to earlier.

115 It was a matter upon which the Commission placed some significance. As stated earlier, in our opinion the Commission ought to have assessed the pay rates in the award by engaging in the process required by Wage Fixing Principle 11. In engaging in this process the Commission was required, as stated by Scott C in *the ISSOA case* at paragraph [28], to consider all of the circumstances. This will include, as stated in paragraph [24] of the reasons of Scott C, the employees' duties and responsibilities and the circumstances under which their work is done. In our opinion the Commission in considering all the circumstances of the case may include a consideration of the basis upon which rates of pay are determined by employers within the industry to be covered by the award. To this extent it would not be an error for the Commission to take into account the way in which Integrated and Skilled set their rates of pay. In our opinion therefore it was not an "*irrelevant consideration*" as stated in the ground of appeal. In our respectful opinion however in awarding the BHPB award rates in large part because Integrated and Skilled adjusted their rates of pay depending upon who their client was, the Commission placed too much weight on this factor".

83 It is not clear to me how in Skilled 1, which relates to an award covering employees of labour hire firms operating on the Rio Tinto railroad, the Commission can 'have regard to' the rates in the BHPB award, so long as the Commission has regard to the facts and circumstances of the setting of that Award; yet in Skilled 2 which applies to employees of labour hire firms on the BHPB railroad, the BHPB award is of 'limited use', because of the facts, circumstances and history in making that award.

84 Nevertheless the Full Bench indicated at paragraph 94 of their reasons in *Skilled 2* that consideration should have been made by the Commission as to the applicability of a number of awards that were tendered by Skilled in setting the pay rates; the Full Bench then listed the awards. Skilled at the proceedings at first instance tendered a bundle of Awards [Exhibit Skilled 1] which extend beyond those referred to by the Full Bench, the awards in total are:

> The Iron Ore Production and Processing (Hamersley Iron Pty Limited)Award 1987, The Iron Ore Production & Processing (BHP Billiton Iron Ore Pty Ltd)Award 2002, The Mining Industry – Rio Tinto Iron Ore Award 2004; The Locomotive Drivers (Victoria) Award 2001; The Australian Railroad Group Employment Pty Ltd Interim Award 2003 (the ARG Award), The Public Transport Corporation Interim Award 1990, The Locomotive Operations Award 2002, The Victorian Electricity Industry (Mining & Energy Workers) Award 1998, The Australian Workers Union Construction and Maintenance (Western Australia) Award 2003, The Building Construction Industry (Northern Territory) Award 2002, The Manildra Group – Rail, Tram and Bus Union Rail Operations Award 2001, The Australian Workers Union (Victorian Public Sector) Award 2001, The Western Australian Civil Contracting Award 1998, The Australian Workers Union Construction and Maintenance Award 2002, The West Coast Wilderness Railway Award 2004, The Locomotive Enginemen's Award 1996, The Locomotive Enginemen's New South Wales Award 2002.

85 Each of the awards mentioned above are Federal awards made by the Australian Industrial Relations Commission except for the Hamersley Iron & BHPB awards which are State awards made by the Commission. The Hamersley award is effectively defunct as a result of the making of the Federal Mining Industry – Rio Tinto Iron Ore Award 2004. The vast majority of the Federal awards, including the Rio Tinto award are derived from award simplification proceedings or by consent. They are of questionable relevance. However, Mr Blackburn concentrated specifically on the ARG award, a Federal arbitrated award.

86 I should add that the Dampier Salt Award is an arbitrated award of this Commission which applies to workers in the Pilbara. It is difficult to use this award for the same reason that the Commission did not use the BHBP award when making an award for Dampier Salt. The industries are quite different and it does not apply to locomotive drivers. The Commission cannot get away, in making an award or in the work of the Commission generally, from having regard for the needs of the relevant industry balanced with fairness to the employees in it. The objects of the Act demand this and the Principles are subservient to this, and in any event do not work against it. So using the Dampier Salt award would be of limited value for the iron ore industry.

87 Scott C at paragraph 28 stated:

> "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'".

88 This leaves the BHPB award for comparison purposes, which supports the submissions made by the applicant. Alternatively, the use of the ARG award as proposed by the respondent. There can be no doubt that the BHPB award was set having regard to structurally efficiency considerations. In the making of the award in 2002 the Commission in Court (*The Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union of Workers – Western Australian Branch v BHP Iron Ore Limited & Others* 82 WAIG 2033) specifically dealt with structural efficiency considerations at paragraphs 96-98; 105, 107-108, 110.

89 I can see the logic of the applicant's submission, particularly given this is the only relevant arbitrated award which operates in the Pilbara. The difficulty is that such an approach flies in the face of the strong expressions in the Full Bench decision against using this award in anything other than a limited manner. Given these reasons it would be wrong to then simply adopt the approach submitted by the applicant and revert to the BHPB award.

90 If I were to adopt the approach submitted by the respondent, and use the ARG award for comparison purposes, then according to [Exhibit Skilled 7] the ordinary minimum rate of pay for a locomotive driver, under driver only operation and operating on the mainline, would be $800.63 per week. This rate is for a 38 hour week (see clauses 16.1 and 16.2) and does not include any other allowances or penalties. This equates to an hourly rate of $21.07. The shift work provisions of the ARG award are at clause 24.3. This clause provides an additional hourly payment of $2.05 for afternoon shift and $2.38 for night shift. For simplification, as the Skilled and Integrated drivers at BHPB work a combination of shifts on a 24/7 operation, I will average this hourly figure to $2.22 an hour. Therefore a person working 38 hours a week on shift and on the mainline under driver only could receive $23.29 per hour.

91 If one then adds a general overtime rate to this hourly figure, ignoring whether the penalty relates specifically to Saturday, Sunday, Public Holiday or whenever; and if one uses the penalty as suggested by the respondent [see Exhibit Skilled 4] the following rates are derived. For a 42 hour average week the rate would be $24.95, for a 46 hour average week it would be $26.83 and for a 48 hour average week it would be $27.66.

92 I reject the submission of the respondent that establishing an aggregate rate is in anyway counter to the principles. I accept though that as far as possible the aggregate rate should be transparent.

93 What cannot be ignored then in any proper calculation of pay rates is that there is a difference in pay for workers who operate in the Pilbara; especially in the mining industry. It is common knowledge, at least in Western Australia that workers in this locality and industry are paid higher rates.

94 More relevantly though is the fact that Mr Butler under questioning from the Commission confirmed that the only reason for the great disparity between the rates paid by Skilled to its employees at ARG, compared to the Pilbara Iron and BHPB, is

because the latter work in the Pilbara. In response to why the Pilbara Iron and BHPB rates were different he said that it was because of working in Port Hedland and operating locotrol. The added difficulty in terms of location and locotrol seemingly accounting for the significant difference in rates. Except that in re-examination Mr Butler confirmed that Skilled attempted to adjust rates of pay according to the client, and complained that the BHPB rates are simply too high.

95 The Full Bench has cautioned against giving too much weight to the approach adopted by the respondents in pay. However, there is no proper guide for what are relevant Pilbara loadings. The respondent submitted that the applicant had led insufficient evidence and that only the general location allowance established by the Commission could be used. If I adopted this approach I would be breaching my obligations under s.26 of the Act. The only potential guides are the BHPB award, the Hamersley or Rio Tinto awards (which I have discounted) or an assessment of how Integrated and Skilled in fact treat 'Pilbara pay' at BHPB. In other words by an assessment of the rates they pay as a differential. If I adopt this last approach, as a commonsense approach because it gives a comparison only of relative rates, then I derive the multiple of 1.7 can be applied for level 1 and the multiple of 2 can be applied for level 2. This is based on the comparison of rates paid at ARG by Skilled, and rates paid by Skilled and Integrated at BHPB.

96 Therefore, the hourly pay rates to be applied are as follows:

	A Roster average 42 ordinary hours per week	B Roster average 46 ordinary hours per week	C Roster average 48 ordinary hours per week
Locomotive Driver Level 1 **Yard and Construction**	$42.41	$45.61	$47.00
Locomotive Driver Level 2 **Main Line**	$49.90	$53.66	$55.30

2006 WAIRC 05510

IRON ORE PRODUCTION & PROCESSING (LOCOMOTIVE DRIVERS) AWARD 2006

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE CONSTRUCTION, FORESTRY MINING AND ENERGY UNION OF WORKERS

APPLICANT

-v-

INTEGRATED GROUP LTD AND OTHERS

RESPONDENTS

CORAM COMMISSIONER S WOOD

DATE TUESDAY, 26 SEPTEMBER 2006

FILE NO A 3 OF 2005

CITATION NO. 2006 WAIRC 05510

Result Award issued

Representation

Applicant Mr D Schapper of Counsel

Respondent Mr N Ellery of Counsel for Integrated Group Ltd

Mr J Blackburn of Counsel and with him Mr M Borlase for Skilled Rail Services Pty Ltd and Skilled Group Ltd

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Order

HAVING heard Mr D Schapper of Counsel on behalf of the applicant, Mr N Ellery of Counsel on behalf of Integrated Group Ltd and Mr J Blackburn of Counsel and Mr M Borlase for Skilled Rail Services Pty Ltd and Skilled Group Ltd, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Iron Ore Production & Processing (Locomotive Drivers) Award 2006 be made in accordance with the following schedule and that such award shall have effect from the date of this order.

(Sgd.) S WOOD,
Commissioner.

[L.S.]

SCHEDULE

1. AWARD STRUCTURE

1.1 TITLE

The Iron Ore Production & Processing (Locomotive Drivers) Award 2006.

1.2. ARRANGEMENT

1.3 AREA AND SCOPE

This award shall apply to all locomotive drivers working on the BHP Billiton Iron Ore Pty Ltd railroad who are employed by any person or company other than BHP Billiton Iron Ore Pty Ltd and to all employers employing such persons.

1.4 TERM

This award shall operate from the first pay period commencing on or after the making of this award and shall remain in force for a period of 12 months.

2. RATES OF PAY

2.1 WAGES

Employees shall be employed in the appropriate classification and level as set out in Clause 2.3 of this Award.

The minimum hourly rate of wage for work performed by employees shall be:

	A Roster average 42 ordinary hours per week	B Roster average 46 ordinary hours per week	C Roster average 48 ordinary hours per week
Locomotive Driver Level 1 **Yard and Construction**	$42.41	$45.61	$47.00
Locomotive Driver Level 2 **Main Line**	$49.90	$53.66	$55.30

Employees shall receive the wage rate appropriate to the work they perform in any shift. A loading of 20% of the hourly rate shall be paid for each hour worked by a casual employee.

2.2 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 salaries and allowances prescribed by this award.

2.3 CLASSIFICATIONS

2.3.1 Locomotive Driver Level 1 – Yard and Construction

A person at this level shall be qualified to operate head end powered trains under Driver Only Operations on the BHP Iron Ore Pilbara District Railroad. They shall operate Locotrol under supervision. They shall work in all aspects of the Yards in accordance with Yard operations

2.3.2 Locomotive Driver Level 2 – Mainline

A person at this level shall be qualified to operate all trains including Locotrol trains under Driver Only Operation over the BHP Iron Ore Pilbara District Railroad.

2.4. MINIMUM ADULT AWARD WAGE

(1) No adult employee shall be paid less than the minimum adult award wage unless otherwise provided by this clause.

(2) The minimum adult award wage for full-time adult employees is $504.40 per week payable on and from 7 July 2006.

(3) The minimum adult award wage is deemed to include all arbitrated safety net adjustments from State Wage Case decisions.

(4) Unless otherwise provided in this clause adults employed as casuals, part-time employees or piece workers or employees who are remunerated wholly on the basis of payment by result shall not be paid less than pro rata the minimum adult award wage according to the hours worked.

(5) Juniors shall be paid no less than the wage determined by applying the percentage prescribed in the junior rates provision in this award to the minimum adult award wage.

(6) (a) The minimum adult award wage shall not apply to apprentices, employees engaged on traineeships or Jobskill placements or employed under the Commonwealth Government Supported Wage System or to other categories of employees who by prescription are paid less than the minimum award rate.

(b) Liberty to apply is reserved in relation to any special category of employees not included here or otherwise in relation to the application of the minimum adult award wage.

(7) Subject to this clause the minimum adult award wage shall –

(a) apply to all work in ordinary hours.

(b) Apply to the calculation of overtime and all other penalty rates, superannuation, payments during any period of paid leave and for all purposes of this award.

(8) Minimum Adult Award Wage

The rates of pay in this award include the minimum weekly wage for adult employees payable under the 2006 General Order Wage Case Decision. Any increase arising from the insertion of the adult minimum wage will be offset against any equivalent amount in rates of pay received by employees whose wages and conditions of employment are regulated by this award which are above the wage rates prescribed in the award. Such above award payments include wages payable pursuant to enterprise agreements, consent awards or award variations to give effect to enterprise agreements and over award arrangements. Absorption which is contrary to the terms of an agreement is not required.

Increases under previous State Wage Case Principles or under the current Statement of Principles, excepting those resulting from enterprise agreements, are not to be used to offset the adult minimum wage.

(9) Adult Apprentices

(a) Notwithstanding the provisions of this clause, an apprentice, 21 years of age or over, shall not be paid less than $421.70 per week.

(b) The rate paid in paragraph (a) above is payable on superannuation and during any period of paid leave prescribed by this award.

(c) Where in this award an additional rate is expressed as a percentage, fraction or multiple of the ordinary rate of pay, it shall be calculated upon the rate prescribed in this award for the actual year of apprenticeship.

(d) Nothing in this clause shall operate to reduce the rate of pay fixed by the award for an adult apprentice in force immediately prior to 5 June 2003.

3. HOURS OF DUTY

3.1 HOURS OF DUTY

Employees shall work a roster averaging either 42, 46 or 48 ordinary hours per week, or otherwise by agreement between the parties.

3.2 OVERTIME

Any hours outside or in excess of the rostered hours shall be paid at the rate of time and one half for the first two hours and double time thereafter.

A loading of 20% of the above rate shall be paid for each hour of overtime worked by a casual employee; the loading shall not be cumulative on the loading prescribed in clause 2.1.

4. LEAVE

4.1 ANNUAL LEAVE

Five weeks paid annual leave shall be allowed for each year worked. An additional week of annual leave will be paid to employees who are required to work continuous shift work. Pro rata leave shall be paid out on termination. This clause shall not apply to casual employees.

5. ALLOWANCES AND FACILITIES

5.1 TRAVEL AND ACCOMODATION (FLY IN/FLY OUT)

The employer shall provide for travel between Perth Airport and site, to and from the site and to and from the workplace. The employer shall provide for the employee's accommodation whilst at site and the meals of the employee. This clause shall apply only to Fly in/Fly out employees

6. SAFETY

6.1 SAFETY EQUIPMENT, UNIFORMS AND NECESSARIES

The employer shall provide for all necessary safety gear, uniforms and other things necessary for the employee to fulfil his duties.

7. DISPUTE RESOLUTION PROCEDURE

7.1 DISPUTE RESOLUTION PROCEDURE

7.1.1 Subject to the Industrial Relations Act 1979, where a question, dispute or difficulty arises under this award, or where an employee has a grievance or complaint in relation to any industrial matter covered by this Award, the employee shall first contact their supervisor to work out the problem.

7.1.2 If the above fails, representation may then be made to the employer by the employee or a union representative.

7.1.3 In the event that, following the step described in 7.1.2, the dispute is not resolved, the dispute may be then referred to the Western Australian Industrial Relations Commission by either of the parties.

8. NAMED PARTIES TO THE AWARD

8.1.1 The parties to this award are:

The Construction, Forestry, Mining and Energy Union of Workers

Integrated Group Ltd

Skilled Rail Services Pty Ltd

2006 WAIRC 05300

IRON ORE PRODUCTION & PROCESSING (LOCOMOTIVE DRIVERS RIO TINTO RAILWAY) AWARD 2006

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY MINING AND ENERGY UNION OF WORKERS
	APPLICANT
	-v-
	SKILLED RAIL SERVICES PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 21 AUGUST 2006
FILE NO.	A 5 OF 2005
CITATION NO.	2006 WAIRC 05300

Result Direction issued

Direction

The Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby directs –

1 THAT the applicant and respondent file and serve an outline of submissions no later than three days prior to the date of hearing.

2 THAT the outline of submissions referred to in par 1 above should specify, with particularity, what is proposed by the applicant and respondent as to:

(a) the classifications and rates of pay in any order to issue;

(b) the basis upon which those classifications and rates of pay should be determined by the Commission; and

(c) any other conditions of employment that may be relevant to the proceedings.

(Sgd.) S J KENNER,
[L.S.] Commissioner.

2006 WAIRC 05462

IRON ORE PRODUCTION & PROCESSING (LOCOMOTIVE DRIVERS RIO TINTO RAILWAY) AWARD 2006

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS
	APPLICANT
	-v-
	SKILLED RAIL SERVICES PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
HEARD	WEDNESDAY, 30 AUGUST 2006, FRIDAY, 8 SEPTEMBER 2006, FRIDAY, 15 SEPTEMBER 2006
DATE	FRIDAY, 22 SEPTEMBER 2006
FILE NO.	A 5 OF 2005
CITATION NO.	2006 WAIRC 05462

Catchwords	Industrial law – New award – Remittal of proceedings following appeal against decision of Commission - Interpretation of Wage Fixing Principles of Commission - Structural efficiency considerations - Consideration of classifications and rates of pay - Principles applied - New award made - Order issued - *Industrial Relations Act 1979* (WA) s 26(1)(a), s 26(1)(d)(vi), s 32, s 32A, s 49(5)(c); *Commonwealth Constitution* s 109; *Workplace Relations Act 1996* (Cth) s 208; *Federal Court of Australia Act 1976* (Cth) s 28(1)(c)
Result	Order issued
Representation	
Applicant	Mr D Schapper of counsel instructed by D H Schapper & Co
Respondent	Mr J Blackburn of counsel instructed by the Australian Mines and Metals Association

Reasons for Decision

1 By an order dated 17 March 2006 the Commission made an award known as the Iron Ore Production and Processing (Locomotive Drivers Rio Tinto Award Railway) Award 2006 ("The Award"): (2006) 86 WAIG 1279. The making of the Award was accompanied by supplementary reasons for decision published on the same date: ((2006) 86 WAIG 1278) which followed earlier reasons for decision of the Commission of 7 March 2006: (2006) 86 WAIG 1268.

2 The respondent subsequently filed an appeal against the Commission's decision to the Full Bench under s 49 of the Industrial Relations Act 1979 ("the Act") and its decision was delivered on 3 August 2006: (2006) 86 WAIG 2509. The Full Bench allowed the appeal in part which turned principally on the relatively narrow issue as to the proper interpretation of Principle 11(a) of the Commission's Wage Fixing Principles of 2005, the subject of a general order of the Commission in Court Session of 4 July 2005: (2005) 85 WAIG 2101.

3 The Commission as presently constituted took the view that the effect of the decision of the Industrial Appeal Court in *Robe River Iron Associates v AMWSU (1993)* 73 WAIG 1993 required the Commission to apply the Wage Fixing Principles. The Commission adopted the view that the terms of Principle 11(a) insofar as "structural efficiency" was concerned, involved as the main consideration, according to the language of the principle, the employee interests and the needs of the particular enterprise, with "structural efficiency" being a secondary consideration.

4 In its reasons, the Full Bench took a different view as to the interpretation of Principle 11(a) of the Wage Fixing Principles, to the effect that "structural efficiency", in terms of the application of the Structural Efficiency Principle, was part of the "main" consideration to be taken into account. It was on this basis only, that the matter has been remitted to the Commission for further hearing and determination.

5 To facilitate the further hearing and determination of this matter the Commission issued directions to the parties on 21 August 2006 to require the applicant and respondent to file and serve an outline of submissions in respect of their contentions, no later than three days prior to the date of the hearing of the matter. That direction required the parties to specify, with particularity, what it was they proposed as to classifications and rates of pay in relation to any order to issue from the Commission. Additionally, the respondent filed a witness statement in respect of further evidence it proposed to adduce in the proceedings. I will return to that issue later in these reasons.

Contentions

6 The applicant, in a short outline of submissions, contended that the Commission was required to determine one issue only arising from the decision of the Full Bench. That was that the Commission should, in the application of the terms of Principle 11(a) of the Wage Fixing Principles, establish a further classification and rate of pay for Yard Drivers and perhaps also Bankers, in accordance with the rationale adopted by the Commission, in applying rates of pay for the same classifications in effect under the Iron Ore Production and Processing BHP Billiton Award 2002 ("the BHP Award").

7 On the other hand, counsel for the respondent in two separate submissions, appeared to adopt two different positions. The first position was that in applying Principle 11(a) as interpreted by the Full Bench, the Commission should dismiss the application. This was on the basis that the applicant had not established a proper basis for the fixation of minimum rates of pay in accordance with the structural efficiency requirements of the Wage Fixing Principles, as interpreted by the Full Bench. Alternatively, the respondent referred to a variety of other awards, made in the federal jurisdiction, to establish a minimum rate in accordance with Principle 11(a). Additionally submissions were made about the role of aggregate rates of pay and also as I apprehended it, some submissions made about the purported effect of s 208 of the Workplace Relations Act 1996 (Cth) ("the WRA") for the purposes of inclusion in what is described as the Australian Pay and Classification Scale under that legislation.

8 The second set of written submissions filed by the respondent sought, in the alternative, to deal with the aggregate rates of pay under the BHP Award in an endeavour to persuade the Commission that if this basis is still adopted for the fixation of rates of pay in any order to issue, then various matters, including overtime, rosters and other penalty arrangements, should be further taken into account.

9 In relation to this submission, counsel for the respondent submitted that in its view, the BHP Award was an "actual rates" award, and not a minimum rates award as required by the Wage Fixing Principles. As this matter appeared to occupy a central theme in the respondent's submissions this matter needs to be addressed at the outset. These submissions demonstrate a misconception as to the nature of an actual rates award (or paid rates award) and a minimum rates award. There is no doubt that the BHP Award is a minimum rates award, as its terms make clear.

10 Most awards made by industrial tribunals are minimum rates awards reflecting minimum rates and conditions applicable under the relevant award made under the respective legislation. Paid or actual rates awards were a feature of the Australian industrial relations system at the State and Commonwealth levels until about the late 1980's to early 1990's when the concept was phased out. In a paid rates award the rate reflects the actual rates and conditions applicable in a particular industry, with a general prohibition upon rates and conditions being afforded in excess of those prescribed by the relevant award. Simply because, in the case of BHP, the circumstances in that matter led to the Commission making an award reflecting the aggregate salaries paid by the company at the time, it does not correspond to a paid or actual rates award, as a matter of law or industrial principle. I note in passing that it appears that a similar submission was made by the respondent to the Full Bench in other proceedings in FBA 7 and 8 of 2006, with the Full Bench at par 113 also rejecting the submission made: 2006 WAIRC 05366.

Further Evidence

11 As noted above, the respondent filed a witness statement of Graham Robert Butler in further support of the respondent's contentions in this matter. The content of the witness statement appears in large part, to further expand upon matters about which Mr Butler gave evidence in the initial proceedings. This evidence was objected to by counsel for the applicant. Mr Schapper submitted that the effect of the application by the respondent is in effect for it to now attempt to re-run its case with the benefit of the decision of the Commission as presently constituted and that of the Full Bench. In part upon reliance upon obiter observations of the Full Bench in *Sealanes (1985) Pty Ltd v The Shop, Distributive and Allied Employees Association of Western Australia and Ors (2006)* 86 WAIG 5, counsel for the respondent Mr Blackburn submitted that it was open for the respondent to lead fresh evidence and make whatever submissions that it considered fit in support of its contentions.

12 In my opinion, the matter is far from clear cut as appeared to be the import of the respondent's submissions. Pursuant to s 49(5)(c) of the Act, the Full Bench may, by order, "suspend the operation of the decision and remit the case to the Commission for further hearing and determination." The other powers in s 49(5) of the Act include dismissing an appeal, or upholding an appeal and quashing it, or varying it in such manner as the Full Bench considers appropriate. The question is what is meant by "for further hearing and determination"?

13 Surprisingly, there is very little authority on this point. In *Lynch v Howard* (1980) 44 FLR 71 a Full Court of the Federal Court adverted to this question in the context of s 28(1)(c) of the Federal Court of Australia Act 1976 (Cth). Evatt and Keely JJ declined to remit a matter to the trial judge because to do so would permit a party in the proceedings to depart from the conduct of its case at first instance. That case turned on its own circumstances. In *Marks v GIO Australia Holdings Ltd* (unreported FCA 1010 1999) Einfield J, on remittal from a judgement of the Full Court of the Federal Court, considered the issue of an application by a party to adduce fresh evidence on the question remitted by the Full Court. Einfeld J considered that it was a matter of discretion for him to determine such an application.

14 Both of these judgements were considered by Finkelstein J in *The Community and Public Sector Union v Telstra Corp Ltd (No 2)* (unreported 2000 FCA 479). In this case, the issue arose clearly for consideration. Finkelstein J took the view that given the terms of s 28(1) of the Federal Court Act (Cth) there was a distinction between a "further hearing" and a "new trial". Referring to *Marks*, Finkelstein J inclined to the view that "further hearing" should be taken to mean a continuation of the first hearing, "*where the parties can only mend their hand or change course in accordance with well known rules*" (at par 17).

15 It seems to me that for the purposes of s 49(5)(c) of the Act, "further hearing and determination" does not mean a hearing as if the first proceedings had never taken place. It must mean a resumption of the proceedings in light of the reasons of the Full Bench as to the issues which are to be the subject of further hearing and determination. Parliament has not introduced a provision into s 49(5) to provide for a completely new hearing and "further" must be given some meaning. I therefore

consider it a question of discretion for the Commission whether further evidence should be let in on a case by case basis, which discretion would no doubt be exercised in having regard to the matters remitted to a Commissioner by the Full Bench. To conclude otherwise would appear to me to be inconsistent with the general principle of the finality of litigation.

16 In this particular case having considered the content of the witness statement filed by the respondent, the Commission decided to exercise its discretion in favour of receiving the further evidence, it being in the main directed to, as I apprehended it, the classifications and rates of pay for the respondent's train drivers in any order to issue. As a consequence of this the Commission granted the applicant leave to lead any evidence in reply to that contained in Mr Butler's further witness statement. Given that this witness statement was served on the applicant only on the day prior to the hearing, the application was adjourned to enable counsel for the applicant to consider the content of the statement.

Consideration

17 As noted above, the issue for resolution on the remittal of this matter from the Full Bench involves further consideration of classifications and rates of pay to apply to employees of the respondent engaged in locomotive driving duties on the iron ore operations conducted by Rio Tinto in the Pilbara in this State. On the construction of Principle 11(a), adopted by the Full Bench, accepting as it did that there was ambiguity as to its meaning, structural efficiency considerations involve reference to the Structural Efficiency Principle itself, although it is no longer expressly a part of the current Wage Fixing Principles. Principle 11(a) is in the following terms:

> *"(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."*

18 The terms of the Structural Efficiency Principle as referred to in the September 1988 State Wage Decision ((1988) 68 WAIG 2412) was in the following terms:

> *"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 workforce."*

19 In considering the Structural Efficiency Principle, it is important to appreciate the circumstances in which it came to be implemented and in particular, the observations of the Commission in Court Session in its reasons for decision which accompanied the introduction of this principle. In considering this matter, the Commission in Court Session said at par 36 as follows:

> *"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 re-cast so that they were in some way internally structurally efficient. The Principle is not about how an award, including the 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."*

20 In my view, these observations are particularly important in understanding the application of the structural efficiency principle in context. It is not simply about ensuring that the particular award meets the requirements of the Structural Efficiency Principle. It is more fundamental than that. It requires, in particular in the making of a first award, as I observed in my reasons in the first proceedings, that an award so made be conducive to flexibility and productivity at the level of the enterprise to which the award applies. Put another way, what structural efficiency, as a general principle requires, is that workplace relations arrangements are conducive to the maximum degree of productivity and efficiency, balanced with fairness to employees as to the terms and conditions of employment as the Act requires. As to the outcome of the process, as the Full Bench recognised at par 79, *"Ultimately the pay rates provided in an award must be fair, proper and reasonable in all of the circumstances."* It was further said by the Full Bench at par 79 that:

> *"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."*

21 Importantly, as is stated in the Structural Efficiency Principle itself, the measures set out above are not exclusive. Notably also, are the observations of the Commission in Court Session, set out above, that structural efficiency extends further than the particular structure or form of an award in issue.

22 It is also the case that in applying the Structural Efficiency Principle, in the context of the making of a first award, a range of considerations will apply, depending upon the particular circumstances of each case. A rigid, formulaic approach is inappropriate. As I noted in my earlier reasons for decision, generally speaking, arrangements based upon consensus such as consent awards, industrial agreements and the like, will be of more limited assistance although not an irrelevant consideration to take into account. It was in this context, that I regarded reference to the Rio Tinto Award 2004, with some caution. Of course, regard can also be had to relevant awards that contain properly fixed minimum rates and conditions of employment, as long as those awards have some relevance to the particular industry or enterprise into which the inquiry is being made. General consideration was given to these matters by me at par 67 of my earlier reasons for decision:(2006) 86 WAIG 1268 at 1276.

23 Much weight was placed by the respondent in its submissions on the approach of the Commission in *The Independent Schools Salary Officers Association of Western Australia, Industrial Union of Workers v Anglican School's Commission (Inc) and Others (2000)* 80 WAIG 3198. This decision was also referred to by the Full Bench as an example of the application of the Structural Efficiency Principle. This matter concerned an application for a first award to apply to psychologists and social workers employed at independent schools. In this case, Scott C considered the terms of the Structural Efficiency Principle and salaries for the classifications sought to be covered by the new award applicable in the public sector generally and in the education department in particular. Of significance however, in this matter, was the factual background which stands in contrast to the factual background to the instant proceedings. In *ISSOA* the Commission referred to the fact that in the industry enterprise bargaining was a prevalent mode of industrial regulation with many enterprise bargaining agreements having been registered before the Commission covering the classifications sought to be covered by the proposed award. This led the Commission to observe at par 23:

> *"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 No such circumstances are present in this matter. At the time of the initial application being made for an award to apply in this case, in September 2005, it is common ground that the employees concerned were employed on common law contracts of employment. Shortly after the application was filed, the evidence is that the respondent took steps to put the relevant employees on Australian Workplace Agreements pursuant to the Workplace Relations Act 1996 (Cth) ("the WRA"). By the time the matter came before the Commission for a hearing on the merits of any final award to issue, all existing employees were engaged on AWAs. It was also clear from the submissions of the respondent and the evidence of Mr Butler, that this was the mode of industrial regulation that the respondent proposed to continue with.

25 The employment of employees on AWAs, in the context of impending amendments to the WRA by what has become known as the "Work Choices" legislation, was the foundation for submissions by the respondent earlier in the proceedings, against the making of any award in the public interest. I declined to accede to those submissions and the Full Bench also rejected them on the appeal.

26 Furthermore, at an earlier stage of this matter, the respondent pressed the Commission to conciliate the applicant's claim pursuant to s 32 of the Act. This proposition was advanced in tandem with its proposal that the issue of whether an award ought to be made in the public interest, should be dealt with as a preliminary issue. The Commission as presently constituted was not disposed to separating the issue of the public interest and the merits. As to the respondent's proposal to conciliate, given the stance adopted by the parties, in particular that of the respondent of outright opposition to any award, I considered that at that point, the resolution of the dispute would not be assisted by conciliation. The prospect of conciliation however, pursuant to s 32A of the Act, was held out to the parties at any stage of the ensuing proceedings. That invitation has not been taken up in particular by the respondent, after having initially raised the matter.

27 The issue of the Commission's alleged failure to conciliate under s 32 of the Act was a ground of appeal to the Full Bench, which ground of appeal was also dismissed.

28 The significance of these issues in my opinion goes to the point of substantial distinction between the factual circumstances in the *ISSOA* case and this matter. Given the history of this matter, it is open to infer and I do infer, there is little prospect of any collective bargaining between the parties with a view to entering into an a collective industrial agreement under any legislation, by which the award sought in these proceedings, could be regarded as a true safety net for collective bargaining. Moreover given the terms of s 348 of the WRA providing that an AWA will prevail over any collective agreement, in light of my observations above about the respondent's preferred mode of industrial regulation, the above conclusion is almost inescapable. In my view, this is a relevant consideration for the Commission when applying structural efficiency considerations in this case. The Commission must consider the industrial reality of the circumstances before it, as to do otherwise would ignore the statutory injunction on the Commission under s 26(1)(a) of the Act.

29 Before turning to the specific issue of rates of pay and classifications, there was one matter raised by counsel for the applicant, Mr Schapper, that I deal with now. This submission was to the effect that for the purposes of the application of Principle 11(a) of the Wage Fixing Principles, it is existing awards and relevant agreements of this Commission made and registered under the Act, that are to constitute the award safety net. That is, the Commission's consideration of this matter, should be confined to awards of this Commission, because the Wage Fixing Principles are made under general orders of the Commission in Court Session under the Act to have application in this jurisdiction within this State.

30 The preamble to the Wage Fixing Principle provides as follows:

> ***"1. <u>Role of Arbitration and the Award Safety Net</u>***
>
> *Existing wages and conditions in awards and relevant agreements of the Commission constitute the safety net which protects employees who may be unable to reach an industrial agreement.*
>
> *Wages and conditions of employment maintained in awards in accordance with these Principles and through the operation of section 40B of the Act are the safety net.*
>
> *These Principles do not have application to Enterprise Orders made under section 42I of the Act."*

31 Where reference is made to awards and industrial agreements within the context of the Wage Fixing Principles, clearly in my view, this is a reference to awards and industrial agreements made by and registered by this Commission under the Act. Indeed, the Structural Efficiency Principle, set out above, in terms, refers to "a fundamental review of that award" as justification for increases in wages and salaries for improvements in conditions of employment. Clearly, the reference to "award" in the context of the Structural Efficiency Principles refers to an award made by this Commission. These observations are consistent with the reasonably simple and obvious proposition that the Wage Fixing Principles have operated and are intended to operate, with respect to parties and industrial instruments, applicable within this jurisdiction.

32 There is considerable force to Mr Schapper's submissions in this regard. However, for the purposes of Principle 11(a), in the context of the making of a new award, whilst primary consideration should be given to awards of this Commission, I do not regard it as impermissible to have regard to industrial instruments made in other jurisdictions, as long as those considerations take into account the circumstances leading to the making of those instruments, the particular industry or industries to which they apply, any particular historical features of those instruments, and whether and to what extent there exist any relationships with awards or industrial agreements from other jurisdictions. Account must be had to the specific circumstances and working environment in which the work undertaken is carried out. Put shortly, when comparisons are to be made, it must be a case of truly comparing "apples with apples". The foregoing is no more than an illustration of the broad task to be undertaken by the Commission, to determine claims of this kind in accordance with all of the circumstances of the case, not just some of them.

33 The first plank of the respondent's case was to the effect that if the application is not dismissed on the basis that the applicant has failed to establish a prima facie case, then rates of pay for the relevant employees of the respondent should be determined on the basis of a decision of the Australian Industrial Relations Commission ("the AIRC") in *ARTBIU v Westrail Great Employment Pty Ltd* (print PR 926550) (also prints PR 917909 and PR 919981). Counsel for the respondent submitted that the award arising from those proceedings, the Australian Railroad Group Employment Pty Ltd Interim Award 2003 ("the ARG Award"), extends to all of the operations of the Australian Railroad Group ("ARG") in relation to its rail freight operations, which was formerly conducted by Westrail in this State.

34 According to the respondent's written submissions, ARG's main freight commodities include grain, alumina, bauxite, iron ore, nickel ore, mineral sands and woodchips. According to the evidence of Mr Butler, the respondent provides mainline drivers to ARG at its various sites in this State at Forrestfield, Merredin, Esperance, Northam, Geraldton and Bunbury. Mr Butler's evidence was that drivers supplied by the respondent drive trains carrying all of the various commodities freighted by ARG including iron ore over the Koolyanobbing - Kalgoorlie - Esperance lines. According to Mr Butler, this part of the rail network provides great challenges to drivers given its undulating track geometry and in his opinion, is more difficult than driving on the Yandi and West Angeles lines in the Pilbara.

35 The respondent submitted that the ARG Award resulted from an extensive examination by Larkin C of rates and classifications in a range of State and federal awards, which led to a determination by the AIRC of a minimum rate of pay for a locomotive driver of 118.5% of the C10 metal tradespersons rate.

36 Taking into account allowances of 9% and 18% for driver only operations on yard work and main line work respectively, the respondent submitted that hourly rates of $19.46 for a yard driver and $21.07 for a mainline driver would be appropriate. According to Mr Blackburn, in addition to these rates, there should be a classification of "Construction Driver" based on Mr Butler's evidence, which was not raised in the earlier proceedings, at a rate of between $19.46 per hour and $21.07 per hour and for a Banker Driver at the same range of rates. The reason for this range of rates was not entirely clear on the respondent's submissions.

37 There are a number of issues to take into account in relation to the terms of the ARG Award on the respondent's submissions. I have carefully considered the written reasons for decision of Larkin C referred to by the respondent in its submissions. The application for the ARG Award arose from the sale by the State Government of its Westrail freight business to ARG. As a part of this transaction, and taking into account the requirements of the Public Sector Management Act 1994 (WA), a company known as Westrail Freight Employment Pty Ltd was incorporated to facilitate the transmission of employees from Westrail to the successful purchaser of its business. An agreement between this company and relevant unions under s170LL of the WRA was struck. Subsequently, a dispute finding was made between the parties and proceedings commenced for the making of the ARG Award. Some matters were agreed and some matters were arbitrated by the AIRC.

38 Relevant to those proceedings, and set out by Larkin C in her reasons for decision, were the then relevant statutory provisions of the WRA, in particular those provisions of the WRA requiring primary responsibility for the determination of workplace relations matters at the enterprise level and for awards to prescribe the minimum safety net of wages and conditions of employment. Furthermore the provisions of the WRA at that time required the AIRC to exercise its functions and powers in relation to making and varying awards so to encourage the making of agreements between employers and employees at the enterprise level. Relevant also, was consideration of the then section 89A of the WRA, dealing with allowable award matters. The AIRC also considered in its decision in that matter, relevant provisions of the AIRC's wage fixing principles, in particular those following the Safety Net Review Wage Decision, May 2001. Principle 11 of the wage principles arising from that decision of the AIRC, dealing with first awards and the extension of an existing award was then in the following terms:

> *"11. FIRST AWARD AND EXTENSION TO AN EXISTING AWARD*
>
> *Any first award or an extension to an existing award must be consistent with the Commission's obligations under Part VI of the Act.*
>
> *In determining the content of a first award the Commission will have particular regard to:*
>
> *(a) relevant minimum wage rates in other awards, provided the rates have been adjusted for previous National Wage Case decisions and are consistent with the decision of the August 1989 National Wage Case [Print H9100, (1989) 30 IR 81];*
>
> *(b) the need for any alterations to wage relativities between award to be based on skill, responsibility and the conditions under which the work is performed (s.88B(3)(a));*
>
> *(c) section 89A and the need to ensure that it does not contain provisions that are not either allowable award matters, or both incidental to allowable award matters and necessary for the effective operation of the award; and*
>
> *(d) the award simplification criteria in s.143 of the Act."*[34]

39 It is of some significance to note that there is no reference in the above principle to the structural efficiency principle or structural efficiency considerations generally, as is the case under Principle 11(a) of the Wage Fixing Principles in this State. It is also significant to observe that in the *ARG* case before Larkin C, there was a requirement for the AIRC, in accordance with the Paid Rates Review Supplementary decision of a Full Bench of the AIRC (Print S0105, 14 October 1999), to establish wage relativities in accordance with the metal trades C10 fitter's rate of pay. This was referred to in particular at pars 228 and 243 of Larkin C's reasons of 22 May 2002, as the primary basis for rejecting the claim by the unions in that case for a higher relativity.

40 Also of significance in the *ARG Award* case, in relation to the fixation of rates of pay, is the fact that one of the predecessor Westrail awards, the Government Railways Locomotive Engineman's Award 1973-1990, which previously covered the Westrail locomotive drivers, had a firm nexus with an award of the AIRC, the Locomotive Engineman's Award 1966. This was recognised as a matter of some significance by Larkin C in her reasons of 29 January 2003 at pars 97-98. No such historical nexus has ever existed in the iron ore industry in this State. Indeed, save for developments of relatively recent times, the iron ore industry in this State has been entirely regulated by industrial instruments in this jurisdiction.

41 In the final result, the AIRC established a minimum rate for a locomotive driver on a relativity of 118.5% of the metal trades C10 rate, which was somewhere in between the positions adopted by the parties. That current rate, including arbitrated safety net adjustments, and including the allowance for driver only operations, which is a loading of 18%, is $800.63 according to exhibit R11. The reason for reaching that particular relativity of 118.5% is not clearly apparent from the reasons of the AIRC. What is apparent however is that in its reasons of 29 January 2003 at par 116, the AIRC had regard to the particular circumstances of the case before including the ARG structure and its requirements, and the environment within which the locomotive drivers operated. The ARG Award is also based on a 38 hour week and the rates referred to above do not account for rostered overtime, weekend work and night shifts, and many additional allowances are also payable to locomotive drivers engaged in rail freight operations under this particular award. There is also nothing before the Commission to indicate to what extent the locomotive drivers under this award are required to commute to and from working trains, apart from what is contained in cl 26-Held Away From Home Payment, that provides where a driver is booked away from their home location for more than 12 hours, they are to be paid ordinary rates for such time. This stands in obvious contrast to FIFO drivers engaged by the respondent who are required to commute to the Pilbara on a fly in fly out roster and work and live in the Pilbara for lengthy periods each year.

42 There are a number of things that need to be noted about this particular award and how it was made. Firstly, the legislative scheme under the WRA is quite different to the scheme of the Act as it now is, and the requirements imposed by the Act on the Commission in the making and varying of an award are very different. Read in conjunction with the Wage Fixing Principles, the Commission is by s 6(af) and (ca), required to facilitate the efficient organisation and performance of work, balanced with fairness to employees, and to provide a fair system of wages and conditions of employment. By s 26(1)(d)(vi) the requirement for the efficient organisation and performance of work balanced with fairness to employees, is further referred to. Secondly, the requirements of Principle 11(a) of this Commission's Wage Fixing Principles contain a different emphasis to that considered by the AIRC in the *ARG* case. Equally relevantly, is the fact that the proceedings in that case, concerned minimum rates and conditions of employment for locomotive drivers in the general rail freight industry Australia wide. In particular, as far as the WA operation of the award is concerned, it applies to what were the former Westrail freight operations. The specific circumstances of that industry clearly had a bearing upon the AIRC's consideration in that matter.

43 I have also carefully considered a variety of other awards referred to by the respondent in its submissions, which were mainly awards of the AIRC under the same legislation and principles of wage fixation as dealt with in the *ARG* case. These awards were helpfully set out in table form in exhibit R6, with those most relied on by the respondent appearing in a rates comparison document tendered as exhibit R11. These awards include the Locomotive Operations Award 2002; the Locomotive Enginemen's New South Wales Award 2002; the Locomotive Drivers (Victoria) Award 2001; the Building Construction Industry (NT) Award; the Manildra Group-Rail Tram and Bus Union Rail Operations Award 2001; the AWU (Victorian Public Sector) Award 2001; the Western Australian Civil Contracting Award 1998; the West Coast Wilderness Railway Award 2004 and the Iron Ore Production and Processing (Hamersley Iron Pty Ltd) Award 1967 ("the Hamersley Iron Award). A number of these awards were made arising from the award simplification process under the WRA as it then was. That process arose from amendments to the WRA not relevant in this jurisdiction.

44 It is to be noted that as acknowledged by the respondent, all of these awards in exhibit R11, upon which some reliance was placed by the respondent, apart from the ARG Award, were made by consent under the WRA. The respondent relied upon these other awards in support of its submissions that the minimum rate struck by the AIRC in the ARG Award was reasonable

and appropriate. Apart from these considerations however, the Commission knows little about these other awards and combined with the fact they were made by consent, they do not provide the Commission with much assistance in the present matter.

45 For example, in the case of the Locomotive Drivers (Victoria) Award 2001, according to a decision of the AIRC of 17 April 2003 (PR930454), the rates of pay arose from the award simplification process required to be done under the WRA as it then was. It was also the case that as the WRA and the AIRC's Wage Fixing Principles required, the rates of pay were converted according to the Paid Rates Review Principles of the AIRC with relativity to the C10 tradesperson's rate. In this case Larkin C at par 4 referred to the "complex history" of the rates of pay for locomotive drivers and various linkages with rates of pay in the public transport industry in Victoria. The Commission knows nothing of that history for present purposes.

Iron Ore Industry in Western Australia

46 As noted above, until recent times, the iron ore industry in this State has been exclusively the subject of industrial instruments within the State jurisdiction. This includes workplace agreements under the Workplace Agreements Act 1993. There is no doubt that the respondent, although it engages in labour hire, is properly in my opinion, also regarded as engaging in the iron ore industry. The award which issued in the earlier proceedings is manifestly so limited and does not have any application outside of the railroad network conducted by Rio Tinto in the Pilbara in this State. Additionally, as submitted by Mr Schapper, the present circumstances are unusual in that although a common rule award is sought by the applicant, given its limited scope to one enterprise location only and on present indications, to only one employer, it is somewhat of a hybrid situation.

47 It is trite to observe that an employer and an employee may be engaged in more than one industry or a branch of an industry. Also, by reason of that fact, in the process of considering any first award, in accordance with the requirements of structural efficiency generally, and the Structural Efficiency Principle in particular, as the cases make clear, the environment in which the work is performed is an important element in assessing rates of pay and conditions of employment. In this respect, I adhere to what I said in my earlier reasons at par 67 about these matters. I also adhere to what I said at par 69 of my earlier reasons, to the effect that a direct "like with like" comparison, which may contain a hint of comparative wage justice, is not appropriate. I do not regard anything said by the Full Bench as being inconsistent with these propositions.

48 The two principal awards of this Commission in the iron ore industry are the Hamersley Iron Award and the BHP Award. The Hamersley Iron Award, whilst it has not been varied for many years save for safety net adjustments, has now being effectively superseded by the Mining Industry - Rio Tinto Iron Ore Award 2004 ("the Rio Tinto Award"), that was the subject of consideration by the Commission in the earlier proceedings. By clause 3.1 of the Rio Tinto Award, it seems that the operation of the Hamersley Iron Award is generally of no effect, when read with s 109 of the Commonwealth Constitution. Therefore, the only relevant award in the iron ore industry for present purposes is the BHP Award.

49 The issue of the Commission's consideration of the BHP Award occupied much of the submissions by the parties to the proceedings both before me and apparently also, before the Full Bench. I have taken all of those submissions into consideration. It is significant to note that the Full Bench, in dealing with this issue, did not say that it was inappropriate to consider the rates of pay under the BHP Award. On the contrary, at par 85 of its reasons for decision, the Full Bench said "*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 the particular penalties, allowances and disabilities for which they represent compensation.*" It is to be noted that at pars 69 and 70 of my earlier reasons for decision, I made it clear that the relevance of the BHP Award rates of pay, were used for the purposes of a guide only. This is what I apprehend to be a requirement of structural efficiency. This is part of the consideration of all of the circumstances of the case, in order to in the final analysis determine rates of pay which are fair, proper and reasonable.

50 It is not the case, contrary to at least the respondent's initial submissions, that in considering rates and conditions in other awards, the Commission is, by the Structural Efficiency Principle, limited to only considering rates of pay which have been struck in accordance with, for example, the minimum rates adjustment process. This is not what the Structural Efficiency Principle requires. Where they exist and where they are demonstrably relevant, such awards can be useful as a guide, as a part of considering all of the circumstances of the particular case. This must also be determined in accordance with the requirements of the Act in particular s 26(1)(a). In fairness to the respondent, there seemed to be an acceptance of this proposition as the case proceeded.

51 The Commission in Court Session had before it in the BHP Award case, an application by various unions for a new award to apply to the operations of BHP and for that award to replace all prior awards, industrial agreements, both formal and informal, and other arrangements, such that the award to be made would be the only industrial instrument of this Commission applicable. The Commission in Court Session's first reasons were published in November 2001: (2001) 82 WAIG 233. This was a major case before the Commission in Court Session which involved the arbitration by the Commission of a new award in the iron ore industry in relation to one of the major companies in that industry, for the first time in very many years. This was far from a case where the Commission in Court Session was presented with a consent arrangement between the parties for ratification by way of an enterprise award.

52 The history of industrial regulation at BHP has a long history. It is set out generally in the various reasons for decision of the Commission in Court Session leading to the making of the BHP Award but in summary is as follows. The underpinning award was the Iron Ore Production and Processing (Mt Newman Mining Co Pty Ltd) Award No. 29 of 1984 which was made by consent by the Commission on 25 January 1985: (1985) 65 WAIG 245. The wages for employees covered by that award were set out in the First Schedule with locomotive drivers contained in the railway section. Additionally, in Part II of that award, were dedicated provisions to apply to employees engaged in rail traffic operations including locomotive drivers.

Subsequently, in addition to the original award, the parties entered into various industrial agreements including the BHP Iron Ore Enterprise Bargaining Agreement July 1993 ("EBA 1"); the BHP Iron Ore Pty Ltd - BHP Iron (Goldsworthy) Pty Ltd Enterprise Bargaining Agreement November 1995 ("EBA 2"); the BHP Iron Ore Enterprise Bargaining Agreement 1997 July 1998 ("EBA 3"); and the BHP Iron Ore Pty Ltd Driver Only Operation Agreement 1999 April 1999 ("the DOO"). The application for the new award, and indeed the counterproposal submitted by BHP, sought the cancellation and replacement of all former awards, industrial agreements, both registered and unregistered, and any under other understandings between the parties. The new award was intended to be a stand-alone industrial instrument, in simple terms, to regulate the workplace relationship between the parties. Substantial wage increases were sought in exchange for what the unions considered to be almost complete flexibility for the employer in the management of its operations.

53 The case before the Commission in Court Session was brought pursuant to Principle 10 of the Wage Fixing Principles, on the basis that it was an application to increase wages and conditions above the safety net in relation to an enterprise specific award. The Commission in Court Session referred to this at pars 95-97 as follows:

> *"95 The Commission is to apply the State Wage Principles. We consider that Principle 10 is satisfied by the material before us. Accordingly, no other principle is applicable and in that regard we agree with the submissions of Mr Schapper and AMMA to that effect.*
>
> *96 There is tension between establishing an Award Safety Net which assumes existing award conditions and those in relevant agreements and the requirements of Principle 10 ('Making or Varying an Award or Issuing an Order which has the effect of varying conditions above or below the safety net).* ***The objective must be to establish terms and conditions consistent with demands for structural efficiency and productivity based outcomes.***
>
> *97 All parties have pressed for significant changes not all of which rely on existing award conditions and relevant agreements. Indeed to rely on existing award conditions and relevant agreements would, it is argued, be contrary to Section 26 of the Act as some existing conditions may lack merit. The unions in particular concede that the current regime operates to BHPIO's disadvantage. The necessity for flexibility is recognised." (My emphasis)*

54 As at the time of the proceedings before the Commission in Court Session, the original award, the Iron Ore Production and Processing (Mt Newman Mining Company Pty Limited) Award 1984 ("the Mt Newman Award"), prior to the various EBA's, contained at the First Schedule detailed classification structures for the various classification groups across the operation. Those classifications were expressed as a base rate, with the relevant arbitrated safety net adjustment and a total weekly wage rate. Additionally, in Part II of the Mt Newman Award, by clause 9 - Remuneration, employees engaged in rail operations were paid on an annual salary basis encompassing all payments for the performance of rail duties on each roster including disability payments, shift penalties, overtime, crib breaks and the appropriate award base total weekly rate of pay. The classification structure was set out over five levels for locomotive drivers in similar terms to that existing under the now BHP Award. In the annual income calculations, the locomotive driver classifications Levels 1 to 5 are expressed in terms of basic salaries, and separately itemised amounts for crib, transport, and the arbitrated safety net adjustments, giving an annualised total salary. These amounts were further broken down into fortnightly pay amounts and roster shift payments.

55 The decision of the Commission leading to the variation of the Mt Newman Award to include this classification structure is *CFMEU and Ors v BHP Iron Ore Ltd* (1992) 72 WAIG 1587. This was an application to vary the award in a number of respects, significantly for present purposes, to give effect to the Commission's then Wage Fixing Principles, specifically the Structural Efficiency Principle arising from the State Wage Case 1989. The majority of the proposed variations to the award proceeded by consent. The Commission was required to consider the application of the Wage Fixing Principles and in this regard Gregor C said at 1587:

> *"By this application the Construction, Mining and Energy Workers' Union of Australia, Western Australian Branch and Others (the Unions) moves the Commission to give effect to the Wages Principles, in particular the Structural Efficiency Principle (SEP) as decided in the 1989 State Wage Case. The majority of the schedule to the application is agreed and having heard from the parties on the basis of that agreement, the Commission indicated to them during hearing that it was satisfied that their agreement constituted proper compliance with the SEP. It agreed to ratify the variation to the Iron Ore Production and Processing (Mt. Newman Mining Company Pty Limited) Award No. A 29 of 1984 (the Award) in the form of the schedule the parties had submitted but reserved its decision on a matter of dispute concerning the wording of Clause 5. - Contract of Service."*

56 Thus in this matter, the aggregate wages provisions of the Mt Newman Award, the clear predecessor to the current structure under the now BHP Award, were considered by this Commission to be consistent with the Commission's Wage Fixing Principles and in particular, the Structural Efficiency Principle.

57 This aggregate wages concept was carried over to EBA 3 where clause 9.40 of that agreement sets out the multi level classification structure largely as incorporated into the new BHP Award. That structure, in so far as rail operations are concerned, provides a clear career path progression for locomotive drivers from the base Level 1, the entry level classification, through to and including Level 5, being the most senior classification level, reflecting a locomotive driver able to operate on any and all aspects of BHP's railroad operations in the Pilbara. The classification structure contains established internal relativities which have not essentially changed.

58 As I pointed out in my earlier reasons for decision, the circumstances leading to the making of the BHP Award are a matter of record and are set out in detail in the various decisions of the Commission in Court Session. However, it may assist if I set those issues out in more detail in these reasons. Additionally, it should also be noted, that the DOO agreement was registered by this Commission in April 1999: (1999) 80 WAIG 1771. Notably, at clause 10 of the DOO, as a consequence of the movement to driver only operations, additional provisions were added to the locomotive driver classification structure, particularising skills and knowledge and training modules in order to progress from a Level 1 to a Level 5 locomotive driver

on driver only operations. It must be recognised however, that whilst the classification structure was tailored to driver only operations in the Pilbara, it was also clearly developed in relation to the specific requirements of BHP on its railroad operations. This was a factor given some significance by me in my earlier reasons.

59 The claims of the union for salary increases to apply in the new award were based upon a number of components including the fact that as at the time of the proceedings, there had been no wage adjustments to employees covered by EBA 3 on its expiry in November 1999, with CPI movements over that period being some 6.3%. Additionally, reference was made to general community movements for enterprise agreements in the range of 3.5% to 4.4% over the same period. Significantly also, the claims were based on substantial increases in productivity at BHP both current and prospective, given the flexibilities to be obtained under the proposed award. On the other hand, BHP submitted that rates of wages should increase only by an amount of 5% on the existing enterprise agreement rates, having regard to general community wage movements.

60 The Commission in Court Session considered the large amount of evidence adduced in the proceedings and came to the conclusion that a new award should be made with improvements in rates of pay in the order of 14% initially, with a further 6% adjustment available on the anniversary date of the new award, subject to productivity and efficiency measures being demonstrably reached. In relation to structural reform and structural efficiency, the Commission in Court Session made a number of relevant observations. In particular, at pars 107-116 it was said:

> *"107 The enterprise specific award must fulfil the dual requirements of protecting employees as a safety net and providing the employer with a structurally efficient framework within which efficiencies and productivity improvements can be pursued.*
>
> *108 It should reflect the developments under the process of structural reform that has been going on for the past fifteen years. The award cannot harbour inefficient work practices in the expectation that at some time in the future those matters may be addressed under another EBA.*
>
> *109 The wage fixing principles now recognises the particular nature of an enterprise specific award. Where agreement can be reached between parties the award can be varied under Principle 10 without recourse to the Commission in Court Session. In effect the enterprise award can be the EBA.*
>
> ***110 With the restoration of the primacy of the enterprise award at BHPIO, wage rates must reflect the worth of work in a structurally efficient environment free from restrictive work practices. In the enterprise award it must effectively identify what would otherwise have been specified as the commitments to efficiency and productivity outcomes under an EBA. In this respect the wage rate must be commensurate with the scope of benefits the employer can achieve in managing the structurally efficient workplace.***
>
> *111 In the circumstances of BHPIO's operation, the productivity already achieved provides the benchmark.*
>
> *112 While award employment necessarily imposes some limitations in comparison with a totally unregulated environment, nevertheless the benefits in productivity outcomes and efficiencies and the ability to manage without the encumbrances inherent from the history of agreements and formal and informal arrangements, are significant.*
>
> *113 The challenge is for BHPIO to manage change in the structurally reformed regulated workplace.*
>
> ***114 The worth of work has to a significant extent been established on what was offered to award employees to take up WPA's.***
>
> *115 The levels of efficiency, flexibility and productivity being realised presently must be the objective for those who will be employed under the award.*
>
> *116 We consider that an award should issue. The level of award prescription should be minimal. It should not afford an opportunity for the successive layers of negotiated working conditions to be held on to in the expectation of further concessions." (My emphasis)*

61 Further proceedings took place before the Commission in Court Session and reasons for decision were published in March 2002: (2002) 82 WAIG 2048. Subsequently, in June 2002, the Commission in Court Session published further reasons for decision in relation to various matters outstanding from the earlier proceedings. In relation to the classifications and wages clause, the issue of the retention of the detailed classification structure was raised in the proceedings. The difference between the parties being the unions' proposed retention of the detailed classification structure, prescribing training and career path requirements, as opposed to BHP's proposal to remove much of that structure. The Commission in Court Session decided after considering the structure, that it ought be retained and set out its views in this regard at pars 12-15 as follows:

> ***"Clause 7. – Aggregate wages***
>
> *12 BHPIO's proposal is contained in its submissions at paragraph 36. The fundamental difference between that and the proposition of the unions is the unions' retention of the classification structure.*
>
> *13 The decision of the Commission as expressed in its Reasons and Further Reasons was given in the context of the claims then before the Commission. BHPIO's claim, which in general was the claim favoured by the Commission over the proposal of the unions, provides for employees to be employed in classifications set out in a classification structure. The Commission is not prepared, on the evidence and materials before it, to depart significantly from the matters that were in issue before it and upon which its decision has been based. The award to issue therefore will contain Clause 8.1 as contained in the unions' amended proposal. Given that the roster is to be identified in order to determine an employee's remuneration, the words "and roster" are included.*

14 In doing so we accept the unions' recognition not to "return to the days of rigid classification or union demarcation and the necessity for flexibility in the work that people do" and state that the classification structure is not to be taken by the employees as placing a restriction on flexibility in the performance of work. Correspondingly, in the event that an issue arises, the matter is able to be brought to the Commission.

15 The Commission's Reasons and Further Reasons for Decision were based upon both the BHPIO proposed award and the unions' proposed award both of which contained a classification structure. The Commission's decision was largely in favour of the increased flexibility which would flow from BHPIO's proposed award compared with the intentions reflected in the proposed award of the unions. The proposed departure of BHPIO from the recognised classification structure which it itself proposed originally therefore reads more into the Commission's Reasons and Further Reasons than was intended, particularly given that the Commission could not have in mind any proposal to move away from the established classification structure at the time its reasons was given. This is all the more so having regard to the parties' submissions in the substantive proceedings that the classification structure is one of the matters that is anticipated to require ongoing discussions beyond the making of the award. For that reason, the unions' proposed classification structure in their Schedule III, which is a consolidation of the existing structure, is to be incorporated into the award."

