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GENERAL ORDERS—

2008 WAIRC 00326

GENERAL ORDER RE MINIMUM AWARD WAGES IN SOME AWARDS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ON THE COMMISSION'S OWN MOTION
CORAM	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER P E SCOTT
	COMMISSIONER S WOOD
HEARD	THURSDAY, 22 MAY 2008
DELIVERED	TUESDAY, 27 MAY 2008
FILE NO.	APPL 16 OF 2008
CITATION NO.	2008 WAIRC 00326

CatchWords	General Order - Commission's own motion – awards with a classification wage rate less than the award minimum wage – minimum wage calculation for 40 hour week – Industrial Relations Act, 1979 s.50(3)(a) and (4)
Result	General Order issued by consent
Representation	Ms K Scoble, for the Hon Minister for Employment Protection
	Mr D Robinson, for Trades and Labor Council of Western Australia
	Mr G Bull, for Australian Mines and Metals Association (Inc)
	Mr D Jones, for Chamber of Commerce and Industry of WA

Reasons for Decision

1 This application arose following the Awards section of the Commission identifying a number of awards which had at least one rate below the adult minimum weekly wage rate of $528.40 for a 38 hour week. An award rate which is less than the minimum wage is potentially misleading to the reader of the award because that rate will be overridden by the minimum wage clause in the award which provides that no adult employee can be paid less than the minimum wage. The fact that an award may mislead is to be avoided and this application sought to remedy the position by varying each of these awards by deleting that award wage rate and inserting the minimum wage rate.

2 This is an administrative exercise given that the employer parties to these awards are already obliged by the *Minimum Conditions of Employment Act, 1993* (WA) (MCE Act) to pay the minimum wage. Given the limited nature of the exercise, the Commission in Court Session proposed to vary the awards by a General Order under s.50(3)(a) and (4).

3 We advised that this will still leave approximately eight awards which will need to be varied however the circumstances are such that it is appropriate they be done individually under s.40B on another day.

4 The Commission distributed schedules identifying the awards concerned, setting out the existing wages clause, and setting out the wages clause as it was proposed to be varied. A notice was placed in the local newspaper on Saturday, 10 May 2008, in the WA Industrial Gazette ((2008) 88 WAIG 299) and on the Commission's website.

5 It was proposed that where the award provides for a 38 hour week, any wage rate less than $528.40 would be increased to $528.40. Where the award contains a 40 hour week, the wage rate was increased to $556.40. ($528.40 divided 38 = $13.9052 per hour. The resulting hourly rate of $13.9052 was then rounded to the nearest cent, ie, $13.91 and then multiplied by the number of ordinary hours in the award, ie, 40. $13.91 x 40 = $556.40.)

6 In both cases where this occurs, the base rate and ASNA columns adjacent to that rate have been deleted.

7 Where the award does not contain any minimum hours per week, the amount of $528.40 for a 38 hour week has been specified.

8 The Commission has also identified within three of these awards junior worker percentages which are less than the junior worker percentages under the MCE Act s.13 and it is intended to correct those as well.

9 The Minister, the TLCWA, AMMA and CCIWA each consented to a General Order issuing and to the amendments proposed. They also recorded their appreciation for the efforts of the Commission's Award section.

10 A Minute of Proposed General Order was handed to the parties at the hearing on Thursday, 22 May 2008. Parties were to respond by 10:00am on Monday, 26 May 2008 as to whether they agreed with the Minute. In the interim, eleven further minor corrections were identified by the Commission. Parties were notified of these and given an opportunity to comment upon them. The Minute and all eleven corrections were agreed to and the General Order issues accordingly.

2008 WAIRC 00327

GENERAL ORDER RE MINIMUM AWARD WAGES IN SOME AWARDS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ON THE COMMISSION'S OWN MOTION
CORAM	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER P E SCOTT
	COMMISSIONER S WOOD
DATE	TUESDAY, 27 MAY 2008
FILE NO.	APPL 16 OF 2008
CITATION NO.	2008 WAIRC 00327

Result General Order issued by consent

General Order

HAVING heard Ms K Scoble on behalf of the Hon Minister for Employment Protection; Mr D Robinson on behalf of the Trades and Labor Council of Western Australia; Mr G Bull on behalf of Australian Mines and Metals Association (Inc); and Mr D Jones on behalf of the Chamber of Commerce and Industry of Western Australia, the Commission in Court Session, pursuant to the powers conferred on it by the *Industrial Relations Act 1979* (WA) hereby orders —

(1) THAT each award cited in the attached Schedule be varied in accordance with the Schedule.

(2) THAT the variation to each award shall have effect from the beginning of the first pay period to commence on or after the 27th day of May 2008.

(Sgd.) A R BEECH,
Chief Commissioner,
[L.S.] For and on behalf of the Commission In Court Session.

SCHEDULE

1. Bespoke Bootmakers' and Repairers' Award No. 4 of 1946

Clause 8. - Wages: Delete subclause (1) of this clause and insert the following in lieu thereof:

(1) The following shall be the minimum weekly rates of wages payable to workers covered by this award -

		$
(a)	Surgical Bootmaker	556.40
(b)	Bespoke Bootmaker	556.40
(c)	Boot Repairer	556.40

A worker employed in the classification of "Boot Repairer" who is called upon to perform the work of "Bespoke Bootmaker" or "Surgical Bootmaker" shall be paid the appropriate rate for the actual time he/she is engaged on the work of the higher classification, provided that if he/she is employed for more than four hours in any one day on work of the higher classification he/she shall be paid the appropriate rate for the whole of that day.

2. Building Trades Award 1968

Clause 10. - Wages: Delete the preamble and subclause (1) of this clause and insert the following in lieu thereof:

The rates of wages payable to the employees covered by the award (other than duly registered apprentices) shall be as follows:

(1) Base Rate and Supplementary Payment (per week)

	Base RatePer Week$	Safety NetAdjustment$	Total RatePer Week$
(a)			
(i) Bricklayers, stoneworkers, carpenters, joiners, painters, signwriters, glaziers, plasterers and plumbers as defined in Clause 6 of this award	376.20	205.00	581.20
(ii) Plumber holding registration in accordance with the Metropolitan Water Supply, Sewerage and Drainage Act	385.40	205.00	590.40
(iii) Joiner - Assembler A (as defined in Clause 6 of this award)	344.60	203.00	547.60
(iv) Joiner - Assembler B (as defined in Clause 6 of this award)	330.70	203.00	533.70
(b) Builders Labourers:-			
(i) Rigger	360.30	203.00	563.30
(ii) Drainer	360.30	203.00	563.30
(iii) Dogman	360.30	203.00	563.30
(iv) Scaffolder	345.00	203.00	548.00
(v) Powder Monkey	345.00	203.00	548.00
(vi) Hoist or Winch Driver	345.00	203.00	548.00
(vii) Concrete Finisher	345.00	203.00	548.00
(viii) Steel Fixer including tack welder	345.00	203.00	548.00
(ix) Operator Concrete Pump	345.00	203.00	548.00
(x) Bricklayer's Labourer	333.60	203.00	536.60
Plasterer's Labourer	333.60	203.00	536.60
Assistant Powder Monkey	333.60	203.00	536.60
Assistant Rigger	333.60	203.00	536.60
Demolition Worker (after three months' experience)	333.60	203.00	536.60
Gear Hand	333.60	203.00	536.60
Pile Driver	333.60	203.00	536.60
Tackle Hand	333.60	203.00	536.60
Jackhammer Hand	333.60	203.00	536.60
Mixer Driver (concrete)	333.60	203.00	536.60
Steel Erector	333.60	203.00	536.60
Aluminium Alloy Structural Erector	333.60	203.00	536.60
Gantry Hand or Crane Hand	333.60	203.00	536.60
Crane Chaser	333.60	203.00	536.60
Concrete Gang including Concrete Floater	333.60	203.00	536.60
Steel or Bar Bender to pattern or plan	333.60	203.00	536.60
Concrete Formwork Stripper	333.60	203.00	536.60
Concrete Pump Hose Hand	333.60	203.00	536.60
(xi) Builder's Labourers employed on work other than specified in classifications (i) to (x)			528.40

3. Case and Box Makers' Award, 1952

Clause 6. – Wages: Delete subclause (1) of this clause and insert the following in lieu thereof:

(1) The minimum rates of wages payable to employees employed in classifications contained in subclause (2) of this clause shall be as follows:

Broadbanded Groups	**Base Rate $**	**Arbitrated Safety Net Adjustment $**	**Total Minimum Weekly Rate (38 Hours) $**
1			528.40
2			528.40
3	364.60	173.00	537.60
4	385.50	173.00	558.50
5	417.20	173.00	590.20
6	438.10	173.00	611.10

The rates of pay in this award include arbitrated safety net adjustments available since December 1993, under the Arbitrated Safety Net Adjustment Principle.

These arbitrated safety net adjustments may be offset against any equivalent amount in the rate of pay received by employees since 1 November 1991 above the rate prescribed in the Award, except where such absorption is contrary to the terms of an industrial agreement.

Increases in rates of pay otherwise made under the State Wage Case Principles, excepting those resulting from enterprise agreements, are not to be used to offset arbitrated safety net adjustments.

4. Cement Tile Manufacturing Award No. 3 of 1966

Addendum: Delete (1) of this Addendum and insert the following in lieu thereof:

(1) ADULT:	A $	B $	C $
Fork Lift Driver	314.10	324.10	528.40
Machine Operator	309.30	319.30	528.40
Hand Presser	309.30	319.30	528.40
Ridge Maker and Finisher and Stripper	309.30	319.30	528.40
Colour Operator	303.80	313.80	528.40
Stripper and Stacker	299.10	309.10	528.40
All Others	299.10	309.10	528.40

5. Cement Workers' Award, 1975

a. Clause 11. – Wages: Delete this clause and insert the following in lieu thereof:

11. - WAGES

The minimum rates of wage payable under this award shall be as follows:-

Classification:	Column A06/10/88$	Column B06/04/89$	ASNA	TOTAL
Kiln Burner (1 or more kilns)	250.90	260.90		556.40
X.R.F. Tester	250.90	260.90		556.40
Cement and Raw Miller	241.10	251.10		556.40
Lime Burner (1 or more kilns)	241.10	251.10		556.40
Machine Bag Filler	241.10	251.10		556.40
Physical Tester	241.10	251.10		556.40
Reclaimer Operator - Woodman Point	241.10	251.10		556.40
Relief Burner/Kiln Greaser	241.10	251.10		556.40
Utility Man	241.10	251.10		556.40
Cement and Slurry Tester	233.90	243.90		556.40
Coal Miller	233.90	243.90		556.40
Crusher Operator (Swan Portland Cement only)	233.90	243.90		556.40
Hydrator and/or Hydrator Miller	233.90	243.90		556.40
Loader	233.90	243.90		556.40
Process Attendant	233.90	243.90		556.40
Pumphouse Attendant Woodman Point	233.90	243.90		556.40
Plant Attendant, (covers Kiln Greaser, Crusher Attendant, Cooler Attendant, Pumphouse Attendant - Slurry etc.)	223.20	233.30		556.40
Road Sweeper Operator	223.20	233.30		556.40
Amenities Attendant	218.90	228.90		556.40
General Hand	218.90	228.90		556.40

Casual workers shall be paid on an hourly basis at the rate of twenty per cent in addition to the rates prescribed herein.

Any worker appointed as a Leading Hand by the employer shall be paid the following amounts in addition to his ordinary wages when placed in charge of:-

		$ Per Week
(a)	Not less than three and not more than ten other workers	12.60
(b)	More than ten and not more than 20 other workers	19.80
(c)	More than 20 other workers	25.10

The rates of pay in this award include arbitrated safety net adjustments available since December 1993, under the Arbitrated Safety Net Adjustment Principle.

These arbitrated safety net adjustments may be offset against any equivalent amount in the rate of pay received by employees since 1 November 1991 above the rate prescribed in the Award, except where such absorption is contrary to the terms of an industrial agreement.

Increases in rates of pay otherwise made under the State Wage Case Principles, excepting those resulting from enterprise agreements, are not to be used to offset arbitrated safety net adjustments.

b. Clause 27. - Wages Cockburn Cement: Delete subclause (2) of this clause and insert the following in lieu thereof:

(2)	$ TOTAL
Burner	556.40
X.R.F. Tester	556.40
Physical Tester	556.40
Relief Burner	556.40
Operator Fremantle Depot	556.40
Cement Tester	556.40
Miller (Cement Raw and Coal)	556.40
Machine Bag Filler	556.40
Reclaimer Operator - Woodman Point	556.40
Utility Man (Relief Miller).	556.40
Crusher Operator	556.40
Loader	556.40
Process Attendant	556.40
Pumphouse Attendant	556.40
Kiln Attendant	556.40
Plant Attendant	556.40
Road Sweeper Operator	556.40
Amenities Attendant	556.40
General Hand	556.40

6. Cereal Processing, Extracting and Manufacturing Award No. 26 of 1970

Clause 30. – Wages: Delete subclause (1) of this clause and insert the following in lieu thereof:

(1) Shift Miller in charge of shift -		$	ASNA	TOTAL
(a)	Not exceeding 2 tonnes of provender per hour	371.65	165.00	536.65
(b)	Exceeding 2 tonnes but not exceeding 6 tonnes of provender per hour	378.30	165.00	543.30
(c)	Exceeding 6 tonnes but not exceeding 12 tonnes of provender per hour	385.30	165.00	550.30
(d)	Exceeding 12 tonnes but not exceeding 18 tonnes of provender per hour	392.05	165.00	557.05
(e)	Exceeding 18 tonnes but not exceeding 28 tonnes of provender per hour	400.25	165.00	565.25
(f)	Exceeding 28 tonnes but not exceeding 40 tonnes of provender per hour	408.45	165.00	573.45
(g)	Exceeding 40 tonnes but not exceeding 60 tonnes of provender per hour	417.00	165.00	582.00
Mill Operative- Grade 3				528.40
Grade 2				528.40
Grade 1		364.80	165.00	529.80
Premix Blender				528.40
Binsman				528.40
Packerman/Packer/Stacker				528.40
Storeman/Storehand/Siloman				528.40
Fork Lift truck driver and/or tractor driver				528.40
Millwright		388.50	165.00	553.50
Head Millwright		406.50	165.00	571.50
STARCH AND GLUTEN SECTION:				
Foreman Miller		390.30	165.00	555.30
Shift Miller		377.70	165.00	542.70
Top Floor Man				528.40
Corrugator				528.40
Batter Mixer				528.40
Process Attendant				528.40
Fork Lift truck driver and/or tractor driver				528.40
General Hand				528.40
Millwright		388.50	165.00	553.50
Head Millwright		406.50	165.00	571.50

	$	ASNA	TOTAL
OIL REFINING SECTION:			
Plant Operator			528.40
General Hand			528.40
Millwright	388.50	165.00	553.50
Head Millwright	406.50	165.00	571.50
YEAST SECTION:			
Plant Operator			528.40
General Hand			528.40
Millwright	388.50	165.00	553.50
Head Millwright	406.50	165.00	571.50

7. Clerks (Commercial, Social and Professional Services) Award No. 14 of 1972

Schedule "D" Australian Red Cross Blood Transfusion Service, Western Australia Agreement 1996: Delete subclause (2) of Clause 12. - Wages of this Schedule and insert the following in lieu thereof:

(2) ADULT EMPLOYEES: Total Rate Per Week

a)

Grade 1	**$**
1st year of experience at this grade	528.40
2nd year of experience at this grade	528.40
3rd year of such experience and thereafter	530.20
Grade 2	
1st year of experience at this grade	541.60
2nd year of experience at this grade	546.00
3rd year of such experience and thereafter	552.40
Grade 3	
1st year of experience at this grade	560.50
2nd year of such experience and thereafter	565.90

8. Clerks' (Control Room Operators) Award 1984

Schedule "B" – Enterprise Agreement - Wormald Security Australia Pty Ltd: Delete subclause (2) of this Schedule and insert the following in lieu thereof:

(2) Rates of Pay:

Notwithstanding the provisions of subclause (2) of Clause 14. - Rates of Pay the following minimum weekly rates of wages shall be paid to employees covered by this agreement -

Control Room Operators	$
During the first six months' experience	528.40
Thereafter	528.40

9. The Dried Vine Fruits Industry Award, 1951

Clause 22. - Wages: Delete subclause (1) of this clause and insert the following in lieu thereof:

(1) Adult Workers (per week) -	$
All adults engaged in production	556.40

10. Earth Moving and Construction Award

Clause 27. – Wages: Delete PART 1 of this clause and insert the following in lieu thereof:

	CLASSIFICATION	RATE PER WEEK$	ARBITRATED SAFETY NET ADJUSTMENT$	TOTAL RATEPER WEEK$
PART 1				
(a)	Engine Driver operating winch from pile driving rig net on pile driving	384.60	155.00	539.60
(b)	All stationary steam engine drivers whose work requires first or second class certificate	392.90	155.00	547.90

	CLASSIFICATION	RATE PER WEEK$	ARBITRATED SAFETY NET ADJUSTMENT$	TOTAL RATEPER WEEK$
PART 1—*continued*				
(c)	All other stationary steam engine drivers whose work requires third class certificate	379.70	155.00	534.70
(d)	Drivers of Internal Combustion Engines –			
	(i) if under 250 b.h.p.	388.50	155.00	543.50
	(ii) if 250 b.h.p. or over	395.70	155.00	550.70
(e)	Locomotive fireman	379.20	155.00	534.20
(f)	Boiler Attendant -			
	(i) attending one boiler			528.40
	(ii) attending two boilers	377.40	155.00	532.40
(g)	Driver of steam crane	386.10	155.00	541.10
(h)	Scotch Derrick power crane	405.30	155.00	560.30
(i)	Compressor driver over 30 h.p.	373.70	155.00	528.70
(j)	Driver of Wayne Road Sweeper	397.60	155.00	552.60

(k) Additions to margins, an Engine Driver engaged under this Part, as hereinafter specified shall have his/her marginal rate increased as follows:

(i)	Attending to electric generator or alternator exceeding 10 k.w. capacity	18.55
(ii)	Attending to refrigerator compressor or compressors	18.55
(iii)	Engine Driver in charge of plant	18.55
(iv)	Engine Driver in charge of switchboard of 350 k.w. capacity or more	5.85
(v)	Crane Drivers engaged on building construction or demolition	17.10

11. Egg Processing Award 1978

Clause 14. - Wages: Delete subclause (1) of this clause and insert the following in lieu thereof:

(1) Adult Employees

	Relativity	Weekly Rate $	ASNA $	Total Weekly Rate $
Level F5	100%	465.20	157.00	622.20
Level F4	92.4%	429.80	155.00	584.80
Level F3	87.4%	406.60	155.00	561.60
Level F2	82%	381.50	155.00	536.50
Level F1				528.40

The rates of pay in this award include arbitrated safety net adjustments available since December 1993, under the Arbitrated Safety Net Adjustment Principle.

These arbitrated safety net adjustments may be offset against any equivalent amount in the rate of pay received by employees since 1 November 1991 above the rate prescribed in the Award, except where such absorption is contrary to the terms of an industrial agreement.

Increases in rates of pay otherwise made under the State Wage Case Principles, excepting those resulting from enterprise agreements, are not to be used to offset arbitrated safety net adjustments.

12. Electronics Industry Award

Part I Clause 33. - Wages: Delete subclause (1) (a) of this clause and insert the following in lieu thereof:

(1) (a) Adults

	RatePer Week	ArbitratedSafety NetAdjustment	Total RatePer Week
Electronic Technician (Grade III)	537.50	203.00	740.50
Electronic Technician (Grade II)	463.30	203.00	666.30
Electronic Technician (Grade I)	442.20	205.00	647.20
Electronic Serviceperson	418.90	205.00	623.90
Installer	375.90	203.00	578.90
Serviceperson’s Assistant	357.90	203.00	560.90
Assembler (1)	352.60	203.00	555.60
Assembler	331.50	203.00	534.50
Trainee Installer			528.40

13. Engine Drivers' (General) Award

Clause 19. - Wages: Delete subclause (1) of this clause and insert the following in lieu thereof:

(1)

Classification:	Wage Per Week$	Supplementary Payments Per Week$	Safety Net$	Total Per Week Adjustments$
(a) Turbine Driver	345.30	16.80	203.00	565.10
(b) Steam Engine Drivers:				
(i) whose work requires 1st or 2nd class certificate	341.30	16.80	203.00	561.10
(ii) whose work requires a 3rd class certificate				556.40
I Internal Combustion Engine Drivers:				
(i) 180 kW brake power or over	344.20	16.80	203.00	564.00
(ii) 35 kW brake power or over but under 180 kW brake power				556.40
(iii) under 35 kW brake power				556.40
(d) Electric Motor Attendant:				
(i) on motors over 180 kW power	339.60	16.80	203.00	559.40
(ii) on motors 70 kW power to 180 kW power inclusive				556.40
(iii) on motors under 70 kW power				556.40
Where an employee attends two or more motors he/she shall be paid at a rate calculated on the aggregate kW power of such motors.				
Note: kW power shall be that shown on the maker's nameplate.				
(e) Greaser or Oiler				556.40
(f) Fireperson:				
(i) Attending one boiler				556.40
(ii) attending two or more boilers				556.40
(g) Trimmer				556.40
(h) Scotch Derrick Crane Driver	347.40	16.80	203.00	567.20
(i) Overhead electric crane driver who requires a certificate under the Inspection of Machinery Act				556.40
(j) Mobile Crane Driver				
(i) lifting capacity up to and including 5 tonnes	339.60	13.80	203.00	556.40
(ii) lifting capacity over 5 tonnes but not exceeding 10 tonnes	344.10	16.80	203.00	563.90
(iii) lifting capacity over 10 tonnes but not exceeding 20 tonnes	349.90	19.90	203.00	572.80
(iv) lifting capacity over 20 tonnes but not exceeding 40 tonnes	360.20	23.10	203.00	586.30
(v) lifting capacity over 40 tonnes but not exceeding 80 tonnes	366.30	26.00	203.00	595.30
(vi) lifting capacity in excess of 80 tonnes	373.90	28.00	203.00	604.90
(k) Excavator Driver:				
(i) up to.5m3	350.00	19.90	203.00	572.90
(ii) over.5 m3 and up to and including 2.25m 3	353.30	21.50	203.00	577.80
(iii) over 2.25 m3	364.00	24.80	203.00	591.80
(l) Tractors - while using power operated attachments:				
(i) up to 35 kW brake power				556.40
(ii) over 35 kW brake power to 70 kW brake power	344.20	16.80	203.00	564.00
(iii) over 70 kW brake power to 110 kW brake power	350.00	19.90	203.00	572.90
(iv) over 110 kW brake power	353.30	21.50	203.00	577.80
(m) Loader, front end or overhead - Appropriate Tractor Margin				

(1) Classification:—*continued*	Wage Per Week$	Supplementary Payments Per Week$	Safety Net$	Total Per Week Adjustments$
(n) Grader self propelled				
(i) over 70 kW brake power	364.00	24.80	203.00	591.80
(ii) 35 to 70 kW brake power inclusive	353.30	21.50	203.00	577.80
(iii) under 35 kW brake power	350.00	19.90	203.00	572.90

14. Enrolled Nurses and Nursing Assistants (Private) Award

Clause 30. - Wages: Delete (1) of this clause and insert the following in lieu thereof:

(1) The minimum rate of wage payable to employees covered by this award shall be as follows:

	Base Rate $	Arbitrated Safety Net Adjustment $	Minimum Weekly Rate $
(a) Trainee Enrolled Nurse			
1st year of training			528.40
2nd year of training			528.40
(b) Enrolled Nurse Level One			
1st year of employment	419.10	205.00	624.10
2nd year of employment	424.10	205.00	629.10
3rd year of employment and thereafter	435.00	205.00	640.00
(c) Enrolled Nurse Level Two			
1st year of employment	428.20	205.00	633.20
2nd year of employment	433.30	205.00	638.30
3rd year of employment and thereafter	444.10	205.00	649.10
(d) Enrolled Nurse Level Three	456.30	205.00	661.30
(e) Nursing Assistant (at 19 years of age and over)			
1st year of employment	377.70	203.00	580.70
2nd year of employment	388.00	203.00	591.00
3rd year of employment and thereafter	398.50	203.00	601.50

(f) Nursing Assistant (under 19 years of age) shall be paid a percentage of the total weekly wage prescribed for a Nursing Assistant in their first year of employment in subclause (1)(e) hereof as follows:

Under 17 years of age	73%
Under 18 years of age	81%
Under 19 years of age	87%

(g) Provided that an Enrolled Nurse undergoing training in a post basic course approved by the Nurses' Board of W A will be paid the '1st year of employment' rate of wage at the appropriate level during the training period.

(h) Provided further that an Enrolled Nurse (Student) who is 21 years of age or over shall be paid at the rate applicable to a Nursing Assistant (at 19 years of age and over) at the 'first year of employment' rate.

(i) The rates of pay in this award include arbitrated safety net adjustments available since December 1993, under the Arbitrated Safety Net Adjustment Principle.

These arbitrated safety net adjustments may be offset against any equivalent amount in the rate of pay received by employees since 1 November 1991 above the rate prescribed in the Award, except where such absorption is contrary to the terms of an industrial agreement.

Increases in rates of pay otherwise made under the State Wage Case Principles, excepting those resulting from enterprise agreements, are not to be used to offset arbitrated safety net adjustments.

15. Farm Employees' Award

Clause 14. - Wages: Delete subclause (1) of this clause and insert the following in lieu thereof:

(1)

	TOTAL $
Adult Employees:	
Farm Hand	
(a) With less than twelve months experience in the industry	528.40
(b) With twelve months experience in the industry	528.40
(c) General Farm Hand	528.40
(d) Farm Tradesman (As defined)	528.40

"Farm Tradesman" shall mean a farm hand who has satisfactorily completed the approved apprenticeship in "farming" or who has been issued with an approved trade certificate and provides proof satisfactory to the employer of such qualification or who has by other means achieved a standard of knowledge deemed by his employer as equivalent thereto and is appointed as such in writing by his employer.

16. Fruit and Produce Market Employees Award

Clause 11. - Wages: Delete subclause (1) of this clause and insert the following in lieu thereof:

(1)	Adults	Operative on and from the commencement of the first pay period on or after 1 July 2007 $
	Storemen	556.40
	Head Storemen	556.40

The rates of pay in this award include arbitrated safety net adjustments available since December 1993, under the Arbitrated Safety Net Adjustment Principle.

These arbitrated safety net adjustments may be offset against any equivalent amount in the rate of pay received by employees since 1 November 1991 above the rate prescribed in the Award, except where such absorption is contrary to the terms of an industrial agreement.

Increases in rates of pay otherwise made under the State Wage Case Principles, excepting those resulting from enterprise agreements, are not to be used to offset arbitrated safety net adjustments.