62 It is clear from all of the reasons for decision taken as a whole, that the Commission in Court Session endorsed the classification structure as being appropriate and consistent with a structurally efficient award in a modern industrial environment. This was a classification structure the essence of which has been previously endorsed by the Commission as being consistent with the Structural Efficiency Principle. Finally, in July 2002, the new award issued: (2002) 82 WAIG 2066. The BHP Award that was made provided in cl 7 - Aggregate Wages, when read with the relevant schedules, annual compensation for the various classifications of employees, including locomotive drivers in rail operations, on an annualised basis, which salaries incorporated, consistent with the previous arrangements, all base payments for work done, disabilities, penalties and the like.

63 Subsequently, by a further decision of the Commission in Court Session, the rates of wages under the BHP Award were increased by a further 6%, in recognition of productivity improvements, but phased in over a period of six months from January to July 2003.

64 Later, in July 2004, the Commission in Court Session further varied the BHP Award in a number of respects: (2004) 84 WAIG 3219. In those proceedings, a claim was made to further adjust aggregate wages in cl 7 of the award with the Commission in Court Session concluding that those rates of wages should be increased by 8%. The basis of the adjustment sought in that case included factors such as inflation, general wage increases in the community, past and future changes in productivity and performance of work in a structurally efficient enterprise, amongst others. As to the requirements of the Act and the Wage Fixing Principles, the Commission in Court Session in these proceedings made a number of observations commencing at par 92 as follows:

"92 We largely accept, therefore, the principal submission put by Mr Schapper that the considerations which arise in the claim before us will primarily be considered by those relevant considerations set out in s.26(1) of the Act. The Commission will also apply the State Wage Principles ([2003] WAIRC 0845; there has been no relevant change to the Commission's State Wage Principles arising from the 2004 State Wage Case 3 June 2004, [2004] WAIRC 11661). The significance of the State Wage Principles remains. The Principles provide a context in considering the role of the Commission in arbitrating claims to vary awards. It is a Principle that existing wages and conditions in awards of the Commission constitute the safety net which protects employees who may be unable to reach an industrial agreement."

65 Further, at pars 106-110 the Commission said:

"106 The evidence before us shows that the safety net award prescribes the rates of wage actually paid by BHPB. The terms and conditions of employment it prescribes are those actually received by the employees (together with such other applicable BHPB policies or benefits). In the present circumstances the safety net award is effectively an enterprise award. The award may thus be distinguished from the common rule Metal Trades (General) Award or the awards applicable generally to employees in the nickel or gold mining industries to which BHPB took us.

107 This conclusion does not alter the basic philosophy of a safety net under the State Wage Principles. However, where the changes to conditions of employment above the safety net which are envisaged to be agreed between parties to an enterprise bargaining agreement are unable to be so agreed, those changes will necessarily be able to be reflected within the award on a proper case being made out. *We consider that a refusal to negotiate an enterprise bargaining agreement with the unions is contrary to the thrust of the Act and the State Wage Principles which respectively have an object of promoting collective bargaining and establishing the primacy of collective agreements over individual agreements and the role of a safety net award underpinning enterprise agreements reached in the workplace. We consider that BHPB as a responsible employer has an obligation to its employees employed under an award to be prepared to bargain collectively as the Act envisages.*

108 It would be naïve to expect that wage rates applying to one group of employees in an enterprise, and the fact of increases given to those employees, does not impact upon other employees in the enterprise. There is an inherent value to the work performed established by reference to the "market" in which those employees are engaged. In circumstances where the deregulated arrangements under AWAs and award regulated terms and conditions function side-by-side, the notion of the "no disadvantage test" ensures that the "market" does not become distorted with respect to those working under the deregulated scheme. While there is no direct statutory safeguard to ensure that the converse does not occur with respect to those engaged under an award,

the Act enables claims for awards to be varied. However, while the State Wage Principles act to ensure that the focus remains on enterprise bargaining, the principles do not exclude the possibility of wage increases. The principles of wage fixation do not impose the dead hand of a wages freeze but they do not provide an avenue through which increases in income and improvements in conditions can be achieved through mere reliance on outcomes elsewhere in the "market", free from the requirement to increase productivity.

109 The statutory framework within which the principles operate in this State is not built around arrangements which provide for respective parties to take protected action nor an award system circumscribed by statute to cover only approved matters and designated to be only a safety net. ***A failure to secure an enterprise outcome, or the absence of an environment in which there is the opportunity to negotiate an agreement which sits on top of the award, does not mean that issues within that market cannot be addressed under the Act. Subject to satisfying the tests set out in the State Wage Principles the provision of the Act must apply.***

110 Here we are satisfied that the application comes within the scope of principle 10 and that subject to the requirements set out in s.26 of the Act the award may be varied." *(My emphasis)*

66 Significantly in these reasons, the Commission in Court Session referred to the role of a safety net award for the clear intended purpose of providing the foundation for enterprise bargaining under the Act and under the Wage Fixing Principles. The absence of an ability to achieve such an outcome was clearly a matter of importance for the Commission in Court Session. This was expressed in both the sense of a refusal of an employer to bargain and additionally, the absence of an environment where there is the opportunity to bargain at the enterprise level. The latter observation has relevance to these proceedings.

67 Also, for present purposes, the BHP Award was varied to change the hour's clause in relation to rail operations, to move to a twelve hour shift on the basis of a 48 hour per week roster. The Commission in Court Session's observations in this regard are set out at pars 322-325 as follows:

"322 If 12-hour shifts are to be worked by award drivers it is important for the Commission to determine the salary to apply and the number of weekly hours required. Given the history of the lack of negotiations between the parties it is the Commission's view that the parties, if left to resolve those issues, would not be able to do so unaided. The Commission is not restricted to the precise claims made. The complaint by the unions is that in making the award, and given the complexities of rail, the Commission did not take full account of the effect of removing the "job and knock" arrangements. The effect was to increase the weekly hours by 6 and hence rail drivers did not gain the full benefit of the 20% pay increase. The unions said the proposal seeks to address this imbalance or inequity.

323 There are two points to be made in respect of this part of the application. Firstly, it is clear from the submissions of both parties and the evidence that rail is different from the rest of the operations of the company. The complexity of rostering and scheduling is magnified. The unions' direct comparison to other employees is not accepted by the Commission. Second, the Commission does not accept that the effects of the abolition of the "job and knock" system were somehow overlooked in the award decision. Nevertheless, the Commission is now faced with compelling evidence that the nature of the shift pattern restricts the work of one set of employees within the rail system. We regard this as an unfairness. Having regard to the Commission's obligations under Section 26 of the Act, in particular section 26(1)(d)(vi), the Commission considers it now necessary to make provision for 12 hour shifts for rail drivers under the award.

324 It is not, in the Commission's view, adequate to respond by indicating that the history of this matter is that the restrictions faced by award drivers under the 10 x 10 shift arrangements were caused by them; namely they should be left at a disadvantage brought about by their own hand. The disadvantage faced by the award drivers is that they do more yard work and cannot work all the lines. This can only be addressed through longer shift lengths. The disadvantage faced by award drivers also has to do with the "unfriendly" nature of the roster and the lack of weekends. Mr Johncock's evidence is persuasive in this regard. We note Mr Johncock's evidence that this last issue by itself could be addressed by a return to averaging but we do not consider this would address the other areas of disadvantage.

325 The Commission does not accept the proposition that there needs to be clear evidence of deskilling of drivers under the 10 x 10 shift arrangement for a change to be made; albeit the Commission is suspicious that that may indeed be a possible result in future if left unaddressed. The Commission is mindful of the additional cost burden placed on BHPB by a move to 12-hour shifts. The calculation of 11 or 12 additional drivers was based on a 42 hour week. The Commission for the reasons given does not accept this base. However, the Commission does consider that a 48 hour per week averaging base should apply. The question then becomes whether the salary should be adjusted due to a change from a 50 hour per week to a 48 hour per week average base. It is the Commission's view that, given the history of this matter, the increased flexibility offered by the 12-hour shift length (as confirmed by Mr Ireland), and the need in the Commission's view to narrow the difference in the systems of work, the fair, sensible and equitable outcome should be a retention of the rail drivers' salaries at their current rate. This of course is to be coupled with a move to up to 12-hour shift lengths and 48 hours averaged weekly. The rail drivers' salaries are then to be adjusted by the general award increase outlined earlier."

68 The order varying the BHP Award giving effect to these proceedings was published in Sept 2004: (2004) 84 WAIG 3252. It is also not insignificant to observe in the context of these proceedings that in *AFMEPKIU and Ors v BHP Billiton Iron Ore Pty Ltd* (2006) 86 WAIG 613 the Full Bench by majority (Kenner C with Harrison C agreeing; Ritter AP dissenting) held that the BHP Award had extended to locomotive drivers working on a fly in fly out basis, from the time the award was made. This decision was affirmed by the Industrial Appeal Court: (2006) 86 WAIG 1477.

69 Taken in their totality, the various decisions of the Commission in Court Session, in relation to the making of the BHP Award, were in one sense, concerned primarily with structural efficiency in the workplace in its broadest sense. That is, these decisions led to a dramatic change to industrial regulation at a very large and complex mining operation in an industry of great significance to this State. Layers of industrial regulation and complexity were removed, and introduced instead, was a relatively simple and flexible industrial instrument, designed to achieve maximum productivity and efficiency in the workplace, in return for fair wages and conditions of employment. On one view, the BHP case is a classic illustration of the broader application of the Structural Efficiency Principle, referred to by the Commission in Court Session, as set out earlier in these reasons.

70 In the present case, the positions of both the applicant and the respondent, has caused the Commission significant difficulties. On the one hand is the claim by the applicant for rates of pay based on the BHP Award which itself turns, to some extent, on its own circumstances. However, and significantly, it is the only award of this Commission applicable in the iron ore industry in this State which has recently been the subject of repeated arbitrations by this Commission over the last several years. The fact also is that the classifications and rates of pay in the BHP Award have been adjusted by the Commission by arbitration, to take into account a number of considerations, including enhanced productivity. Those decisions have been transparent as to the basis upon which the rates of pay have been adjusted and provide clear evidence of the basis of the rates of pay arising from these cases. It is also clear from the various decisions of the Commission in Court Session, that productivity has not been the only issue considered. Consideration has also been given to wage movements in the community generally and the effective inability of the relevant employees to have access to collective bargaining. The Commission has also previously applied the Structural Efficiency Principle to the classification structure and the aggregate wages clauses.

71 On the other hand, the respondent's position has been to largely argue that some minimum rates awards made to apply in the other industries, in particular the general rail freight industry, made by the AIRC, under different legislative arrangements and wage fixing principles, should be the basis for the rates in this case. Ultimately, in establishing appropriate minimum rates to apply in an award to issue from these proceedings, the Commission can be guided only by rates and conditions of employment existing in other workplaces and industries.

72 Considering these issues as a whole however, I remain of the opinion that in terms of the present respondent, operating clearly as it does in the iron ore industry in this State, taking into account the specific circumstances leading to the making of the BHP Award, and the structure of the aggregate salaries paid to locomotive drivers, which has been referred to above, that it is not an inappropriate guide for present purposes. It is the case that the worth of the work for a mainline locomotive driver and others, operating at BHP, has been considered by the Commission in Court Session in its various deliberations. I accept that a part of that consideration was based on the specific productivity initiatives in that case. Additionally, historically, the parties to that award, by their various agreements, have also established a relative value for the work of a locomotive driver working in the Pilbara environment, which again, in my opinion, is able to be regarded by the Commission in all of the circumstances. Those structures have been endorsed by the Commission in Court Session.

73 As I pointed out in my earlier reasons, striking an appropriate rate of pay in cases such as this, with the difficulties that I have referred to, is not an exercise that can be performed with any mathematical or scientific precision. It was with regard to some of these matters, that in my initial reasons for decision, I considered that the BHP rates whilst they could be used as a guide should be discounted. I remain of that view. It is also the case as the proceedings have developed, on the evidence as it now is through Mr Butler, that there should be due allowance made for the additional work of construction drivers. I also consider it not inappropriate, as referred to in the respondent's second set of written submissions, that if the BHP Award aggregate rate is to be used as a guide, that there be further consideration of the effect of overtime and penalty rates in the composition of those aggregate rates, given their history.

74 The Commission has also considered the rates and conditions generally under the ARG Award on which considerable reliance was placed by the respondent. I have also taken into account the rates and conditions prescribed in the various consent awards referred to by Mr Blackburn in exhibit R6, and the other awards referred to in exhibit R11. All of these awards, except the Hamersley Award, are of the AIRC. Despite the limitations of those awards that I have referred to above, they also contain many terms and allowances that seem to be peculiar to the general rail industry and not the specific circumstances of rail operations in the Pilbara of this State. For example, in the ARG Award there exist as part of the safety net award, various allowances including a kilowatt allowance; mileage/distance payments; and running shed allowances, to name a few, that appear to be well known to the general rail industry but are not in my experience, known at all in the iron ore industry. Also some of these awards apply to the general construction industry and at least one, to a tourist type of operation in Tasmania.

75 Additionally, to prescribe, having regard to all of the circumstances of this case, as contended by the respondent, a base rate of pay of some $670 per week (excluding the DOO loading) for a locomotive driver working and living in the Pilbara, which is a rate only some $70 per week more than a store person working in Perth under the Shop and Warehouse (Wholesale and Retail Establishments) Award 1977, has, with respect, an air of unreality about it.

76 Whilst the respondent submitted that there was little before the Commission as to the conditions and disabilities in the Pilbara region of the State, that is not so. One only has to examine the various awards applicable to the iron ore industry in this State, including those relied on by the respondent earlier in these proceedings such as the Rio Tinto Award 2004, to ascertain the variety of provisions that pay due regard to working conditions in the Pilbara. These provisions include for example a site allowance for general disabilities flowing from living and working in the Pilbara and a commute allowance for those on FIFO to compensate for the disruption to family and social life. Under the Hamersley Award there exist payments of various kinds in respect of disabilities; district allowances; service payments; recreational leave travel assistance and the like. Additionally, in the Robe River Certified Agreement 2002 (PR917415) upon which the respondent also in part relied in the earlier proceedings, there similarly exist a number of payments and allowances to compensate for various conditions and work arrangements at that operation.

Conclusion

77 I do not accede to the respondent's submission that the Commission should dismiss the application. There is sufficient before the Commission to determine the matter.

78 I therefore consider that in the proposed award to issue, there should be classifications of locomotive driver Levels 1 and 2. The Locomotive Driver Level 1 will be the base level driver as the Yard Driver/Trainee Mainline Driver. The Locomotive Driver Level 2 will be the Mainline Driver classification which will also encompass construction work on the evidence of Mr Butler. Whilst he referred to this work as involving ballasting and rail drops, it is also clear from his evidence that the respondent has some cross over between construction work and mainline work and presently they are paid the same rates of pay. It is appropriate to recognise this in the classification. This classification will also include reference to banking work as may be required, which is similar to the position under the BHP Award. The classifications will broadly correspond to the BHP Award Level 3 and Level 4 driver classifications respectively.

79 In terms of rates of pay, I propose to award an aggregate rate. I do not accept that this should not be the case. I consider there is some force in Mr Schapper's submissions that a modern industrial instrument should not be necessarily limited to a minimum wage or salary supplemented by various allowances. It seems to me at least arguable, that such a structure may not be entirely structurally efficient from an administration point of view. Whilst it descends into a considerable degree of particularity, the Commission considers there is merit in the respondent's submissions which make due allowance for the components of the aggregate rates set out in the BHP Award in terms of overtime, shift, weekend and public holiday penalties. This is so in order that appropriates allowance can be made for different roster arrangements based on a 42, 48 and 56 hour roster. I do not accept the respondent's submissions that the award to issue should not stipulate rosters and merely limit ordinary hours to 38 for example. It would be appropriate in my opinion, in setting a rate of wage that is fair, proper and reasonable in all of the circumstances, to make allowances for such factors, particularly when the guide taken into account is a rate of salary based upon a 48 hour week roster. To not take these factors into account would be inequitable in terms of those working rosters fewer or greater numbers of hours per roster accordingly. The rates for Level 1 and 2 drivers on an aggregate hourly basis will therefore be consistent with par 43 of the respondent's written submissions.

80 In relation to the overtime adjustment for the aggregate rates, Annexure 1 to the respondent's written submissions, setting out the methodology for such adjustment over 42, 48 and 56 hour rosters, will be Schedule 1 to the Award. Similarly, the methodology to adjust the aggregate rates making allowance for shift, weekend and public holiday penalties, based as it is on the Rio Tinto Award, will be Schedule 2.

81 As to the hours of work provision, the hours of work clause will specify working hours on a roster of 42, 48 or 56 hours as the case may be. There will be provision in the hours' clause for other rosters to be worked by agreement between the parties, with any adjustment to the aggregate rates being applied in accordance with Schedules 1 and 2 as the case may be.

82 The Commission will use as a guide the rates of pay as they were as at the time the Commission made the original order in January 2006. Whilst the rates have been increased by consent since that time, the basis for that increase is not apparent from the order of the Commission in that matter. Therefore the Commission has no material before it as to the factors giving rise to it.

83 The classification structure and rates of pay structure to be included in the award to issue creates a clear career path progression from a Level 1 to a Level 2 Locomotive Driver. There is an appropriate relativity between the two classifications. The rates and classifications used as a guide have been considered by the Commission under the Structural Efficiency Principle and have been considered in some detail by the Commission in Court Session, all of which has been referred to above. These rates of pay and classification structure are in my opinion, consistent with the broad principles of structural efficiency in that the Commission has had regard to a range of awards and industrial agreements in the context of the particular circumstances of this case. It is also the case that the award to issue, given that it imposes few if any restrictions on the deployment of employees covered by it, is in terms of the Structural Efficiency Principle generally, structurally efficient.

84 A minute of proposed order now issues.

2006 WAIRC 05472

IRON ORE PRODUCTION & PROCESSING (LOCOMOTIVE DRIVERS RIO TINTO RAILWAY) AWARD 2006

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS
	APPLICANT
	-v-
	SKILLED RAIL SERVICES PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 25 SEPTEMBER 2006
FILE NO.	A 5 OF 2005
CITATION NO.	2006 WAIRC 05472

Catchwords	Industrial law – Supplementary reasons for decision - Reasons for decision and minute of proposed order previously issued by Commission – Speaking to the minutes - Clarification and confirmation of intended effect of Commission's order - Order issued - *Industrial Relations Act 1979* (WA) s 34(3)
Result	Order Issued
Representation	
Applicant	Mr D Schapper of counsel instructed by D H Schapper & Co
Respondent	Mr J Blackburn of counsel instructed by the Australian Mines and Metals Association

Supplementary Reasons for Decision

1 Further to the Commission's reasons for decision and minute of proposed order published on 22 September 2006, the parties have conferred in an endeavour to reach agreement on one relatively minor matter arising from the minute of proposed order. The parties are agreed that there should be some minor variations to the table in cl 6(4) of the proposed Award and also agreed to a variation to the proposed cl 7(1). The issue in contention between the parties arising on the minute of proposed order is the insertion of the word "ordinary" in the table in cl 6(4) as against each rostered hours arrangement whether it be 42, 48 or 56. The applicant also proposes inserting similar reference to "ordinary" when referring to rostered hours in its proposed cl 7(1) and in cl 8 - Overtime.

2 Given that the issue between the parties was a narrow one, arising from the minute of proposed order, the Commission invited the parties to consider whether the Commission would determine that issue by effectively a speaking to the minutes "on the papers" without the parties needing to appear before the Commission. The parties consented to this course.

3 A speaking to the minutes of a proposed order under s 34(3) of the Industrial Relations Act 1979 ("the Act") is for the purpose of ensuring that the Commission's decision as reflected in a minute of proposed order is workable and consistent with the Commission's intentions. Provisions which are unworkable, inconsistent with the Commission's intention or inserted by inadvertence or mistake, may be changed to ensure the effectiveness of an award: *Mt Newman Mining Co Pty Ltd v. AMWSU and Or* (1981) 61 WAIG 1043. In my opinion this is a matter falling within the proper parameters of ensuring that the Commission's award is workable and consistent with its intention from its reasons for decision arising from the totality of the proceedings before the Commission.

4 The thrust of the argument of counsel for the applicant is that by reason of the existence of cl 8 – Overtime, it should be made clear in the award that where reference is made to rostered hours of work, that this is a reference to "ordinary hours", in excess of which overtime is payable as provided by cl 8. On the other hand, the respondent contends that the inclusion of the words "ordinary hours" as proposed is unnecessary and may lead to confusion as it is not otherwise referred to or defined.

5 There is no doubt in my opinion that a reading of the combined effect of cl's 7 - Hours and 8 - Overtime is intended to operate such that hours worked in excess of those rostered, they being 42, 48 or 56 per week on average, are to be paid at overtime rates. This includes other hour's arrangements that may be agreed between the parties.

6 Having considered this relatively narrow point, the applicant's submissions have merit. The clear intention of a combined reading of cl's 7 and 8 as I have referred above would be made more certain by the inclusion of the words "ordinary hours" in the relevant parts of cl's 6(4), 7(1) and 8. This will clarify and confirm the clearly intended effect of the order and make it fully workable in my view.

7 Order accordingly.

2006 WAIRC 05470

IRON ORE PRODUCTION & PROCESSING (LOCOMOTIVE DRIVERS RIO TINTO RAILWAY) AWARD 2006

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS
	APPLICANT
	-v-
	SKILLED RAIL SERVICES PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 25 SEPTEMBER 2006
FILE NO	A 5 OF 2005
CITATION NO.	2006 WAIRC 05470

Result	New Award
Representation	
Applicant	Mr D H Schapper of counsel instructed by D H Schapper & Co
Respondent	Mr J Blackburn of counsel instructed by the Australian Mines and Metals Association

Order

HAVING heard Mr D H Schapper of counsel on behalf of the applicant and Mr J Blackburn of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby –

(1) MAKES an award to be known as the Iron Ore Production & Processing (Locomotive Drivers Rio Tinto Railway) Award 2006 in terms of the schedule hereto with effect on and from the date of this order.

(2) ORDERS that the Iron Ore Production and Processing (Engine Drivers – Skilled Rail Services) Interim Award 2006 be and is hereby cancelled.

(Sgd.) S J KENNER,
[L.S.] Commissioner.

SCHEDULE

1. - TITLE

This award shall be known as the Iron Ore Production & Processing (Locomotive Drivers Rio Tinto Railway) Award 2006

2. - ARRANGEMENT

3. - AREA AND SCOPE

(1) This award shall apply to all locomotive drivers working on the railroad which forms part of the iron ore production and processing operations carried on in and around Dampier, Pannawonica, Tom Price, Paraburdoo, Marandoo and associated places and who are employed by any firm, company, enterprise or undertaking engaged in the industry of labour hire.

(2) This award shall not apply to any employee employed by Pilbara Iron Company (Services) Pty Ltd, Hamersley Iron Pty Ltd, Robe River Mining Company and Robe River Iron Associates.

4. - CONTRACT OF SERVICE

(1) An employer may direct an employee to carry out such duties as are within the limits of the employee's skill, competence and training.

(2) Notice of Termination by Employer

(a) The employment of any employee (other than a casual employee) may be terminated by the following notice period, provided that an employee has not been dismissed on the grounds of gross misconduct in which case shall only be paid up to the time of dismissal.

PERIOD OF CONTINUOUS SERVICE	PERIOD OF NOTICE
Less than 1 year	1 week
1 year but less than 3 years	2 weeks
3 years but less than 5 years	3 weeks
5 years and over	4 weeks

(b) An employee who at the time of being given notice is over 45 years of age and has completed two years' continuous service with the employer, shall be entitled to one week's additional notice.

(c) Payment in lieu of the notice prescribed in paragraphs (a) and (b) of this subclause shall be made if the appropriate notice period is not given. The employment may be terminated by part of the period of notice specified and part payment in lieu thereof.

(d) In calculating any payment in lieu of notice the employer shall pay the employee the ordinary wages for the period of notice had the employment not been terminated.

(e) Service by the employee with a business which has been transmitted from one employer to another and the employee's service has been deemed continuous in accordance the Long Service Leave Provisions published in

Volume 66 of the Western Australian Industrial Gazette at pages 1-4, as amended from time to time, shall constitute continuous service for the purpose of this clause.

(3) Notice of Termination by Employee

(a) The notice of termination required to be given by an employee shall be the same as that required of an employer, save and except that there shall be no additional notice based on the age of the employee concerned.

(b) If an employee fails to give the required notice or having given, or been given, such notice leaves before the notice expires, the employer shall have the right to withhold moneys due to the employee to a maximum amount equal to the ordinary time rate of pay for the required period of notice.

(4) Time Off During Notice Period

Where an employer has given notice of termination to an employee who has completed one month's continuous service, that employee shall, for the purpose of seeking other employment be entitled to be absent from work up to a maximum of eight ordinary hours without deduction of pay. The time off shall be taken at times that are convenient to the employee after consultation with the employer.

This subclause shall not apply to a casual employee.

(5) Statement of Employment

On termination of service a worker shall, on request, be given a certificate setting out the length of service and duties performed.

(6) Casual Employees

(a) (i) The period of notice of termination in the case of a casual employee shall be one hour.

(ii) If the required notice of termination is not given one hour's wages shall be paid by the employer or forfeited by the employee.

(7) Absence From Duty

The employer shall be under no obligation to pay for any day not worked upon which the employee is required to present for duty, except when such absence is due to leave to which the employee is entitled to take and be paid for under the provisions of this award.

(8) Standing Down of Employees

(a) (i) The employer is entitled to deduct payment for any day or part of a day on which an employee (including an apprentice) cannot be usefully employed because of industrial action by any of the unions party to this award, or by any other association or union.

(ii) If an employee is required to attend for work on any day but because of failure or shortage of electric power work is not provided, such employee shall be entitled to two hours' pay and further, where any employee commences work he/she shall be provided with four hours' employment or be paid for four hours' work.

(b) The provisions of paragraph (a) of this subclause also apply where the employee cannot be usefully employed through any cause which the employer could not reasonably have prevented but only if, and to the extent that, the employer and the union or unions concerned so agree or, in the event of disagreement, the Board of Reference so determines.

(c) Where the stoppage of work has resulted from a breakdown of the employer's machinery the Board of Reference/Commission, in determining a dispute under paragraph (b) of this subclause, shall have regard for the duration of the stoppage and the endeavours made by the employer to repair the breakdown.

5. - MINIMUM ADULT AWARD WAGE

(1) No adult employee shall be paid less than the Minimum Adult Award Wage unless otherwise provided by this clause.

(2) The Minimum Adult Award Wage for full time adult employees is $504.40 per week payable on and from 7th July 2006.

(3) The Minimum Adult Award Wage of $504.40 per week is deemed to include all arbitrated safety net adjustments from State Wage Case decisions.

(4) Unless otherwise provided in this clause adults employed as casuals, part time employees or pieceworkers or employees who are remunerated wholly on the basis of payment by result shall not be paid less than pro rata the Minimum Adult Award Wage according to the hours worked.

(5) Juniors shall be paid no less than the wage determined by applying the percentage prescribed in the junior rates provision in this award to the Minimum Adult Award Wage of $504.40 per week.

(6) (a) The Minimum Adult Award Wage shall not apply to apprentices, employees engaged on traineeships or Jobskill placements or employed under the Commonwealth Government Supported Wage System or to other categories of employees who by prescription are paid less than the minimum award rate.

(b) Liberty to apply is reserved in relation to any special categories of employees not included here or otherwise in relation to the application of the Minimum Adult Award Wage.

(7) Subject to this clause the Minimum Adult Award Wage shall –

(a) apply to all work in ordinary hours.

(b) apply to the calculation of overtime and all other penalty rates, superannuation, payments during any period of paid leave and for all purposes of this award.

(8) Minimum Adult Award Wage

The rates of pay in this award include the minimum weekly wage for adult employees payable under the 2005 State Wage Case Decision. Any increase arising from the insertion of the minimum adult award wage will be offset against any equivalent amount in rates of pay received by employees whose wages and conditions of employment are regulated by this award which are above the wage rates prescribed in the award. Such above award payments include wages payable pursuant to enterprise agreements, consent awards or award variations to give effect to enterprise agreements and over award arrangements. Absorption which is contrary to the terms of an agreement is not required.

Increases under previous State Wage Case Principles or under the current Statement of Principles, excepting those resulting from enterprise agreements, are not to be used to offset the minimum adult award wage.

(9) Adult Apprentices

(a) Notwithstanding the provisions of this clause, an apprentice, 21 years of age or over, shall not be paid less than $421.70 per week.

(b) The rate paid in paragraph (a) above is payable on superannuation and during any period of paid leave prescribed by this Award.

(c) Where in this award an additional rate is expressed as a percentage, fraction or multiple of the ordinary rate of pay, it shall be calculated upon the rate prescribed in this award for the actual year of apprenticeship.

6. - AGGREGATE WAGES

(1) The aggregate hourly rate of wage for employees to whom this award applies shall be as set out in this clause in each classification specified.

(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) Classifications and Rates of Pay

Classification

Locomotive Driver Level 1-Yard Driver/Trainee Mainline Driver

An employee at this level shall perform any and all aspects of shunting and other railway work within yard limits and in and around all workshops and work as a second person on mainline trains as required

Locomotive Driver Level 2- Mainline/Construction Driver

An employee at this level shall perform all or any aspect of mainline driving on a driver only basis including work and construction trains and banking operations on the mainline as required.

Rates of Pay Per Hour

	A Roster average 42 ordinary hours per week	B Roster average 48 ordinary hours per week	C Roster average 56 ordinary hours per week
Locomotive Driver Level 1	29.05	33.13	37.53
Locomotive Driver Level 2	35.92	40.71	45.82

(5) 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

(1) Subject to clause 7(2), employees shall work a roster averaging either 42, 48 or 56 ordinary hours per week whether fly in, fly out or residential.

(2) Other rosters may be worked by agreement of the parties to this award. Given the aggregate rates of pay in clause 6 - Aggregate Wages, changes to rosters may affect the aggregate rates of wages. Adjustments are to be made in accordance with the methodology set out in Schedules 1 and 2 to this award.

8. - OVERTIME

Any hours worked in excess of the ordinary hours prescribed in clause 7 – Hours, or as otherwise agreed between the parties, shall be paid at the rate of time and one half for the first two hours and double time thereafter.

9. - ANNUAL LEAVE

(1) Five weeks paid annual leave shall be allowed for each year worked.

(2) Continuous shift employees shall be allowed a further week as annual leave, in addition to that prescribed in (1).

(3) Pro rata leave shall be paid out on termination.

(4) This clause shall not apply to casual employees.

10. - LONG SERVICE LEAVE

(1) 13 weeks paid long service leave shall be allowed for each period of 10 completed years of service.

(2) Pro rata leave shall be paid out on termination where termination occurs after more than 5 years service.

11. - TRAVEL AND ACCOMMODATION

(1) The employer shall provide and shall pay all costs associated with travel between Perth Airport and site, to and from the site and to and from the workplace.

(2) The employer shall provide and pay all costs associated with the employee's accommodation whilst at site and the meals of the employee.

(3) This clause shall only apply to fly in fly out employees.

12. - SAFETY EQUIPMENT, UNIFORMS AND NECESSARIES

The employer shall, at its own cost, provide all necessary safety gear, uniforms and other things necessary for the employee to fulfil his duties.

13. - DISPUTE RESOLUTION

(1) In the case of any questions, disputes or difficulties arising under this award, the employer and employee(s) are to confer amongst themselves and make reasonable attempts to resolve any such questions, disputes or difficulties.

(2) In the event the employer and employee(s) are not able to resolve any questions, disputes or difficulties having complied with sub clause (1) above either may refer the matter to the Western Australian Industrial Relations Commission.

14. – NAMED PARTIES TO THE AWARD

The parties to this award are:

The Construction, Forestry, Mining & Energy Union of Workers

Skilled Rail Services Pty Ltd

SCHEDULE 1

	Comparison of aggregate wage for 38, 42, 48 and 56 hour week	
42 hours = 38 ordinary hours + 4 hours @ 2 x (= 8 hours) = 46 hours pay (for a 42 hour week) Hourly rate = 46/42 = 1.0952 *i.e.* a properly constructed aggregate hourly rate would include a loading of 9.52% for the overtime incorporated as part of the roster	48 hours = 38 ordinary hours +10 hours @ 2 x (= 20 hours) = 58 hours pay (for a 48 hour week) Hourly rate = 58/48 = 1.2083 *i.e.* the BHPB aggregate hourly rate may be taken to include a loading of 20.83% for the overtime incorporated as part of the 48 hour roster	56 hours = 38 ordinary hours + 18 hours @ 2 x (= 36 hours) = 74 hours pay (for a 56 hour week) Hourly rate = 74/56 = 1.3214 *i.e.* a properly constructed aggregate hourly rate would include a loading of 32.14% for the overtime incorporated as part of the roster

SCHEDULE 2

(Note: This is taken from the Mining- Rio Tinto Award 2004 and is to be used as a methodology guide only for the purposes of cl 6-Aggregate Wages and cl 7-Hours of this award)

	Event Type			
Shift Length (Hours)	Payment per night	Payment per afternoon	Payment per Weekend	Payment per public Holiday
12	$56.35	Not Applicable	$204.90	$256.13
10	$46.96	$35.21	$170.75	$213.44
8	$37.57	$28.17	$136.60	$170.15

The aggregate wages in this award have been adjusted to compensate for work done on nights, weekends and public holidays. This is based on three components:

- The average number of nights and/or afternoons worked as allocated by the roster pattern;
- The average number of weekends worked as allocated by the roster pattern; and

- The average number of public holidays worked as allocated by the roster pattern.

Allowance is made according to the average number of above events that in a roster pattern per annum. The formula for calculating this payment is:

(#Nights x Payment per night) + (#Afternoons x Payment per Afternoon) + (#Weekends x Payment per weekend) + (#Public Holidays x Payment per Public Holidays)

The average number of any particular event occurring is calculated as follows:

NIGHTS # of Nights worked per cycle* / Total days in the cycle x 365.25	**WEEKENDS** # of Shifts worked per *cycle / Total days in the cycle x 52.18 Applies only to rosters where work on Saturday and/or Sunday is required
AFTERNOONS # of Afternoons worked per cycle* / Total days in the cycle x 365.25	**PUBLIC HOLIDAYS** # of shifts worked per *cycle / Total days in the cycle x 10 Applies only to rosters where work on Public Holidays is required

*Cycle = shortest period of time in which the roster pattern repeats.

"Nights":

- = a 12 hour shift where the majority of hours falls between 1800 hours and 0600 hours the following day.
- = a 10 hour shift commencing at or after 1900 hours on any given day.
- = an 8 hour shift commencing at or after 2000 hours on any given day.

"Afternoon"

- = No Afternoon shift applies for 12 hour shifts.
- = a 10 hour shift that commences at or after 1100 hours but before 1900 hours on any given day.
- = an 8 hour shift that commences at or after 1200 hours but before 2000 hours on any given day.

Example

It has been proposed that Crew 'A' move to a 12 hour shift, 48 hour a week roster. The roster pattern is 3 Days 3 Nights 6 Off 3 Days 3 Night 3 Off.

The average Night is 6 / 21 x 365.25 = 104.36 (Rounded to 105) 105 x $56.35.00 = $5,916.75

The average Weekend is 12 / 21 x 52.18 = 29.82 (Rounded to 30) 30 x $204.90 = $6,147.00

The average Public Holiday is 12 / 21 x 10 = 5.71 (Rounded to 6) 6 x $256.13 = $1,536.78

Total Shift Payment for the proposed roster will be $13,600.53

2006 WAIRC 05514

PLASTERWISE / CFMEUW INDUSTRIAL AGREEMENT 2005-2008

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CONSTRUCTION, FORESTRY MINING AND ENERGY UNION OF WORKERS
	APPLICANT
	-v-
	PLASTERWISE PLASTERING CONTRACTORS
	RESPONDENT
CORAM	SENIOR COMMISSIONER J F GREGOR
DATE	WEDNESDAY, 27 SEPTEMBER 2006
FILE NO/S	AG 15 OF 2006
CITATION NO.	2006 WAIRC 05514

Result Discontinued

Order

WHEREAS on 3rd February 2006 The Construction, Forestry, Mining and Energy Union of Workers ("the Applicant Union") applied to the Commission to register an agreement pursuant to the *Industrial Relations Act, 1979;* and

WHEREAS the matter was listed for registration on 28th February 2006; and

WHEREAS on 23rd February 2006 the Respondent requested the matter be stood over pending further advice from Department of Employment and Workplace Relations ("the DEWR") whether the Enterprise Bargaining Agreement ("the EBA") is compliant with Federal Code of Practice and Guidelines; and

WHEREAS the Applicant Union consented to the adjournment and requested the EBA be re-listed For Mention in 14 days; and

WHEREAS the matter was listed For Mention on 22nd March 2006; and

WHEREAS on 15th March 2006 the Respondent requested a further postponement until the EBA was compliant with the Federal Code of Practice and the Commission agreed to this request; and

WHEREAS on 4th May 2006 the matter was listed For Mention; and

WHEREAS the hearing on 4th May 2006 was vacated and the application re-listed for hearing on 9th June 2006; and

WHEREAS on 6th June 2006 the Respondent advised the EBA was still not code compliant as advised by DEWR and requested a further postponement; and

WHEREAS on 10th July 2006 the Respondent requested the file be held open for a further 14 days to give the parties time to resolve this matter; and

WHEREAS on 7th September 2006 the Commission wrote to the Applicant Union stating that if no advice was received regarding the status of the matter, it would be listed for Show Cause; and

WHEREAS on 14th September 2006 the Applicant Union filed a Notice of Discontinuance and the Commission has decided to discontinue the application.

NOW THEREFORE pursuant to the powers vested in it by the *Industrial Relations Act, 1979,* the Commission, hereby orders:

THAT the application be, and is hereby, discontinued.

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

PUBLIC SERVICE ARBITRATOR—Awards/Agreements—Variation of—

2006 WAIRC 05484

EDUCATION DEPARTMENT MINISTERIAL OFFICERS SALARIES ALLOWANCES AND CONDITIONS AWARD 1983 NO 5 OF 1983

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DIRECTOR GENERAL DEPARTMENT OF EDUCATION AND TRAINING (WESTERN AUSTRALIA)
	-and-
	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER P E SCOTT
DATE	TUESDAY, 26 SEPTEMBER 2006
FILE NO	P 31 OF 2006
CITATION NO.	2006 WAIRC 05484

Result Award varied

Order

HAVING heard Mr G Wibrow and with him Mr E Rea on behalf of the Director General, Department of Education and Training and Mr M Finnegan 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 Education Department Ministerial Officers Salaries Allowances and Conditions Award 1983 (No. 5 of 1983) be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 21st day of September 2006.

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

SCHEDULE

1. Clause 4. – Definitions: Delete this clause and insert the following in lieu thereof:

In this Award, the following expressions shall have the following meaning:-

"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.

"Employee" means an employee pursuant to section 235 (1)(c) of the *School Education Act 1999.*

"Employer" means the Director General, Department of Education and Training (or however so named).

"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.

"Officer" means an employee pursuant to section 235 (1)(c) of the *School Education Act 1999.*

"Partner" means either spouse or de facto partner.

"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.

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

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

2. Clause 9. – 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 10. - Salaries of this Award in accordance with the following formula:

$$\frac{\text{Fortnightly Salary of the appropriate Public Service Award classification rate}}{75}$$

With the addition of twenty percent in lieu of annual leave, sick leave, long service leave and payment for public holidays.

(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 carer's 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.

(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 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.

3. Clause 10. – Salaries:

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

(2)

Classification	Base Salary	Arbitrated Safety Net Adjustment ($ per annum)	75 Hours Total Salary ($ per annum)
Officer (Junior)			
Under 17	$10,591	$3,624	$14,215
17 years	$12,377	$4,235	$16,612
18 years	$14,438	$4,941	$19,379
19 years	$16,712	$5,719	$22,431
20 years	$18,768	$6,423	$25,191
Officer Level 1			
Year 1 (21 years)	$20,616	$7,055	$27,671
Year 2	$21,224	$7,055	$28,279
Year 3	$21,832	$7,055	$28,887
Year 4	$22,435	$7,153	$29,588
Year 5	$23,042	$7,153	$30,195
Year 6	$23,649	$7,153	$30,802
Year 7	$24,348	$7,056	$31,404
Year 8	$24,831	$7,056	$31,887
Year 9	$25,546	$7,056	$32,602
Officer Level 2			
Year 1	$26,401	$7,056	$33,457
Year 2	$27,056	$7,056	$34,112
Year 3	$27,746	$7,056	$34,802
Year 4	$28,474	$7,056	$35,530
Year 5	$29,236	$7,056	$36,292
Officer Level 3			
Year 1	$30,284	$7,056	$37,340
Year 2	$31,100	$7,056	$38,156
Year 3	$31,941	$7,056	$38,997
Year 4	$32,805	$6,958	$39,763
Officer Level 4			
Year 1	$33,989	$6,958	$40,947
Year 2	$34,917	$6,861	$41,778
Year 3	$35,872	$6,861	$42,733

Classification	Base Salary	Arbitrated Safety Net Adjustment ($ per annum)	75 Hours Total Salary ($ per annum)
Officer Level 5			
5.1	$37,712	$6,861	$44,573
5.2	$38,955	$6,861	$45,816
5.3	$40,247	$6,861	$47,107
5.4	$41,587	$6,861	$48,448

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

(4) The fortnightly salary of employees shall be calculated as follows:

$$\text{Annual Salary} \times \frac{12}{313}$$

4. Clause 18. – Long Service Leave:

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

(1) Each officer who has completed a period of 7 years of continuous service in a permanent and/or fixed term contract 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. Directly after subclause (12) of this clause insert new clauses (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.

(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.

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 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) (i) Where a period of parental leave overlaps with a period of vacation leave, for which an employee would receive normal pay, the period of paid parental leave will be extended by the period of the overlap.

(ii) An employee proceeding on unpaid parental leave may elect to substitute any period of that unpaid parental leave with accrued leave entitlements 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 8. – 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 8. – 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 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.

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 54. – Purchased Leave – Deferred Salary Arrangement: Directly after subclause (6) of this clause and insert new 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.

9. Schedule I – Expired General Agreement Salaries: Delete this Schedule and insert the following in lieu thereof:

Classification	Annual Salary From the beginning of the first Pay Period commencing on or after 26 February 2005
Officer (Junior)	
Under 17	$14,327
17 years	$16,744
18 years	$19,531
19 years	$22,607
20 years	$25,387
Officer Level 1	
Year 1 (21 years)	$27,888
Year 2	$28,747
Year 3	$29,605

Classification	Annual Salary From the beginning of the first Pay Period commencing on or after 26 February 2005
Officer Level 1—*continued*	
Year 4	$30,457
Year 5	$31,315
Year 6	$32,173
Year 7	$33,159
Year 8	$33,842
Year 9	$34,851
Officer Level 2	
Year 1	$36,059
Year 2	$36,986
Year 3	$37,960
Year 4	$38,989
Year 5	$40,066
Officer Level 3	
Year 1	$41,545
Year 2	$42,699
Year 3	$43,887
Year 4	$45,107
Officer Level 4	
Year 1	$46,780
Year 2	$48,091
Year 3	$49,440

2006 WAIRC 05488

ELECTORATE OFFICERS AWARD 1986

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE PRESIDENT OF THE LEGISLATIVE COUNCIL AND THE SPEAKER OF THE LEGISLATIVE ASSEMBLY
	-and-
	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER P E SCOTT
DATE	TUESDAY, 26 SEPTEMBER 2006
FILE NO	P 33 OF 2006
CITATION NO.	2006 WAIRC 05488

Result	Award varied

Order

HAVING heard Mr G Wibrow on behalf of The President of the Legislative Council and the Speaker of the Legislative Assembly and Mr M Finnegan 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 Electorate Officers Award 1986 (No. A 18 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 21st day of September 2006.

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

SCHEDULE

1. Clause 2. – Arrangement: Delete "12. Purchased Leave 48/52 Salary Arrangement" and insert the following in lieu thereof:

12. Purchased Leave 44/52 Salary Arrangement

2. Clause 6. – Definitions: Delete the definition for "The Association" and insert the following in lieu thereof:

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

3. Clause 12. - Purchased Leave 48/52 Salary Arrangement: Delete this number, title and clause and insert new number, title and clause as follows:

12. – 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.

4. Clause 14. – Annual Leave:

A. 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) 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) On written application, an employee shall be paid salary in advance when proceeding on annual leave.

(d) The provisions of this clause apply to relief employees, in accordance with Clause 49. - Relief Arrangements of this award.

B. Delete subclause (8) of this clause and insert the following in lieu thereof:

(8) Subject to paragraph (2)(b) of this clause, the employer may direct an employee to take accrued annual leave and may 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.

5. Clause 16. – Long Service Leave:

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

(1) Each employee who has completed a period of 7 years of continuous service 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. Directly 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.

6. Clause 19. – 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 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."

7. Clause 20. – 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 the employee is on leave of absence without pay shall not for any purpose be regarded as part of the period of service for that employee.

8. Clause 24. – 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.

9. Schedule G Expired General Agreement Salaries: Delete this schedule and insert the following in lieu thereof:

Year of Service	$ Per Annum
1st Year	$50,156
2nd Year	$51,562
3rd Year	$53,008
4th Year	$55,795
5th Year	$57,677
6th Year	$59,633
7th Year	$61,664

2006 WAIRC 05490

GOVERNMENT OFFICERS (SOCIAL TRAINERS) AWARD 1988

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DISABILITY SERVICES COMMISSION
	-and-
	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER P E SCOTT
DATE	TUESDAY, 26 SEPTEMBER 2006
FILE NO	P 35 OF 2006
CITATION NO.	2006 WAIRC 05490

Result Award varied

Order

HAVING heard Mr G Wibrow on behalf of the Disability Services Commission and Mr M Finnegan 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 (Social Trainers) Award 1988 (No. PSAA 20 of 1985) 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 21st day of September 2006.

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

SCHEDULE

1. Clause 2. – Arrangement: Delete "12. Purchased Leave 48/52 Salary Arrangement" and insert the following in lieu thereof:

12. Purchased Leave 44/52 Salary Arrangement

2. Clause 6. – Definitions: Delete this clause and insert the following in lieu thereof:

In this Award, the following expressions shall have the following meaning:-

"Accrued Day(s) Off" means the paid day's off accruing to an employee resulting from an entitlement to the 38 hour week as prescribed in Clause 17. - Hours of this Award.

"Casual Employee" means an employee engaged by the hour for a period not exceeding one calendar month in any period of engagement, as determined by the Employer.

"Client Assistant" means an employee who is appointed by the Employer to work in conjunction with Social Trainers and in accordance with well defined practices and procedures, and on appointment is to undertake to complete a course, as determined by the Employer, in both theoretical and practical components of their role.

"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.

"Employee" means a Government Officer within the meaning of the *Industrial Relations Act 1979.*

"Employer" shall mean the Director General of the Disability Services Commission.

"Metropolitan Area" means that area within a radius of fifty (50) kilometres from the Perth City Railway Station.

"Partner" means either spouse or de facto partner.

"Senior Social Trainer" means a Social Trainer who is appointed or promoted to a position designated as such by the Employer and is subordinate to a Social Trainer Supervisor provided that the minimum qualifications for appointment as a Senior Social Trainer will be the Certificate IV in Community Services (Disability Work) or equivalent.

"Senior Staff Educator" means a Social Trainer who:

(a) is engaged in co-ordinating the training of employees and the supervision of Staff Educators employed under this Award;

(b) is designated as such by the Employer;

(c) has completed the Certificate IV in Community Services (Disability Work) or equivalent; and

(d) has not less than two years experience as an appointed Social Trainer.

"Social Trainer" means:

(a) an employee who has completed not less than one year's continuous service as a Trainee Social Trainer, and who has the Certificate IV in Community Services (Disability Work) or equivalent and has made satisfactory progress on their Performance Development Program; or

(b) an employee who has completed Certificate IV in Community Services (Disability Work) or equivalent prior to employment has not less than six months continuous service as a Trainee Social Trainer and has made satisfactory progress on their Performance Development Program.

"Social Trainer Supervisors" means a Social Trainer who is appointed or promoted to a position designated as such by the Employer provided that the minimum qualifications for appointment as a Social Trainer Supervisor/Supervising Social Trainer will be the Certificate IV in Community Services (Disability Work) or equivalent.

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

"Staff Educator" means a Social Trainer who:

(a) is engaged in the training of employees employed under this Award;

(b) is designated as such by the Employer;

(c) has completed the Certificate IV in Community Services (Disability Work) or equivalent; and

(d) has not less than two years experience working as an appointed Social Trainer.

"Trainee Social Trainer" means an employee who has undertaken to complete Certificate IV in Community Services (Disability Work) to qualify as a Social Trainer.

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

3. Clause 10. – Casual Employment:

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

(a) The provisions of clauses 22, 23, 24, 25, 26, 27, 28, 29, 30, 36, 37, and 38 shall not apply to casual employees, with the exception of access to unpaid carer's leave.

B. Directly after subclause (4) of this clause and insert new subclause (5) as follows:

(5) Caring Responsibilities

(a) Subject to the evidentiary and notice requirements in Clause 26 – 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 12. - Purchased Leave 48/52 Salary Arrangement: Delete this number, title and clause and insert new number, title and clause as follows:

12. - 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 16. - 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 13. - Purchased Leave - Deferred Salary Arrangement: Directly after subclause (6) of this clause insert new 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 22. – Annual Leave:

A. 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) 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 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.

(d) On written application, an employee shall be paid salary in advance when proceeding on annual leave.

(e) The provisions of this clause do not apply to casual employees.

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 employee to take accrued annual leave and may 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 24. – Long Service Leave: Delete this clause and insert the following in lieu thereof:

(1) Each employee who has completed:

(a) A period of 7 years of continuous service shall be entitled to 13 weeks of long 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.

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

(3) Each employee is entitled to an additional 13 weeks of long service leave on full pay for each subsequent period of 7 years of continuous service.

(4) A part-time employee shall have the same entitlement to long service leave, as full time employees however payment made during such periods of long service leave shall be adjusted according to the hours worked by the employee during that accrual period.

(5) For the purpose of determining an employee's long service leave entitlement, the expression "continuous service" includes any period during which the employee is absent on full pay or part pay from duties but does not include:

(a) any period exceeding two weeks during which the employee is absent on leave without pay or unpaid parental leave, except where leave without pay is approved for the purpose of fulfilling an obligation by the Government of Western Australia to provide staff for a particular assignment external to the Public Sector of Western Australia;

(b) any period during which an employee is taking long service leave entitlement or any portion thereof except in the case of subclause (10) when the period excised will equate to a full entitlement of 13 weeks;

(c) any service by an employee who resigns, is dismissed or whose services are otherwise terminated other than service prior to such resignation, dismissal or termination when that prior service has actually entitled the employee to the long service leave under this clause;

(d) any period of service that was taken into account in ascertaining the amount of a lump sum payment in lieu of long service leave; or

(e) any service of a Cadet whilst undertaking full time studies.

(6) A long service leave entitlement, which fell due prior to March 16, 1988, amounted to three months. A long service leave entitlement, which falls due on or after that date, shall amount to thirteen weeks.

(7) Any Public Holiday or days in lieu of the repealed public service holidays occurring during an employees absence on long service leave shall be deemed to be a portion of the long service leave and extra days in lieu thereof shall not be granted.

(8) The Employer may direct an employee to take accrued long service leave and may 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.

(9) An employee who has elected to retire at or over the age of 55 years and who will complete not less than 12 months continuous service before the date of retirement may take application to the Employer to take pro-rata long service leave before the date of retirement, based on continuous service of a lesser period than that prescribed by this clause for a long service entitlement.

(10) Compaction of leave

(a) An employee who, during an accrual period was subject to variations in ordinary working hours or whose ordinary working hours during the accrual period are less than the employee's ordinary working hours at the time of commencement of long service leave, may elect to take a lesser period of long service leave calculated by converting the average ordinary working hours during the accrual period to the equivalent ordinary hours at the time of commencement of long service leave.

(b) Notwithstanding subclause (5) of this clause, an employee who has elected to compact an accrued entitlement to long service leave in accordance with paragraph (10)(a) of this clause, shall only take such leave in any period on full pay, and the period excised as "continuous service" shall be 13 weeks.

(11) Portability

(a) Where an employee was, immediately prior to being employed by the Employer employed in the service of:

· Any Western Australian State body or statutory authority, or

· The Commonwealth of Australia, or

· Any other State Government of Australia

and the period between the date when the employee ceased previous employment and the date of commencing employment does not exceed one week, that employee shall be entitled to long service leave determined in the following manner:

(i) the pro-rata portion of long service leave to which the employee would have been entitled up to the date of appointment shall be calculated in accordance with the provisions that applied to the previous employment referred to, but in calculating that period of pro-rata long service leave, any long service leave taken or any benefit granted in lieu of any such long service leave during that employment shall be deducted from any long service leave to which the employee may become entitled under this clause; and

(ii) the balance of the long service leave entitlement of the employee shall be calculated upon appointment to the Public Sector in accordance with the provisions of this clause.

(b) Nothing in this clause confers or shall be deemed to confer on any employee previously employed by the Commonwealth or by any other State of Australia any entitlement to a complete period of long service leave that accrued in the employee's favour prior to the date on which the employee commenced employment.

(12) Half Pay

Subject to the Employer's convenience, the Employer may approve an employee's application to take long service leave on full pay or half pay. In the case of long service leave which falls due on or after March 16, 1988 portions in excess of four weeks shall be in multiples of one week's entitlement.

When an employee proceeds on long service leave there will be no accrual towards an Accrued Day Off. Payment for long service leave will continue to be at the ordinary weekly rate.

(13) Lump Sum Payments

(a) On application to the employing authority, a lump sum payment for the money equivalent of any -

(i) Long service leave entitlement for continuous service as prescribed by subclause (1) and (2) of this clause shall be made to employee who resigns, retires, is retired or is dismissed or in respect of an officer who dies;

(ii) pro-rata long service leave based on continuous service of a lesser period than that prescribed by subclause (1) and (2) of this clause for a long service leave entitlement shall be made -

(aa) to an employee who retires at or over the age of 55 years or who is retired on the grounds of ill health, if the employee has completed not less than 12 months continuous service before the date of retirement;

(bb) to an employee who, not having resigned, is retired by the employing authority for any other cause, if the employee has completed not less than 3 years continuous service before the date of retirement;

(cc) in respect of an employee who dies, if the officer has completed not less than 12 months continuous service before the date of death.

(b) In the case of a deceased employee, payment shall be made to the estate of the employee unless the employee is survived by a legal dependant, approved by the Employer, in which case payment shall be made to the legal dependant.

(c) The calculation of the amount due for long service leave accrued and for pro-rata long service leave shall be made at the rate of salary of an employee at the date of retirement or resignation or death, whichever applies.

(14) 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.

(15) Cash Out of Accrued Long Service Leave Entitlement

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 27. – 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 officers.

"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) 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 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 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.

9. Clause 28. – 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) An employee who is absent on any form of leave without pay for less than a total of five days in any 12 month work cycle shall not have payment reduced when proceeding on Accrued Days Off.

(6) An employee who is absent on any form of leave without pay for a total of five days or more in any 12 month work cycle will have such period of leave added to the work cycle.

10. Clause 32. – 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 K – Expired General Agreement Salaries: Delete this Schedule and insert the following in lieu thereof:

Salaries

	Annual Salary From the beginning of the first pay period commencing on or after 26 February 2005		
LEVELS	SCHEDULE 1 BASE RATES FOR 76-HOUR FORTNIGHT WITH 12 ACCRUED DAYS OFF	**SCHEDULE 2** BASE RATES FOR 78-HOUR FORTNIGHT WITH 6 ACCRUED DAYS OFF	**SCHEDULE 3** BASE RATES FOR 80-HOUR FORTNIGHT WITH NO ACCRUED DAYS OFF
Level 1			
Under 17 yrs	$15,361	$15,765	$16,169
17 yrs	$17,952	$18,424	$18,897
18 yrs	$20,940	$21,490	$22,042

	Annual Salary From the beginning of the first pay period commencing on or after 26 February 2005		
LEVELS	SCHEDULE 1 BASE RATES FOR 76-HOUR FORTNIGHT WITH 12 ACCRUED DAYS OFF	**SCHEDULE 2** BASE RATES FOR 78-HOUR FORTNIGHT WITH 6 ACCRUED DAYS OFF	**SCHEDULE 3** BASE RATES FOR 80-HOUR FORTNIGHT WITH NO ACCRUED DAYS OFF
19 yrs	$24,238	$24,876	$25,514
20 yrs	$27,219	$27,934	$28,651
1.1	$29,901	$30,686	$31,474
1.2	$30,821	$31,633	$32,443
1.3	$31,741	$32,576	$33,412
1.4	$32,655	$33,515	$34,374
1.5	$33,575	$34,458	$35,342
1.6	$34,495	$35,402	$36,310
1.7	$35,552	$36,488	$37,423
1.8	$36,284	$37,239	$38,194
1.9	$37,366	$38,350	$39,334
LEVEL 2.1	$38,661	$39,679	$40,697
2.2	$39,655	$40,698	$41,743
2.3	$40,699	$41,770	$42,842
2.4	$41,803	$42,903	$44,003
2.5	$42,957	$44,087	$45,217
LEVEL 3.1	$44,543	$45,715	$46,887
3.2	$45,780	$46,984	$48,189
3.3	$47,054	$48,291	$49,530
3.4	$48,362	$49,635	$50,907
LEVEL 4.1	$50,156	$51,476	$52,797
4.2	$51,562	$52,919	$54,275
4.3	$53,008	$54,402	$55,798

2006 WAIRC 05485

GRAYLANDS SELBY-LEMNOS AND SPECIAL CARE HEALTH SERVICES AWARD 1999

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MINISTER OF HEALTH INCORPORATED AS THE BOARD OF GRAYLANDS SELBY-LEMNOS AND SPECIAL CARE HEALTH SERVICES
	-and-
	THE CIVIL SERVICE ASSOCATION OF WESTERN AUSTRALIA INCORPORATED
	-and-
	HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS)
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER P E SCOTT
DATE	TUESDAY, 26 SEPTEMBER 2006
FILE NO	P 32 OF 2006
CITATION NO.	2006 WAIRC 05485

Result Award varied

Order

HAVING heard Mr G Wibrow on behalf of the Minister for Health, Mr M Finnegan on behalf of the Civil Service Association of Western Australia Incorporated and Ms C Thomas on behalf of the Health Services Union of Western Australia (Union of Workers), and by consent, the Public Service Arbitrator, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders:

THAT the Graylands Selby-Lemnos and Special Care Health Services Award 1999 (No. PSAA 1 of 1999) 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 21st day of September 2006.

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

SCHEDULE

1. Clause 2. – Arrangement: Delete "23. Maternity Leave" and insert the following in lieu thereof:

23. Parental Leave

2. 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 published in accordance with Section 19 of the Public Service Act 1978.

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

"Employer" means the Metropolitan Health Service Board.

"GSL" means at Graylands Selby-Lemnos and Special Care Health Services

"Headquarters" means the place in which the principal work of an officer is carried out, as defined by the Employer.

"HSU" means the Health Services Union of Western Australia (Union of Workers)

"Metropolitan Area" means that area within a radius of fifty (50) kilometres from the Perth City Railway Station.

"Officer" means a Government officer within the meaning of the Industrial Relations Act 1979.

"Unions" means the Civil Service Association of Western Australia (Inc) and the Health Services Union of Western Australia (Union of Workers)

3. Clause 19. – 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 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 employee to take accrued annual leave and may 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.

4. Clause 21. – 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 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. Directly after subclause (11) insert new subclauses (12) and (13) as follows:

(12) 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.

(13) 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.

5. Clause 23. – Maternity Leave: Delete the number, title and clause and insert number, new title and clause as follows:

23. - PARENTAL LEAVE

(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 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 (2) - Termination of Employment 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 24. – 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) A temporary officer or an officer on a fixed term appointment may not be granted leave without pay for any period beyond that officer's approved period of engagement.

(5) Leave Without Pay for Full Time Study

The employer may grant an officer leave without pay to undertake full time study, subject to a yearly review of satisfactory performance.