17. The Fruit Growing and Fruit Packing Industry Award

Clause 24. - Wages: Delete subclauses (1) and (2) this clause and insert the following in lieu thereof:

		Rate Per Week $Total
(1)	Fruit Packing and Sorting	
	(a) Trainee Packer & Trainee Sorter	556.40
	(b) Competent Packer (as defined) & Sorter	556.40
	(c) Shed Hand	556.40
(2)	Fruit Growing and Picking:	
	(a) Orchard Hand (General)	556.40
	(b) Orchard Hand (Machine Operator)	556.40

The following hourly rates shall apply to workers in this section for each hour worked in excess of 40 hours per week and not more than 52 hours per week:

(a)	Orchard Hand (General)	20.87
(b)	Orchard Hand (Machine Operator)	20.87

The following hourly rates shall apply to workers in this section for each hour worked in excess of 52 hours per week:

(a)	Orchard Hand	27.82
(b)	Orchard Hand (Machine Operator)	27.82

The rates of pay in this award include arbitrated safety net adjustments available since December 1993, under the Arbitrated Safety Net Adjustment Principle.

These arbitrated safety net adjustments may be offset against any equivalent amount in the rate of pay received by employees since 1 November 1991 above the rate prescribed in the Award, except where such absorption is contrary to the terms of an industrial agreement.

Increases in rates of pay otherwise made under the State Wage Case Principles, excepting those resulting from enterprise agreements, are not to be used to offset arbitrated safety net adjustments.

18. The Horticultural (Nursery) Industry Award

a. Clause 5. - Wages: Delete subclause (1) of Clause 5 and insert the following in lieu thereof:

(1) Adult Employees

The rates in Column A are effective on date of registration, Column B effective from six months thereafter, Column C effective from an additional 6 months, any safety net adjustments during this time to be incorporated into the rates.

	Column A	Column B	Column C	Column D (effective on and from the commencement of the first pay period on or after 1 July 2007)
	Total RatePer Week$	Total RatePer Week$	Total RatePer Week$	
Trainee				528.40
Horticultural Employee Grade 1				528.40
Horticultural Employee Grade 2	484.10	488.07	488.07	532.07
Horticultural Employee Grade 3	489.70	500.70	504.83	548.83
Horticultural Tradesperson Grade 1	540.30	551.30	561.20	605.20
Horticultural Tradesperson Grade 2	559.00	570.00	581.29	625.29
Horticultural Tradesperson Advanced	579.60	590.60	601.28	645.28

The rates of pay in this award include arbitrated safety net adjustments available since December 1993, under the Arbitrated Safety Net Adjustment Principle.

These arbitrated safety net adjustments may be offset against any equivalent amount in the rate of pay received by employees since 1 November 1991 above the rate prescribed in the Award, except where such absorption is contrary to the terms of an industrial agreement.

Increases in rates of pay otherwise made under the State Wage Case Principles, excepting those resulting from enterprise agreements, are not to be used to offset arbitrated safety net adjustments.

b. Appendix 1. - Make Up of Total Wage: Delete (1) of Appendix 1 and insert the following in lieu thereof:

(1) Adult Employees

	Base Rate$	Arbitrated Safety Net Adjustments$	Total Rate$ on and from the commencement of the first pay period on or after 1 July 2007
Trainee			528.40
Horticultural Employee Grade 1			528.40
Horticultural Employee Grade 2	346.07	186.00	532.07
Horticultural Employee Grade 3	362.83	186.00	548.83
Horticultural Tradesperson Grade 1	417.20	188.00	605.20
Horticultural Tradesperson Grade 2	437.29	188.00	625.29
Horticultural Tradesperson Advanced	457.28	188.00	645.28

19. Industrial Catering Workers' Award, 1977

Clause 22. - Wages: Delete subclause (1) of this clause and insert the following in lieu hereof:

(1)	Classifications:	Broken Work Period Loading $	Total Wage (per week) $
	(1) Chef or Head Cook	16.00	556.40
	(2) Qualified Cook	12.80	556.40
	(3) Pastrycook	12.80	556.40
	(4) Cook Employed Alone	16.00	556.40
	(5) Breakfast and/or Other Cooks	11.50	556.40
	(6) Butcher	11.50	556.40
	(7) Dining Room Attendant and/or Counterhand	11.50	556.40
	(8) Kitchenhand	11.50	556.40
	(9) Housemaid	11.50	556.40
	(10) Cleaner	11.50	556.40
	(11) Laundress	11.50	556.40
	(12) Bar Attendant	11.50	556.40
	(13) Cellarman	11.50	556.40
	(14) Storeman	-	556.40
	(15) Gardener	-	556.40
	(16) Garbage Attendant	-	556.40
	(17) Motor Vehicle Driver -		
	Not exceeding 25 cwt capacity		556.40
	Exceeding 25 cwt capacity, but not exceeding 3 tons capacity		556.40
	Exceeding 3 tons capacity, but under 6 tons capacity		556.40
	(18) General Hand		556.40

The rates of pay in this award include arbitrated safety net adjustments available since December 1993, under the Arbitrated Safety Net Adjustment Principle.

These arbitrated safety net adjustments may be offset against any equivalent amount in the rate of pay received by employees since 1 November 1991 above the rate prescribed in the Award, except where such absorption is contrary to the terms of an industrial agreement.

Increases in rates of pay otherwise made under the State Wage Case Principles, excepting those resulting from enterprise agreements, are not to be used to offset arbitrated safety net adjustments.

20. Manufacturing Chemists Award, 1976

Clause 7. - Wages: Delete subclause (1) of this clause and insert the following in lieu thereof:

(1) Adult Employees

Classifications	Base Rates Per Week $	Arbitrated Safety Net Adjustments $	Total Award Rate Per Week $
(a) Extracts, Essences and Distillation			
First Class Plant Operative	363.15	203.00	566.15
Second Class Plant Operative			
1st three months			556.40
Thereafter			556.40
(b) Galenicals, Patents, Medicines, Cordials etc			
First Class Factory Hands			556.40
Factory Hands (Handling Corrosive Acids)			556.40
(c) General Factory Hands			556.40

The rates of pay in this award include arbitrated safety net adjustments available since December 1993, under the Arbitrated Safety Net Adjustment Principle.

These arbitrated safety net adjustments may be offset against any equivalent amount in the rate of pay received by employees since 1 November 1991 above the rate prescribed in the Award, except where such absorption is contrary to the terms of an industrial agreement.

Increases in rates of pay otherwise made under the State Wage Case Principles, excepting those resulting from enterprise agreements, are not to be used to offset arbitrated safety net adjustments.

21. Marine Stores Award

Clause 6. - Rates of Pay: Delete subclause (1) of this clause and insert the following in lieu thereof:

(1) The minimum weekly rate of wage payable to employees covered by this award shall be as follows:

Classification	Minimum Rate$
General Hand	528.40
Sorter	528.40
Packer	528.40
Washer of Bottles	528.40
Cutter of Cloth	528.40

22. Mental Health Nurses' Consolidated Award 1981 No. 13 of 1947

Clause 22. - Rates of Pay and Allowances: Delete Subclause (1) of this clause and insert the following in lieu thereof:

(1) Registered Mental Health Nurses, Enrolled Mental Health Nurses, and Student Mental Health Nurses shall be paid the weekly wages as set out hereunder:

	$ Per Week	ASNA	TOTAL
(a) Mental Health Nurse			
(i) Student Nurse Adult			
1st year of training			528.40
2nd year of training			528.40
3rd year of training	382.80	165.00	547.80
Student under 21 years of age			
1st year of training	316.40	119.40	435.80
2nd year of training	334.30	122.50	456.80
3rd year of training	356.40	127.10	483.50
4th year of training	380.50	131.20	511.70
(ii) Level 1			
1st year of service	445.10	165.00	610.10
2nd year of service	458.10	167.00	625.10
3rd year of service	476.50	167.00	643.50
4th year of service	495.30	167.00	662.30
5th year of service	509.60	165.00	674.60
6th year of service	526.60	165.00	691.60
7th year of service	547.00	165.00	712.00

	$ Per Week	ASNA	TOTAL
(iii) Level 2			
1st year of service	581.00	167.00	748.00
2nd year of service	597.00	167.00	764.00
3rd year of service	619.60	167.00	786.60
(iv) Level 3			
1st year of service	667.00	165.00	832.00
2nd year of service	686.10	165.00	851.10
3rd year of service	702.40	165.00	867.40
(v) Community Mental Health Nurses			
1st year of service	619.60	167.00	786.60
2nd year of service	631.00	167.00	798.00
3rd year of service	646.70	167.00	813.70
4th year of service	662.20	165.00	827.20
(vi) Community Mental Health Nurse with a post basic certificate			
1st year of service	631.00	167.00	798.00
2nd year of service	646.70	167.00	813.70
3rd year of service	662.20	165.00	827.20
4th year of service	684.50	165.00	849.50
(vii) Community Mental Health Administrative Nurse	697.10	165.00	862.10
(viii) Community Mental Health Nurse with a post basic certificate	713.50	165.00	878.50

(b) (i) Progression through the increments for a registered mental health nurse classified at Level 1 shall occur by annual increments.

(ii) Progression for all other classifications for which there is more than one wage point, shall be by annual increments, subject to a satisfactory performance appraisal.

(c) Where an employee is appointed to a position, previous relevant nursing experience at that level, or in a similar level under a differing career structure, shall be taken into account for determining the appropriate increment level.

(d) The onus of proof of previous experience shall rest with the employee.

Provided that an employee returning to the profession after an absence greater than five years shall commence at the first increment of Level 1 for a period of three months. During this time the employee shall be reviewed by an assessment panel. Upon satisfactory review she/he shall move to a level and increment as determined by the panel's assessment. An employee who fails to satisfy the panel of her/his competency to progress through the Level 1 increments or into another level as the case may be, may apply for re-assessment by an assessment panel after a period of 12 months from the date of employment.

	$ Per Week	ASNA	TOTAL
(e) Enrolled Mental Health Nurse			
(i) Student Enrolled Mental Health Nurse			
Adult Student			
1st year of training			528.40
Thereafter			528.40
Student under 21 years			
1st year of training	316.40	119.40	435.80
Thereafter	334.30	122.50	456.80
(ii) Registered Enrolled Mental Health Nurse			
1st year of service	399.20	165.00	564.20
2nd year of service	407.50	165.00	572.50
Thereafter	416.30	165.00	581.30

(f) Provided that a student nurse in his/her first year of training shall only proceed to the next increment point in sub-paragraph (i) of paragraph (a) of subclause (1) of this clause upon passing the required examination.

23. Monumental Masonry Industry Award, 1989

Clause 7. - Wages: Delete subclause (1) and insert the following in lieu thereof:

(1) (a) The rates of wages payable to the employees covered by this Award (other than duly registered apprentices and junior employees) shall be as follows:

Classification	Minimum Weekly Base Rate $	Supple-mentary Payment $	Arbitrated Safety Net Adjustment $	Total Rate (Exclusive of Industry Allowance) $
Monumental Mason	365.20	52.00	205.00	622.20
Monumental Fixer	345.20	49.30	203.00	597.50
Monumental Employee Grade 4	318.90	45.50	203.00	567.40
A Grade 3 employee who has attained a high level of skill in at least one function or who is regularly required to perform more than two of the functions contained in Grade 3				
Monumental Employee Grade 3	301.40	43.00	203.00	547.40
Employee who has been performing work at Grade 2 level for more than six months				
Monumental Employee Grade 2				528.40
Employee who is performing one or more of the following functions and who has been performing such work for less than six months -				
- Primary Saw Operator				
- Secondary Saw Operator				
- Polishing Machine Operator				
- Stone Engraving Operator				
- Assistant Monumental Fixer				
- Monumental Concrete Moulder				
Monumental Employee Grade 1				528.40
Employee who is engaged to perform work not covered by any of the above classifications.				

(b) The rates of pay in this award include arbitrated safety net adjustments available since December 1993, under the Arbitrated Safety Net Adjustment Principle.

These arbitrated safety net adjustments may be offset against any equivalent amount in the rate of pay received by employees since 1 November 1991 above the rate prescribed in the Award, except where such absorption is contrary to the terms of an industrial agreement.

Increases in rates of pay otherwise made under the State Wage Case Principles, excepting those resulting from enterprise agreements, are not to be used to offset arbitrated safety net adjustments.

24. Nurses (Child Care Centres) Award 1984

Clause 11. - Wages: Delete this clause and insert the following in lieu thereof:

11. - WAGES

An employer on whom this award is binding shall not increase the rate of wage payable to an employee on 9th September, 1988, or otherwise vary the conditions applicable to an employee on that date so as to increase that employer's labour costs except to the extent that any such increase has been authorised by the Commission after that date.

Except as hereinafter provided the minimum rates of wage payable to employees under this award shall be as follows:

	Column A (4%) Operative on and from 21/12/88Per Week $	Column B ($10 p.w.) Operative* 3/4/89Per Week $	ASNA	TOTAL
(1) Registered General Nurse				
1st year of experience	381.50	391.50	165.00	556.50
2nd year of experience	390.50	400.50	165.00	565.50
3rd year of experience	403.60	413.60	165.00	578.60
4th year of experience	414.50	424.50	165.00	589.50
Thereafter	427.60	437.60	165.00	602.60

		Column A (4%) Operative on and from 21/12/88Per Week $	Column B ($10 p.w.) Operative* 3/4/89Per Week $	ASNA	TOTAL
(2)	Registered Mothercraft Nurse				
	1st year of experience				528.40
	2nd year of experience				528.40
	3rd year of experience	372.90	382.90	165.00	547.90
	4th year of experience	393.20	403.20	165.00	568.20
	Thereafter	413.20	423.20	165.00	588.20

* NB This column is operative from the 1st pay period on or after 3/4/89.

The rates of pay in this award include arbitrated safety net adjustments available since December 1993, under the Arbitrated Safety Net Adjustment Principle.

These arbitrated safety net adjustments may be offset against any equivalent amount in the rate of pay received by employees since 1 November 1991 above the rate prescribed in the Award, except where such absorption is contrary to the terms of an industrial agreement.

Increases in rates of pay otherwise made under the State Wage Case Principles, excepting those resulting from enterprise agreements, are not to be used to offset arbitrated safety net adjustments.

25. Nurses' (Day Care Centres) Award 1976

Clause 20 - Salaries: Delete this clause and insert the following in lieu thereof:

20. - WAGES

An employer on whom this award is binding shall not increase the rate of wage payable to an employee on 9th September, 1988, or otherwise vary the conditions of employment applicable to an employee on that date so as to increase that employer's labour costs except to the extent that any such increase has been authorised by the Commission after that date.

	Column A Operative 3/10/88*	Column B Operative 30/12/88*	Column C Operative 30/3/89*	Column D Operative 3/4/89*	ASNA	Operative on and from the commencement of the first pay period on or after 1 July 2007
	Per Week$	Per Week$	Per Week$	Per Week$	Per Week$	Per Week$
Registered General Nurse						
1st year	366.80	374.10	381.50	391.50	165.00	556.50
2nd year	385.50	383.00	390.50	400.50	165.00	565.50
Registered Mothercraft Nurse						
1st year						556.40
2nd year						556.40

All operative dates are from the 1st pay period on or after the nominated date, except for the last 2 columns which are operative on and from the commencement of the first pay period on or after 1 July 2007.

The rates of pay in this award include arbitrated safety net adjustments available since December 1993, under the Arbitrated Safety Net Adjustment Principle.

These arbitrated safety net adjustments may be offset against any equivalent amount in the rate of pay received by employees since 1 November 1991 above the rate prescribed in the Award, except where such absorption is contrary to the terms of an industrial agreement.

Increases in rates of pay otherwise made under the State Wage Case Principles, excepting those resulting from enterprise agreements, are not to be used to offset arbitrated safety net adjustments.

26. Optical Mechanics' Award, 1971

Clause 24. - Wages: Delete subclause (1) of this clause and insert the following in lieu thereof:

(1) The minimum weekly rate of wage payable to an employee covered by this award shall include the base rate plus the Arbitrated Safety Net Adjustment expressed hereunder:

	Base Rate $	Arbitrated Safety Net Adjustments $	Minimum Rate $
Adults (total wage per week)			
(a) Optical Mechanic	397.60	203.00	600.60
(b) Optical Employee:			
First 3 months of experience			528.40
Thereafter	342.40	203.00	545.40

27. Particle Board Employees' Award, 1964

Clause 5. - Wages: Delete subclauses (1) and (2) of this clause and insert the following in lieu thereof:

(1) The minimum rates of wage payable to employees covered by this Award shall be:

	Rate of Wage$	Supplementary Payment$	ASNA	Award Rate$
Grade 1				528.40
Trainee Operator				
Yard Hand				
Packaging				
Machine Assistant				
Factory Hand				
Grade 2				528.40
Flaker/Knife Room Operator				
Overlay Operator				
Log Deck/Chipping Operator				
Glue Mixer				
Paper Impregnation Operator				
Log Tower Operator				
Gatekeeper				
Grade 3				528.40
Residue & Waste Operator				
Flooring & Grading Operator				
Log Deck Loader				
Knife Setter & Grinder & Changing Knives				
Grade 4	362.70	15.90	165.00	543.60
Laboratory Assistant				
Finishing Line				
Logyard Loader				
Panel Saw Operator				
Sanding & Grading Operator				
Grade 5	378.70	15.90	165.00	559.60
Drier Operator				
Despatch				
Forming Machine Operator				
Relief Operator				
Press Operator				
Resin Plant Operator				
Grade 6	396.30	15.90	165.00	577.20
Senior Melamine Operator				
Senior Finishing Operator				
Senior Shift Operator				

(2) Junior Employee: (percentage of sum of Grade 1 rate of wage $528.40 and supplementary payments prescribed):

	%	BASE RATE$	SUPPLE-MENTARY PAYMENT$	ASNA	AWARD RATE$
under 16	40				211.40
16 years	50				264.20
17 years	60				317.10
18 years	70				369.90
19 years	80				422.80
20 years	95	310.46	15.10	156.76	482.32

The rates of pay in this award include arbitrated safety net adjustments available since December 1993, under the Arbitrated Safety Net Adjustment Principle.

These arbitrated safety net adjustments may be offset against any equivalent amount in the rate of pay received by employees since 1 November 1991 above the rate prescribed in the Award, except where such absorption is contrary to the terms of an industrial agreement.

Increases in rates of pay otherwise made under the State Wage Case Principles, excepting those resulting from enterprise agreements, are not to be used to offset arbitrated safety net adjustments.

28. Performers Live Award (WA) 1993

Clause 7. - Rates of Pay: Delete this clause and insert the following in lieu thereof:

7. – RATES OF PAY

The rates of pay in this award include arbitrated safety net adjustments available since December 1993, under the Arbitrated Safety Net Adjustment Principle.

These arbitrated safety net adjustments may be offset against any equivalent amount in the rate of pay received by employees since 1 November 1991 above the rate prescribed in the Award, except where such absorption is contrary to the terms of an industrial agreement.

Increases in rates of pay otherwise made under the State Wage Case Principles, excepting those resulting from enterprise agreements, are not to be used to offset arbitrated safety net adjustments.

(1) Engaged by the Week (age sixteen and over)	PER WEEK $	ASNA $	TOTAL $
(a) (i) Speciality Artiste:			
Solo	498.60	203.00	701.60
Duo (each)	468.50	203.00	671.50
Trio (each	453.10	205.00	658.10
Quartet or an act of more than four artists (each)	437.00	205.00	642.00
(ii) Variety Artist	468.50	203.00	671.50
(iii) Vocalist	453.10	205.00	658.10
(iv) Actor or Actress	416.80	205.00	621.80
(v) Ballet or Chorus	398.80	203.00	601.80
(vi) Model	398.80	203.00	601.80
(b) Skaters:			
(i) Solo, Duo or Speciality Artist	416.80	205.00	621.80
(ii) Employee engaged only in a skating ensemble	398.80	203.00	601.80
(c) Aquatic Artists:			
(i) Other than member of an aquatic ensemble	416.80	205.00	621.80
(ii) Aquatic ensemble - employee engaged therein only	398.80	203.00	601.80
(d) (i) Supernumeraries engaged by the week shall be paid $15.55 per hour with a minimum payment for a week of			556.40
(ii) Supernumeraries on tour shall be paid the ballet of chorus rate of pay together with the touring allowance as hereinafter specified.			

(e) A walking understudy and/or supernumerary understudying one of the other roles in a theatrical production and any other employees speaking not more than 80 words in the production shall be paid as follows:

16 years of age and over	$	$	$
- not on tour - at the rate per week of	398.80	203.00	601.80
- on tour, plus the touring allowance as hereinafter specified	416.80	205.00	621.80

(f) A member of the chorus or ballet or skating ensemble or a showperson or model speaking not less than seven lines containing in the aggregate not less than 30 words, or singing and/or dancing solo not less than 24 bars of music, shall be paid an additional sum of one percent of the minimum weekly award rate for an extra per performance.

(g) An employee who as part of the employee's duties is required by the employer to act as a stage manager or an assistant stage manager shall be paid in addition to the applicable weekly rate hereinbefore specified twelve percent or six percent respectively of the minimum weekly award rate for an Actor or Actress per week.

(h) A member of the ballet or chorus or skating or aquatic ensemble who acts as deputy ballet or chorus or skating or aquatic ensemble director or who, under instruction and supervision of the producer or stage manager and/or employer, supervises the number of acts to be performed by the skating or aquatic ensemble as the case may be, during a performance or rehearsal shall be paid not less than six percent of the minimum weekly award rate for an Actor or Actress per week, in addition to the per week rate.

(i) If an employee is required by the employer to act as understudy the employee shall be paid an additional amount per week for each part understudied as follows:

		$
(i)	Star Role	37.55
(ii)	Leading Role	25.05
(iii)	Actor/Actress	12.52
(iv)	Supporting Role	9.37

(j) If an employee is required to perform in a role which the employee is acting as understudy the employee shall be paid an additional amount per performance as follows:

		$
(i)	Star Role	62.58
(ii)	Leading Role	43.80
(iii)	Actor/Actress	31.28
(iv)	Supporting Role	18.78

Provided that: aggregate of payments to swing performers may not exceed contracted salaries paid to the employees whose part is understudied either on a pro-rata or weekly basis. The additional payments prescribed in this paragraph and in the preceding paragraph shall not apply in the case of ensemble companies.

(k) An employee who agrees to pose as a nude or semi-nude shall be paid not less than an additional 2.5 percent of the minimum weekly award rate for an Actor or Actress per performance.

(l) An employee who is required to perform work as a driver or as a person in charge whilst on tour shall be paid not less than 7.5 percent of the minimum weekly award rate for an Actor or Actress per week in addition to the per week rate.

(m) A performer not taking part in a production for which the performer is required to record a voice over tape shall be paid a once off fee at least equal to fifty percent of the weekly award rate for an Actor or Actress as prescribed in subparagraph (iv) of paragraph (a) of this subclause for each hour or part thereof taken in the process of recording. Such fee shall apply to the use of the recording during the initial run of the production in the theatre in which it is being played or in the case of Theatre-in-Education for its initial tour or schools or other venues. Any change in venue or extension of the run of the production including any tour will require a further once off fee at least equal to the initial fee paid to such performer.

(n) If an employee is required by the employer to perform in such a manner which leads to the employee being charged with an offence, the employer shall be responsible for all legal and other costs associated with the employee's appearance in court proceedings and any fines ordered against the employee.

(o) The following rates apply to juvenile performers for a maximum of four performances per week:

		Percentage of the applicable adult weekly rate
(i)	fourteen years of age and under	
	Not on tour	45 percent
	On tour to be paid the applicable adult rate	
(ii)	Over fourteen years and under sixteen years	
	Not on tour	55 percent
	On tour to be paid the applicable adult rate	

(2) Rehearsals

Prior to commencement of performances:

(a) An employee who attends rehearsals only at the direction of an employer for a future production and who is not at that time employed in any current production on a weekly basis by that employer shall, for the period between the first date upon which such person is directed to attend for rehearsal and the commencement of the production, be paid the appropriate rate laid down in paragraph (a) of subclause (1) of this clause.

(b) If any employee is engaged for employment and is directed to rehearse in another town or towns or city or cities other than that in which the employee was engaged the employee shall be paid the applicable weekly wage and in addition shall be paid the touring allowance specified in Clause 16. - Travelling of this award.

(c) Rehearsals shall be regarded as continuous from the day of the first call to the day of the opening performance inclusive.

(3) Engaged Casually

(a) Performance

(i) Casual employees (other than variety artists) who are aged sixteen years or over shall for each performance be paid one-sixth, plus fifteen percent thereof of the appropriate per week adult rate as set out in subclause (1) of this clause. The maximum length of any such performances shall be three hours (exclusive of any making up or taking off), provided that any performance of longer duration shall be paid at the rate specified in paragraph (a) of subclause (2) of Clause 12. - Overtime of this award.

(ii) An employee aged sixteen years or over engaged as a vocalist, variety artist or as an "act" for each performance shall be paid one-fifth plus fifteen percent thereof of the appropriate per week adult rate as set out in subclause (1) of this clause. The maximum length of any such performances (exclusive of making up or taking off) shall be three hours, provided that any performance of longer duration shall be paid at the rate specified in paragraph (a) of subclause (2) of Clause 12. - Overtime of this award.

(iii) Casual employees aged fourteen years and under those aged fifteen years shall be paid 45 and 55 percent respectively of the rates set out in subparagraphs (i) and (ii) above.

(b) Rehearsals

(i) An employee aged sixteen years or over who is required to rehearse by the employer shall be paid the rate of $21.57 for one hour (minimum) and over one hour at the rate of $10.79 per half hour or part thereof, provided however that if the employee desires to leave the rehearsal before the completion of one hour's rehearsal payment shall be at the rate of $10.79 per half hour or part thereof for the time actually worked.

(ii) Any rehearsals required of employees aged fourteen years and under or those aged fifteen years shall be paid for at 45 and 55 percent respectively of the above rates.

(c) Casual supernumeraries shall be paid at $16.69 per hour with a minimum call for performances of three hours and for rehearsals of two hours.

(4) If an engagement which has been made is cancelled by the employer at a time which is less than ten days prior to the date of the performance/rehearsal for which the employee was engaged, the employee shall receive payment in full. If an open air performance/rehearsal is postponed because of rain the employee shall receive half the fee if such employee is re-engaged for a subsequent presentation not later than three weeks after the date of the postponement otherwise the employee shall receive full payment. Where an open air performance/rehearsal is abandoned because of rain the employee shall be paid in full.

(5) Except in the case of supernumeraries all such engagements shall be made in writing and such document shall specify the date and place of the performance and the fee to be paid to the employee and shall be signed by the employer.

(6) Provision of Meals

(a) If an employee is required by an employer to appear in any place where meals and/or light refreshments are served to the public the employer shall provide at the employer's expense, a meal for that employee if the total spread of employee's work is over a period of more than four hours from beginning to end.

Such meal shall be of the type and quality supplied to the public at the employer's establishment. Should the employer fail to provide the employee with such meal the employer shall pay the employee a sum equivalent to three percent of the minimum weekly award rate for an Actor or Actress in lieu thereof.

(b) When an employee takes part in addition to the ordinary evening performance, in an intermediate performance commencing at between 5.00pm and 6.15pm, the employer shall provide a satisfactory meal to such employee or pay to such employee a meal allowance equivalent to three percent of the minimum weekly award rate for an Actor or Actress for his/her evening meal, and shall also provide tea and coffee or the ingredients and facilities to make and serve same.

29. Photographic Industry Award, 1980

Clause 12. - Wages: Delete subclause (1) of this clause and insert the following in lieu thereof:

(1) The minimum weekly rate of wage payable to an employee covered by this award shall be -

	Base Rate$	Arbitrated Safety Net Adjustments$	Minimum Rate$
SECTION A:			
Portrait Advertising And Commercial Studios:			
(a) Photographer	348.50	203.00	551.50
(b) All others -			
First three months.			528.40
(c) All others - Thereafter	338.30	203.00	541.30
SECTION B:			
Developing, Printing And Finishing Establishments:			
(a) Colour filter determinator			
Custom colour enlargement printer			
Colour printer controller	356.50	203.00	559.50
(b) Rack and tank colour film processor machine operator Colour enlargement printer			
Colour quality corrector			
Kit mixing operator			
Colour printer operator	348.50	203.00	551.50

	Base Rate$	Arbitrated Safety Net Adjustments$	Minimum Rate$
SECTION B:—*continued*			
Developing, Printing And Finishing Establishments:			
(c) Rack and tank black and white film processor			
Black and white enlargement printer			
Black and white printer operator	341.10	203.00	544.10
(d) All others -			
First three months			528.40
(e) All others - Thereafter	338.30	203.00	541.30

SECTION C

(a) The rates of pay in this award include arbitrated safety net adjustments available since December 1993, under the Arbitrated Safety Net Adjustment Principle.

These arbitrated safety net adjustments may be offset against any equivalent amount in the rate of pay received by employees since 1 November 1991 above the rate prescribed in the Award, except where such absorption is contrary to the terms of an industrial agreement.

Increases in rates of pay otherwise made under the State Wage Case Principles, excepting those resulting from enterprise agreements, are not to be used to offset arbitrated safety net adjustments.

30. Plaster, Plasterglass and Cement Workers' Award No. A 29 of 1989

Clause 13. - Wages: Delete subclauses (1) and (2) of this clause and insert the following in lieu thereof:

			Wage Per Week$	Arbitrated Safety Net$	Total Wage Per Week$
(1)	(a)	Modeller	408.90	203.00	611.90
		Tool Allowance			1.44
	(b)	Plaster Caster	386.15	203.00	589.15
	(c)	Plaster Caster (Mechanical)	362.35	203.00	565.35
	(d)	Labourers	342.10	203.00	545.10
	(e)	Cement employee	338.25	203.00	541.25
	(f)	Trainee Casters – up to 40 per cent proficiency			528.40

Thereafter, such percentage of the plaster caster's total wage as is assessed in accordance with subclause (9) of Clause 7. – Adult Trainee Casters.

	(g)	Plant Operator	528.40
	(h)	Bagger	528.40
	(i)	Washer	528.40
	(j)	Front End Loader	528.40
	(k)	Fork Lift Driver	528.40
(2)	Junior Employees Under 21 years of age		475.60
	Under 20 years of age		422.80
	Under 19 years of age		369.90

31. Plywood and Veneer Workers' Award, 1952

Clause 5. - Wages: Delete subclauses (1) and (2) of this clause and insert the following in lieu thereof:

(1) The minimum rates of wages payable to employees covered by this Award shall be:

The rates of pay in this award include arbitrated safety net adjustments available since December 1993, under the Arbitrated Safety Net Adjustment Principle.

These arbitrated safety net adjustments may be offset against any equivalent amount in the rate of pay received by employees since 1 November 1991 above the rate prescribed in the Award, except where such absorption is contrary to the terms of an industrial agreement.

Increases in rates of pay otherwise made under the State Wage Case Principles, excepting those resulting from enterprise agreements, are not to be used to offset arbitrated safety net adjustments.

	Rate of Wage $	Supplementary Payment $	ASNA $	Award Rate $
Grade 1				528.40
Trainee Operator				
Factory/Yard Hand				
In/Out Feeder Assistant				
Hogger				
Cover Layer				
Packaging				

	Rate of Wage $	Supplementary Payment $	ASNA $	Award Rate $
Grade 2				528.40
Hilderbrand Dryer Infeed				
Schieldie Out/In Feed Control				
Asst. to Lathe/ Slicer Op				
Panel Grader Asst Desp				
Sander Asst.				
Taping				
Glue Mixer				
Core Sawyer				
Press Assist.				
Edging - Pre Gluer				
Log Charger				
Kuper Operator				
Veneer Assemb.				
Grade 3				528.40
Guillotine				
Groover				
Core Feeder				
Splicer Operator				
Clipper Operator				
Chain/Log Operator				
Dryer Grader				
Sander Operator				
Grade 4				528.40
Core/Centre Layer				
Panel Sawyer				
Slicer Operator				
Press Operator				
Grade 5	362.70	15.90	165.00	543.60
Slicer Machinist				
Lathe Machinist				

(2) Junior Employees: (percentage of Grade I rate of wage $311.70 and supplementary payments prescribed)

	%	Rate of Wage $	Supplementary Payment $	ASNA $	Award Rate $
Under 16	40				211.40
16 years	50				264.20
17 years	60				317.10
18 years	70				369.90
19 years	80				422.80
20 years	95				502.00

32. Poultry Breeding Farm & Hatchery Workers' Award 1976

Clause 9. - Wages: Delete this clause and insert the following in lieu thereof:

The minimum weekly rates of wage payable to employees employed under this award shall include the base rate plus the arbitrated safety net adjustment expressed hereunder:

(1) Poultry Breeding Farms	Base Rate $	Arbitrated Safety Net Adjustments $	Minimum Rate $
(a) General Hand - Maintenance			528.40
(b) General Hand - Other			528.40
(2) Hatcheries General Hand			528.40

(3) Junior Employees - Junior employees shall receive the prescribed percentage of the adult rate for the class of work on which they are engaged

	%
Under 16 years of age	50
16 to 17 years of age	60
17 to 18 years of age	70
18 to 19 years of age	80
19 to 20 years of age	90
At 20 years of age, adult rates	

(4)	Leading Hands In addition to the ordinary rate of pay, an employee placed in charge of more than 3 other employees shall receive	$ 25.05

(5) The rates of pay in this award include arbitrated safety net adjustments available since December 1993, under the Arbitrated Safety Net Adjustment Principle.

These arbitrated safety net adjustments may be offset against any equivalent amount in the rate of pay received by employees since 1 November 1991 above the rate prescribed in the Award, except where such absorption is contrary to the terms of an industrial agreement.

Increases in rates of pay otherwise made under the State Wage Case Principles, excepting those resulting from enterprise agreements, are not to be used to offset arbitrated safety net adjustments.

33. Printing Award

Clause 11. - Rate of Wages: Delete Parts 1 and 2 of this clause and insert the following in lieu thereof:

PART 1 RATE OF WAGES;

An adult employees' minimum award rate of wage is set out in Table A hereof, operative on and from the commencement of the first pay period on or after 1 July 2007.

TABLE A

GROUP LEVEL	BASE RATE	SAFETY NET ADJUSTMENT	AWARD RATE
	$	**$**	**$**
1			528.40
2	342.10	189.00	531.10
3	364.60	189.00	553.60
4	385.50	189.00	574.50
5	417.20	189.00	606.20

The rates of pay in this award include arbitrated safety net adjustments available since December 1993, under the Arbitrated Safety Net Adjustment Principle.

These arbitrated safety net adjustments may be offset against any equivalent amount in the rate of pay received by employees since 1 November 1991 above the rate prescribed in the Award, except where such absorption is contrary to the terms of an industrial agreement.

Increases in rates of pay otherwise made under the State Wage Case Principles, excepting those resulting from enterprise agreements, are not to be used to offset arbitrated safety net adjustments.

Junior and apprentices

Where the work is performed by a junior (other than a junior artist and/or designer or a junior keyboard operator/assembler) not being an apprentice, the minimum rates of wages shall be undermentioned percentages of the wage of an employee working at the rate prescribed for group level 2 of this award for the area in which he is employed:

TABLE B

AGE	**% OF LEVEL 2 WAGE**
under 16	40
16 years	50
17 years	60
18 years	70
19 years	80
20 years	90

Junior keyboard operator/assembler

The minimum rate of wage payable to a junior employed as a keyboard operator/assembler shall be the award rate of wage prescribed for group level 4 for the area in which he is employed.

Apprentice

Where the work is performed by an apprentice, the minimum rates of wages shall be the undermentioned percentages of the wage of a skilled employee working at the rate prescribed for group level 5 for the area in which he is employed:

TABLE C

YEAR	**% OF LEVEL 5 WAGE**
First	47.5
Second	60.0
Third	72.5
Fourth	87.5

Junior artist and/or designer (including junior commercial artist)

Where the work is performed by a junior artist and/or designer (including a junior commercial artist) the minimum rates of wages shall be undermentioned percentages of the wage of an employee working at the rate prescribed for group level 4 of this award for the area in which he is employed:

TABLE D

AGE	% OF LEVEL 4 WAGE
under 16 years	40
16 years	50
17 years	60
18 years	70
19 years	80
20 years	90

Adult apprentice

Where the work is performed by an adult apprentice, the minimum rates of wages shall be the undermentioned percentage of the wage of an employee working at the rate prescribed for group level 5 for the area in which he is employed:

TABLE E

YEAR	% OF LEVEL 5 WAGE
First	82.0
Second	87.0
Third	92.0
Fourth	100.0

An adult apprentice who enters his apprenticeship at an advanced stage pursuant to paragraph 36A(3)(b) of this award, shall be deemed, for the purposes of calculating the appropriate wage rate, to have completed the period by which he has been advanced.

Progress to the next year rate of wage shall occur when the balance of the year to which he has been advanced in his apprenticeship is completed.

Traineeship

Where the work is performed by a small offset printing trainee, a printing production support trainee, a print design trainee and a graphic arts merchants trainee under the terms of Clause 36B. - Traineeships, the wage rate shall be as set out in subclause (2) of that clause.

Calculation of rates in table "B"

The rate prescribed for all employees paid in accordance with the provisions of this table shall be calculated in multiples of 10 cents, amounts less than 5 cents being taken to the lower multiple and amounts of 5 cents or more being taken to the higher multiple.

"Overaward payments" is defined as the amount (whether it be termed "overaward payment", "attendance bonus", "service increment", or any other terms whatsoever) which an employee would receive in excess of the "base rate" of pay set out in Table A. Payments such as overtime, shift allowances, penalty rates, disability allowance, fares and travelling time allowance and other ancillary payment of like nature prescribed by this award shall be excluded from the definition.

PART 2 - CLASSIFICATION STRUCTURE

The classification structure relates to an adult employee performing the description of employment set out in the second column below. The Group Level for the adult employee is shown in the third column and the appropriate minimum weekly rate of pay in the fourth column.

	COLUMN 2 DESCRIPTION OF EMPLOYMENT	COLUMN 3 GROUP LEVEL	COLUMN 4 MINIMUM WEEKLY WAGE $
a)	Compositor	5	606.20
b)	Keyboard Operator	4	574.50
c)	Proof Reader	4	574.50
d)	Proof Readers' Assistant	2	531.10
e)	Printing Machinist	5	606.20
f)	Artist/Designer	4	574.50

	COLUMN 2 DESCRIPTION OF EMPLOYMENT —*continued*	COLUMN 3 GROUP LEVEL	COLUMN 4 MINIMUM WEEKLY WAGE $
g)	Graphic Reproducer	5	606.20
	(i) Image Preparer		
	(ii) Plate Preparer		
	(iii) Cylinder Preparer		
h)	Small Offset Machinist	4	574.50
i)	Non Impact Printing Machinist (including Electronic and Laser Printing Machine Operator)	4	574.50
j)	Binder/Finisher	5	606.20
k)	Employee employed directly in connection with stationery, system work, addressograph work, paper products	2	531.10
l)	Feeder on any machine	2	531.10
m)	Storeperson	3	553.60
n)	Screen Printing:		
	(i) Stencil Preparer	5	606.20
	(ii) Power Driven Screen PrintingMachine Operator	3	553.60
	(iii) Screen attendant	2	531.10
o)	An employee not otherwise specified	1	528.40

The rates of pay in this award include arbitrated safety net adjustments available since December 1993, under the Arbitrated Safety Net Adjustment Principle.

These arbitrated safety net adjustments may be offset against any equivalent amount in the rate of pay received by employees since 1 November 1991 above the rate prescribed in the Award, except where such absorption is contrary to the terms of an industrial agreement.

Increases in rates of pay otherwise made under the State Wage Case Principles, excepting those resulting from enterprise agreements, are not to be used to offset arbitrated safety net adjustments.

34. The Rock Lobster and Prawn Processing Award 1978

Clause 7. - Wages: Delete subclause (1) of this clause and insert the following in lieu thereof:

(1) Adult Employees

The following shall be the minimum weekly rate of wage payable to employees covered by this award, with effect on and from the commencement of the first pay period on or after 1 July 2007.

Classifications	Base Rates Per Week $	Arbitrated Safety Net Adjustments $	Total Award Rate Per Week $
(a) Grader	325.95	203.00	528.95
(b) Process Employee			528.40

The rates of pay in this award include arbitrated safety net adjustments available since December 1993, under the Arbitrated Safety Net Adjustment Principle.

These arbitrated safety net adjustments may be offset against any equivalent amount in the rate of pay received by employees since 1 November 1991 above the rate prescribed in the Award, except where such absorption is contrary to the terms of an industrial agreement.

Increases in rates of pay otherwise made under the State Wage Case Principles, excepting those resulting from enterprise agreements, are not to be used to offset arbitrated safety net adjustments.

35. Rope and Twine Workers' Award

Clause 19. - Wages: Delete subclause (1) of this clause and insert the following in lieu thereof:

		Rate $	Arbitrated Safety Net Adjustment $	TotalRate $
(1)	Adult Employees			
	Rope layer on heavy type strand machine			528.40
	Rope layer (other) in walk with traveller			528.40

		Rate	Arbitrated Safety Net Adjustment	TotalRate
		$	$	$
(1)	Adult Employees—*continued*			
	Rope splicer on driving ropes and springs			528.40
	Combination spinning and spooling machine operator			528.40
	Rope house machinist			528.40
	Feeder on first spreader			528.40
	Oiler and/or belt repairer			528.40
	Employees lumping, loading and unloading hemp			528.40
	All other machine operators or employees feeding or taking from machines			528.40
	All others			528.40

36. Saw Servicing Establishments Award No. 17 of 1977

Clause 28. - Wages: Delete subclause (1) of this clause and insert the following in lieu thereof:

(1) Rate Per Week:

The minimum rate of wages payable to employees employed in classifications contained in this subclause shall be as follows:

		Base Rate $	Arbitrated Safety Net Adjustment $	Total Minimum Award Rate (38 Hours) $
(a)	Saw Doctor Special Skills	438.10	173.00	611.10
(b)	Saw Doctor	417.20	173.00	590.20
(c)	Saw Filer	385.50	173.00	558.50
(d)	Factory Hand			528.40

37. Ship Painters' and Dockers' Award

Division II, Clause 4. - Rates of Wages: Delete subclause (1) of this clause and insert the following in lieu thereof:

(1) The following shall be the minimum rates of wages payable to employees employed under this Division –

		Per Week$	ASNA	TOTAL
(a)	Rigger			528.40
(b)	General Hand			528.40

2. Division IV: Clause 2 Rates of Wages

Delete subclause (1) of this clause and insert in lieu:

(1) The minimum weekly rates of wages for employees bound by this Division shall be –

		Per Week	
		A$	B$
(a)	(i) Rigger Certificated		528.40
	(ii) Rigger Not Certificated		528.40
(b)	General Hand		528.40

(c) In any week when ship repair work is performed the parties may agree to the payment of a ship repair allowance to compensate for the disabilities associated with that work. The allowance agreed upon shall be in lieu of the provisions of Clause 3. – Special Rates of Division I of this award.

The rates of pay in this award include arbitrated safety net adjustments available since December 1993, under the Arbitrated Safety Net Adjustment Principle.

These arbitrated safety net adjustments may be offset against any equivalent amount in the rate of pay received by employees since 1 November 1991 above the rate prescribed in the Award, except where such absorption is contrary to the terms of an industrial agreement.

Increases in rates of pay otherwise made under the State Wage Case Principles, excepting those resulting from enterprise agreements, are not to be used to offset arbitrated safety net adjustments.

38. Show Grounds Maintenance Worker's Award

Clause 27. - Wages: Delete subclause (2) of this clause and insert the following in lieu thereof:

			Rate Per Week$	ASNA	TOTAL
(2)	(a)	Motor Vehicle Drivers -			
		Not exceeding 25cwt capacity			528.40
		Exceeding 25cwt but not exceeding 3 tons capacity			528.40
		Exceeding 3 tons but under 6 tons capacity			528.40
		Exceeding 6 tons and over but under 7 tons capacity			528.40
		Exceeding 7 tons and over but under 8 tons capacity			528.40
	(b)	Machine Drivers -			
		Operator-powered roller under 8 tons			528.40
		Operator-powered roller 8 tons and over			528.40
		Operator-powered vibrating roller under 4 tons			528.40
		Operator-powered vibrating roller 4 tons and over			528.40
		Operator-powered road roller pneumatic tyred 8 tons and over			528.40
		Operator-tractor-pneumatic tyred without power operated attachments -			
		(i) Classes 1 and 2			528.40
		(ii) Classes 3, 4, 5 and 6 (including tractors tilting or a one man hitch trailer)			528.40
		(iii) Over Class 6			528.40
		Operator-tractor-pneumatic tyred with power operated attachments -			
		(i) Classes 1 and 2			528.40
		(ii) Classes 3, 4, 5 and 6 (not including tractors tilting or a one man hitch trailer)			528.40
		(iii) Over Class 6 and up to and including 230 engine horsepower			528.40
		(iv) Over Class 6 with power operated attachments in excess of 230 engine horsepower			528.40
		Operator - Graders -			
		(i) Drawn Graders			528.40
		(ii) Grader - power operated below 50 net engine horsepower			528.40
		(iii) Grader - power operated 50 to 100 net engine horsepower			528.40
		(iv) Grader - power operated above 100 net engine horsepower			528.40
		Operator of portable petrol driven crosscut or circular saw			528.40
	(c)	Gardeners -			
		Propagator			528.40
		Nurserymen, first class gardeners appointed as such by the employer and street tree pruners			528.40
		Gardeners planting out and attending flower beds and assisting nurserymen			528.40
		Hand power motor mower			528.40
		Hand rotary hoe and operators of other machines			528.40
		Sprayers or fumigators of noxious weeds and/or pests vermin, mosquitoes, or ants or workers employed in destroying blackberry bush or boxthorn -			
		(i) Hand operated			528.40
		(ii) Power Operated			528.40

		Rate Per Week$	ASNA	TOTAL
(d)	General -			
	Track hands			528.40
	Machine man (jackhammer)			528.40
	Concrete slab layer			528.40
	Concrete kerb layer			528.40
	Concrete finisher			528.40
	Others			528.40

The rates of pay in this award include arbitrated safety net adjustments available since December 1993, under the Arbitrated Safety Net Adjustment Principle.

These arbitrated safety net adjustments may be offset against any equivalent amount in the rate of pay received by employees since 1 November 1991 above the rate prescribed in the Award, except where such absorption is contrary to the terms of an industrial agreement.

Increases in rates of pay otherwise made under the State Wage Case Principles, excepting those resulting from enterprise agreements, are not to be used to offset arbitrated safety net adjustments.

39. Theatrical Employees (Perth Theatre Trust) Award No. 9 of 1983

Clause 5. - Rates of Pay: Delete this clause and insert the following in lieu thereof:

5. - RATES OF PAY

The rates of pay in this award include arbitrated safety net adjustments available since December 1993, under the Arbitrated Safety Net Adjustment Principle.

These arbitrated safety net adjustments may be offset against any equivalent amount in the rate of pay received by employees since 1 November 1991 above the rate prescribed in the Award, except where such absorption is contrary to the terms of an industrial agreement.

Increases in rates of pay otherwise made under the State Wage Case Principles, excepting those resulting from enterprise agreements, are not to be used to offset arbitrated safety net adjustments.

The minimum weekly award rate of pay to be paid to an employee shall be as follows -

			MINIMUM RATE	SUPPLE-MENTARY PAYMENT	ASNA	TOTAL MINIMUM AWARD RATE
			$	$	$	$
(1)		Stage Management Section				
	(a)	Technical Stage Manager	500.40	8.00	203.00	711.40
	(b)	Stage Manager	472.40	8.00	205.00	685.40
	(c)	Assistant Stage Manager	390.00	8.00	203.00	601.00
(2)		Mechanical Department				
	(a)	Workshop				
	(i)	Head carpenter	460.40	8.00	205.00	673.40
	(ii)	Carpenter	406.30	8.00	203.00	617.30
	(iii)	Carpenter's assistant	357.50	8.00	203.00	568.50
	(b)	Stage				
	(i)	Head mechanist/head road manager	460.40	8.00	205.00	673.40
	(ii)	Mechanist/head flyman/road manager	406.30	8.00	203.00	617.30
	(iii)	Stage hand/flyman	357.50	8.00	203.00	568.50
		Loading for stage hands in charge of side/revolve truck: 8 per cent.				
(3)		Electrical/Lighting Department				
	(a)	Head electrician	460.40	8.00	205.00	673.40
	(b)	Electrician/main switchboard operator	406.30	8.00	203.00	617.30
	(c)	Electrical hand	357.50	8.00	203.00	568.50
		Loading for electrical hand who is required to operate spots/auxiliary switchboard/visual effects: 8 per cent.				
(4)		Audio Department				
	(a)	Head audio technician	460.40	8.00	205.00	673.40
	(b)	Audio operator	406.30	8.00	203.00	617.30
	(c)	Audio hand	357.50	8.00	203.00	568.50
		N.B. Where there is no separate audio department the audio operator/hand shall be classified under (3) Electrical/Lighting Department.				

			MINIMUM RATE	SUPPLE-MENTARY PAYMENT	ASNA	TOTAL MINIMUM AWARD RATE
			$	$	$	$
(5)		Wardrobe Section				
	(a)	Workshop				
	(i)	Head of wardrobe	460.40	8.00	205.00	673.40
	(ii)	Cutter/tailor/ wigmaker/milliner	406.30	8.00	203.00	617.30
	(iii)	Seamstress/maintenance hand/buyer/costume jeweller	357.50	8.00	203.00	568.50
	(b)	Stage				
	(i)	Head of department	460.40	8.00	205.00	673.40
	(ii)	Wardrobe hand/dresser/valet	406.30	8.00	203.00	617.30
(6)		Property Department				
	(a)	Workshop				
	(i)	Property master/mistress	460.40	8.00	205.00	673.40
	(ii)	Property maker	406.30	8.00	203.00	617.30
	(iii)	Property hand	357.50	8.00	203.00	568.50
	(b)	Stage				
	(i)	Property master/mistress	460.40	8.00	205.00	673.40
	(ii)	Property hand	357.50	8.00	203.00	568.50
(7)		Art Department				
	(a)	Scenic Artist	460.40	8.00	205.00	673.40
	(b)	Assistant scenic artist	406.30	8.00	203.00	617.30
	(c)	Artist's labourer	357.50	8.00	203.00	568.50
(8)		Services				
	(a)	Receptionist/telephonist (enquiry clerk)	348.30	8.00	203.00	559.30
	(b)	Firefighter				556.40
	(c)	Utility person	349.40	8.00	203.00	560.40
	(d)	Stage Door Keeper				556.40
(9)		Cleaners				
	(a)	Head cleaner	371.50	8.00	203.00	582.50
	(b)	Cleaner	364.10	8.00	203.00	575.10
		Engaged by the hour (with a minimum payment as of three and a half hours).				
			$			
		8.00 a.m. to 6.00 p.m.	16.14			
		6.00 p.m. to midnight	23.85			
		midnight to 8.00 a.m.	31.56			
(10)		Skilled labour not classified elsewhere	460.40	8.00	205.00	673.40
(11)		Unskilled labour not classified elsewhere				556.40
(12)		Additional Rates				

Persons employed as casuals in the following classifications shall be paid the specified hourly amounts in addition to the wage provided elsewhere:

	MINIMUM RATE	SUPPLE-MENTARY PAYMENT	ASNA	TOTAL MINIMUM AWARD RATE
	$	$	$	$
Main switchboard operator	1.70			
Head flyman	1.52			
Person in charge of side	0.70			

			MINIMUM RATE	SUPPLE-MENTARY PAYMENT	ASNA	TOTAL MINIMUM AWARD RATE
			$	$	$	$
(13)		Front of House	$	$	$	$
	(a)	Senior Booking Office Supervisor	498.80	8.00	205.00	711.80
	(b)	Head Booking Clerk (i.e. one who supervises the staff)	467.00	8.00	205.00	680.00
	(c)	Booking Clerk (including party bookings)	438.90	8.00	203.00	649.90
	(d)	Ticket Seller	384.30	8.00	203.00	595.30
	(e)	Programme/concession sellers/ushers/ticket takers/cloakroom attendant	348.30	8.00	203.00	559.30

Booking clerks and ticket sellers shall not be held responsible for cash shortages when they are instructed to allow another employee (including the manager of the venue) access to their cash or tickets during a selling period

40. Theatrical Employees Entertainment, Sporting and Amusement Facilities (Western Australian Government) Award 1987

Schedule A - Rates of Payment: Delete this schedule and insert the following in lieu thereof:

SCHEDULE A – RATES OF PAYMENT

	Classification	Hourly Rate of Pay			
		Column A $	Column B	ASNA	TOTAL
(1)	Attendant - General Duties: Cloakroom Attendant Gate Attendant Parking Attendant Turnstile Attendant Usher				13.91
(2)	Barrier Attendant (Racing) Change Room Attendant Curtain Attendant Door Attendant Fence Attendant Kennel Attendant/Dog Leader Ride Operator Stalls Attendant (Racing) Ticket Collector/Examiner Track Attendant				13.91
(3)	Scoreboard Operator Scratching Board Operator/ Writer (Racing)				13.91
(4)	Parking Fee Collector Kennel Supervisor Programme Seller				13.91
(5)	Change Cashier Gate Keeper Ticket/Token Seller Turnstile Operator				13.91
(6)	Scales – Assistant Starter (Racing)				13.91
(7)	Supervisor of less than 10 employees				13.91
(8)	Supervisor of 10 or more employees				13.91

The rates of pay in this award include arbitrated safety net adjustments available since December 1993, under the Arbitrated Safety Net Adjustment Principle.

These arbitrated safety net adjustments may be offset against any equivalent amount in the rate of pay received by employees since 1 November 1991 above the rate prescribed in the Award, except where such absorption is contrary to the terms of an industrial agreement.

Increases in rates of pay otherwise made under the State Wage Case Principles, excepting those resulting from enterprise agreements, are not to be used to offset arbitrated safety net adjustments.

41. Watchmakers' and Jewellers' Award, 1970

Clause 8. - Wages: Delete subclause (1) of this clause and insert the following in lieu thereof:

(1) The minimum weekly rate of wage payable to adult employees covered by this award shall include the base rate plus the arbitrated safety net adjustment expressed hereunder, on and from the commencement of the first pay period on or after 1 July 2007.