(a) The course of study is directly related to the officers' official duties; or

(b) The course is not available on a part-time basis; or

(c) There is an identified shortage of individuals with skills in the area addressed by the particular course of study; or

(d) It is critical to the continued operation of the department for the officer to undertake the particular course of study.

Leave without pay for this purpose shall not count as qualifying service for leave purposes.

(6) Leave Without Pay for Australian Institute of Sport Scholarships

Subject to the provisions of subclause (2) of this clause, the employer may grant an officer who has been awarded a sporting scholarship by the Australian Institute of Sport, leave without pay.

Leave without pay for this purpose shall count as qualifying service for all purposes except annual leave.

AWARDS/AGREEMENTS—Variation of—

2006 WAIRC 05565

ELECTRICAL CONTRACTING INDUSTRY AWARD R 22 OF 1978

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING & ELECTRICAL DIVISION, WA BRANCH

APPLICANT

-v-

ELECTRICAL CONTRACTORS ASSOCIATION OF WESTERN AUSTRALIA (UNION OF EMPLOYERS) AND OTHERS

RESPONDENTS

CORAM	SENIOR COMMISSIONER J F GREGOR
DATE	TUESDAY, 10 OCTOBER 2006
FILE NO/S	APPL 69 OF 2006
CITATION NO.	2006 WAIRC 05565

Result	Award varied
Representation	
Applicant	Mr L Edmonds (of Counsel) on behalf of the Applicant Union
Respondent	Ms Jessica Price (as Agent) on behalf of the Respondents

Order

HAVING heard Mr L. Edmonds, of Counsel, who appeared on behalf of the Applicant Union and Ms Jessica Price, as Agent, on behalf of the Respondents, and by consent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders:

THAT the Electrical Contracting Industry Award R212 of 1978 be varied in accordance with the following Schedule and that such variation shall have effect commencing from the first pay period on or after 10 October 2006.

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

SCHEDULE

1. Clause 6. – Safety Footwear: Delete subclause (1) of this clause and insert in lieu thereof the following:

(1) On "construction work" a payment of **12 cents** for each hour worked shall be paid to all employees to compensate them for the requirement to wear approved safety footwear which the employees are to ensure are maintained in sound condition.

2. Clause 12. – Overtime: Delete paragraph (e) of subclause (2) and insert in lieu thereof the following:

(e) (i) An employee required to work overtime for more than two hours without being notified on the previous day or earlier that they will be so required to work overtime shall be supplied with a meal by the employer or be paid **$10.35** for such meal and for a second or subsequent meal if so required.

(ii) No such payments shall be made to any employee living in the same locality as their place of work who can reasonably return home for such meals.

(iii) If an employee to whom subparagraph (i) of paragraph (e) of subclause (2) hereof applies has, as a consequence of the notice referred to in that paragraph, provided themselves with a meal or meals and is not required to work overtime or is required to work less overtime than the period notified, they shall be paid for each meal provided and not required, **$10.35**.

3. Clause 18. – Special Rates and Provisions:

A. Delete subclauses (1), (2), (3), (4) and (5) and insert in lieu thereof the following:

(1) **Height Money**: An employee shall be paid an allowance of **$2.15** for each day on which they work at a height of 15.5 metres or more above the nearest horizontal plane, but this provision does not apply to linespersons.

(2) **Dirt Money**: An employee shall be paid an allowance of **44 cents** per hour when engaged on work of an unusually dirty nature where clothes are necessarily unduly soiled or damaged or boots are unduly damaged by the nature of the work done.

(3) **Grain Dust**: Where any dispute arises at a bulk grain handling installation due to the presence of grain dust in the atmosphere and the Board of Reference determines that employees employed under this award are unduly affected by that dust, the Board may, subject to such conditions as it deems fit to impose, fix an allowance or allowances not exceeding **75 cents** per hour.

(4) **Confined Space**: An employee shall be paid an allowance of **53 cents** per hour when, because of the dimensions of the compartment or space in which they are working, the employee is required to work in a stooped or otherwise cramped position or without proper ventilation.

(5) **Diesel Engine Ships**: The provisions of subclauses (2) and (4) of this Clause do not apply to an employee when they are engaged on work below the floor plates in diesel engine ships, but the employee shall be paid an allowance of **75 cents** per hour whilst so engaged.

B. Delete subclause (7) and insert in lieu thereof the following:

(7) **Hot Work**: An employee shall be paid an allowance of **44 cents** per hour when they work in the shade in any place where the temperature is raised by artificial means to between 46.1 and 54.4 degrees Celsius.

C. Delete subclauses (9), (10), (11) and (12) and insert in lieu thereof the following:

(9) **Percussion Tools**: An employee shall be paid an allowance of **27 cents** per hour when working a pneumatic riveter of the percussion type and other pneumatic tools of the percussion type.

(10) **Chemical, Artificial Manure and Cement Works**: An employee other than a general labourer, in chemical, artificial manure and cement works shall, in respect of all work done in and around the plant outside the machine shop, be paid an allowance calculated at the rate of **$11.10** per week. The allowance shall be paid during overtime but shall not be subject to penalty additions. An employee receiving this allowance is not entitled to any other allowance under this Clause.

(11) **Abattoirs**: An employee employed in and about an abattoir shall be paid an allowance calculated at the rate of **$14.70** per week. The allowance shall be paid during overtime but shall not be subject to penalty additions. An employee receiving this allowance is not entitled to any other allowance under this Clause.

(12) **Phosphate Ships**: An employee shall be paid an allowance of **66 cents** for each hour they work in the holds 'tween decks of ships which, immediately prior to such work, have carried phosphatic rock but this subclause only applies if and for as long as the holds and 'tween decks are not cleaned down.

D. Delete subclause (19) and insert in lieu thereof the following:

(19) An employee holding either a Third Year First Aid Medallion of the St. John Ambulance Association or a "C" Standard Senior First Aid Certificate of the Australian Red Cross Society, appointed by the employer to perform first aid duties shall be paid $8.80 per week in addition to their ordinary rate.

E. Delete subclause (21) and insert in lieu thereof the following:

(21) **Nominee**: A licensed electrical installer or fitter who acts as a nominee for an electrical contractor shall be paid an allowance of **$54.60** per week.

4. Clause 19. – Car Allowance: Delete this Title and Clause and insert in lieu thereof the following:

19. – CAR ALLOWANCE

Where an employee is required and authorised to use their own motor vehicle in the course of their duties the employee shall be paid an allowance of **70.9 cents** per kilometre travelled. Notwithstanding anything contained in this Clause the employer and the employee may make any other arrangement as to car allowance not less favourable to the employee.

5. Clause 20. – Allowance for Travelling and Employment in Construction Work: Delete paragraph (a) of subclause (2) and insert in lieu thereof the following:

(a) On jobs measured by radius from the General Post Office, Perth situated within the area of:

		Per Day $
(i)	Up to and including 50 kilometre radius	15.30
	OR	
(ii)	Over 50 kilometres up to and including 60 kilometre radius	19.40
	OR	

(iii)	Over 60 kilometres up to and including 75 kilometre radius	29.80
	OR	
(iv)	Over 75 kilometres up to and including 90 kilometre radius	42.15
	OR	
(v)	Over 90 kilometres up to and including 105 kilometre radius	54.65

6. Clause 21. – Distant Work:

A. Delete subclause (6) and insert in lieu thereof the following:

(6) An employee to whom the provisions of subclause (1) of this Clause apply shall be paid an allowance of **$29.95** for any weekend that they returns to their home from the job but only if –

(a) The employee advises the employer or their agent of their intention no later than the Tuesday immediately preceding the weekend in which the employee so returns;

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

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

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

B Delete subclause (9) and insert in lieu thereof the following:

(9) Where an employee, supplied with the board and lodging by their employer, is required to live more than 800 metres from the job the employee shall be provided with suitable transport to and from that job or be paid an allowance of **$13.25** per day provided that where the time actually spent in travelling either to or from the job exceeds 20 minutes, that excess travelling time shall be paid for at ordinary rates whether or not suitable transport is supplied by the employer.

7. Clause 27. – Grievance Procedure and Special Allowance: Delete subclause (3) of this Clause and insert in lieu thereof the following:

(3) (a) Subject to paragraph (e) of this subclause, a special allowance of **$27.10** per week shall be paid as a flat amount each week except where direct action takes place.

(b) Provided that a general combined union meeting called by the Unions W.A., or any absence declared by the Commission under Section 44 as being an authorised absence, shall not be regarded as non-adherence to the disputes procedure Clause or affect the payment of this allowance.

(c) In the event of the need for a meeting not covered by the circumstances outlined by the above, a Union Official shall give 24 hours' notice to the employer and the reason for the meeting and **$27.10** shall be paid.

(d) Any time which an employee is absent from work on annual leave, public holidays, bereavement leave or paid sick leave shall not affect the payment of this allowance.

(e) An apprentice shall be paid a percentage of **$27.10** being the percentage which appears against their year of apprenticeship set out in subclause (4) of the First Schedule - Wages.

8. Clause 30. – Special Provisions – Western Power: Delete subclauses (2), (3), (4), (5) and (6) and insert in lieu thereof the following:

(2) In addition to the wage otherwise payable to an employee pursuant to the provisions of this award an employee (other than an apprentice) shall be paid:

(a) **$1.91** per hour for each hour worked if employed at Muja;

(b) **$1.14** per hour for each hour worked if employed at Kwinana;

(3) (a) An employee to whom Clause 20. - Allowance for Travelling and Employment in Construction Work applies and who is engaged on construction work at Muja shall be paid:

(i) An allowance of **$15.30** per day if the employee resides within a radius of 50 kilometres from the Muja Power Station;

(ii) An allowance of **$41.35** per day if the employee resides outside that radius;

in lieu of the allowance prescribed in the said Clause.

(b) Where transport to and from the job is supplied by the employer from and to a place mutually agreed upon between the employer and the employee half the above rates shall be paid provided that the conveyance used for such transport is equipped with suitable seating and weather proof covering.

(4) In addition to the allowance payable pursuant to subclause (6) of Clause 21. - Distant Work of this award an employee to whom that Clause applies shall be paid **$26.05** on each occasion upon which the employee returns home at the weekend but only if -

(a) The employee has completed three months' continuous service with the employer;

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

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

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

and such payment shall be deemed to compensate for a periodical return home at the employer's expense.

(5) An employee to whom Clause 21. - Distant Work of this award applied and who proceeds to construction work at Muja from their home where located within a radius of 50 kilometres from the General Post Office, Perth -

(a) Shall be paid an amount of **$70.25** and for three hours at ordinary rates in lieu of the expenses and payment prescribed in subclause (3) of the said Clause; and

(b) In lieu of the provisions of subclause (4) of the said Clause, shall be paid **$70.25** and for three hours at ordinary rates when their services terminate if the employee has completed three months continuous service;

and the provisions of subclause (3) and subclause (4) of Clause 21. - Distant Work shall not apply to such an employee.

(6) (a) An employee to whom the provisions of Clause 21. - Distant Work of this Award, applies who work at Muja and who elects not to live in Construction Camp Accommodation shall, subject to paragraph (b) of this subclause, be paid a living-out allowance at the rate of **$356.50** per week to meet the expenses reasonably incurred by the employee for board and lodging.

(b) (i) The allowance prescribed in paragraph (a) shall only apply to an employee while they continue to live with their spouse (including de facto partner) in accommodation provided by the employee.

(ii) The accommodation shall be of a reasonable standard.

(iii) The employee shall continue to maintain their original residence.

(iv) The employee shall satisfy the employer, upon request, that their circumstances meet the requirements of this subclause.

(v) Any dispute as to the application of this Clause shall be subject to discussion between the employer and the Union and, failing agreement, shall be referred to a Board of Reference for determination.

(c) Provided that the provisions of subclause (6) of Clause 21. - Distant Work of this Award shall not apply.

9. First Schedule – Wages:

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

(3) Leading Hands - In addition to the appropriate rates shown in subclause (2) hereof a leading hand shall be paid -

(a)	If placed in charge of not less than three and not more than ten other employees	$22.90
(b)	If placed in charge of more than ten and not more than twenty other employees	$34.90
(c)	If placed in charge of more than twenty other employees	$45.00

B. Delete subclauses (5) and (6) of this Clause and insert in lieu thereof the following:

(5) **Tool Allowance**:

(a) In accordance with the provisions of subclause (20) of Clause 18. – Special Rates and Provisions of this award the tool allowance to be paid is:

(i) **$13.10** per week to such tradesperson, or

(ii) In the case of an apprentice a percentage of **$13.10** being the percentage which appears against the apprentice's year of apprenticeship set out in subclause (4) of this schedule.

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

(6) **Construction Allowance**:

(a) In addition to the appropriate rates of pay prescribed in this Clause an employee shall be paid:

(i) **$40.60** per week if the employee is engaged on the construction of a large industrial undertaking or any large civil engineering project.

(ii) **$36.60** per week if the employee is engaged on a multi-storeyed building but only until the exterior walls have been erected and the windows completed and a lift made available to carry the employee between the ground floor and the floor upon which the employee is required to work. A multi-storeyed building is a building which, when completed, will consist of at least five storeys.

(iii) **$21.50** per week if the employee is engaged otherwise on construction work falling within the definition of construction work in Clause 5. - Definitions of this Award.

(b) Any dispute as to which of the aforesaid allowances applies to particular work shall be determined by the Board of Reference.

C. Delete subclauses (9) and (10) of this Clause and insert in lieu thereof:

(9) **Licence Allowance**:

A tradesperson who holds and in the course of their employment may be required to use a current "A" Grade or "B" Grade licence issued pursuant to the relevant regulation in force at the date of this Award under the Electricity Act, 1945, shall be paid **$19.30** per week.

(10) **Commissioning Allowances**:

An "Electrician Commissioning" as defined shall be paid at the rate of **$29.50** per week in addition to rates prescribed in this schedule.

2006 WAIRC 03999

IRON ORE PRODUCTION & PROCESSING (BHP BILLITON IRON ORE PTY LTD) AWARD 2002

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING & KINDRED INDUSTRIES UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH AND OTHERS
	APPLICANTS
	-v-
	BHP BILLITON IRON ORE PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S WOOD
HEARD	MONDAY, 13 MARCH 2006
DELIVERED	MONDAY, 20 MARCH 2006
FILE NO.	APPL 338 OF 2005
CITATION NO.	2006 WAIRC 03999

CatchWords	Matter remitted by Full Bench – s.32 orders sought – Work Choices legislation
Result	Application for section 32 orders not granted
Representation	
Applicants	Mr D Schapper of Counsel
Respondent	Mr R Lilburne of Counsel

Reasons for Decision

1 On 3 March 2006 the Full Bench ordered that the matters subject of appeal on grounds 4.1, 4.2, 4.3, 4.4, 4.7(a) and (b), 4.8, 4.9 and 6 be remitted to the Commissioner at first instance for further hearing and determination in accordance with the reasons of the Full Bench.

2 Counsel for the applicant unions advised, by letter dated 8 March 2006, that at conference on 13 March 2006 his clients would seek an order pursuant to s.32 of the Act in the following terms:

> "1. The minimum annual base salary inclusive of shift allowance for a train controller competent to operate at least one board in the respondent's rail system shall be not less than $145,000.00
>
> 2. The minimum annual base salary inclusive of shift allowance for a locomotive driver in the respondent's rail system who is party to an expired workplace agreement shall be not less than $150,729.00
>
> 3. These orders shall have immediate effect and shall continue until further order."

3 Counsel for the applicants then outlined the bases for seeking such an order. Essentially the arguments are, as enunciated also at conference, that the applicants have attempted to discuss the pay rates for Train Controllers and WPA drivers with Mr Ritchie for the respondent. The applicants are concerned that they have had no indication of the respondent's attitude, other than Mr Ritchie is unable to decide what to do. The applicants complain that the respondent is delaying resolution of the application to ensure the timeline runs past the introduction of the Federal Work Choices legislation. At which time the application will arguably be defunct. The proposition being it would seem that the Commission's powers to deal with matters involving constitutional corporations are to be negated. The remuneration issues will then 'fall to be determined unilaterally and unreviewably by the respondent'. The applicants submit that the proposed order will provide a 'significant incentive' for the respondent to conciliate and will enable the conciliation and/or arbitration to resolve the matter. The orders would be a 'circuit breaker' for the discussions. The applicants submit that if the assessment of salaries or remuneration is undertaken properly then, in light of the evidence to date, the comparison with other classifications, compels the conclusion that Train Controllers are significantly underpaid. Mr Schapper compared the salaries of various classifications and submitted that the Train Controllers do not receive the operational component one payment of approximately $23,000 per annum, unlike several comparable classifications.

4 Counsel for the respondent, by letter dated 10 March 2006, advised that the respondent was reviewing the Full Bench decision 'as to its implications and possible grounds of appeal'. The respondent is also reviewing the evidence at first hearing to ascertain whether further evidence should be led. The respondent stated, "In all circumstances our client does not consider that it is appropriate for the Commission to hear your client's application for orders in this matter but rather, subject to any appeal by our client, should program the matter for hearing and determination as ordered by the Full Bench in FBA 19 of 2005."

5 At conference Counsel for the respondent queried the grounds, within s.32, upon which the applicant relied. The respondent submitted that there were insufficient grounds to make such an order, even if such an order could be made in the circumstances of the matter having been remitted. The matters referred are very limited. The respondent submitted that it was difficult to consider conciliation in the circumstances and rejected the position put by the applicants in conciliation. The applicants seek increased salaries above those in the application and do not include a range of salaries for Train Controllers. The respondent submitted that there was no basis for s.32 orders to issue. The merits of the matters need to be re-heard and the hearing should not be pre-empted by such orders. The respondent is reviewing the evidence, however, the review of Train Controllers salaries is not contemplated other than by way of the normal annual review of salaries.

6 The matter has been remitted to me by the Full Bench for rehearing having regard to their reasons. Notwithstanding this process, in my view, the application is now again before me and I am able to have resort to my full powers to resolve the matter. This includes the issuance of orders, pursuant to s.32 of the Act if I consider, in this instance, that the direction or order will "enable conciliation or arbitration to resolve the matter" (s.32(8)(a(ii)). This is the ground within the legislation which is relied upon by the applicants. This function may be performed even if "arbitration functions are being or have been performed" (s.32A(2)).

7 Having heard the parties it is my considered view that the prospect of conciliation resolving these matters is remote at this time. The matters, in brief, are the salaries of WPA drivers and Train Controllers and the coverage of those categories of employees under the award. The applicants seek salaries for those two categories of employees above the level of salaries in the application. The applicants have, since conference, formally sought to amend their application. The respondent has not objected to the amendment of the application, but continues to oppose the application. I can see no prospect of the matter being resolved by conciliation at this time.

8 The nature of the applicants' submissions then is that the order should issue to be a 'circuit breaker' for discussions or because the Work Choices legislation may overtake the matter, and the applicants' members then, without such orders, would be denied redress in the form of coverage by the award and salary increases. I am not convinced that such orders can be seen as, or would be, a 'circuit breaker'. It is also not clear to me how the orders sought could properly be characterised as interim pending arbitration if the intention is that the orders should be made because new legislation may otherwise overtake the application. The essence of this point being that the matters remitted may then never be finally determined. Under this scenario then the orders would seemingly remain in place for a period of at least three years under the new legislative provisions.

9 I have yet to fully digest or hear any submission as to the actual effect of the Work Choices legislation. Since the conference the regulations have been made public. The proper task in my view, having considered the submission of the parties, is to seek to hear the parties as soon as practicable as to the merits of the matters remitted. These matters should not be pre-determined by the making of the s.32 orders as sought. In summary, I would deny the application for the orders pursuant to s.32.

2006 WAIRC 05467

IRON ORE PRODUCTION & PROCESSING (BHP BILLITON IRON ORE PTY LTD) AWARD 2002

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING & KINDRED INDUSTRIES UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH AND OTHERS
	APPLICANTS
	-v-
	BHP BILLITON IRON ORE PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S WOOD
HEARD	MONDAY, 29 MAY 2006, TUESDAY, 30 MAY 2006, THURSDAY, 17 AUGUST 2006, TUESDAY, 29 AUGUST 2006, THURSDAY, 31 AUGUST 2006, MONDAY, 4 SEPTEMBER 2006
DELIVERED	FRIDAY, 22 SEPTEMBER 2006
FILE NO.	APPL 338 OF 2005
CITATION NO.	2006 WAIRC 05467

CatchWords	Award variation - Matter remitted from Full Bench – Amended Application -Workplace Agreement Drivers - Train Controllers, Locomotive Drivers, Supervisors, Crew Development Officer, Co-ordinator - Comparison of Duties, Responsibilities and Remuneration - Wage Fixing Principles - Salary increases sought - Industrial Relations Act 1979 (WA) s.40 - Workplace Agreements Act 1993
Result	Award varied to incorporate WPA drivers and Train Controllers
Representation	
Applicant	Mr D Schapper of Counsel
Respondent	Mr H Dixon of Senior Counsel and with him Ms K O'Rourke of Counsel

Reasons for Decision

1 This matter comes to the Commission on remittal. The remaining issues were heard on 29 and 30 May 2006. The parties requested that the matter then be adjourned pending the Industrial Appeal Court (IAC) decision, to allow for further submission and perhaps evidence. Final submissions were received from the applicant on 17 and 31 August 2006, and from the respondent on 29 August and 4 September 2006.

2 The applicant, by letter dated 13 March 2006, sought to amend the application in the following terms:

"My client amends its application to claim as follows:

1. In Schedule I — Aggregate Wages **vary** the denotation "Level 5" under the heading "CFMEU LOCO" to read

   Level 5 (including WPA Fly in Fly out drivers)

2. At the end of Schedule I — Aggregate Wages **add** the following:

   Train Controller — not less than $145,000 per annum. This aggregate wage shall be in respect of base salary and shift allowance only. All other existing terms and conditions of employment of train controllers shall be unaltered by the insertion of this clause in the Award.

3. At the end of Schedule III — Award Classifications **add** the following:

   6. Train controller — A person at this level will be competent to perform train control duties over all or any part of the Company's rail road.

4. **Add** new subparagraphs (4a) and (4b) to clause 11.— Hours of Work as follows:

   (4a) The ordinary hours of train controllers shall be an average of 84 per fortnight which shall be worked in shifts of 12 hours on a continuous shift basis.

   (4b) The ordinary hours of WPA drivers shall be worked in 12 hour shifts with 12 shifts on and 10 shifts off. The aggregate wage for WPA drivers referred to in Schedule I shall be in respect of base salary and shift allowance only All other existing terms and conditions of employment of WPA drivers shall be unaltered by the insertion of this clause in the Award and by the inclusion of WPA drivers in Schedule I."

3 The application to amend was dealt with at hearing on 29 May 2006 (Transcript p.458-460). Mr Dixon sought to confirm that the amendments represented the total variations sought to the Award. Mr Schapper confirmed this and the respondent raised no objection to the amendment being granted. Leave was granted.

4 Following decisions of the Full Bench and Industrial Appeal Court (IAC) the remitted matters are described by the grounds of appeal which were upheld. These are as follows:

"The Commission erred in refusing to add the claimed classification of "train controller" to the award in that

4.7(a) it failed or refused to make any judgment, as the case required it to do, about the fairness of the salary and other remuneration of train controllers compared to the salaries and other remuneration of all other roles, not limited to locomotive drivers, within the rail department; and

4.7(b) had it performed the task it was required to do as set out in paragraph 4.7(a), it could not have come to any conclusion other than that train controllers were grossly underpaid, by reference to both salary and overall remuneration, and should be brought under the award to correct that unfairness; and

4.8 having identified the unfairness of the train controllers' salary being unilaterally and arbitrarily capped by the respondent, the Commission then did nothing to remedy that unfairness

4.9 it wrongly fettered the exercise of its discretion by appearing to regard a change in basic skills and responsibilities of train controllers as the essential and sole pre-requisite to either bringing them under the award or awarding them a pay increase. In so doing the Commission wrongly excluded consideration of, inter alia, the following relevant factors from the exercise of its discretion

- the salaries and remuneration paid to other employees within the rail department and
- the nature and comparative significance of the respective roles and responsibilities of other employees within the rail department
- the very substantial and ongoing increase in work intensity endured by train controllers

Claim in respect of WPA drivers

6. The Commission erred in law in holding that the Award did not extend or apply to the WPA drivers. On its proper interpretation the Award did so apply. Consequently, the Commission erred in its assessment as to the effect of s4H of the Workplace Agreements Act."

5 The IAC found that the Award applied in law to the WPA drivers and that 'remuneration' as opposed to simply 'salary' was the appropriate benefit for comparison between the classifications in the Rail department.

WPA/FIFO Drivers

6 The IAC determined that the WPA/FIFO drivers are already legally covered by the award. Pullin J, with whom the other members agreed, stated:

> "25 …… The award says that it extends to "employees employed by the company in the classifications mentioned in this award". The word "employees" is susceptible of no ambiguity and no attempt has been made to argue that the three train drivers do not fit within the classification of Level 5 drivers. No ambiguity emerges from a consideration of the context in which the award was made at the time. It is true that no reference was made to workplace agreement train drivers or their conditions of employment, but the parties must be taken to have known that workplace agreement train drivers were not covered by the award only because of s 6 of the *Workplace Agreements Act*. It must have been quite obvious to all concerned at the time the award was made, that if workplace agreement train drivers ceased to be subject to a workplace agreement, then the award would extend to them. In those circumstances the conditions in the award would prevail and not the conditions in any contract between BHP and the employee. See s 37 and s 114 of the *Industrial Relations Act 1979.*
>
> 26 In my opinion, construing the award as a whole and giving the words their ordinary usage, it is clear that the award was intended to extend to all employees of BHP who fitted within the classifications in the award. I detect no ambiguity and the ordinary sense of the words do not have to be modified to avoid any absurdity, repugnance or inconsistency within the award. The three train drivers are "employees employed by the company" in the classification of a Level 5 driver."

7 Mr Schapper submitted that the Full Bench, having decided that the Award applies, the question is now what variations, if any, need to be made to the Award. Mr Schapper in further submissions following the IAC decision submitted that, "the award applies to all WPA employees including locomotive drivers and has so applied since the expiry of each of the WPAs or August 2003, whichever is the earlier". He stated that, "the only significant question is whether the FIFO rate should be at the existing level 5 rate or some other rate", and, that:

> "WPA drivers should receive the same base salary as the award driver because:
>
> (a) their WPA terms and conditions of employment are to be preserved under the union's proposed variation to the award
>
> (b) those terms and conditions are equivalent to those of the AWA drivers and give greater flexibility in deployment than the award driver
>
> (c) Payment of the award rate will properly reflect the "AWA differential" identified in previous CCS decisions. Although the rate will be the same as the award driver, the differential receives recognition by reason of the WPA drivers' slightly less hours of work."

8 He submitted further that, "the award requires variation to allow them to work FIFO". The applicant also sought, "For the avoidance of doubt, the variation of the award to include WPA drivers should expressly continue the leave entitlement at the 9.5 rate". The applicant in the application and throughout the hearing maintained that, except for salary, all other conditions enjoyed by these drivers should remain the same.

9 Mr Dixon for the respondent at hearing submitted:

> "What is now required is an examination because the award extends to them, but the award deals with a different working arrangement or regime, is if the appeal fails and you are obliged to do what the Full Bench directed you to do then, in our respectful submission, in order to grant the protection of the award or to sustain the protection of the award on the basis that these employees are - - that the award already "extends" to them would be to insert into the award a provision which covers - - includes them in the classification of a level 5 driver and makes express provision for their present rate of pay to be paid to them and a commensurate change that that would be in respect of the number of hours that they work and the shift arrangements that they work.
>
> Nothing further needs happen - - need happen, and there's nothing been put to you which would justify an increase now in wages when it was earlier rejected, and even if one accepts the view that you must re-exercise your discretion in respect of this matter, we would invite you to exercise it in precisely the same way because you were entitled, in looking at the relevant comparisons, to form the view that a salary increase was not justified.
>
> So in respect of the WPA drivers, if you follow the Full Bench approach, then we would effectively invite the Commission to maintain the status quo by the insertion of those limited provisions into the agreement and incorporate the rate for the WPA hours. In our respectful submission, it would be contrary to section 26, and there's no substantial merit for an increase to be granted" (Transcript p.528-529).

10 The respondent submitted in final submissions, following the IAC decision, that the Full Bench has not remitted to the Commission, "any issue in relation to varying the Award in relation to locomotive drivers on expired WPAs". They submitted that the only finding of the Commission regarding WPA drivers which was overturned was that the Award did not cover these drivers. They stated that Ground 7 of the appeal, which related to salary, was dismissed. Hence, "there is no issue before the Commission in relation to WPA locomotive drivers". There was no further evidence adduced by the applicant on remittal.

They submitted that the IAC decision means that, "the terms of the Award apply equally to WPA locomotive drivers as they do to all other locomotive drivers of the Company". The respondent then went on to emphasise the words of Pullin J that, "the conditions of the award would prevail and not the conditions in any contract between BHP and the employee".

11 In my view, the rationale of the applicant in bringing the application, apart from a desire to achieve a pay increase, is displayed in Schedule 3 of the application. The applicant stated, "Protection of those employees by way of extension of the award to them is required as, in any event, it is arguable that the award applies to them anyway." The later argument has been decided. It was the subject of Ground 6 of the appeal to the Full Bench. The IAC upheld the majority view of the Full Bench. As a matter of law then the Award applies, and has applied, to these WPA/FIFO drivers. Ground 7 of the applicant's appeal to the Full Bench concerned the salary for WPA drivers. It was not remitted to me after appeal. Kenner C and Harrison C each stated that given their reasons in relation to Ground 6 it was not necessary to then deal with Ground 7. I can only presume this means that all the terms and conditions of the Award apply, and apply in their totality. Certainly that would seem to be the case having regard to paragraph 25 of the IAC's decision.

12 Therefore, the primary submission of the respondent would appear to be correct. It would appear to be unnecessary to make any variation to the Award to incorporate WPA drivers as they are already covered legally by the Award. Given the decision of the IAC that the conditions of the Award prevail over those in the previous WPA contract, and this must include salary also, it would appear there is no more for the Commission to do on remittal with respect to WPA drivers. The same is true of the amendment sought for annual leave. The terms of the Award apply.

13 Having said that, the remittal includes reference to WPA drivers. The issue of WPA drivers is back before me. I can only assume, because it is not clear from the Full Bench decision, that the matter has been referred back to me to consider whether any amendment to the Award might be necessary because all parties now know that these employees are covered by the Award. I have therefore considered the further submissions of the applicant which essentially are designed to achieve a salary increase for WPA drivers, to equate them to Award drivers, whilst leaving all their other conditions unchanged, except for annual leave which is claimed belatedly.

14 I am not minded in favour of the applicant's submission for an increased salary; having regard for the fact that the applicant seeks that the WPA drivers retain all their pre-existing terms and conditions. There is nothing new presented by the applicant which persuades me to vary my thinking on salary for WPA drivers as expressed in my earlier decision. The table in [Exhibit R7; Tab 16] does not highlight a deficiency in remuneration for these drivers compared to the Level 5 Award Drivers. I am not persuaded that effectively no regard should be had for the difference in hours between WPA and Award drivers because they are said to display flexibilities similar to AWA drivers.

15 What does concern me is the fact that these drivers have been on fly in/fly out arrangements for sometime and the Award does not include such arrangements. The Award has operated for some years and until this application it would seem that neither party contemplated seriously that the Award did apply to WPA drivers. Given the history then of these drivers, and the manner in which this application has progressed, it could potentially place these drivers in a difficult position if they could no longer access fly in/fly out arrangements.

16 The evidence is that their roster and hours operate differently to other drivers under the Award. The roster and hours are conducive, in the main, to fitting within flights schedules at either end of the driver's rotation. One driver resides in Victoria. Whilst I do not consider that any change to salary is warranted for the reasons expressed in my previous decision, I am concerned by paragraph 10(b) of the respondent's further submissions which says that the effect of the variation sought by the applicant would be to, "allow WPA locomotive drives to remain FIFO, an option not currently available to other locomotive drivers employed under the Award". This suggests, in my mind, that the drivers may be made to cease their FIFO arrangements. The drivers could of course move to AWAs, as recognised in the decision of the acting Hon. President. However, the drivers through their union have sought the protection of the Award and it has been determined that the Award does apply.

17 Having regard then for my obligations under s.26 of the Act, I consider that either the option is to discontinue the application as it relates to WPA drivers and leave it to the parties to sort out the practicalities of how the Award applies and has applied. The other option is to make an amendment to the Award to protect all the terms and conditions of WPA drivers (including salary) as they have applied prior to this application. Such an approach would quarantine the arrangements of these drivers and ensure that they maintain their FIFO arrangements, but enjoy Award coverage.

18 I consider the latter course of action is warranted. Therefore, the amendment to the Award for WPA should be effected by the addition of a new Schedule IA to the Award. The arrangements clause will also need to be amended to reflect this change. The full order is covered at the conclusion of the reasons. To effect the required amendments by other than the inclusion of a new schedule will create undue complexity in formatting.

Train Controllers

19 The task to be undertaken is a comparison of remuneration between Train Controllers, Locomotive Drivers, Rail Supervisors, Crew Development Officers (CDO's) and Rail Transport Co-ordinators. This is to decide whether Train Controllers are undervalued unfairly and hence whether to correct this unfairness by varying the Award to include Train Controllers in the Award. It is common ground that the issues previously raised by the applicant concerning breaks and salary capping for Train Controllers are no longer relevant in this matter.

20 The task then to be performed by the Commission was separately described by members of the Full Bench as follows, the Acting Hon President stated:

> "84 It was agreed by the parties that the work of the engine drivers, which was already covered by the award, was the "work" against which there should be the assessment referred to in Principle 11(d). ……. I do not think the principle contemplates that the value of this work is the sole criterion against which the value of the work is to be judged. In other words, a comparison to the remuneration of other non-award employees can be relevant, not only to the decision

as to whether to include award-free work within the award, but also in the assessment of the value of that work when included in the award."

Kenner C stated:

"245 In assessing this evidence as expressed in his reasons, in my view, with due respect the learned Commissioner placed an over emphasis on the comparison between Train Controllers and Award Level 5 drivers and did not pay any or any sufficient attention to the relevant comparison between Train Controllers and Crew Development Officers, Train Co-ordinators, and Rail Supervisors. The terms of exhibit R5 are limited to a comparison between Train Controllers and Award Level 5 drivers and additionally, previous historical comparisons between Train Controllers and classifications in the former Goldsworthy Award with which the Train Controller had a historical award nexus. There does not seem to have been undertaken a salary and/or remuneration comparison between Train Controllers and other than Award Level 5 drivers, in light of the evidence adduced. It is also not insignificant to observe that had such a comparison been undertaken, there were very significant differences in base salaries between Train Controllers and rail positions other than Award Level 5 drivers, with Train Controllers well behind in salary terms."

"247 In light of my conclusions as to ground 4.7(a), it may well be open to conclude as is asserted by ground 4.7(b), that had the Commission at first instance undertaken the analysis of rates of salary between Train Controllers and positions other than Level 5 drivers, then inadequacies may have been apparent that required a remedy by the Commission. However, given that this analysis was for the reasons as outlined above not undertaken, an appealable error is made out."

21 Harrison C stated:

"285 As the learned Commissioner only compared train controllers with Level 5 locomotive drivers and did not compare train controllers with other occupations which work alongside train controllers when determining whether the classification of train controller should be included in the Award, which in my view is a comparison contemplated having regard to s26(1)(a) of the Act as well as Principle 11(d) of the State Wage Principles, I conclude with respect that the learned Commissioner erred when he did not take into account this relevant consideration. I would therefore uphold ground 4.7(a).

286 As to ground 4.7(b) it is my opinion that a comparison of the salaries of other relevant classifications such as crew development officers, rail co-ordinators and rail supervisors with the salary paid to train controllers could have led the Commission to form the view that train controllers were underpaid and should be brought under the Award to correct this unfairness."

22 It is common ground that Principle 11 is the relevant principle to be applied under the wage fixing principles. It reads as follows:

11. New Awards (including interim Awards) and Extensions to an existing Award

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."

23 Mr Johncock was the only witness called on remittal. He is the union convenor for Rail at Port Hedland. He says that Rail Supervisors work a 4on/4off roster. The roster is 24 hours a day, 7 days a week. The shifts are 12 hours a day with changeover at 6am and 6pm. The CDOs work 4on/4off as a 12 hour day shift. Start time is 6am and operates 7 days a week. They occasionally work evenings. They work on trains when they need to do pass-outs or give instruction. When this happens they work the same shift as the actual driver. He estimates that a CDO would be on track about 10% of his working time. The Rail Co-ordinators work 6on/5off, 6on/4off pattern. The average 48 hours a week and shift changeover is 6am and 6pm. They are also rostered to do load-out duties which start one hour earlier. From time to time they operate trains on the mainline to keep their hand in. The locomotive drivers work a 6on/5off, 6on/4off arrangement. It is a 48 hour week average with variable start times.

24 Under cross-examination Mr Johncock says that there has been a new rule book. Drivers are being trained in this by CDOs and the training lasts about 6 hours. Anyone who is qualified in the rule book would need to go through the training, including supervision and Train Controllers.

25 At the remitted hearing, the applicant tendered the following documents:

Exhibit A12 – the BHPBIO Railroad Operating Rules, and an email dated 26 May 2006 from Mr Schapper indicating which pages, from the BHPBIO Railroad Operating Rules, the applicant would refer to in submissions.

Exhibit A13 – an email dated 26 May 2006 from Mr Schapper which seeks to update documents 1 & 2 contained in Exhibit R5.

Exhibit A14 – a letter dated 24 May 2006 from BHPBIO to Mr Emmit detailing an increase in salary.

Exhibit A15 - a table indicating base salary and total salary for Train Controllers.

The following documents were tendered by the respondent:

Exhibit R7 – a bundle of documents to be relied on by the respondent. This bundle comprises some 17 sections and contains in part documents which relate to position descriptions of PDO's and Rail Operations Schedulers, emails, memorandums and remuneration comparisons pre and post 23 May 2006. The later comparisons being of particular importance (see 16A)

Exhibit R8 - a document entitled Company's new train control salary structure, which sets out the differing salary levels Controllers can achieve having regard to the number of boards they are passed out on, and also depicts an assumed annual review in September 2006.

Exhibit R9 – a document entitled ADSTE Award nexus which seeks to summarise the amendments to the ADSTE Award.

Exhibit R10 – a table entitled Schedule Level 5 Locomotive Driver, which sets out various figures

Exhibit R11 - a comparison document which seeks to convert the Rail Transport Technician – WPA remuneration for a 45.82 hr wk to a figure for a 48 hr wk.

Exhibit R12 – a document entitled Trainee Train Controllers, which sets out four employees, their commencement date, previous experience and qualifications.

Comparison (Duties and Responsibilities)

26 The following compares the duties and responsibilities of the Train Controller, Rail Supervisor, CDO, Co-ordinator and Locomotive Driver based on the job description, evidence and submissions. Where there is a reference to paragraphs, this relates to the summary of evidence in my earlier decision. Mr Hoare's evidence is treated separately.

27 The evidence in relation to Train Controllers duties and responsibilities is that of Mr James, a Train Controller (at paragraphs 23 and 24), Mr Thompson, a Train Controller (at paragraphs 27 and 32), Mr Porter, a Train Controller (at paragraphs 36 and 37), Mr Emmitt, a Train Controller (at paragraphs 46 and 49), Mr Kara, a Train Controller (at paragraphs 52 and 53), Mr Goiack, Superintendent (at paragraphs 62, 64, 70, 72 and 74) and Mr Punter, Supervisor (at paragraphs 78, 81, 83 and 84).

28 The job descriptions of each of the classifications are expressed at [Exhibit R1; Tab 19-22]. The descriptions and the evidence make it clear that the Train Controllers have "absolute authority" over rail traffic movements, to allow any person within 5 metres of the rail track, and to order the cessation of work at any time within this 5 metre occupation zone. They also have total authority over use of the Two Way Radio System. The complaint was that certain persons (eg contractors) did not know or comply with the protocol for use of this system and that this was potentially a safety concern.

29 The Train Controllers also have freedom to, "utilise skills to develop and initiate alternative plans resulting from equipment failure or manning shortfalls to maximise production and minimise train losses". The basic function being to, "ensure the ongoing iron ore supply from the Mines to the Ports whilst providing for service train operations, track maintenance, signals and communications maintenance windows". In so doing they have control over traffic control, train control, train crew control (on the mainline), motive power control and rollingstock control. They plan, co-ordinate and implement track and yard movements to ensure throughput plans and train schedules are met.

30 There is no specific mention of any management or supervisory duties or responsibilities for Train Controllers in the job descriptions. This matter was covered in the evidence and consisted of Train Controllers having to call out drivers or rolling stock to respond to changes in scheduling or mishaps and to ensure that production is maximised. The evidence is that, in an effort to reduce the load on Train Controllers, changes were to be made such that Train Controllers did not have to do these tasks. However, Train Controllers still call out the rolling stock. Some Train Controllers gave evidence that it would be more efficient if they still called out drivers. The evidence related also to Train Controllers having to advise drivers and others of requirements under the railroad Regulations, eg advising drivers as to how many handbrakes to apply. Train Controllers are required to have a thorough knowledge of the Regulations. There was no evidence that the Train Controllers were involved in performance management or discipline. There was some evidence about involvement in projects or training. The later points in my view not being significant, notwithstanding Mr Schapper's statement at paragraph 7 of his letter of 31 August 2006.

31 It should also be noted that whilst Train Controllers do some training, the respondent has instituted the position of Performance Development Officer (PDO's) to deal with much of this development work. In that respect the submission at paragraph 37 of the respondent's submissions of 29 August 2006 is valid.

32 There was clear evidence as to the increased complexity of the job of Train Controller due to the increased traffic and personnel on the track. There was clear evidence that the Train Controller is an essential part of the railroad system, works in partnership with others to maximise production levels, safely and efficiently.

33 The evidence in relation to Supervisors is that of Mr Punter (at paragraphs 76, 80 and 81).

34 Two basic functions of a Rail Supervisor would appear on the job description to have direct overlap with that of the Train Controller. A Supervisor has to, "maximise production efficiency by the optimum use of all available railroad resources in a safe and timely manner in all railroad operational areas". A Supervisor has also to maintain effective communication with a range of personnel to ensure efficient operations in accordance with a variety of Rules, instructions and conditions.

35 The Supervisors are different to the Train Controller in that they co-ordinate performance management, oversee/carry out rostering and resolve issues raised by rail operations personnel. They must also operate trains as required (where qualified). The Supervisor has a clear and separate responsibility for "Employee Development and Appraisal". I do not go to each of these tasks except that it involves resolving conflicts, discipline, managing performance, responding to industrial issues and

training and development. The evidence is also that Supervisors are responsible for managing the drug and alcohol policy. They also provide relief for the Superintendent.

36 The evidence in relation to CDOs is that of Mr Punter (at paragraphs 79 and 83).

37 The basic function of the CDO as covered in the job description is to, "observe, monitor, assess, educate and promote the competency of Rail Crew employees". They must pass out drivers, operate trains and educate employees in the safety regulations and requirements. Hence the CDO job has a large element of training and assessment. The CDOs play a role in alcohol and drug testing and in discipline. The CDO has driver qualifications and operates on the mainline on occasion for assessment and familiarisation purposes.

38 The evidence in relation to Co-ordinators is that of Mr Johncock, a locomotive driver and union convenor (at paragraph 16), Mr Ashton (at paragraph 18), Mr Emmitt (at paragraph 48), Mr Goaick (at paragraph 71) and Mr Punter (at paragraph 78).

39 The Co-ordinator's basic function as specified in the job descriptions is to, "assist the Traffic Controller (Tower) with the running of the Port Hedland Marshalling Yard efficiently and safely". The Co-ordinator works under the direction of a Supervisor; for traffic movements they also operate under the direction of the Train Controller to ensure plans and schedules are met. The Co-ordinator may assist with faults, manage crews and allocate tasks. They are required to do driving duties as and when required. They must do safety inspections in the absence of the Supervisor. They may organise roster coverage on weekends and backshifts. They may also investigate non-compliance with standards and practices. Mr Johncock says that the Co-ordinators' role is supervisory. They ensure that trains go to the appropriate mine, are loaded, come back and are made up (for the mainline journey) and are ready to go on time.

40 Mr Schapper submitted that the Commission was required to determine whether the Train Controllers remuneration is fair given a comparison with other classifications within the rail department. Mr Schapper submitted:

> "That properly evaluated, the strategic - - the nature of the train controller's task is of prime importance both in relation to the overall safe conduct of operations on the railroad and in terms of maximising production and the utilisation of capital within the railroad. On a comparative basis the train controller in his role is - - can have more effect on both of these areas, that is, production and safety than, in our submission, any other of the classifications." (Transcript p.493, 494)

41 The applicant's case is built mostly on this notion. That is the Controller is the "prime" person for controlling operation and maximising production on the railroad. The problem with this notion is that it downplays significantly and wrongly the role of other personnel in operations and production, and for that matter safety. It is wrong to view Train Controllers as simply directing traffic on the railroad because the job is much more complex, but equally it is wrong to view their role as being "prime" among other personnel in the Rail department.

42 Mr Schapper submitted in relation to the Train Controller:

> "He's got absolute control over all traffic movements. Absolute authority to allow persons within 5 metres of the track. Total authority over the use of the two-way railway system. There's freedom to utilise skills to develop or initiate alternate plans resulting from equipment failure or manning shortfalls to maximise production and minimise train losses. And he can cancel or reinstate trains to a set criteria in the event of shortages, track problems, rolling stock shortages, et cetera, et cetera. He can redirect trains to different ore sources and he can take preventative actions.
>
> And all of those things, or many of those things go to the overall responsibility of the controller to ensure that the railroad system is run in such a manner that there's maximum utilisation of plant and the whole system runs to maximum productivity." (Transcript p.495)

43 The first statement is correct. The second statement would lead one to believe that the Train Controller is in effect the defacto manager of the railroad, when in fact they are the co-ordination point for traffic and must exercise authority and problem solving in overcoming traffic difficulties.

44 Mr Schapper concentrated on a comparison between the Train Controller and the Supervisor. He submitted:

> "The supervisor's position description at tab 22, the basic functions are to maximise production efficiency by optimum use of all available railroad resources in a safe and timely manner in all railroad operational areas."

He described this as a function which is directly applicable to the controller. I agree. He submitted further that Supervisors are responsible for performance management and rostering. He described these activities as, "hardly of the same order in terms of significance and importance as many of the duties of the controller". I disagree entirely; the submission wrongly downplays the task and responsibility of managing people.

45 Further, in my view, when one reads the Occupational Health and Safety responsibilities of the Train Controller in comparison to the Rail Supervisor, the later carries more onerous responsibilities. The Supervisor acts as the appointed person responsible for all safety matters related to train crew whilst on shift. The Supervisor attends safety meetings, performs safety inspections, may conduct as opposed to simply be involved in safety investigations and manages cyclone shutdown procedures.

46 Mr Schapper submitted that:

> "If there's some problem of a technical nature or some other nature that the train controller cannot resolve, or does not fall within the train controller's range of authority then I guess the supervisor … would become involved. (Transcript p.499)
>
> All of those personnel supervision aspects that one expects to find in a supervisor and one does not find those, at least to the same extent, in relation to the controller, and that's one of the areas where there is some difference between the two positions. But, nevertheless, the controller does supervise in terms of directing work the engine - - the locomotive drivers but not in quite the same way that 3.5 identifies it." (Transcript p.501)

47 There is a clear distinction between Supervisors and Controllers in the area of supervision. The Controller allocates some rolling stock, gives instruction to drivers and supervisors to the extent of getting personnel and equipment to site in the case of

breakdown. These are different to the normal supervision or management tasks carried out by supervisors and to a degree CDO's and Co-ordinators. The performance management, discipline, personnel problem resolution and investigation functions are all part of normal management work which are not part of the Controller's duties. I do not view the responsibility for traffic control, including the setting of switches and planning of traffic flows, to be inherently supervisory in nature.

48 Mr Schapper compared the Train Controller to the CDO and Co-ordinator as follows:

> "when you compare the controller with the CDO and with the supervisor, you are compelled to come to the conclusion, in our respectful submission, that they are broadly equivalent positions." (Transcript p.504)
>
> "The role of the coordinator and that is to coordinate the traffic at the Jimblebar Junction
>
> The JBJ coordinator does not have authority to clear trains into JBJ or clear them out. That is still a function carried out by the controller,
>
> So it simply doesn't make sense, in our respectful submission, for the controllers to be paid less than or about the same as the rail transport coordinators." (Transcript p.496)

49 The position of CDO is completely different to that of Train Controller. A CDO is primarily concerned with training and assessment and has some management tasks in concert with Supervisors. Their role is very much one of quality assurance in the sense that they ensure the skills and knowledge of drivers especially, but also Train Controllers for the Regulations, are of a sufficient standard.

50 As for the Co-ordinator some of the duties are analogous to a Train Controller and the Co-ordinator must respond to the Train Controller in respect of managing traffic on the track. However, the Co-ordinator is on the track to supervise and ensure a physical co-ordination of the mine output to train schedules.

51 Mr Schapper compared the Train Controller to a locomotive driver as follows:

> "Train controllers operate machinery as do engine drivers although, of course, the range and extent of the machinery is different. … A train controller is required by the rules in certain respects to tell the engine driver - - instruct the engine driver what to do in relation to his - - to his locomotive. …
>
> the controller who determines how many handbrakes the driver must apply when his train has come to a stand on a gradient." (Transcript pp. 506 – 507)

He submitted that whole range of authorities can only be undertaken with the consent of the train controller, and gave the example of overriding the ATP system. He stated the position of the train controller is much more analogous to the position of the supervisor than it is to the position of the locomotive driver. Drivers and Train Controllers undertake separate and limited responsibilities and work in partnership. The Full Bench decision in the *Rudland* case (*The Construction, Forestry, Mining and Energy Workers Union of Workers v BHP Billiton Iron Ore Ltd* 84 WAIG 1033) provides a good explanation of this.

Mr Hoare's Evidence

52 The evidence of Mr Hoare took on some prominence in the decision of the Full Bench and indeed in my earlier decision. The Acting Hon President stated:

> "89 The Commissioner could have decided, if he accepted the evidence of Mr Hoare about the relative rating of the jobs which the appellants nominated for their comparison, that the assessment of the relative worth of the train controllers was not unfair. The reasons of the Commissioner do not, however, indicate whether or not he accepted this evidence of Mr Hoare.
>
> 90 Accordingly, in my opinion, the appellants have established ground 4.7(a). I do not think that ground 4.7(b) has been established, however. In my opinion, the Commission could have concluded that the train controllers were not underpaid, if it accepted the evidence of Mr Hoare regarding the comparability of the train controllers' functions as against the other relevant rail employees, bearing in mind that the train controllers' salaries varied according to factors including their level of skill, experience and length of service. The problem is that the Commission did not indicate whether he accepted this evidence of Mr Hoare. Overall therefore the Commission did not complete the task which, in my opinion, it was obliged to, given the case of the appellants. Further, this is a task which I do not think can be completed by the Full Bench as, amongst other things, the issue involves an assessment of the nature and quality of Mr Hoare's evidence. This depends in part upon opinions formed about the credibility of Mr Hoare's evidence, as to which the Commissioner at first instance, having seen Mr Hoare give evidence, is in the appropriate position to make such a judgment".

53 Kenner C in the Full Bench decision at paragraph 243 stated:

> "243 However, Mr Hoare accepted that the Train Controller positions, in terms of the decisions that they make, were crucial to the efficient deployment of locomotives and rolling stock at the respondent's operations at 352T. He also accepted at 325T, that as opposed to an absence by a Supervisor, if a Train Controller is absent, then the respondent's whole railway system stops".

54 I make it plain that I accept the evidence of Mr Hoare. His evidence was straightforward, logical and undiminished. He gave a credible description of how the valuation of classifications was undertaken by the respondent and the use of the Hay point system. He gave a good explanation of the responsibilities of the classifications and a comparison of the roles of Supervisor and Train Controller. This is notwithstanding Mr Schapper's objection as to whether Mr Hoare was in fact competent to give such evidence. A point followed up and addressed satisfactorily by Mr Hoare. However, that is not the end of the matter. Whilst I do not accept Mr Schapper's submissions in relation to this evidence and the usefulness of the Hay point system, he identifies correctly that the Commission is to undertake the valuation. This would appear to be clear from the judgement of Kenner C. Notwithstanding this the evidence concerning the employer's method for valuing classifications is of course relevant and should be given considerable weight in the assessment of the value of classifications. There is no suggestion in

the evidence of Mr Hoare that he sought to downgrade Train Controllers in any way. He answered directly questions which put the work of Train Controllers in some instances in a favourable light comparatively. There is also no evidence, either for the applicant or the respondent, which suggests that the respondent has not sought to adopt an appropriate rationale in the valuation of Train Controllers. It is more the case that the parties simply have distinct and separate views on the relative duties, responsibilities and values attributed to the respective classifications. Not an uncommon situation in matters of pay. The issue of comparable markets rates also plays a role in the assessment of classifications, and that is plain from the evidence of Mr Hoare. This is a valid factor to be entertained, and it is only the uncontradicted evidence of Mr Hoare which the Commission has to rely upon for this factor.

Classifications Comparison (Remuneration)

55 The essential proposition of the applicant is as expressed by Mr Schapper in his closing reply. He stated, "the Train Controller occupies a critical and central function in his railway such that there is no justification for the level of remuneration which they currently have."

56 He submitted that the salaries that the company now has, at best, from its point of view, put the controller at the same or under the level of the coordinator, and that is entirely inappropriate.

57 Mr Schapper submitted that the applicant does not seek to include a classification of trainee controller or to implement the structure for Controllers in the Award. The applicant seeks only a minimum salary (inclusive of base salary and shift allowance) for a competent Train Controller.

58 The applicant submitted that the rates for Train Controllers should equate to those of Rail Supervisors and that the Commission need only establish in the Award one rate as a minimum for Train Controllers. The rate which the applicant would have the Commission adopt is $145,000 per annum, which would incorporate only the base salary and shift allowance.

59 Mr Schapper submitted: "At the end of the day, can I be quite blunt about it, sir, we want a $20,000 a year increase. We don't care particularly how it's achieved." (Transcript p.519)

60 Mr Dixon submitted:

> "In our respectful submission, the Commission is entitled to conclude, as it did before, that there is no warrant for award coverage, particularly to achieve only the selected or selective objective of a salary increase." (Transcript p.531)

61 Mr Dixon submitted that it was not appropriate to establish one minimum rate without regard for the fact that Trainee Controllers commence on approximately $72,000 per annum in salary, and then progress substantially after they are passed as competent to handle the control boards. Mr Dixon submitted also that it was wrong to compare a newly appointed Train Controller with an experienced Supervisor or CDO, and that without some considerable experience employees would not be appointed to these supervisory categories of employment. This submission should be given some weight.

62 Mr Schapper submitted that the Train Controllers play a significant role in the application of the railroad Regulations. He referred to the *Rudland* decision of the Full Bench and submitted that since that time it is the responsibility of the Train Controller to decide the actual application of handbrakes. As stated earlier, in my view, the *Rudland* decision reinforces a view that each classification has under the Regulations their separate responsibilities. A driver is in control of his/her train and is responsible for the sole operation of that equipment on track, notwithstanding that he/she may require permission from Train Control to turn off the ATP system or advice/direction on how many handbrakes to apply. Mr Dixon submitted that each category of employee is responsible for applying these Regulations and have their separate and clear responsibilities. He submitted it was wrong to view the Train Controllers obligations under these Regulations as more onerous. In my view, the respondent's submission is a more accurate portrayal of the responsibilities in relation to the Regulations of the respective classifications. These Regulations are emphasised in each of the job descriptions and must be adhered to by each employee in carrying out his/her role.

63 Table 16A in Exhibit R7 displays the key comparisons in remuneration between the classifications. This table was adjusted to accommodate a concern of the applicant about the inclusion of the shift allowance when making adjustment calculations. The table displays a difference in remuneration for Train Controllers who were employed pre and post 1998. The difference is due to a difference in the calculation of superannuation, namely whether it is based on the total salary or the base salary (refer to footnote 2). Mr Schapper also expressed a concern that the respondent had assumed that the base salary for a driver (either AWA or WPA) could be adjusted by a 42 over 48 hour methodology. He submitted that this methodology or assumption is not correct. The respondent does not accept this criticism. I similarly do not accept the applicant's point. The methodology used by the respondent is an appropriate approach to attempt to achieve a like with like comparison. Having said that then I accept Exhibit 16A as the appropriate basis for making the comparisons of remuneration. The IAC has stated that superannuation and bonus payments are to be included and the table achieves this aim.

64 The table deserves some further analysis in conjunction with Exhibits R8 and A15. Exhibit A15 displays the salaries of all current Train Controllers with effect from 23 May 2006. It shows that 4 controllers are on a base salary of either $72,000 or $72,800. The applicant encourages the Commission to disregard these employees in the sense that the application is not about and does not seek to include a trainee classification in the Award. There is then a range of salaries commencing at $92,100 to $112,100. In other words the actual difference in base salary between the Train Controllers is $20,000. Mr Emmit [ExhibitA14] who is a long serving and experienced Train Controller at BHPB, and who gave evidence, is on a salary of $108,700. Exhibit R8 then displays the new Train Control salary structure which has been adopted by the respondent after discussions with the Train Controllers. Mr Goiack gave evidence on this structure and the discussions. This structure has salary ranges at three levels. The levels are dependent on whether a Train Controller is competent in one, two or three boards. The top salary, at time of hearing, was said to be $120,000 per annum for three boards. The bottom salary, for one board post-training is said to be $80,000. There is presently no Train Controller passed out as competent on three boards. Mr Dixon explained that a Train Controller may fall anywhere within the range depending on experience or other factors judged by the respondent. The present salaries of Train Controllers do not equate readily into this structure.

65 The question becomes which salary point or range the Commission should use for comparison. I am content to use the column in 16A which relates to post 1998 employment. The bulk of Train Controller fall under this arrangement and any order I make would apply for the future (i.e. post-1998 employees). However, as stated Mr Dixon submitted that it would be wrong to compare newly qualified Train Controllers, who are trained by the respondent, with experienced employees who are Supervisors, CDOs or Co-ordinators. This submission is persuasive to the point that it is a factor to be weighed into the comparison. This is also relevant given the applicant sought a minimum salary to be applied. I approach the exercise in this way. I have some evidence about some of the background of some of the Train Controllers. I have very limited evidence about the background of other classifications, except for that of Mr Punter. The applicant has sought a minimum to apply. I would then adopt the lowest actual salary point for Train Controllers employed post 1998, i.e. $92,100 per annum. I would similarly adopt the actual lowest salary point for the other classifications. This salary point for Train Controllers would be for someone qualified on one board. I do not use the figures in the salary structure as a Controller could fit anywhere within that structure and the range is a difference of $40,000. The actual range is presently $20,000. It is more appropriate to use the actual rate which is paid for comparative purposes than some more theoretical figure. By using lowest actual salary figure in each range as the comparative figure, the comparison is less subject to years of service with the respondent, and that is a matter about which I have little evidence. Of course the Award driver has only one total remuneration point.

66 The comparison would then be as follows [Exhibit R7; Tab 16A condensed]

Remuneration comparison (taking into account pay increase, with shift allowance adjustment)

	Train Controller employed post 1998	Rail Transport supervisor	Rail Transport Coordinator (48 hr wk)	Crew Development Officer	Rail Transport Technician AWA (48 hr wk)	Award Engine Driver (48 hr wk)
Base Salary	92,100	123,100	91,130	123,100	88,610	150,729
Shift Allowance	23,100	23,070	22,780	23,070	22,150	n/a
Rail/FIFO Allowance	n/a	n/a	18,230	n/a	17,720	n/a
Ops 1	n/a	n/a	24,190	n/a	23,520	n/a
Ops 2	n/a	n/a	6,040	n/a	5,880	n/a
Total Salary	115,200	146,170	162,370	146,170	157,880	150,729
Total Remuneration	138,158	176,640	181,963	176,641	176,931	161,512
Total Remuneration based on 42 hr week	138,158	176,640	162,065	176,641	157,583	141,323

67 It is self evident from this table that the base salary of Train Controllers is comparable to that of Co-ordinators or Locomotive drivers. It is substantially less than CDO's or Supervisors. The shift allowance is a fairly common figure. The remuneration comparisons then differ based on allowances. I have not included specifically the bonus and superannuation figures but they are of course part of total remuneration. The allowance issue is a question of whether the conditions are met to qualify the employee for payment.