		Base Rate $	Supple-mentary Payment$	Arbitrated Safety Net Adjustments $	Minimum Rates $
(a)	Watchmaker, Clockmaker watch and clock repairer	365.20	52.00	205.00	622.20
(b)	Jeweller, setter, general jeweller's tradesman and engraver	365.20	52.00	205.00	622.20
(c)	***Process Worker % of trade***				
	Grade 1 78				528.40
	Grade 2 80	292.16	36.80	203.00	531.96
	Grade 3 85	310.42	40.60	203.00	554.02

FULL BENCH—Appeals against decision of Commission—

2008 WAIRC 00215

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2008 WAIRC 00215
CORAM	**:**	THE HONOURABLE M T RITTER, ACTING PRESIDENT CHIEF COMMISSIONER A R BEECH COMMISSIONER S WOOD
HEARD	**:**	MONDAY, 11 FEBRUARY 2008
DELIVERED	**:**	THURSDAY, 10 APRIL 2008
FILE NO.	**:**	FBA 21 OF 2007
BETWEEN	**:**	HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS) Appellant AND DIRECTOR GENERAL OF HEALTH IN RIGHT OF THE MINISTER FOR HEALTH AS THE METROPOLITAN HEALTH SERVICE, THE SOUTH WEST HEALTH BOARD AND THE WA COUNTRY HEALTH SERVICE Respondent

ON APPEAL FROM:

Jurisdiction	**:**	**Public Service Arbitrator**
Coram	**:**	**Commissioner P E Scott**
Citation	**:**	**(2007) 87 WAIG 3120**
File No	**:**	**PSACR 28 of 2006**

Catchwords:

Industrial Law (WA) – appeal against decision of the Public Service Arbitrator – procedural fairness – employee suspended on full pay for alleged misconduct then later suspended without pay when criminal charges to be laid – employer failed to afford opportunity to be heard

Meaning of s26(1)(a) that Arbitrator exercise jurisdiction *"according to equity, good conscience and the substantial merits of the case"* – relevance of legal principles of procedural fairness to Arbitrator's jurisdiction.

'Futility' – test to be applied - whether affording an opportunity to be heard futile – 'hardship' - employee deferred making submissions to avoid jeopardising pending criminal charges – public interest - whether procedural unfairness 'cured' by arbitration.

Meaning of *"void"* in context of decisions upon employment status made pursuant to a statutory power – whether decision to suspend without pay void - nature of suspension of public sector employees.

Breach of procedural fairness and damages - appellant sought payment of past and future remuneration - Arbitrator not in a position to make orders for non-receipt of past remuneration – 'no service no pay' principle - basis for payment of past remuneration not made out – decision to suspend without pay nullified.

Legislation:

Hospitals and Health Services Act 1927 (WA) – s7

Industrial Relations Act 1979 (WA) – ss6, 7, 22A, 26(1)(a), 26(1)(c), 36, 46, 44(7), 44(9), 48(11), 49, 50A, 62(2), 62(3), 66, 73, 80C, 80D, 80E, 80G(1), 84.

Industrial Relations Commission Regulations 2005 – r31

Interpretation Act 1984 (WA) – s52(1)(a)

Minimum Conditions of Employment Act 1993 (WA)

Public Sector Management Act 1994 (WA) – ss9, 34, 76(1), 82

Result:

Appeal allowed

Representation:

Counsel:

Appellant	:	Mr T. Borgeest, by leave
Respondent	:	Mr R. Andretich, by leave

Solicitors:

Appellant:		Slater & Gordon, Lawyers
Respondent	:	State Solicitor for Western Australia

Case(s) referred to in reasons:

Administration of the Territory Papua New Guinea v Daera Guba (1973) 130 CLR 353

Amalgamated Metal Workers and Shipwrights Union of Western Australia and Another v State Energy Commission of Western Australia (1979) 59 WAIG 494

Applicant NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs (2004) 221 CLR 1

Attorney-General (NSW) v Quin (1990) 170 CLR 1

Automatic Fire Sprinklers Pty Ltd v Watson (1946) 72 CLR 435

Balenzuela v De Gail (1959) 101 CLR 226

Ballantyne v WorkCover Authority of New South Wales [2007] NSWCA 239

Bannister v Director General, Department of Corrective Services [2005] 1 Qd R 117

Birss v Secretary for Justice [1984] 1 NZLR 513

Browne v Commissioner of Railways (1935) 36 SR (NSW) 21

Byrne and Frew v Australian Airlines Ltd (1995) 185 CLR 410

Calvin v Carr (1979) 1 NSWLR 1; [1980] AC 574

Chate v Commissioner of Police (1997) 76 IR 70

Chief Constable of North Wales Police v Evans (1982) 3 All ER 141

Chief Executive Officer, Department of Agriculture and Food v Wall & Ward (2008) 88 WAIG 156

Commissioner for Railways (NSW) v Cavanaugh (1935) 53 CLR 220

Concut Pty Ltd v Worrell (2000) 176 ALR 693

Coulton v Holcombe (1986) 162 CLR 1

Csomore v Public Service Board of New South Wales (1987) 10 NSWLR 587

Director-General Department of Justice v Civil Service Association of Western Australia Inc [2005] WASCA 244; (2005) 149 IR 160

Director-General, Department of Justice v Civil Service Association of Western Australia Inc (2003) 83 WAIG 908

The Director General of the Department of Justice v The Civil Service Association of Western Australia (Inc) (2004) 85 WAIG 629

Dixon v Commonwealth of Australia (1981) 61 ALR 173

Dunlop v Woolahra Municipal Council [1982] AC 158

Eaton v Overland (2001) 67 ALD 671

Everingham v Director General of Education (1993) 31 ALD 741; (Unreported, FCSASC, 17 September 1993)

Featherston v Tully (2002) 83 SASR 302

Foong v Norfolk Island Hospital Enterprise (2002) 170 FLR 354

Gapes v Commercial Bank of Australia Ltd (1980) 37 ALR 20; 41 FLR 21

Garbett v Midland Brick [2003] WASCA 36

Gerlach v Clifton Bricks Pty Ltd [2002] HCA 22; (2002) 209 CLR 478

Grady v Commissioner for Railways (NSW) (1935) 53 CLR 229

Griggs v Norris Group of Companies (2006) 94 SASR 126

Gromark Packaging v The Federated Miscellaneous Workers Union of Australia, WA Branch (1992) 73 WAIG 220

Grundman v Repatriation Commission [2001] FCA 892; (2001) 66 ALD 125

Herron v McGregor (1986) 6 NSWLR 246 at 266

Hill v Green (1999) 48 NSWLR 161

House v King (1936) 55 CLR 499

Hunkin v Siebert (1934) 51 CLR 538

Jarratt v Commissioner of Police (NSW) (2005) 224 CLR 44

John v Rees [1970] Ch 345

Jones v National Coal Board [1957] 2 QB 55

Kioa v West (1985) 159 CLR 550

Lee v Naismith [1990] VR 235

Macksville and District Court Hospital v Mayze (1987) 10 NSWLR 708

Malloch v Aberdeen Corporation [1971] 1 WLR 1578

Matkevich v NSW Technical and Further Education Commissioner [No. 3] (Unreported, NSWCA, 2 February 1996, BC 9600084)

Minister for Immigration and Multicultural Affairs v Bhardwaj (2002) 209 CLR 597

Minister for Immigration and Multicultural Affairs v Eshetu (1999) 197 CLR 611

NAIS v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 228 CLR 470; 223 ALR 171

Nicholson v Heaven and Earth Gallery (1994) 1 IRCR 199

Northern Territory v Mengel (1996) 185 CLR 307

Park Oh Ho v Minister for Immigration and Ethnic Affairs (1989) 167 CLR 637

Qantas Airways Ltd v Gubbins (1992) 28 NSWLR 26

Queensland Police Credit Union Ltd v Criminal Justice Commission [2000] 1 Qd R 626

Re Ciffolilli; Ex parte Rogers [1999] WASCA 205

Re Kenner; ex parte Minister For Education [2003] WASCA 37

Re Martin; ex parte Dipane (2005) 30 WAR 164

Re Minister for Immigration and Multicultural Affairs ex parte Miah (2001) 206 CLR 57

Re Piper; Ex parte Meloney (1996) 63 IR 473

Re Refugee Tribunal; Ex parte AALA (2000) 204 CLR 82

Registrar v Liquor, Hospitality and Miscellaneous Union, Western Australian Branch (2007) 87 WAIG 1199

Reid v Australian Institute of Marine and Power Engineers and Others (1990) 96 ALR 174

Ridge v Baldwin (1963) 2 All ER 63

SGIC v Johnson (1997) 77 WAIG 2169

SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 228 CLR 152

Santos Ltd v Saunders (1988) 49 SASR 556

Schmohl v Commonwealth of Australia (1983) 49 ACTR 24

Shire of Esperance v Peter Maxwell Mouritz (1991) 71 WAIG 891

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

Sue v Hill and Another (1999) 199 CLR 462

Townsville City Council v Chief Executive, Department of Main Roads [2006] Qd R 77

Ucar v Nylex Products Pty Ltd [2007] VSCA 181

Wall v Windridge (1999) 1 Qd R 329

Wallwork v Fielding [1922] 2 KB 66

Welbourn v Australian Postal Commission [1984] VR 257

Reasons for Decision

RITTER AP:

Summary of Outcome

1 The paragraphs under this heading are published with the agreement of Beech CC and Wood C.

2 This appeal was against the dismissal, after a hearing, of the appellant's application to the Public Service Arbitrator (the Arbitrator). The hearing was about the respondent's decision to suspend without pay the respondent's employee and the appellant's member, Mr Michael Moodie.

3 Before the Arbitrator the appellant argued the respondent denied Mr Moodie procedural fairness in making the decision without giving him the opportunity to be heard. It was contended therefore that the decision was "*void*", with the consequence that the respondent should be ordered to remunerate Mr Moodie for the period since the decision was made and until the making of any lawful decision to suspend without pay.

4 The Arbitrator decided it would have been "*futile*" to have provided Mr Moodie with an opportunity to be heard; and in any event the "*merits*" favoured suspension without pay.

5 Although each member of the Full Bench has written and will publish their own reasons, there is agreement that, with respect, the Arbitrator erred on the "*futility issue*" and was not then in a position to decide that the "*merits*" favoured the suspension of Mr Moodie without pay.

6 In our opinion the decision of the respondent ought to have been nullified by the Arbitrator with a direction that if the respondent again wished to decide whether to suspend Mr Moodie without pay, a reasonable opportunity should be given to him to be heard. Accordingly the appeal should be upheld and the decision of the Arbitrator varied so that these orders are now made.

7 We are not persuaded however, in part because of the way which the appellant conducted the hearing before the Arbitrator, that the Arbitrator would have been justified in making an order to redress the non receipt of past remuneration.

8 As we are of the opinion that the decision of the respondent to suspend Mr Moodie without pay should be nullified, a consequence is that the respondent and Mr Moodie will again be in the position which they were prior to the making of the impugned decision. This is that the respondent has made a decision to direct Mr Moodie to remain away from the workplace on "*full pay*" until otherwise determined by the respondent

9 A minute of proposed order has been published reflecting these joint opinions. The parties will then have the entitlement to "*speak to*" the minute. In our preliminary opinion this could be done by the parties providing any submissions they wish to make in writing within 14 days. If either party considers that some other procedure should be adopted, they can advise the Full Bench in writing of their position which the Full Bench will then consider.

10 The following represent my reasons for reaching these conclusions.

The Appeal

11 This is an appeal to the Full Bench pursuant to s49 of the *Industrial Relations Act 1979* (WA) (*the Act*) against a decision of the Arbitrator to dismiss the appellant's application.

Leave to Appeal

12 The Notice of Appeal asserted leave to appeal is required under s49(2a) of *the Act.* In my opinion it is not. Section 49(2a) applies to an appeal against a "*finding*". That word 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*". As the decision of the Arbitrator was to dismiss the application it did finally dispose of the proceedings and therefore leave is not required. The respondent did not contend otherwise.

The Statutory Setting

13 Before discussing the procedural background and facts, I will set out and briefly comment upon the jurisdiction of the Arbitrator. I will later analyse it in more detail.

14 The Arbitrator's jurisdiction is established by ss80C-80L of *the Act*, within Division 2 of Part IIA. The Arbitrator is defined in s80C(1) to mean "*the Commission constituted by a public service arbitrator appointed under this Division*". Section 80D is about the appointment of a member or members of the Commission as Arbitrators. Section 80E sets out the jurisdiction of the Arbitrator. The general jurisdiction of the Arbitrator is contained in s80E(1) which is as follows:

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

15 Section 80E(2) describes jurisdiction which is included within the general description in s80E(1), but it is not necessary to discuss it in this appeal. There are three qualifications to the general jurisdiction of the Arbitrator which are specified in s80E(1) of *the Act*. The first is what is contained in Division 3 of Part II. This is about general orders by the Commission. Secondly s80E(6) is about the referral by the Arbitrator of an industrial matter to the Commission in Court Session or a question of law to the Full Bench. Thirdly s80E(7) provides the Arbitrator does not have jurisdiction to enquire into, deal with or refer "*any matter in respect of which a procedure referred to in section 97(1)(a) of the Public Sector Management Act 1994 is, or may be, prescribed under that Act*". None of these three qualifications are relevant to the appeal.

16 Section 80E(5) of *the Act* is also a qualification to the jurisdiction of the Arbitrator, but it is relevant to the appeal. It provides:

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

17 Section 80E(5) distinguishes between the "*exercise*" by an employer of a "*power in relation to any matter*" and an "*act, matter or thing done by an employer in relation*" to the "*matter*". It is only in the latter circumstances that the Arbitrator has powers to review, modify, nullify or vary. Section 80E does not however set out the criteria or basis upon which the Arbitrator is to decide whether to take one of these four actions.

18 Section 80F is about by whom matters may be referred to the Arbitrator. That is not an issue in this appeal.

19 Section 80G(1) of *the Act* is relevant to the appeal and provides:

> ***"80G. Provisions of Part II Division 2 to apply***
>
> *(1) Subject to this Division, the provisions of Part II Divisions 2 to 2G that apply to or in relation to the exercise of the jurisdiction of the Commission constituted by a commissioner shall apply with such modifications as are prescribed and such other modifications as may be necessary or appropriate, to the exercise by an Arbitrator of his jurisdiction under this Act.*"

20 Part II of *the Act* is about the Commission. Divisions 2-2G are comprised by ss22A-49O of *the Act*. The general jurisdiction and powers of the Commission comprises ss22A-36 of *the Act*. In its recent decision in *Chief Executive Officer, Department of Agriculture and Food v Wall & Ward* (2008) 88 WAIG 156 the Full Bench discussed the interaction between the jurisdiction of the Arbitrator and the general jurisdiction of the Commission. For present purposes it is sufficient to note that s80G(1) has the effect that generally, in the interaction, the contents of Division 2 of Part IIA have primacy. This arises from the use of the expression "*[s]ubject to this Division*" in s80G(1). Within that limitation the provisions of Part II, Divisions 2-2G that apply to or in relation to the exercise of the general jurisdiction of the Commission apply to the exercise of the Arbitrator's jurisdiction. There are no prescribed modifications as contemplated by s80G(1).

21 Section 26(1) of *the Act* is relevant to the present appeal. This is a section which applies, in the words of s80G(1), "*in relation to the exercise of the jurisdiction of the Commission*". It therefore applies to the Arbitrator's jurisdiction. Section 26(1) provides:

> "*(1) In the exercise of its jurisdiction under this Act the Commission —*
>
> *(a) shall act according to equity, good conscience, and the substantial merits of the case without regard to technicalities or legal forms;*
>
> *(b) shall not be bound by any rules of evidence, but may inform itself on any matter in such a way as it thinks just;*
>
> *(c) shall have regard for the interests of the persons immediately concerned whether directly affected or not and, where appropriate, for the interests of the community as a whole; and*
>
> *(d) shall take into consideration to the extent that it is relevant —*

> *(i) the state of the national economy;*
>
> *(ii) the state of the economy of Western Australia;*
>
> *(iii) the capacity of employers as a whole or of an individual employer to pay wages, salaries, allowances or other remuneration and to bear the cost of improved or additional conditions of employment;*
>
> *(iv) the likely effects of its decision on the economies referred to in subparagraphs (i) and (ii) and, in particular, on the level of employment and on inflation;*
>
> *(v) any changes in productivity that have occurred or are likely to occur;*
>
> *(vi) the need to facilitate the efficient organisation and performance of work according to the needs of an industry and enterprises within it, balanced with fairness to the employees in the industry and enterprises;*
>
> *(vii) the need to encourage employers, employees and organisations to reach agreements appropriate to the needs of enterprises and the employees in those enterprises.*"

22 Division 2C of Part II of *the Act* is about the "*Holding of compulsory conferences*". In the present case, the appellant, as an organisation registered under *the Act*, exercised its entitlement under s44(7) to apply to the Commission for a compulsory conciliation conference. A conference was held but it did not resolve the whole of the dispute. Section 44(9) provides, in such circumstances:

> "*(9) Where at the conclusion of a conference held in accordance with this section any question, dispute, or disagreement in relation to an industrial matter has not been settled by agreement between all of the parties, the Commission may hear and determine that question, dispute, or disagreement and may make an order binding only the parties in relation to whom the matter has not been so settled.*"

23 The way in which this jurisdiction proceeds is set out in regulation 31 of the *Industrial Relations Commission Regulations 2005* (*the Regulations*). This provides:

> "***31. Memorandum following compulsory conference***
>
> *Where at the conclusion of a conference under section 44 of the Act a matter is to be heard and determined by the Commission, the Commission is to draw up or cause to be drawn up and sign, a memorandum of the matter requiring hearing and determination and for that purpose may direct parties to file statements of claim, answers, counter-proposals and replies in such manner and within such time as the Commission sees fit.*"

Facts and Proceedings

24 It is necessary in my opinion to discuss the facts and proceedings in some detail. This is because the appeal, to a significant degree, turns upon on the facts and the basis upon which the proceedings at first instance were conducted. To set the scene however I will first provide a factual overview.

Factual Overview

25 As I have said, the appellant is a registered organisation under *the Act.* Mr Michael Moodie is a member of the appellant. From 28 November 2005 he has been the Executive Director, Technology, of the South West Area Health Service. The respondent is the employing authority with responsibility for Mr Moodie. As I will set out in more detail later, from 7 July 2006 the respondent suspended Mr Moodie from duty with pay, because of serious allegations which were to be investigated. A Mr Hodkinson was engaged by the respondent to inquire into and prepare a report about the allegations. A copy of his report, dated 29 September 2006, was provided to Mr Moodie's solicitors with an accompanying letter on 6 October 2006. The letter said Mr Moodie had an opportunity to respond to the report. On 19 October 2006 Mr Moodie's solicitors wrote to the respondent to request that he not be required to respond to the report within the requested time. This was because Mr Moodie was to be charged with parallel criminal offences by the Corruption and Crime Commission of Western Australia (the CCC). On 20 October 2006 the respondent said in writing that given Mr Moodie was to be charged, he was now suspended from duty without pay.

The Application

26 After this letter was received, but on the same date, the appellant filed an application to the Arbitrator for a conciliation conference pursuant to s44 of *the Act*. Schedule A to the application set out the grounds and reasons for the application. Relevantly the application said:

(a) The appellant was in dispute with the respondent about allegations made against Mr Moodie.

(b) There was concern about a lack of procedural fairness, the manner and nature of the investigation into allegations, the failure of the respondent to provide adequate time to respond, the failure of the respondent to provide adequate access to records and other materials necessary to be able to adequately respond to the allegations within the time permitted, the "*request for Mr Moodie to be on paid leave for an extensive period*", the failure of the respondent to make contact with Mr Moodie and the failure of the respondent to use the usual or normal administrative policies in an attempt to resolve the issues in question.

(c) The activities of a "*third party*" were complicating the endeavours of the appellant and Mr Moodie to resolve the dispute and made it inappropriate for the respondent to continue its present course of action requiring Mr Moodie to respond to allegations.

(d) Any determination arising from the respondent's course of action would generate publicity and make it difficult for the respondent to make a proper determination and if the determination were adverse to Mr Moodie it would "*inevitably prejudice our member's ability to be dealt with fairly in other jurisdictions*".

(e) The approach taken by the respondent was detrimental to Mr Moodie and should not become a precedent.

(f) Other issues might arise in the course of the conference.

27 At the end of Schedule A the relief sought was set out. In summary this was:

(a) An order that the respondent cease taking the current course of action.

(b) An extension of time from 24 October 2004 [sic – 2006] to respond to the allegations.

(c) The opportunity for the appellant and Mr Moodie to have direct dialogue with a senior representative of the respondent.

(d) Copies of relevant documents and materials.

The Conciliation Conference

28 The s44 conference did not entirely resolve the dispute, although on 23 October 2006 the respondent did undertake that it would not continue with the disciplinary action against Mr Moodie pending the determination of the criminal charges. The decision to suspend without pay remained. It is that decision which then became the focus of proceedings.

The Memorandum of Matters

29 A Memorandum of the Matters requiring hearing and determination was drawn up pursuant to regulation 31 of *the Regulations* (the Memorandum).

30 The Memorandum was as follows:

"*1. The Applicant says that:*

(a) The Applicant is an organisation registered under the provisions of the Industrial Relations Act 1979 (WA).

(b) Mr Moodie is a member of the Applicant and an employee of the Respondent.

(c) Mr Moodie is the subject of an internal disciplinary investigation. He was stood down from his duties, on full pay, with effect on or about 7 July 2006.

(d) In late October 2006, the respondent was informed that the Corruption and Crime Commission ("CCC") had expressed its intention to charge Mr Moodie with a criminal offence/s in connection with matters under the internal disciplinary investigation.

(e) On or about 20 October 2006, the respondent suspended Mr Moodie's salary. He has received no salary since this time.

(f) On or about 15 January 2007, the respondent wrote to Mr Moodie's solicitors notifying that the employer required the packaged motor vehicle be returned to the employer within 30 days. Mr Moodie returned the motor vehicle in accordance with the employer's demand.

2. The Applicant seeks orders and declaration as follows:

(a) A declaration that the 20 October 2006 decision by the respondent to suspend payment of Mr Moodie's remuneration is void and of no effect.

(b) Orders that the Respondent:

(i) resume Mr Moodie's salary with immediate effect;

(ii) reimburse Mr Moodie the amount that he would have received had his salary not been suspended, within 10 working days;

(iii) return the packaged motor vehicle to Mr Moodie;

(iv) reimburse Mr Moodie the cash value of the private use of the packaged motor vehicle for the period over which the vehicle was required to be returned; and

(v) restore and pay any other elements of Mr Moodie's remuneration which was "suspended" in accordance with the contract of employment.

(c) A direction that the parties confer as to the calculation of reimbursements provided for under the abovementioned orders, with liberty to apply if agreement cannot be reached.

3. The Respondent rejects the Applicant's claims and says that:

(a) On 19 October 2006, Mr Moodie's solicitors advised that the CCC had charged Mr Moodie in connection with the internal disciplinary investigation and requested that the disciplinary matter be deferred pending the outcome of the criminal proceedings.

(b) The respondent agreed to defer the investigation on 23 October 2006, despite it being complete but for Mr Moodie's response.

(c) It was reasonable for the respondent to suspend Mr Moodie, pursuant to s 52(1)(a) of the Interpretation Act 1984 (WA), without pay.

(d) Mr Moodie's remuneration included a motor vehicle to which he was not entitled during the abovementioned period of suspension.

4. The Respondent denies that the Applicant is entitled to the relief sought or any relief at all and opposes the orders sought as:

(a) there was a clear statutory basis upon which the respondent acted;

(b) it would be unreasonable and not in the public interest for Mr Moodie's suspension to be set aside; and

(c) there is no right of remuneration where services have not been rendered and the circumstances are not such that this principle should not be observed."

The Hearing - Sources of Factual Information

31 The hearing of the matters requiring determination took place on 28 June 2007. A Statement of Agreed Facts and Documents (the Statement) was filed on 26 June 2007. The Statement said it was "*not intended to limit either party's entitlement to lead further evidence*". The Statement was received as exhibit 1 at the hearing. This was the only evidence adduced by the appellant.

32 The respondent called Mr Shane Wilson to give evidence. Mr Wilson was the Director of Corporate Governance at the Department of Health (the Department). It is not necessary to consider his evidence at any length. Mr Wilson's evidence in chief was not lengthy and he was not extensively cross-examined. Some documents were tendered through Mr Wilson. After Mr Wilson's evidence the respondent also tendered some other documents which were received as exhibits.

33 The sources of the factual information before the Arbitrator were therefore:

(a) The facts contained in the numbered paragraphs of the Statement.

(b) The documents included in the Statement.

(c) The evidence given by Mr Wilson.

(d) Additional documents referred to by Mr Wilson and received as exhibits.

(e) Additional documents referred to by the respondent's counsel and received as exhibits.

34 I will try to summarize the facts before the Arbitrator from the combination of these 5 sources. In what follows below, I have quoted in full the numbered paragraphs of the Statement, except for the reference to certain documents being attached to it. I have added, in chronological sequence, a summary of the documents included or referred to in the Statement or otherwise received as exhibits, as well as relevant evidence from Mr Wilson.

The Facts

35 The first four paragraphs of the Statement were:

> "*1. The Applicant is an organisation registered under the provisions of the Industrial Relations Act 1979.*
>
> *2. The Minister for Health is incorporated as the board of all the Hospitals comprised in South West Health Board under s 7 of the* Hospitals and Health Services Act 1927 *(WA) and has delegated all his powers and duties as such to the Director General of Health.*
>
> *3. On 11 December 2003 Michael Moodie executed a Contract of employment with the then Director General of the Department of Health. The contract was executed on behalf of Director General by his delegate.*
>
> *4. On 28 November 2005 Moodie and the Director General executed a document which varied the terms of the 11 December 2003 Contract. The variation effectively transferred Moodie from the position of CEO SWAHS to a position entitled Executive Director, Technology.*"

36 The Statement included copies of the covering letter, contract and contract variation referred to in paragraphs 3 and 4 respectively.

37 Mr Wilson said his responsibility was to advise the respondent about audit risk management, accountability and discipline. He had been the overseer of the disciplinary process against Mr Moodie commencing in May 2006 (T3, 5). On 26 May 2006 there was a request to review Mr Moodie's conduct. This lead to a letter being sent from the respondent to Mr Moodie dated 7 July 2006. Mr Wilson said the CCC were also advised of these matters of "*necessity*" (T5).

38 The schedules to the contract of employment between the Minister for Health and Mr Moodie and the job description for the Chief Executive, South West Health (Mr Moodie's previous position) were identified by Mr Wilson and received as exhibits.

39 In cross-examination Mr Wilson said the Department of Health was required by a notice from the CCC to provide a range of documents relating to the expenditures claimed by Mr Moodie. Mr Wilson supervised this process. Mr Wilson said the CCC later referred matters back to the Department for further investigation.

40 Paragraph 5 of the Statement was:

> "*5. By letter to Mr Moodie dated 7 July 2006, the Director General raised allegations of matters that, he said, "could, if proven, constitute serious breaches of discipline and gross misconduct by you". Five issues were identified. Mr Moodie was directed to remain away from the workplace, to return certain Department property, and to not communicate with employees of the Department or of any Health Service. The Director General stated that "you will remain on full pay during this absence until otherwise determined by me.*"

41 A copy of the letter dated 7 July 2006 was included in the Statement. The first of the 5 allegations set out in the letter was the only one which later retained relevance. This was an allegation that:

> "*between January 2005 and July 2005, you submitted to South West Area Health Service (SWAHS) documentation that you knew to be false in relation to claims for reimbursement for accommodation at the 'Maylands Bed and Breakfast', when such a business does not exist and the address provided for on the falsified document is that of a private resident that you are leasing. This documentation resulted in the payment of monies to you which you were not entitled.*"

42 The letter said Mr Moodie was to "*leave the workplace immediately. You are to remain away from the workplace until I direct you to return. You will remain on full pay during this absence until otherwise determined*". A response to the allegations was requested within 5 working days.

43 Paragraph 6 of the Statement was:

> "*6. Moodie's solicitors (Tottle Partners) responded to the allegations by letter on 11 July 2006. Among other things, particulars of the allegations were requested.*"

44 A copy of the letter dated 11 July 2006 was included in the Statement. The letter complained about the way in which Mr Moodie had been treated at the time he was suspended. The letter asserted the respondent deliberately created "*the impression of guilt*". The letter implied the respondent had been unfair in not earlier advising Mr Moodie that allegations 1 and 2 had been referred to the CCC. As mentioned in the Statement the letter also sought particularisation of the allegations and "*discovery*" of four categories of documents.

45 Tottle Partners also sent letters to the respondent dated 25 and 27 July 2006. Copies of these letters were neither included in the Statement nor received as exhibits at the hearing. Part of their contents is quoted in the report of Mr Hodkinson, from which the following is taken (report pages 27-29). The letter from Tottle Partners dated 25 July 2006 said:

> "*It remains impossible for our client to make any constructive observation on the suspicions referred to in paragraph 2 of your letter of 7 July 2006. It would appear to us, however, that those suspicions proceed on the false premise that our client submitted claims personally and with knowledge that they exceeded his entitlements. This was not the case. Our client's practice was to provide Mr. Peter Duncan, a senior finance officer within SWAHS with his receipts and associated documentation and Mr. Duncan made claims on his behalf. Our client's recollection is that he did not sign any formal claim form in respect of these expenses.*"

46 The letter then referred to "*the suspicions referred to in paragraph 1 of your letter of 7 July 2006*". The letter said the "*gravamen of these suspicions*" was that Mr Moodie "*set out between January and July 2005 to defraud the Department*". The letter said this was "*manifestly untenable because, apart from other reasons, on 24 February 2005 our client send (sic) an email in the following terms to Mr. Duncan of SWAHS …*". The terms of the email were then set out. The letter referred to a series of communications between Mr Moodie and Mr Duncan which were asserted to have "*clearly disclosed on more that (sic) one occasion that the invoices that accompanied his travel claims were in respect of his leased accommodation*". The letter said Mr Moodie accepted some of his actions were "*ill advised*" but there was "*no question of dishonesty*". The letter also said the arrangements outlined in the email to Mr Duncan saved "*the Department money when compared to the most costly alternative of staying in hotel accommodation*".

47 The letter from Tottle Partners to the respondent dated 27 July 2006 referred to Operations Circular No OP/1597/02 (the Circular). The letter said the Circular was headed "*Travel Expenses – Claimable rates and guidelines*" and set out entitlements to travel and accommodation expenses for Department of Health employees. The letter referred to the entitlements which it was asserted Mr Moodie had in accordance with the Circular. The letter set out calculations based upon what Mr Moodie had been entitled to claim. It asserted that what had been claimed by Mr Moodie was less than this. It was then submitted "*in our respectful view*" that there was "*no question of our client having acting dishonestly but no question of our client having been paid monies to which he was not entitled*" [sic].

48 Paragraph 7 of the Statement was:

> "*7. The Director General responded to the letter of 11 July 2006 and other associated correspondence by letter on 31 July 2006. That letter reiterated that Mr Moodie was directed to "remain at home during this formal investigation during which Mr Moodie would continue to be paid". The Director General notified Tottle Partners that an independent investigation would be undertaken. Attached to the letter were certain particulars of the allegations, in response to requests made by Tottle Partners.*"

49 A copy of the letter dated 31 July 2006 was included in the Statement. The letter clarified that the formal investigation was only into allegations 1, 2 and 3. (As it turned out 4 allegations were investigated). Attached to the letter were more detailed particulars. The letter also advised Mr Hodkinson had been appointed to carry out the investigation. The respondent directed that Mr Moodie "*remain at home during this formal investigation during which [he] will continue to be paid*". Within the particulars, there were 44 paragraphs of factual assertions in support of allegation 1. At the end of these paragraphs the document said it was "*alleged that Michael Harris Moodie in his capacity as the Chief Executive Officer for the South West Area Health Service (SWAHS) on twenty-two occasions as listed above committed offences against section 85 of the Criminal Code (Falsification of records by Public Officer)*".

50 As mentioned earlier, Mr Hodkinson's report was dated 29 September 2006. It comprised 32 pages, absent the attachments (which Mr Wilson said filled 3 lever arch files). The report was included in the Statement but not the attachments.

51 The report said the investigator had invited Mr Moodie through his solicitors to take part in an interview about the allegations. The report said the offer was declined by letter from Tottle Partners dated 17 August 2006. The letter was received as exhibit 4 at the hearing. In the words of the report in this letter Tottle Partners "*did state that Moodie, through them, would be pleased to provide … a written submission dealing with particular allegations*". The report then said this "*is a process that can take place following the submission of this report*" (page 5). The report did not say why Mr Hodkinson did not take up the offer of the submission.

52 The report set out what Mr Hodkinson had done to "*inquire*" into the allegations. This included a review of information, an examination of records and discussions and interviews with a number of named people. The interviews, if recorded, were attached to the report. There was also a "*witness statement*".

53 The report set out the investigation and findings made about the now 4 allegations. As mentioned only allegation 1 remains relevant. On this issue the report referred to Mr Moodie's employment status and position, and set out clauses of his contract about work related expenses and the termination of his employment (pages 11/12). The report referred to s9 of the *Public Sector Management Act 1994* (WA) (the *PSMA*) which is about general principles of official conduct. The report set out a summary of what was described as "*principles of conduct that are to be observed by all public sector bodies and employees*" (pages 12/13). The report described two documents which were the "*Western Australian Public Sector Code of Ethics*" and the "*South West Health Code of Conduct*". Both were attached to the report. The report said both codes applied during the relevant period. A passage of the Code of Ethics was set out which specifically referred to Chief Executive Officers. The report said the South West Health Code of Conduct came into effect in March 2003 and applied to all staff employed by SWAHS, regardless of employment terms and conditions. The report said that part 6 of the document was about ethical

behaviour and included as a dot point that there was to be no falsification of "*records or documents, or to make unwarranted claims for allowances, overtime etc*" (page 13).

54 Allegation 1 was reproduced and there was then a discussion of "*physical evidence*", interviews with 5 departmental employees and the witness statement. The report referred to the letters from Tottle Partners to the respondent dated 25 and 27 July 2006 and set out aspects of interviews.

55 The report then discussed the Circular and what it said about "*accommodation*" (pages 29/30). The report said the Circular required the supply of a "*tax invoice*" except where the expense was under $55.00, for which an original receipt was acceptable. The Circular referred to the employee being reimbursed for the actual cost of the accommodation including GST up to a Scheduled Rate. The Circular said that any decision to "*reimburse*" claims over and above that rate was at "*the Manager's discretion, if the expense is deemed to be necessary and unavoidable*". The Circular was said to also require "*Claim Forms*". The relevant passage of the Circular was then quoted. It said the employee should complete the "*two page Travel Expense Claim for Actual Expenses Arrangement form*". The Circular said: "*All relevant information must be included on this form, which must have the relevant certifications, and all receipts and/or tax invoices attached as well as to the original of the Travel Approval Form*". The report asserted Mr Moodie was aware of the existence of the form.

56 The next part of the report was "*Recommendations As to Breaches of Discipline*" (page 30). This contained a summary of the facts upon which the report relied and said that "*50 false invoices were presented*" through Mr Duncan by Mr Moodie for reimbursement of travel and accommodation expenses. The report said that "*whether he was entitled to none, part or the whole amount of each of the 50 invoices is not important in this matter*". The report said it was the author's view that Mr Moodie "*having regard to section 9 of the* Public Sector Management Act, 1994*, in breaching both the Code of Conduct and the Code of Ethics, committed a serious breach of discipline*". It was submitted this could provide "*Due Cause*" for the relevant employing authority to terminate Mr Moodie's employment without notice in accordance with clause 9.1 of his contract of employment (pages 31/32).

57 Paragraph 8 of the Statement was:

> "*8. On 6 October 2006 the Director General wrote to Mr Moodie informing him of the outcome of the formal investigation, and his conclusions or determinations in relation to the investigation's "findings". In relation to three of the four allegations, the Director General advised that no further action would be taken. In relation to the first allegation, the Director General agreed with the investigator that a serious breach of discipline had been committed. The Director General advised that he was now turning to consider what action should be taken in that regard, and invited Mr Moodie to provide further information, within 5 working days, if he wished to. The letter included a copy of the investigation report, and stated that the report had been included so as to assist Mr Moodie in his consideration of the that matter.*"

58 A copy of the letter was included in the Statement. The letter said Mr Hodkinson's inquiry was into 4 listed allegations. The letter said that in "*his report Mr Hodkinson makes the following findings …*". The letter said about allegation 1 that "*a serious breach of discipline has been committed*". The letter said the respondent had "*considered the evidence*" before him and agreed with Mr Hodkinson's findings. The letter said the respondent was "*now considering what further action should be taken regarding Allegation 1*". The letter said that having "*regard to the allegation is there any further information that you wish to place before me before I decide on what further action will be taken*". The letter enclosed a copy of Mr Hodkinson's report to "*assist your considerations*". The letter said that "*should you have further information for my consideration that it be forwarded to me within 5 working days of your receipt of this letter*".

59 Paragraph 9 of the Statement was:

> "*9. On 19 October 2006 Tottle Partners informed the Director General that they had received advice from officers of the Corruption & Crime Commission that the CCC intended to charge Moodie in connection with the matters which were the subject matter of the first allegation. Among other things, the letter expressed the view that it would be clearly inappropriate for the Department to make any determination as to whether Moodie's conduct, being the same conduct that is the subject of the criminal charges, amounted to 'a serious breach of discipline'. Against that background, Tottle Partners suggested that further consideration of whether Moodie's conduct amounts to 'a serious breach of discipline' be deferred until the outcome of the criminal charges is known.*"

60 A copy of the letter from Tottle Partners dated 19 October 2006 was included in the Statement. The letter submitted it was "*clear beyond per adventure*" that Mr Moodie had no dishonest intent, had acted transparently and did not receive funds to which he was not entitled. The letter also said it was highly probable that Mr Moodie was in fact paid less than the amount to which he may have been entitled. The respondent was advised that Mr Moodie "*will be defending the charges to be bought [sic] by the CCC with all of the resources at his disposal*". The letter submitted it was inappropriate for the department to make a determination as to whether Mr Moodie's conduct, which was the same conduct as that the subject of the criminal charges, amounted to a "*serious breach of discipline*". The letter then said "*[a]ny such determination and the publicity that it*

would generate, (this case has already attracted significant media interest), would inevitably prejudice our client's ability to have a fair trial, leading to one side questions of contempt of court". The letter expressed the hope that there could be an agreement reached "*in relation to the manner in which our client's employment should now be dealt with*". The letter also said Mr Moodie's rights were reserved. The letter requested an urgent response given the requirement of the respondent for a response to Mr Hodkinson's report by 24 October 2006. (It is unclear why this was now the relevant date when according to the letter dated 6 October 2006 any reply was required within 5 working days).

61 Paragraph 10 of the Statement was:

> "*10. By letter to Mr Moodie's solicitors on 20 October 2006, the Director General acknowledged receipt of the 19 October 2006 letter. The Director General stated that, in light of the advice concerning the CCC's intentions, Moodie was to be 'suspended from duty from the Department of Health', and that the suspension is to be 'without pay'. This was to take effect from close of business that day, 20 October 2006. The letter also foreshadowed a further response to the 19 October 1etter, after legal advice was obtained, in connection with other matters there raised.*"

62 A copy of the letter dated 20 October 2006 was included in the Statement. In addition to informing Mr Moodie's solicitors about his suspension without pay the letter said: "*You also raised a number of other matters in your letter dated 19 October. We are currently seeking legal advice and once received, a response will be forwarded*".

63 Mr Wilson, without objection, gave evidence about the contents of the letter dated 20 October 2006 (T7). Mr Wilson was asked in examination in chief about the reasoning behind the decision to suspend without pay. He answered:

> "*There were a range of considerations. There had certainly been the completion of a formal inquiry in which there had been a finding of a breach of serious discipline involving acts of dishonesty. Mr Moodie was one of the most senior executives in health. The consideration was that central to his employment was the issue of trust and honesty. The charges and there were 50 criminal charges of forgery and uttering … were significant. The decision to delay the final determination of the disciplinary matter which was all but complete would have caused … there was going to be obviously considerably [sic] delay. That matter is still awaiting a final hearing date in the Magistrates Court as far as I'm aware. Mr Moodie was to be required to stay at home until the matter was final [sic] determined. There was going to be no requirement on Mr Moodie to provide any services in line with his contract and there were a range of additional issues that had arisen …*" (T8). (The dots and spaces are as appear in the transcript).

64 Mr Wilson said it was not tenable for Mr Moodie to remain in the workplace whilst "*these things are hanging over him … absolutely not*" (T8).

65 As I said earlier the application was filed after receipt of the letter on 20 October 2006. Paragraphs 11-13 of the Statement were:

> "*11. As foreshadowed in the 20 October 2006 letter, Moodie's remuneration payments ceased with effect from 20 October 2006.*
>
> *12. On 23 October 2006, at conciliation proceedings in the WAIRC, the representative of the Director General informed the representative of the HSU that the disciplinary proceedings would be suspended until the criminal charges were determined.*
>
> *13. Moodie has been charged with certain criminal offences as foreshadowed in the letter referred to above and dated 19 October 2006. Moodie has entered a plea of 'not guilty' to those charges, and the matter has not yet been determined by the court exercising criminal jurisdiction.*"

66 During Mr Wilson's evidence reference was made to other suspected breaches of discipline. There was then an exchange between counsel and the Arbitrator about the relevance of that evidence. During this, the appellant's counsel made a submission which I will refer to later. So as to put it into context I will refer to the submission as being made at "*point 1 in the hearing*". A letter from the Department to Mr Moodie dated 26 June 2007 was then received as an exhibit. Mr Wilson confirmed there were other issues then under investigation (T10).

67 Paragraphs 14-17 of the Statement were:

> "*14. On or about 11 January 2007 the applicant wrote to the respondent concerning the investigation and concerning the respondent's decision to stand Moodie down from duty without pay.*
>
> *15. On or about 15 January 2007, the Director General wrote to Moodie's solicitors notifying Moodie that the employer required that the packaged motor vehicle be returned to the employer within 30 days.*

> *16. Moodie returned the motor vehicle in accordance with the employer's demand, within the period required.*
>
> *17. On or about 21 January 2007 the respondent wrote to the applicant in response to some of the matters raised in the applicant's letter of 11 January 2007.*"

68 These were the last 3 paragraphs of the Statement. A copy of each of the 3 letters mentioned were included in the Statement.

69 Following Mr Wilson's evidence and after some discussion, a letter from Commissioner of the CCC to the State Solicitor dated 27 June 2007 was received as an exhibit. The letter enclosed a statement of material facts in support of 50 forging and uttering charges against Mr Moodie. At this time the respondent's counsel made a submission which I will refer to later as being made at "*point 2 in the hearing*".

The Submissions at First Instance

70 Both parties filed written submissions prior to the hearing and made closing oral submissions. Counsel also made relevant submissions at points 1 and 2 in the hearing. I will first refer to the appellant's written submissions, followed by the submissions made at point 1 in the hearing and then the closing oral submissions. I will then similarly summarise the respondent's submissions.

(a) The Appellant's Written Submissions

71 The appellant's written submissions first dealt with jurisdiction. They relied upon the jurisdiction of the Arbitrator to "*enquire into and deal with any industrial matter relating to a government officer*", under s80E(1) of *the Act*. It was submitted Mr Moodie was a "*Government officer*", within the definitions in ss7 and 80C(1) of *the Act*, as he was a person employed on the salaried staff of a public authority. It was also submitted Mr Moodie was not a "*public service officer*" within the meaning of s76(1) of the *PSMA*. This was because he was not employed in the "*public service*" as defined in s34 of the *PSMA*. Accordingly, Part 5 of the *PSMA* which includes a scheme or code for the conduct of investigations and enquiries into allegations of breach of discipline, did not apply to Mr Moodie.

72 The submissions summarised the factual background and then traversed the power to suspend remuneration. Section 52(1)(a) of the *Interpretation Act 1984* (WA) was quoted. This provides:

> "*(1) Where a written law confers a power or imposes a duty upon a person to make an appointment to an office or position, including an acting appointment, the person having such power or duty shall also have the power —*
>
> *(a) to remove or suspend a person so appointed to an office or position, and to reappoint or reinstate, any person appointed in exercise of such power or duty;*"

73 It was submitted the exercise of any statutory power to suspend remuneration attracted the common law duty of fairness, and that this included giving Mr Moodie an opportunity to make submissions before any decision was taken to suspend his pay. The appellant relied upon observations by the Full Federal Court in *Dixon v Commonwealth of Australia* (1981) 61 ALR 173 at 178-9.

74 The submissions then referred to the apprehended "*defence*" of the respondent. This was said to be a reliance upon *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 145 that "*not every departure from the rules of natural justice at a trial will entitle the aggrieved party to a new trial*". It was submitted this observation was of no assistance to the respondent because the High Court was referring to extreme or exceptional cases in which it would be plainly "*futile*" to provide a remedy. The observations by the Court in *Stead* at 145 were quoted in support of this submission. The appellant also cited and quoted from *Dixon* on the futility issue.

75 The next submission was that a failure to provide procedural fairness meant the decision was "*void and the lost remuneration is payable*". The appellant again relied on *Dixon* at 179 and also 182 where the decision to suspend was described as "*void*" and "*invalid and ineffectual*". The appellant also cited *Everingham v Director General of Education* (1993) 31 ALD 741; (Unreported, SASCFC, 17 September 1993). It was then submitted that to declare the decision void was to nullify the decision retrospectively.

76 It was next submitted the "*no work no pay*" principle had no application. On this issue the appellant referred to *Csomore v Public Service Board of New South Wales* (1987) 10 NSWLR 587. The appellant also referred to the citation with approval in *Csomore* of the reasons of Deane J in *Gapes v Commercial Bank of Australia Ltd* (1980) 41 FLR 21 at 33; 37 ALR 20 at 25. It was submitted the reasons of Rogers J in *Csomore* made it clear that the obligation to pay wages is only conditioned by a requirement that service continue in circumstances where the employer had not waived the usual requirement that an employee perform the full range of duties. It was submitted the respondent had waived this requirement.

77 It was next submitted that in exercising its jurisdiction the Arbitrator was required to have regard to the contents of s26 of *the Act*. It was submitted s26 authorised the Arbitrator to have regard to the "*industrial merits*". It was submitted however that the applicable legal principle was that a decision to suspend remuneration without affording a right to be heard was void and ineffective and this complied with s26 favoured the grant of the relief sought.

78 The submissions concluded with the form of orders sought. Included was a declaration that the respondent's decision to suspend Mr Moodie's remuneration with effect from 20 October 2006 was void and of no effect, that the respondent immediately resume the provision of remuneration and that the respondent "*back pay*" his salary and give Mr Moodie the cash equivalent of the withheld non-financial elements of his remuneration package.

(b) The Appellant's Submission at Point 1 in the Hearing

79 At point 1 in the hearing the respondent's counsel referred to the appellant seeking an order for ongoing payment to Mr Moodie. The appellant's counsel then said:

> "*[I]t would be helpful if I explained how narrow our application is. On the … on the basis of the authority of the High Court [sic] in Dixon which is not contradicted by the Department as I understand there's a duty of fairness which is attracted by the decision to suspend without pay. There was no attempt to discharge that obligation on the part of the Department and we say the authority … if you follow the authorities then it means that the decision is void and should be set aside and should be effectively undone. And, if that particular decision is undone we get back to the situation you were prior to the 20th of October, namely where Mr Moodie has been relieved of his obligation to perform duty and the disciplinary process is incomplete. This is just because there has been failure to give an opportunity to be heard.*" (T9)

80 The appellant's counsel said there was nothing in the application which sought an order that the remuneration "*remain in place*" until the disciplinary process was finalised.

(c) The Appellant's Closing Oral Submissions

81 The appellant's counsel said this "*is an application which seeks to vindicate the right of this government officer to be dealt with fairly in this particular decision, the decision to suspend remuneration*" (T16). Counsel then referred to the facts and correspondence. Counsel then cited a number of authorities including *Dixon, Stead, Everingham, Csomore, Gapes, Automatic Fire Sprinklers Pty Ltd v Watson* (1946) 72 CLR 435 and *Director-General, Department of Justice v Civil Service Association of Western Australia Inc* (2003) 83 WAIG 908 (*Bowles*). Counsel also made the following material submissions:

(i) Where there was a denial of procedural fairness the question was whether the provision of a right to a hearing would be futile. It was submitted that something "*quite exceptional, quite extraordinary*" was required before a reasonable conclusion could be reached that the right to be heard was meaningless (T21).

(ii) Mr Moodie had not been made aware of the considerations taken into account by the respondent in deciding to suspend his salary without pay.

(iii) Counsel referred to "*some merits questions*". Reference was made to s26 of *the Act* which counsel submitted provided the Commission with a broad function. It was submitted this encompassed more than the vindication of such things as an employee's common law right to procedural fairness but that the right should loom large (T24).

(iv) The "*applicable legal principle we have taken you to is that the decision in the absence of any attempt to provide procedural fairness is void and ineffective and that carries with it the obligation to replace the income that was lost*" (T25).

(v) The Commission could infer from the evidence that Mr Moodie has a family and that the suspension of his remuneration had caused considerable hardship (T25).

(d) The Respondent's Written Submissions

82 The respondent's written submissions commenced with a summary of the facts. They then addressed the legal basis for the suspension. Section 52(1)(a) of the *Interpretation Act* was relied upon. It was submitted that where there is a statutory power to suspend, it is without pay unless expressed to be otherwise. In support of this proposition the respondent relied upon *Wallwork v Fielding* [1922] 2 KB 66 at 72, 74 and 75.

83 The submissions then addressed the merits of the decision to suspend. The following contentions were made:

(i) An employer and employee have a fiduciary relationship (citing *Concut Pty Ltd v Worrell* (2000) 176 ALR 693 per Kirby J at 698).

(ii) Acts of dishonesty or similar conduct are so destructive of the mutual trust necessary for the employment relationship that once discovered the conduct authorised summary dismissal. (Citing *Concut* per Kirby J at 707).

(iii) Having formed the suspicion that Mr Moodie had acted dishonestly, the respondent arranged for the allegations to be investigated and was prepared as a matter of fairness to allow Mr Moodie to remain at home on pay.

(iv) The respondent had completed all of its investigations except for Mr Moodie's response to the investigator's report.

(v) Mr Moodie's solicitors requested the final determination of allegation 1 to be deferred because Mr Moodie was to be charged with concurrent criminal proceedings.

(vi) It was unreasonable to submit the respondent should not finalise the disciplinary proceeding which could justify dismissal, but continue to pay Mr Moodie.

(vii) This was in part because the respondent has no control over when the criminal charges would be heard and could not reasonably be expected to utilise the services of Mr Moodie given "*the evidence that he appears*

to have engaged in dishonest conduct which is incompatible with his high status as an officer of the respondent".

(viii) It would be against the public interest for an order to be made that Mr Moodie be paid during the periods in which he had rendered no service.

84 The submissions next addressed the position if there was no power to suspend. The respondent relied upon *Bowles* in support of the proposition that an ultra vires suspension did not "*found*" a claim for wages. The President's reasons at [47] were cited. It also was submitted this contention was supported by *Csomore*.

85 The submissions also referred to the reliance by the President in *Bowles* on the reasons of Dixon J at 465 and 466 of *Automatic Fire Sprinklers*. It was submitted there was no entitlement to wages where no service had been rendered, even if an employee is by an unlawful act prevented from rendering that service. The reasons of the President and Scott C in *Bowles* at [28]-[36] and [70] respectively were cited.

86 It was submitted it was untenable and not in the public interest for there to be a departure from *Automatic Fire Sprinklers*. It was also submitted that if Mr Moodie had been given a hearing before the suspension of pay it would have made no difference to the outcome. *Stead* was cited.

(e) The Respondent's Submission at Point 2 in the Hearing

87 At point 2 in the hearing the respondent's counsel referred to the consequence of an absence of procedural fairness as being that the "*decision is void*". Counsel also submitted that no "*monetary award is made, no decision is made in place of the decision maker. The decision maker is told to go back and do it again*" (T14).

(f) The Respondent's Counsel's Closing Oral Submissions

88 As I have mentioned the respondent's counsel during his closing submissions tendered documents which were received as exhibits. Counsel then made the following submissions in addition to what was in the written outline:

(i) Equity and fairness and the public interest were critical elements in the Arbitrator's decision (T27).

(ii) The public interest was that of a public authority being required to pay a senior employee which it cannot trust until proceedings are resolved against him over which it has no control (T27).

(iii) When Mr Hodkinson's report was provided to Mr Moodie he was being given the opportunity to be heard about the allegations (T28).

(iv) If the Arbitrator was satisfied there was a lack of procedural fairness then "*the decision was unlawful*". It was submitted the only thing that could have been said on Mr Moodie's behalf about whether to suspend his pay was economic hardship (T31).

(v) Reference was made to *Bowles* and *Automatic Fire Sprinklers* and the necessity for service before an employee was entitled to recover wages (T32).

(vi) Suspension without pay, even if unlawful, did not entitle a person to be paid (T33).

(vii) The Arbitrator was required to make a merits-based decision and there was no power to make an award of money, based on *Bowles* (T33).

(viii) Hardship "*could not override the public interest of not having a person of Mr Moodie's seniority for a protracted period of time being paid to stay at home. The employer was prepared to do that when it had some control over … how long that would be, it has no control over that [now]*" (T33).

(ix) If the Arbitrator was "*minded to make any order based upon the denial of procedural fairness then it should simply be that the decision to suspend without pay was void. Without any accompanying order the effect of that could be worked out in another application and another forum*". Counsel submitted that: "*If you are minded to make an order it should be limited to that. We say as a matter of discretion and on the basis of the Bowles' case you shouldn't.*" (T34).

89 At the end of the hearing the Arbitrator reserved her decision.

The Arbitrator's Reasons For Decision

90 The reasons for decision of the Arbitrator were published on 13 November 2007. The reasons commenced by quoting the Memorandum and the Statement. The reasons then described in detail the appellant's and the respondent's arguments. The submissions of the parties and the authorities they relied on were summarised. Neither party contended there was any error in this section of the reasons.

91 The next section of the reasons was headed "*Issues and Conclusions*". At [18] the Arbitrator listed the issues she said were "*associated with the resolution of these matters*". They were:

"*(1) Is there a power to suspend?*

(2) Is the suspension without pay?