68 Mr Dixon submitted that the applicant in the first instance focussed on a comparison between the Award locomotive driver and the Train Controller. He says that the applicant has now changed the focus of comparison from the locomotive driver to the Supervisor as the earlier comparison does not support the applicant's objective. Mr Schapper rejected this submission and quoted a passage from the applicant's written submissions. There are some obiter comments in the decision of the Full Bench which relate to this point. In my view it is clear from the first hearing, notwithstanding the passage to which Mr Schapper referred, and some submissions made at first hearing, that the focus of comparison initially was on the locomotive driver. It is clear from my earlier reasons, Exhibit R5 and Exhibit R7, 16A that there is no obvious remuneration disadvantage for Train Controllers using the comparison with locomotive drivers. The base figure is slightly lower, but the range takes the Train Controller comfortably past a driver. Bearing in mind the comparison is with a Level 5 driver and the driver's remuneration includes components for variable starts, being away from home and being on the rail. However, the change of focus is not relevant to me now given the reasoning of the majority of the Full Bench that the Commission is required effectively to value the comparative classifications.

69 Mr Schapper submitted that the classifications of Supervisor, Co-ordinator and CDO were built from a base of the locomotive driver. Mr Dixon rejected this submission and referred to the evidence of Mr Hoare that the respondent utilised the Hay point system for valuing positions. I have re-read the evidence of Mr Hoare to which Mr Dixon referred me. However, I cannot glean from that evidence the point which Mr Dixon sought to make. It is the case that the Hay system is used as Mr Hoare described. This point does not speak against a view that Supervisors, CDOs and Co-ordinators are based on drivers' salaries; in the sense that each of those classifications incorporates driving. Hence this component of the duty must be valued along with other components of the duties and responsibilities of the respective classifications. Mr Schapper submitted that any reliance on the Hay point system was clearly overcome when the respondent, by their own admission, simply paid the train Controllers more in an attempt to settle this application. I do not agree that somehow this industrial strategy taken by the respondent would negate the value they put on the Hay point system for valuing jobs.

70 Mr Schapper sought to emphasise the disadvantage suffered by Train Controllers by reference to a historical nexus between Train Controllers covered by the Goldsworthy Mining Limited ADSTE Staff Award No. A33 of 1981 and the Shovel Drivers covered by the Iron Ore Production and Processing (Goldsworthy Mining Limited) Award No. 43 of 1981. Mr Dixon

submitted that there is no suggestion under principle 11(d) of the wage fixing principles that the Commission should pay attention to a person employed under provisions of a different award and an award that has been cancelled by the Commission. Any nexus argument was broken by the wage fixing principles long ago. There is no valid basis for arriving at the argument put forward by the applicant. I am not persuaded in any way by this argument of the applicant. Life has moved on in the award structure governing employees at BHPB.

71 I received evidence and submissions about the salary structure for Train Controllers that was discussed and is now implemented. The structure is based on the number of boards which a Controller is competent to operate. The applicant submitted that the Commission only needed to deal with a minimum salary figure and that the parties or respondent could implement arrangements in supplement to that. I expressed some views earlier which favoured reflecting a structure as opposed to just a minimum rate. Having now heard Mr Dixon's elaboration of the structure I am disinclined to put anything other than a minimum base salary into the Award, if warranted. The structure provides for considerable discretion by the employer as to where a person fits within the structure but more relevantly what actual salary an individual Controller receives. The applicant's preferred option does not seek to reduce this flexibility. The respondent's submissions have not been directed toward placing such a structure within the Award. Hence there is no real basis or rationale for the Commission to interfere by more than the establishment of a minimum figure, if in fact that intervention is warranted.

72 The applicant has encouraged the Commission to place the Train Controllers within a hierarchy of classifications comparative to the other Rail classifications. The difficulty with this notion, if it were to be applied with any precision is that the duties and responsibilities are both quite different and the work is complementary in that each must work with the other to ensure the production process. It is not a line of authority or seniority except for drivers or perhaps the JBJ Co-ordinator (see Railroad Operations Organisational Chart, Exhibit R7, Tab1). The JBJ Co-ordinator may aspire to be a Supervisor. In differing circumstances Train Controllers and Supervisors have their respective authorities. The authority of the Train Controller is paramount for the movement of trains and personnel on the track, whether mainline or yard. The Supervisor is the line of authority for managing drivers and employee problems. In case of breakdown a Train Controller will be responsible for getting equipment and personnel to the site; this is a directing of traffic and capacity. The supervisor will manage the resolution of the problem at site. The evidence is that Train Controllers may aspire in the new arrangements to a PDO position. It is possible that a driver might become a Train Controller, in that a driver qualification is a desirable criterion for a Train Controller. It is improbable on the evidence that a Train Controller would become a driver, as none are said to have previous driving experience or qualification. If that is so then it is not likely that they would move to a CDO or Co-ordinator role, both of which require driving. A supervisory role would appear a possibility. However, what Mr Schapper is really meaning is a hierarchy of importance to the operation, taking account of the respective skills and responsibilities.

73 Without wishing to state the obvious a locomotive driver is primarily concerned with driving a locomotive. A Train Controller is primarily concerned with controlling traffic on the railroad. A Co-ordinator is primarily concerned with driving and co-ordinating trains and their loads coming from the mines. A CDO is primarily concerned with training and accreditation. To do this they must also drive locomotives at times. A Rail Supervisor is primarily concerned with supervising personnel and work. If a hierarchy is to be applied, then I see no reason why the hierarchy explained by Mr Hoare under cross examination (transcript p.351) is not a reasonable conclusion. This would then equate, if that is a correct term having regard for the different responsibilities, a Train Controller with a Locomotive driver. Whilst Mr Hoare's assessment is based on his knowledge of the railroad and the Hay Point System; having now reviewed all the evidence I conclude that this summation is reasonable and accurate.

74 Each classification works shifts and receives an allowance which is approximately the same. In any event the Train Controllers receive, along with others, the highest amount. The pattern of shiftwork is different for each of the classifications but they all work 12 hour shifts. The rate for the Award driver is an all up annual rate and it is not easy or necessary for the purposes of this application to seek to decompose that rate. However, it is a reasonable assumption having regard for the history of making the Award that a component of that salary relates to working shifts.

75 Mr Schapper submitted that the Train Controller is undervalued as the Co-ordinator receives a Rail Allowance, but only works the mainline on occasion or for refresher purposes (as per the evidence of Mr Johncock). He submitted similarly that the CDO does not, in the main, work other than day shifts unless assessing on the mainline. If this criticism is to be given weight then it must apply equally to the Supervisor and locomotive driver classifications. They would equally be disadvantaged. The fact that the respondent pays the CDO and Co-ordinator allowances annually, the purpose of which may be utilised occasionally, is not an issue to which I have much regard except as it may be compared to the Operational Component 1 payment which I will deal with later.

76 The hours worked by each classification are different, however, the exercise undertaken by the respondent to reduce each classification to a 42 hour per week base is valid in my view. It allows for the best possible like with like comparison that can be achieved. The roster pattern is different for each classification and is not relevant in my view except that CDOs typically do not work nights. This is unless the CDO is working on the track. Mr Johncock says unchallenged that they spend about 10% of their time on track. The drivers work variable start times and work regularly away from home. The CDOs also work variable starts when they are performing work on the mainline, as do the Co-ordinators when they are doing quarterly track refresher work. The Co-ordinators' start times also vary slightly when they are rostered to do load-out duties.

77 I am not convinced that the Train Controllers perform work that can be properly classified as truly supervisory. They do tasks which allocate employees to jobs and which direct those jobs to the extent that they provide information as to required compliance with the Regulations and movements so as to co-ordinate with other traffic on the line. This is clearly the main task of the Train Controller; that is to plan, direct and co-ordinate movements on the track and in the yard.

78 I am not persuaded by the argument that the role of Train Controllers is of crucial importance, such that it places them above other classifications, because they can stop traffic, have the absolute authority concerning movements within 5 metres of the track. In saying this I do not denigrate the work of Train Controllers. They are a crucial component of the railroad system. This was confirmed in the evidence of Mr Goiack, Mr Hoare, and by the comment of Mr Bartholomew about which evidence

was given. Their evidence would also display that they are very committed to their work. However, other personnel can also have such a significant impact if they are not mindful of their job. The mainline is the pipeline for ore from mines to port. It is a single track with passing sites. An errant train driver could also stop traffic for a considerable time. The authority of Train Control is based on the need to co-ordinate traffic to ensure efficient and safe production. The logic is not that one can direct and stop traffic and only the Train Controller has the authority, hence hierarchically this classification has pre-eminence. In matters of safety other employees are also duty bound to halt production if the circumstances are unsafe. The logic is instead the important role Train Controllers play in making sure production is maximised efficiently and safely. The logic is whether a right or wrong decision of a Train Controller could have significant impact, and more so than other classifications. In this regard drivers and Controllers work in partnership, as do others, to ensure the instances of significant impact are minimised. There is a component of planning by Train Controllers within a shift, to ensure the best and most timely operation of the traffic on the railroad. This was variously described as having to plan 4 to 6 (perhaps 8) hours in advance. It could be said that this task, in complexity, places the Train Controller above a Driver or Co-ordinator. However, on balance such a view would ignore some of the complexity or physical challenges in the duties of the Driver or Co-ordinator.

79 I am also not persuaded that the responsibilities of Train Controllers in relation to the Regulations are necessarily greater than those of other classifications.

80 For all the reasons expressed I am not convinced by the applicant's case that the Train Controllers are unfairly or wrongly valued, in comparison to other classifications in the Rail department, having regard to their remuneration, duties and responsibilities. This is except for the following issue.

Operational Component One

81 There is an aspect of the Train Controllers roster, which translates to remuneration, which on reflection was canvassed insufficiently in my earlier decision (see paragraphs 163, 166 and 179). This concerns the handover which Train Controllers are required to do at the start-end of every shift. The outgoing Train Controller briefs the incoming Train Controller as to developments relating to the board they are to operate. Mr Schapper submitted that the handover was 15 to 30 minutes. Mr Goiack said it could last from 5 to 15 minutes. Mr Goiack further said that if breaks were taken this would require more handovers during shifts. Hence the handover is clearly a necessary component of the job. It sits in addition to the 12 hour shift the Train Controller is required to perform. Mr Dixon submitted correctly in my view that the evidence was that the handovers took on average 15 minutes. Mr Schapper submitted that this additional time should be accommodated, as it is for other operational staff in the Award, by reference to a 44 hour average week rather than a 42 hour average week. He submitted:

> "What we say is that the wages for train controllers should be struck on the basis that they work, in effect, a 12½ hour shift. A hand-over is essential as there is unanimity amongst the witnesses, and that is set out, sir, at paragraph 32 of my outline of submissions." (Transcript p.379)

82 In his written submissions at paragraph 32 he states:

> "Further, whilst notional hours are 42, in fact, hours are more properly regarded as approximately 44 by reason of a half hour unpaid handover being worked in each shift. A handover is essential for the incoming controller to be familiarised with the then current state of play on the board before assuming responsibility for it."

83 Mr Dixon referred also to the handover. He referred to it first in the context of short breaks and said, "there is implicit in such an arrangement an element of safety as to whether it was desirable for that level of continuity in the performance of the tasks". This reinforces a view that a handover is essential. Mr Dixon later returned to the issue of handovers, in response to a question from the Commission. He submitted:

> "The evidence I was going to submit to the commission fairly viewed would allow the commission to draw the conclusion that on average there's a 15 minute handover period required, but it effectively is only 15 minutes because the - - what is the practice is that the traffic controller comes in and does the handover at the beginning of the shift, so it's effectively a hot seat changeover in that sense, and then the next traffic controller comes in 15 minutes earlier at the conclusion of that particular shift. So the evidence, on my submission, reflects fairly a 15 minute period. Mr Goiack's evidence was there are occasions when it might be more, and I think the train controllers came down to the 15 minute average in relation to their evidence." (Transcript p.415)

84 Mr Schapper returned to the issue of handovers at the re-hearing on 29 May 2006. I include the submission and exchange with the Commission in full as follows:

> "Another factor is the operational 1 component is paid to the coordinator and the AWA drivers and the WPA drivers of an amount between some $23,000 up to some $25,000. The operational component - - operational component 1 is paid to them and that is a substantial sum of money. When we look to the staff handbook to ascertain what is operational component sum number 1 paid for, we see, and I'm referring now to exhibit A5, the staff handbook, section 1, salary, that I took you to before, 1.3, operational components:
>
> > "In addition to an employee's base salary and shift payments where applicable, two operational components will also be made in the following circumstance:
> >
> > Operation component 1:
> >
> > Where applicable, this only applies to shift workers."
>
> Well, controllers are shift workers.
>
> > "In consideration of an employee being required to work additional time associated with their shift roster, e.g. hand-over, hot seat change, 40/42 hours, et cetera, they will receive payment of operational component 1 of an annual amount paid pro rata."

Well, as you well know, Commissioner, train controllers do hand-overs. They work more than their notional 42 hours a week. And that, on its face, appears to be what operational component 1 is directed at. Hand-overs. It's expressly mentioned." (Transcript p.491)

"And yet they are not paid that amount, whereas rail transport coordinators and locomotive drivers are paid that - - staff locomotive drivers are paid that amount. And yet we know that at least as far as locomotive drivers are concerned, is they are not permitted to work more than 12 hours for safety reasons in any one shift.

Now, if you take the operational component 1 being some - - as the document shows, some 23 to $25,000 and say, well, on its face that applies - - should apply to controllers because they do hand-overs, then you would say well even leaving the base rate and the shift allowance and all of that the same for controllers, but we will compensate them for their hand-overs, you would increase their salaries in the order of 23 to $25,000 which is in the order of our claim when wrapped up with the total salary we've claimed in respect of total minimum salary of 145,000.

So the point that's being made here, Commissioner, is that when you come to look at the various salaries of the various players in the rail system and how it is they're paid and the rationale for it, there are, as you would expect, and I don't mean this as a criticism of the company, but as you would expect there are a variety of anomalies. Those anomalies - - none of those anomalies work in favour of controllers. All of the anomalies work in favour of others and I'm suggesting a possible explanation for that is the need for the others total remuneration level to be boosted to because of the operation of - - the floor operation effect of the award drivers' locomotive rate of 150-odd thousand." (Transcript p.492)

WOOD C: All right. Is it your argument that the train controller should really be in receipt of an ops 1 type component?

MR SCHAPPER: Our argument is that - - we don't want to get into ops 1 for the purposes of what goes into the award if we get to that point. Our only function in pointing to ops 1 is to say within the company's staff structure there's an operational component 1 which is paid for hand-overs. That's what it says it's for.

Controllers do hand-overs and don't get ops 1. That's a further string in our bow to demonstrate that controllers are not fairly remunerated. So you use that to - - as part of, and it's only a small part of the basis to decide, well, they're not fairly remunerated but in order to decide what goes into the award you don't necessarily have to pick up the clutter, if I can put it that way, from the staff handbook. We just say put in one figure that encompasses base and shift and, of course, ops 1, not that ops 1 is payable. I mean, we're not going to be saying, well, if you put 145 in the award we want ops 1 as well. We're not saying that - - well, perhaps I should say that - -

WOOD C: You're getting your instructions, Mr Schapper?

MR SCHAPPER: No, no, we're not saying that. I don't need instructions on that. But we're simply pointing to the fact that we don't get paid ops 1 as demonstration that, you know, in the overall scheme of things we're being unfairly dealt with. When people who - - well, an ops 1 is a very substantial amount for hand-overs, a 40/42-hour week and so on, hot seat changeovers.

So, Commissioner, I can see that you're struggling for precision and I'm unable to give it to you.

WOOD C: Well, Mr Schapper, it's for a quite obvious reason, and that is, whereas I may wish to wave a wand about these." (Transcript p.517)

85 The issue received no further treatment by Mr Dixon or in the further submissions of the parties following the decision of the IAC.

86 The point I make is that on reflection the handover and the additional time and effort involved has not been accommodated either by using a 43 hour average week base (the shift pattern is 4 shifts of 12 hours) or by inclusion of the Operational Component 1 allowance from the Staff Handbook. Given the manner in which the argument first arose and has been argued at re-hearing I have given consideration as to whether the matter was squarely before the Commission or should be referred back to the parties for further submission. I have come to the conclusion that the issue of whether Train Controllers are fairly remunerated for the handovers is properly and fairly before the Commission and for the Commission to decide upon. It can be said to be a component of the comparative remuneration of the classifications. Additionally, the Commission asked a direct question about Operational Component One and parties had the opportunity to and were capable of making submissions if they so chose.

87 I consider it to be an aspect of unfairness in the remuneration of Train Controllers that they are not rewarded for the handovers. I was concerned about this at first instance but did not give sufficient attention to it. I note that I was criticised rightly by the Full Bench for finding that the salary capping of Train Controllers was unfair but did not address whether a remedy should be applied. This issue is no longer a feature of Train Controllers' remuneration. One method to correct the unfairness would be to incorporate a 43 hour average week in Train Controllers' base. I do not favour this approach given the approach adopted by the respondent to rewarding the notion of handovers as hot seat handovers (the analogy is appropriate for Train Controllers given the submission of Mr Dixon quoted earlier). The approach the respondent adopts is to pay Operational Component One. I am influenced also to some degree by the submission of Mr Schapper in relation to the Rail Allowance for Co-ordinators and the Shift Allowance for CDO's. The submission by Mr Schapper goes to the point that these allowances are paid when these classifications work in accordance with the allowance for only part of the time or on occasion. Mr Dixon submitted these allowances are paid to give the respondent flexibility. The same could be said of the Train Controllers handover.

88 I consider therefore that the comparative disadvantage suffered in remuneration by Train Controllers relates to the non payment for handovers which should be corrected by the application of the Operational Component One allowance. The only method available to the Commission to effect this directly is by varying the Award to include the classification of Train Controller, incorporate a minimum annual salary amount, incorporating a yearly amount for shift allowance and a yearly amount for shift handovers. This will be aggregated as one minimum figure similar to Award drivers.

89 Mr Schapper submitted that the minimum salary should be one figure incorporating base salary and shift allowance. In light of the salary set for locomotive drivers I am content to follow this approach.

90 The minimum annual salary will therefore comprise a shift allowance amount of $23,100 per annum, a minimum salary of $80,000 and an Operational Component One or shift handover amount. The minimum salary of $80,000 I use as it is the initial salary point for Train Controllers who exit the trainee route. To apply any other higher point would mean inflating artificially the remuneration of the base level Train Controller, i.e. the Controller who is just qualified post traineeship. Of course under the salary structure applied by the respondent, which the applicant does not seek to apply in the Award, there is an additional $40,000 to be gained through experience and competency on additional boards. I used the actual rate for comparison given that I only have actual rates with which to make that comparison for each of the classifications. However, this cannot be applied as if it truly reflects the minimum salary payable for that classification.

91 As for the shift handover component I know that this component varies in actual payment from $23,627 to 24,190 at base. I do not have evidence as to how the component is actually calculated and why it varies across the classifications. The variation in any event is small. I propose that at the time of the speaking to the minutes to allow parties to first make submission and lead evidence if need be, as to the correct rate to be applied to this component. This is not an invitation to challenge whether it is to be paid, simply the amount to be paid. A better course would be for the parties to agree a figure, in light of these reasons, and present it to the Commission for incorporation, if that is possible.

92 I am also mindful that Mr Schapper, in closing, made a submission to the effect that it may be possible for the parties to agree, following the Commission's decision, on a rate for Train Controllers such that no variation to the Award would be necessary. I am duty bound by the Act to entertain conciliation if it is possible that it may be fruitful. Conciliation may be undertaken even though the matter is being arbitrated. I encourage the parties to have discussion arising from these Reasons and if an agreement is reached then to advise me at the time of the Speaking to the Minutes. Of course if the Commission can be of assistance the parties can advise the Commission of the need to convene urgently. This does not leave much time given the impending activation of the Work Choices provisions, however, there has been some history of discussions in this matter and hence I leave open that prospect.

CONCLUSION

93 Therefore, the amendments to the Award for WPA Drivers and Train Controllers would read as follows:

"1. In Clause 2 – Arrangement – insert the following after Schedule I – Aggregate Wages:

Schedule IA - WPA Drivers and Train Controllers"

2. Following Schedule I – Aggregate Wages insert a new Schedule IA as follows:

Schedule IA - WPA Drivers and Train Controllers

1 (a) The Classification of Level 5, WPA Locomotive Driver is incorporated in this award.

1 (b) The WPA Locomotive Drivers operate on a fly in fly out basis.

1 (c) The ordinary hours of WPA drivers shall be worked in 12 hour shifts with 12 shifts on and 10 shifts off. All existing terms and conditions of employment of WPA drivers shall be unaltered on the insertion of this clause in the Award.

2 (a) The Classification of Train Controller is incorporated in this award. A person at this level will be competent to perform train control duties over all or any part of the Company's railroad.

2 (b) A Train Controller shall be paid not less than _____ per annum. This aggregate wage shall be in respect of base salary, shift allowance and shift handover only. All other existing terms and conditions of employment of train controllers shall be unaltered by the insertion of this clause in the Award.

2 (c) The ordinary hours of Train Controllers shall be an average of 84 per fortnight which shall be worked in shifts of 12 hours on a continuous shift basis".

2006 WAIRC 05499

IRON ORE PRODUCTION & PROCESSING (BHP BILLITON IRON ORE PTY LTD) AWARD 2002

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING & KINDRED INDUSTRIES UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	BHP BILLITON IRON ORE PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	TUESDAY, 26 SEPTEMBER 2006
FILE NO.	APPL 338 OF 2005
CITATION NO.	2006 WAIRC 05499

Catchwords	Award variation - Matter remitted from Full Bench – Amended Application -Workplace Agreement Drivers - Train Controllers, Locomotive Drivers, Supervisors, Crew Development Officer, Co-ordinator - Comparison of Duties, Responsibilities and Remuneration - Wage Fixing Principles - Salary increases sought - Industrial Relations Act 1979 (WA) s.40 - Workplace Agreements Act 1993
Result	Award varied in relation to pre 1998 Train Controllers
Representation	
Applicant	Mr D Schapper of Counsel
Respondent	Ms G Archer of Counsel and with her Ms K O'Rourke of Counsel

Supplementary Reasons for Decision

1 The applicant advised that the parties had further discussions, as foreshadowed in the Commission's reasons of 22 September 2006, but no issues were resolved. The applicant tendered further written submissions which sought an additional increase of 4% to the base salary, the inclusion of annual and long service leave loading in the base, and operational component one amount of $24,190, the top amount, and a 4% loading on this to total $25,158. The applicant included in those submissions two remuneration package adjustment letters for two Train Controllers arising from the respondent's annual remuneration review, effective from 1 September 2006.

2 The applicant sought also a correction to paragraphs 2(a) and 2(b) of the Minute of Proposed Order to include the words, "employed after 1998" in 2(a) after the word Train Controller, and the words, "as defined in 2(a)", in 2(b) after the word, Train Controller. This was to protect the superannuation benefits of pre-1998 Train Controllers who would otherwise be denied benefits under their defined benefit scheme.

3 Those submissions were opposed by the respondent who confirmed that staff increases had been awarded effective from 1 September 2006, however, the increases were variable in nature and counsel was aware of some 3% increases. The respondent described the applicant's submissions as fresh evidence and that the issue of leave loading was not put in evidence earlier. As for the adjustment to the order the respondent submitted that it was clearly part of the respondent's case that superannuation and other benefits would be affected by a change to salary. It was now too late for the applicant's case to change and for the applicant to pick and choose.

4 I am content to make the amendment to the order as requested by the applicant. In my view, this is an unintended consequence about which the Commission has only now been alerted. It would be wrong in my view and perverse for this matter to deprive those Train Controllers of substantial retirement benefits through their inclusion in the award. Their specific omission will not disadvantage the respondent.

5 The respondent has confirmed that leave loadings will continue as part of Train Controllers preserved package as requested by the Commission. I am content then not to incorporate these matters in the award. As for the salary increases, the difficulty I have is that whilst this may legitimately fall into the category of new evidence, which was not available to be led previously, it is brought to the Commission too late for it to be effectively tested and made clear. I am not certain as to the figure that could properly be applied; if I were minded to award the increase, is a figure of 4%. I am constrained by time to allow this matter to proceed further than today. To do so would deprive the applicant of the award variations altogether, due to provisions within the Federal legislation. Hence I cannot, and I have not been requested to by either party, to convene to hear a more complete and tested version of the matter raised by the applicant. I would therefore not incorporate these figures in the award. I note that in any event the award is a minimum annual figure and Train Controllers are in receipt of greater amounts of remuneration. They should not be unduly disadvantaged by not incorporating the new and uncertain amount in the base.

6 As for the component one of shift handover allowance I accept the submission of the respondent to select a figure in the middle range. The figure will therefore be $23,630 per annum. The new total base salary, inclusive of base shift allowance and shift handover will be $126,730.

2006 WAIRC 05500

IRON ORE PRODUCTION & PROCESSING (BHP BILLITON IRON ORE PTY LTD) AWARD 2002

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING & KINDRED INDUSTRIES UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH & OTHERS
	APPLICANTS
	-v-
	BHP BILLITON IRON ORE PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	TUESDAY, 26 SEPTEMBER 2006
FILE NO	APPL 338 OF 2005
CITATION NO.	2006 WAIRC 05500

Result	Award varied
Representation	
Applicants	Mr D Schapper of Counsel
Respondent	Ms G Archer of Counsel and with her Ms K O'Rourke of Counsel

Order

HAVING heard Mr D Schapper of Counsel on behalf of the applicants and Ms G Archer of Counsel and with her Ms K O'Rourke 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 Iron Ore Production & Processing (BHP Billiton Iron Ore Pty Ltd) Award 2002 (No. A2 of 2001) as varied, be further varied in accordance with the following Schedule and that such variation shall have effect from the date of this order.

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

SCHEDULE

1. In Clause 2 – Arrangement – insert the following after Schedule I – Aggregate Wages:

"**Schedule IA - WPA Drivers and Train Controllers**"

2. Following Schedule I – Aggregate Wages insert a new Schedule IA as follows:

"Schedule IA - WPA Drivers and Train Controllers

1 (a)	The Classification of Level 5, WPA Locomotive Driver is incorporated in this award.
1 (b)	The WPA Locomotive Drivers operate on a fly in fly out basis.
1 (c)	The ordinary hours of WPA drivers shall be worked in 12 hour shifts with 12 shifts on and 10 shifts off. All existing terms and conditions of employment of WPA drivers shall be unaltered on the insertion of this clause in the Award.
2 (a)	The Classification of Train Controller, employed after 1998, is incorporated in this award. A person at this level will be competent to perform train control duties over all or any part of the Company's railroad.
2 (b)	A Train Controller, as defined in 2(a), shall be paid not less than $126,730 per annum. This aggregate wage shall be in respect of base salary, shift allowance and shift handover only. All other existing terms and conditions of employment of train controllers shall be unaltered by the insertion of this clause in the Award.
2 (c)	The ordinary hours of Train Controllers shall be an average of 84 per fortnight which shall be worked in shifts of 12 hours on a continuous shift basis".

AWARDS/AGREEMENTS AND ORDERS—Application for variation of—No variation resulting—

2006 WAIRC 05541

IRON ORE PRODUCTION AND PROCESSING (HAMERSLEY IRON PTY LTD) AWARD 1987 NO. A 20 OF 1987

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS
	APPLICANT
	-v-
	HAMERSLEY IRON PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 4 OCTOBER 2006
FILE NO	APPL 1216 OF 2003
CITATION NO.	2006 WAIRC 05541

Result	Discontinued by leave
Representation	
Applicant	Mr D Schapper of counsel
Respondent	Ms E Hartley of counsel

Order

WHEREAS the applicant sought and was granted leave to discontinue the application, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued by leave.

(Sgd.) S J KENNER,
[L.S.] Commissioner.

2006 WAIRC 05542

IRON ORE PRODUCTION AND PROCESSING (HAMERSLEY IRON PTY LTD) AWARD 1987 NO. A 20 OF 1987

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY , INFORMATION, POSTAL, PLUMBING AND ALLIED SERVICES UNION OF AUSTRALIA, THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING & KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH, CONSTRUCTION, FORESTRY MINING AND ENERGY UNION OF WORKERS
	APPLICANTS
	-v-
	HAMERSLEY IRON PTY LTD, ROBE RIVER IRON ASSOCIATES
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 4 OCTOBER 2006
FILE NO	APPL 1230 OF 2003
CITATION NO.	2006 WAIRC 05542

Result	Discontinued by leave
Representation	
Applicant	Mr D Schapper of counsel
Respondent	Ms E Hartley of counsel

Order

WHEREAS the applicant sought and was granted leave to discontinue the application, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued by leave.

(Sgd.) S J KENNER,
[L.S.] Commissioner.

POWER OF ENTRY—Matters pertaining to—

2006 WAIRC 05483

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WOODSIDE ENERGY LIMITED
	APPLICANT
	-v-
	CONSTRUCTION, FORESTRY MINING AND ENERGY UNION OF WORKERS
	RESPONDENT
CORAM	SENIOR COMMISSIONER J F GREGOR
DATE	MONDAY, 25 SEPTEMBER 2006
FILE NO/S	APPL 23 OF 2006
CITATION NO.	2006 WAIRC 05483

Result	Discontinued by consent
Representation	
Applicant	Mr R Hooker (of counsel) and Ms J Denkha (of counsel)
Respondent	Mr T Kucera (of counsel)

Order

WHEREAS the parties to this matter have untaken negotiations with the aim of resolving the application; and

WHEREAS in reliance on the undertakings given by the Construction Forestry Mining and Energy Union of Workers, on behalf of first and second respondents, in the attached Schedule, without prejudice to any party's rights in respect of the matters alleged in the application and without any admission by any party and in accordance with agreement, the Commission will discontinue the application by consent without any order for costs; and

WHEREAS the hearing listed for 27th September, 3rd and 4th October, 2006 will be vacated;

NOW THEREFORE pursuant to the powers vested in it by the Industrial Relations Act 1979 and by consent the Commission hereby orders:

1. The application is discontinued by consent.
2. There be no order as to costs.
3. The hearings listed for 27th September, 3rd and 4th October 2006 are hereby vacated.

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

SCHEDULE

1. The Construction Forestry Mining and Energy Union of Workers (**CFMEUW**) undertakes itself and on behalf of its authorised officials and employees, including Mr Bob Wade, as follows:

   (a) Where any authorised official or employee of the CFMEUW wishes to enter the leasehold land on the Burrup Peninsular controlled by Woodside Energy Ltd (**Woodside**) which includes the operating gas plant and the North West Shelf Project Phase V construction site (**Site**) pursuant to the provisions of any Act of the Western Australian Parliament (and relevant Regulations) providing for entry to premises including the *Industrial Relations Act 1979* (**State Legislation**), the authorised official or employee of the CFMEUW will:

      (i) only seek to exercise a right of entry under the State Legislation in respect of the Site to investigate a suspected breach of the *Occupational Health and Safety Act 1984* (**OSH Act**) insofar as it is pursuant to an OHS law as defined under section 737 of the *Workplace Relations Act 1996* (**Federal Act**) (and relevant Regulations) and in no other circumstances;

      (ii) provide Woodside with notice of intention to exercise the right of entry referred to in 1(a)(i) above, including the name of the relevant employer, details of the nature of the relevant suspected breach of the OSH Act and the powers listed under the State Legislation that the official or employee of the CFMEUW intends to exercise, which:

         (A) in the event of a serious and urgent safety issue arising on the Site involving a suspected breach of the OSH Act that requires urgent investigation such that it is impracticable to give 24 hours notice in writing, shall be provided to Woodside as soon as practicable and in any event prior to seeking to enter the Site;

         (B) in any other circumstances, shall be provided to Woodside at least 24 hours prior to seeking to enter the Site and shall be in writing, including the details required for a valid right of entry notice under section 738 of the Federal Act (and relevant regulations);

         and

      (iii) at all times comply with all site safety, security and access requirements as determined by Woodside and Foster Wheeler WorleyParsons Joint Venture (**FWW**) and immediately comply with any direction given by Woodside and/or FWW personnel in respect of safety and security on the Site;

   (b) Where an employer on the Site named in the notice referred to in 1(a)(ii) above disputes that an authorised official or employee of the CFMEUW has a right to enter the Site to investigate breaches of the OSH Act in accordance with the notice, and either:

      (i) advises the CFMEUW or the relevant authorised official or employee of the CFMEUW directly; or

      (ii) advises Woodside and Woodside in turn advises the CFMEUW or the relevant authorised official or employee of the CFMEUW directly,

   the CFMEUW will apply to have the dispute with the employer resolved in an applicable court or tribunal and, without limiting other rights of entry that may be exercised under the Federal Act in respect of that employer on the Site, no authorised official or employee of the CFMEUW will enter the Site until that dispute is resolved in that court or tribunal.

2. The CFMEUW undertakes itself and on behalf of Mr Joe McDonald, that Mr McDonald will not seek to enter the Site for the life of the North West Shelf Project Phase V without Woodside's permission given in writing, whether Mr McDonald is authorised under any legislation (other than the Federal Act) or not, until such time as Mr McDonald holds a permit to exercise right of entry to premises under the Federal Act.

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2006 WAIRC 05535

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	IAN ANDERSON
	APPLICANT
	-v-
	ROGERS SELLER & MYHILL PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
HEARD	THURSDAY, 24 AUGUST 2006
DELIVERED	WEDNESDAY, 4 OCTOBER 2006
FILE NO.	U 309 OF 2006, B 309 OF 2006
CITATION NO.	2006 WAIRC 05535

Catchwords	Industrial law - Termination of employment - Harsh, oppressive and unfair dismissal and denied contractual benefits - Alleged breach of respondent's email policy and equal opportunity and harassment policy - Whether summary dismissal of applicant justified - Principles applied - Commission not persuaded that summary dismissal warranted - Applicant harshly, oppressively and unfairly dismissed by reason of his summary dismissal - Application upheld in part - Compensation ordered - *Industrial Relations Act 1979* (WA) s 29(1)(b)(i), s 29(1)(b)(ii) & s 23A
Result	Order issued
Representation	
Applicant	Ms J Kenny of counsel instructed by Dwyer Durack Lawyers
Respondent	Mr J Edmonds

Reasons for Decision

1 The applicant brings two applications before the Commission pursuant to s 29(1)(b)(i) and (ii) of the Industrial Relations Act 1979 ("the Act"). The applicant claims that he was unfairly dismissed from his position as a retail sales consultant on or about 10 March 2006 and was denied a contractual benefit by way of payment of salary in lieu of notice in the sum of $3,010.76.

2 The respondent wholly denies the applicant's claims and alleges the applicant was lawfully and fairly summarily dismissed for misconduct.

3 At the outset of the proceedings the Commission, by consent, ordered that the name of the respondent be amended to reflect the proper name of the applicant's former employer.

Factual Background

4 The facts of this matter are not essentially controversial and they are as follows. The applicant commenced employment as a retail sales consultant with the respondent, which is a supplier of bathroom fittings and fixtures, on or about 10 March 2005. The applicant entered into a written contract of employment a copy of which was tendered as exhibit A1. Relevantly, for present purposes, amongst other matters, that contract of employment contained a declaration to the effect that the applicant had received a copy of the respondent's staff manual and agreed to comply with the conditions and policies set out in it. A copy of the staff manual was tendered as exhibit A2. That manual contained various policies including policies in relation to computer usage and equal opportunity and harassment matters, the relevance of which will appear further below in these reasons.

5 The circumstances leading to the termination of the applicant's employment arose from events which occurred outside of the workplace on 2 March 2006. The applicant testified that he was attending a dinner party with friends in East Fremantle in Perth. Towards the end of the dinner, the applicant said he noticed someone removing car keys from a table close to the front door of the house. He gave chase. The intruder was pursued by the applicant along with others it seems, from the dinner party. At some point in the pursuit, the intruder appeared from bushes brandishing a knife and threatened the applicant and others who were present. The intruder then attempted to and apparently did, drive off in a motor vehicle which had been

stolen from the house where the dinner party had been taking place. Subsequent to that, the applicant assisted police which ultimately led to the apprehension of the intruder who was subsequently charged with various serious criminal offences.

6 The applicant testified that he arrived home very early the following morning and had little sleep before attending work the next day on 3 March 2006. He testified that he was still shaken and upset from the experience of the night before. He spoke to some employees about the incident when he commenced work and said this made him feel better. Thereafter, for present purposes, the applicant prepared and sent an email to all staff of the respondent which it was common ground, was distributed to employees of the respondent nationally. Given that the applicant's and respondent's cases respectively turned on the content of this email communication and its characterisation, it is set out in full as follows:

> *"Hi Everyone,*
>
> *This is an email that I would like everyone to read and seriously think about it. It is not an urban legend and it is not one of those things that happened to a friend of a friend. This happened to me last night and is head lining this morning's news in Perth (Friday 03/03/06).*
>
> *Last night I was at a dinner party in the very nice neighbourhood of East Fremantle. We were out on the balcony finishing off the night with coffee when my friends dog, that was with us, started to go berserk heading for the front door. I looked and saw and (sic) arm doing a snatch and grab from the hallway table at the front of the house. Unfortunately it was a coloured arm that did not belong in the house.*
>
> *The next thing, I was out of me (sic) seat running and yelling at the intruder who had walked through the unlocked front door. He ran out of the house with my self hot on the trail, leaving the rest of the dinner party wondering what the hell was going on. By the time I got outside he was already out of sight. Hearing the sound of someone going through bushes at the corner, I headed down the street in hot pursuit. Unfortunately, I lost track of him, but thankfully a neighbour who had been observing the commotion from across the street saw him hide in some bushes. By that time, the rest of the dinner party joined me and we surrounded the bushes telling him to come out, when one of the other guest (sic) arrived with his car and was shining the light into the bushes.*
>
> *This is where things took a turns (sic) and he came out of the bushes brandishing a large knife that surprised us all. We all of course moved back and he made back down the street towards the cars that were parked at the front of my friend's house. He was using the remote on the keys he had swiped to locate the car by deactivating the alarm. He then jumped in the vehicle and proceeded to try and start it. The other dinner guest who was in his car drove up the street and blocked the car in. I yelled at him to get out of the road as this guy is getting out of here one way or another. He reversed in time as the guy took of (sic) at a rate of knots. At this stage, the dinner guest in his car decided to follow the stolen car and another called the police. With some clever liaising with the police and the guest tailing the car, the police apprehended the guy and his (sic) is in custody facing court today charged with armed robbery and aggravated burglary.*
>
> *The point of sending you all this email is not to scare you and turn your house into fort knox and live in fear. Things are getting worse out there and its time we stopped turning a blind eye and start making a stand against it. The world is crumbling under violence and terrorism and we should not take our way of life for granted. I want this email to raise your awareness and think a little.*
>
> - *Do take to precautions to secure your home when you are away and also when you are at home.*
> - *Introduce yourself to your neighbours and swap phone numbers and keep an eye out for one another.*
>
> *These are two simple things that could of stopped the (sic) this event from happening. The worst thing you can do is do nothing and simply turn a blind eye. Do your part to keep the Australian spirit and way of life alive and most of all, but most of all, be sensible about the actions you take. Doing nothing should never be an option.*
>
> *With thanks"*

7 It was common ground that the applicant also sent the email to some friends outside of the respondent, which email contained a sound recording.

8 The applicant said that after he returned home after work that day he was still quite traumatised by the incident. The applicant next attended work the following Tuesday as it was a long weekend. He received a telephone call from the respondent's General Manager Mr Parker. Mr Parker informed the applicant that there was concern about the content of the email he had sent to all staff as it was in breach of the respondent's policies. The applicant was informed that as a result, there was to be an investigation into the matter and in the meantime, until Friday 10 March 2006, the applicant was suspended on pay. This was confirmed in a letter from Mr Parker to the applicant dated 7 March 2006 a copy of which was which was tendered as exhibit R4. This letter informed the applicant that he would undergo a formal disciplinary process as a consequence of the email that he sent, with a formal disciplinary meeting to be held on 10 March 2006. It was alleged in particular, that the email was inappropriate as it contained a racial slur and additionally, attempted in the respondent's view, to solicit support for a political cause or contained a political overtone.

9 The concerns that the respondent had about the applicant's email were referred to in the evidence of Mr Edmonds the respondent's Managing Director. He testified that he regarded the email as a serious breach of the respondent's Computing and Equal Opportunity Policy as it was inconsistent with the respondent's values. He said that the respondent employed some 80 plus employees of various cultural backgrounds and he took the view that the reference to "coloured arm" and the final paragraphs requesting readers to take some action, as containing a political overtone and highly inappropriate for a workplace communication. The applicant was informed that the respondent considered the matter a serious one and one which may lead to termination of employment.

10 A meeting took place on the morning of 9 March 2006 between the applicant and representatives of the respondent. A copy of the notes of this discussion, were tendered as exhibit R5. The applicant accepted that the notes captured the gist of the

discussion. The applicant was prior to the meeting, invited to have a witness present but declined to do so. During the course of the meeting, the applicant was informed that the respondent took the view that the email sent by the applicant on 4 March 2006 was in breach of its Computer and Equal Opportunity and Harassment policies. The applicant confirmed that he was aware of these policies in the staff manual. The applicant was informed that the reference to "coloured arm" could clearly be construed as offensive to a reader of the email in breach of the respondent's policy and also, given that the email was sent to "All Staff" and was prepared during work time, this was unacceptable conduct. The applicant was also referred to a previous counselling he received in January 2006 regarding use of the respondent's internet for private purposes.

11 The applicant's response during the meeting, and indeed his testimony, was that he meant no harm by the email but rather prepared and sent it to make others within the respondent aware of the possibility of such incidents occurring in their own homes. The applicant said that he attempted to make something positive arising from the incident and to raise the level of awareness with the respondent's employees.

12 As to the reference to "coloured arm", the applicant said he unthinkingly said this because given those who attended the dinner party, the fact that the arm was not fair skinned meant it was not someone at the party who was taking keys from the table. As to the passages in the email about "making a stand", the applicant said he only meant to say that in this country we should not take our lifestyle for granted and that these events can occur to anyone anywhere. The applicant was remorseful for his conduct and apologised to the respondent for it.

13 Additionally, the applicant prepared and provided to the respondent a written response to the allegations dated 9 March 2006 which was tendered as exhibit R6. In it the applicant referred to the incident, why he sent the email and that he intended no ill by it and was apologetic again.

14 The next day on Friday 10 March 2006 a further meeting took place in the morning. At that meeting, Ms Corner the WA Manager for the respondent informed the applicant that the respondent had considered the circumstances of the case and the applicant's explanation. The applicant was informed that it was the respondent's decision to summarily dismiss the applicant for misconduct. The reason for the dismissal was the breach of the respondent's Computing and Equal Opportunity and Harassment policies. The applicant said he was upset by the respondent's decision and left the premises that day. Counselling services were offered by the respondent which the applicant availed himself of.

15 Subsequent to his dismissal, the applicant sought alternative employment and commenced in a new position on or about 24 July 2006 on an annual salary in excess of that earned by him in his employment with the respondent. I find accordingly

Consideration

16 Whether or not the applicant's dismissal was harsh, oppressive or unfair turns on whether the employer has exercised its contractual right to terminate the contract of employment contrary to the principles set out in *Miles & Ors t/as The Undercliffe Nursing Home v FMWU* (1985) 65 WAIG 385. Additionally, given that the dismissal was effected summarily for misconduct, there is an obligation on the employer to establish on the balance of probabilities that the misconduct complained of actually occurred: *Newmont Australia Ltd v The AWU* (1988) 68 WAIG 677. Additionally, in a case such as this, the lawfulness of the dismissal is a relevant consideration however not all unlawful dismissals will be unfair and vice versa: *R v The Industrial Court of South Australia; ex parte General Motors Holden* (1975) 10 SASR 582.

17 The issues in this case are as follows:

(a) did the conduct of the applicant, properly characterised, constitute a breach of the respondent's policies?;

(b) if it did, was the breach sufficient to warrant summary dismissal?; and

(c) if it was not sufficient to warrant summary dismissal, did the applicant's conduct warrant dismissal on notice?

Breach of Policies

18 The Commission has already referred to the staff manual tendered as exhibit R2. The relevant policies from the staff manual are the "Computer, Internet and E-mail Security Policy" and the "Equal Opportunity and Harassment Policy". Relevantly, the Computer, Internet and E-mail Security Policy provides as follows:

> ***"rogerseller*** *makes available to its staff computer equipment, software, Email and internet access. The provision of these facilities is to allow staff to be as productive as possible in the delivery of products and services to our customers. This policy is to ensure that:*
>
> - *these facilities are used to improve the services to our customers;*
> - *these facilities are not used in a way that damages the company's interests; and*
> - *the significant investment in these facilities is protected…*
>
> *As a condition of continued employment, each User is personally responsible to ensure that this policy is followed. Violation of this Policy will subject the User to discipline, up to and including termination of employment...*
>
> *ELECTRONIC MAIL OR EMAIL*
>
> *The primary purpose of electronic mail is to facilitate internal and external business-related communication. Accordingly, Email should be used primarily for matters of concern to* ***rogerseller*** *business. The use of email for personal, private or non-business should be only on a limited basis only.*
>
> *Email and other information systems of the company are not to be used in a way that may be disruptive, offensive to others, or harmful to morale.*
>
> *You must not display or transmit sexually explicit images, messages or cartoons or Email communications that may contain ethnic slurs or anything that may be construed as harassment or discredit others based on their race, national origin, sex, sexual orientation, age, disability, religious or political beliefs.*

The Email system cannot be used to solicit or convert others for commercial ventures, religious or political causes, outside organisations or other non-job related matters."

19 Further, the Equal Opportunity and Harassment Policy provides as follows:

***"rogerseller** will not tolerate discrimination, harassment or victimisation. We believe that all employees have the right to be treated with respect and dignity, in a workplace free from harassment.*

*The Equal Opportunity and Harassment policy of **rogerseller** is based on the right of all individuals to be treated with respect and dignity.*

Every employee is obliged to treat his or her work mates with courtesy, sensitivity and fairness.

Discrimination, harassment or victimisation will not be tolerated, and appropriate action will be taken whenever it is found to occur. All employees are entitled to fair treatment regardless of:

- *age*
- *race, colour or national origin*
- *sex or sexual preference*
- *marital status or pregnancy*
- *religious or political convictions*
- *physical impairment.*

Harassment is any physical or verbal conduct which is unwelcome, intimidating or offensive. It must be remembered that behaviour or comments which may not offend one person may be unwelcome or offensive to another.

Harassment includes:

- *displays of offensive material*
- *leering, touching or suggestive behaviour*
- *smutty, racist or other offensive jokes or comments*
- *intimidating or humiliating phone calls*
- *name calling or deliberate gestures*
- *demands or subtle pressures for sexual favours or outings*
- *campaigns of hate or silence*
- *derogatory terms or behaviour."*

20 The Harassment Policy then goes on to outline the process for dealing with complaints by an employee alleging harassment in contravention of its terms.

21 At the outset, I am not persuaded on the evidence that the applicant's conduct constituted harassment for the purposes of the respondent's Harassment Policy. I considered the application of a similar policy in *CMETSWU v BHP Iron Ore Ltd* (2001) 81 WAIG 1393. In this case, an employee of the respondent company was dismissed for writing allegedly offensive remarks on a draft affidavit to be used in court proceedings in connection with an ongoing industrial dispute. In that case, the operative part of the respondent's harassment policy was similar to the Harassment Policy set out above and was in the following terms:

"BHP IRON ORE NON HARASSMENT POLICY

BHPIO is opposed to all forms of work related harassment including that related to sex, race, membership or non-membership of trade unions and acceptance or non-acceptance of workplace agreements.

Harassment takes many forms but is usually constituted by unwelcome acts or remarks which make the workplace unpleasant or humiliating for the targeted person.

Such harassment may comprise of:

- *verbal abuse, including derogatory words;*
- *offensive graffiti;*
- *intimidating behaviour towards another employee or members of that employee's family; and*
- *direct threats*

Any employee who believes that they are being subject to harassment, and any employee who observes behaviour which may amount to harassment, should immediately report it to their supervisor or manager.

Work related harassment, including threats and intimidation, is unacceptable to BHPIO and any employees found to have engaged in such behaviour will be subject to disciplinary action up to and including summary dismissal.

Management will ensure that all complaints are treated confidentially, seriously and sympathetically and that appropriate action is taken whenever harassment occurs.

Note that pursuant to the Workplace Agreements Act 1993 (WA) ("the WPA") a person must not by threats or intimidation persuade, or attempt to persuade, another person to not enter into (or enter into) workplace agreements.

Further, Section 68(2) of the WPA relevantly provides that a person must not intimidate an employee or threaten, injury or harm to a person or property of an employer because the employee is (or is not) a party to a workplace agreement."

22 Interpreting the policy in accordance with the ordinary and natural meaning of its language, I said at pars 19-21 as follows:

> *"19 The clear purpose of the Policy is to prevent employees of the respondent from engaging in any conduct that may have the effect of harassing another employee. It is also clear from the plain language of the Policy, when read as a whole, that for there to be harassment, there needs to be some form of communication and/or conduct engaged in by an employee, which conduct and/or communication is directed at another person, (referred to in the Policy as the "target") and that other person, in some way, shape or form, is in receipt of it. It is a necessary ingredient of harassment in my opinion, for the purposes of the Policy, that the "harassee" be harassed. That is, the subject or "target" must receive it and be affected by it in some way. That is the whole purpose of the Policy.*
>
> *20 Some assistance as to what is meant by "harassment" in its ordinary and natural meaning, can be obtained from the Shorter Oxford English Dictionary which defines "harass" as follows:*
>
> > *"Harass - 1. To wear out, or exhaust with fatigue, care, trouble etc. 2. To harry, lay waste 3. To trouble or vex by repeated attacks. 4. To worry, distress with annoying labour, care, importunity, misfortune, etc."*
>
> *21 Clearly therefore, for a person to be "harassed" under the Policy, the person must, as a necessary ingredient, know of the alleged harassing conduct or communication. In this case, the evidence was that Mr Holland was never aware of the words written by Mr Robinson at any material time prior to his dismissal. Indeed on the evidence, even as at the time of these proceedings, Mr Holland had never seen the notations placed on the affidavit."*

23 On the facts of that case, the Commission concluded that there could be no harassment within the terms of the policy, because the alleged "target" of the harassment, was not even aware of the relevant written comments, let alone affected by them in the manner contemplated by the policy. The Commission's decision in this case was affirmed on appeal to the Full Bench of the Commission ((2001) 81 WAIG 30, 31) and further by the Industrial Appeal Court in *BHP Billiton Iron Ore Pty Ltd v CMETSWU* (2002) 82 WAIG 1188.

24 On the evidence before the Commission in this matter, there is nothing to suggest that the email sent by the applicant was received by any person within the staff of the respondent who regarded the communication as unwelcome, intimidating or offensive or otherwise complained about it. I do not include the management's response to the email in this regard, as clearly their concern was compliance with the policy, not a complaint of harassment in any particular sense. It is also clear from the text of the respondent's Equal Opportunity and Harassment Policy read as a whole, that for a breach of such a policy to occur, there must be a subject, being another employee or person, who feels discriminated against or harassed.

25 In the absence of a breach of the Harassment Policy, the next issue is whether the applicant's conduct was in breach of the respondent's Computer, Internet and Email Security Policy. It is quite clear that this policy is designed to prevent the use of the respondent's internet and email system in an inappropriate manner. There is no requirement for a breach of this policy to occur, that a recipient of such a communication be aggrieved in any particular manner, as opposed to the Harassment Policy. It is the actual use by an employee, or more appropriately, misuse, of the respondent's computing system that might give rise to a breach of the policy. It is clear in my opinion that sending an email as did the applicant, if it contains material falling within the terms of the policy, may constitute a breach of the policy.

26 There are a number of matters to be referred to in relation to this policy. Firstly, the policy makes it plain in accordance with its terms, that the primary use of the respondent's computing equipment, software and email etc, is for business purposes only. There is provision in the policy for use of email for personal purposes on a limited basis. It is also very clear that the purpose of the email policy is to ensure that such communications are free from the kinds of subject matter there set out. The respondent submitted that the applicant must have spent some time composing and typing this email, and correspondingly, would naturally involve some time during working time, in every recipient of it reading it.

27 Firstly, I do not accept the applicant's evidence that the email was simply a spur of the moment communication. From its terms, it was clearly a well thought out and constructed communication with a serious message contained within it. The manner of composition, the detail involved in the narration, and the final paragraphs extolling the virtues of the Australian way of life and requesting readers to "make a stand against it" are strongly suggestive of a communication into which has been put considerable thought. From the time of sending, on exhibit R3, based on AEST, of 2.31pm, even allowing for daylight saving, it would also appear that it was not sent shortly after the applicant arrived at work as was the suggestion in his evidence. The email also invites the reader to consider and take seriously the message intended by the communication. It is certainly not a light hearted brief communication with all staff.

28 It was the applicant's evidence and submissions made on his behalf, that he did not intend any offence by the content of his email. I accept the applicant's evidence in this regard and also that he was remorseful and apologetic for the difficulties caused by his conduct. However, the relevant point to be made at this juncture is that in terms of policies of this kind, and equal opportunity law generally, intention is not an element to be established: *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165; 64 ALJR 53; 29 IR 398; 89 ALR 1; [1989] EOC 92-271; *Waters v Public Transport Corp* (1991) 173 CLR 349; 66 ALJR 47; 103 ALR 513; [1991] EOC 92-390. A principal purpose of policies of this kind, put in place by employers in the workplace, is to ensure that employees do not, even inadvertently, inappropriately use an employer's resources which may have the effect of causing harm or offence to others. This in turn, places an employer in a position where it may be held vicariously liable for the conduct of its employees in some circumstances. It must always be borne in mind in cases of this kind, as indeed the respondent's policy records, that things said or done by one person, without any intention to offend or harm, may be interpreted by another person in an entirely different way, depending perhaps for example, on their cultural background. That is why sensitivity to these matters is required at all times in the workplace.

29 Returning to the email itself as exhibit R3, I consider that reference to "coloured arm" could be interpreted by a recipient of the email as a racial slur. The reference was very specific. This is despite the applicant's evidence that he did not intend in any way to convey such an impression. Secondly, the penultimate and final paragraphs in my opinion, in accordance with the plain language of the email, read in the context of the email as a whole, clearly seek to solicit support by other staff of the respondent for people to in effect, "stand up and defend themselves". In my opinion, read in context, these two paragraphs do contain overtones of soliciting support for a political cause, not in a party political sense, but may be construed more generally in terms of citizen's rights and the requirement for vigilance to defend those rights, in particular in one's home.

30 These matters are clearly inappropriate content for a communication in the workplace. They carry with them the clear potential for a recipient to misinterpret its content. I also take into account the un-contradicted evidence of Mr Edmonds that the respondent's employees come from a diverse range of cultural backgrounds.

31 I therefore regard the email sent by the applicant on 3 March 2006 as being in breach of the respondent's Computer, Internet and Email Security Policy as set out above.

Did The Breach Warrant Summary Dismissal?

32 The remedy of summary dismissal is available to an employer in a situation where an employee commits an act of misconduct which is sufficiently grave to indicate that the employee no longer intends to be bound by his or her obligations under the contract of employment. The right to summary dismissal at common law is an implied term of a contract of employment. It enables an employer, in response to a fundamental breach of the contract by an employee, to terminate the contract without providing notice or pay in lieu of notice of termination under the contract. Additionally, in some circumstances, depending upon the terms of the contract of employment and any relevant industrial instrument, the employee lawfully summarily dismissed may also forfeit other accrued entitlements which would otherwise fall due on termination of employment. Moreover, reference by way of express terms in a contract of employment or relevant industrial instrument, to some grounds justifying summary dismissal for misconduct, do not exclude the implication of the more general right at common law: *AWU v Mackay Harbour Board; re Keane* (1939) 33 QJP 124.

33 In the present case, there is an express term in the applicant's written contract of employment contained at clause 19(d) in the following terms:

> *"d) In addition, the Employer has the right to terminate the Employee's employment without notice for serious misconduct, for serious breach of the Employer's policies or procedures or serious or persistent breach of the Employee's terms and conditions of employment, and in such case the Employee's pay and other entitlements will be paid up to the time of termination only."*

34 I am satisfied on the evidence in this matter and I find that at the time that the applicant sent the email in question, he was aware of the respondent's policies. This is so because of his admissions in evidence and also, by reason of the counselling he received in January 2006 concerning his use of the internet during working hours, where he made a similar admission as to his knowledge. I also take into account as a relevant consideration, that the events of the evening of 2 March 2006 must have been a traumatic experience for the applicant and no doubt others involved at the time. Whilst to some extent this might be seen as a mitigating circumstance, the fact remains that the applicant did prepare and send the email which he did, in the knowledge that it must have been inconsistent with the respondent's relevant policies. It was a deliberate and not an inadvertent act. Whilst there was no actual harassment in the circumstances of this case, for the reasons I have set out above, the potential for offence to be taken to such a communication is clear and it is equally important that policies of the kind adopted by the respondent, be enforced to reinforce their importance in the workplace.

35 However, in all of the circumstances of this case, I do not consider that the actions of the applicant warranted summary dismissal without notice for serious misconduct. This is the most severe remedy available to an employer to exercise in situations where an employee's conduct or performance strikes at the very root of the contract of service. Having considered all of the background to this matter, the ultimate sanction of summary dismissal was, in the present circumstances, too severe a penalty. The applicant has lost the benefit of salary in lieu of notice which he would otherwise have been paid. I therefore consider that for these reasons, the dismissal of the applicant was unlawful and also unfair to that extent.

Did The Breach Warrant Dismissal on Notice?

36 Whilst the Commission has concluded that the applicant's dismissal was wrongful at law, and to that extent was unfair, in my opinion, having regard to the fact that the applicant was aware of the relevant policies; that he consciously prepared and sent the email which he did that clearly contained inappropriate material; and that the applicant had been previously counselled as to a breach of the respondent's computing policies regarding internet usage; and that the respondent must enforce such policies as a component of their integrity, I consider that termination of the applicant's employment on notice would have been the appropriate outcome in this case.

37 As to the applicant's submissions that he was in some way denied procedural fairness, I am not persuaded that this was the case. The applicant was notified of his conduct as soon as it occurred. He was suspended on pay while the disciplinary process took place. The allegations against the applicant, which were not really factually controversial, were clearly put to the applicant and he was given every reasonable opportunity to respond. The applicant did so both orally and in writing. I am satisfied that the respondent took into account the applicant's explanation and in particular did have regard to his remorse for his conduct. In all of the circumstances, it cannot be said in my opinion that the dismissal was, in any sense, procedurally unfair.

38 Accordingly, having concluded that the applicant ought properly have been lawfully and fairly dismissed on notice or by payment in lieu of notice, the Commission will declare the applicant to have been harshly, oppressively and unfairly dismissed by reason of his summary dismissal, and will order compensation by way of payment in lieu of notice that the applicant would otherwise have received if the employment was terminated lawfully. Given that it was not in dispute that the applicant would have been entitled to the sum of $3,010.76 by way of four weeks' salary in lieu of notice, I find that to be the

applicant's loss for the purposes of s 23A(6) of the Act. Whilst the applicant also claimed that he had suffered injury as a consequence of the dismissal, I am not persuaded that the circumstances of the applicant's dismissal warrant any award of compensation on this ground: *Burazin v Blacktown City Guardian Pty Ltd* 142 ALR 144 at 151-152 (FCFC), and the approval by the Full Court of the dicta of Lee J in *Aitken v CMETSWU* (1995) 63 IR 1 at 9; *Bogunovich v Bayside Western Australia Pty Ltd* 79 WAIG 8; *Nicholas Richard Lynam v Lataga Pty Ltd* (2001) 81 WAIG 986.