(3) Is the suspension void due to a failure to provide an opportunity to be heard?"

92 The Arbitrator first considered whether there was a power to suspend. The Arbitrator explained that neither of the parties had relied upon s82 of the *PSMA* about "*suspension without pay*". (At the hearing of the appeal the parties agreed that s82 of the *PSMA* did not apply to Mr Moodie's employment). The Arbitrator quoted s52(1)(a) of the *Interpretation Act* and said the "*respondent's power to appoint Mr Moodie brought with it the statutory power to suspend him*".

93 The Arbitrator then discussed whether the power to suspend was "*a power to suspend without pay*" ([24]). The Arbitrator quoted from McCarry LJ, *Aspects of Public Sector Employment Law*, Law Book Company, 1988 in which the effect of suspension upon the right to wages was discussed. It was there said the effect of suspension would depend upon the terms of the statute under which it occurred. Prima facie however it would involve loss of wages. McCarry cited *Wallwork v Fielding* [1922] 2 KB 66 per Lord Sterndale MR at 72 and Warrington LJ at 74-75. Warrington LJ said the effect was to excuse the employed person from performing his part of the contract and at the same time relieve the employer from performing his. McCarry said that this was not to say, subject to statute, that "*salary would not later be payable if the officer was found innocent or if he appeals successfully against a dismissal or conviction*". *Commissioner for Railways (NSW) v Cavanough* (1935) 53 CLR 220 and *Grady v Commissioner for Railways (NSW)* (1935) 53 CLR 229 were cited in support of this point.

94 The Arbitrator then cited and distinguished both *Csomore* and *Gapes* on the basis that there the employees refused to perform their full range of duties and were therefore directed to refrain from performing them all ([25]).

95 The Arbitrator decided that suspension is of the "*contractual rights and obligations, including the right to payment*". If however, criminal charges and/or allegations of a breach of discipline were subsequently not sustained, then "*subject to the statute, the employee would be entitled to be reimbursed contractual benefits lost on account of the suspension*" ([26]). The Arbitrator said when "*the respondent wrote to Mr Moodie on the 20 October 2006, informing him of the decision to suspend him without pay, the rights and obligations under the contract were placed in abeyance* ([26]). *Therefore the respondent was under no obligation to pay salary to Mr Moodie from 20 October 2006. The obligation was suspended*" ([27]).

96 The Arbitrator then said the "*question then arises, was the respondent in breach of the requirement to afford Mr Moodie natural justice or standards of fairness in the manner in which it reached its decision to suspend him without pay?*" ([28]). The Arbitrator said the principles of natural justice applied, citing *Dixon*; although in what appears to be a slip, the reasons refer to *Dixon* as a decision of the High Court and not the Full Federal Court.

97 The Arbitrator then referred to *Stead* in the following way:

> "*30 In* Stead v SGIO *(op cit), the High Court (sic) referred to the general principles applicable and expressed by the English Court of Appeal in* Jones v National Coal Board *[1957] 2 QB 55 at 67 that:*
>
> > "*[t]here is one thing to which everyone in this country is entitled, and that is a fair trial at which he can put his case properly before the judge ... No cause is lost until the judge has found it so; and he cannot find it without a fair trial, nor can we affirm it.*"
>
> *31 Also in* Stead v SGIO *(op cit) their Honours asked that:*
>
> > *"Would further information possibly have made any difference? That qualification is that an appellate court will not order a new trial if it would inevitably result in the making of the same order as that made by the primary judge in the first trial. An order for a new trial in such a case would be a futility.*
> >
> > *For this reason not every departure from the rules of natural justice at a trial will entitle the aggrieved party to a new trial. By way of illustration, if all that happened at the trial was that a party was denied the opportunity of making submissions on a question of law, when, in the opinion of the appellate court, the question of law would clearly be answered unfavourably to the aggrieved party, it would be futile to order a new trial.*
> >
> > *Where, however, the denial of natural justice affects the entitlement of the party to make submissions on an issue of fact, especially when the issue is whether the evidence of a particular witness would be accepted, it is more difficult for a court of appeal to conclude that compliance with the requirements of natural justice could have made no difference.*"

98 At [32] the Arbitrator asserted that *Stead* stood for the proposition that "*where it would be futile to do so, in that it would not alter the decision, there was no such requirement*", to "*provide procedural fairness to an employee prior to making any decision which will have an adverse effect upon the employee*" ([32]).

99 Paragraphs [33] and [34] are important in the reasoning of the Arbitrator. These were:

> "*33 There is no dispute about the facts surrounding the suspension. The respondent undertook an investigation into allegations of breaches of discipline by Mr Moodie. The investigation was completed. The respondent provided Mr Moodie with an opportunity to respond to the investigator's report. Until this time, Mr Moodie had been relieved of the obligation to perform work but his salary was maintained. Prior to Mr Moodie responding to the investigator's report, Mr Moodie was*

charged with criminal offences. He sought not to respond until such time as the criminal charges were resolved. As is usual in such cases where the employee may jeopardise his or her position before a criminal trial by making any statements to the employer the respondent agreed to the disciplinary process being held in abeyance pending the outcome of the criminal proceedings. In this case, that meant that the employer, at Mr Moodie's request, did not require him to respond to the investigation report at that time and it therefore could not conclude the disciplinary process. Therefore, there is little by way of the facts which Mr Moodie could have put to the respondent. Accordingly, it would have made no difference to the respondent in its decision to suspend without pay for Mr Moodie to have been given an opportunity to be heard it would have been futile.

34 As to the merits of the suspension without pay, it should be noted that the role of the Public Service Arbitrator as the constituent authority of the Commission, according to s 6 of [the Act] and s 26(1)(a) and (c) in particular, is the resolution of disputes according to equity, good conscience and the substantial merits of the case. It is not an administrative tribunal whose role is to examine the application of proper process and declare void those decisions which fall short of the appropriate standard. It is to provide practical and equitable resolutions. In this case, that requires consideration of whether the respondent's decision to suspend without pay was fair and equitable even if a proper process was not applied."

100 The Arbitrator then referred to submissions of the respondent about the criminal charges. The Arbitrator said that if the respondent intended to suggest there was a high probability of Mr Moodie having committed the alleged breaches of discipline or being guilty of the charges, and this constituted a good reason for not providing him with the opportunity to be heard prior to the decision being made, it was not a relevant consideration. The Arbitrator said the "*issue of suspension without pay does not relate to Mr Moodie's guilt or innocence. However, if the submission was that the nature and seriousness of the allegations is a consideration, then this is so. This factor goes to the appropriateness of continuing to have Mr Moodie undertaking work for the respondent during the time following his being charged with criminal offences, prior to the resolution*" ([35]). The Arbitrator then said in the circumstances, it was inappropriate for the respondent to provide Mr Moodie with work ([36]).

101 The Arbitrator's reasons concluded:

"*37 Also, given the lengthy period which was likely to pass before the criminal charges could be resolved, it would be unreasonable and contrary to the public interest for the respondent to be required to continue to pay Mr Moodie while he was providing no work. This period of delay was beyond the control of the respondent and the respondent was unable to conclude its investigation through no fault of its own. This is as a consequence of agreeing to Mr Moodie's request. It is of no benefit to the respondent to have such a delay, although it is to Mr Moodie's benefit.*

38 Therefore in the circumstances of:

(a) the nature and seriousness of the charges;

(b) the seniority and nature of the position held by Mr Moodie;

(c) the inappropriateness of the respondent providing him with work;

(d) the lengthy delay before a trial; and

(e) placing the disciplinary proceedings in abeyance at Mr Moodie's request,

the merits of the situation favour the suspension without pay.

39 Taking account of the all the circumstances, I conclude that:

(a) the respondent had a statutory power to suspend Mr Moodie in his employment;

(b) the suspension in those circumstances is without pay;

(c) it would have been futile to have provided Mr Moodie with an opportunity to be heard in respect of the suspension prior to the decision having been made; and

(d) alternatively, in the circumstances, there was no unfairness in the suspension without pay.

40 Accordingly the matter will be dismissed."

The Notice of Appeal

102 The notice of appeal filed on 19 December 2007 contained 4 "*grounds*" as follows:

> "*1. The Commissioner erred in that she had insufficient regard to the principle that the resolution of disputes according to equity, good conscience and the substantial merits of the case must ordinarily require that appropriate remedies be granted in response to violations of the rules of procedural fairness.*
>
> *2. The Commissioner erred in finding that it would have made no difference to the respondent in its decision to suspend Mr Moodie's salary for Mr Moodie to have been given an opportunity to be heard.*
>
> *3. The Commissioner erred in assuming that the only matters about which Mr Moodie might have made submissions upon, were he afforded an opportunity to be heard, were those matters specified in paragraph [33] of the reasons.*
>
> *4. The Commissioner erred in having regard to the reasonableness or otherwise of any requirement that the respondent provide work to Mr Moodie, as the respondent's prior decision to relieve Mr Moodie from the obligation to perform duties was not put in issue.*"

103 The notice of appeal also contained the following:

> "*Remedy*
>
> *6. The appellant seeks orders that the decision and orders of the Commission below be set aside, orders that the respondent's decision to suspend Mr Moodie's remuneration be declared void, and orders that the respondent (a) pay to Mr Moodie the remuneration he would have received, but for the void decision, between the date of that decision and the date of the Full Bench's order, and (b) resume payments of Mr Moodie's remuneration, subject to any subsequent lawful cessation of that remuneration.*"

The Submissions on Appeal

104 Both parties filed a written outline of submissions, in accordance with the applicable practice direction. These submissions were adopted and supplemented at the hearing. As highlighted in the reasons of Wood C the grounds of appeal were not clearly drafted. Perhaps because of this neither party addressed the grounds of appeal sequentially. What follows is a summary of the written and oral submissions of each party on the issues which they addressed. The resolution of the appeal will depend upon an analysis of these issues.

(a) What the Arbitrator Had to Decide

105 The parties did not agree on the issue which was before the Arbitrator to decide. The appellant asserted the issue was a narrow one; whether the decision to suspend without pay was void because of a denial of procedural fairness. The respondent submitted that what was before the Arbitrator was the merit of the decision to suspend without pay; and that this was not just tested by considering whether the decision had been made in accordance with the rules of procedural fairness. It was the justifiability and not simply the legality of the decision which was being reviewed.

(b) The Content and Exercise of the Jurisdiction of the Arbitrator

106 The appellant submitted s80E(5) relevantly "*works*" so that the Arbitrator could not intervene whilst a statutory body/employer was utilising a power. But once it had been exercised and an "*act*", "*done*" the Arbitrator could "*step in*" and review, nullify modify or vary it (T10). The appellant submitted the decision to suspend remuneration was therefore an "*act*" liable to be "*reviewed, nullified, modified or varied by the Arbitrator*" under s80E(5) of *the Act*.

107 In its written submissions the appellant said the question in the appeal was:

> "*An employee of a public authority was denied procedural fairness in the exercise of a statutory power, the exercise of which directly and severely affected his rights and interests. The purposed [sic – purported] exercise of power would be liable to be set aside by a Court exercising its judicial review jurisdiction. Why should any other result follow when the Public Sector Arbitrator's dispute resolution jurisdiction is engaged?*"

108 The appellant submitted the Arbitrator's jurisdiction was required to be exercised in accordance with s26(1) of *the Act*. Section 26(1)(a) and (c) were relied upon. It was submitted Mr Moodie had the "*substantial interest*" of his common law right to be heard. The appellant's written submissions said that:

> "*The statutory injunction to give effect to 'equity, good conscience and the substantial merits of the case' is no licence to disregard a common law principle of procedural fairness. Quite the reverse. The substantial merits of the case require attention to the fact that a substantial common law right was*

> *infringed, and that the employer need not have incurred any very significant cost or delay in affording that right. Nothing about affording the right would have prevented the employer from ultimately having regard to, or giving effect to, such considerations as it considered relevant and determinative.*" [31].

109 The appellant submitted the Arbitrator had erred in acting on the basis that s26(1)(a) gave her "*greater liberty*" than a court (T11).

110 The respondent strongly submitted the effect of s26(1)(a) of *the Act* meant the Arbitrator had to review the merits of the decision. The Arbitrator was required to decide whether the decision to suspend pay was "*fair*" (T32). It was also submitted the application required the Arbitrator to consider "*the interests of the community as a whole*" under s26(1)(c) of *the Act*. This was because what was at issue was the possible use of public funds in remunerating Mr Moodie whilst suspended. The Arbitrator should have had regard to the fairness and appropriateness of the decision to suspend without pay.

111 The respondent distinguished the "*merits based review*" of the Arbitrator's jurisdiction from a court exercising powers of judicial review on administrative law principles. Reliance was placed upon the decision of the Industrial Appeal Court in *Director-General Department of Justice v Civil Service Association of Western Australia Inc* [2005] WASCA 244; (2005) 149 IR 160 (*Jones*).

112 The respondent read [28] of the reasons of Wheeler and Le Miere JJ in *Jones*:

> "*28 Turning, then, to the question of the proper construction of s 80E(5), read with s 80E(1), in our view the controversy which has arisen relates to a false issue. As we have noted, there is no power conferred by the Act upon the Arbitrator to engage in anything in the nature of "judicial review", or to make a bare declaration. That is jurisdiction of a kind quite different from the merits-based inquiry contemplated by s 80E. To the extent that the reasons of the Full Bench might be read as suggesting that there is such power, they are in error. "*

113 The respondent also relied upon [167] of the reasons of Hasluck J in *Jones*:

> "*167 As to these grounds of appeal, I share the view expressed in the joint judgment that there is no power conferred by the Industrial Relations Act upon an arbitrator to engage in anything in the nature of judicial review, or to make a bare declaration. That is jurisdiction of a kind quite different from the merit-based inquiry contemplated by s 80E of the Act. However, the powers of the Arbitrator are very wide. There may be occasions when it is necessary in order to deal appropriately with an industrial matter, to nullify, modify or vary an action or decision of an employer in the manner allowed for by s 80E(5) of the Act.*"

(c) Procedural Fairness Principles

114 The appellant relied on the "*principles*" of the "*modern law of procedural fairness*". The appellant cited *Kioa v West* (1985) 159 CLR 550 at 584 per Mason J as containing a "*broad statement of principle*". It was submitted the principle applied in circumstances where an employer exercising statutory powers suspends the remuneration of a public sector employee. The appellant then relied upon *Dixon*. This was a decision about the exercise of the power of suspension under the *Public Service Act 1922* (Cth) by the Chief Officer of the Commonwealth Government Printing Office. The applicable common law duty of fairness was discussed by the Full Federal Court at 178-179. This was said to be in terms consistent with the subsequent statements of principle by the High Court in *Kioa*. The appellant also cited *Everingham* at 744-745 which applied *Dixon* and decided a school teacher was entitled to be heard prior to her suspension from duty without salary under the *Education Act 1972* (SA). The appellant relied upon the discussion and application of these principles by Rowland J in *Re Piper; Ex parte Meloney* (1996) 63 IR 473. This decision was about a public sector employee suspended without pay under s82(1) of the *PSMA*.

115 The appellant submitted there were two bases upon which the Arbitrator had dismissed the application. The primary basis was that it would have been futile for Mr Moodie to be given the opportunity to be heard. The alternative reason was that an examination of the merits of suspension without pay led to the conclusion that it would be unreasonable and contrary to public interest for the respondent to be required to pay Mr Moodie.

116 On the futility issue, the appellant cited and made submissions about *Stead*. It was contended the Arbitrator misapplied *Stead* "*by unjustifiably expanding the principles it stands for*". This was because the circumstances on 20 October 2006 were not such as to make it an inevitability that the respondent would have made the same decision if it had afforded Mr Moodie an opportunity to be heard. It was submitted that *Dixon* and *Everingham* were of greater assistance than *Stead* on this issue. Particular reliance was placed upon this passage of *Dixon* at 182:

> "*The appellant was entitled to be heard on the question whether he should be suspended without salary during that interim period. It may well be that there is little that the appellant could have said or done that was likely to influence the decision on that question. It may well be that the decision would have been the same if he had been given the opportunity of being heard. The fact*

> *remains, however, that he was given no opportunity whatsoever of being heard on the question whether he should be suspended without salary. The decision ... to suspend the appellant was invalid and ineffectual.*"

117 The appellant also relied upon the reasons of Megarry J in *John v Rees* [1970] Ch 345 at 405 where his Honour said:

> "*The path of the law is strewn with examples of open and shut cases which, somehow, were not; of answerable charges which, in the event, were completely answered: of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.*"

118 The appellant noted this passage was adopted by Heydon J in *Jarratt v Commissioner of Police* (NSW) (2005) 224 CLR 44 at 95. The appellant also relied upon the similar observations of Deane J in *Kioa* at 633.

119 The appellant also claimed support from two authorities which I drew to the parties' attention before the hearing. The first was *Queensland Police Credit Union Ltd v Criminal Justice Commission* [2000] 1 Qd R 626. That was an appeal against a declaration that there had been a failure to observe the requirements of procedural fairness prior to the Criminal Justice Commission carrying out a statutory function in writing a report. McPherson JA (with whom Pincus JA and Derrington J agreed) considered an argument that the plaintiff had not shown what would have been done if there was a right to be heard. The appellant relied upon what McPherson JA at 631/2:

> *"With great respect, it seems to me that accepting this submission would reduce to vanishing point the need for tribunals to observe the rules of procedural fairness when acting in the exercise of statutory powers to investigate and report in a way that affects, or has a real potential to affect, the reputation or rights of persons. The question is not whether, by reporting to courts of law after the power has been exercised, a person so affected may be able to secure a belated measure of the justice or fairness to which he, she, or it was originally entitled, but whether such an opportunity was afforded, as it ought to have been, by the tribunal itself in the course of the proceedings before it. The opportunity of which the aggrieved party complains it was deprived is not that of being heard by a court (which has not been denied), but of being heard by the appointed tribunal before it exercises the statutory power vested exclusively in it to produce the result complained of. Judicial insistence that the rule be observed is prophylactic in character, for which the power of the courts to right a wrong after it has been done is not an adequate substitute. In practice, it would mean that procedural justice would be assured only to those who could afford to litigate the matter in a court.*"

120 The appellant also noted the passage of the reasons of Megarry J in *John v Rees*, quoted earlier, was cited with approval by McPherson JA at 632.

121 The second authority was *Ucar v Nylex Products Pty Ltd* [2007] VSCA 181. That appeal involved issues of procedural fairness arising out of a trial at which damages for personal injuries were assessed. The trial judge, in making a credibility finding, relied in part upon observations he made about a witness in court, without previously saying he was going to do so. The Court of Appeal allowed the appeal. Warren CJ and Chernov JA generally agreed with the reasons of Redlich JA, although each also wrote separate reasons. The appellant relied on [33] in the reasons of Chernov JA. In that paragraph his Honour quoted *Stead* and also said:

> "*Since mere breach of natural justice does not necessarily invalidate the decision, [Stead page 145] the answer to this question depends on whether it can be said that the breach had no bearing on the decision, [*Re Refugee Tribunal; Ex parte AALA *(2000) 204 CLR 82, 122 (McHugh), 130-131 (Kirby J)] or that an order for a retrial would be futile in that, upon a retrial, the same order will inevitably result. [Stead v State Government Insurance Commission (1986) 161 CLR 141 at 145 (Mason, Wilson, Brennan, Deane and Dawson JJ), Re Refugee Tribunal; Ex parte AALA at 154 (Callinan J)]*."
> (For ease of reference and clarity the footnotes have been inserted into the paragraph and modified slightly).

122 The appellant also relied on the reasons of Redlich JA at [65]:

> "*In* Gerlach v Clifton Bricks Pty Ltd *[[2002] HCA 22] Kirby J and Callinan J explained the principle in these terms:*
>
> > *But in* Stead *this Court showed itself resistant (as it had earlier been in* Balenzuela v De Gail *(1959) 101 CLR 226) to the notion that because such an error might have been immaterial to the actual result, the outcome of the trial was unaffected and therefore that a new trial would be a futility. The Court in* Stead *concluded that for a party to secure an order for a new trial, that party, otherwise entitled by an error of law (natural justice), need only show the* possibility *of a different outcome.*" (The footnote reference is included in the paragraph and the emphasis was in the original).

123 The respondent submitted that where there had been a denial of procedural fairness by the failure to accord a hearing, to obtain relief the complainant must show that he or she could have submitted something of substance. The respondent relied upon the observations of Lord Wilberforce in *Malloch v Aberdeen Corporation* [1971] 1 WLR 1578 at 1579 as follows:

> "*The Appellant has first to show that his position was such that he had, in principle, a right to make representations before a decision against him was taken. But to show this is not necessarily enough, unless he can also show that if admitted to state his case he had a case of substance to make. A breach of procedure, whether called a failure of natural justice, or an initial administrative fault cannot give him a remedy in the courts, unless behind it there is something of substance which has been lost by the failure. The court does not act in vain.*"

124 The respondent submitted the appellant, at first instance, did not put forward any case of substance that Mr Moodie might have made if he had been given a hearing. The respondent also relied upon *Stead* at 147 to support an argument that a decision maker was entitled to waive a hearing if a different outcome could not have occurred.

(d) Errors by the Arbitrator on Procedural Fairness Issue

125 The appellant and respondent agreed that procedural fairness was owed to Mr Moodie in deciding whether he should be suspended without pay and that no opportunity to be heard had been given to him.

126 The appellant asserted the Arbitrator erred at [33] of her reasons. This was because the only issue the Arbitrator said she took into account in assessing futility was "*the facts*" which Mr Moodie could have put to the respondent. That is, it was submitted the Arbitrator acted on the basis that the only matter which could have been the subject of any submissions by Mr Moodie were issues of fact which had been investigated and reported upon. The appellant submitted there were other topics Mr Moodie could have made submissions about. Additionally the Arbitrator decided in effect that because Mr Moodie had wanted the disciplinary proceedings to be deferred until after the criminal proceedings, he would not comment upon the facts in Mr Hodkinson's report.

127 During the hearing there was discussion with the appellant's counsel about what topics he asserted Mr Moodie could have made submissions about if he had been given the opportunity to be heard. In response, counsel did not accept there was much of a requirement to provide details given the authorities he relied on. At one point it was asserted that the onus to prove "*futility*" was on the respondent and this meant there was little the appellant had to do. Counsel also pointed out he was not Mr Moodie's counsel and had not taken instructions from him. When the issue was further discussed however, counsel provided these topics:

(i) Hardship (as per King CJ in *Everingham*) (T15).

(ii) The maintenance of the integrity of the disciplinary process as lack of pay lead to greater pressure upon Mr Moodie to resign (T15).

(iii) The challenges to the fairness of the process to date as included for example in the earlier letters from Tottle Partners (T15).

(iv) Whether it was fair to suspend without pay, if the appropriate and fair thing to do was simply to defer the disciplinary proceedings until the criminal charges had been dealt with (T16).

128 In contrast the respondent strongly submitted the Arbitrator had not erred. Again emphasis was placed upon the hearing being merits-based and not judicial review. The respondent therefore submitted the Arbitrator's focus on the merits was appropriate.

129 Additionally, it was submitted that even if the Arbitrator had erred on the "*futility*" point, the appeal could not succeed unless the Arbitrator had also erred on the merits. The respondent submitted the decision of the Arbitrator was discretionary and therefore the appellant was required to show there had been a miscarriage in its exercise. The well known authorities of *House v King* (1936) 55 CLR 499 and *Gromark Packaging v The Federated Miscellaneous Workers Union of Australia, WA Branch* (1992) 73 WAIG 220 were cited.

130 The respondent also submitted:

(i) There was little the appellant could have said if given the opportunity; and

(ii) If the appellant wanted to make a case for the suspension not being without pay, the opportunity to do so was before the Arbitrator.

131 As to (i), in [14] of the written submissions the respondent said:

> "*The Commissioner correctly concluded that insofar as the disciplinary matters were concerned the Appellant could say nothing of substance because Mr Moodie had requested consideration of these be deferred so as to not prejudice the hearing of the concurrent criminal charges (para 33 Reasons for Decision). Accordingly any submission could only be limited to the personal circumstances of Mr Moodie and how the decision would be productive of personal hardship for him. These would not have produced a different outcome.*"

132 At the hearing of the appeal the respondent's counsel said the only issue he thought could be raised was "*hardship*", but that was "*always an issue*" and "*would not have made any difference to the outcome*" given the weighty issues in support of suspending without pay (T37). These were the seriousness of the allegation, the stage the inquiry had reached, Mr Moodie's

desire to defer the disciplinary process with the effect that he was not going to comment on the facts of the allegation, the respondent's lack of control over how long the criminal proceedings would take to complete and the public interest in money not being paid to Mr Moodie in this combination of circumstances.

133 When asked whether hardship could ever lead to a decision to suspend with pay the respondent's counsel said: "*I wouldn't have thought so in this case … The employer had already done that, had already taken cognisance of Mr Moodie's position in suspending him with pay*" (T37). It was argued that it was not in the public interest to make an order that he be paid during periods when he will not render service, no matter what his personal circumstances.

134 The respondent endorsed the Arbitrator's observations about her role at [34] of the reasons. The respondent also reiterated the submissions made at first instance in reliance upon *Concut.* The respondent argued it was unreasonable for the appellant to submit the respondent should not finalise the disciplinary proceedings but continue to pay Mr Moodie. Also, the services of Mr Moodie could not be engaged given the evidence that he had engaged in dishonest conduct.

135 As to (ii), the respondent submitted nothing was put before the Arbitrator to indicate anything of substance would have been submitted to the respondent if an opportunity to be heard had been provided. It was submitted there "*was an opportunity to provide evidence, it was merits review*" (T40).

(e) Remuneration During Suspension

136 The respondent's counsel was asked if he contended that it would have been illegal for the respondent to pay Mr Moodie whilst he was suspended. Counsel said no, conceding that government officers are sometimes paid whilst suspended, as Mr Moodie had been to 20 October 2006 (T34).

137 As discussed in more detail below, the respondent did submit that Mr Moodie had no entitlement to be paid whilst suspended. The appellant appeared not to accept this. This seems however to be an alternative position. The appellant's counsel insisted throughout the hearing of the appeal that although the denial of procedural fairness meant the decision to suspend without pay was void, the respondent could at any time revisit the decision and validly decide to suspend without pay.

138 Submissions were also made on the consequence of a finding that the decision was void for an absence of procedural fairness. I will later set out the submissions on this issue.

(f) The Merits of the Decision

139 As to the merits, the appellant said that the Arbitrator had framed the question in the wrong way in [34] of her reasons. The Arbitrator was not to decide the merits of "*the suspension without pay*". It was submitted the only relevant "*merits*" to consider were those about the decision to refuse to afford Mr Moodie an opportunity to be heard. It was submitted that although the factors which the Arbitrator thought supported the suspension of pay were relevant, none of them excused or authorised the denial of the right to be heard.

140 I have already referred to the respondent's position on the merits. It was submitted the issue the Arbitrator had to determine was whether the decision to suspend without pay was justifiable and fair. It was submitted the Arbitrator did not err in the exercise of her discretion and made a reasonable decision.