39 Finally, as the award of compensation to the applicant effectively satisfies his claim under s 29(1)(b)(ii) of the Act for denied contractual benefits, this application will be dismissed.

40 Order accordingly.

2006 WAIRC 05536

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	IAN ANDERSON
	APPLICANT
	-v-
	ROGERS SELLER & MYHILL PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 4 OCTOBER 2006
FILE NO/S	U 309 OF 2006, B 309 OF 2006
CITATION NO.	2006 WAIRC 05536

Result	Order issued
Representation	
Applicant	Ms J Kenny of counsel instructed by Dwyer Durack Lawyers
Respondent	Mr J Edmonds

Declarations and Orders

HAVING heard Ms J Kenny of counsel on behalf of the applicant and Mr J Edmonds on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 ("the Act"), hereby –

1 DECLARES that the applicant was harshly, oppressively and unfairly dismissed by reason of his summary dismissal from his employment as a retail sales consultant on or about 10 March 2006.

2 DECLARES that reinstatement or re-employment is impractical.

3 ORDERS the respondent to pay to the applicant the sum of $3,010.76 as compensation for loss less any amount payable to the Commissioner of Taxation pursuant to the Income Tax Assessment Act 1936 and actually paid within 21 days of the date of this order.

4 ORDERS that application B 309 of 2006 be and is hereby dismissed.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.

2006 WAIRC 05529

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOHN FRANCES BELCHER
	APPLICANT
	-v-
	WEST FORM SCAFOLDING & RIGGING SERVICES
	RESPONDENT
CORAM	SENIOR COMMISSIONER J F GREGOR
HEARD	TUESDAY, 12 SEPTEMBER 2006, THURSDAY, 20 JULY 2006, TUESDAY, 20 JUNE 2006, TUESDAY, 29 AUGUST 2006
DELIVERED	WEDNESDAY, 4 OCTOBER 2006
FILE NO.	U 305 OF 2006
CITATION NO.	2006 WAIRC 05529

CatchWords	Termination of employment – unfair dismissal – constructive dismissal principles applied – questions of mitigation principles applied – *Industrial Relations Act, 1979 s23A*
Result	Application upheld, compensation awarded
Representation	
Applicant	Mr A Chilvers (of Counsel)
Respondent	Ms G Howe

Reasons for Decision

1 This application was filed by John Frances Belcher (the Applicant) in which he alleged that he was unfairly dismissed from employment with West Form Scaffolding and Rigging Services (the Respondent).

2 There is a suggestion from the Respondent that it should not be properly categorized as Respondent to these proceedings and further that the application was filed out of time. At the commencement of the proceedings in Karratha on the 12 September 2006 the Commission ruled that it would deal with both of those preliminary matters after hearing evidence from the parties. During the course of the hearing the Commission advised that the referral date indicated on the file was within the 28 day period specified in the *Industrial Relations Act, 1979* (the Act). There was another stamp on the file for a later date but applying the rules set out in *STW Channel 9 Perth v Giselle Satie (1999)* 79 WAIG 1863 the date of the referral is the date that is 'before' the Commission and therefore the application was in time.

3 Shortly stated the Applicant claims that he was approached by a principal of the Respondent, Mr Suratman, in Karratha and invited to visit the company's premises in the light industrial area in Karratha. The Applicant claims that he had a conversation with the Respondent in which he was offered employment. He was invited to fill out forms which contained information relating to his previous work record, his resumé and his qualifications. During the proceedings he described the document he completed as "just a normal application form". He also supplied three referees. After he filled out the forms and handed them to Mr Suratman, Mr Suratman told him that he would be paid $37.00 per hour and he could start work straight away subject to a successful drug and alcohol test and a medical.

4 The Applicant undertook the drug and alcohol test and medical and passed them both. The costs of the tests were met by the Respondent.

5 The Applicant then worked for the Respondent on various jobs throughout the Pilbara ranging from Telfer to Dampier Salt to Radio Hill and places in between. The Applicant described that he would go to work at various sites in a utility which was painted in the Respondent's livery. At all times he wore the Respondent's shirts, he supplied his own boots and other clothes. This employment pattern continued.

6 On some occasions the Applicant would receive a slightly different payment relevant to the site on which he was employed.

7 The Applicant would also from time to time work on jobs where other workers were brought from Perth to do shutdowns. At these times the men would wear shirts showing the Respondent's identification.

8 The arrangement was his pay would be put into the Commonwealth Bank and he filled out the forms to allow that to happen. These forms authorised the Respondent to make deposits. These happened on a regular basis and he received payslips sometime later.

9 He described them in his evidence. He noted they came from Balcatta and contained the name Pathline.

10 He queried this with Mr Adrian Graham, his Supervisor and he was told not to worry, it was normal practise and he worked full-time for the Respondent. After he had raised the query he never raised it again even when the names on the payslip changed because he thought it was none of his business, on the contrary it was as he described 'company business'.

11 During the course of his employment he lost his driver's license and he applied for an extraordinary license. He received assistance from the Respondent in making that application by Mr Suratman supplying a letter in which certified the Applicant was an employee of the West Scaffolding and Rigging Services (*Exhibit C1).* The letter before the Commission in *Exhibit C1* is in the following terms, formal parts omitted:

> *"To Whom It May Concern*
>
> *Mr. John Belcher has been a (sic) employee for Westform Scaffolding and Rigging Services P/L for some (6) six months, carrying out duties as a scaffolder/rigger. Since that time span we have expanded our company services to several mine sites servicing the maintenance division to these company's (sic). In the past Westform has had to transport John to various sites to perform work.*
>
> *Should John receive his driver's license back it would help Westform and be able to keep John in his position to carry out the maintenance work which is a valuable asset to our company. Should you required further information please contact Myself on 0437157545 at any time.*
>
> *Without Prejudice.*
>
> *Many Thanks*
>
> *Doug Suratman"*
>
> (*Exhibit C1*)

12 The working relationship continued for some 34 weeks and came to an end in circumstances where the Applicant says that he queried his pay after some work he performed on and around 27 February 2006. He had worked additional hours through a cyclone and afterwards he raised some concerns about his pay. After he had returned to Karratha Mr Suratman said he would look into the pay situation and he would be in touch. After a couple of days the Applicant had not heard from Mr Suratman and telephoned to ask what was going on. Mr Suratman said words to the effect "I've got no work at the moment. Get it through your head there is no such thing as a full-time job". The Applicant queried this saying he had been working full-time for 10 months. He asked about his money and Mr Suratman terminated the phone call. Then the Applicant received a payslip and he noticed it stated that he was a casual.

13 The Applicant spoke to Mr Suratman's wife and raised the issue of the change from casual to full-time. He was told that Mr Suratman had ordered the change. The Applicant objected and he was told to sort it out with Mr Suratman, which he attempted to do.

14 It came to pass that he was never ever contacted again and he did not work for the Respondent again.

15 He found difficulty getting work later because he could not prove that he worked for the Respondent who declined to confirm that he had. He eventually obtained work after some four months.

16 The Respondent did not lead any evidence in the proceedings. Its advocate commented because of that circumstance the Respondent was unable to challenge many of the assertions made by the Applicant in his evidence.

17 The majority of the cross-examination related to payslips and the names on those payslips. The Applicant continued during the cross-examination to assert that after he made the enquiry about the name on the payslips and received an assurance from Mr Graham of the payer, it never became an issue with him that the names on payslips were different to the name of the Respondent.

18 The Applicant asserted that he had suffered a constructive dismissal by the unilateral change to his contract of employment to casual and then failure to offer him employment.

19 For the Respondent it was argued that it uses labour hire companies but also employs its own staff. All the paperwork is done in Karratha and is forwarded to whichever labour hire company is being used at the time. If there are jobs finished and an employee goes to another work site, some employees may go back and work for the Respondent but a lot of the employees work directly and they are not the subject of any difficulty in payment.

20 It is asserted that the Applicant at all times was employed through various labour hire companies depending on the site he worked at, that the Respondent uses different labour hire companies for different sites and the Applicant's submission that he received payments from different companies was sufficient when he could not produce any evidence of confirmation he was employ directly by the Respondent. He had not produced any paperwork to substantiate that so therefore the allegations and the application against the Respondent that it has a responsibility must be dismissed because it is the responsibility of the Applicant to nominate the correct employer.

21 Through his Counsel, Mr Chilvers the Applicant says that he has entered into a properly made contract with the Respondent, he wore clothing marked with their logo, completed their day book, attended medicals paid by them, attended drug and alcohol testing paid for by them, drove hire cars for them and vehicles in their livery and at all times was assured that he was a permanent full-time employee of the Respondent. He regularly queried discrepancies in his pay with the Respondent and sometimes they were corrected and others they were not. There was a dispute which he raised towards the end of the relationship and only when his status was suddenly changed to casual without notice, was he not offered any work. The only evidence before the Commission is that he was employed by the Respondent. There is no evidence from the Respondent to conclude the Applicant's assertions, apart from statements from the bar table which should carry little weight. If there was a difficulty getting a witness present for hearing the Respondent could have asked for a listing on a different date.

22 If any more evidence was needed Mr Suratman signed a letter for presentation to a Magistrate stating that the Applicant was an employee of West Form Scaffolding and Rigging Services for some six months at the date of the letter. The Counsel for the Applicant suggested that in the absence of any other information the Commission was bound to draw the conclusion that the Applicant's story is correct, had not be contradicted in cross-examination one iota and there should be a finding in his favour.

23 Mr Chilvers says that during the period the Applicant was employed by the Respondent he earned $53,481.00 net which equates to $1,550.00 per week. He was off work for four months which is 17.3 weeks which at the net figure would be loss of $26,886.00. It was not put to the Applicant in cross-examination that he could have obtained other employment. Neither was it suggested that he had not made efforts nor was not put to him that he could have mitigated his loss, so his evidence in that regard is unchallenged. He should be entitled to the amount of money nominated as loss.

Analysis and Conclusions

24 I have noted earlier that the Commission during the proceedings rejected the contention of the Applicant that the application was filed out of time. Even if it were, it is clear that the principle set out in *Director General of the Department of Education v Prem Singh Malik (2003)* 83 WAIG 3006 are met and that if an extension of time needed to be granted it would have been granted upon those principles.

25 The only evidence before the Commission is that the Applicant made a contract with the Respondent to enter into an employment contract.

26 As described in Macken, McCarry and Sappideen's *"The Law of Employment"* Chapter 3 for a contract to be formed there must be an intention between the parties to create a legal relationship in terms that are enforceable. There must be offer by one party and its acceptance by the other. The contract must be supported by valuable consideration. The parties must be legally capable of making a contract. The parties must genuinely consent to the terms of the contract and the contract must not be entered into for any purpose which is illegal.

27 The situation here is that Mr Suratman and the Applicant had a discussion. During the discussion Mr Suratman offered the Applicant a job and that he indicated that he wanted a job. There was therefore an intention to create a legal relationship. There was then an offer by Mr Suratman and it was accepted by the Applicant. That offer was conditional upon a medical being successfully completed and a successful drug and alcohol test. It was also conditional upon the Applicant filling in application forms, providing proof of his qualifications and references. All of these things were done and accepted by the Respondent. The Respondent through Mr Suratman then offered the Applicant $37.00 per hour as a valuable consideration. There is nothing in evidence to say that the parties were not legally capable of making the contract. There is evidence of genuine consent at least on the unchallenged evidence of the Applicant, clearly the contract was a legal contract.

28 There is no doubt that a proper contract was formed between the Applicant and the Respondent. The letter in *Exhibit C1* gives unchallenged documentary support to this conclusion.

29 The Commission therefore must find that the Respondent in these proceedings is properly identified as West Form Scaffolding and Rigging Services.

30 The question remains as to whether there was a dismissal. Section 29 of the Act only creates the right for an Applicant to bring an application if there has been an employment contract and if there has been a dismissal.

31 The circumstances in this case are that the Applicant on the evidence, which is accepted by the Commission, was working along in a full-time job until sometime in February 2005 when he made a query about his pay. Immediately thereafter his status was changed to that of casual employee and thereafter he was never offered any more work. The cross-examination about the small discrepancies in the dates of the last two payslips does not describe what was the obvious train of events in this matter. The Applicant, upon the principles in *Hon. Attorney General v Western Australian Prison Officers' Union, (1995)* 75 WAIG 3166, was constructively dismissed and therefore for the purposes of s29 of the Act he is entitled to make the application.

32 The way the contract of employment was brought to an end, on the evidence available to the Commission and on the balance of probabilities, was because the Applicant made a query about his pay. This caused the Respondent through Mr Suratman to change the Applicant's employment status and thereafter he received no work. It is open to conclude and should be concluded that these actions amount an unfair dismissal, the dismissal being because the Applicant had made a query about his amount of his pay.

33 I therefore find the Applicant was unfairly dismissed.

34 It remains to deal with the question of the different names on the payslip. As I have indicated earlier for there to be a contract of employment between a master and a servant the formation of it must be based upon the principles outlined, that is, there must be an offer, an intention make a contract, an acceptance of the contract and a valuable consideration. None of these essential ingredients are present with any of the companies whose names appear on the payslips.

35 It can only be speculated, because there is no evidence to the contrary, that the use of those names are used as nothing more than an administrative convenience, there is no evidence to say they were even labour hire companies as asserted by the bar table. The Applicant proceeded on the basis that he was working for the Respondent and was being paid by it. He had made an enquiry about the different name in the payslip and he was told by a Supervisor "not to worry about it" and that the Respondent was his employer. If there need be any other proof that he was employed by the Respondent, *Exhibit C1* was created for the purpose of producing to a Court to certify the Applicant's employment status, is clear documentary evidence that he was employed by the Respondent and no one else. That must be the case, because if it were not that letter would constitute an instrument to mislead a Court in the discharge of its functions. That is not something about which the Commission would draw any conclusion other than that the letter was honestly given and honestly stated the status of the Applicant.

Remedy

36 It is clear that reinstatement is not a remedy in this case and the Applicant seeks payment of some 17.3 weeks which is the total time he was out of work after he completed with the Respondent. Questions of mitigation then arise.

37 The Full Bench of the Commission in *The St Cecilia's College School Board v Carmelina Grigson (2006)* WAIRC 05496 in a decision delivered on 26 September 2006 has visited the principles relating to mitigation:

> "*Mitigation was considered by Sharkey P, with whom Parks C agreed in Growers Market Butchers v Backman (1999) 79 WAIG 1313 at 1316 as follows:-*
>
> > *"1. The duty to mitigate loss in claims of unfair dismissal lies on the claimant employee (see Bogunovich v Bayside Western Australia Pty Ltd 79 WAIG 8 (FB).*
> >
> > *2. In practical terms, this requires the employee to diligently seek suitable alternative employment (see Brace v Calder and Others [1895] 2 QB 253).*
> >
> > *3. The onus of proof of failure to mitigate loss is on the respondent (see Metal Fabrications (Vic) Pty Ltd v Kelcey [1986] VR 507 (FC), Goldburg v Shell Oil Co of Australia Ltd (1990) 95 ALR 711 (FC), Prus-Grzybowski v Everingham and Others (1986) 45 ALR 468, 87 FLR 182 (Fed Ct FC) and McGregor on Damages (15th Edition 1988) at page 723.*

4. (a) The obligation to mitigate loss is an obligation to act reasonably in the mitigation of loss but not an obligation which a reasonable and prudent person would not undertake.

(b) This duty to act reasonably to mitigate damage does not generally require the employee to take employment of a different or inferior kind (see "Truth" and "Sportsman" Limited v Molesworth [1956] AR (NSW) 924; Bostik (Australia) Pty Ltd [1991] v Gorgevski (No 1) 36 FCR 20; 41 IR 452 and compare Dunstan v The National Mutual Life Association of Australia Ltd (1992) 5 VIR 73).

(c) In some cases, it may be unreasonable not to accept employment at a lower status and salary level (see Yetton v Eastwoods Froy Ltd [1967] 1 WLR 104 , for example).

5. (a) There is, of course, no recovery for the loss avoided, unless the matter is collateral (see W R Freedland "The Contract of Employment" (1976) at page 26).

(b) Salary or wages, including any fringe benefits received from a new employer, will reduce the damages payable (see Bold v Brough Nicholson and Hall Ltd [1964] 1 WLR 201; Lavarack v Woods of Colchester [1967] 1 QB 278 at 301; Hutt v The Cascade Brewery Ltd (unreported) (Supreme Ct Tas) per Wright J and Golja v Lord (unreported) 21 February 1996 (IRC of Aust) per Madgwick J).

6. Expenses incurred in seeking alternative employment to mitigate one's loss may be taken into account (see Brookton Holdings No V Pty Ltd v Kara Kar Holdings Pty Ltd (1994) 57 IR 288."

The principle in paragraph 2 of the passage quoted above has recently been qualified by the Full Bench. In BHP Billiton Iron Ore Pty Ltd v Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch (2006) 86 WAIG 642 it was observed by Ritter AP at [104] (with whom Beech CC and Gregor SC agreed) that Brace v Calder [1895] 2 QB 253 is not an authority which supports the principle that an employee must diligently seek suitable alternative employment.

The same principles discussed by Sharkey P in Growers Market Butchers v Backman (op cit) apply to the present assessment of contractual benefits. When assessing mitigation in contractual benefit claims the principles are the same as the principles that apply to unfair dismissal cases. In saying this we note that it may, strictly speaking, be a misnomer to refer to the "duty to mitigate". (See BHP Billiton (op cit) at [101]).

One of the authorities referred to by the President in Growers Market Butchers v Backman (op cit) was Yetton v Eastwoods Froy Ltd [1967] 1 WLR 104. In that matter the plaintiff had been employed as a managing director of a company for a fixed term of five years. After two years of the term, he was wrongfully dismissed and offered employment as assistant managing director at the same salary. He refused. It was held by the Court that the plaintiff's refusal to accept the offer was reasonable. In reaching this conclusion Blain J at page 118 held that the authorities make it plain whether a refusal to accept alternative employment which would reduce an employee's loss is a question of fact to be determined by regard to circumstances, in particular the personal factors raised."

38 Applying these principles from what the Applicant has said he was confused about his status and did not immediately seek work in the hope the Respondent would offer him something to do. The best inference one can draw from his evidence is that he may have been in this state of mind for some four to six weeks after his employment with the Respondent stopped. It seems too that the implication of his evidence is that he was trying to sort out what his relationship or status was with the Respondent.

39 It is submitted by the Applicant's Counsel that it was not put to him in cross-examination that he could have obtained other employment nor was it suggested to him that he had not made efforts, nor was it put to him that he could have any other way mitigated his loss. Therefore his evidence is unchallenged. Therefore, his Counsel submitted he should be entitled to have the whole of the period between the time he finished with the Respondent and he started work treated as a period of loss.

40 The onus of proof failure to mitigate loss is on the Respondent (see *Metal Fabrications (Vic) Pty Ltd v Kelcey* [1986] VR 507 (FC), *Goldburg v Shell Oil Co of Australia Ltd* (1990) 95 ALR 711 (FC), *Prus-Grzybowski v Everingham and Others* (1986) 45 ALR 468, 87 FLR 182 (Fed Ct FC) and *McGregor on Damages* (15th Edition 1988) at page 723.)

41 That onus of proof has not been discharged by the Respondent in this matter and therefore the Commission has to accept the argument advanced by Counsel for the Applicant that the loss should be found at the whole of the period until the Applicant obtained work. Therefore the Commission is obliged to order payment for a period 17.3 weeks which is a loss of $26,886.00. There was no claim for compensation for injury.

42 An Order will issue that the Applicant was unfairly dismissed, that reinstatement would be unavailing and the Respondent shall pay the Applicant $26,886.00 as compensation for loss.

2006 WAIRC 05557

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOHN FRANCES BELCHER
	APPLICANT
	-v-
	WEST FORM SCAFOLDING & RIGGING SERVICES
	RESPONDENT
CORAM	SENIOR COMMISSIONER J F GREGOR
DATE	FRIDAY, 6 OCTOBER 2006
FILE NO/S	U 305 OF 2006
CITATION NO.	2006 WAIRC 05557

Result	Application upheld, compensation awarded

Order

HAVING heard Mr A Chilvers, of Counsel, who appeared on behalf of the Applicant and Ms G Howe who appeared on behalf of the Respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby orders:

1. THAT the applicant on was unfairly dismissed, and reinstatement would be unavailing.
2. THAT West Form Scaffolding and Rigging Services pay the Applicant $26,886.00 as compensation for loss.

[L.S.]

(Sgd.) J F GREGOR,
Senior Commissioner.

2006 WAIRC 05475

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CLIVE DESMOND BOWLER
	APPLICANT
	-v-
	GLENISE TUTT - PRINCIPLE - ALBANY REAL ESTATE
	RESPONDENT
CORAM	COMMISSIONER P E SCOTT
HEARD	WEDNESDAY, 12 JULY 2006, TUESDAY, 11 JULY 2006, TUESDAY, 14 MARCH 2006, 11 SEPTEMBER 2006, 12 SEPTEMBER 2006
DELIVERED	TUESDAY, 26 SEPTEMBER 2006
FILE NO.	U 347 OF 2005
CITATION NO.	2006 WAIRC 05475

CatchWords	Industrial law (WA) – Claim of harsh, oppressive and unfair dismissal – Applicant sought compensation for injury suffered as a consequence of the dismissal - Applicant's gross misconduct jeopardised respondent's licence and business – Circumstances and test considered - Dismissal justified - Application dismissed – *Industrial Relations Act 1979* (WA) s.29(1)(b)(i)
Result	Application Dismissed
Representation	
Applicant	Appeared on his own behalf
Respondent	Mr G Maddy (of counsel)

Reasons for Decision

(Given extemporaneously and edited by the Commissioner)

1 The applicant claims that he was harshly, oppressively and unfairly dismissed by the respondent and he seeks compensation for the injury he says he suffered as a consequence of the dismissal. The respondent says the dismissal arose because the applicant had engaged in unethical conduct in a number of ways, all of which had the potential to put the respondent's real estate licence in jeopardy. The respondent says that the applicant agreed to the termination of his employment.

2 The Commission has heard the evidence of the applicant, Clive Desmond Bowler; Glenise Elizabeth Tutt, the principal of Albany Real Estate; and Timothy David Locke, a real estate sales representative with the respondent. In particular, I find that

the evidence of Ms Tutt is credible evidence, and where the evidence of the applicant conflicts with that of Ms Tutt and Mr Locke, I have no hesitation in accepting the latter evidence. I do so on the basis that the applicant's evidence contained a number of inconsistencies, including when in cross-examination about an undertaking given to the owners of the Broughton Street property, from whom the applicant was seeking agreement to list that property for sale, he initially said that he told them that he would get the advertisement into the papers within the week. Later he changed this to as soon as possible, and his evidence on this matter was equivocal. However, it is clear that in any event he handed the listing over to Mr Locke, once Mr Locke started employment with the respondent, by which time the deadline for submitting the advertisement had passed. I will say more later as to the applicant's conduct in this regard.

3 The facts relating to the applicant's employment with the respondent are as follows. The applicant is around 70 years of age. After working as a locomotive engine driver for many years, the applicant suffered health problems and as a consequence was unable to continue in that work. This occurred approximately 2 years ago. The applicant required income and he undertook study to become a real estate representative. He then worked for a real estate business and ceased that employment. The respondent engaged him in early November 2005.

4 The applicant agrees that his conditions of employment were those contained in the Workplace Contract (Exhibit R1) which applied to all sales staff of the respondent. This included that the applicant's remuneration would arise only from commissions on sales. This contract also contained, amongst others, the following conditions:

> "5 The Sales Representative's UNDERTAKINGS AND OBLIGATIONS
>
> …
>
> 5.6 The Representative will at all times act in the best interests of the Agency and comply with the lawful directions of the Agent or Licensee.
>
> …
>
> 11 TERMINATION OF THIS AGREEMENT:
>
> This Agreement shall remain in force and effect until:
>
> 11.1 Any material term of this Agreement or any statutory Code of Conduct governing the activities of the Agent or the Representative are breached.
>
> …
>
> 11.3 The Agent may dismiss the Representative without notice where the Representative has committed:
>
> …
>
> 11.3.2 any act omission or misconduct by the Representative that damages the goodwill or business reputation associated with the Agent,
>
> …
>
> 11.3.4 any wilful disobedience or neglect by the Representative to carry out or comply with any lawful directions or demands by the Agent"

5 There is also prescribed, pursuant to the regulations to the Real Estate and Business Agents Act 1978, a Code of Conduct for Agents and Sales Representatives (Exhibit R2). This contains a number of provisions, including:

> "2. An agent must act in the best interests of his or her principal except where it is unreasonable or improper to do so.
>
> …
>
> 4. …
>
> (3) An agent must not advertise that any real estate or business is for sale or erect or display a sign of sale or leasing without written authority."

6 Ms Tutt and the respondent's sales manager, Geoff Oldfield, provided the applicant with training and direction. During November 2005, Ms Tutt received a number of inquiries from other real estate agents about property for sale on the basis of a number of signs placed by the applicant. It appears that those signs were at Chester Pass Road, Takalarup and Youngenup Roads and Yallenup Road. Ms Tutt asked the applicant about the signs and he acknowledged that they were placed by him. He says in evidence that although the signs were not on or adjacent to properties he had listed for sale, that each sign had an arrow pointing in the direction of the property which was for sale. However, he says that he did not place a sign at the properties which were for sale. His intention was to indicate that there was a property for sale somewhere in the direction of the arrow. Interested people would have to telephone him for the specific details and a number of people did call him on that basis.

7 In any event, Ms Tutt told him in mid to late November 2005 to remove the signs as it was not appropriate to have a sign on or adjacent to a property which the agency did not have authority to sell - that this could place the agency's licence in jeopardy. He assured her that he would remove the signs. I find that although the applicant says in his evidence that he removed one particular sign within 2 days, that he did not do so. This is because Ms Tutt continued to receive inquiries from other agents.

8 Although the applicant denies being present at a sales meeting at Lavender Cottage on 5 December 2005, Ms Tutt and Mr Locke both gave evidence of his being present at a meeting at that venue and that Ms Tutt raised the issue again and that the applicant reassured her that the signs had been removed. I find that the matter was raised and answered in that manner. Mr Locke gave evidence that he removed the sign which the applicant had put on Chester Pass Road after the applicant's employment terminated.

9 Further problems arose, including that the applicant did not complete documentation before it was signed and Ms Tutt returned documents to him for him to have the details completed. On one occasion, according to her evidence, he simply added details himself after the contract had been signed and Ms Tutt informed him that he could not do that, that he had to have the details complete before the documents were signed, that they had formed a contract.

10 A particular problem arose with two properties which the applicant was dealing with. Mr and Mrs Street had made an offer to purchase a property in Spencer Street. They made that offer subject to the sale of their home in Broughton Street. Ms Tutt says she received a complaint from Mr and Mrs Street that after they had signed the offer to purchase the Spencer Street property, the applicant presented them with what is known as a 48-hour clause which I understand requires that if another offer is made which is not conditional, they would then have to make their offer unconditional within 48 hours or their offer would not stand.

11 The applicant denies that he presented the 48-hour clause after the offer had been signed. However, I find that it is more likely than not that this is what he did. I do so on the basis that it is consistent with his other actions of adding to contracts already signed and that a client who appears impartial in the matter complained of it occurring. Further, in an effort to obtain the listing of the Broughton Street property, the applicant undertook that he would arrange advertising of the property within the week. This was not done, nor could it have been done according to the agency's protocols for advertising and due to the advertising deadlines.

12 Further, and quite extraordinarily, the applicant gave evidence that what he intended to do was arrange the advertising privately, to pay for it himself, for it to be done not in the name of the agency or with the agency's logo but in the name of the vendors and to do so without seeking Ms Tutt's approval. That the applicant could have thought this was acceptable is indicative of his approach.

13 On the morning of 22 December 2005, Ms Tutt received the complaint from Mr and Mrs Street and they advised that they would be withdrawing the listing from the agency. They complained that the applicant had promised them that there would be editorial advertising of the property and that it had not occurred. They also complained about the manner in which the 48-hour clause had been put to them. Ms Tutt had not known of the promise of editorial advertising, nor had she approved it. It was not within the applicant's authority to have given such an undertaking without her approval.

14 After receiving the complaint, Ms Tutt met with the applicant. She told him that she believed that he was conducting himself in an unethical manner and thereby placing the business in jeopardy. He asked if the problem was discounting of commissions which had previously been an issue. She replied that that was one problem and then went on to raise with him the complaint regarding editorial advertising and the 48-hour clause. In the course of this discussion, she was attempting to explain the consequences for the business, and at the same time the applicant said words to the effect that she should not upset herself, if she wanted him to leave he would go and that he accepted it. The applicant has given evidence that Ms Tutt was becoming quite upset and her voice becoming very loud or high pitched. However, they parted on the basis that there were no hard feelings and they shook hands. The applicant denies that this was the way the conversation went. However, I accept that its tenor as described by Ms Tutt appears to be correct. The applicant and Mr Locke had a conversation later about the dismissal, and the applicant’s evidence is at odds with that of Mr Locke.

15 The test to be applied to a summary dismissal for gross misconduct are set out in *Bi-Lo Pty Ltd and Hooper* (1992) 53 IR 224 at 229 to 230 and referred to by the Full Bench in *Western Mining Corporation Ltd and the Australian Workers Union* (1997) 77 WAIG 1079 at 1084. This states:

> “Where the dismissal is based upon the alleged misconduct of the employee, the employer will satisfy the evidentiary onus which is cast upon it if it demonstrates that insofar as was within its power, before dismissing the employee, it conducted as full and extensive investigation into all of the relevant matters surrounding the alleged misconduct as was reasonable in the circumstances; it gave the employee every reasonable opportunity and sufficient time to answer all allegations and respond thereto; and that having done those things the employer honestly and genuinely believed and had reasonable grounds for believing on the information available at that time that the employee was guilty of the misconduct alleged; and that, taking into account any mitigating circumstances either associated with the misconduct or the employee’s work record, such misconduct justified dismissal. A failure to satisfactorily establish any of those matters will probably render the dismissal harsh, unjust or unreasonable.”

16 In this case those steps were not followed in any formal way and in fact a number of those steps were not applied at all. However, given what I have found in respect of what occurred at the final meeting between Ms Tutt and the applicant, that as soon as those matters commenced to be raised and she indicated her concern about them and attempted to explain to the applicant her concerns, he indicated that if she wanted him to go he would do so. Whilst it could not be said that the dismissal or that the termination of employment was mutually agreed, the circumstances under which it occurred means the steps required in *Bi-Lo and Hooper* (supra) are not required to be as rigidly applied in this case, i.e. when Ms Tutt raised the issues with the applicant, he said he would leave if she wanted him to, and they parted ostensibly on good terms.

17 In any event, any failings in the application of the process set out in *Bi-Lo and Hooper* (supra) are, in my view, insubstantial when looked at in the light of the conduct. That conduct was that the applicant did not comply with the requirements of the Code of Conduct for Agents and Sales Representatives in that he displayed signs on properties for which there was no authority to sell. While he claims that other real estate agents did the same, it was contrary to the Code and his employer had previously made known that the practice was not acceptable to that agency and he had previously been instructed a number of times to remove them. The applicant failed to remove the signs when directed a number of times to do so.

18 In addition, the applicant gave undertakings to a potential vendor regarding advertising which, firstly, he had no authority to give and, secondly, he did not comply with. Further, his intention to privately advertise was contrary to his obligations to the respondent. He also put the 48-hour clause to the clients after the offer had been signed and I refer here to the offer for the purchase of Broughton Street.

19 In all of those things, the applicant's conduct jeopardised the reputation and even the licence of his employer. That no actual long-term harm is evidenced is not the point. In the case of the listing of the Spencer Street property, this was retrieved by Ms Tutt and Mr Locke after the vendor's complaint.

20 The applicant had breached his obligations to his employer in significant ways going to the heart of the employment relationship. Conduct which strikes at the heart of the employment relationship constitutes gross misconduct. Not all acts of gross misconduct justify dismissal. Consideration must be given to all of the circumstances. The circumstances in this case include that the applicant had been employed by the respondent for less than 2 months and in that time had demonstrated consistently a failure to understand and comply with his obligations and with instructions. His conduct jeopardised the respondent's licence and business.

21 Accordingly, I find that the dismissal was justified in the circumstances. The application will be dismissed.

2006 WAIRC 05474

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CLIVE DESMOND BOWLER
	APPLICANT
	-v-
	GLENISE TUTT - PRINCIPLE - ALBANY REAL ESTATE
	RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE	TUESDAY, 26 SEPTEMBER 2006
FILE NO	U 347 OF 2005
CITATION NO.	2006 WAIRC 05474

Result	Application Dismissed

Order

HAVING heard the applicant on his own behalf and Mr G Maddy (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders:

THAT this application be, and is hereby dismissed.

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

2006 WAIRC 05468

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LUIS DOS SANTOS
	APPLICANT
	-v-
	SDR AUSTRALIA
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
HEARD	FRIDAY, 4 AUGUST 2006
DELIVERED	MONDAY, 25 SEPTEMBER 2006
FILE NO.	B 3 OF 2005
CITATION NO.	2006 WAIRC 05468

Catchwords	Contractual benefits claim - Claim for a benefit under contract of employment – Claim for payment for attending medical examination and for tool allowance - Application dismissed – Industrial Relations Act 1979 (WA) s 29(1)(b)(ii)
Result	Dismissed
Representation	
Applicant	Mr L Dos Santos on his own behalf
Respondent	Ms L Gibbs (of counsel)

Reasons for Decision

1 On 5 September 2005 Luis Dos Santos ("the applicant") lodged an application pursuant to s29(1)(b)(ii) of the *Industrial Relations Act 1979* ("the Act") against SDR Australia ("the respondent") claiming that he was owed benefits under his contract of employment. The respondent denies that the applicant is owed the benefits he is claiming.

The claim

2 The applicant initially sought the payment of a number of entitlements which he claimed were due to him pursuant to an Australian Industrial Relations Commission ("AIRC") certified agreement which covered his employment with the respondent (the SDR Australia Pty Ltd, CBH Albany Terminal Grain Handling Upgrade Mechanical Certified Agreement 2004 – "the Agreement").

3 After the respondent objected to the Commission dealing with these claims on the basis that the Commission lacked jurisdiction to deal with these matters the applicant stated at the hearing that he would not pursue these entitlements in the Commission (see *Cousins v YMCA of Perth* (2001) 82 WAIG 5).

4 It was not in contest and I find that the two remaining benefits the applicant is claiming with respect to this application are not entitlements which arise under the Agreement. The applicant is claiming a tool allowance of $42 per week for the 37 weeks he worked with the respondent ($1554 gross), which he says he was entitled to be paid when he was employed by the respondent to work on the Albany Terminal Grain Handling Upgrade Site ("the Site") and a day's pay ($189.22 gross) for attendance at a medical examination organised and paid for by the respondent which the applicant undertook in early January 2005 prior to commencing employment with the respondent.

Background

5 The applicant commenced employment with the respondent on the Site on or about 24 January 2005 to undertake welding duties and the applicant was terminated by the respondent in September 2005. The applicant's initial terms and conditions of employment were those contained in the Leighton Contractors Pty Ltd CBH Albany Terminal Grain Handling Upgrade Certified Agreement 2004 and from 25 July 2005 the applicant's employment was covered by the Agreement after it was registered by the AIRC.

Applicant's evidence

Payment for attendance at a medical examination in early January 2005

6 The applicant gave evidence that he applied for a welding position with the respondent in November or December 2004 by speaking to one of the respondent's supervisors in Kwinana, Mr Antonino Giardina. The applicant stated that he was aware that the respondent was undertaking a job at the Site in Albany and he was seeking employment there. The applicant stated that Mr Giardina told him that he would have to undertake a welding test and attend a medical examination. The applicant gave evidence that Mr Giardina told him that he would be paid for the time taken to undertake the medical examination and he told the applicant that he would also be paid for undertaking the welding test, which took between four to five hours. The applicant stated that three or four days after his conversation with Mr Giardina he attended a medical examination which lasted approximately one hour and the applicant stated that he had to take a day off work in order to attend this examination. The applicant gave evidence that in this industry it was usual to be paid for time taken to attend a medical examination.

7 The applicant stated that he was concerned when his first pay slip from the respondent did not include payment for the time to undertake the welding test and the medical examination. The applicant then approached the Site manager Mr Michael Hoson who told him that he was unsure whether the respondent had to pay him for the time to undertake the welding test and medical examination and he told him that he would look into both issues. The applicant stated that after this initial contact he again approached Mr Hoson about these payments and Mr Hoson told him that he would speak to the union representative at the Site. The applicant stated that in response to his claims for payment Mr Hoson initially offered to pay him half a day's pay and he later offered to pay him one day's pay for undertaking the welding test which the applicant later received. The applicant stated that Mr Hoson told him that the respondent would not pay for the time taken to attend the medical examination. The applicant stated that when he was refused payment for attending the medical examination he told Mr Hoson that he would deal with this issue using the Agreement's dispute settlement procedures and the applicant confirmed his intentions in this regard in writing (see Exhibit A1).

Tool allowance

8 The applicant stated that because the weekly rate of pay in the Agreement does not contemplate the payment of a tool allowance he was entitled to be paid a tool allowance (see Clause 9 - Wage Rates of the Agreement). As I understand the applicant's evidence he also stated that he was entitled to this payment because the respondent agreed in principle to make this payment to welders. The applicant stated that after a representative of the AMWU ("the Union") approached the respondent about the payment of a tool allowance to the boilermakers on the Site, which "automatically" involved the welders as well, the respondent accepted the principle of the payment of a tool allowance being made to welders. The applicant stated that Mr Hoson confirmed this to shop stewards on the Site, including the applicant, at a meeting held on 10 August 2005. The applicant then stated that "Mr Hoson said at that time he pays - - he thinks about (sic) got to pay boilermakers but the welders doesn't pay because they supply the tools - -" (transcript page 37). The applicant stated that after this meeting with Mr Hoson the respondent did not pay a tool allowance to boilermakers but provided them with a tool kit. The applicant then claimed that the respondent did not supply the necessary tools to welders in lieu of the payment of a tool allowance. The applicant maintained that the respondent only supplied him with a chipper hammer to undertake his work and the applicant stated that there were a number of other tools such as pliers, wire cutters, spanners, allen keys, screwdrivers, hammer and chisel which he provided to undertake his duties.

9 Under cross-examination the applicant denied that he initially contacted the respondent's co-owner Mr Alexandros Lazidis about working with the respondent and the applicant maintained that he only spoke to Mr Giardina when seeking employment with the respondent. The applicant denied that when Mr Giardina arranged for him to undertake a medical examination he told him that the examination would be paid for but not the time to take the examination and the applicant denied that he was advised that he would not be paid for the time to undertake the welding test and the applicant responded by stating that it was usual for him to be paid for the time taken to attend medical examinations. The applicant agreed that the respondent did not commence paying his wages from when he undertook the welding test but the applicant maintained that he became the respondent's employee once he passed the welding test. When it was put to the applicant that Mr Hoson told him that the respondent would not pay him for attending the medical examination the applicant claimed that Mr Hoson told him he would investigate this issue.

10 The applicant stated that at a meeting employees had with Mr Hoson on 10 August 2005 Mr Hoson told him that welders on site would not be paid a tool allowance as they were being supplied with all necessary tools. The applicant confirmed that Mr Hoson never agreed to pay him a tool allowance.

11 Mr Garnet O'Connell worked as a welder on the Site from March 2005 to approximately January or February 2006 and he worked with the applicant for part of this time.

12 Mr O'Connell stated that he understood the respondent had undertaken to either pay welders on the Site a tool allowance or supply them with the necessary tools to undertake their job. Mr O'Connell stated that the respondent gave the boilermakers tools to undertake their duties but he claimed that welders were not given any tools nor were they given a tool allowance. Mr O'Connell claimed that the respondent did not supply a number of necessary tools to welders on site and he stated that he had to supply a number of his own tools including a hammer and chisel, pliers, file wrenches, crescents, allen keys, screwdrivers and a level in order to undertake his duties.

13 Under cross-examination Mr O'Connell stated that if he needed additional tools he borrowed them from workmates. Mr O'Connell agreed that the respondent did not tell him to supply his own tools but he stated that he needed his tools to undertake his job. Mr O'Connell again stated that he understood the respondent gave an undertaking to pay welders a tool allowance or supply the tools required by welders. When it was put to Mr O'Connell that the respondent only agreed to pay a tool allowance to boilermakers if a tool kit was not provided Mr O'Connell stated the following:

> "I put to you that the only agreement made was that the boilermakers would be provided with the tool allowance or a tool kit?---Well, sort of - -
>
> That - - that could be correct, couldn't it?---Well, it could be, but I mean the welders are sort of - - sort of been? there as well."
>
> (Transcript page 50)

14 Under re-examination Mr O'Connell maintained that the respondent did not make the necessary tools available for welders to use.

Respondent's evidence

15 Mr Hoson is the respondent's construction manager and is in charge of the respondent's activities at the Site. Mr Hoson stated that Mr Lazidis is responsible for arranging the employment of workers at the Site however he also employed some personnel living in the Albany area.

16 Mr Hoson stated that he did not have any discussion with the applicant about being paid for attending a medical examination prior to the applicant commencing employment at the Site. Mr Hoson stated that when the applicant asked him for payment for attending his medical examination he told the applicant that this payment was not part of the Agreement. Mr Hoson stated that the respondent did not pay any worker to attend medical examinations and he advised the applicant of this. Mr Hoson denied that he told the applicant that the respondent would pay him half a day's pay for attending the medical examination.

17 Mr Hoson stated that when the boilermakers on the Site were supplied with tools the payment of a tool allowance to them ceased and he stated that because the respondent supplied welders on the Site with the necessary tools they were not entitled to be paid a tool allowance. Mr Hoson stated that welders on the Site were supplied with welders, chipping hammers, a wire brush and a grinder and he stated that no other major tools were required or needed by welders to undertake their job. Mr Hoson stated that if any additional tools were required by an employee there was a tool shop on site which had general tools for the use of employees. Mr Hoson recalled the issue of the payment of tool allowances to welders and boilermakers being raised at a tool box meeting and he stated that the welders in attendance were advised that the respondent would not pay them a tool allowance. Mr Hoson could not recall if the applicant was at this meeting but he stated that he would have been if he was working that day. Mr Hoson stated that he had no other discussions with the applicant about paying him a tool allowance.

18 Under cross-examination Mr Hoson stated that after the applicant approached him about payment for the time to undertake the welding test and medical examination he told him that he would check whether or not he was entitled to be paid for attending these tests and he stated that he may have told the applicant that he would raise this issue with a union representative on site. Mr Hoson maintained that he told the applicant that he would pay for his attendance at the welding test and not for attending the medical examination. Mr Hoson stated that if both the medical examination and welding test were passed by a worker then he or she would be considered for employment with the respondent. Mr Hoson stated that after the boilermakers asked to be paid a tool allowance they were given a tool kit. Mr Hoson recalled that welders on the Site asked the respondent for the payment of this allowance but they were advised that a tool allowance would not be paid to them. Mr Hoson stated that a number of relevant tools were available to welders for use on the Site.

19 Mr Giardina is the respondent's workshop manager at Kwinana. Mr Giardina stated that he knows the applicant and he confirmed that the applicant undertook a welding test at the respondent's Kwinana workshop. Mr Giardina stated that Mr Lazidis told him that the applicant would be undertaking a welding test, he stated that he did not employ the applicant to work at the Site and he did not recall the applicant contacting him about a job with the respondent at the end of 2004. Mr Giardina stated that he had no discussions with the applicant about him being paid for the time taken to undergo a medical examination. Mr Giardina stated that he could not recall any discussion with the applicant about him having to take a day off work to undertake his medical examination. Mr Giardina agreed that his name was on a contact list when jobs were advertised by the respondent.

20 Mr Lazidis is the respondent's operations manager and co-owner of the respondent. Mr Lazidis stated that as at the end of 2004 it was his role to recruit labour to work on the Site. Mr Lazidis gave evidence that when the applicant contacted him about employment at the Site they discussed the terms and conditions of employment at the Site. Mr Lazidis told the applicant to contact Mr Giardina and he advised Mr Giardina to expect a call from the applicant. Mr Lazidis stated that he also told the applicant that he was required to do a welding test, he had to undertake a medical examination and he had to have a client clearance to work on the Site. Mr Lazidis stated that he did not have any discussion with the applicant about payment for attending the medical examination.

Submissions

21 The applicant maintains that he only spoke to Mr Giardina about working at the Site and about payment for undertaking the medical examination and the applicant maintains that he had an agreement with Mr Giardina that he would be paid for attendance at both the welding test and the medical examination. The applicant argues that as the respondent paid for him to undertake the welding test this adds weight to his claim that there was an agreement to this effect. The applicant claims that Mr Hoson agreed that he was entitled to be paid a tool allowance and the respondent either had to pay him this allowance or give the welders on the Site a tool kit, which did not occur. The applicant maintained that it was unfair that boilermakers working on the Site were given a tool kit but not welders. The applicant claims that there is substance to his claims as he has endeavoured to negotiate his claims with the respondent over a lengthy period.

22 The respondent maintains that there is no evidence corroborating the applicant's claim that there was an agreement that he be paid for attendance at the medical examination and argues that the evidence of both Mr Lazidis and Mr Giardina was contrary to the applicant's claim about this issue and that these witnesses were not challenged by the applicant on this issue. The respondent argues that the Commission should also take into account the applicant's objection to Mr Giardina being called as a witness when deciding this issue. The respondent maintains that the applicant's account about his claims has changed and relies on the contents of a letter the applicant sent to the Commission around November 2005 after a conference was held in relation to this matter. The respondent also argues that this claim cannot be a benefit under the applicant's contract of employment as there was no employment relationship between the applicant and the respondent when the applicant undertook his medical examination and the respondent argues that the claim for eight hours pay is unrealistic given that the medical examination only took one hour.

23 The respondent argues that there was no evidence of any agreement that the applicant would be paid a tool allowance and claims that as there was no direct evidence of any agreement this claim should be dismissed. The respondent also argues that the applicant's evidence about this issue was inconsistent and the respondent maintains that the applicant wanted to be paid a tool allowance because the boilermakers were either going to receive a tool allowance or have their tools provided.

24 The respondent argues that the applicant's claims are frivolous and vexatious and is seeking an order for costs against the applicant (see *Denise Brailey v Mendex Pty Ltd t/a Mair and Co Maylands* (1992) 73 WAIG 26). The respondent also requests the opportunity to make further submissions on this issue if the Commission is disposed to award costs in its favour.

Findings and conclusions

Credibility

25 I listened carefully to the evidence given by all of the witnesses. I have concerns about some of the evidence given by the applicant. In my view the applicant was unconvincing when giving evidence about the conversation he claimed he had with Mr Giardina about payment for attendance at his medical examination and I also find that the applicant's evidence about being told that he had an entitlement to be paid a tool allowance was inconsistent. My understanding of the applicant's evidence was that Mr Hoson told him that he accepted the principle that welders on the Site would be paid a tool allowance and the applicant later stated under cross-examination that Mr Hoson never agreed to pay him a tool allowance. On the other hand I found the evidence given by the other witnesses in these proceedings including Mr O'Connell to be evidence that was given honestly and to the best of each person's recollection. Additionally, the evidence given by the respondent's witnesses was largely in accord with each other. As there was a discrepancy between the evidence given by the applicant and the respondent's witnesses and given my doubts about the applicant's evidence I am of the view that where there is any inconsistency in the evidence given by the applicant and the other witnesses in these proceedings I prefer the evidence given by the other witnesses.

26 The claim before the Commission is one for an alleged denial of a contractual benefit. The law as to these matters is well settled. For an applicant to be successful in such a claim a number of elements must be established. The claim must relate to an industrial matter pursuant to s7 of the Act and the claimant must be an employee; the claimed benefit must be a contractual benefit that being a benefit to which there is an entitlement under the applicant's contract of service; the relevant contract must be a contract of service; the benefit claimed must not arise under an award or order of this Commission; and the benefit must have been denied by the employer: *Hotcopper Australia Ltd v David Saab* (2001) 81 WAIG 2704; *Ahern v Australian Federation of Totally and Permanently Incapacitated Ex-Service Men and Women (WA Branch Inc)* (1999) 79 WAIG 1867. The meaning of "benefit" has been interpreted widely in this jurisdiction: *Balfour v Travel Strength Ltd* (1980) 60 WAIG 1015; *Perth Finishing College Pty Ltd v Watts* (1989) 69 WAIG 2307.

27 There is no issue in this matter that at all material times the applicant was an employee of the respondent and was employed under a contract of service. I find that these claims are also industrial matters for the purposes of s7 of the Act as they relate to payments the applicant claims are due to him which arise out of the applicant's employment with the respondent. It is also common ground that the benefits that the applicant is claiming do not arise under an award or order of this Commission. The issue to be determined therefore is what were the terms of the applicant's contract of employment with the respondent and whether it was a term of the contract of employment that the applicant is entitled to the payments he is seeking.

28 There was no dispute that the applicant was employed by the respondent as a welder on the Site between 24 January 2005 and September 2005 and that his terms and conditions of employment were governed by the terms of the Agreement.

29 I reject the respondent's argument that the applicant's claim for payment for attendance at a medical examination cannot be a benefit under the applicant's contract of employment as he was not employed by the respondent when he undertook the medical examination. I have reached this conclusion as I am of the view that parties to an employment relationship can agree that payments can be made to an employee or on behalf of an employee on the basis of a prospective relationship between the parties. For example, the respondent paid for the medical examination attended by the applicant even though he was not an employee when he undertook this examination. Notwithstanding this view I find that the applicant has not demonstrated that it was a condition of his contract of employment with the respondent that he is entitled to be paid one day's pay for attendance at a medical examination. I also reject the applicant's claim for the payment of a tool allowance at a rate of $42 per week.

30 Given my views on witness credit I do not accept the applicant's evidence that he was told by Mr Giardina prior to undertaking the medical examination that he would be paid for the time to attend this examination. As I accept the evidence of Mr Giardina in preference to that of the applicant I find that there was no oral agreement between the applicant and Mr Giardina for the respondent to pay him for attendance at the medical examination. I am also of the view that it was not an express or an implied term of the applicant's contract of employment with the respondent that he be paid for attendance at this examination given Mr Hoson's evidence that he refused to pay the applicant for his attendance at the medical examination, that this payment was not made to any of the respondent's employees and his evidence that the respondent did not have a policy to pay employees for attendance at medical examinations prior to commencing employment with the respondent. In addition to his claim that Mr Giardina told him that he would be paid for attending this examination the applicant claimed that he had an entitlement to this payment based on what he understood to be the custom and practice in the industry within which he worked however he gave no specific evidence to confirm this assertion. In the circumstances I find that it was not a term of the applicant's contract of employment with the respondent that he be paid one day's pay for attendance at the medical examination.

31 Notwithstanding that there was no inclusion of a tool allowance in the applicant's weekly rate of pay (see Clause 9 – Wage Rates of the Agreement) it is my view that the applicant has not demonstrated that it was a condition of his contract of employment with the respondent that he be paid a tool allowance for the duration of his employment with the respondent. I have already found that the applicant's evidence about when and if an agreement was reached with the respondent to pay this allowance was inconsistent. Furthermore, the applicant specifically stated under cross-examination that Mr Hoson never agreed to pay him a tool allowance which undermines the applicant's claim that the payment of this allowance formed part of his contract of employment with the respondent. Mr O'Connell was also unable to specify if and when an agreement was made to pay this allowance and with whom this agreement was made.

32 I find that at a meeting held on 10 August 2005 Mr Hoson told the applicant and other employees that the respondent believed that all necessary tools that the welders were required to use on the Site were being provided by the respondent and that as a result welders on the Site were not entitled to be paid a tool allowance and I reject the applicants' claim that at this meeting Mr Hoson told the applicant and other site representatives that welders would be paid a tool allowance if the respondent did not provide the tools they required to undertake their duties. I find that both the applicant and Mr O'Connell were annoyed that boilermakers working on the Site were provided with tools in lieu of the payment of a tool allowance and I find that they were upset that welders on the Site were not paid a tool allowance which should have occurred because they believed that they were not provided with the relevant tools by the respondent. However, even if this was the case, which I am unable to conclusively determine on the information currently before me, this did not mean that the applicant and other welders on the Site were automatically entitled to be paid a tool allowance. In the circumstances in the absence of the applicant being able to demonstrate that the respondent agreed to pay him a tool allowance over and above his weekly rate of pay I find that it was not a term of the applicant's contract of employment with the respondent that he be paid a tool allowance.

Costs

33 The respondent is seeking an order for costs if the applicant is unsuccessful in proving his claims on the basis that the applicant's claims are frivolous and vexatious. The general policy in this jurisdiction is that costs ought not to be awarded except in extreme cases (*Denise Brailey v Mendex Pty Ltd t/a Mair & Co Maylands* (op cit)). I do not believe that in bringing this application to the Commission that the applicant's claims fall into the category of a case where an order for costs should apply. In reaching this view I am not satisfied that the circumstances of this matter are such as to warrant an order for costs against the applicant as I find that the applicant's claims were not totally lacking in substance and I note that the applicant pursued both of these claims with Mr Hoson over some months whilst employed at the Site as he understood he was owed the entitlements he was claiming in this application.

34 An order will now issue dismissing this application.

2006 WAIRC 05469

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LUIS DOS SANTOS
	APPLICANT
	-v-
	SDR AUSTRALIA
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	MONDAY, 25 SEPTEMBER 2006
FILE NO/S	B 3 OF 2005
CITATION NO.	2006 WAIRC 05469

Result Dismissed

Order

HAVING HEARD Mr L Dos Santos on his own behalf and Ms L Gibbs 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.) J L HARRISON,
Commissioner.

2006 WAIRC 05415

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	IAN McCULLOUGH
	APPLICANT
	-v-
	THE STANLEY WORKS PTY LTD
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
HEARD	THURSDAY, 20 JULY 2006
DELIVERED	TUESDAY, 12 SEPTEMBER 2006
FILE NO.	U 331 OF 2006
CITATION NO.	2006 WAIRC 05415

CatchWords	Termination of employment - Harsh, oppressive and unfair dismissal - Applicant summarily dismissed - Allegation of fraud against the Respondent not made out - Applicant unfairly dismissed - *Industrial Relations Act 1979* (WA) s 29(1)(b)(i)
Result	Order issued that the Respondent pay the Applicant $17,500 (gross) as compensation
Representation	
Applicant	Mr S Kemp (of counsel)
Respondent	Ms K Peacock-Smith (of counsel)

Reasons for Decision

1 This is an application by Ian McCullough ("the Applicant") under s 29(1)(b)(i) of the *Industrial Relations Act 1979* ("the Act") for orders pursuant to s 23 of the Act. The Applicant claims that he was harshly, oppressively or unfairly dismissed by The Stanley Works Pty Ltd ("the Respondent") on Thursday, 23 March 2006.

Background

2 The Applicant commenced employment with the Respondent in January 2001 as a salesman. In April 2003 he became the Warehouse Supervisor of the Western Australian warehouse.

3 The Applicant was employed as a salaried employee. At the time the Applicant's employment was terminated he was paid a salary of $42,000 per annum. It was an express term and condition of his contract of employment that he was not required to

work set hours of work but he was expected to complete his daily and weekly activities to meet the needs of the Respondent. It was also an express term of his contract of employment that he was not to be paid overtime, but in exceptional circumstances only, time in lieu arrangements could be exercised at the discretion and approval of his manager in accordance with the needs of the work in the Applicant's department (*Exhibit 1*).

4 Until early December 2005, the Applicant reported to Ned McDonald, the Logistics Manager in Melbourne. On 12 December 2005, Matthew Jenkin became the Logistics Manager and from that time onwards the Applicant reported to him.

5 It was also an express term of the Applicant's contract of employment that he was eligible to participate in the Stanley Asia Pacific Annual Bonus Incentive Scheme, whereby a percentage of his base salary was paid subject to achieving agreed outcomes. The Applicant was eligible for payment of two types of bonuses. One was a bonus of five per cent which was payable if 98 per cent of orders were delivered within 28 hours. The Applicant was consistently paid a five per cent bonus under this scheme and was last paid a five per cent bonus under this scheme on 3 March 2006. The bonus was calculated on the basis of the warehouse performance from January 2005 until 31 December 2005. The other part of the scheme entitled the Applicant to a bonus from five per cent to 15 per cent if a certain number of lines per hour were picked by a certain ratio of labour. It is common ground that from July 2005 until the termination of his employment, the Western Australian warehouse did not achieve a line pick rate high enough to entitle the Applicant to a bonus.

6 The Applicant says that his employment was terminated without warning after the Respondent made an enquiry of him about times recorded on a casual employee's timesheet which did not reflect actual hours worked. The person in question was Kevin Cook who had been engaged for some time as a casual to work five days a week at the warehouse. The Applicant was dismissed whilst he was on sick leave, was given no warnings prior to being dismissed and contends he was not given an opportunity to present a defence prior to his dismissal.

7 The Respondent says that the Applicant's employment was summarily terminated because it ascertained that on Friday, 17 March 2006, the Applicant and Mr Cook left work at approximately at 2:00 pm after the Applicant had stated on Mr Cook's timesheet that Mr Cook had worked from 7:00 am to 3:30 pm that day. Further, the Respondent says that Mr Cook could not have commenced work at 7:00 am that day as the warehouse was not opened until 7:37 am. The Respondent says that completion of the timesheet in question constituted a fraud against the company which fundamentally breached the Applicant's terms and conditions of employment. The Respondent also says that the Applicant also engaged in fraudulent behaviour as he regularly recorded orders as confirmed when they had not been picked which resulted in him wrongly being paid the five per cent bonus.

The Applicant's Evidence

8 The Applicant testified that although he reported to Ned McDonald, his immediate Manager was Phillip Parker who was the Respondent's National Account Manager based in Perth and whose office was in the same building as the Western Australian warehouse.

9 The Applicant's hours of work were between 8:00 am and 4:00 pm each day from Monday to Friday each week but occasionally he worked extra hours to complete work in the warehouse and some times he took time off in lieu. On one occasion he took two days off work for the 2005 Melbourne Cup. When he did so he filled out a form to claim time in lieu but was told by his Manager, Mr McDonald, not to fill in a form but to orally seek approval.

10 The Applicant worked in the warehouse with one other full-time employee, Jamie Dalgleish. Mr Dalgleish was a storeperson who reported to the Applicant. The Applicant engaged casual staff to work in the warehouse through Flexi Staff. The number of casuals who were engaged to work in the warehouse fluctuated depending upon the volume of orders received. The Applicant usually engaged one casual five days a week but sometimes when they carried out a stocktake he engaged four or five casuals at one time. He says, however, that it was important to retain the same daily casual because if they did not do so they would continually have to train new people. He contends that he received instructions not to engage a casual for longer than eight hours at a time as if they did so they would have to pay penalty rates. During the entire time that the Applicant worked for the Respondent as the Western Australian warehouse supervisor the Applicant completed timesheets for the casual staff to reflect their "proposed" hours of work and not their actual hours of work. He says he did this to ensure that each casual did not work longer than eight hours each shift. In particular, in relation to Mr Cook, the Applicant testified that Mr Cook often worked beyond the finish time stated on his timesheet and he usually worked through his lunch hour. So when Mr Cook asked for extra time off at lunch time the Applicant allowed Mr Cook to do so but Mr Cook's timesheets were not adjusted to reflect a longer lunch break. The Applicant testified that about once a month Mr Cook took a lunch break longer than one hour. The Applicant sometimes left early and Mr Cook and Mr Dalgleish remained in the warehouse until 4:00 pm unless either of them informed him (the Applicant) that they finished at a different time.

11 The Applicant says that he spoke to Mr McDonald and Mr Parker about how hard it was to keep casuals and his opinion was that there was a need to maintain one casual employee for five days a week even when on some days there was not a need to have the person work eight hours a day especially on a Friday.

12 The Applicant was required to open the warehouse in the morning as the office staff do not arrive at work before 8:30 pm. When he was off sick he telephoned Mr Parker to make arrangements to open up.

13 On Australia Day 2006, the Applicant's father died. At about that time he was moving house. These two events caused him a considerable amount of stress. The Applicant was also making arrangements to take 120 children to Bangkok to play baseball in late March 2006. Prior to mid February 2006, the Applicant obtained approval to take three weeks' holiday from Friday, 24 March 2006 to go to Bangkok. The Applicant testified that because he was going away for three weeks and because he had taken time off while his father had been ill, he wanted to organise the warehouse so that Jamie Dalgleish could run the warehouse with one casual and another casual when required, so the targets for the budget could be achieved. Consequently, he asked Mr Cook and Mr Dalgleish, if they would agree to start work at 7:00 am instead of 8:00 am. The Applicant says his reason for starting early was that a lot could be achieved between 7:00 am and 8:30 am before anyone was in the office and before the telephones started to ring and enquires were made. The office and the warehouse are in one building. Mr Dalgleish

refused the request to start early because he had to drive his girlfriend to work. However, Mr Cook agreed to commence work at 7:00 am each day. During late February 2006 and early March 2006, the Applicant did not sleep very well, which resulted in him sleeping in on a few occasions and being late for work. The Applicant says that after they started the new hours, Mr Cook did not always finish work at 3:00 pm, in particular, if he (the Applicant) was late for work, Mr Cook worked through to 3:30 pm, if not later. The Applicant says that Mr Cook was a mature hard working employee who consistently worked longer hours than he was paid for.

14 The Applicant concedes that the security logs produced by the Respondent for the period of time from the Monday, 20 February 2006 to Friday, 17 March 2006 are correct. The Applicant did not usually close the warehouse, as he usually left work prior to 4:30 pm each day. The security logs show that the warehouse was usually closed some time after 4:30 pm each day. However, he closed the warehouse on 7 March 2006, as he and Mr Cook worked until 5:30 pm.

15 The Applicant testified that during the week ending Friday, 17 March 2006, they were very busy but by Friday they had caught up with their work, so he suggested to Mr Cook that he may wish to leave early and he told Mr Parker that he and Mr Cook were leaving early that day. They left at 2:00 pm but the Applicant recorded on Mr Cook's timesheet that Mr Cook had worked until 3:30 pm. He said he did so because Mr Cook had worked extra hours such as working through his lunch hours.

16 When cross-examined, the Applicant conceded that he always filled in the timesheets for all casuals. His practice was that after he completed the timesheets at the end of each week he sent the timesheets by facsimile to Flexi Staff the following Monday. He also conceded that at the end of each week he sent an email to the Melbourne office reflecting the information stated on the casuals' timesheets. When invoices were received from Flexi Staff, the Applicant certified each invoice as correct to be paid. He did not ask the casuals to sign the timesheets. He said, however, that he provided a copy of the Flexi Staff timesheet to each casual. The Applicant contended that the hours reflected in the timesheets were the hours that the casual employees were "asked to work".

17 On Tuesday, 21 March 2006, the Applicant asked Mr Dalgleish to do something or he said something to Mr Dalgleish and Mr Dalgleish responded by rudely telling the Applicant he was resigning. When the Applicant asked, "What do you mean?" Mr Dalgleish said that he had already spoken to Mr Jenkin (the Applicant's line manager) and he was leaving. Mr Dalgleish walked out the door and went and spoke to Mr Parker. The Applicant later spoke to Mr Parker who told him Mr Dalgleish had resigned and he (Mr Parker) had told Mr Dalgleish to ring Mr Jenkin. The Applicant telephoned Mr Jenkin. Mr Jenkin informed the Applicant that he had a serious issue he wished to raise. Mr Jenkin then told the Applicant that he had become aware that the Applicant was recording on timesheets times when Mr Cook was not working. In particular, he told the Applicant that there were times that the timesheets recorded that the casual had started work at 7:00 am when he (the Applicant) did not arrive at work until 7:20 am. The Applicant explained that the timesheets started the start time as 7:00 am because he had asked the casual to start at 7:00 am so the casual had to be paid from 7:00 am. The Applicant also told Mr Jenkin if there was a problem with the way the times were recorded on the timesheets, he would change the practice. Mr Jenkin then said that he needed to investigate the matter further and that Mr Dalgleish would not be at work the next day.

18 The Applicant worked on Wednesday, 22 March 2006, with Mr Cook. He says that he did not know what was going on as Mr Jenkin was a new manager and he did not know him very well. The Applicant was aware that Mr Cook had been informed that he was not to attend work at the Respondent's premises the next day and the Applicant said it was unusual that they did not want Mr Cook to continue to work. That night the Applicant was unable to sleep so he went to the doctor the next morning and explained to the doctor how he was feeling. The doctor provided him with a medical certificate for two days off work and prescribed sleeping tablets. The Applicant went home, took a sleeping tablet and woke up at approximately 2:00 pm. When he woke he found a missed call and a message from Mr Jenkin asking the Applicant to contact him (Mr Jenkin). The Applicant telephoned Mr Jenkin and told him he was sick. Mr Jenkin informed the Applicant that he wanted him (the Applicant) to come into the office. The Applicant refused because he had taken medication. Mr Jenkin then told the Applicant that his employment was going to be terminated.

19 Earlier that morning, the Applicant telephoned Mr Parker and Mr Jenkin to inform them that he was not coming into work. When cross-examined, the Applicant was asked why he telephoned Mr Jenkin when it was not his practice to do so when he was ill. The Applicant said that he did so because Mr Jenkin was his new boss and Mr Jenkin had wanted to know everything that was going on in the warehouse. He said that he also telephoned Mr Parker that morning to ask him to open up the warehouse.

20 When cross-examined about what Mr Dalgleish had said on Tuesday, 21 March 2006, when he told the Applicant that he wanted to resign, the Applicant was asked whether he had raised his voice at Mr Dalgleish. The Applicant said that yes, he had. He said that he (the Applicant) is a very loud person but he denied that he yelled at Mr Dalgleish on that day. He speculated that because he had raised his voice that this could have been the reason why Mr Dalgleish had decided to resign. He conceded that he had yelled at Mr Dalgleish in the past but said that Mr Dalgleish had never raised it as an issue. The Applicant then said that they "joked around" in the warehouse.

21 After the Applicant's employment was terminated the Applicant travelled to Thailand for three weeks. After he returned from Thailand, he looked for work in newspapers but prior to the hearing of this matter he had only applied for one job. He recently attended an interview for a position and was asked why he left his last employer. The Applicant said that he found it very difficult to answer that question because he could not provide a referee to account for the last five years of his employment because he did not want any prospective employer to know that he had been dismissed for fraud. He says that his only option is to buy a business and to become self-employed but he does not wish to do anything until this matter is resolved, as he is seeking reinstatement. The Applicant says that he had received bonuses each year he was employed as the Warehouse Manager, no issues were raised about his performance whilst he was employed and his work had been satisfactorily appraised.

22 When cross-examined the Applicant was asked about the quarterly five per cent productivity bonus, which was calculated on whether orders were picked and packed on time. It was put to the Applicant that he had committed an act of fraud, as he had regularly reported to the Respondent that orders had been confirmed when they had not been picked. The Applicant testified

that this had been a common practice to record that an order had been completed or confirmed if the item was known to be on the shelves. He says this practice had not been hidden from anyone, as the item or items were waiting to be sent out the next day. The Applicant said that this practice had applied in the warehouse until Mr Jenkin visited the Respondent's warehouse in Western Australian for the first time in February 2006. The Applicant said that Mr Parker knew about this practice and so did Mr McDonald but Mr Jenkin had raised the matter in February 2006 as a breach of the Respondent's auditing requirements.

23 Following Mr Jenkin's visit in February 2006, the Applicant received an email from Mr Jenkin on Tuesday, 7 March 2006. Attached to the email was a document titled *Stanley Australia Perth WH Processes Feb 2006*, in which the following instruction was given for orders:

"3. Orders

- All orders allocated on/before 2pm are to be despatched by COB the following day
- NO orders are to be confirmed out of BPCS until the stock has been physically picked
- NO orders are to be invoiced out of BPCS until the order has been picked and packed ready for despatch"

(*Exhibit A)*

24 The Applicant testified that after the new process came into effect he complied with the direction given by Mr Jenkin.

25 The Applicant says that it had never been raised with him until he was cross-examined on Thursday, 20 July 2006, that it was alleged he had defrauded the bonus system.

26 Kevin Cook gave evidence about the work he carried out for his employer, Flexi Staff. Mr Cook is still working for Flexi Staff for another company. He said that when he worked at the Respondent's premises, he was told that his hours of work were 8:00 am to 4:00 pm. Mr Cook testified that he did not always strictly work those hours as he usually worked through his lunch break and when it came to finishing time if a job was not finished he would work on until the job was complete which may take an extra half an hour. When asked why he worked additional hours, Mr Cook said that it had been instilled in him by his father that if you work hard, do a little bit extra and take a bit of initiative, your efforts will be rewarded by an employer and it was his hope that he would eventually obtain a permanent position. Mr Cook testified that he has been working additional hours for his current employer for which he has not been paid and in his view it has resulted in a recent offer of a full-time position.

27 Mr Cook said that whilst he worked at the Respondent's warehouse he sometimes took time off between the hours of 8:00 am to 4:00 pm to go to the doctor or the bank. He said that when he did so he always made sure he worked 40 hours each week by either working back late at the end of the day or through his lunchbreak. He said that Mr Parker was aware of this practice.

28 Mr Cook says that in February 2006, he was asked to start work early so his hours were changed to 7:00 am to 3:00 pm. Mr Cook testified that the workload was intense and it was very hot and sweaty in the warehouse at that time of the year so he was happy to start work when it was cooler. He strongly maintained in his evidence that he always arrived at the warehouse ready to start work at 7:00 am. However, the Applicant was not always there on time and arrived late on a few occasions. Consequently, Mr Cook was not able to start work until the Applicant arrived. Mr Cook testified that when he was told to be at work at 7:00 am, he was there on the "dot" and he expected to get paid from that time.

29 Mr Cook was asked about his timesheet on Friday, 17 March 2006, and the fact that it recorded that he had worked until 3:30 pm. He agreed that he had left an hour and a half earlier on that day but said that they had been very busy and he had worked up to 5:00 pm and for most of that week he worked through his lunchbreaks. On Friday, 17 March 2006, he was told by the Applicant to take some time off because he had worked excess hours and it was quiet.

30 When cross-examined, Mr Cook was asked whether he had ever seen a copy of timesheets completed by the Applicant. Mr Cook said that he had never seen the timesheets and he was never asked or told to sign them by anyone. Mr Cook says that at his current placement, he is not required to sign his timesheets nor does he see them. When asked whether he has an obligation to notify his employer of the hours he worked, he said no, the employer does.

Respondent's Evidence

31 Matthew Jenkin is the Respondent's Logistics Manager. He has been employed by the Respondent since 12 December 2005 and he is located in Melbourne. Prior to being employed by the Respondent he had worked in warehouse distribution for 15 years. The Respondent's Melbourne warehouse distribution centre employs 55 staff. The warehouse in Perth had three staff until the Applicant's employment was terminated and now it only has two. Mr Jenkin says that he is responsible for the costs and productivity of the Western Australian warehouse. The main functions of the Western Australian warehouse are to receive goods, including goods from the Victorian warehouse and to pick and pack orders. The Applicant reported to him directly and he also reported indirectly to Mr Parker. If there was an urgent issue, Mr Parker dealt with it but Mr Parker did not act on any issue until he had spoken to him (Mr Jenkin).

32 Sometime after Mr Jenkin commenced employment with the Respondent in December 2005, he became concerned about the productivity of the Western Australian warehouse. His opinion was that the Western Australian warehouse should be outperforming the Melbourne warehouse given its size and the orders they were pushing out. He looked at ways of improving productivity. He suggested to the Applicant that casuals should be used differently, that instead of engaging them five days a week, they should be engaged to work when demand for their service was required, which would mean that on some occasions one casual would work four days a week and on some days they might need three casuals to help receipt goods sent over from Melbourne.

33 When Mr Jenkin visited the Perth warehouse in February 2006, he was concerned that a number of orders had been reported as confirmed when the orders were still sitting in the warehouse. He said that this was a breach of the Respondent's holding company requirements. It is his understanding that the holding company is listed on the US Stock Exchange and part of being listed on the stock exchange is that certain guidelines and procedures have to be adhered to. One of those procedures is that orders cannot be shipped and confirmed until they have physically left the building. To obtain the five per cent bonus for on-time deliveries, the warehouse has to achieve an on time delivery rate of 98 percent. He said that he noticed in Perth that it was rare that late deliveries were recorded and he ascertained that orders were being confirmed prior to being physically despatched. Consequently, he sent the email to the Applicant on Friday, 17 March 2006, outlining the process to be followed for orders.

34 When asked whether any performance issues had been raised with the Applicant prior to the termination of his employment, Mr Jenkin said no, that all performance reviews had been based on the Applicant's 2005 performance and he had only recently become the Applicant's manager.

35 In Melbourne the requirements are that casuals engaged by the Respondent have to sign a register in which they enter their start and finish times. Mr Jenkin testified that in Melbourne if a casual incorrectly records their start or finish times their services are terminated immediately. He says the Respondent pays its casuals for all hours worked and if a casual works extra hours beyond ordinary time they are paid overtime.

36 Mr Jenkin said that he became aware that the Applicant was not filling out the timesheets correctly when he received an email from Mr Parker on Monday, 20 March 2006, in relation to events that occurred on Friday, 17 March 2006. In the email, Mr Parker stated that Mr Dalgleish said that he was going to resign on Monday, 20 March 2006, as he could no longer handle the way he was being treated. Mr Parker also informed Mr Jenkin in the email that the real issue was that the Applicant and Mr Cook had both left work at 2:00 pm on Friday when Mr Cook's timesheet stated that Mr Cook had started work at 7:00 am and finished work at 3:30 pm. Mr Parker advised Mr Jenkin that the warehouse did not open until 7:37 am and that he had requested a security monitoring report which had made plain to Mr Parker that the Applicant had been claiming extra time for Mr Cook. Mr Parker also raised a number of other allegations in the email which were not dealt with in oral evidence before the Commission. Mr Parker informed Mr Jenkin in the email that it was his opinion that the Applicant should either be demoted or have his employment immediately terminated. Mr Jenkin later received from Mr Parker a copy of the timesheets for Mr Cook which covered the period from Monday, 20 February 2006 to Friday, 17 March 2006 (*Exhibit 3*) and the security logs from Monday, 20 February 2006 to Friday, 17 March 2006 (*Exhibit 4*).

37 On Tuesday, 21 March 2006, Mr Jenkin received a telephone call from Mr Dalgleish. Mr Dalgleish told Mr Jenkin that he wanted to resign, Mr Jenkin said that he would investigate the matter and informed Mr Dalgleish he could have a day or two off with pay whilst Mr Jenkin investigated the matter. Mr Jenkin asked Mr Dalgleish to provide him with a facsimile or email setting out why he thought he needed to resign. Mr Dalgleish agreed and did so on the following day. On Wednesday, 22 March 2006, Mr Jenkin received a typed written document which was facsimiled from Mr Dalgleish. In that document Mr Dalgleish stated:

> "Hi mathew [sic] Jenkins [sic]
>
> First off I did like working at stanley [sic], but lately in the pass [sic] three months it has been hard to work in the warehouse. I don't want to complain or anything but there are many problems. One example is that I believe that if we need to hire a casual in, We hire him to work for us and in the Perth warehouse we have a casual that can do pretty much anything he wants in the warehouse. There are no set time for breaks for him, if he wants he is allowed to have lunch whenever he chooses, for example at 2pm when he finishes at 3pm. Some days lunch for him could be up to [sic] hour. I don't feel that he is putting in any really [sic] effort to contribute to the work load in the ware house.
>
> It feels like the casual has something on Ian. If I bring up a problem with Ian about the casual, it seems like he doesn't want to know about it. Ian [sic] relationship with the casual is a buddy relationship and not a work one.
>
> As to the hours I email them to Lorraine and Helen, on Ian's email under his instructions. I put the same hours for the casual every week and most of the time he wouldn't have work [sic] that many hours.
>
> An example was last Friday I put the hours as 7.5 hours, but the casual and Ian left at 2pm, 2 hours early, Phil came at [sic] to the warehouse about 30 minutes later and was a witness to this. This is not the first time by a long shot.
>
> The many reason [sic] for me wanting to leave is that I want to see the warehouse grow and expand, I believe that I'm the only one in the warehouse that want [sic] to see that happen. Smoke breaks for Ian are every 30 minutes. Some times we have orders that need to go to a special address, Ian always takes them and delivers then this could take up to a [sic] hour and a half. I feel if he is the supervise [sic] he shouldn't really need [sic] leave the warehouse and plus we could easy [sic] send these order [sic] by our transport company. an example is a marsue order.
>
> Plus a [sic] least a couple [sic] times a week Ian will have one of his mates come in and would spend a [sic] hour talk [sic] about baseball with them and then go on lunch break. I feel like I have to carry a bigger workload then [sic] everyone else in the warehouse. By the end of the day there should be no reason for us to be behind but that is not the case it is a major concern for me.
>
> I have been told not to do any favour [sic] for Gail or Phil. If they want something done, ever [sic] if [sic] is small, like a 30 second job. I [sic] been told to refuse and tell them to speak to Ian. If I do a favour for then and Ian Finds [sic] out, it becomes a drama in the warehouse. It [sic] like been [sic] at pre-school.

I feel like if I go back to work, I would be double team by Ian and the casual. And just continue to get hassled.

I have spoken to Phil about some of the problems because I believe that if I spoke to Ian about them he wouldn't take them serious [sic] and just give me shit for it.

I do enjoying [sic] working for Stanley but not like this. Everyone needs to put in the effort to make the warehouse work not just a few.

Thanks for listen [sic] Mathew [sic].

Please keep this email between us.

Jamie Dalgleish"

(*Exhibit D*)

38 Mr When Mr Jenkin spoke to Mr Dalgleish, Mr Dalgleish told him he wanted to resign but he did not give any reasons and that was why he (Mr Jenkin) decided to give him a couple of days off.

39 On Tuesday, 21 March 2006, Mr Jenkin spoke to the Applicant on the telephone and told him he was going to investigate why Mr Dalgleish was going to resign. The Applicant seemed to be agitated and asked why. Mr Jenkin did not provide the Applicant with much information but instead quizzed the Applicant about Mr Cook's timesheets and why they were different to the hours that Mr Cook actually worked. Mr Jenkin said that the Applicant told him that if a timesheet wrongly recorded that Mr Cook started work at 7:00 am that the hours were being made up later in the day. Mr Jenkin told the Applicant that he would continue to investigate. When cross-examined, Mr Jenkin said that the Applicant explained that he was aware that there were discrepancies between the security logs and the timesheet for Mr Cook but they were working to make up lost time.

40 After Mr Jenkin received Mr Dalgleish's statement, he discussed the matter with the Respondent's Human Resource Manager and Managing Director. A decision was made that the Applicant be dismissed because a view was reached that the Applicant had committed fraud or theft against the Respondent by incorrectly recording start and finish times on Mr Cook's timesheets. Mr Jenkin was instructed to fly to Perth to inform the Applicant that his employment was to be terminated. Mr Jenkin prepared a termination notice prior to leaving Melbourne stating the Applicant was terminated for fraud (*Exhibit 6*). Mr Jenkin travelled to Perth early on Thursday, 23 March 2006. When he arrived in Perth he turned on his mobile telephone and received a message from the Applicant saying that he was not going to be at work that day. Mr Jenkin thought it was unusual that the Applicant telephoned him because he had never telephoned him before when he was sick and the Applicant was not aware that he (Mr Jenkin) was coming to Perth. Mr Jenkin had telephoned Flexi Staff the day before and gave an instruction that Mr Cook was not to attend the Respondent's premises, so he rang Mr Dalgleish and asked Mr Dalgleish to come to work. Mr Jenkin told Mr Dalgleish that the Applicant would not be at work that day, and Mr Dalgleish agreed to come in and work. Mr Jenkin tried to contact the Applicant but was unsuccessful until late in the afternoon. When the Applicant telephoned he spoke to the Applicant in the presence of Mr Parker. Mr Jenkin asked the Applicant to come into the office but the Applicant declined and said that it was impossible. As the Applicant was about to go on three or four weeks' leave, Mr Jenkin informed the Applicant they had no choice but to have the conversation on the telephone. He read from the pre-prepared termination notice (*Exhibit 6*) and told the Applicant that he was terminated due to fraud against the company in relation to the entries made on Friday, 17 March 2006 on the Flexi Staff timesheets. He then asked the Applicant if there was anything he would like to say and the Applicant told him he did not want to say anything in case it may incriminate him. The Applicant then said words to the effect, "Jamie had better have his facts straight or I'll come after him." Mr Jenkin then told the Applicant he would process his termination payment.

41 The Applicant was paid four weeks' pay in lieu of notice and his accrued entitlements. Mr Jenkin says that it would be impossible to reinstate the Applicant. In particular, he says that the morale of staff would be affected and so would productivity. Mr Jenkin produced in his evidence a copy of a graph which shows that since the Applicant's employment has been terminated, the lines picked per hour per person has increased substantially, which has resulted in Mr Dalgleish being paid the line pick rates bonus of 15 per cent for the months of April 2006 and May 2006 and a five per cent line pick rates bonus for the month of June 2006. Mr Dalgleish has not replaced the Applicant. Mr Dalgleish is acting in the position of Team Leader as a wage employee and is paid overtime.

42 When cross-examined, Mr Jenkin conceded that the only reason why the Applicant was dismissed was for fraud against the company was in relation to entering hours on Mr Cook's timesheets that Mr Cook was not working. Mr Jenkin also conceded that he did not try to investigate what practices had been in place in the Western Australian warehouse in respect of working hours and the recording of those hours, in particular, he did not make any enquires whether any flexible work arrangements had been in practice.

43 Phillip Parker has been employed by the Respondent for five years. For the past two and a half years he has been the Respondent's National Account Manager and his role is to manage the Respondent's sales team. Although his predecessor supervised the warehouse staff, he says he is not involved in their supervision.

44 Mr Parker testified that to open the warehouse, you have to enter through the sales office but during the day staff can exit out of the back of the warehouse without going through the office. Mr Parker said that he did not know what the ordinary hours of work of the warehouse were. He was aware that some people started at 7:00 am and others started at 8:00 am. Mr Parker sometimes worked in the office and some times he was on the road. His practice was to leave home about 7:45 am each morning. If he was going directly to the office he would arrive there at approximately 8:30 am. By that time the warehouse was open but if the Applicant was ill for some reason, he would receive a telephone call from the Applicant and Mr Parker would open up the warehouse or he would make arrangements for his personal assistant, Gail Neil, to open up.

45 Mr Parker testified that he occasionally received complaints from customers about lateness of orders and when he told the Applicant they had to improve on delivery times the Applicant was not happy.

46 Mr Parker said that he noticed in late February 2006 that orders were being confirmed by the warehouse but had not been despatched in the timeframe required. When he raised the matter with the Applicant the Applicant told him it had to be done that way otherwise he would not receive the five per cent bonus. Mr Parker says that he made Mr Jenkin aware of the practice and an instruction was then given that orders should not be confirmed until after they were despatched but he (Mr Parker) says that he later ascertained that orders had been confirmed that had not been despatched which was a breach of those instructions.

47 On Friday, 17 March 2006, at about 2:00 pm Mr Parker saw the Applicant and Mr Cook leave work. When cross-examined Mr Parker could not recall whether the Applicant had told him on that day he was going to leave but he said it was doubtful as he and the Applicant did not speak unless it was absolutely necessary. After he saw the Applicant leave he asked Mr Dalgleish if he knew where they were going and Mr Dalgleish told him that he did not know and Mr Dalgleish commented that he was going to resign as he had been left at the warehouse by himself, yet again. Mr Parker viewed Mr Cook's timesheets and saw that Mr Cook's timesheet stated that the time of finishing work on that day was 3:30 pm. Mr Parker then made arrangements to obtain the security logs and prepared a report which he sent by email to Mr Jenkin on Sunday, 19 March 2006 (*Exhibit C*).

48 On Tuesday, 21 March 2006, Mr Dalgleish came into Mr Parker's office and told him he could not take it any more and that he was resigning. Mr Parker made arrangements for Mr Dalgleish to telephone Mr Jenkin. Mr Parker left the office while Mr Dalgleish had a private conversation with Mr Jenkin. Mr Dalgleish then left to go home. Later the Applicant came into Mr Parker's office and asked what had been discussed and Mr Parker told the Applicant that it was none of his business.

49 On the following day, Mr Parker received a telephone call from the Respondent's Managing Director who made enquiries of Mr Parker about this particular matter. Mr Parker later received a telephone call from Mr Jenkin who told him he was travelling to Perth.

50 On Thursday, 23 March 2006, Mr Parker received a telephone call from the Applicant saying he was ill and would not be coming to work that day. Later that day Mr Parker was present whilst Mr Jenkin spoke to the Applicant on the telephone. Mr Parker testified that he heard Mr Jenkin tell the Applicant that the investigation was complete and they were looking at terminating the Applicant's employment and the matter had been discussed with senior managers. Mr Parker says that Mr Jenkin asked the Applicant if there was anything he wished to say in reply and the Applicant said no. He recalled that the Applicant said that he could not come into the office because he was fully medicated and the Applicant also said, "Jamie had better get his facts right or I'll come after him."

51 When cross-examined, Mr Parker conceded that from time to time Mr Dalgleish had left early when he had medical appointments or other matters to deal with but he said those absences were documented in timesheets. However, when questioned further, Mr Parker was unable to say whether the timesheets accurately reflected those absences as the Applicant filled in the timesheets but he said that there were records of the absences such as medical certificates, medical bills or medical advices. Mr Parker denied that casuals could take time off in lieu if they worked longer hours. However, Mr Parker conceded that Mr Cook had worked extra hours as there were occasions when the Applicant and Mr Dalgleish had left for the day and when he (Mr Parker) went to lock the warehouse Mr Cook was still present.

52 Mr Parker says that if the Applicant was to be reinstated it would not work as there are many side issues and some staff members are not willing to work with the Applicant again.

53 Jamie Dalgleish also gave evidence on behalf of the Respondent. He works as a Store Person in the warehouse and his current role is Warehouse Team Leader. He has worked in the warehouse for two years. For the first year he was engaged as a casual. During the past 12 months he has been employed as a permanent employee. When he was engaged as a casual employee the Applicant completed his timesheets. Mr Dalgleish says that he did not fill in the timesheets or know what was stated on the timesheets. He testified he could not say whether he was paid for the hours he worked, other than he was aware that he usually received the same amount each fortnight. When cross-examined, he said he worked from 8:00 am to 4:00 pm each day but sometimes he worked an extra 15 or 20 minutes. He, however, could not say whether the extra time he worked was recorded on the timesheets. He also testified that he was not aware of any policy for casual workers to take time off in lieu.

54 Mr Dalgleish says that whilst the Applicant was employed he (Mr Dalgleish) sent an email to the Melbourne office on each Friday stating that each person in the warehouse had worked from 8:00 am to 4:00 pm each day. Mr Dalgleish says that he did so as he was instructed by the Applicant to state those were the hours worked. Mr Dalgleish testified that Mr Cook and the Applicant left work earlier on some occasions. When he questioned the Applicant about this the Applicant told him that they come in early so they finish early. When asked in evidence in chief whether that was correct, Mr Dalgleish said he was not sure. Mr Dalgleish also testified that after February 2006 the Applicant and Mr Cook often took long breaks during the day.

55 Since the Applicant has ceased to be employed, Mr Dalgleish testified that the casuals fill in and sign their own timesheets. Mr Dalgleish also signs the sheets before they are sent by facsimile to Flexi Staff.

56 On Friday, 17 March 2006, Mr Dalgleish was working out the back of the warehouse. At about 2:00 pm he saw that the Applicant had gone home. Mr Parker came out and asked, "Where have they gone?" Mr Dalgleish told Mr Parker that he did not know. Mr Parker then asked him, "Was it work related?" and Mr Dalgleish told him, no. Mr Parker then asked if they often left early and Mr Dalgleish told Mr Parker, yes.

57 Mr Daglish says he found the Applicant intimidating. On Tuesday, 21 March 2006, Mr Dalgleish made a mistake and the Applicant yelled at him. Mr Dalgleish had sent an order out in the morning which should have been sent in the afternoon. A sales representative was meeting the client to whom the order had been sent in the afternoon and the sales representative

wanted the order to arrive at that time. Mr Dalgleish said that the instruction was contained on the Applicant's computer but he did not read the email until after he had despatched the order. When Mr Dalgleish told the Applicant what had happened the Applicant yelled and became very angry. Mr Dalgleish told the Applicant he did not want the job anymore. Mr Dalgleish says that he wanted to resign because, he felt intimidated by the Applicant, the Applicant was taking long lunch breaks and he (Mr Dalgleish) was left in the warehouse by himself with a lot of the workload.

58 Mr Dalgleish says that when he spoke to Mr Parker on Tuesday, 21 March 2006, he told him he was resigning because he could not take it anymore but he did not tell him anything about being verbally abused by the Applicant. When asked why he was dissatisfied, Mr Dalgleish testified his decision to resign was based on what had occurred over the last month and a half.

59 Mr Dalgleish said that since the Applicant has not been employed, he (Mr Dalgleish) has been paid the line pick rates bonus of up to 15 per cent. When asked whether he was now carrying out the Applicant's duties he said that he was doing about half of what the Applicant used to do and Mr Parker helps out. He said that they get more goods out of the warehouse because he (Mr Dalgleish) has changed the location of the goods which makes the goods easier to pick.

60 Mr Dalgleish testified that if the Applicant is reinstated he would probably want to resign as he feels intimidated by the Applicant.

Credibility and Important Findings of Facts

61 I have heard the evidence given by each witness and observed them carefully. I found the Applicant to generally be a truthful witness. He gave his evidence in an open and forthright way. However, I accept that his evidence was guarded about one matter. I did not find his evidence credible that he did not yell at Mr Dalgleish on Tuesday, 21 March 2006. His evidence in relation to this point was pedantic. I do not accept his contention that he is a very "loud person". When the Applicant gave his evidence his demeanour was very quiet.

62 I found Mr Cook to be a truthful witness whose evidence is generally reliable. His testimony was not shaken when he was cross-examined. I accept that Mr Cook worked at least 40 hours each week. Further, I accept his evidence that from the middle of February 2006 he was ready to start work at 7:00 am each day. For the reasons set out below his hours of work should be counted from 7:00 am each day. However, I do not accept Mr Cook's assertion that during the week ending 17 March 2006, he worked up to 5:00 pm during that week. The security logs show that on Monday, 13 March 2006, the warehouse was closed at 4:30 pm; on Tuesday, 14 March 2006, the warehouse was closed at 4:40 pm; on Wednesday, 15 March 2006, the warehouse was closed at 4:32 pm and on Thursday, 16 March 2006, the warehouse was closed at 4:50 pm (*Exhibit 4*). Whilst it may be the case that Mr Cook worked until 4:50 pm on Thursday, 16 March 2006, his evidence that he worked to 5:00 pm was too vague to be accepted. In particular, he did not say on how many occasions this occurred and whether it was during that week. Secondly his evidence is inconsistent with the security logs. However, I accept the Applicant's and Mr Cook's evidence that from the beginning of February 2006, Mr Cook started work at 7:00 am each day. If he only took half an hour for lunch he should have finished work at 3:00 or 3:30 pm. As his evidence that he worked beyond that time is corroborated in part by Mr Parker, I accept Mr Cook's evidence that he worked at least 40 hours each week, including the week ending 17 March 2006, even though he left work at 2:00 pm the last day of that week.

63 As to Mr Jenkin, I found him to be a reliable and truthful witness. His evidence was largely uncontroversial as his role in this matter was largely to gather information from others. His testimony did not substantially depart from the evidence given by the Applicant. However, I found his evidence about his concerns that orders being confirmed before being despatched at page 81 of the transcript was vague and inconsistent with his instructions in Exhibit A. Notwithstanding this issue I found him to be a credible witness.

64 In relation to Mr Parker, I did not find him to be an entirely reliable and truthful witness. His evidence that after Mr Jenkin had given written instructions that the warehouse was not to confirm orders unless they had been picked and packed ready for despatch, he observed the practice to confirm orders that had not been picked and packed ready for despatch continued. Firstly, the allegation was vague. Mr Parker gave no details of when this was said to have occurred or what he actually observed. Secondly, the allegation was not put to the Applicant when he was cross-examined. Thirdly, Mr Parker did not report the matter to Mr Jenkin. In particular, he did not raise it in his email to Mr Jenkin on 19 March 2006. Fourthly, Mr Parker's evidence that orders have to be despatched before being confirmed is inconsistent with Mr Jenkin's instructions in Exhibit A which contemplates that orders can be confirmed after being picked but not invoiced out until despatched. Fifthly, when Mr Jenkin informed the Applicant his employment was being terminated Mr Parker's testimony about this conversation was materially inconsistent to Mr Jenkin's evidence. Mr Jenkin testified that he did not ask the Applicant whether there was anything he wished to say until after he (Mr Jenkin) told the Applicant his employment was to be terminated because of fraud against the company in relation to the entries made on the Flexi Staff timesheet on Friday, 17 March 2006. The decision to terminate the Applicant's employment had been made prior to Mr Jenkin's arrival in Perth (*Exhibit 6*) yet the effect of Mr Parker's evidence was that Mr Jenkin told the Applicant that the Respondent was considering whether to terminate his employment and Mr Jenkin asked the Applicant whether he wished to say anything. Clearly, Mr Parker's version of events is substantially different to Mr Jenkin's evidence on this point.

65 As to Mr Dalgleish, whilst I did not find him to be a dishonest witness, his evidence about some material matters was vague. The Applicant and Mr Cook gave clear evidence that from early February 2006 an agreement was reached that they would both start work at 7:00 am. The Applicant in particular, testified that he asked both Mr Cook and Mr Dalgleish to work from 7:00 am each day and that Mr Cook agreed but that Mr Dalgleish refused and his ordinary hours of work continued to be 8:00 am to 4:00 pm. Mr Dalgleish testified that when he asked the Applicant about why he (the Applicant) left early Mr Dalgleish said that the Applicant told him that they come in early so they finish early. When asked whether that was correct Mr Dalgleish said he was not sure. Albeit the Applicant was often late for work from 20 February 2006 to 17 March 2006, the security logs show that the Applicant opened the warehouse between 7.01 am and 7:37 am each day (*Exhibit 4*),

however, the Applicant was starting work earlier than Mr Dalgleish so it could be said that he was entitled at times to leave earlier than Mr Dalgleish. The security logs also show that during that period of time the warehouse was closed by a person other than the Applicant between 4:30 pm and 5:14 pm except on one occasion when the Applicant opened the warehouse at 7:22 am and closed the warehouse at 5:28 pm.

66 I accept, however, that Mr Dalgleish was intimidated by the Applicant as the Applicant concedes that he had on occasions yelled at Mr Dalgleish. I also accept that Mr Dalgleish is a loyal and valuable employee who through his efforts productivity in the warehouse has improved since the Applicant's employment was terminated.

67 Except for the contrary findings set out above where their evidence departs I prefer the evidence given by the Applicant, Mr Cook and Mr Jenkin to the evidence given by Mr Parker and Mr Dalgleish.

Was the Applicant Unfairly Dismissed?

68 The question to be determined by the Commission is whether the legal right of the Respondent to dismiss the Applicant has been exercised harshly or oppressively against the employee so as to amount to an abuse of that right (*Ronald David Miles, Norma Shirley Miles, Lee Gavin Miles and Rose & Crown Hiring Service trading as The Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385 at 386).

69 Where an employee is dismissed summarily the onus is on the Applicant to demonstrate the dismissal was not fair on the balance of probabilities. However, there is an evidential onus upon the employer to prove that the summary dismissal is justified (*Newmont Australia Ltd v The Australian Workers' Union, West Australian Branch, Industrial Union of Workers* (1988) 68 WAIG 677 at 679).

70 If an inquiry held by an employer is unfair, the Commission may investigate the merits of the matter by considering all of the evidence de novo. However, the requirement to accord procedural fairness, not every denial of procedural fairness will entitle an employee to a remedy. No injustice will result if after a review of all the circumstances of the termination it can be said that the employee could be justifiably dismissed (*Shire of Esperance v Mouritz* (1990) 71 WAIG 891; *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 430 per Brennan CJ, Dawson and Toohey JJ, and at 466 per McHugh and Gummow JJ).

71 The ordinary standard of proof required of a party who bears the onus in civil litigation is proof on the balance of probabilities. Where criminal conduct is alleged a Court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct (*Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 per Mason CJ, Brennan, Deane and Gaudron JJ at 170-171). The test to be applied is the "Briginshaw" test which was expressed by Dixon J in *Briginshaw v Briginshaw and Another* (1938) 60 CLR 336 at pages 361-362 as follows:

> "... when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality. No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty … at common law … it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal."

72 In *Bi-Lo Pty Ltd v Hooper* (1992) 53 IR 224 it was held by the Full Bench of the Industrial Commission of South Australia at 229 to 230:

> "An employee is entitled to both substantive and procedural fairness in respect of a dismissal. Substantive fairness will be satisfied if the grounds upon which dismissal occurs are fair grounds. Broadly speaking a dismissal will be procedurally fair if the manner or process of dismissal and the investigation leading up to the decision to dismiss is just.
>
> Where the dismissal is based upon the alleged misconduct of the employee, the employer will satisfy the evidentiary onus which is cast upon it if it demonstrates that insofar as was within its power, before dismissing the employee, it conducted as full and extensive investigation into all of the relevant matters surrounding the alleged misconduct as was reasonable in the circumstances; it gave the employee every reasonable opportunity and sufficient time to answer all allegations and respond thereto; and that having done those things the employer honestly and genuinely believed and had reasonable grounds for believing on the information available at that time that that the employee was guilty of the misconduct alleged; and that, taking into account any mitigating circumstances either associated with the misconduct or the employee's work record, such misconduct justified dismissal. A failure to satisfactorily establish any of those matters will probably render the dismissal harsh, unjust or unreasonable.
>
> If a fact or facts come to light subsequent to the dismissal which cast a different light on the Commission of the alleged misconduct, such fact or facts will not necessarily or automatically render the dismissal harsh, unjust or unreasonable. In our view in such circumstances what will need to be considered is whether the employer, if it had acted reasonably and with all due diligence, could have ascertained those facts before the dismissal occurred.
>
> The Commission is required to objectively assess the subjective actions and beliefs of the employer as at the time of dismissal and not at some subsequent time: see *Gregory v Philip Morris* (1998) 24 IR 397 at 413; 80 ALR 455 at 471; see also *Stearnes v Myer SA Stores* Print No 9A/1973 at 5.

> Whether the employer will satisfy that objective test will depend upon the facts of each case. The gravity of the alleged offence will dictate the nature and extent of the inquiry which the employer must conduct. An employer must ensure that an employee is given as detailed particulars of the allegations against him/her as is possible, an opportunity to be heard in respect of such allegations, and a chance to bring forward any witnesses he/she may wish to answer those allegations."

73 The decision of *Bi-Lo Pty Ltd v Hooper* (op cit) was approved by the majority of the Full Bench of this Commission in *Western Mining v Australian Workers' Union* (1997) 77 WAIG 1079 at 1084.

74 In my opinion the Respondent cannot prove to the requisite standard the acts to justify the summary dismissal for fraud in relation to entries on the timesheets.

75 In applying the test set out in *Bi-Lo Pty Ltd v Hooper* (op cit) the Respondent has clearly failed on all counts. It patently failed to properly bring the allegations to the attention of the Applicant and to allow the Applicant an opportunity to explain. Nor did the Respondent take steps to interview Mr Cook. By failing to do so, the Applicant was deprived of the opportunity of not having a finding of fraud made against him. An element of fraud is that the act complained of must have caused loss. Evidence has been put before this Commission if accepted by the Respondent that it could not be satisfied that it had suffered any loss by the action of the Applicant in incorrectly stating when Mr Cook started and finished work and the length of his breaks.

76 However, it cannot be disputed that the Applicant's practice of recording on the timesheets the hours the "casuals were asked to work" was inappropriate. By doing so, the Applicant deprived the Respondent from reviewing not only the accuracy of those records but deprived the Respondent from reviewing whether its use of casuals reflected the needs of the business. In addition, Mr Cook and Mr Dalgleish (when he was engaged as a casual) were deprived of being paid for the hours they actually worked. Whilst the casuals were not employed by the Respondent but by Flexi Staff, it is a right fundamentally enshrined in the wages/work bargain that wage employees be paid for the actual hours they work. When Mr Cook was ready and willing to work at 7:00 am at law he was entitled to be paid from that time (see *Automatic Fire Sprinklers Pty Ltd v Watson* (1946) 72 CLR 435 at 466).

77 Did the failure to complete the timesheets accurately otherwise justify the summary dismissal of the Applicant? In my opinion, no. The Applicant gave uncontradicted evidence that the reason why he adopted the practice of averaging the casuals' hours of work over a week was because he had been instructed that casuals were not to work longer than eight hours each shift. Although the Applicant's practice was inappropriate and plainly misguided it did not warrant the summary dismissal of the Applicant.

78 In relation to the contention that the Applicant fraudulently recorded orders as confirmed when they had not been picked which resulted in him wrongly being paid the five per cent bonus, I am not satisfied that this allegation is made out. Firstly, no evidence was led about the frequency of the occurrence of the practice. Consequently, no assessment can be made as to whether the Applicant would or would not have been regularly paid this bonus. Secondly, no evidence was given that the Applicant had been informed that this practice was inappropriate. Thirdly, the oral evidence given by Mr Jenkin and Mr Parker of what is required was different to the instruction given in Exhibit A. Both Mr Parker and Mr Jenkin spoke of concerns about orders being confirmed before they were picked and packed, yet Exhibit A contemplates orders can be confirmed prior to despatch. Fourthly, even if the conduct by the Applicant was proved to be fraudulent (which in my opinion has not been made out) at the time the practice came to Mr Jenkin's attention he did not raise it as an issue with the Applicant other than to put in place a direction that the practice cease. At law such conduct on behalf of the Respondent amounts to a waiver, which results in abandonment of the right to summarily dismiss the Applicant on this ground (see Macken, O'Grady, Sappideen and Warburton, *Law of Employment* (5th ed) at 219 and 220 and the cases cited therein).

Remedy

79 Whilst I am satisfied that the Applicant has proved that he was unfairly dismissed, I am not satisfied that reinstatement is practicable. As set out above the Applicant exercised poor judgment in relation to his practice of not recording hours actually worked by the casuals. Also I am satisfied that the Applicant engaged in behaviour that Mr Dalgleish found intimidating. I am satisfied that because of the Applicant's poor judgement and his treatment of Mr Dalgleish that the relationship between the Applicant and the Respondent has irretrievably broken down.

80 The duty to mitigate requires an employee to diligently seek suitable alternative employment and the onus of proof of failure to mitigate loss is on the Respondent (see *Brace v Calder and Others* [1895] 2 QB 253 applied by the Full Bench of this Commission in *Growers Market Butchers v Backman* (1999) 79 WAIG 1313 at 1316).

81 In this matter the Respondent has impeded the Applicant in seeking employment as it wrongly dismissed him for fraud. Plainly when a person in the Applicant's position is faced with putting forth an explanation to a prospective employer that raises issues of fraud against a long standing employer it will be difficult for him or her to obtain a new position. Consequently, it is understandable that the Applicant has been reluctant to pursue job opportunities with as much vigour as might be otherwise expected of a person who has been dismissed. I accept, however, he has taken some steps to mitigate his loss by looking for work in the newspaper and attending one job interview. For these reasons I am of the opinion that the Applicant has satisfied his duty to mitigate and the Respondent has failed in its onus.

82 At the time of the hearing of this matter the Applicant had been unemployed for approximately four months. Taking into account that the Applicant was paid one month's pay in lieu of notice and then allowing for another two months from the date of the hearing to find alternative employment, I will make an award of compensation of five months' pay, which is an amount of $17,500 (gross).

2006 WAIRC 05430

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	IAN McCULLOUGH
	APPLICANT
	-v-
	THE STANLEY WORKS PTY LTD
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	FRIDAY, 15 SEPTEMBER 2006
FILE NO/S	U 331 OF 2006
CITATION NO.	2006 WAIRC 05430

Result	Order issued
Representation	
Applicant	Mr S Kemp (of counsel)
Respondent	Ms K Peacock-Smith (of counsel)

Order

HAVING heard Mr Kemp, of counsel on behalf of the Applicant and Ms Peacock-Smith, of counsel on behalf of the Respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby:

(1) DECLARES that the Applicant 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 $17,500 (gross) as compensation.

(3) ORDERS that the application is otherwise hereby dismissed.

[L.S.]

(Sgd.) J H SMITH,
Commissioner.

2006 WAIRC 05404

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ESTHER JOY MONTGOMERY
	APPLICANT
	-v-
	WOODSIDE ENERGY LIMITED KARRATHA GAS PLANT
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
HEARD	FRIDAY, 23 JUNE 2006
DELIVERED	THURSDAY, 7 SEPTEMBER 2006
FILE NO.	U 130 OF 2006
CITATION NO.	2006 WAIRC 05404

Catchwords	Industrial Law (WA) – dismissal of employment – jurisdiction - alleged harsh, oppressive and unfair dismissal – nature of employment contract -application dismissed – *Industrial Relations Act 1979* (WA) – s 29(1)(b)(i) – public interest
Result	Application dismissed
Representation	
Applicant	Mr S. Millman (of counsel)
Respondent	Mr N. Ellery (of counsel

Reasons for Decision

1 This application was lodged in the Commission on 17 February 2006. Ms Esther Joy Montgomery ("the applicant") was dismissed from her employment effective as of 7 February 2006. The applicant claims she had been harshly, oppressively or unfairly dismissed and sought reinstatement in her employment. On 26 April 2006 the application was called on for a

conciliation conference. The matters in dispute were discussed with the parties together and in divided conference. No settlement was able to be reached. At the time of conciliation proceedings the participation of Woodside Energy Limited ("the respondent") was on a "without prejudice" basis. The respondent held there had been no dismissal as the applicant had been employed pursuant to a 12 month fixed term contract and the termination payment to the applicant had been fixed at an amount equivalent to 12 months.

2 The respondent advised the Commission on 2 May 2006 of preliminary jurisdictional issues. In the first instance it was submitted there had been no dismissal for the purposes of s 29(1)(b)(i) of the Act and therefore the application ought be dismissed. Alternatively and, in the event there was found to be a dismissal, then the respondent submitted it would be in the public interest, per s 27(1)(a)(ii) of the Act, for the application to be dismissed, given the applicant had been employed on a fixed term contract and had received all payments and benefits (including ongoing provision of subsidised accommodation) she would have received had she remained employed until the contract expiry date of 12 May 2006.

3 The Commission referred the preliminary issues of:

- whether the applicant was dismissed by the respondent on 7 February 2006; and
- if a dismissal did occur, whether it would be in the "public interest" for the matter to proceed for hearing and determination.

Respondent's submissions and evidence

4 The applicant's contract of employment was in writing, was dated 27 April 2005 and signed by the applicant and the respondent at the time of the applicant's engagement. Specifically the contract provided for:

> "… This appointment is effective from Tuesday 10th May 2005 and unless otherwise terminated will remain in force until the contract expiry dated of Friday 12th May 2006.
>
> …
>
> Termination of employment
>
> Your employment may be terminated by either party giving to the other one calendar month's notice in writing. The Company may elect to pay you one month's pay in lieu of such notice or provide you with a combination of part notice and pro rata pay in lieu up to a total of one month or terminate your contract instantly for gross misconduct.
>
> In the event of termination, you will be required to complete the Employee Separation Checklist and return all Company property (keys, cards, security pass, etc.) before collecting any final payment.
>
> The Company reserves the right to deduct from your monthly pay or final pay any monies owed to the Company as a result of any overpayment or payments made in advance.
>
> …"

(Exhibit W2)

5 The respondent submitted that at all times the applicant's contract of employment was a fixed term contract commencing 10 May 2005 and containing a specific expiry date of 12 May 2006. There was, on the respondent's submissions, no option or capacity provided to extend the applicant's employment beyond the expiry date of 12 May 2006.

6 The respondent submitted that the termination of the applicant's employment on 7 February 2006 was not undertaken in accordance with the written contract through the provision of a month's notice. Rather, the respondent submitted, a decision was made to pay out the balance of the applicant's fixed term contract on the basis of fairness. In the letter of termination (exhibit W3) the respondent advised the applicant would be paid wages and accrued annual leave up to 12 May 2006, equating to payment for three months and five days.

7 Mr Warren Fish, Corporate Affairs Manager for the respondent in Karratha testified it was the respondent's clear intention to offer the applicant a 12 month contract and that the applicant was made aware of this term and accepted employment on the basis that the contract would continue only for 12 months. In cross-examination Mr Fish advised that the respondent no longer employed an indigenous employment officer.

8 Ms Ainslie Bourne, the Human Resources Manager for the respondent in Karratha testified she was involved in recruiting the applicant at first instance and at no stage of the applicant's employment had the respondent ever stated or even suggested that the employment would continue beyond 12 May 2006. Counsel for the respondent submitted that at all times the applicant knew the contract was limited to 12 months. Ms Bourne testified the applicant was on a fixed term contract of 12 months as the role associated with the applicant's position was going through various changes. Ms Bourne testified that it was her understanding that the applicant was aware she was on a fixed term contract, that there was an end date to the contract and that she wanted to work through to the conclusion of the contract.

9 Ms Bourne testified that at the time of terminating the applicant on 7 February 2006 and following a discussion with the applicant, the applicant was advised she could remain in the respondent's accommodation until 12 May 2006. Ms Bourne testified that at the time of the hearing of this application the applicant remained in the respondent's accommodation at 24B Lewis Place, Karratha paying a small rent. Ms Bourne testified that the job the applicant had filled no longer existed and that the respondent was currently reconsidering the issue of recruitment of aboriginal persons in the future.

10 In re-examination Ms Bourne testified that she understood the applicant, at the time of her employment with the respondent, lived in Karratha and was looking for employment. Ms Bourne testified this was based that knowledge on the fact that the applicant had a Karratha address.

11 In considering the issue of reinstatement the respondent referred to the decision in *Bingham v. Director General Department of Justice* (2002) WAIRC 06396. The respondent submitted it would be impracticable for the Commission to order reinstatement because the job the applicant had held no longer existed. In asserting that reinstatement would be impracticable the respondent

referred to the decision of Scott C in *Grigson v. St Cecelia's College School Board* (2005) WAIRC 03124 and the decision of Beech C (as he then was) in *O'Keefe v. City of Albany* (2002) 80 WAIG 655. In that decision Beech C stated at (page 658):

> "When a position has been abolished, it is far more difficult, indeed, impracticable, to order re-instatement … In my view, that evidence discharges the onus upon the respondent to show that I ought not exercise my discretion to order re-instatement."

Ms Bourne testified that since 7 February 2006 the position previously held by the applicant had remained vacant and that the respondent had no intention of filling this position. Ms Bourne testified that the organisational restructure proposed by the respondent would mean that the position would no longer exist in its current form.

12 In the application currently before the Commission it was submitted by the respondent that the Commission was unable to order that compensation be paid given the applicant had suffered no loss or injury. In making this submission the respondent referred to the comments of EM Heenan J of the Industrial Appeal Court in *Garbett v. Midland Brick Company Pty Ltd* [2003] WASCA 36 at paragraph 85. Drawing on the principles outlined in this decision the respondent submitted in the event the Commission were to award the applicant any amount of compensation in relation to a cessation of employment such an award would constitute a 'windfall gain'. The respondent submitted that the applicant had suffered no loss or injury and therefore there was no remedy the Commission could or should order. Further proceedings were therefore neither necessary nor desirable in the public interest and the application ought be dismissed.

Applicant's submissions and evidence

13 The applicant testified she commenced employment with the respondent on 12 May 2005 working in the corporate affairs section as the indigenous liaison officer. The applicant testified that she had resigned from a position in Adelaide in order to come to the position in Karratha working with the respondent.

14 After 3½ months with the respondent the applicant was placed in the human resource section positioned in a dual role as indigenous liaison officer and aboriginal employment officer. The applicant testified that part of her role was to counsel aboriginal employees of the respondent and another part of her role was to put out a tender for cross-cultural, in particular local Ngarluma Yindjibarndi people to be recruited to the respondent. The applicant testified that she had developed workshops as a result of the successful tender with the Ngarluma Yindjibarndi people and worked with another woman meeting with the indigenous people in Roebourne in November 2005. At the time of her termination the applicant testified that she was working on a brochure which was to be distributed throughout the indigenous community. The applicant testified she understood the position with the respondent was to work for an increase in the number of indigenous persons employed by the respondent. The applicant testified that during 2005 recruitment targets were set for the employment of aboriginal people with the respondent. In 2005 the applicant's target was to ensure 6 aboriginal persons were recruited with the respondent and in 2006, the target was for 9 aboriginal persons to be recruited.

15 The applicant testified that prior to her termination she felt that she was "going excellent" in terms of performing the role. The applicant testified:

> "… there were no aboriginal people there at the Karratha Gas Plant when I first got there. I got employees in the company and they're all still there. … they'd never ever had aboriginal employees there before. So I thought I was doing very very well. I thought I had a great working relationship with different people. I mean, I'm reasonably straight out and I thought I was going well, in terms of my work performance."
>
> (Transcript page 42)

16 The applicant testified she received a written warning from the respondent following an incident in December 2005:

> "16th December 2005
>
> Esther Montgomery
>
> 24B Lewis Drive
>
> Karratha 6714
>
> Dear Esther
>
> As discussed your behaviour at a sponsored Woodside function on Saturday night, 10th December, and at a subsequent meeting on Wednesday 14th December was unacceptable.
>
> You were responsible for representing Woodside's interest both as host and as Aboriginal Liaison Officer at this event. Allowing the excessive consumption of alcohol and subsequent takeaways on Woodside's account was unacceptable both as a role model and as an officer of the Company.
>
> A complaint was made against you by two guests at the function on Saturday night, regarding the sentiment that the girls were not welcome in Karratha. This behaviour caused the girls and their families great distress.
>
> Your refusal to apologise to the girls at Wednesday's meeting and continued sentiment that the girls are not welcome does not align with Woodside's Indigenous Affairs Policy or values.
>
> Your behaviour on both of these occasions and refusal to reconcile your personal views and Woodside's organisational requirements casts serious doubt over your suitability to act in the role of Aboriginal Liaison Officer on behalf of Woodside.
>
> …

The seriousness of these issues and your response to them has resulted in this first and final written warning. Any further breach of Company procedure or inappropriate behaviour relating to your role will result in the termination of your employment.

Regards

Ainslie Bourne

Human Resources Manager

…"

(Exhibit M1)

17 The applicant testified that following the letter of warning and prior to her dismissal she received no further warnings. The applicant testified that at no stage in February 2006 was she advised or warned that her employment was going to be terminated yet on 7 February 2006 she was given a letter terminating her employment:

"7 February 2006

Esther Montgomery

24B Lewis Place

KARRATHA WA 6714

Dear Esther

Further to our discussions, please be advised that Woodside Energy Ltd intends to terminate your Fixed Term Contract of employment as of Tuesday, 7 February 2006.

As compensation for the early termination of your fixed term contract, you will be paid $16,302.00. This amount equates to the wages you would have earned had you been required to complete your employment contract. In addition, you will be paid out any annual leave accrual balance you may be entitled to.

You are also now provided with notice to vacate your company accommodation by Friday, 12 May 2006. Please contact Julie Cawthray prior to this date to arrange local relocation.

Thank you for your contribution to Woodside and we wish you all the best in the future.

Yours sincerely

John Rigden

General Manager, Karratha

(Exhibit M1)

18 The applicant testified that as a result of the actions by the respondent in terminating her from her employment, she was now the subject of rumour and innuendo which had created an emotional and upsetting time for her. In cross-examination the applicant acknowledged that she was familiar with the contract of employment as signed at the commencement of her employment with the respondent however denied ever having discussed the issue of a 12 month contract. In response to a question from the respondent that the applicant knew it was going to be a 12 month contract the applicant responded:

"… No, it wasn't. No 12 month, no year was discussed.

That was never mentioned to you? - - - Never mentioned to me, not at those three meetings. It was never, ever mentioned to me.

So if it was never mentioned to you, when you received the letter of employment that said a 12 month term, presumably you went and spoke to somebody at Woodside about that and queried that? - - - We were talking - - - at that interview and when I was talking to Ainslie, we talked about long term."

(Transcript page 50)

19 In cross-examination the applicant acknowledged receiving an amount of money, from the respondent, $16,302.00 following her termination. The applicant agreed that the amount reflected, as a minimum, the base salary entitlements plus some other components. The applicant testified that she was still in the respondent's accommodation at the time of the hearing paying a nominal rent, namely $90 per month to the respondent.

20 The applicant's counsel submitted that for the Commission to determine the true employment contract it was necessary to consider all of the facts and circumstances of the particular case, in this case the matter between the applicant and respondent. In drawing on this authority the applicant relied on the principles of the decision in *Doyle v. Sidney Stewart Company* (1936) 56 CLR 545. The applicant submitted that the proof of paper documentation is relevant but not determinative referring in particular to the decision in *Pilter v. Langford* (1991) 23 NSWLR 142 and *The CFMEU v. BHP and Integrated* (2005) WAIRC 01797.

21 The applicant submitted that throughout the period of employment with the respondent, she performed her contractual obligations evidenced by the increase in the numbers of indigenous people directly employed by the respondent from 2 to 8 persons. The applicant further submitted the feedback from performance reviews provided the applicant with a bonus in her employment indicating that the applicant was performing her contractual obligations. The applicant submitted the position was permanent reflected by the transfer of the position from corporate affairs, where the applicant originally commenced, to human resources, an evolving contractual relationship over time. The applicant submitted, based on the written and oral evidence, there was an ongoing permanent relationship between the applicant and the respondent.

22 The applicant submitted the importance of considering the merits of the case in determining whether it was in the public interest for the application to be dismissed at this stage. In the applicant's submissions the applicant received a written warning in December 2005 from the respondent yet it was not until early February 2006, a delay of some months that the respondent determined that the applicant ought be terminated. The respondent then deposited an amount of money into the applicant's bank account at the end of February and in a sudden and abrupt way the employment relationship was ended. The applicant submitted the issue of remedy had not been exhausted given reinstatement was the primary remedy sought by the applicant. As an alternative to reinstatement compensation was sought if it was found by the Commission that the employment relationship would have continued beyond the expiry date and that the dismissed was, in all the circumstances unfair. The applicant submitted it would therefore be open for an order to be made for compensation for loss and injury in the event that reinstatement was not practicable.

Commission's findings and conclusions

23 There are a couple of matters relating to credibility on which it is necessary to comment. The Commission was satisfied with the evidence given Ms Bourne in her recollection of the recruitment process of the applicant. This was in conflict with the evidence of the applicant particularly as it related to any prior knowledge of the respondent as to the applicant having shifted from South Australia. The denial in the applicant's evidence regarding her contractual arrangements with the respondent being short term appeared in direct conflict with the applicant's understanding of her written contract. However, of itself, that particular evidence is not material other than in respect of credibility.

24 The Commission has considered the submissions and evidence of the parties on the preliminary issue of whether the applicant was dismissed by the respondent on 7 February 2006. The terms of the contract of employment signed by the parties at the commencement of the applicant's employment have also been considered. In particular, the Commission has had regard for the express term contained in the applicant's contract (exhibit W2) relating to termination of employment and the provision from exhibit W2.

25 It is suggested that the period of employment referred to is an express provision of the contract. Having regard for that submission and the notice period provision (exhibit W2) the two terms, the Commission finds, are in contradiction. There is authority for the view that in such circumstances the contract is altered from that of a "fixed term" contract to one which is terminable by notice. In *British Broadcasting Corporation v. Ioannou* [1975] 2 ALL ER 999, the Court of Appeal considered the terms of a particular contract to determine to whether it was "fixed term". In his consideration, Lord Denning MR at page 1005 said:

> "If a contract of employment is for a state of term of two or three years, but is determinable by three months' notice during that time, is it a "fixed term"? … In my opinion a "fixed term" is one which cannot be unfixed by notice. To be a "fixed term", the parties must be bound for the term stated in the agreement; and unable to determine it by notice on either side. If it were only determinable for misconduct, it would I think, be a "fixed term" – because that is imported by the common law anyway. But determination by notice is destructive of any "fixed term"."