(g) Payment During Suspension – Legal Principles

141 The respondent repeated the reliance it placed at first instance upon *Bowles*, *Csomore* and *Automatic Fire Sprinklers*. There was particular reliance upon *Bowles* and the reasons of the President at [29]-[36] and [47]-[53]. The President there endorsed the approach of Dixon J in *Automatic Fire Sprinklers.* At [36] the President said: "*I wish therefore to make it clear that it is service, not readiness and willingness which entitles a person to recover wages*" Paragraph [53] was also quoted to the Full Bench, where his Honour said that "*whether the suspension was unlawful or not, however, on the authority of Csomore and Another v Public Service Board of NSW (op cit) and Law of Employment, 5th edition, (op cit), Ms Bowles was not entitled to be paid a salary, since she has not rendered any service for the relevant periods*". (The reference to "*Law of Employment"* is to Macken, O'Grady, Sappideen and Warburton, *Law of Employment* (5th Edition, 2002), Thompson).

142 The respondent noted the Arbitrator appeared to accept this in [26] of her reasons; where she said that, "*when the respondent wrote to Mr Moodie on 20 October 2006, informing him of the decision to suspend him without pay, the rights and obligations under the contract were held in abeyance*". The respondent submitted it would be untenable and not in the public interest for there to be a departure from *Automatic Fire Sprinklers* which would require Mr Moodie to be paid for those periods of time when he had been excluded from the workplace without pay.

143 The appellant filed written submissions in reply to the respondent's "*no service no pay*" argument. It was submitted the critical difference between the parties was the respondent assumed Mr Moodie was not providing service in the sense discussed by Dixon J in *Automatic Fire Sprinklers*, whereas the appellant argued that to the contrary Mr Moodie was providing a kind of service within the contemplation of Dixon J. Reference was made to his Honour's reasons at 466 that did not embrace any artificially narrow concept of service. The appellant cited a passage of the reasons where Dixon J said that a master who sends his servant upon a holiday upon full pay can be sued for wages. His Honour said: "*They also serve who stand and wait*". It was submitted that although Mr Moodie had not been physically performing duties he had been effectively told to "*stand and wait*", when he was directed to remain at home pending the determination of the disciplinary investigation.

144 The respondent also referred to [60](h) of the reasons of the President in *Bowles.* The respondent said his Honour "*questioned whether the Arbitrator could make an order for past unpaid salary and so does the respondent*". As to this the appellant submitted that no firm view was there expressed. It was also pointed out that the authority cited by the President, *SGIC v Johnson* (1997) 77 WAIG 2169, was a case involving the different jurisdiction of the Public Service Appeal Board.

(h) Remedies

145 At the hearing of the appeal there was discussion about the orders the Full Bench should make if the appeal succeeded. The appellant pressed for the orders set out in its written outline of submissions at [33] that:

(1) The appeal be upheld and the decision of the Arbitrator be set aside.

(2) In place of the order of the Arbitrator it be declared that the decision to suspend Mr Moodie's remuneration is a nullity and it be ordered that:

(a) The respondent pay Mr Moodie such remuneration as he would have received from 20 October 2006 as if the respondent had not suspended payment of remuneration.

(b) The respondent continue payment of Mr Moodie's remuneration from the date of an order being made subject to any subsequent lawful cessation of remuneration.

(c) There be liberty to apply "*in connection with any disagreement as to the application of the proceeding orders*."

146 The appellant did not want the Full Bench to simply make an order that the decision of the respondent "*be declared void*", with the consequences of such an order being left to be determined either as a matter of course or in some later proceedings. The appellant submitted the decision of the respondent should be declared void and Mr Moodie be placed in the position he would have been had the decision not been made.

147 The appellant's position was that if the decision to suspend without remuneration was declared void, it would have been void from the beginning, that is from 20 October 2006. If therefore that decision was "*nullified*" it would leave in place the previous decision of the respondent to suspend with pay. Accordingly, back pay should be ordered. Alternatively, it was submitted there was an ongoing entitlement under the contract of employment and the common law for Mr Moodie to be paid his remuneration (see T14, and 24-25).

148 The respondent submitted that if the Full Bench's determination was that the decision to suspend without pay was void, a claim for being paid in the past "*would be left for another application and perhaps another jurisdiction*" (T35). Counsel also said however that the respondent should know its "*liability*" if the decision was void (T36).

149 In reply the appellant's counsel reiterated that the orders sought were those in the written outline, quoted earlier. The appellant's counsel said the making of an order of invalidity and also the consequential orders sought were within the object of *the Act* specified in s6(c) (T47).

Analysis of Issues

(a) The Statutory Process and the Arbitrator's Jurisdiction

150 Pursuant to s80E(1) of *the Act* the Arbitrator had jurisdiction to "*enquire into and deal with*" the industrial matter constituted by the dispute between the appellant and the respondent. The Arbitrator's jurisdiction was first invoked by an application for a compulsory conference pursuant to s44 of *the Act*. At the conclusion of the conciliation conference the parties had not settled all issues in relation to the industrial matter. Accordingly pursuant to s44(9) of *the Act* the parties desired the Arbitrator to "*hear and determine that question, dispute or disagreement*". Under regulation 31 of *the Regulations* a memorandum of the "*matter*" "*requiring hearing and determination*" was to be drawn up and signed. By this stage it was the Memorandum which should have detailed the "*industrial matter*" which the Arbitrator was then required to "*deal with*".

151 In my opinion despite the terms of a Memorandum and subject to the requirements of procedural fairness, the way in which an arbitration is conducted may have an impact on the decision which the Arbitrator may reasonably make. This is such a case.

(b) The Memorandum and the Conduct of the Hearing

152 In my respectful opinion however, the Memorandum did not set out as clearly as it might have the "*question, dispute or disagreement*" which the parties wanted the Arbitrator to "*hear and determine*". The Memorandum contained the assertions of both parties about the facts, law and remedies but did not clearly delineate what "*question, dispute or disagreement*" the Arbitrator was to resolve. This had to be gleaned or inferred from what was in the Memorandum. In my opinion the lack of clarity in the Memorandum was a source of the differing submissions of the parties about what the Arbitrator had to decide.

153 As I construe the Memorandum the following were before the Arbitrator for determination:

(i) Whether or not the decision by the respondent to suspend payment of Mr Moodie's remuneration was void because of a denial of a right to be heard.

(ii) Whether an order should be made that the respondent resume Mr Moodie's remuneration with immediate effect.

(iii) Whether an order should be made for reimbursement to Mr Moodie of the remuneration he would have received if his salary had not been suspended.

(iv) Whether it was unreasonable and not in the public interest for Mr Moodie's suspension to be set aside.

(v) Whether Mr Moodie had a right to remuneration when he had not rendered services during the period of suspension without pay.

(vi) If the answer to (v) was no, whether there was any reason why that principle should not be observed.

154 Regrettably the appellant and the respondent at first instance seem to some extent to have advanced cases which addressed different issues. This was compounded by a lack of clarification of the position during the hearing. The narrowness of the issue, as described by the appellant's counsel at point 1 in the hearing (and repeated during his oral closing submissions) was

not expressly contradicted by the respondent and the Arbitrator did not say, during the hearing, whether she accepted what the appellant said about this. In addition by framing its case in the narrow way in which it did, the appellant did not seek to persuade the Arbitrator that the merits favoured not suspending without pay. That is they did not put before the Arbitrator evidence and/or submissions about the decision which ought to have been made.

155 In contrast to the appellant, the respondent's case clearly focussed upon the merits of the decision to suspend and Mr Moodie's asserted lack of entitlement to any remuneration whilst his services were suspended. In his oral closing submissions counsel emphasised the public interest in not paying Mr Moodie whilst the criminal proceedings were pending. As a result, the respondent submitted that to have provided Mr Moodie with a right to be heard would have been futile (T33 and see also the respondent's written submissions at first instance at [23]).

156 As set out above in my opinion, from the Memorandum, both the issues of whether the decision to suspend Mr Moodie's pay was "*void*" and the reasonableness of the decision to suspend without pay were strictly before the Arbitrator for decision. However as mentioned already and discussed in more detail later, the way the parties conducted the hearing had an impact on the decision the Arbitrator could reasonably make.

157 I have earlier set out what the Arbitrator listed in her reasons as the issues which were "*associated with the resolution of these matters*". These did not specifically include whether there was an entitlement to payment during suspension or whether the "*merits*" favoured suspension without pay, but the Arbitrator decided these issues in any event.

(c) The Content and Exercise of the Jurisdiction of the Arbitrator

158 As set out earlier s80E(1) of *the Act* gave the Arbitrator the jurisdiction to enquire into and deal with the "*industrial matter*". Section 80E(5) gave the Arbitrator the power to "*deal with*" the industrial matter by reviewing, nullifying, modifying or varying an "*act, matter or thing*" done by the respondent employer. As to this jurisdiction, the joint reasons of Wheeler and Le Miere JJ in *Jones* make the following points:

(i) The Arbitrator has no jurisdiction to make "*bare declarations of illegality*" ([19] and see also [28]).

(ii) The powers of the Arbitrator are nevertheless very wide ([29]).

(iii) In determining how to deal with an industrial matter an Arbitrator may make a finding of unlawful or improper conduct as a step in determining how the industrial matter is to be dealt with ([30]).

(iv) It can be necessary for the Arbitrator to decide how relevant statutes apply to the facts as a "*step in the process of ascertaining what is required*" to deal with the industrial matter ([32]).

(v) Section 80E(5) of *the Act* "*does not confer any independent jurisdiction to quash … decisions, but only to do so to the extent necessary to ensure that the industrial matter is dealt with*" in accordance with s80E(1) ([33]).

(vi) Section 80E(5) confers a power to review and if necessary differ from a decision made "*where it is necessary to do so as part of the process of dealing with an industrial matter*" ([33]).

(vii) Questions which would be determined by a court undertaking judicial review of the actions of government officers may be questions necessary for an Arbitrator to decide in order to deal with an industrial matter relating to those government officers. The questions are dealt with as "*steps in the process of determining how the industrial matter is to be dealt with*" ([34]).

159 The analysis by their Honours in *Jones* confirms that the powers contained in s80E(5) of *the Act* are tools for possible use in dealing with an industrial matter and not a source of added jurisdiction. The Industrial Appeal Court in *Jones* was not required to analyse the basis upon which an Arbitrator should decide whether to exercise one of the powers contained in s80E(5) of *the Act*, other than to emphasise, as stated by Hasluck J the "*merit-based*" inquiry which is contemplated ([165]). Also in *Jones* the Industrial Appeal Court did not discuss the interaction between ss80E and 44(9) of *the Act*, regulation 31 and the extent to which the parties conduct of a hearing may impact upon how the Arbitrator may deal with an industrial matter. Again it was unnecessary to do so.

(d) The Equity and Substantial Merits Direction

160 As set out earlier, s26(1)(a) of *the Act* applies to the jurisdiction of the Arbitrator. This brings into question what is meant by the requirement that the Arbitrator exercise jurisdiction "*according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms*". (For shorthand purposes I will refer to this as "*the equity and substantial merits direction*"). The issue was considered, albeit not in the context of the Arbitrator's jurisdiction, in *Registrar v Liquor, Hospitality and Miscellaneous Union, Western Australian Branch* (2007) 87 WAIG 1199 (*LHMU*). There my reasons for decision were agreed with by Scott C and accordingly constitute the binding opinion of the Full Bench. The submissions on this appeal, make it necessary in my opinion to elaborate upon the issue in greater depth. I do not however think anything that is written below is in conflict with the reasons of the majority of the Full Bench in *LHMU*.

161 In [40] of *LHMU*, I emphasised that despite s26(1)(a) of *the Act*, the Commission is not, to put it colloquially, authorised to act in the way in which it thinks best on the basis of some sort of "*pub rules*". In [42]-[48] I explained what I meant:

> "*42 … The subsection does not provide license for a Commissioner or the Full Bench to ignore limits upon the exercise of the powers or jurisdiction of the Commission; or to avoid or mould legal principles to a conclusion thought desirable about the Commission's jurisdiction.*

> *43 In the article, Procedure and evidence in 'court substitute' tribunals, Professor Neil Rees, Australian Bar Review, Volume 28, No. 1, page 41, there is a traced history of sections like s26(1)(a) and the present understanding of their meaning by Australian courts. At page 83, Professor Rees concludes:-*
>
> > *"In earlier times 'equity and good conscience' clauses were intended and interpreted to mean that the recipient of the power had some latitude to depart from the rules of substantive law which would have governed proceedings in the courts. They seem to permit 'a sort of rough and ready local justice to litigants in small cases'. That view of these powers is no longer sustainable."*
>
> *44 Earlier at page 63, Professor Rees referred to* Qantas Airways Ltd v Gubbins *(1992) 28 NSWLR 26 and the joint judgment of Gleeson CJ and Handley JA. Professor Rees cited the observation by their Honours at page 29 that "[t]he words "equity, good conscience and the substantial merits of the case" are not terms of art and have no fixed legal meaning independent of the statutory context in which they are found". However, Professor Rees also referred to the conclusion by their Honours that such a clause did not give the New South Wales Equal Opportunity Tribunal license to depart from "the obligation to apply rules of law in arriving at its decisions". (Page 29). Professor Rees also referred to the rationale for this conclusion by their Honours which was that if it permitted the Tribunal to do anything other than apply the general law "there would have been no point in conferring a right of appeal to the Supreme Court on a question of law". (29). Professor Rees said that this rationale was compelling.*
>
> *45 On this issue it is noted that under s90(1) of the Act, an appeal lies to the Industrial Appeal Court from any decision of the President, the Full Bench or the Commission in Court Session, on, amongst other things, the ground that the decision was erroneous in law in that there had been an error in the construction or interpretation of any act, regulation, award, industrial agreement or order in the course of making the decision appealed against.*
>
> *46 At pages 64/65 Professor Rees referred to the reasons for decision of the High Court in* Sue v Hill and Another *(1999) 199 CLR 462 where in a joint judgment, Gleeson CJ, Gummow and Hayne JJ at paragraph [42] said that provisions of this type "do not exonerate the court from the application of substantive rules of law …". Professor Rees also referred to the similar observations by Gaudron J at paragraph [149].*
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> *47 Other decisions referred to by Professor Rees were Minister for Immigration and Multicultural Affairs v Eshetu (1999) 197 CLR 611 and NAIS v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 223 ALR 171. In the latter, Gummow J at [34] referred to s420 of the Migration Act which is in not dissimilar terms to s26(1)(a) of the Act. By reference to the reasons of the court in Eshetu, his Honour at [35] said that the section "does not delimit boundaries of jurisdiction".*
>
> *48 In summary, s26(1)(a) does not give license to either a Commissioner or the Full Bench to do other than act according to law and construe the limits of the jurisdiction or the powers of the Commission other than on the basis of legal principle.*"

162 The authorities, including those cited and quoted above, establish the following general propositions which are applicable in my opinion to the equity and substantial merits direction.

163 **Firstly**, s26(1)(a) is not a source of jurisdiction, but applies only to the exercise of jurisdiction otherwise granted by legislation. *Griggs v Norris Group of Companies* (2006) 94 SASR 126 is apposite on this point. There, the Full Court of the Supreme Court of South Australia considered s154 of the then *Industrial and Employee Relations Act (SA) 1994*. Section 154(1) provided that in exercising its jurisdiction the South Australian Industrial Relations Court and the South Australian Industrial Relations Commission were "*governed in matters of procedure and substance by equity, good conscience, and the substantial merits of the case, without regard to technicalities, legal forms or the practice of courts*". White J, with whom Perry J agreed (Layton J dissenting) said at [36] that s154(1) was not itself a source of additional jurisdiction but a statutory direction as to the manner in which the jurisdiction elsewhere vested was to be exercised. (See also [41]).

164 **Secondly**, the Commission and the Arbitrator as a constituent authority of the Commission cannot ignore the substantive law, whether statutory or common law, in the exercise of its jurisdiction. This point was referred to by White J in *Griggs* at [44] by quoting from *Featherston v Tully* (2002) 83 SASR 302 at [156]-[158]. *Featherston* was about the Court of Disputed Returns, which by s103(1) of the *Electoral Act 1985* (*SA*) "*was to be guided by good conscience and the substantial merits of each case without regard to legal forms or technicalities*". In *Featherston* it was said that the Court was obliged to act judicially, to apply the requirements of the *Electoral Act* and the common law and to afford natural justice to all parties and interveners. Within these bounds the Court was permitted to resort to a commonsense judgment but could not be "*merely arbitrary*". Relevant common law principles still applied.

165 Similarly in *Ballantyne v WorkCover Authority of New South Wales* [2007] NSWCA 239, Basten JA with whom Beazley JA agreed at [89], cited the joint reasons in *Qantas Airways Ltd v Gubbins* (1992) 28 NSWLR 26 (*Gubbins*) with approval and reiterated that although the relevant body was required to act "*according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms, it is clear that it must exercise its powers according to law: were it otherwise, the conferral of a right of appeal to this Court 'in point of law' … would be significantly diminished, if not rendered otiose*". The same point was made in my reasons quoted above in *LHMU*. It was also succinctly made in *Townsville City Council v Chief Executive, Department of Main Roads* [2006] Qd R 77 at [43] where Keane JA with whom McMurdo P and White J agreed said:

> "*The authorities suggest that a statutory obligation to have regard to the "substantial merits of the case" means that the merits may not be able to trump a countervailing rule of law but that they are one factor that must be taken into account when exercising a discretion.*"

166 To like effect are the observations by Gray J in *Grundman v Repatriation Commission* [2001] FCA 892; (2001) 66 ALD 125. Pursuant to s119(1) of the *Veterans' Entitlement Act 1986* (Cth) the Repatriation Commission was required to act "*according to the substantial justice and the merits of the case without regard to legal form and technicalities*". Gray J considered an argument that this allowed the Administrative Appeals Tribunal, standing in the shoes of the Repatriation Commission, to take a more benevolent view of an applicant's case than it would otherwise have done. His Honour said that this "*argument has been put many times. It has been rejected just as many times*" ([39]).

167 The Full Court of the Supreme Court of Western Australia in *Re Ciffolilli; Ex parte Rogers* [1999] WASCA 205 also endorsed what was said in *Gubbins*. Parker J, with whom Pidgeon and Anderson JJ agreed, at [53] said:

> "*This section follows a rather familiar pattern by providing that the Tribunal is to act according to equity and good conscience and the substantial merits of the case without regard to technicalities and legal forms and is not bound by the rules of evidence, but is bound by the regulations in matters of procedure. S155 goes onto provide that a question of law which arises in proceedings for the Tribunal may be referred by way of case stated for the opinion of the Supreme Court which has jurisdiction to consider and determine that question of law. The effect of provisions such as s154, especially where there is a provision for the Supreme Court to review questions of law arising in the proceedings, was considered by Gleeson CJ and Handley JA in their decision in Qantas Airways Ltd v Gubbins (1992) 28 NSWLR 26 at 29-31. I would respectfully adopt the reasoning of their Honours and apply to this present case the conclusion expressed by their Honours at 31 where they said: "In our view the duty to act according to equity and good conscience, in the context of this Act, did not free the Tribunal from its duty to apply the general law in deciding the issues raised ...."*

168 The point is neatly illustrated in *The Director General of the Department of Justice v The Civil Service Association of Western Australia (Inc)* (2004) 85 WAIG 629. In that case, a Mr Dinnie had been overpaid 22.1 days of sick leave more than his entitlement. His employer required him to reimburse the amount of the overpayment. Mr Dinnie objected to doing so. An application was made to the Arbitrator to deal with this industrial dispute. The Arbitrator made an order that Mr Dinnie be "*deemed to have been on paid sick leave for the 22.1 days prior to his return to work*". The Full Bench allowed an appeal against the Arbitrator's decision. Relevantly and with respect succinctly put by Kenner C at [68]:

> "*The fact of the matter was in this case, that it was not in dispute that Mr Dinnie had been paid funds out of consolidated revenue to which he had no entitlement. That being the case, irrespective of the quantum of the sum of monies involved, the State has a right, and arguably a duty, to seek to recover those monies overpaid …In my opinion, to the extent that the learned Arbitrator did not apply this general principle and sought to apply s 26 of the Act, having regard to the circumstances of Mr Dinnie, then this was in error. Whilst s 26(1)(a) of the Act requires an Arbitrator and the Commission to deal with a matter in accordance with equity, good conscience and the substantial merits of the case, this does not permit an Arbitrator or the Commission to depart from the duty to apply the general law …*".

169 Kenner C then cited a number of authorities including *Gubbins*. (See also the reasons of Sharkey P in *Dinnie*, agreed with by Gregor C, at [39]).

170 **Thirdly**, as referred to in *LHMU* by reference to *Gubbins*, the impact of the equity and substantial merits direction varies in accordance with the particular function, jurisdiction or power being exercised by the Commission. White J in *Griggs* at [32] said the meaning of the expression was dependent upon the context in which it was used, having regard to the nature of the decision-maker and the decision to be made. His Honour supported this observation by reference to *Santos Ltd v Saunders* (1988) 49 SASR 556 at 564. White J then said that the content and application of the relevant section was "*more limited in those cases in which the IR Court is, for example, exercising the jurisdiction to hear and determine a question of law referred to it by the Commission … than it will be in those cases in which the Commission is exercising its jurisdiction to make awards regulating remuneration and other industrial matters …*". With necessary modification, these observations are in my respectful opinion apposite to the Commission.

171 The Commission, including the President, Full Bench and constituent authorities have a variety of functions, jurisdiction and powers under *the Act*. The extent to which the requirements of s26(1)(a) can have a substantive impact upon the way the Commission exercises its jurisdiction will vary according to the particular function, jurisdiction and/or power the Commission is exercising or contemplating exercising.

172 The functions of the Commission were summarised in *Amalgamated Metal Workers and Shipwrights Union of Western Australia and Another v State Energy Commission of Western Australia* (1979) 59 WAIG 494 at 496 as being, in some respects, each of those of an administrative body, a court of record and a legislative body. This is possibly too simple today. The Commission, without attempting to be exhaustive:

(i) Conciliates industrial disputes of various types (ss32 and 44). These include negotiations for agreements about the terms and conditions of employment, industrial awards, unfair dismissals and denial of contractual benefits claims. The making of awards is probably the quasi-legislative function the Industrial Appeal Court had in mind. (It may be that this is now not correct description given the High Court decision of *Byrne and Frew v Australian Airlines Ltd* (1995) 185 CLR 410).

(ii) Under s44 of *the Act*, has a power to make orders at or in relation to a conciliation conference.

(iii) Possesses an arbitral and/or judicial power to determine the type of disputes referred to in (i) above, mostly after a conciliation conference has not resolved the proceedings.

(iv) Declares the true interpretation of awards and industrial instruments (s46).

(v) Constituted as the Commission in Court Session (CCS), has the power to make general orders as described in s50A of *the Act*. (The Commission is there exercising original jurisdiction, but the CCS also has an appellate jurisdiction, under for example s48(11) of *the Act*).

(vi) Constituted as the Full Bench, decides appeals against decisions of the Commission, including the Arbitrator, the Occupational Safety and Health Tribunal and the Industrial Magistrate's Court (ss49 and 84).

(vii) Constituted as the Full Bench, decides some types of rule alteration applications, applications for enforcement of the orders of the Commission and deregistration proceedings (ss62(2), 84A and 73).

(viii) Constituted by the President, confers with the Registrar about some rules alteration applications (s62(3)), hears applications to stay orders pending appeals (s49(12)) and determines complaints by members or the Registrar about an organisation's non-observance of its rules (s66).

(ix) As an administrative body, administers and maintains a record of the applications made to the Commission, awards and orders made by the Commission, the registration of industrial agents and organisations, including the maintenance of an up to date set of the rules of an organisation, and determination of some alteration rules applications.

173 To illustrate the point I have explained above, when the Commission is conducting conciliation conferences, the presiding Commissioner would be expected to use his/her experience, understanding of the law and industrial fairness and conciliation and mediation skills to try and assist the parties to reach an agreed resolution of the dispute. On the contrary if the Commission is arbitrating a claim referred by an employee under s29(1)(b)(ii) of *the Act* which asserts they have not been given a contractual entitlement, the Commission must decide what the terms of the contract were and whether or not they have been complied with by the employer. The Commission does not have licence to add to or subtract from the terms of the contract or the facts and order, for example, that a benefit be given to an employee because they think it would be equitable or fair. The terms of the contract cannot be disregarded as "*technicalities or legal forms*" or for any other reason supposedly supported by s26(1)(a) of *the Act*.

174 In *LHMU* I referred to and quoted from Professor Rees' article. Professor Rees concluded of the equity and substantial merits direction:

> "*They are now procedural powers only. While provisions of this nature appear to give Tribunals some latitude to depart from the manner in which proceedings are conducted in the courts, there may be no modern need for these powers because legislatures and courts have transformed the way in which court based litigation is conducted in most Australian jurisdictions.*"

175 This applies in my opinion to at least some of the functions, jurisdiction and powers of the Commission. The same point was made in *Administration of the Territory Papua New Guinea v Daera Guba* (1973) 130 CLR 353 about a land board set up under s9 of the *Land Ordinance of 1911* to decide disputes about the ownership of land. Section 9 provided that such a board "*in giving its decision shall be guided by the principles of equity and good conscience and shall not be bound by rules of*

evidence or legal procedure". Gibbs J at 455 said that the "*words in the form of those quoted from s.9 must be regarded as dealing only with procedure, and not as excluding the application of rules of substantive law*". (See also Barwick CJ at 402).

(e) The Memorandum, *Jones* and The Equity and Substantial Merits Direction

176 The Memorandum said the appellant sought a declaration that the decision of the respondent to suspend Mr Moodie without pay was void. In my opinion however this was not a "*bare declaration*" of illegality based on notions of judicial review as discussed in the joint reasons in *Jones*. The appellant did not just seek a declaration that the decision was "*void*" but in effect wanted the Arbitrator to "*nullify*" the decision and make consequential orders about the past and future remuneration of Mr Moodie. This was the way in which the appellant contended the Arbitrator should "*deal with*" the industrial matter.

177 In deciding whether or not to make these orders, the Arbitrator could not, according to the above authorities, ignore the substantive common law about whether the decision of the Arbitrator was or was not void because of a lack of procedural fairness. A decision as to whether or not the decision was void did not necessarily of itself however resolve the application in the favour of the appellant and require the Arbitrator to make the consequential orders sought. This was because in my opinion and consistent with *Jones*, the Arbitrator had to consider how to "*deal with*" the industrial matter. How she could do so however was limited by the constraints of the law, the Memorandum and how the hearing was conducted by the parties.

178 I have earlier quoted [34] of the Arbitrator's reasons. There the Arbitrator's jurisdiction was contrasted to that of an "*administrative tribunal*" and was described as providing "*practical and equitable resolutions*". The Arbitrator said that in the case before her therefore the issue was "*whether the respondent's decision to suspend without pay was fair and equitable even if a proper process was not applied*". Read literally, this could mean that the issue of whether the decision was "*fair and equitable*" was divorced from or separate to the issue of whether a proper process was applied and if not the legal consequence(s) of this. If this is what the Arbitrator meant, it was in my opinion wrong. This is because the issue of whether a "*proper*" or procedurally fair process had occurred fed into whether the decision was "*fair and equitable*", and indeed may have been decisive of that issue. Also if it meant that the Arbitrator could ignore the law then with respect this was also wrong.