26 In his decision, Lord Denning MR identifies two types of contracts, one terminable by notice the other not terminable by notice. The Commission finds that the terms of the contract between the parties in the current proceedings together with the evidence from both the applicant and the respondent make the current contract of employment, a contract terminable by notice. The Commission finds that in this matter, the action taken by the respondent to issue the applicant with a letter on 7 February 2006 was a termination at the initiative of the employer. In other words:

> "the action of the employer is the principle factor which leads to the termination of the employment relationship."
>
> (*Mohazab v. Dick Smith Electronics Pty Ltd (No. 2)* (1995) 62 IR 200 at 205)

27 The Commission finds on the preliminary point that the applicant's employment with the respondent was terminated at the initiative of the respondent and falls within the definition of a dismissal for the purposes of the Act. The Commission finds the contract of employment between the applicant and the respondent, whilst not a contract for a specified period, could not have been expected to run for longer than approximately 12 months.

28 The next issue to determine is whether the Commission ought dismiss the application on public interest grounds having regard for the payment by the respondent to the applicant of $16,302.00 at the time of the applicant's termination. The Commission has considered the primary remedy sought by the applicant in these proceedings is reinstatement and if that is not practicable then compensation and having heard submissions and evidence from each party on the practicability associated with reinstatement the Commission finds it would be impracticable to consider reinstatement in these circumstances.

29 Even if the application were to proceed and was found by the Commission to be unfair in all the circumstances the Commission would not chose to exercise its discretion to make an award of compensation for loss or injury given the limitations set by the Act and given, a payment was made by the respondent at the time of the applicant's termination. The application is dismissed under s.27 of the Act. In making such a determination the Commission has had regard for the comments of Heenan J of the Industrial Appeal Court in *Garbett v. Midland Brick Company Pty Ltd* (2003) (op.cit.).

> "If no loss or damage, nor entitlement to compensation for the former employee is established beyond payments which have been made by the employer, then there will be no entitlement to redress cause the powers conferred under s.23A are intended to compensated the employee who has been harshly, oppressively or unfairly dismissed in respect of losses so caused and no more."

30 The Commission finds there to be no evidence on the issue of injury to the applicant related to the termination. The Commission finds that the applicant would not have been employed by the respondent for any period of time beyond 12 months. The Commission finds that a payment was made by the respondent to the applicant following her termination in which the respondent intended to pay an amount as if the applicant had concluded the balance of the 12 month period. The Commission finds that the applicant continues to occupy the respondent's housing for a nominal rent, an additional payment over and above the termination payment.

31 The Commission is not therefore minded in these proceedings to exercise its discretion given the restrictions on compensation for unfair dismissal contained within the Act would have limited the Commission's considerations with respect to compensation to the 12 month period. In another similar matter before this Commission, to proceed has been referred to by Fielding C as he then was, as an "academic exercise", *Johnston v Wesfarmers Ltd* 70 WAIG 2434 at 2435. In such circumstances it seems to the Commission appropriate to exercise its discretion pursuant to s 27(1)(a)(ii) and dismiss the s 29(1)(b)(i) application on the basis that further proceedings would not be desirable in the public interest.

32 It was unclear to the Commission, based on the evidence and submissions from the parties, whether the termination payment made by the respondent had provided the applicant with all entitlements she would have received had her employment continued for the 12 month period. Further written submissions were received on the issue. As a preliminary step the Commission requires the representatives of each party confer on the finalisation of the termination payment based on the respondent's undertakings before the Commission and forward to the Commission within 7 days of the issuance of these reasons for decision a draft order.

2006 WAIRC 05442

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ESTHER JOY MONTGOMERY
	APPLICANT
	-v-
	WOODSIDE ENERGY LIMITED KARRATHA GAS PLANT
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 19 SEPTEMBER 2006
FILE NO/S	U 130 OF 2006
CITATION NO.	2006 WAIRC 05442

Result	Application dismissed
Representation	
Applicant	Mr S Millman (of counsel)
Respondent	Mr N Ellery (of counsel)

Order

HAVING HEARD Mr S Millman (of counsel) on behalf of the applicant and Mr N Ellery (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 section 29(1)(b)(i) application be and is hereby dismissed.

(Sgd.) S M MAYMAN,
Commissioner.

[L.S.]

2006 WAIRC 05549

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MERETE LUND PAGH & PETER BOYE PAGH
	APPLICANTS
	-v-
	ROD & PETA CROXFORD, COCOS VILLAGE BUNGALOWS
	RESPONDENTS
CORAM	COMMISSIONER J H SMITH
HEARD	FRIDAY, 25 AUGUST 2006
DELIVERED	FRIDAY, 6 OCTOBER 2006
FILE NO.	U 215 OF 2006, U 216 OF 2006
CITATION NO.	2006 WAIRC 05549

CatchWords	Jurisdiction as to "industrial matter" - Extra-territorial effect of the Industrial Relations Act 1979 (WA) considered - *Industrial Relations Act 1979* (WA) s 3(6); s 7, s 23 and s 29(1)(b)(i); *Cocos (Keeling) Islands Act 1955* (Cth) s 7A, s 8A, s 8A(1) and s 8A(2); *Applied Laws (Implementation) Ordinance 1992* (Cth) s 6 and Schedule 4; and *Australian Constitution* (Cth) s 109
Result	Orders dismissing applications issued
Representation	
Applicants	Mrs M L Pagh & Mr P B Pagh
Respondents	Mr R and Mrs P Croxford (on behalf of the Respondents)

Reasons for Decision

1 These are applications by Merete Lund Pagh and Peter Boye Pagh ("the Applicants") under s 29(1)(b)(i) of the *Industrial Relations Act 1979* ("the IR Act") for orders pursuant to s 23A of the IR Act. The Applicants claim that they were harshly, oppressively or unfairly dismissed by Rodney Croxford and Peta Croxford, Cocos Village Bungalows ("the Respondents") on 20 February 2006.

2 The Applicants were engaged to manage and caretake the Cocos Village Bungalows on Cocos (Keeling) Islands which is a Territory of Australia and outside the limits of the State of Western Australia. The applications were listed for hearing to determine whether the Commission has jurisdiction to hear and determine the applications. The issue was raised by the Commission on its own motion. The issue is whether this Commission has jurisdiction to hear and determine the Applicants' claims under s 29(1)(b)(i) of the IR Act where the work, the subject of the contract of employment was carried outside the limits of Western Australia. During the hearing of the territorial issue the Respondents raised an additional jurisdictional issue. The issue raised is whether the jurisdiction of the Western Australian Industrial Relations Commission is ousted by the jurisdiction by the Australian Industrial Relation Commission.

3 The Applicants are Danish and the holders of Danish passports. They were granted resident status enabling them to reside in Australia in 1982. The Applicants have two sons who reside in Melbourne. It is common ground that at all material times the Applicants' place of employment and all work carried out by them took place in a Territory of Cocos (Keeling) Islands and that the termination of the Applicants' employment occurred in the Territory of Cocos (Keeling) Islands.

The Applicants' Evidence

4 The Applicants claim that they have been resident in Western Australia since 2 November 2002.

5 In November 2002, the Applicants were staying with a friend, Henning Nielsen in Mandurah, Western Australia, when they met Rodney and Peta Croxford. When they met they discussed the fact that Mr Pagh had recently applied for a job on Cocos (Keeling) Islands but had been unsuccessful.

6 Mr Pagh testified that since 7 November 2002, he and his wife have resided in Western Australia on four occasions. After they met Mr and Mrs Croxford in November 2002, the Applicants travelled around Australia and returned to Denmark on several occasions. When they visited Western Australia after November 2002 on one occasion they stayed at Mr Nielsen's house for three months, on another occasion they stayed for two months and on one occasion they looked after a house owned by a neighbour of Mr Nielsen's. On no occasion did the Applicants acquire or rent their own premises in Western Australia nor did they pay rent to anyone. In the beginning of 2005 they returned to Denmark for a period of six months.

7 Shortly before 2 September 2005 whilst the Applicants were in Denmark, Mr Pagh received a telephone call from a friend who told them that they had heard that Mr and Mrs Croxford were looking to employ managers for the Cocos Village Bungalows. Mr and Mrs Pagh were interested in applying for the positions, so Mr Pagh telephoned Mr Croxford. At that time Mr and Mrs Croxford were in Mandurah. After the telephone conversation the Applicants and Mr and Mrs Croxford communicated about the jobs by email. On 2 September 2005, Mr and Mrs Pagh sent Mr and Mrs Croxford an email in which they stated that they had "just spent the summer in Denmark and are now planning for Australia to escape the Danish winter as usual". In that email they provided details of their address and telephone number in Denmark and stated that their address in Australia was 2 Liris Court, Ringwood, Melbourne in Victoria. Mr Croxford replied to Mr and Mrs Pagh's email on 10 September 2005 from Mandurah. In that email Mr Croxford informed Mr and Mrs Pagh that he intended to hold a meeting the following Monday morning with the bungalow partners to discuss the Applicants' applications for managers. In that email he also stated the details of the jobs of managers were as follows:

> "Basically the job is to do what ever is necessary to efficiently run & maintain our 10 bungalow tourist accommodation business in a tropical island paradise – see website www.cocosvillagebungalows.com I have an incomplete Managers Guide I have been working on which will assist you with details, but it is really just hospitality, good business practice & common sense.
>
> We would like a 12 months commitment if possible (after a 3 month probationary period for us both to confirm everything is OK), with options of further 12 months if it suits both of us. As this is a "life style" option for who ever takes it on, we will fit around your requirements as much as possible – Peta & I can come back to relieve you for a few months when ever you need to go home or Melbourne or what ever.
>
> The remuneration package is based on exactly what Peta & I have been receiving for the past 3 years:
>
> a) Retainer of $500.00 per week to manage & maintain including general building/grounds maintenance & room preparation for cleaner - $26,000 pa.
>
> b) Accommodation of $500.00 per week supplied free of charge – 2 bedroom + office spacious luxury upstairs apartment, best on Island - $26,000 pa.

c) Guest change over cleaning when ever cleaners can't do it or can not complete in time without your help @ $20/hr – this may vary between $3K - $8K pa.

d) We do not want you to do all the cleaning (worth $15K - $20K pa) unless there are no alternatives because you often need to have reliable help available to you.

So the annual package has been around $55K - $60K plus to $72K if you do everything – not recommended if you want time to enjoy the life style.

However, in that package Peta & I have been & still will be doing the marketing, promotions, accounting, etc now off island – just guessing about $5K of that package will need to be allocated to us to continue with that & other off island management."

(*Exhibit 1*)

8 On 12 September 2005, the Applicants replied to emails sent by Mr and Mrs Croxford sent on 10 and 11 September 2005 and informed Mr and Mrs Croxford that they accepted the Respondents' offer to work as managers to run and maintain 10 bungalows on Cocos (Keeling) Islands. In that email the Applicants stated that they were aware that there was a minimum of 12 months commitment (a three month probationary period) and an option of a further 12 months. Arrangements were then made for the Applicants to travel to Melbourne from Denmark and on to Cocos (Keeling) Islands. The Applicants travelled to Melbourne where they stayed for three days. They then drove their vehicle from Melbourne to Mandurah and stayed with Mr and Mrs Nielsen for two days and then flew to Cocos (Keeling) Islands on 2 November 2005. The Respondents paid for the Applicants to fly to Cocos (Keeling) Islands (Exhibit 1). When they arrived Mr and Mrs Croxford met them.

9 Pursuant to the terms of the Applicants' remuneration package they were paid $500 (gross) a week. The money paid into their bank account in Melbourne by bank transfer. The Applicants' employment was terminated by Mr and Mrs Croxford on Cocos (Keeling) Islands on 20 February 2006.

The Respondents' Evidence

10 Mr Rodney Croxford testified that his address is 173 Clunies Ross Avenue, Cocos (Keeling) Islands. Mr Croxford and his wife own 25 per cent of the Cocos Village Bungalows through the ownership of their company, Syndic Pty Ltd. There are seven other owners of the Cocos Village Bungalows who all reside in Western Australia and together with Syndic Pty Ltd they own the business in partnership. Mr Croxford testified that he thought that some of the other owners hold their interest in the business through companies but he was not sure.

11 Mr and Mrs Croxford lived on Cocos (Keeling) Islands permanently for six years from 1998 until the beginning of 2005. Since the beginning of 2005 they have spent a significant amount of time away from Cocos (Keeling) Islands because they have been assisting their daughter to build a house in Kalgoorlie in Western Australia. Mr and Mrs Croxford are not registered to vote in Western Australia. As they are owners of property in Cocos (Keeling) Islands, they are registered to vote in the Northern Territory. Mr Croxford holds a Cocos (Keeling) Islands driver's licence but not a Western Australian driver's licence. Their company, Syndic Pty Ltd, owns a house in Mandurah which they use as their holiday accommodation.

12 Mr Croxford testified that all the partners attend an annual general meeting in March of each year at the Cocos Village Bungalows on Cocos (Keeling) Islands. In March 2005, a motion was passed by the partners to seek to engage managers of the bungalows on a probationary basis. Mr Croxford testified that the only reason why the offer of employment was made to the Applicants from Mandurah was that he and his wife were on holiday in Mandurah at the time the offer was made. He convened a meeting of the other partners in Mandurah on 12 September 2005, before the offers of employment were made to the Applicants, as it was convenient to do so at that location.

13 Mr Croxford testified that all banking takes place on Cocos (Keeling) Islands. The Respondents have a Commonwealth Bank account with a Cocos (Keeling) Islands agency which is located at the Cocos Co-operative. However, because it is an agency the branch is located in Mt Hawthorn in Western Australia. All payments were made to the Applicants by electronic banking through the internet.

Extra Territorial Effect of the IR Act

14 Section 3 of the IR Act provides:

"(1) Subject to subsections (5) and (6) where any industry is carried on —

(a) partly within the State and partly within an area to which this subsection applies; or

(b) wholly or partly in an area to which this subsection applies, and —

(i) facilities for servicing or supporting that industry are maintained in the State by or on behalf of the employer concerned;

(ii) the employer concerned is connected with the State;

(iii) that industry is carried on from, or on, or by means of, an aircraft, ship, or vessel certificated, registered, or licensed under a law of the State or by a public authority, or which is required to be so certificated, registered, or licensed;

(iv) that industry is carried on from, or on, or by means of, a rig or other structure, installation, or equipment, the use or function of which is regulated by the State or by the State and the Commonwealth, or is required to be so regulated;

(v) that industry is authorised or regulated by the State or by the State and the Commonwealth; or

(vi) that industry is carried on pursuant to a law of the State,

then this Act applies to and in relation to that industry in so far as any employment relates to the area to which this subsection applies and in any such case this Act also applies to and in relation to any industrial matter or industrial action related thereto, and any jurisdiction, function, duty, or power exercisable, imposed, or conferred by or under this Act extends thereto.

(2) An employer shall, for the purposes of subsection (1), be connected with the State if that employer —

(a) is domiciled in the State;

(b) is resident in the State, normally or temporarily;

(c) being a body corporate, is —

(i) registered, incorporated, or established under a law of the State;

(ii) taken to be registered in the State; or

(iii) a related body corporate of such a body for the purposes of the Corporations Act 2001 of the Commonwealth;

(d) in connection with the industry concerned, has an office or a place of business in the State; or

(e) is the holder of a licence, lease, tenement, permit, or other authority, granted under a law of the State or by a public authority under or by virtue of which the industry is carried on.

(3) The areas to which subsection (1) applies are —

(a) that area situate west of 129° of east longitude reckoning from the meridian of Greenwich, that is part of the areas known as and comprised within —

(i) the Australian fishing zone as defined by the Commonwealth Fisheries Act 1952; or

(ii) the continental shelf, within the meaning of the Convention on the Continental Shelf a copy of which in the English language is set out in Schedule 1 to the Commonwealth Petroleum (Submerged Lands) Act 1967;

(b) any other area seaward of the State to which from time to time the laws of the State apply or, by a law of the Commonwealth, are applied.

(4) For the purposes of any proceedings under this Act an averment in the application or process —

(a) that an employer was, pursuant to subsection (2), at a specified time or during a specified period or at all material times connected with the State; or

(b) that any conduct, event, circumstance, or matter occurred, or that any place is situate, within an area referred to in subsection (3),

shall, in the absence of proof to the contrary, be deemed to be proved.

(5) Subsections (1), (2), and (3) shall not be construed as applying this Act to or in relation to any person, circumstance, thing, or place by reason only of the operation of paragraph (c) of the interpretation of the term "industry" set out in section 7(1) unless this Act would also apply by reason of the operation of subsection (1).

(6) Effect shall be given to subsections (1), (2), and (3) only where this Act or any provision of this Act would not otherwise apply as a law of the State, or be applied as a law of the Commonwealth, to or in relation to any person, circumstance, thing, or place."

15 In *Parker v Tranfield* (2001) 81 WAIG 2505 Hasluck J at [70] to [73] (with whom Kennedy J agreed) held that s 3(6) of the IR Act has the effect that the IR Act applies to certain activities and areas outside the State where there is a real and substantial connection between the circumstances on which the legislation operates and the State of Western Australia. The test is to be liberally applied. A real, even though a remote, or general connection with Western Australia is sufficient (*Parker v Tranfield* (op cit) per McKechnie J at [20] with whom Kennedy J agreed at [1]).

16 In the matters before me the facts establish that at the time the contracts of employment were entered into, the Applicants did not reside in Western Australian. Although, they had a right to do so pursuant to the terms of their visas, they were in fact residing (albeit temporarily) in Denmark. Even if it could be said that they were resident in Australia at the time the contract of employment was entered into, the email from the Applicants to Mr and Mrs Croxford dated 2 September 2005, establishes that at the time the contract was entered into their place of residence in Australia was Ringwood in Victoria. I do not accept their contention that because they had visited Western Australia on a number of occasions that they were residents of Western Australia. However, the offers of employment were made within the jurisdiction following a meeting of all of the partners of the Respondents' business at Mandurah. Although the Applicants' place of employment was outside the limits of the State, in the email sent by Mr and Mrs Croxford on 10 September 2005, Mr and Mrs Croxford stated that they would continue to carry out the marketing, promotions and accounting and that these activities would be carried out off the island (and thus outside the Territory of Cocos (Keeling) Islands) (*Exhibit B*).

17 Whilst it is not in dispute that the Applicants were dismissed outside the limits of Western Australia, in determining whether there is a real and substantial connection of the factual circumstances on which the legislation operates and Western Australia, the Commission must consider the nature of the business and the activities of the employer. A business is an "industry" within the meaning of s 7(a) of the IR Act of the definition of industry. A business is carried on and conducted by management, administration, financial control and activity, marketing and advertising, canvassing prospective customers, personnel management and other activities (*Tranfield v Parker* (2001) 81 WAIG 990 (FB) at 54). The industry or calling of the

Respondent is the provision of accommodation on Cocos (Keeling) Islands. Although Mr and Mrs Croxford were on holidays when the positions were offered to the Applicants, they and the other owners carried out managerial functions within Western Australia. The Applicants' contracts of employment were negotiated within Western Australia. Further, whilst some administrative functions, such as banking were carried out on the islands, some were not. Since the beginning of 2005, Mr and Mrs Croxford have spent a significant amount of time in Western Australia. It can be inferred from that evidence and the statements made by them in the email dated 10 September 2005 in respect of the activities that would be continued to be carried out by them, that some administrative functions such as marketing, accounting and promotions would be carried out by them in Western Australia after the Applicants were employed.

18 I am satisfied that the Respondents carried out some of their business activities in Western Australia. The Respondents engaged in administrative work by negotiating and entering into the contracts of employment with the Applicants and Mr and Mrs Croxford as partners of the business engaged in accounting, marketing and promotion of the bungalows in Western Australia. Although the actual work the subject of the contract of employment was outside the jurisdiction, I am satisfied that the work performed by the Applicants was in an industry having a real and substantial connection with the jurisdiction. Even if the connection could be said to be remote, the connection is sufficient to make a finding that by operation of s 3 of the IR Act the matters are "industrial" matters within the meaning of s 7 and s 29(1)(b)(i) of the IR Act and within the jurisdiction of the Commission. However, for the reasons set out in paragraphs [19] to [24] of these reasons for decision, this finding cannot be made because the effect of s 7A and s 8A(2) of the *Cocos (Keeling) Islands Act 1955* (Cth).

Is the Jurisdiction of the Commission Ousted by a Law of the Commonwealth?

19 At the hearing Mr Croxford on behalf of the Respondents raised the issue whether the *Cocos Islands Employees Award 2003* ("the Award") (which is an award made by the Australian Industrial Relations Commission), ousts the jurisdiction of the Commission. Mr Croxford argued that the Applicants cannot have recourse to the unfair dismissal jurisdiction of this Commission because the Award covers all persons employed or to be employed in the Territory of the Cocos (Keeling) Islands in or in connection with or incidental to the industries or industrial pursuits of tourism, accommodation, hotels, motels and resorts. However, the scope provision of the Award does not apply the terms of the Award as widely as the Respondents contend. Although clause 4.1 of the Award provides that, "This award applies to and operates in the territory of the Cocos (Keeling) Islands", clause 4.2 restricts the operation of the Award to employees engaged in classifications in the Award who are employed by the Cocos Islands Co-operative Society Ltd. As the Award does not apply to the Respondents or to the Applicants, the Respondents' argument fails.

20 After the hearing of this matter on 25 August 2006, the Commission sought written submissions from the parties about the effect of s 7A and s 8A of the *Cocos (Keeling) Islands Act*.

21 Section 7A of the *Cocos (Keeling) Islands Act* provides:

> "On and after 1 July 1992, the laws in force in the Territory from time to time are:
>
> (a) Acts as in force from time to time in or in relation to the Territory on and after that day; and
>
> (b) Ordinances made on or after that day as in force from time to time; and
>
> (c) Laws as in force in the Territory in accordance with section 8; and
>
> (d) Western Australian laws as in force in the Territory in accordance with section 8A."

22 Section 8A of the *Cocos (Keeling) Islands Act* provides:

> "(1) Subject to this section, section 8G and Part IVAA, the provisions of the law of Western Australia (whether made before or after this section's commencement) as in force in Western Australia from time to time are in force in the Territory.
>
> (2) To the extent that a law is in force in the Territory under subsection (1), it may be incorporated, amended or repealed by an Ordinance or a law made under an Ordinance.
>
> (3) An Ordinance may suspend the operation in the Territory of a law in force in the Territory under subsection (1) for such period as is specified in the Ordinance.
>
> (4) To the extent that a law is in force in the Territory under subsection (1), it has no effect so far as it is inconsistent with the Constitution or an Act or Ordinance.
>
> (5) For the purpose of subsection (4), a law is consistent with the Constitution or an Act or Ordinance if the law is capable of operating concurrently with it.
>
> (6) In this section:
>
> provision of the law of Western Australia:
>
> (a) includes a principle or rule of common law or equity that is part of the law of Western Australia; and
>
> (b) does not include an Act or a provision of an Act."

23 The effect of s 7A and s 8A(1) of the *Cocos (Keeling) Islands Act* is that all laws of the State of Western Australia are in force in the Territory of Cocos (Keeling) Islands unless pursuant to s 8A(2) any enactment of the State of Western Australia has been repealed by an Ordinance. Pursuant to s 8A(2) of the *Cocos (Keeling) Islands Act*, the IR Act has been repealed by s 6 and schedule 4 of the Cocos (Keeling) Island *Applied Laws (Implementation) Ordinance 1992* ("the Ordinance"). Section 6 of the Ordinance provides that the applied laws in Schedule 4 of the Ordinance are repealed. Schedule 4 of the Ordinance lists the IR Act among others as a repealed applied law. Consequently, the provisions of the IR Act do not apply within the Territory of Cocos (Keeling) Islands. Section 109 of the *Australian Constitution* provides that a State law is inoperative where it is inconsistent with a law of the Commonwealth. One of the ways inconsistency may arise is where the relevant laws collide in

their operation: that is, where both regulate the same subject, in such a way that one explicitly removes or modifies a right or obligation created by the other (*Clyde Engineering Co Ltd v Cowburn (1926) 37 CLR 466*). In *Clyde Engineering Co Ltd v Cowburn* (op cit) a Federal award which applied to the matter in dispute fixed a standard working week of 48 hours and a State act prescribed 44 hours. The High Court held in that matter that when a Federal award has been made the Parliament of a State cannot alter the terms of the award or confer or impose on parties to it rights or obligations which are inconsistent with such terms.

24 In these matters the *Cocos (Keeling) Islands Act*, by the making of s 6 and Schedule 4 of the Ordinance, expressly excludes the operation of the IR Act in the Territory of Cocos (Keeling) Islands. By operation of the provisions of the Federal law does a direct inconsistency with the IR Act arise in these matters before the Commission? In my opinion, the answer to that question is yes. Section 29(1)(b)(i) of the IR Act confers a right to an individual employee to bring an application before the Commission to claim that he or she has been harshly, oppressively or unfairly dismissed. The circumstance that invokes the jurisdiction of the Commission is a dismissal. Both Applicants in this matter were dismissed within the Territory of Cocos (Keeling) Islands and not within the State of Western Australian. The provisions of the *Cocos (Keeling) Islands Act* unequivocally have the effect of prohibiting the jurisdiction of the Commission in respect of dismissals that occur in the Territory of Cocos (Keeling) Islands. Consequently, in these matters, pursuant to s 109 of the *Constitution*, s 29(1)(b)(i) of the IR Act is rendered inoperative.

25 For these reasons I will make orders dismissing the applications.

2006 WAIRC 05551

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MERETE LUND PAGH
	APPLICANT
	-v-
	MR & MRS ROD & PETA CROXFORD, COCOS VILLAGE BUNGALOWS
	RESPONDENTS
CORAM	COMMISSIONER J H SMITH
DATE	FRIDAY, 6 OCTOBER 2006
FILE NO/S	U 215 OF 2006
CITATION NO.	2006 WAIRC 05551

Result	Dismissed
Representation	
Applicant	Mrs M L Pagh
Respondents	Mr R and Mrs P Croxford (on behalf of the Respondents)

Order

Having heard the Applicant in person and Mr and Mrs Croxford on behalf of the Respondents, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* hereby orders:—

THAT the application is hereby dismissed.

(Sgd.) J H SMITH,
[L.S.] Commissioner.

2006 WAIRC 05550

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PETER BOYE PAGH
	APPLICANT
	-v-
	MR & MRS ROD & PETA CROXFORD, COCOS VILLAGE BUNGALOWS
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	FRIDAY, 6 OCTOBER 2006
FILE NO/S	U 216 OF 2006
CITATION NO.	2006 WAIRC 05550

Result	Dismissed
Representation	
Applicant	Mr P B Pagh
Respondents	Mr R and Mrs P Croxford (on behalf of the Respondents)

Order

Having heard the Applicant in person and Mr and Mrs Croxford on behalf of the Respondents, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* hereby orders:—

THAT the application is hereby dismissed.

[L.S.]

(Sgd.) J H SMITH,
Commissioner.

2006 WAIRC 04508

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CHONG-WAH LIEW
	APPLICANT
	-v-
	DIRECTOR GENERAL OF EDUCATION
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
HEARD	21 FEBRUARY 2006, 22 FEBRUARY 2006, 17 MARCH 2006
DELIVERED	MONDAY, 12 JUNE 2006
FILE NO.	APPL 33 OF 2005
CITATION NO.	2006 WAIRC 04508

Catchwords	Termination of employment - Harsh, oppressive and unfair dismissal - Issues in relation to applicant's performance - Procedural fairness considered – Non-application of mandatory provisions considered - Principles applied - Industrial Relations *Act 1979* (WA) s 29(1)(b)(i) – *Public Sector Management Act 1994* (WA) s78, s 79(3) and (5)
Result	Reasons for Decision issued
Representation	
Applicant	Mr S Millman (of counsel)
Respondent	Mr S Murphy (of counsel)

Reasons for Decision

1 This is an application by Chong-Wah Liew ("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 by the Director General of Education in the State of Western Australia ("the respondent") on 17 December 2004.

Background

2 The applicant was employed by the respondent on 31 January 2002 as a probationary teacher at Gosnells Senior High School (see Exhibit R1/181). At the commencement of the 2003 school year the applicant was transferred to Safety Bay Senior High School ("SBSHS") under an employer initiated placement due to a surplus of teachers at Gosnells Senior High School. By letter dated 20 December 2004 the respondent terminated the applicant's employment. The parties agree that at the time of the applicant's termination the *Government School Teachers and School Administrators Certified Agreement 2004* ("the Agreement") applied to the applicant's employment.

Applicant's evidence

3 The applicant gave evidence that he has a Bachelor of Science degree with honours in chemistry, physics and mathematics and a Masters of Education from Malaysia, and he completed a Doctorate of Science Education at Curtin University in January 2005.

4 Prior to coming to Australia in 1993 the applicant taught in Malaysia for seventeen years. The applicant was a full-time teacher in 1994, and in 2001 the applicant undertook a full-time relief teaching position at Gosnells Senior High School and was then appointed to work at the school on a six month contract commencing in the second semester of 2001. At the end of 2001 the applicant was appointed to Gosnells Senior High School until 20 December 2004 (Exhibit R1/181). The applicant

stated that at the end of 2002 he was given a satisfactory appraisal of his performance for the period he worked at Gosnells Senior High School (Exhibit A1).

5 The applicant stated that after he was transferred to SBSHS in 2003 his performance was appraised under the standard performance appraisal process in place and he was monitored along with a group of other teachers who were new to SBSHS. The applicant stated that he was advised by Mr Abraham Kassab who was a deputy principal at SBSHS that his performance and progress in Term 1, 2003 was satisfactory.

6 The applicant stated that at a meeting he had with Mr Kassab in August 2003 he was given a document detailing a range of areas where his performance required improvement. The applicant stated that at the time he was also advised by Mr Kassab that he was unable to determine if the applicant's performance was satisfactory or unsatisfactory (Exhibit R1/187).

7 The applicant stated that he was unaware that parents had made complaints about him in 2003 and the applicant could not remember seeing a document which appraised his performance in December 2003 (see Exhibit R1/188-197).

8 The applicant stated that there were no communications with him about any performance concerns in semester one, 2004 and the applicant stated that he was not told that he would be appraised during this semester and he was not informed that some of his lessons were going to be observed.

9 The applicant stated that in July 2004 he was advised that a formal review of his performance was to take place and the applicant stated at a meeting he attended in July 2004 he was given a letter stating that his performance was unsatisfactory and he was told to respond in writing, which he did so (see Exhibit R1/153-154 and 148-9).

10 The applicant agreed that he was given details specifying the areas in which he was required to improve but the applicant was of the view that his Performance Improvement Plan ("PIP") contained insufficient details. The applicant also maintained that his PIP did not contain enough detail about the specific improvements required of him. The applicant stated that he did not have any input into the matrix of the PIP even though he wanted to be consulted.

11 The applicant stated that he asked the deputy principal overseeing his performance in 2004, Mr Lawrence Longworth, to observe him conducting a lesson but this request was denied. The applicant stated that he wanted a colleague Mr Brian Coulson to be involved in his PIP process as he was an experienced teacher who could observe the applicant and could also demonstrate lessons however the applicant maintained that SBSHS would not allow Mr Coulson to become involved in his PIP process.

12 The applicant claimed that the outcome of his PIP was pre-determined. The applicant relied on a timetable of teachers and classes for 2005 which did not include him and was given to him at a meeting held on 23 November 2004. The applicant also claimed that during his PIP he was not given sufficient support to improve his performance and what support he was given was ineffective.

13 The applicant stated that even though he wanted information on the areas in which he was required to improve and how he could make the required improvements he was not given this feedback. The applicant stated that he worked hard to improve his classroom management skills and he claimed that he was not observed using positive reinforcement techniques with his students and he maintained that he made significant improvements in this area.

14 The applicant stated that at a meeting held on 13 December 2004 the respondent acknowledged that he had improved in two of the four areas in which he was experiencing difficulties and he claimed that in the two other areas where his performance remained unsatisfactory, his performance had improved (Exhibit R1/67-68).

15 The applicant stated that during Terms 3 and 4 of a school year a student's behaviour is more difficult to control as they lack motivation. The applicant stated that even though some students were taken out of some of his classes in semester two, 2004 this was insufficient to assist the applicant because at the same time difficult students were transferred into his classes.

16 The applicant stated that since ceasing employment with the respondent he has been unable to undertake relief teaching in the government school system but he has been undertaking some relief teaching in non-government schools and he worked three to four days per week in winter 2005. He is currently working full time in a non government school in a temporary position.

17 The applicant stated that he believed the assessment of his performance arose after complaints were made by parents about him that in the main he was unaware of. The applicant maintained that SBSHS was a difficult school to staff and he claimed that a number of the students at the school were difficult to teach. The applicant stated that in 2003 he taught year eight maths and science and a year ten maths class and he stated that this class was very difficult to teach as he stated that the year 10 students were not in the normal school stream as it was a lower school access ("LSA") class that contained difficult students. In 2004 the applicant taught year nine maths and science classes as well as a year twelve physics class.

18 Under cross-examination it was put to the applicant that at times students left his classroom without his permission. The applicant stated that this was not an uncommon occurrence even for other teachers at SBSHS. The applicant stated that he was aware that a student had climbed into a classroom through a window when he was conducting a class outside after the student went to the toilet and the applicant acknowledged that a colleague returned this student to his class. The applicant stated that he had difficulty with some students who he claimed were out of control at home and the applicant disputed that he did not always use student names. The applicant stated that he was authoritarian at times with his students and the applicant stated that he applied a variety of styles to his teaching and the applicant claimed that he built a relationship with his students.

19 The applicant agreed that in 2003 Mr Kim Thorne, Mr Kassab and Mr Stuart Pryer provided him with feedback and support after reviewing some of his classes and he conceded that Mr Pryer specialised in classroom management and had discussed classroom management techniques with him. The applicant acknowledged that Mr Pryer twice helped him with his year ten class at the end of 2003 and provided him with assistance. The applicant stated that he did not observe other teachers

conducting classes at SBSHS or at other schools in 2003 even though he asked to do so and the applicant stated that it was difficult to work co-operatively with other staff members at SBSHS as he was teaching across two subjects - maths and science. The applicant stated that he made positive contributions to the school and worked collaboratively with other teachers in maths and science during 2003 and 2004.

20 The applicant was asked to comment on an incident which took place in August 2003 involving three students who left his classroom (Exhibit R1/172). The applicant stated that he was aware of this incident and he stated that there was little that he could do about the situation and that he tried to locate a phone to obtain assistance but was unable to do so because the door to the room where the phone was located was locked. The applicant claimed that in the circumstances his actions were appropriate.

21 The applicant stated that he was given feedback and copies of some notes written about his teaching and the applicant stated that even though suggestions were given to him to improve his performance, when he applied them they did not work. The applicant stated that the professional development course he attended called 'verbal judo' was unhelpful. The applicant acknowledged that two notes containing feedback from Mr Thorne in 2003 had been seen by him and he agreed that Mr Kassab had attended his classroom to give the applicant feedback and the applicant agreed that he discussed some of the ideas contained in the feedback with Mr Kassab. The applicant stated that even though Mr Thorne and Mr Kassab provided him with feedback in 2003 and sat in on some of his classes he was not given effective support.

22 The applicant disputed that his performance was unsatisfactory in 2003 and he claimed that he was not given any notification to this effect. The applicant maintained that no serious complaints made by parents or students were raised with him in 2003 and he believed that his teaching was professional.

23 When a number of complaints made by parents in 2004 about the applicant were put to him the applicant maintained that he was aware of only one of these complaints. The applicant stated that in this instance the student's mother had told him that her daughter was out of control at home (see Exhibit R1/114).

24 The applicant stated that he was aware that in semester one, 2004 Mr Michael Churchman collected a student who had walked out of the applicant's class. The applicant could not recall seeing a classroom observation note dated June 2004 written by Mr Longworth after he reviewed one of the applicant's classes and he rejected the claims made by Mr Longworth in this document. The applicant also maintained that he did not have any discussions with Mr Longworth about this observation note (Exhibit R1/159). The applicant recalled Mr Longworth taking over one of his lessons and he stated that the students only responded to Mr Longworth because he was the deputy principal. When an observation note completed by Mr Churchman dated 30 June 2004 was put to the applicant, the applicant recalled meeting Mr Churchman about this lesson. The applicant stated that the class Mr Churchman reviewed was difficult and that the students in this class eventually listened to him.

25 The applicant believed that he had a good rapport with most of his students.

26 The applicant stated that the letter written to him in July 2004 informing him that his performance was not satisfactory did not sufficiently specify the areas in which he was required to improve and the applicant maintained that his PIP contained insufficient details about what he was to do even though the applicant understood some of what was required of him (Exhibit R1/70-71). The applicant stated that he wanted written feedback about each lesson reviewed by others and he wanted to view a demonstration lesson however he was denied this opportunity. The applicant agreed that he sat in on a class conducted by Mr Tony Galiano and stated that this class was very quite as the students were doing their work and there was very little interaction between the Mr Galiano and the students. The applicant also agreed that he sat in on a lesson given by Mr Coulson and that Mr Coulson sat in on one of his lessons.

27 The applicant agreed that he was given a copy of the respondent's Managing Unsatisfactory and Substandard Performance of Teaching Staff and School Administrators document ("the Policy") (Exhibit R2).

28 The applicant confirmed that during the period of his PIP he was given regular feedback about his performance but the applicant stated that even though he was given feedback, support and suggestions to improve these were ineffective. The applicant agreed that Mr Longworth sat in on some of his classes and gave him feedback and the applicant stated that even though he wanted Mr Longworth to specifically demonstrate the areas in which he expected the applicant to improve he refused to do so. The applicant stated that some students were removed from his class and others put in his classes but he claimed that this assistance was ineffective as it occurred at the end of the performance management process. The applicant stated that he started with an average size class of 25 students and that class numbers fluctuated during 2004. The applicant conceded that by the end of 2004 the number of students in his classes had reduced significantly.

29 The applicant agreed that in Term 4, 2004 he was told that he could attend professional development sessions which could assist him to improve his performance.

30 The applicant stated that in November 2004 he viewed lessons at schools in Rockingham and Mandurah because he felt he should attend these lessons. The applicant stated that even though he visited Rockingham Senior High School to look at two teachers taking lessons he said that this visit was irrelevant as the teachers had different management styles which did not relate to his circumstances.

31 The applicant recalled attending a meeting with Mr Longworth on or about 10 September 2004 and he recalled that feedback and suggestions were given to him about a lesson during this meeting but he could not recall being given a copy of the record of this meeting (Exhibit R1/133).

32 The applicant disagreed that he found it difficult to develop a rapport with students and the applicant maintained that he must have had some rapport with students otherwise no work would have been done in his classes.

33 The applicant recalled receiving a lesson feedback observation sheet from Mr Churchman dated 21 October 2004. The applicant maintained that his summary of this lesson was inaccurate and he claimed that as the students he was teaching were difficult this summary should have been disregarded (Exhibit R1/104).

34 The applicant agreed that he was given some support during the PIP process but he stated that the support was insufficient to provide the effective change as required in his PIP and the applicant denied that he had an unrealistic expectation of the support he needed. The applicant stated that even though he was given comprehensive feedback at times about his performance he did not find this feedback helpful. The applicant stated that he disagreed with the comments made by Mr Churchman after observing a lesson held on 2 December 2004 about his ability to develop positive a relationship with students and his classroom management as the standard expected of him was not consistent given the difficult students he was teaching (see Exhibit R1/88-89).

35 The applicant again stated that he was unaware that complaints had been made about him by parents during 2004.

36 The applicant could not recall receiving a letter dated 14 December 2004 from the Principal of SBSHS informing him that he had not demonstrated satisfactory performance during the period of the PIP and that a recommendation was to be made to the Director General to investigate his performance (Exhibit R1/62).

37 The applicant stated that a letter written on his behalf by the State School Teachers Union of WA (Inc) ("the Union") confirmed his views about the PIP process.

38 The applicant stated that even though he was frequently given feedback about his performance this was not effective. The applicant maintained that he had improved appropriately given the students and the school where he was teaching and he claimed that the expectations on him were unrealistic. The applicant denied that Mr Longworth had good reason not to demonstrate a class for him and he stated that he was unaware if any other teachers had been left off the proposed teaching timetable for 2005 given to him in November 2004.

39 The applicant stated that he complained to his line manager about students making comments about his cultural background and he was advised that the students were disciplined. The applicant stated that notwithstanding these actions the attitude of theses students did not change.

40 The applicant confirmed his earnings subsequent to ceasing employment with the respondent by way of a group certificate covering the period up to 30 June 2005 and a pay slip covering the period up to 1 February 2006 (Exhibit A5).

Respondent's evidence

41 Mr Churchman has been a mathematics teacher for eighteen years and has a teaching qualification and a degree in mathematics. Mr Churchman was the head of maths and science at SBSHS in 2003 and 2004 and was responsible for years 10, 11 and 12. Mr Churchman stated that he was the applicant's line manager in 2003.

42 Mr Churchman stated that students at SBSHS were in the middle range of difficult students to teach and teachers ordinarily had no problems teaching students at SBSHS if they had good control of their classes.

43 Mr Churchman stated that Mr Thorne advised him in Term 2, 2003 that the applicant was experiencing classroom management problems and as a result he observed some of the applicant's classes on an informal basis. Mr Churchman stated that the applicant was experiencing problems managing his classes and he understood that the applicant was assisted by others in this regard.

44 Mr Churchman stated that when he observed one of the applicant's lessons in Term 2, 2004 he was very concerned about the students' behaviour during this lesson as students were swearing at the applicant, not on task, walking out of class and Mr Churchman stated that the applicant had no control over the students. Mr Churchman then spoke to Mr Gerald Lloyd and Mr Longworth about the applicant.

45 During Term 3, 2004 Mr Churchman was on long service leave.

46 Mr Churchman stated that he observed one of the applicant's classes in Term 4, 2004 after the applicant was advised that he would be observing his classes and the applicant was asked to nominate a class. Mr Churchman stated that even though the applicant had prepared this lesson well it did not work, there was conflict within the class, some students were drawing and some were not doing any work. Mr Churchman stated that after observing this lesson he expressed his concerns about the applicant's performance to Mr Longworth and Mr Lloyd.

47 Mr Churchman stated that when he observed the applicant again in November 2004 he noted that the applicant was making attempts to build a rapport with students by remembering their names and using humour but at times he was too friendly, little work was being done in his classes, some students did what they liked and the applicant went out of his way to avoid confrontation to the point that students did what they liked. Mr Churchman stated that it appeared to him that the applicant had no idea how to conduct himself.

48 Mr Churchman stated that after he observed the applicant's classes he gave the applicant written feedback and spoke to him when he had a chance about his observations about the applicant's lessons and Mr Churchman stated that after he observed the applicant's lessons he gave copies of his observations to both Mr Longworth and the applicant. Mr Churchman stated that a copy of the feedback provided to the applicant about a lesson he observed on 30 June 2004 was provided to both Mr Lloyd and Mr Longworth (Exhibit R1/156).

49 Mr Churchman stated that by the end of 2004 the applicant had made some changes and was trying different strategies to improve his teaching. Mr Churchman stated that as he was concerned that the applicant was unsure of what was expected of him he was encouraged to observe teachers at other schools and Mr Churchman stated that the applicant understood the theories of classroom management but was unable to apply this to his teaching. Mr Churchman stated that it was his view that at the end of 2004 the applicant's performance was unsatisfactory.

50 Under cross-examination Mr Churchman stated that the applicant should have built up a rapport with his students during the year and that putting in place measures in November 2004 was too late for the applicant to demonstrate significant improvements. Mr Churchman stated that in the two areas that the applicant was deemed to be unsatisfactory (classroom management and developing relationships with students) he made some improvements by the end of 2004 however they were

marginal and the applicant was still way off the required standard of performance. Mr Churchman understood that the applicant's line managers gave clear indications to the applicant about what the applicant was required to do to improve his performance.

51 Mr Kassab has a Bachelor of Arts in Education and a Bachelor of Education and he commenced teaching in 1991. Mr Kassab has taught at a number of schools in both metropolitan and country areas and he has worked with gifted students and students at risk. Mr Kassab has also focussed on effective teaching practices and assisting schools to focus on dealing with maximising student learning.

52 In 2003 Mr Kassab was a relieving deputy principal at SBSHS and he was responsible for the school's performance management and appraisal processes.

53 Mr Kassab stated that SBSHS is not a difficult school to teach at if a learning programme was properly structured. Mr Kassab stated that classroom management of students is critical and that if the classroom was not properly managed students have difficulty learning and this applied to students at all levels and at all schools.

54 Mr Kassab stated that he had a meeting with the applicant in Term 1, 2003 about the SBSHS performance management process. Mr Kassab stated that he maintained a positive approach with the applicant during that meeting to encourage him to meet student needs. After he observed one of the applicant's classes at the beginning of Term 2, 2003 Mr Kassab stated that he was concerned that learning in the classroom was not being maximised to meet student needs and he was also concerned about how the applicant managed students and the applicant's lack of relationship building with his students.

55 Mr Kassab stated that in Term 2, 2003 he wrote to the applicant to arrange a time to sit in on one of his classes and Mr Kassab stated that the reference in this letter to the applicant being professional was his attempt to be positive even though at that stage he had received concerns from the applicant's line managers about his performance and he had also received a number of complaints from parents about the applicant (Exhibit A4).

56 Mr Kassab stated that when issues about the applicant were raised by parents in 2003 he raised them with the applicant at the time.

57 Mr Kassab stated that he frequently looked in on the applicant's classes and Mr Kassab stated that throughout 2003 he raised a number of performance concerns with the applicant and identified a list of issues for him to work on to make the necessary improvements. Mr Kassab stated that some issues continued to arise and that the applicant lacked consistent procedures, for example, when students entered the classroom. Mr Kassab stated that he gave the applicant feedback and clear advice about how to improve his teaching on 5 August 2003 but there was no evidence that the applicant had acted on this advice (Exhibit R1/180). Mr Kassab stated that at the time he gave the applicant a document listing his concerns.

58 Mr Kassab stated that on 7 August 2003 he prepared notes for the applicant to highlight his concerns about his performance as well as improvements that could be made (Exhibit R1/213). Mr Kassab stated that it was his practice to meet the applicant after reviewing his lessons and to give him feedback and advice and he understood that Mr Lloyd, Mr Thorne and Mr Pryer were also giving him assistance. Mr Kassab stated that he gave the applicant feedback about a lesson he attended on 26 August 2003 and he wrote a memo to the applicant after this visit confirming his views about the applicant's lesson (Exhibit R1/183).

59 Mr Kassab stated that during a lesson the applicant was teaching in August 2003 an incident occurred whereby two students tied up another student on a chair with insulation tape and took him out of the room. Mr Kassab stated that when he approached the applicant about this incident the applicant told him that he did not see it happen. Mr Kassab again observed one of the applicant's classes on 29 August 2003 and spoke to the applicant about his observations (see Exhibit R1/170-171).

60 Mr Kassab stated that Mr Thorne gave the applicant assistance and he was the applicant's mentor which was appropriate as he was not in a supervisory position and therefore not a threat to the applicant. Mr Kassab stated that Mr Pryer also gave the applicant assistance and that he had specific training in classroom management skills.

61 Mr Kassab stated that at the end of Term 3, 2003 the applicant was advised that because of his unsatisfactory performance the Performance Appraisal Process would continue in 2004.

62 Mr Kassab stated that when he filled out a performance appraisal document about the applicant in December 2003 he endeavoured to articulate his concerns about the applicant's performance and identified areas of improvement for the applicant to target. Mr Kassab stated that this document was probably filled out to assist with the applicant's ongoing performance appraisal in 2004. Mr Kassab stated that he would have shown this document to the applicant (see Exhibit R1/188-197).

63 Mr Kassab stated that it was his view that as at the end of 2003 the applicant's performance was unsatisfactory. Mr Kassab stated that the applicant was unable to understand and build relationships with students, his preparation was lacking, his work did not reflect student needs, and he had problems with classroom management. Complaints had been made about the applicant by parents and the applicant was given feedback about these complaints. Mr Kassab also stated that the applicant was not working as part of a team and his students were not engaged in learning.

64 Mr Kassab stated that it was his policy not to include teachers in discussions with parents when a complaint was made about a teacher and Mr Kassab stated that in Terms 2 and 3, 2003 there were weekly complaints from parents about the applicant.

65 Mr Kassab gave evidence that all classes at SBSHS had academic students and students with special needs.

66 Under cross-examination Mr Kassab stated that under the PIP process a teacher's strengths and weaknesses were identified and a teacher was given support to ensure that he or she was able to maximise student performance.

67 It was put to Mr Kassab that a summary completed about the applicant on 7 August 2003 had some positive comments about him (Exhibit R1/213). In response Mr Kassab stated that when engaging students in the learning process the applicant's performance was inconsistent and Mr Kassab stated that he also was a moderating influence on the students during this lesson. When asked why the document he filled out about the applicant's performance at the end of 2003 did not specify whether he

was operating at a satisfactory or unsatisfactory level, Mr Kassab stated that it was not a final summary but a device to give specific feedback to the applicant.

68 Mr Longworth holds a Bachelor of Education with a physical education major. He has been teaching for 24 years and for four and a half of those years he has been a deputy principal and manager of student services. In 2004 he was a deputy principal at SBSHS and in this role he was in charge of upper school and student services giving support to students and to teachers with difficult students. The applicant's manager reported to Mr Longworth.

69 Mr Longworth stated that whilst SBSHS was funded for some specific behaviour management programmes and has some challenging students, most students were manageable and well behaved.

70 Mr Longworth stated that classroom management and building up a rapport with students was fundamental to the learning process.

71 Mr Longworth stated that he had concerns about the applicant's performance in semester one, 2004. Mr Longworth stated that he observed the applicant undertaking lessons on many occasions in semester one, 2004 and Mr Longworth stated that he closely monitored the applicant. Mr Longworth stated that he was aware of complaints from parents about the applicant and that the applicant had experienced problems the previous year. Mr Longworth stated that from his observations the applicant was struggling with the behaviour of his students and classroom management and that students had little respect for him even though he was working hard. Mr Longworth stated that it was difficult for the applicant to make progress with his students.

72 Mr Longworth stated that he had discussions with the applicant's direct managers Mr Churchman and Mr Lloyd about giving the applicant assistance and Mr Longworth was aware that the applicant had some difficult students removed from his class.

73 Mr Longworth gave evidence about the feedback he gave to the applicant. Mr Longworth stated that on 10 June 2004 he observed one of the applicant's classes and he gave a copy of his notes about his observations to the applicant. Mr Longworth stated that the applicant was working hard but with little effect and he stated that this class was not a group of students that should have been out of control (see Exhibit R1/159).

74 Mr Longworth commented on a case conference held after a student's guardian raised concerns about the applicant's teaching ability. Mr Longworth stated that the applicant would have been aware of this case conference but he could not recall giving a note to the applicant about this complaint and discussing the guardian's concerns with the applicant.

75 Mr Longworth stated that in July 2004 he drafted a letter notifying the applicant that his performance was substandard (Exhibit R1/153-154). Mr Longworth stated that he discussed the issues outlined in this letter with the applicant and he gave evidence that the applicant responded by saying that he felt his performance was okay, that he was aware of some classroom management issues and the applicant claimed the difficulties arose because the students in his classes were a tough group to teach. Mr Longworth stated that when the applicant responded in writing to the notification that his performance was substandard the applicant did not respond to all of the areas in which the applicant's performance was required to improve.

76 Mr Longworth stated that the PIP was finalised after consultation with the applicant, Mr Lloyd and Mr Churchman (Exhibit R1/117) and Mr Longworth confirmed that the applicant was subject to an observation roster during the PIP (see Exhibit R1/78).

77 Mr Longworth stated that Mr Pryer was an expert in the field of behaviour management and that other teachers who also gave feedback to the applicant were very experienced. Mr Longworth stated that Mr Jamie Hayres was asked to give feedback to the applicant as he was an outstanding classroom practitioner and Mr Longworth stated that a colleague of the applicant, Mr Coulson, did not want to be involved in the applicant's formal appraisal process.

78 Mr Longworth stated that the lesson observation sheet dated 8 September 2004 was given to the applicant and the lesson observations were discussed with him (Exhibit R1/135-136). Mr Longworth could not recall if he gave the applicant a copy of the record of a meeting dated 10 September 2004 but he stated that it was his practice to give the applicant copies of all relevant feedback and notes (Exhibit R1/133).

79 Mr Longworth stated that he responded formally to the applicant after he requested that Mr Longworth demonstrate a lesson for him. Mr Longworth believed that the applicant's request for him to run a lesson was a distraction and he believed the applicant was personalising the issue which was about the applicant improving and observing other teachers in his subject areas undertaking lessons. Mr Longworth stated that the applicant was becoming increasingly defensive during the PIP process and as a result it was difficult to give him constructive criticism.

80 Mr Longworth stated that during his PIP the applicant was offered the opportunity to undertake any professional development that he wished to and that this was confirmed in a memo to the applicant dated 5 November 2004 (see Exhibit R1/98).

81 Mr Longworth agreed that the applicant was stressed during the PIP process and he stated that this was reflected in his defensiveness to criticism however, he stated that the applicant did not take any sick leave or indicate that he was suffering any major stress at this time.

82 Mr Longworth stated that in order to assist the applicant, the applicant's PIP was extended twice. Mr Longworth stated that the main aim of the PIP was to ensure that the applicant improved in the areas where he was deficient and Mr Longworth said that the school had not determined whether or not the applicant was performing at the required standard until the end of the school year in 2004. Mr Longworth stated that if the applicant had reached the appropriate levels required of him the school was thinking about allocating the applicant to teach upper school students. However, Mr Longworth had a discussion with the applicant about teaching upper school students but the applicant declined this option. Mr Longworth stated that it was not possible for the applicant to continue teaching lower school students because his skills were inadequate in two main areas, classroom management and building a rapport with students.

83 Mr Longworth was of the view that if the applicant taught a new group of students commencing at the beginning of the following year it would not have made much difference to the applicant's ability to manage students.

84 Mr Longworth stated that the applicant wanted unlimited assistance from Mr Pryer but this was not possible.

85 Mr Longworth said that he chaired the review panel overseeing the applicant's substandard performance process to ensure that the correct process was followed and to enable the applicant every opportunity to improve. Mr Longworth stated that the letter sent to the applicant dated 9 December 2004 was a summary of events to date and he stated that at that point a final decision had not been made about the applicant's progress (Exhibit R1/74). Mr Longworth gave evidence that after a final review meeting was held with the applicant on 13 December 2004 the review panel met and Mr Longworth stated that as the applicant remained substandard in two areas, behaviour management and the ability to build a rapport with students, it was determined that the applicant's performance was not satisfactory.

86 Mr Longworth commented on the issues raised in a letter dated 16 December 2004 from the Union written on behalf of the applicant to the Principal of SBSHS. Mr Longworth stated that he gave the applicant as much feedback as possible and that the school did its best to assist the applicant however, the applicant was not open to receiving this feedback. Mr Longworth also stated that the applicant did not raise students making racial slurs against him with him.

87 Under cross-examination Mr Longworth stated that this was the first time he had been involved in a substandard performance process however he stated that had performance managed numerous other teachers.

88 Mr Longworth maintained that classroom management and developing a rapport with students are skills that can be learned although some teachers have more natural ability in this area than others and Mr Longworth said that normally rapport between a teacher and students improves notwithstanding initial difficulties but this did not happen in the applicant's case.

89 Mr Longworth stated that after the applicant was identified as having difficulty teaching students, efforts were made to reduce the applicant's problems and experienced practitioners judged that the applicant would not improve notwithstanding the applicant teaching a new group of students in 2005. Mr Longworth stated that every effort was made by SBSHS to assist the applicant to improve but little if any improvements were made by the applicant in the areas of classroom management and developing positive relationships with students.

90 Ms Michelle Santich has a degree in Human Biology and a Diploma of Education. She commenced teaching at SBSHS in 2003 and worked with the applicant in 2003 and 2004. Ms Santich stated that the focus at SBSHS was teachers working collaboratively. Ms Santich stated that she worked closely with another teacher Ms Maria Riverspool and the applicant up to the end of Term 1, 2003 and she stated that the applicant did not work with her and her colleague after this date. Ms Santich maintained that the applicant did not contribute during meetings of year 8 teachers and she disputed some of the claims made by the applicant about his contribution to his learning areas in a document the applicant produced summarising his input into the year eight learning team (Exhibit R1/169).

91 Mr Lloyd has been teaching at SBSHS since 1995. In 2003 he was manager of the SBSHS's year eight learning team and his role was to do with disciplinary issues, oversee staff and curriculum content. Mr Lloyd stated that in 2003 he was the applicant's direct line manager.

92 Mr Lloyd stated that SBSHS was easier to teach at than other schools he had taught in including schools at Kwinana, Lockridge and Carnarvon.

93 Mr Lloyd stated that classroom management was fundamental to ensuring good learning outcomes for students.

94 Mr Lloyd stated that by March 2003 he was aware that the applicant was experiencing difficulties dealing with some of his students and he stated that the applicant's classes were not under control when he observed them. Mr Lloyd stated that by this time the school also had a couple of complaints from parents about the applicant.

95 Mr Lloyd stated that he arranged for Mr Thorne to assist the applicant at least once a week and after students complained about the applicant more support was given to him. Mr Lloyd stated that one student was moved out of the applicant's class to relieve the pressure on the applicant and Mr Lloyd stated that he spoke to the applicant about a number of requests made to remove students from the applicant's classes.

96 Mr Lloyd stated that a copy of a complaint made by a parent in 2003 was given to the applicant and discussed with him (Exhibit R1/202).

97 Mr Lloyd stated that the applicant was offered the opportunity to attend a number of in-service courses to assist him however he did not attend all of them. Mr Lloyd was aware that the applicant attended one course covering 'verbal judo' and two others dealing with behaviour management.

98 Mr Lloyd stated that he observed some of the applicant's classes for short periods and he stated that even though the applicant's subject knowledge was good and his presentation of the material was okay he lacked classroom control and a rapport with students. Mr Lloyd stated that he discussed with the applicant how to begin a class and establish his authority and he stated that sometimes the applicant acted on his advice.

99 Mr Lloyd stated that on a couple of occasions the applicant raised the issue of racial slurs being made against him by students and he stated that he dealt with these complaints immediately. Mr Lloyd stated that two other teachers also had issues in this area.

100 Mr Lloyd stated that by the end of 2003, the applicant had improved in two areas, however he still had problems with the main area of classroom management and the performance appraisal process was therefore extended into 2004 and this was conveyed to the applicant.

101 Mr Lloyd stated that he had a complaint from a parent in March 2004 about her son who was in one of the applicant's classes and he stated that some students were shifted out of the applicant's class at this point. Mr Lloyd stated that even though new students were occasionally put into this class, the applicant's class numbers were low and he stated that the applicant was not deliberately given difficult students.

102 Mr Lloyd stated that copies of the records of meetings held with the applicant on 31 August 2004 and 14 September 2004 about some of his lessons were given to the applicant as well as copies of observation sheets for these lessons.

103 Mr Lloyd stated that he suggested to the applicant that he view lessons given by other teachers.

104 Mr Lloyd stated that he made a final report about the applicant's performance on 29 September 2004 as he was commencing long service leave at the time. Mr Lloyd stated that prior to going on leave he discussed his views about the applicant with the applicant and Mr Longworth at a meeting and he stated that a copy of this report was given to the applicant (Exhibit R1/120).

105 Mr Lloyd stated that he received approximately two complaints per month from parents about the applicant and it was his view that approximately 50 per cent of these complaints had some substance. Mr Lloyd stated that each time a complaint was made he spoke to the parents concerned and discussed the complaint with the applicant.

106 Mr Lloyd rejected the applicant's claim that insufficient feedback was given to him. Mr Lloyd stated that he regularly gave feedback to the applicant about his performance and he also organised others to do so.

107 Mr Lloyd stated that he asked the applicant to view one of Mr Coulson's classes.

108 Mr Lloyd stated that if the applicant had the opportunity to commence the 2005 school year with a new group of students he would not have succeeded. He based this view on the applicant having new students at the beginning of 2004 and there was no change notwithstanding the assistance given to the applicant in 2003, and taking into account that some students were shifted out of the applicant's classes during 2004.

109 Mr Lloyd stated that he advised the applicant to seriously look at teaching upper school or teaching at a private school but the applicant told him he wanted to continue teaching middle school students.

Applicant's submissions

110 The applicant argues that the decision to terminate him was harsh, unjust or unfair.

111 The applicant submits that the respondent failed to take into account a number of relevant factors when deciding to terminate him. The respondent ignored the applicant's satisfactory performance at Gosnells Senior High School and the difficult teaching environment at SBSHS. The applicant improved in two of the four areas identified in the PIP and the applicant maintains that the areas where the applicant failed to show improvement were closely related to the cohort of students that the applicant was teaching. The applicant argues that the respondent failed to take into account his potential to succeed in an alternative setting or teaching alternative year levels, the respondent failed to canvass the possibility of the applicant's transfer to an alternative school, the respondent ignored the applicant's extensive teaching experience in Malaysia and in Western Australia and the fact that the applicant is a highly qualified teacher and was the only one or one of a small number of teachers at SBSHS who taught both maths and science. The applicant also submits that the respondent failed to adequately consider his future employment prospects given the respondent is the largest employer of teachers in the State. The applicant argues that as the respondent incorrectly applied the provisions of clause 12 of the Agreement the applicant could have been employed for two further terms under clause 12(3) of the Agreement and the applicant argues it was also open to the respondent to withhold an increment of remuneration or reduce the applicant's level of classification.

112 The applicant maintains that he had a history of satisfactory performance prior to commencing employment at SBSHS and the applicant claims that his performance in his first year of teaching at Gosnells Senior High School was satisfactory in all areas. The applicant argues that when his performance was appraised at the end of 2003 his performance at SBSHS was assessed as neither satisfactory nor unsatisfactory and the applicant was not formally assessed or given specific suggestions about how his performance could improve in 2003.

113 The applicant argues that Mr Longworth failed to take the necessary steps to ensure that the PIP was fair and reasonable and to provide the applicant with a reasonable prospect of success and the applicant claims that Mr Longworth should have explained the Policy to the applicant and provided him with effective support and feedback and the school should have acceded to the applicant's request to have input into who was on the assessment panel.

114 The applicant was unhappy with the way in which his PIP was structured and implemented and with the persons involved in his PIP. The applicant claims that he was evaluated on subjective criterion and argues that he was set up to fail his PIP and that his termination was predetermined. The applicant argues that when support and feedback was given to him in regard to his performance this assistance was ineffective. Additionally a request that Mr Longworth demonstrate a class to assist the applicant was refused.

115 The applicant maintains that the performance level required of him was unrealistic because of the difficult students that he was teaching and the applicant maintains that it was unclear to him what was required of him to improve his performance. The applicant argues that he was given insufficient time to demonstrate the ability to manage his classes and to develop a rapport with his students and the applicant maintains that by the time he underwent the PIP his students had developed a particular pattern of behaviour. As the applicant was required to teach low ability, low motivation students under the LSA programme this contributed to the difficulties the applicant had with students. The applicant argues that this is supported by the evidence of Mr Churchman who stated that the applicant did not have any idea of what was expected nor did he understand what was required of him. The applicant also argues that a number of the respondent's witnesses gave evidence that developing a rapport with students took a lengthy period of time and that developing this relationship with students was almost impossible in the timeframe of the PIP.

116 The applicant maintains that some of the complaints made about him by students were based on his cultural background.

117 The applicant submits that he was required to teach a cohort of students at a difficult school and if given an opportunity to teach different classes he may have been able to demonstrate the required standards of classroom management and student rapport.

118 The applicant argues that the respondent failed to properly investigate the applicant's performance pursuant to s79(5) of the *Public Sector Management Act 1994* ("the PSM Act") and claims that Mr Don Barnes did not interview anyone as part of his investigation. The applicant submits that no investigation was undertaken as required under the PSM Act and as there was no compliance with s79(5) of the PSM Act, the respondent could not terminate the applicant. The applicant argues that the respondent applied the process detailed under clause 12 in the Agreement when it ought to have applied the process provided for under s79 of the PSM Act as confirmed by the respondent's letter to the applicant dated 13 December 2004 (Exhibit R1/66).

119 The applicant argues that the Commission is unable to deal with this application as a hearing de novo and argues that the role of the Commission is to determine whether the applicant has been unfairly dismissed and whether or not the unfairness results from substantive and procedural flaws, not to act as the investigator for the purposes of the PSM Act. The applicant argues in the alternative that if the Commission does find that it has the power to deal with this application as a hearing de novo then the applicant submits that his termination was unfair.

120 The applicant is seeking reinstatement and believes that this is appropriate in the circumstances.

Respondent's submissions

121 The respondent maintains that it had good reason to terminate the applicant.

122 The respondent argues that even though the applicant was appraised as having performed to a satisfactory standard in 2002 he was experiencing some difficulties which included classroom management. The respondent maintains that there was documentation confirming these concerns when the applicant taught at Gosnells Senior High School (Exhibit A1).

123 The respondent claims that as early as Term 1, 2003 Mr Kassab noticed that the applicant had difficulties with classroom management and the respondent argues that effective and realistic support was then given to the applicant by a number of staff at SBSHS to help him improve his performance during 2003 and 2004. The respondent argues that there was a substantial amount of documented feedback given to the applicant in 2003 about his performance deficiencies and that all of these documents were provided to the applicant (see Exhibit R1/218, 212-5, 195-9, 187, 183, 180, 174-178, 170-1,161-7). The respondent maintains that in addition to the provision of these documents oral feedback was also provided to the applicant about performance concerns. The respondent argues that the applicant therefore could have been left in no doubt that his performance during 2003 was of concern and that his performance was expected to improve.

124 The respondent argues that there was evidence confirming that the applicant consistently failed to engage his students and relate to them on their level to gain their trust and to develop a rapport with them during 2003 and 2004 and the respondent's witnesses gave evidence that if a teacher is ineffective when dealing with classroom discipline he or she will not be able to educate students in an effective and meaningful way.

125 The respondent argues that throughout 2003 and 2004 the applicant was aware of the areas in which he was not performing and what was expected of him in relation to these areas and claims that the applicant was provided with helpful and constructive suggestions directed at helping him improve. Staff who reviewed the applicant's classes and provided feedback and support included Mr Thorne, Mr Freese, Mr Kassab, Mr Lloyd, Mr Longworth, Mr Churchman, Mr Coulson, Mr Pryer and Mr Hayres. The respondent argues that it is difficult to see what further assistance could reasonably have been provided to assist the applicant to improve. Even though the applicant wanted Mr Coulson involved to assist him as part of the PIP process Mr Coulson did not wish to participate in the formal process. The respondent claims that the assistance provided to the applicant was ultimately ineffective because the applicant's expectations and demands were unclear, unreasonable and unrealistic.

126 The respondent argues that the applicant should have been in no doubt as to what was required of him as the terms of the PIP and the letter initiating the process are self explanatory and discussions were held with the applicant about the process. Each lesson observation sheet completed during the PIP detailed what was expected of the applicant, how the applicant departed from expected standards and how the applicant could achieve the expected standards. The applicant was encouraged to view the classes of other experienced teachers both at SBSHS and Mandurah and Rockingham High Schools to observe examples of satisfactory classroom management. Further, during his two years at SBSHS the applicant was encouraged to attend professional development seminars specific to classroom management.

127 The respondent maintains that the LSA classes taught by the applicant only had approximately ten students in order to accommodate additional difficulties that may be encountered and that notwithstanding the applicant teaching fewer students he failed to establish a rapport and engage his students in any of his classes. The respondent also contends that SBSHS is not the most difficult school to teach at and there was witness evidence in support of this assertion.

128 The respondent argues that when regard is had to all of the evidence the applicant consistently failed to perform to minimum standards in the area of classroom management for the two years he taught at SBSHS notwithstanding efforts made by him to improve his performance in this area.

129 The respondent claims that when SBSHS staff received complaints from parents about the applicant these complaints were discussed with the applicant and whilst the respondent acknowledges that some of these complaints lacked substance the respondent argues that the Commission should have regard to the sheer number of complaints which corroborates the observations of the respondent's witnesses about the applicant's substandard classroom management skills.

130 The respondent argues that an appeal referred to the Commission under s78(2) of the PSM Act should be dealt with in accordance with *Geoffrey Johnston v Mr Ron Mance, Acting Director General Department of Education* (2002) 83 WAIG 1553 as cited in *Margaret Webb v Director General, Department of Education* (2004) 84 WAIG 132 at 136 and *Anca Flynn v Paul Albert, Director General Department of Education and Training* (2005) 85 WAIG 770 at 777. Given the applicant challenges both the procedure followed in terminating him and the merits of the decision to terminate him the respondent argues that the Commission is not limited to determining the reasonableness of the employer's decision but may rehear the matter afresh (a hearing de novo) and the Commission should make a fresh decision as to whether the applicant should be

terminated based on all of the available evidence. The respondent maintains that the role of the Commission is to deal with this appeal and bring the matters in dispute to finality and if there were any problems with the processes applied by the respondent then it is the role of the Commission to resolve the matter and bring it to a finality not merely to deal with procedural defects and send the matter back to the respondent to rectify (*Gudgeon v Black; Ex parte Gudgeon* (1994) 14 WAR 158 as cited recently in *Levaci v Director General, Disability Services Commission* (2005) 85 WAIG 171).

131 The respondent accepts that the applicant was not on probation when he was terminated and maintains that the fact that the applicant was a temporary teacher should be taken into account.

132 The respondent argues that the independent review carried out by Mr Baskwell generated evidence relevant to the fairness and appropriateness of the decision to terminate the applicant.

133 The respondent concedes that the investigation carried out by Mr Barnes did not involve the applicant and other relevant witnesses being interviewed, the respondent argues however that it substantially complied with the requirements of s79(5) of the PSM Act. The applicant was given many opportunities to respond to allegations about his substandard performance in 2004 and the applicant argues that each of the applicant's responses to claims about his substandard performance was considered by Mr Barnes during his investigation. The respondent argues that even if a finding is made that the respondent did not substantially comply with s79(5) of the PSM Act this is not fatal to the respondent's case as this is a hearing de novo and the hearing provided the applicant with ample opportunity to raise any concerns he had and to call any witnesses in support of his case.

134 The respondent argues that the applicant was unable to demonstrate satisfactory performance with respect to classroom management over two years of teaching despite being offered and given all reasonable assistance and that as this is a core dimension of teaching this seriously compromised the respondent's ability to provide quality education to the students in the applicant's classes. The respondent contends that the Commission should therefore find that the applicant's performance was substandard for the purposes of s79 of the PSM Act. The respondent argues that the Commission should terminate the applicant under s79(3)(c) of the PSM Act which effectively upholds the respondent's the decision to terminate the applicant and argues that any procedural defects, including the failure to conduct interviews as part of a broader investigation**,** are not such as to warrant a different outcome.

Findings and conclusions

Credibility

135 I listened carefully to the evidence given by each witness and closely observed each witness.

136 I have concerns about the veracity of the evidence given by the applicant in general and I am of the view the applicant was not convincing when he claimed that colleagues at SBSHS did not give him sufficient and useful feedback about areas where his performance was deficient and that he was unaware of the ways in which his performance needed to improve. Notwithstanding these claims, under cross-examination the applicant conceded that he received documentation giving him feedback about his performance and how he could improve throughout 2003 and 2004 and a review of relevant documents given to the applicant in 2003 and 2004 confirms that the applicant was given detailed, step-by-step advice and feedback about issues the applicant needed to address in order to improve his performance to a satisfactory level. I therefore doubt the applicants' assertions that the feedback he was given during 2003 and 2004, including the period of his PIP was of little or no value to him. The applicant maintained that he was unaware until mid 2004 that his line managers at SBSHS had concerns about his performance however there was documentation from mid 2003 onwards that the applicant's performance was a concern to staff at SBSHS especially his inability to manage classroom behaviour (see Exhibits R1/156, 159,165-167, 170-171, 180, 213-215, 218 and 219). The weight of evidence was also against the applicant in relation to his claim that he was in the main unaware of numerous complaints made about him by parents during 2003 and 2004.

137 I find that the evidence given by 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 forthright, considered and in the main, consistent. I therefore have no hesitation accepting their evidence.

138 In the circumstances where there is any inconsistency in the evidence given by the applicant and the respondent's witnesses I prefer the evidence given by the respondent's witnesses.

139 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.

140 In *Geoffrey Johnston v Ron Mance, Acting Director General of Department of Education* (op cit) at 1557 Kenner C discussed the approach which should be taken by the Commission with respect to a referral under s78(2) of the PSM Act. Kenner C stated the following:

> "Whilst s 78(2) does not refer to an "appeal" to the Commission, it seems plain enough from the language in the section as a whole, that it is concerned with challenges to a decision taken by the employer in relation to which the employee is "aggrieved". Reference to "aggrieved" is made in s 78(1)(b) dealing with appeals to the Public Service Appeal Board, and also in ss 78(2)(b), (3) and (4) dealing with referrals to the Commission. In my opinion, given the nature of the proceeding contemplated by s 78 of the PSMA, a matter referred to the Commission pursuant to s 78(2) by an aggrieved employee from one of the nominated decisions, is to be dealt with in the same manner as a matter referred under s 78(1) of the PSMA. That is, I do not consider that such a proceeding ought to be regarded as an "appeal" in the strict sense, as that issue was discussed by the Full Bench in *Milentis*. Nor is it the case in my opinion, that the Commission is limited to determining only the reasonableness of the employer's decision.

> In other words, depending upon the nature of the challenge to the decision under review, such a proceeding may involve the Commission re-hearing the matter afresh or it may only be necessary to consider the decision taken by the employer "on such record of the proceedings below as comes up to it, supplemented or not by evidence": *Ormsby*. It would seem to be the case therefore, that consistent with the reasoning of the Full Bench in *Milentis*, the decision of the employer is not to be totally disregarded in the Commission hearing and determining the matter.
>
> Furthermore, it also seems to me that if the referral to the Commission pursuant to s 78(2) of the PSMA involves an allegation of harsh, oppressive or unfair dismissal, then, consistent with the referral of such a matter to the Commission pursuant to s 44 of the Act, s 23A should apply to such matters in terms of the relief to be granted. Such a matter, although referred to the Commission under s 78(2) of the PSMA, would nonetheless constitute "a claim of harsh, oppressive or unfair dismissal" for the purposes of s 23A of the Act and any relief to be granted. In my opinion, it would be incongruous if this were not to be the case, as claimants commencing proceedings under ss 29(1)(b)(i) and 44 would be entitled and limited to the remedies under s 23A if successful, whereas those under s 78(2) of the PSMA would not be so limited, for example, as to matters of compensation for loss and injury. Given the scheme of the Act in relation to such matters, I do not think parliament could have intended such an outcome. Different considerations may apply of course in cases where it is alleged that a dismissal was unlawful, for example, on the grounds of a failure by the employer to comply with a mandatory statutory requirement.
>
> …
>
> Therefore, matters referred to the Commission pursuant to s 78(2) of the PSMA are not restricted to consideration by the Commission of the reasonableness of the employer's conduct, but the Commission may review the employer's decision de novo, as the circumstances warrant and determine the matter afresh and substitute its own decision for the employer's decision if that is appropriate."

141 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.

142 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."

143 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).

144 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."

145 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.

146 Paragraph 2 of this decision sets out the relevant background to this case.

147 I have considered the evidence given in these proceedings and reviewed the substantial amount of documentation tendered at the hearing. On the evidence before me it is my view and I find that as at the end of 2004 it was appropriate for the applicant's line managers to determine that the applicant's performance was substandard in the areas of developing positive relationships with students and classroom management and that the issue of the applicant's substandard performance should be referred to the respondent for further consideration.

148 I find that the applicant experienced difficulties teaching students at SBSHS throughout 2003 and 2004 particularly in the areas of developing a rapport with students and effectively managing student behaviour in the classroom and that as a result this culminated in the applicant being subject to a substandard performance improvement process in the second half of 2004 spanning nearly five months even though 20 working days is the minimum timeframe for a PIP under the Policy.

149 I find that as early as the end of Term 1, 2003 it became apparent to the applicant's line managers at SBSHS that the applicant was experiencing difficulties particularly in the area of student discipline and that as a result a number of his students were not engaged in the learning process. I find that because of these difficulties the applicant was given encouragement and feedback throughout 2003 by a number of experienced teachers about how he could improve his performance (see Exhibit R1/161-163, 164, 165-167, 170-171, 180, 213-215, 218 and 219). I find that this support and advice continued through to the end of semester 1, 2004 in line with SBSHS's performance management process to assist the applicant to meet the required performance standards. I find that as the respondent continued to have concerns about the applicant's level of performance over this lengthy timeframe notwithstanding substantial support and advice being given to the applicant to assist him to improve Mr Longworth formally advised the applicant on 8 July 2004 that his performance was considered to be unsatisfactory in four areas – planning learning activities, developing positive relationships with students, classroom management and professional characteristics, including flexibility and collaboration skills, and the applicant replied to this notification on 29 July 2004 (see Exhibit R1/153-4 and 149). I accept that at the time the applicant was notified about his substandard performance he was provided with a copy of the Policy. It was not in dispute that after receiving this notification the applicant then underwent a PIP process which commenced on 13 August 2004 and was extended to 10 December 2004.

150 I find that the respondent complied with the requirements under the Policy when handling the applicant's PIP. 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 was specifically designed to assist the applicant to meet the required performance standards in line with the requirements specified in the Policy I find that the respondent provided appropriate assistance and feedback to the applicant during his PIP so that he could improve his performance within the required timeframes and 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. Indeed, at a review meeting held on 29 October 2004 the applicant was advised that he had met the required standard of performance in two areas. Notwithstanding these improvements at this meeting the applicant was also advised that he still required improvement in the areas of developing positive relationships with students and classroom management and the applicant was invited to identify any further support he required from the school in relation to these areas and did so on 5 November 2004. I find that after this date the applicant continued to be given feedback and support to assist him to improve his performance to the required level and had access to relevant professional development.

151 It was not in dispute that a further review meeting to discuss the applicant's performance was held on 13 December 2004 and that after this meeting the applicant was advised that his performance remained unsatisfactory in the areas of developing positive relationships with students and classroom management. It was following this meeting that the applicant's review panel met and determined that the applicant's performance was unsatisfactory and the following day the applicant was advised by his principal that because he had not demonstrated satisfactory performance she intended to recommend to the Director General that his performance be investigated in accordance with s79(5) of the PSM Act.

152 I find that despite the applicant being given a substantial amount of support and useful feedback by experienced and qualified teachers throughout 2004, including the period of the applicant's PIP, in order to assist the applicant to improve his performance in relation to classroom management and building a rapport with students, the applicant's performance remained deficient in these areas (specifically Mr Lloyd, Mr Longworth, Mr Churchman, Mr Coulson, Mr Pryer and Mr Hayres) (see Exhibits R1/78, 79, 81, 86, 87, 88-89, 90-92, 93-94, 95, 96-97, 98, 100, 101-103, 104-105, 111-112, 113, 116, 120-122, 124, 125, 126, 132, 133, 135-136, 138, 139, 140 and 142).

153 I find that the applicant had access to relevant professional development both prior to and during his PIP to improve his performance in particular in the area of classroom management and the applicant was given a number of opportunities to view colleagues' lessons both at SBSHS and at other schools. I also find that the professional development sessions attended by the applicant when he worked at SBSHS were specifically targeted at addressing the applicant's performance difficulties.

154 I find that the applicant was afforded procedural fairness during the PIP process. The applicant had support from individuals not involved in the PIP process including a Union representative Ms Anne Crawford and colleagues attended some of the review meetings held during the PIP process (see Exhibit R1/106). Further, I find that the applicant had the opportunity to clarify the feedback given to him during his PIP as discussions were held with the applicant after each lesson that was reviewed during this period.

155 I reject the applicant's claim that he experienced difficulties with classroom management and developing a rapport with students because of the nature of the students he was teaching. As I accept the evidence given by the respondent's witnesses in preference to the evidence given by the applicant where there is any conflict I find that the students at SBSHS did not constitute a cohort of students that were very difficult to teach as claimed by the applicant. Even though the applicant taught some classes with students of low ability I note that the number of students in these particular classes was significantly lower than a standard lower school class. Furthermore documentation tendered during the hearing confirmed that the applicant's inability to develop a rapport with students and to effectively manage his classes were problems for the applicant throughout 2003 and 2004 across years 8, 9 and 10. I also reject the applicant's claim that he had insufficient opportunity to establish and build a rapport with his students during his PIP and that once problems in this area were identified his situation was irretrievable because of the cohort of students that the applicant was teaching. In my view the applicant was given a sufficient period of time and support and feedback to establish and nurture the necessary relationships with students both prior to and during the period of the PIP.

156 I conclude that it was appropriate for Mr Longworth to reject the applicant's request to demonstrate a lesson for him as Mr Longworth's background was not in the area of science and maths and the applicant had access to viewing the lessons of a number of other teachers in his curriculum areas and who had skills which would have been useful for the applicant to observe. The applicant claimed that he wanted Mr Coulson be involved in his appraisal and argued that as this request was denied this put the applicant at a disadvantage. As I accept Mr Longworth's evidence I find that Mr Coulson did not wish to become part of the applicant's PIP process. I also accept the respondent's claim that the applicant was not left off the SBSHS 2005 timetable as at November 2004 given the respondent's evidence that this was a draft timetable and I find that any slur of a racial nature made against the applicant was appropriately and sensitively handled by the applicant's line managers. I find that in any event this issue was not raised by the applicant during the PIP process. It is therefore my view that the applicant cannot rely on these issues as an excuse for a lack of improvement in his performance during the period of the applicant's PIP.

157 Whilst I have found that the applicant's performance was unsatisfactory as at the end of 2004 in two areas and that it was appropriate for the Principal of SBSHS to refer this issue to the respondent it is my view that it is inappropriate to finally determine this matter at this point in time as a number of critical and mandatory processes and procedures were not undertaken by the respondent after SBSHS determined that the applicant's performance was substandard and I am of the view that as these processes and procedures have not been followed this has seriously compromised the respondent's decision to terminate the applicant.

158 The respondent decided to terminate the applicant at the end of 2004 on the basis that the applicant was completing his period of probation with the respondent and at the hearing the respondent conceded that the applicant was not on probation at the time he was terminated as the applicant had been teaching with the respondent for more than two years as at December 2004. Mr Huts' letter to the applicant dated 20 December 2004 advised the applicant that he was at the end of completing a two year period of probation and his performance had been assessed during his probationary period, that he was found to be unsuitable for permanency and accordingly under clause 12(3) of the Agreement the respondent had determined that his appointment shall be terminated effective from 17 December 2004 (Exhibit R1/57). Clearly the respondent viewed the applicant as a probationary employee who was unsuitable to be made permanent when deciding to terminate the applicant and as this assumption was incorrect it is my view that this brings into question the basis upon which the respondent decided to terminate the applicant. Even though the respondent invited the Commission to view the applicant as temporary teacher instead of a teacher on probation, I regard a temporary teacher to have a significantly different status to that of an employee on probation.

159 I find that after the respondent was notified by SBSHS that the applicant's performance was unsatisfactory it did not complete the investigation required on it pursuant to s79(5) of the PSM Act. I find that this omission is significant as the requirement to undertake an investigation is mandatory and in my view necessary so that the respondent can properly satisfy itself that the applicant's performance was substandard and if so, determine the appropriate action taking into account the individual circumstances of the employee concerned. Further, the employee being investigated has the opportunity to have an independent person review all of the circumstances surrounding his or her case. Section 79(5) of the PSM Act provides that if an employee disagrees that his performance is unsatisfactory, which was the case in this instance (the applicant contested the school's view that his performance was unsatisfactory by letter dated 16 December 2004 to the Principal of SBSHS) then before forming an opinion that an employee's performance is substandard an investigation must be held. The Policy then details how this investigation is to proceed. The Director General or a delegated officer has the responsibility to formally investigate areas of possible substandard performance and may form an opinion that an employee's performance is substandard and impose sanctions on an employee as a consequence of that opinion as required by s79 of the PSM Act. Additionally, the employee concerned is to be advised when an investigation takes place (see page 11). In this instance the required investigation did not take place. I reject the respondent's claim that Mr Barnes conducted an investigation into the applicant's performance as required under s79 of the PSM Act as I find that the briefing notes Mr Barnes prepared for the respondent's Executive Director Human Resources dated 8 December 2004 does not constitute an investigation as required under s79 of the PSM Act. In any event these notes were compiled prior to a decision being made at SBSHS that the applicant's performance was unsatisfactory (Exhibit R1/76). I also conclude that the review undertaken by Mr Baskwell after the applicant was terminated does not constitute an appropriate investigation pursuant to s79(5) of the PSM Act and the Policy as this review focussed on the process used when terminating the applicant and not issues of merit and Mr Baskwell did not address the issue of the applicant being incorrectly regarded as a probationary employee when he was terminated. I find that as there was no formal investigation of the applicant's alleged substandard performance nor were relevant persons including the applicant

interviewed prior to his termination the respondent was therefore not in a position to determine whether or not the applicant's performance was unsatisfactory and that in all of the circumstances of the applicant's case that the applicant should be terminated.

160 I find that the applicant was again denied natural justice given the process adopted by the respondent when deciding to terminate the applicant. There was no indication that the respondent took into account the issues raised in the applicant's response to Ms M McNeil's letter dated 14 December 2004 notwithstanding Ms McNeil's indication that the applicant's response would be forwarded to the Director General for his consideration (see Exhibits R1/62, 60, 58-59). Furthermore, there was no evidence that when deciding that the applicant should be terminated the respondent took into account the applicant's extensive employment history in the education sector in Western Australia and overseas nor did the respondent appear to have considered the possibility that the applicant could be given an opportunity to remain as an employee teaching upper school classes, which was a possible course of action to allow the applicant to continue being employed by the respondent as suggested by Mr Longworth and Mr Lloyd.

161 There was no evidence that the range of possible sanctions as provided for under s79(3) of the PSM Act against the applicant was considered by the respondent following it forming an opinion that the applicant's performance was substandard and I also find that as there was no evidence that the applicant was given an opportunity to be heard on the issue of penalty he was denied natural justice. Even though this omission would not necessarily render the whole process invalid the applicant was entitled to be heard on the issue of penalty. It is also the case that as the respondent employs a substantial proportion of teachers in Western Australia the penalty of dismissal precludes an employee from seeking work in a large number of schools in the State and in my view this factor should be considered when deciding on a penalty.

162 It is my view that because there were fundamental omissions in the process used by the respondent when deciding to terminate the applicant this raises serious issues about the efficacy of the respondent's decision to terminate the applicant in respect to relevant factors which do not appear to have been considered and whether or not the applicant was given a 'fair go all round'. Given that I have found that the applicant had serious performance difficulties whilst teaching at SBSHS in two areas I am not disposed at this point to order that the applicant be reinstated however I propose to set this matter down for further hearing and determination to hear from the parties as to the appropriate disposition of this application in light of my reasons for decision.

2006 WAIRC 05559

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CHONG-WAH LIEW
	APPLICANT
	-v-
	DIRECTOR GENERAL OF EDUCATION IN THE STATE OF WESTERN AUSTRALIA
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	MONDAY, 9 OCTOBER 2006
FILE NO/S	APPL 33 OF 2005
CITATION NO.	2006 WAIRC 05559
Result	Discontinued

Order

WHEREAS this is an application pursuant to s29(1)(b)(i) of the Industrial Relations Act 1979; and

WHEREAS the Commission issued Reasons for Decision on 12 June 2006 in relation to this application; and

WHEREAS the matter was set down for further hearing and determination on 17 July 2006 to hear from the parties as to the appropriate disposition of the application in light of the Commission's reasons for decision; and

WHEREAS on 17 July 2006 immediately prior to the hearing commencing the applicant advised the Commission that the parties had reached an agreement in principle to settle this application and the hearing was vacated; and

WHEREAS on 5 October 2006 the applicant filed a Notice of Discontinuance in relation to this application; and

WHEREAS on 6 October 2006 the respondent consented to the matter being discontinued;

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

THAT this application be, and is hereby discontinued.

(Sgd.) J L HARRISON,
Commissioner.

[L.S.]

SECTION 29(1)(B)—Notation of—

Parties		Number	Commissioner	Result
Abigail Melia	John Harris and Connie Cooksley Roy Weston Midland and Hills	B 428/2006	Commissioner S J Kenner	Discontinued by leave
Andrea Ginette Ballantyne	Western Australian Shire Councils Municipal Roads Boards, Health Boards, Parks, Cemeteries and Racecourses, Public Authorities Water Boards Union	APPL 3/2005	Commissioner J L Harrison	Discontinued
Benjamin T Billet	Rick Smith	U 312/2006	Senior Commissioner J F Gregor	Discontinued
Beverley McKelvie	RCR Maintenance Pty Ltd	U 110/2005	Senior Commissioner J F Gregor	Discontinued
Bhaishanker Purohit	Consolidated Plastics Pty Ltd	B 359/2006	Commissioner P E Scott	Application Dismissed
Bhaishanker Purohit	Consolidated Plastics Pty Ltd	U 359/2006	Commissioner P E Scott	Application Dismissed
Bradley Wayne Smith	Teac Australia Pty Ltd	APPL 197/2005	Commissioner S M Mayman	Application struck out for want of prosecution
Carina Lee Higgins	Comfort Inn-Kimberley Hotel (Halls Creek)	U 262/2006	Senior Commissioner J F Gregor	Discontinued
Colin John Bourke	The Bishop of Broome	B 118/2005	Commissioner S M Mayman	Application discontinued
Daniel Viet Wilson-Nguyen	Mega Kitchens & Bathrooms, Paul Manester	U 131/2006	Commissioner S M Mayman	Application discontinued
Darren Perry	Comfort Inn -Kimberley Hotel (Halls Creek)	U 263/2006	Senior Commissioner J F Gregor	Discontinued
David Peter Ranieri	Pizza Hut Bunbury	APPL 1528/2004	Commissioner J H Smith	Dismissed
David Van Zyl	GAB Robins Australia Pty Ltd	B 121/2006	Commissioner P E Scott	Application Dismissed
Dawn Ram	Energy World Corporation Ltd	APPL 301/2005	Commissioner P E Scott	Application Dismissed
Eugene Magoo	Dwyer Engineering & Construction Pty Ltd	U 71/2006	Commissioner J L Harrison	Discontinued
Gregory John Sawyer	Ruby's	B 405/2006	Commissioner J H Smith	Discontinued by Leave
Jamie Manns	Neil Thoars	U 8/2005	Commissioner S M Mayman	Application struck out for want of prosecution
Jamie Miller	Armadale Noongar Corporation (ANC)	U 300/2006	Commissioner S M Mayman	Application discontinued
Jenny-Lea Hendley	East Fremantle Vet Clinic	B 448/2006	Commissioner P E Scott	Application Dismissed
Jenny-Lea Hendley	East Fremantle Vet Clinic	U 448/2006	Commissioner P E Scott	Application Dismissed
Jessica Ladkin	Sixty two 10	B 475/2006	Commissioner S M Mayman	Application discontinued
John Cole	Crystal Waters Irrigation	U 355/2006	Commissioner S Wood	Application discontinued

Parties		Number	Commissioner	Result
Kent Gavin Muir	Noel Bairstow	B 354/2006	Senior Commissioner J F Gregor	Discontinued
Leanne Margaret Lusk	Edith Cowan University	B 443/2006	Commissioner J L Harrison	Discontinued
Leonie Manns	Neil Thoars	U 7/2005	Commissioner S M Mayman	Application struck out for want of prosecution
Melanie Krystle Hayman	Dewson-Shoalwater (IGA)	U 400/2006	Senior Commissioner J F Gregor	Discontinued
Michael Lindroos	Structural Monitoring Systems Ltd	B 454/2006	Commissioner S J Kenner	Application discontinued by leave
Michael Munforti	Xtreme Information Technologies Pty Ltd	U 10/2005	Commissioner S M Mayman	Application struck out for want of prosecution
Morwenna Jayne Ritacca	Imtrade Australia Pty Ltd.	B 476/2006	Commissioner P E Scott	Application Withdrawn by Leave
Natasha Tarling-Salmon	Palm City Nursery	B 366/2006	Commissioner J L Harrison	Discontinued
Neil McAllister	Harvey Fresh	U 402/2006	Commissioner J H Smith	Dismissed
Paul Michael Simmons	Mindspring Pty Ltd Trading As Software OEM	B 487/2006	Commissioner P E Scott	Withdrawn By Leave
Pauline Pettiford	Stelisa Pty Ltd T/a Seasons Hotel Newman	B 391/2006	Commissioner S Wood	Application discontinued
Peter Thomas Black	Gentry Home Services ABN 8490 5747 624	U 304/2006	Senior Commissioner J F Gregor	Discontinued
Rex Beach	West Australian Newspapers Limited (ABN 98 008 667 632) (CAN 008 667 632)	U 211/2005	Senior Commissioner J F Gregor	Discontinued
Reynalda Evans	Kerry Taylor	U 324/2006	Commissioner S Wood	Application discontinued
Rodney Aldridge	Vier Pty Ltd trading as The Midas Motel	B 444/2006	Commissioner S J Kenner	Application discontinued by leave
Shirley Lambert	Western Range Wines	U 472/2006	Senior Commissioner J F Gregor	Discontinued
Tammy Rae Mann	Michael & Marlyn White Supa Valu	U 419/2006	Senior Commissioner J F Gregor	Discontinued
Terrence Philip Dowling	(Rio Tinto) Technology Resources pty ltd and another	U 467/2006	Senior Commissioner J F Gregor	Discontinued
Warren Ronald Dunn	Bankwest	B 462/2006	Senior Commissioner J F Gregor	Dismissed
Yar Fern Constantina Lee	Loton Holdings Pty Ltd T/A Priority Appointments	U 459/2006	Commissioner S J Kenner	Application discontinued by leave

CONFERENCES—Matters referred—

2006 WAIRC 05568

ALLEGED UNFAIR TERMINATION OF SYDNEY SAMPEY

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN MANUFACTURING WORKERS' UNION
	APPLICANT
	-v-
	CARBIDE TOOL INDUSTRIES PTY LTD
	RESPONDENT
CORAM	SENIOR COMMISSIONER J F GREGOR
HEARD	MONDAY, 17TH JULY 2006, MONDAY, 18 SEPTEMBER 2006
DELIVERED	WEDNESDAY, 11 OCTOBER 2006
FILE NO.	CR 43 OF 2006
CITATION NO.	2006 WAIRC 05568

CatchWords	Termination of employment – unfair dismissal – procedural fairness - only one of the findings to be awarded – *Industrial Relations Act, 1979 s29*
Result	Dismissed
Representation	
Applicant	Mr A Talbert appeared for the Applicant
Respondent	Mr K Trainer appeared for the Respondent

Reasons for Decision

(Given Extempore as Edited by the Senior Commissioner)

1 This is an application before the Commission pursuant to a reference under s44 of the *Industrial Relations Act, 1979* (the Act) and the subject of a Memorandum of Matters for Hearing and Determination under that section. The schedule is as follows:

> *"Sydney Sampey, a member of The Australian Manufacturing Workers Union (The Applicant Union), claims he was unfairly dismissed from employment with Carbide Tool Industries Pty Ltd (the Respondent). It is claimed the circumstances are that Mr Sampey was employed by the Respondent for approximately 5½ years as a tool cutter and grinder. On 10th of February 2005 he was ill and telephoned the Respondent to inform them he would not be in for the day. Later he was refused payment for the day. When he sought advice from the Union and tried to discuss the matter again with the Respondent he was told to leave.*
>
> *It is alleged by the Applicant Union that this constituted an unfair dismissal and they seek compensation.*
>
> *The Respondent denies that there was an unfair dismissal and says the application ought to be dismissed."*

2 The background information to the application is that Carbide Tool Industries Pty Ltd (the Respondent) is a business that sharpens tools, particularly for use in cabinet making. I take it that this is fine work. It is not like saw doctoring in the timber industry. Carbide Tool Industries Pty Ltd is a family company. The three Directors of the company are all family members and they work in the business.

3 There are four tradesmen employed. In total there are 12 employees. The business is run as are a large number of small businesses in this country, with the principals hands-on, working various parts of the business. One of the Directors, Ms Jan Collings, is the Administrator who is in the factory most of the time. Mr Bruce Phillips, who also gave evidence, is out and about handling sales. He also does the business plans and marketing. Ms Collings, when both of the other Directors are away, is in charge of the operations.

4 There is also another person employed, Ms Sally Phillips. She does administrative work, including the pays. Mr Sampey, the employee the subject of this reference has worked for the company for about five and a half years. It seems as though that relationship had continued over that period without anything untoward happening. Mr Phillips said that from time to time he had issues arise with Mr Sampey, but it appears that Mr Phillips was saying, "Well, they weren't out of the ordinary. They were just in the course of business. Sometimes we had to deal with issues that arise." So there was nothing of the nature that occurred on the 17 February 2005 before then.

5 It is relevant to remember that the parties, as many small businesses do, make arrangements to suit themselves as to how the business will be operated, and even though awards provide for certain kinds of operations, sometimes they are varied by mutual consent. In this case that had happened, where Mr Bruce Phillips, having seen other businesses which had been organised to run on a four day week, had discussed doing the same with the workforce at a toolbox meeting. The employees had agreed that they would work between 7 o'clock and 5 o'clock over 4 days in every week, but have the Friday off. That did not mean any less hours were worked, it meant that there could be better productivity and use of machines.

6 Also, to secure the viability of that arrangement the company said, "One of the reasons we're doing this is to address the problem of sick leave. We do not want the situation to arise where people take sick leave either before or after the Friday or the Sunday, because to do so would defeat the purpose. If there was sick leave on either of those days, then a medical certificate would need to be supplied." And that regime had continued for some time. There was no evidence about when that regime was introduced other than it had been the norm at Carbide Tool Industries for some time.

7 There is no question that Mr Sampey might not have known about the four day week, even though he says that he could not remember the issue being raised. He never at any time said in his evidence that it was not raised.

8 Mr Sampey said that he had been given his pay slip by Sally Phillips. He seems to be quite amenable to Ms Phillips who he described as a nice lady who was very helpful. He says that he took his pay slip back to his machine, opened it and found that there was a notation on it that he would not be paid for a day's sick leave. This concerned him, so he says he went and had a conversation with Ms Collings.

9 He says Ms Collings is a 'tough lady' and she was quite voluble in the conversation. He claimed this was nothing unusual that is just the way she is. She eventually completed the conversation by telling him to "fuck off" out of her factory. Later there was a meeting with other Directors. He says he was not allowed to have representation. At that meeting he was told that because of his conduct in the meeting with Ms Collings, he was being dismissed.

10 The evidence from the Respondent is different. Ms Collings gave evidence her memory of the event is that Mr Sampey appeared in her office. He stood very close to her, very upset about his pay slip. He demanded in a loud voice "Why have you refused to pay me?" She replied, "We have not. There is a notation there that you will need to produce a Doctor's certificate, so that is just pending. We will pay you if you produce the Doctor's certificate."

11 Ms Collings then says that this brought forth from Mr Sampey angry reaction. He used foul language which was incompatible with the normal language in the factory. On a number of occasions he told her to, "Get fucked" or referred to the "fucking sick leave" or the "fucking factory". There was a continuum of this sort of language, accompanied by an aggressive and angry demeanour. His shouting caused Ms Collings to be frightened of Mr Sampey.

12 After he initially approached her she moved into the reception area of the premises. This conversation took place within a metre or so of Ms Phillips. Ms Collings said at the end of the encounter she was shaken, upset and crying. She was unable to work for the rest of the afternoon and considered her future in the business.

13 Sally Phillips gave evidence. She is a person who directly witnessed the events. She says that Mr Sampey immediately opened his pay slip when she gave it to him, and forthwith raised the issue of the docking of the pay with her. He was angry; so much so that she followed him into Ms Collings' office. She described the position that Ms Collings was in when Mr Sampey entered the office, that is, not sitting at a desk but leaning over it. She described that Mr Sampey positioned himself extremely close to Ms Collings and that his language was loud and abusive. She confirmed, as Ms Collings had alleged, both Ms Collings and Mr Sampey moved into the showroom area where the debate continued. This debate was punctuated with the use of foul and obscene language by Mr Sampey. She was firm in her evidence that Ms Collings did not use that language.

14 She also confirmed that Ms Collings was upset and crying and continued that way in the afternoon. The whole event concerned Ms Phillips so much that she rang her husband and said, "You'd better come back because there has been an argument between Jan and Syd, and you need to deal with it."

15 Mr Phillips did so. He told the Commission he went to see Ms Collings. She either gave him the impression, or he gathered the impression that she was so upset she was thinking about her quitting the company, and he told her, "Don't make any decisions now. Calm down for a while. We we'll deal with this tomorrow when we've had time to cool down." He then went to see Mr Sampey, and Mr Sampey, in response to a question from Mr Phillips, responded in the same language that had been used in the conversations with Ms Collings.

16 What happened after that is there was a phone call from Mr Bruce Phillips to another Director, Mr Gary Phillips. They said they would discuss the matter when he returned. On the following day and it was decided amongst them that they would terminate the service of Mr Sampey, having received some advice.

17 Mr Sampey was invited to a meeting and told he was dismissed. He was paid the week's pay that he had worked, plus five weeks' termination pay in lieu of working out his time, and paid 65.23 hours' holiday and loading which was owed to him as at the 23 February 2005.

18 The Commission has heard from the witnesses, and if I start with the witnesses of the Respondent there is nothing in what they say which would lead me to conclude they have not told the Commission the truth. Mr Sampey was firmly convinced in his mind that he never used the words that were attributed to him, particularly the obscene language saying that this is not language which he normally uses.

19 What I say about his evidence is that he may well believe that now but the vast weight of the evidence indicates to the contrary. Having considered all of the evidence, the Commission has to come to the conclusion that the story advanced by Ms Collings and supported by the direct evidence of Ms Phillips is, on the balance of probabilities, what happened on the day concerned. That is, Mr Sampey did use foul and abusive language to Ms Collings in the public area of the business.

20 The question is, was what the company did as a result unfair or not. About that I say this; it is not compatible with a contract of employment if an employee becomes abusive to supervisors or anyone else in the business, and particularly if that abuse uses language which is not normally used in that workplace. In some places it might well be acceptable in some circumstances to use language of the type which is complained of here, but there is no evidence at all that that the language used by Mr Sampey was the normal language of the plant.

21 In particular, when considering the compatibility or not of the conduct with the continuation of the contract of service, a context too has to be considered, and the context here was anger and threatening physical behaviour; that is, by standing close to Ms Collings and shouting at her. Ms Collings might be regarded by Mr Sampey as a tough person, but nevertheless she is a female working in the plant, and that requires some special recognition.

22 When one combines with that the short evidence of Bruce Phillips, that when he came back, found out what was going on and raised the issue with Mr Sampey, there was conduct of a similar kind by Mr Sampey in his presence. That does not add to the strength of the company's position to dismiss him if it had only been addressed to Mr Phillips, but it does confirm that it is more likely than not it was a continuation of language he used to Ms Collings.

23 In situations like this an employer is required to consider the position and not act in haste. They have not acted in haste in this case, but have moved with reasonable speed to deal with the matter after allowing things to cool down. They have though, in dealing with the matter, been procedurally incorrect in that they maybe should have given Mr Sampey a greater opportunity to explain his position, and the dismissal is faulty in that respect. But in the *Shire of Esperance v Mouritz (1991)* 71 WAIG 891 Justice Kennedy makes it clear that when considering the fairness of a dismissal it is all of the surrounding factors which one considers, and a dismissal will not be held bad due to one factor, in this case procedural fairness, not being in favour of the dismissal.

24 The other thing to bear in mind here is that this is not a summary dismissal. This is a dismissal on notice, albeit notice that was paid out. The Respondent has decided that the behaviour of Mr Sampey was incompatible with the continuation of the contract and therefore has brought to an end on notice. The law does not proscribe an employer from doing so. An employer is entitled to bring a contract of employment to an end on notice.

25 What has happened here is a situation where the conduct is of such severity that, in my view, it was a conduct which went to the root of the contract of service. Mr Sampey could well have been dismissed summarily and not receive any of the payments he did. He was dismissed on notice and therefore, if there is any modicum of unfairness in the decision to terminate, it has been ameliorated by paying him money which may not have gone to him if he had been dismissed summarily.

26 This is a case which has been extant since 2005. It is over 18 months since it occurred. These cases are difficult to decide because evidence becomes cold in that period. However, I believe that on the best view of the evidence the situation is, on the balance of probabilities, as I decided it, and therefore this application will be dismissed.

2006 WAIRC 05567

ALLEGED UNFAIR TERMINATION OF SYDNEY SAMPEY

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN MANUFACTURING WORKERS' UNION
	APPLICANT
	-v-
	CARBIDE TOOL INDUSTRIES PTY LTD
	RESPONDENT
CORAM	SENIOR COMMISSIONER J F GREGOR
DATE	WEDNESDAY, 11 OCTOBER 2006
FILE NO/S	CR 43 OF 2006
CITATION NO.	2006 WAIRC 05567

Result Dismissed

Order

HAVING heard Mr Talbert, who appeared on behalf of the Applicant and Mr K Trainer, as Agent, who appeared on behalf of the Respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby orders:

THAT the application be, and is hereby, dismissed.

[L.S.]

(Sgd.) J F GREGOR,
Senior Commissioner.

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
Civil Service Association Of Western Australia	Chief Executive Officer, Disability Services Commission	Kenner C	PSAC 5/2005	1/03/2005 27/04/2005 19/05/2005	Dispute regarding the intention to terminate employment of union member	Application discontinued by leave
Civil Service Association Of Western Australia Incorporated	Director General, Department Of Justice	Kenner C	PSACR 39/2005	N/A	A dispute regarding alleged denial of permanent status of a union member	Application discontinued by leave
Construction, Forestry Mining and Energy Union of Workers	BHP Billiton Iron Ore Pty Ltd AND INTEGRATED GROUP Ltd	Wood C	CR 49/2005	1/07/2005	Dispute regarding termination of employment of union member	Application discontinued
Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	Lythven Pty Ltd T/A Shelf Security	Harrison C	CR 183/2005	4/04/2006	Dispute regarding termination of employment	Discontinued

PROCEDURAL DIRECTIONS AND ORDERS—

2004 WAIRC 10940

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

APPL 1216 OF 2003 CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS & OTHERS

APPLICANTS

-v-

HAMERSLEY IRON PTY LTD & OTHER

RESPONDENTS

APPL 1230 OF 2003 CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS & OTHERS

APPLICANTS

-v-

HAMERSLEY IRON PTY LTD & OTHERS

RESPONDENTS

CORAM COMMISSIONER S J KENNER

DATE FRIDAY, 12 MARCH 2004

FILE NO/S APPLICATION 1216 OF 2003 & APPLICATION 1230 OF 2003

CITATION NO. 2004 WAIRC 10940

Result Order issued

Representation

Unions Mr D Schapper of counsel on behalf of the applicants, and Ms S Burke of counsel on behalf of the Australian Workers' Union, Western Australian Branch, Industrial Union of Workers

Employers Ms E Hartley of counsel

Order

HAVING heard Mr D Schapper of counsel on behalf of the applicants, Ms S Burke of counsel on behalf of the Australian Workers' Union, Western Australian Branch, Industrial Union of Workers, and Ms E Hartley of counsel on behalf of the respondents, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders –

(1) THAT until further order the herein applications be and are hereby further adjourned sine die.

(2) THAT the parties have liberty to apply on short notice.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

2006 WAIRC 05420

DISPUTE REGARDING BARGAINING FOR AN INDUSTRIAL AGREEMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMISSIONER OF POLICE
	APPELLANT
	-v-
	WESTERN AUSTRALIAN POLICE UNION OF WORKERS
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 13 SEPTEMBER 2006
FILE NO	PSAC 23 OF 2006
CITATION NO.	2006 WAIRC 05420

Result Recommendation Issued

Recommendation

WHEREAS on Thursday the 3rd and Tuesday the 22nd days August; and Friday the 1st, Tuesday the 5th and Wednesday the 13th days of September 2006 the Public Service Arbitrator ("the Arbitrator") convened conferences between the parties for the purpose of conciliation in respect of the parties' endeavours to reach a new industrial agreement through good faith bargaining; and

WHEREAS at the conference on Tuesday the 5th day of September 2006 the Respondent's representative undertook to recommend to its Board of Directors that the level of industrial action being undertaken by the Respondent and its members not be escalated and that the ban on probity checks for the Office of Racing, Gaming and Liquor be lifted; and

WHEREAS at the conference on Wednesday the 13th day of September 2006 the Applicant's representative addressed its concern that the recommendation to the Board had not resulted in a lifting of the ban and requested that the Arbitrator issue a recommendation that the Respondent do so and that the level of industrial action not be escalated; and

WHEREAS the Arbitrator heard from the parties in respect of those matters and concluded that such recommendations were appropriate in the circumstances;

NOW THEREFORE the Arbitrator, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby recommends:

1. THAT the ban by the Western Australian Police Union of Workers and its members on probity checks for the Office of Racing and Gaming be lifted.

2. THAT there be no escalation of the industrial action being undertaken by the Western Australian Police Union of Workers and its members.

(Sgd.) P E SCOTT,
Commissioner,
Public Service Arbitrator.

[L.S.]

2006 WAIRC 05424

DISPUTE REGARDING BARGAINING FOR AN INDUSTRIAL AGREEMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMISSIONER OF POLICE
	APPLICANT
	-v-
	WESTERN AUSTRALIAN POLICE UNION OF WORKERS
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER P E SCOTT
DATE	THURSDAY, 14 SEPTEMBER 2006
FILE NO	PSAC 23 OF 2006
CITATION NO.	2006 WAIRC 05424

Result Declaration Issued

Declaration

WHEREAS on the 18th day of April 2006 the Western Australian Police Union of Workers ("WAPU") initiated good faith bargaining pursuant to s 42 of the Industrial Relations Act 1979 ("the Act") for the purpose of negotiating a replacement industrial agreement; and

WHEREAS on the 8th day of May 2006 the Commissioner of Police formally responded in accordance with s 42A of the Act advising that it would bargain for a replacement industrial agreement; and

WHEREAS on the 11th, 12th, 13th, 18th and 26th days of April, the 9th day of May, and the 4th, 18th, 20th, 25th and 31st days of July, 2006 meetings were held between the parties for the purpose of negotiations; and

WHEREAS on the 1st day of August 2006 the Commissioner of Police filed an application requesting a conference before the Public Service Arbitrator ("the Arbitrator") pursuant to s 42E of the Act; and

WHEREAS on the 3rd and 22nd days of August and the 1st and the 5th days of September 2006 the Arbitrator convened conferences for the purpose of conciliating between the parties; and

WHEREAS at the latter conference the Applicant orally sought a declaration that the bargaining had ended pursuant to s 42H of the Act; and

WHEREAS on the 6th day September 2006 the Applicant filed an application for a "declaration pursuant to s 42H of the Act that bargaining between the Commissioner of Police and the Western Australian Police Union of Workers initiated by the Western Australian Police Union of Workers on the 18 of April 2006 has ended"; and

WHEREAS on the 13th day of September 2006 the Arbitrator convened a further conference for the purpose of addressing the application to terminate the bargaining; and

WHEREAS the Arbitrator considered the tests to be applied pursuant to s 42H(1) of the Act that:

"(a)the applicant has bargained in good faith;

(b) bargaining between the applicant and another negotiating party has failed; and

(c) there is no reasonable prospect of the negotiating parties reaching an agreement";

and

WHEREAS the Arbitrator found that the tests pursuant to s 42H(1) had been satisfied in this case; and

WHEREAS the Arbitrator issued a declaration that the bargaining has ended between the negotiating parties; and

NOW THEREFORE, the Arbitrator, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby:

DECLARES that the bargaining between the Commissioner of Police and the Western Australian Police Union of Workers, initiated by the Western Australian Police Union of Workers on the 18th day of April 2006, has ended.

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

ENTERPRISE BARGAINING AGREEMENT—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Australian Labor Party (WA Branch) Enterprise Bargaining Agreement 2006 AG 57/2006	20/09/2006	The Australian Municipal, Administrative, Clerical and Services Union of Employees, W.A. Clerical and Administrative Branch	Australian Labor Party (WA Branch) & Ors	Commissioner S J Kenner	Order issued
Community Newspaper Group Ltd Editorial Enterprise Agreement 2004 AG 266/2005	19/09/2006	Media, Entertainment and Arts Alliance of WesternAustralia (Union of Employees)	Community Newspaper Group Ltd	Commissioner J H Smith	Agreement registered

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Department of Education and Training Ministerial Officers General Agreement 2006 PSAAG 12/2006	26/09/2006	Department of Education and Training	The Civil Service Association of Western Australia Incorporated	Commissioner P E Scott	Agreement Registered
Electorate and Research Employees General Agreement 2006 PSAAG 14/2006	26/09/2006	The President of the Legislative Council and the Speaker of the Legislative Assembly	The Civil Service Association of Western Australia Incorporated	Commissioner P E Scott	Agreement Registered
Graylands Selby-Lemnos and Special Care Health Services General Agreement 2006 PSAAG 13/2006	26/09/2006	Minister of Health incorporated as the Board of Graylands Selby-Lemnos and Special Care Health Services	The Civil Service Association of Western Australia Incorporated	Commissioner P E Scott	Agreement Registered
Social Trainers General Agreement 2006 PSAAG 15/2006	26/09/2006	Disability Services Commission	The Civil Service Association of Western Australia Incorporated	Commissioner P E Scott	Agreement Registered
State School Teachers Union of WA Clerical Staff Agreement 2006 AG 64/2006	20/09/2006	The Australian Municipal, Administrative, Clerical and Services Union of Employees, W.A. Clerical and Administrative Branch	The State School Teachers Union of W.A.(Incorporated)	Commissioner S J Kenner	Order issued

JOINDER/CONCURRENCE OF PARTIES—Application for—

2006 WAIRC 05543

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES CONSTRUCTION, FORESTRY MINING AND ENERGY UNION OF WORKERS

APPLICANT

-v-

ROBE RIVER IRON ASSOCIATES, PILBARA RAIL COMPANY, HAMERSLEY IRON PTY LTD

RESPONDENTS

CORAM COMMISSIONER S J KENNER

DATE WEDNESDAY, 4 OCTOBER 2006

FILE NO APPL 80 OF 2004

CITATION NO. 2006 WAIRC 05543

Result Discontinued by leave

Representation

Applicant Mr D Schapper of counsel

Respondent Ms E Hartley of counsel

Order

WHEREAS the applicant sought and was granted leave to discontinue the application, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued by leave.

(Sgd.) S J KENNER,
[L.S.] Commissioner.

2006 WAIRC 05544

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CONSTRUCTION, FORESTRY MINING AND ENERGY UNION OF WORKERS
	APPLICANT
	-v-
	PILBARA IRON PTY LTD & PILBARA IRON COMPANY(SERVICES) PTY LTD, THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING & KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH, TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH
	RESPONDENTS
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 4 OCTOBER 2006
FILE NO	APPL 284 OF 2004
CITATION NO.	2006 WAIRC 05544

Result	Discontinued by leave
Representation	
Applicant	Mr D Schapper of counsel
Respondent	Ms E Hartley of counsel

Order

WHEREAS the applicant sought and was granted leave to discontinue the application, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued by leave.

(Sgd.) S J KENNER,
[L.S.] Commissioner.

PUBLIC SERVICE APPEAL BOARD—

2006 WAIRC 05548

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KYLE HARGRAVES
	APPLICANT
	-v-
	EASTERN PILBARA COLLEGE OF TAFE
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER J L HARRISON – CHAIRPERSON
	MR K TRENT – BOARD MEMBER
	MR S MUSSON– BOARD MEMBER
DATE	THURSDAY, 5 OCTOBER 2006
FILE NO/S	PSAB 8 OF 2004
CITATION NO.	2006 WAIRC 05548

Result Appeal discontinued

Order

WHEREAS an appeal to the Public Service Appeal Board ("the Board") was lodged in the Commission pursuant to section 80I of the Industrial Relations Act 1979; and

WHEREAS the appeal was listed for hearing and determination on 11 and 12 May 2005; and

WHEREAS on 11 May 2005 the parties advised the Board that the matter had settled and the hearing was vacated; and

WHEREAS the Board contacted the appellant on numerous occasions about the status of the application; and

WHEREAS on 19 May 2006 the Board convened a status conference; and

WHEREAS following the conference the Board was advised that no agreement had been reached and the appeal was listed for hearing and determination on 30 August 2006; and

WHEREAS immediately prior to the hearing commencing on 30 August 2006 the parties advised the Board that they had reached an agreement in respect of the application and the Board therefore agreed to vacate the hearing; and

WHEREAS on 25 September 2006 the appellant filed a Notice of Discontinuance in respect of this appeal;

NOW THEREFORE, the Public Service Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders:

THAT this appeal be, and is hereby discontinued.

(Sgd.) J L HARRISON,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

RECLASSIFICATION APPEALS—Notation of—

File Number	Appellant	Respondent	Commissioner	Decision	Finalisation Date
PSA 36/2005	Mr Shannon Daniel Ellson and Others	The Commissioner of Police Western Australia	Scott C	Reclassification Appeal Withdrawn By Leave	26/09/2006
PSA 11/2006	Maxine Joseph	WA Electoral Commission	Scott C	Reclassification Appeal Withdrawn By Leave	3/10/2006
PSA 17/2006	Dave Martyn Whitford-Harvey	Workcover Western Australia Authority	Scott C	Reclassification Appeal Dismissed	18/09/2006
PSA 18/2006	D'Arcy Kevin Spivey	Workcover Western Australia Authority	Scott C	Reclassification Appeal Dismissed	18/09/2006
PSA 19/2006	Peter Brash	Workcover Western Australia Authority	Scott C	Reclassification Appeal Dismissed	18/09/2006
PSA 20/2006	Frania Bernadette Sharp	Workcover Western Australia Authority	Scott C	Reclassification Appeal Dismissed	18/09/2006
PSA 21/2006	Aubrey Warren Birkelbach	Workcover Western Australia Authority	Scott C	Reclassification Appeal Dismissed	18/09/2006
PSA 22/2006	Maria Helena Boon	Workcover Western Australia Authority	Scott C	Reclassification Appeal Dismissed	18/09/2006
PSA 23/2006	Andrew Anthony Warwick	Workcover Western Australia Authority	Scott C	Reclassification Appeal Dismissed	18/09/2006

OCCUPATIONAL SAFETY AND HEALTH ACT—Matters Dealt With—

2006 WAIRC 05295

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SITTING AS
THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	MALCOLM STANLEY PETERS
	APPLICANT
	-v-
	LEIGHTON KUMAGAI JOINT VENTURE
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	THURSDAY, 17 AUGUST 2006
FILE NO.	OSHT 5 OF 2006
CITATION NO.	2006 WAIRC 05295

Result	Directions issued
Representation	
Applicant	Mr G. MacLean (of counsel)
Respondent	Mrs E. Hartley (of counsel)

Directions

WHEREAS this matter was listed for a For Mention hearing before the Occupational Safety and Health Tribunal ("the Tribunal") on Thursday, 17 August 2006 and having heard Mr G. MacLean (of counsel) on behalf of the applicant and Mrs E. Hartley (of counsel) on behalf of the respondent;

AND WHEREAS having considered it necessary to give directions for the expeditious and just hearing and determination of this matter;

NOW THEREFORE the Occupational Safety and Health Tribunal pursuant to the powers of the *Occupational Safety and Health Act, 1984* hereby directs –

(1) Discovery is to be informal;

(2) The parties are urged to have private discussions which may assist the hearing of preliminary matters in relation to this claim;

(3) The applicant will provide a broad outline of submissions to the respondent by close of business Wednesday, 23 August 2006;

(4) Each party has liberty to apply with respect to these directions.

[L.S.]

(Sgd.) S M MAYMAN,
Commissioner.