179 Paragraphs [38] and [39] seem to clarify that the Arbitrator thought the "*merits*" of the situation favoured suspension, without pay, even if there was no futility in Mr Moodie being heard. I will later comment on the soundness of this reasoning.

(f) Procedural Fairness Principles

180 The appellant and the respondent agreed that the decision to suspend Mr Moodie without pay attracted the procedural fairness "*hearing rule*". That is he ought to have been given an opportunity to be heard prior to the decision being made. It is also agreed that no such opportunity was provided.

181 The parties differed upon whether the Arbitrator properly applied the principles. As I have said the Arbitrator decided that not providing an opportunity to be heard would not have made any difference to the decision ([32] and [33]).

182 On this issue, the parties and the Arbitrator took *Stead* as the leading decision. Stead was however a different case from the present.

183 It is important to acknowledge this, as the requirements of natural justice and the consequences of any breach depend upon the particular statutory power being exercised and the individual facts and circumstances. As stated by Brennan J in *Kioa* at 612:

> "*The principles of natural justice have a flexible quality which, chameleon-like, evokes a different response from the repository of a statutory power according to the circumstances in which the repository is to exercise the power.*"

184 In *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 the High Court in joint reasons said at [26]:

> "*It has long been established that the statutory framework within which a decision-maker exercises statutory power is of critical importance when considering what procedural fairness requires. It is also clear that the particular content to be given to the requirement to accord procedural fairness will depend upon the facts and circumstances of the particular case.*"

(g) The Law on Futility

185 In *Stead*, the context was a decision by a judge after trial in a personal injuries case. The judge, after informing counsel during his closing submissions that a doctor's evidence on causation would not be accepted, did just that in his reasons for decision. This was clearly a breach of the requirements of procedural fairness or natural justice. The question was whether this departure entitled the aggrieved party to a new trial. The context of that decision is different from the present in two important ways. Firstly the nature of a judicial decision after trial is different from the exercise of a statutory power to suspend employment. Secondly the context of a decision by a court as to whether to order a new trial is different from the jurisdiction being exercised by the Arbitrator. This was whether the "*industrial matter*" should be dealt with in part by ordering the decision to suspend without pay was a nullity. There are however some points of general principle which can be taken from *Stead* and when appropriate applied in different contexts. Indeed the High Court has done this. In doing so however it is important to look with some precision at what the Court in *Stead* said about futility.

186 Firstly at 145 the Court said a new trial would not be ordered if it would inevitably result in the making of the same order as at the first trial. Their Honours said that an order for a new trial in such a case would be a futility. Secondly on the same page the court gave the example of a party being denied an opportunity of making submissions on a question of law which would

have been clearly answered unfavourably to that party. Again, the court said it would be futile to order a new trial. These are narrow exceptions.

187 The broader principle which may be extracted from *Stead* is encapsulated by their Honour's question "*would further information possibly have made any difference?*" (145) and that all "*the appellant needed to show was that the denial of natural justice deprived him of the possibility of a successful outcome*" (147).

188 Gleeson CJ in *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 470 at [10] said: "*In a case of failure to give a hearing when a hearing is required, the person complaining of denial procedural fairness does not have to demonstrate that, if heard, he or she would have been believed. The loss of an opportunity is what makes the case of unfairness*". Similarly, Kirby J in *Applicant NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 221 CLR 1 at [86] referred to the High Court in *Re Refugee Tribunal; ex parte Aala* (2000) 204 CLR 82 as affirming the "*strong principle earlier stated in Stead*". This principle was a "*could not possibly have produced a different result*" test.

189 In *Aala* each of the members of the High Court acted in accordance with the *Stead* principle in the context of a denial of natural justice in a hearing by the Refugee Review Tribunal. (See for example Gleeson CJ at [4], Gaudron and Gummow JJ at [59], and [80]-[81], McHugh J at [104] and [110] and Kirby J at [131]). At [81] Gaudron and Gummow JJ quoted the passage from the reasons of Megarry J in *John v Rees* quoted above.

(h) Procedural Fairness and Statutory Decisions Affecting Employment

190 As submitted by the appellant, the courts have applied the principles about having a right to be heard in the context of statutory decisions to suspend or dismiss public sector employees. Earlier I set out the appellant's submissions on this point, in reliance upon *Dixon*, *Everingham* and *Re Piper*.

191 In *Re Piper*, Rowland J at 477 emphasised the importance of a decision of suspending an employee without pay. His Honour said:

> "*An employee in that situation can suffer severe hardship. He may have no other source of money on which to live and at the same time, as he is still employed, he is usually unable to seek or obtain other employment.*"

192 Similarly, in *Schmohl v Commonwealth of Australia* (1983) 49 ACTR 24, Gallop J in the Supreme Court of the Australian Capital Territory followed *Dixon* and said the decision to suspend without giving an opportunity to be heard was likely to have had "*profound emotional, social and financial*" impacts upon the plaintiff (31).

193 *Dixon* was also applied by the New Zealand Court of Appeal in *Birss v Secretary for Justice* [1984] 1 NZLR 513, in the context of a suspension without pay of a probationary officer in the Department of Justice. Richardson J at 4 referred to the characteristics of suspension and said that an officer was then deprived of an entitlement to perform their duties in the public service and where the suspension was without salary the officer was deprived of his entitlement to salary until the charges against him were determined. Richardson J said that "*he is living on his savings and his wife's part-time employment earnings. Had the Secretary for Justice stayed his hand the appellant would have had the opportunity to argue that in his particular social and financial circumstances suspension without pay was so harsh and punitive in its consequences that other alternatives such as transfer to other duties and suspension with pay should be explored further*".

194 These cases serve to emphasise the importance of having a right to be heard in a situation where what is being affected is a person's employment and remuneration. The point was in my respectful opinion powerfully stated by Wilcox CJ, in the context of the then s170DC of the *Industrial Relations Act 1988* (Cth), in *Nicholson v Heaven and Earth Gallery* (1994) 1 IRCR 199 at 209/210. His Honour said:

> "*Section 170DC carries into Australian labour law a fundamental component of the concept known to lawyers as "natural justice" or, more recently, "procedural fairness". The relevant principle is that a person should not exercise legal power over another, to that person's disadvantage and for a reason personal to him or her, without first affording the affected person an opportunity to present a case. The principle is well-established in public administrative law. It was accepted into international labour law when Art 7 was inserted in the Termination of Employment Convention. Section 170DC is directed modelled on Art 7. The principle is, I believe, well understood in the community. It represents part of what Australians call "a fair go". In the context of s 170DC, it is not to be treated lightly. The employee is to be given the opportunity to defend himself or herself "against the allegations made"; that is, the particular allegations of misconduct or poor performance that are putting the employee's job at risk.*"

195 In the context of a statutory decision, Kirby J in *Applicant NAFF* at [69] said that:

> "*The failure to observe proper procedures itself amounts to a legal defect in the performance of the task conferred by law as the law requires. In this sense, the invalidating element is … the anterior failure to conform to the law. That failure is, in a sense, a legal wrong against the whole community. The duty to accord procedural fairness is part of the public law. It is upheld to ensure that the element of governance contemplated by law will (absent lawful exceptions) be discharged fairly.*"

196 A similar point was made by McPherson JA in *Queensland Police Credit Union.* His Honour at 633 quoted with approval from the reasons of Pincus JA in *Wall v Windridge* (1999) 1 Qd R 329 at 336/337. Pincus JA there said it was not "*essential for parties complaining of not having been given a fair opportunity to contest an issue to go into detail as to what questions they might have asked, or evidence they might have adduced, if not so treated.*" (*Kioa* was cited). At 634 and 635 in *Queensland Police Credit Union* McPherson JA concluded:

> "*Once it is shown that there is a right to procedural fairness in the form of an opportunity of being heard in a proceeding, a person aggrieved is ordinarily entitled to relief against adverse consequences of being denied that right without having to establish in detail how the opportunity would have been made use of. The position may, in some instances, be different where it is shown that the opportunity, even if granted, would in fact or law have been of no avail. In practice, however, cases of that kind are, for the reasons referred so by Megarry J. in John Rees [1970] Ch. 345, 402, necessarily rare.*"

197 The potential consequences for the person liable to be affected by a statutory decision can affect both the scope of procedural fairness and the consequences of a breach. As said by Gleeson CJ in *NAIS*, the loss of the opportunity can make the unfairness. In *Dixon* at 182 the same point is made, in different but no less applicable circumstances and language. Allsop J in *Eaton v Overland* (2001) 67 ALD 671 at 716 said, about the not unrelated issue of fitness for a particular type of employment: "*Mr Eaton was entitled to a commensurate degree of fairness in the process of dealing with such a serious matter*". Finally, Kirby P in dissent but not on this point in *Matkevich v NSW Technical and Further Education Commissioner [No. 3]* (Unreported, NSWCA, 2 February 1996, BC 9600084) said at 22 that a delegated statutory power which concerned discipline and the risk of dismissal of a longstanding employee had "*very considerable significance … which made it specially important that the decision should be reached fairly, and manifestly so*".

(i) Errors by the Arbitrator on Procedural Fairness

198 In my opinion and with respect, the Arbitrator erred in her understanding and application of these principles.

(i) Importance of the Right to be Heard

199 The following factors made it important that Mr Moodie be given a right to be heard:

(aa) Through his solicitors, he had denied the relevant allegation and offered to make a submission to Mr Hodkinson, which had not been taken up.

(bb) Up until 20 October 2006, Mr Moodie had been suspended on full pay. The prospect of him being suspended without pay was not contemplated by the letter from the respondent dated 6 October 2006 nor that from his solicitors dated 19 October 2006.

(cc) The only change on 19 and 20 October 2006 was the information that Mr Moodie was to be charged with offences and his seeking of the deferral of the disciplinary process.

(dd) Mr Moodie's solicitors said the charges would be defended. Mr Moodie was also entitled to the presumption of innocence.

(ee) The decision of suspension without pay had serious ramifications for Mr Moodie.

(ii) Would there have been Futility in Giving Mr Moodie a Hearing?

200 In my opinion, **firstly**, the Arbitrator erred at [32] when it was said that *Stead* stands for the proposition that there is no requirement to provide procedural fairness to an employee where "*it would be futile to do so*". This is incorrect. The obligation to provide procedural fairness does not depend on lack of futility. Such a principle would be self defeating. It would require a decision maker, in the absence of hearing the affected party, to decide whether or not giving that party an opportunity to be heard would be futile. This misses the *John v Rees* point. Futility can step in at the point of deciding whether a remedy will be granted for a breach of procedural fairness. For example the High Court in *Stead* mentioned futility in the context of deciding whether to order a new trial.

201 **Secondly** and more significantly, as submitted by the appellant the Arbitrator's reasons in [33] indicate the only issue which was taken into account in judging futility was the lack of facts which Mr Moodie would have put to the respondent, given his solicitors had said he did not want to comment on the investigator's report while the criminal charges were pending. As set out earlier there were other topics which the appellant submitted could have been addressed by Mr Moodie. Most significantly perhaps the Arbitrator ignored the potential topics of hardship and whether it was fair in any event to suspend without pay.

202 In my opinion and based upon the authorities referred to earlier, it was not fatal to the appellant's procedural fairness point that before the Arbitrator there was no evidence or detailed submissions on the use which Mr Moodie might have made of the opportunity to be heard. I note however that the appellant's counsel submitted to the Arbitrator that hardship could have been raised by Mr Moodie (T25).

203 In the circumstances, in my opinion this was sufficient to establish that the process of decision making of the respondent was unfair. It could not be said that giving a right to be heard would have inevitably have produced the same result. Mr Wilson's evidence showed that hardship was not taken into account.

204 As set out earlier, the respondent argued on appeal, in reliance upon *Malloch*, that the appellant had to show that a case of "*substance*" would have been mounted if an opportunity to be heard had been given. It was also submitted that the hearing before the Arbitrator *was* the opportunity to provide the submissions Mr Moodie had been denied from making. As to the first of these points, it is unclear to me whether Lord Wilberforce in *Malloch* was suggesting a different test to that established by

the High Court in *Stead* and applied in the other authorities I have referred to. If so, then the Australian authorities ought be followed. If not, then as I have said the application of the test as explained in the Australian authorities leads to the conclusion that the decision making was demonstrated to have been unfair at the hearing before the Arbitrator.

(iii) The Arbitration Curing the Procedural Unfairness

205 As to the second point, having carefully considered the written submissions and the transcript of the oral submissions at first instance, it was not then asserted by the respondent that this was the appellant's chance to provide evidence and make submissions on behalf of Mr Moodie about what could have been said to the respondent if an opportunity to be heard was provided. No "*Calvin v Carr*" ((1979) 1 NSWLR 1; [1980] AC 574) type point was taken, that the proceedings before the Arbitrator "*cured*" any procedural fairness deficiency, as all of what Mr Moodie wanted to place before the respondent could now be put before the Arbitrator. If such a point was taken at first instance the appellant would have had the opportunity to try to counter this by submissions and/or evidence. Accordingly in my opinion it is not now a point upon which the respondent can rely (*Coulton v Holcombe* (1986) 162 CLR 1 at 7, 8).

206 As discussed by McHugh J in *Re Minister for Immigration and Multicultural Affairs ex parte Miah* (2001) 206 CLR 57 at [145]-[148], whether a later hearing "*cures*" a procedural defect in an earlier decision making process depends upon the circumstances. His Honour cited with approval the reasons of Fitzgerald JA in *Hill v Green* (1999) 48 NSWLR 161 at 195 and 197 (and see also Spigelman CJ in *Hill* at 172). Fitzgerald JA said that such "*curing*" was usually only applicable where the decisions were steps in a single decision making process ([150]). This did not apply where Mr Hill, a teacher, made an application under the *Industrial Relations Act 1996* (NSW) for reinstatement, after a decision had been made to dismiss him under the *Teaching Services Act 1980* (NSW). He also had a right of appeal under the *Government and Related Employees Appeal Tribunal Act 1980* (NSW) to that Tribunal (GREAT). In *Hill* there was discussion about *Matkevich* where a majority (Powell and Cole JJA; Kirby P dissenting) held the GREAT had not been in error in deciding that a breach of procedural fairness could be cured by it hearing an appeal on the merits.

207 It was not necessary for the court in *Hill* to decide the correctness of *Matkevich* but interestingly Fitzgerald JA at [165] indicated an appeal to GREAT could be on the merits or that "*a person charged with a disciplinary offence who is denied procedural fairness in respect of the initial determination could appeal to GREAT on that sole ground and obtain an order setting aside the initial determination and remitting that matter for redetermination*". This echoes how the appellant approached the hearing at first instance.

208 In the present case I am not satisfied that the application to the Arbitrator did or could "*cure*" the defect in procedural fairness as submitted by the respondent. This is because:

(aa) The application was not part of a single decision making process. A separate procedure was invoked, that of the Arbitrator dealing with this as an "*industrial matter*".

(bb) The hearing was not conducted on the basis of a full review of the merits, even though it might have been.

(cc) Additionally, neither the respondent nor the Arbitrator conducted the hearing on the basis that the denial of procedural fairness could be cured by the appellant, on Mr Moodie's behalf, making submissions and adducing evidence on the merits.

(dd) The Arbitrator's reasons also did not proceed on this basis.

(iv) Hardship

209 I have earlier set out the respondent's counsel's submissions on appeal about the question of hardship. With respect, they do not persuade me that giving Mr Moodie an opportunity to be heard on this topic was futile. To reach this conclusion in my opinion involves an unacceptable degree of speculation. It would ignore the point made by the Full Federal Court in *Dixon* at 182, quoted earlier.

(v) The Fairness of Suspension Without Pay and the Public Interest

210 The respondent submitted it was not in the public interest for Mr Moodie to be paid whilst suspended, whatever his personal circumstances. I do not accept this to be necessarily so.

211 In my opinion in considering this issue it needs to be borne in mind the reasons why it was appropriate for the disciplinary process against Mr Moodie not to continue pending the hearing and determination of the criminal charges. As stated in the letter from Tottle Partners dated 19 October 2006 to continue with the disciplinary process could cause unfairness to Mr Moodie in the criminal proceedings. His response to the report might have involved the surrender of his right to silence, a fundamental right of an accused in the criminal process. On the other hand to not comment on the report could lead to Mr Moodie's dismissal. Also if the disciplinary proceedings were decided against him then this could prejudice his trial. It is these difficulties which made a decision to defer the disciplinary process fair and appropriate.

212 That this was a proper way to proceed has been acknowledged by courts which have recognised that an injunction might be granted to restrain disciplinary processes pending the finalisation of parallel criminal proceedings. (See for example *Bannister v Director General, Department of Corrective Services* [2005] 1 Qd R 117 and *Lee v Naismith* [1990] VR 235).

213 In *Re Martin; ex parte Dipane* (2005) 30WAR 164, Roberts-Smith JA, with whom Steytler P and Miller AJA agreed, said at [41] that interference with "*an accused's right to silence … is a relevant (and may be a decisive) factor in determining that disciplinary or other administrative proceedings ought not be concluded pending the outcome of relevant criminal proceedings*".

214 The issue was also considered by the Full Court of the Supreme Court of Western Australia in *De Castro Martins and Others v Racing Penalties Appeal Tribunal of Western Australia and Another* (Unreported, Library No 970519C, 10 October 1997). Steytler J, with whom Kennedy J agreed, at page 10 quoted with approval the reasons of Hope JA in *Edelstein v Richmond*

(1987) 11 NSWLR 51 at 59. Hope JA said that views, "*have been expressed and implemented that so long as related criminal proceedings may be instituted or are pending, it is generally undesirable that disciplinary proceedings should be dealt with … A possibly stronger view was expressed by McHugh JA in* Herron v McGregor *(1986) 6 NSWLR 246 at 266 that, while criminal proceedings are pending, it was only proper that disciplinary proceedings should not be brought on for hearing.*" In *Martins* an application to the Racing Penalties Tribunal against a greyhound trainer alleged a breach of a racing rule. The actions involved in this alleged breach could also be the subject of criminal charges. The trainer requested the Tribunal to adjourn the hearing of the disciplinary charge pending a decision being made about whether criminal charges would also be laid. The adjournment was not granted. Steytler J decided the adjournment ought to have been granted in part because of the trainer's "*right to silence*".

215 In *Bannister*, corrective service officers were committed for trial for an alleged assault. They sought an order that the respondent be restrained from proceeding with disciplinary action about the same incident under the *Public Service Act 1996* (Qld) until the criminal proceedings had been concluded. The application was refused because the applicants had already surrendered their right to silence to the extent of providing responses to the disciplinary charges. However Holmes J endorsed what Hope JA said in *Edelstein*. His Honour said the possibility of the use, against the applicants in their criminal trial, of evidence derived from statements made in the disciplinary proceedings was a proper consideration in the exercise of the discretion to grant an injunction ([17]).

216 A similar issue was considered by Southwell J in *Lee v Naismith*. There was an inquiry by the Pharmacy Board against a pharmacist who asserted criminal proceedings might also be brought against him for the same incident. It was held in the circumstances that there was no more than a fanciful possibility of this and therefore an injunction would not be granted. His Honour referred with approval however to the reasons of McHugh JA in *Herron v McGregor* at 66 and quoted above, in the reasons of Hope JA in *Edelstein*.

217 As I have said, on the basis of these authorities and the fundamental principles of the rights to silence and a fair trial, the decision by the respondent not to proceed with the disciplinary proceedings against Mr Moodie was a fair and appropriate one. It was a decision taken by a public officer and it was in the public interest, as well as that of Mr Moodie, to try and ensure there was a fair trial. In these circumstances reliance upon the "*public interest*" argument of the respondent, accepted by the Arbitrator at [37] of her reasons, about "*expenditure of public funds*" can be over-emphasised.

218 In my opinion it was not inevitable that the respondent would have rejected a submission that, given the deferral of the disciplinary process was the fair thing to do, it was not inappropriate for the respondent to continue to pay the salary of Mr Moodie.

(vi) Conclusion on Futility

219 For these reasons the appellant has established the Arbitrator erred in her conclusion on "*futility*". The Arbitrator also erred in concluding in [39][d] that there was "*no unfairness in the suspension without pay*". The denial of an opportunity to heard was unfair. In my opinion grounds of appeal (2) and (3) have been established.

220 I need to consider however whether the effect of this is that the appeal should be allowed, and if so what orders the Full Bench should make. To do so involves analysis of other issues as follows.

(j) The Consequence of the Procedural Fairness Error

(i) The Issues

221 The appellant submitted that if the Arbitrator erred in her reasoning and conclusion on the procedural fairness issue, it followed that the decision to suspend without pay was "*void*". This was said to have the consequence that Mr Moodie was entitled to the benefit of orders requiring the payment of remuneration. This was both for past non receipt of remuneration and remuneration in the future until such time, if any, as the respondent validly made a decision to suspend without pay.

222 In my opinion however the appellant's submission conflates a number of issues; or put slightly differently attempts, too simplistically, to collapse a number of issues into one. The issues may be summarised as:

(aa) What was the consequence of the denial of procedural fairness at common law.

(bb) If this was that the decision was "*void*", what does this mean, in the present context.

(cc) In particular, does it mean there is an entitlement to past and future remuneration. If so what is the basis of such an entitlement as a matter of law.

(dd) If the answer to the first sentence in (cc) is yes, does the Arbitrator's jurisdiction extend to making orders of this type.

(ee) If the answer to (dd) is yes, should the Arbitrator have made such orders in dealing with the industrial matter.

(ii) Decision to Suspend Without Pay Void

223 The appellant's submission that the Arbitrator ought to have found the decision to suspend without pay was "*void*", is unobjectionable as far as it goes. The submission is supported by decisions of the High Court. For example, in *Plaintiff S157/2002 v The Commonwealth of Australia* (2003) 211 CLR 476 at 506, Gaudron, McHugh, Gummow, Kirby and Hayne JJ said that an administrative decision infected with, amongst other things, a denial of procedural fairness was "*regarded, in law, as no decision at all*". In making this comment, their Honours cited the joint reasons of Gaudron and Gummow JJ in *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 614, 615 (McHugh J agreeing at 618).

224 In *Bhardwaj,* the High Court upheld the validity of the actions of the Refugee Review Tribunal in making a second decision upon an application, when the first was flawed by a denial of procedural fairness. The High Court held that as no decision had in effect been made, the Tribunal had not yet completed the exercise of its jurisdiction and could validly make the second decision.

(iii) What Does Void Mean

225 In the present case however what does the decision being "*void"* mean? What consequence does it have? Is it axiomatic, as the appellant would have it, that there should have been an order that the respondent pay to Mr Moodie the remuneration he has not been paid? And if so why? For example was the consequence of the decision being void that there was no effective suspension without pay, so that the respondent not continuing to pay Mr Moodie was in breach of contract?

226 As discussed in *Judicial Review of Administrative Action, Aaronson and Others, 3rd ed, Law Book Company,* 2002 at 620 the reasons for decision in *Bhardwaj* "*explicitly acknowledge the limited utility of such concepts as nullity, or voidance from the beginning, or distinctions between "void" and "voidable". Gaudron and Gummow JJ even forswore the utility of "invalidity" and "vitiated". Of the remaining three judges, Gleeson CJ studiously avoided all of those terms except "invalid" and, even there, his Honour was careful to explain the concept purely in terms of its legal consequences, emphasising that these might vary between context. Callinan J avoided all of the terms without exception. Kirby J used them all, but went to considerable length to show his discomfort with them.*" (The footnotes are omitted but referred to *Bhardwaj* at 612/613 per Gaudron and Gummow JJ, 618 per McHugh J, 643/647 per Hayne J, and 604/605 per Gleeson CJ.)

(iv) Void Decisions in the Employment Law Context

227 As submitted by the appellant the authorities have held that if decisions under statute about dismissal or suspension from employment are made in breach of the requirements of procedural fairness, the decision is "*void*". In *Dixon* the Full Federal Court said this and concluded the decision of the Public Service Board to dismiss Mr Dixon was "*invalid and ineffectual*". In *Everingham* the teacher was, pursuant to a statute, suspended with a direction by the Minister that she was not entitled to salary for the period of suspension. King CJ with whom Mohr and Bollen JJ agreed said at 746:

> "*The valid exercise of the power to suspend is conditioned upon compliance with appropriate standards of procedural fairness. The denial of natural justice involved in non-compliance with those standards renders the decision and the consequential direction as to salary, void and of no effect.*"

228 In *Re Piper*, Rowland J made absolute an order nisi that the suspension of the applicant without pay be quashed. Gallop J in *Schmohl* made a declaration that the decision to suspend the plaintiff from duty was void and of no effect. (See also *Malloch* at 1584; *Ridge v Baldwin* (1963) 2 All ER 63 at 81, 106, 116 and 119).

229 In *Foong v Norfolk Island Hospital Enterprise* (2002) 170 FLR 354 the plaintiff sought a declaratory order that a resolution of the board of management of the respondent which suspended his employment was "*void and of no effect*". The plaintiff also sought reinstatement and damages. It was held the board did not have any power to suspend (366) and the purported suspension was "*null and void*" (367). An order for reinstatement was said to be "*not necessary in the case of the Crown, once the Court declares that the purported suspension had no effect*". As to the "*monetary claims*" it was said to be "*not feasible to deal with this aspect at this stage*". Unfortunately there is no later report of that aspect of the case.

230 A case where "*back pay*" did occur when a void decision to dismiss had occurred was *Grady*, which was cited by the Arbitrator. There an officer employed by the Commissioner for Railways of New South Wales was dismissed for misconduct under s82 of the *Government Railways Act 1912* (NSW) (the *GRA*). The *GRA* also gave a right of appeal to a board. Mr Grady was dismissed under s82 but an appeal was allowed by the board. In joint reasons Rich, Dixon, Evatt and McTiernan JJ at 232 said the power to dismiss was not absolute, but subject to review. Their Honours said that if the board found no misconduct had occurred "*the power of the officer to dismiss never arose*". Their Honours said at 233:

> "*But when the Board allows the appeal simpliciter, it completely reverses the dismissal. The provisional character of the dismissal is evident, and it is as if it had never taken place. Performance of the officer's duties is excused, not because he has been temporarily out of the service, but because under the conditions of his service he has been dispensed from carrying his duties out. If it turns out that he ought not to be dismissed and his provisional dismissal is set aside, it does not seem unreasonable that he should receive the salary attached to the office accruing in the mean time, and that he should do so simply because his dismissal is vacated or quashed.*"

231 Their Honours supported their decision by reference to another decision handed down on the same day, *Commissioner for Railways (NSW) v Cavanough* (1935) 53 CLR 220. In that case an officer was convicted of a "*felony*". After that he was not paid salary as he was "*deemed to have vacated his office*" under s80 of the *GRA*. He successfully appealed against his conviction and then sued the Commissioner for unpaid salary. He succeeded in the High Court on the basis that as the conviction was quashed "*ab initio*" therefore "*in contemplation of law, [he] was never out of office, he is entitled to the salary attached to it. There is no allegation that, under the terms of his employment, an actual performance of duty is a condition precedent to his right to salary*" (225/6).

232 Both *Grady* and *Cavanough* are distinguishable however from the present case. They turned on the positions occupied by the officers and the contents of the *GRA*.

233 None of the cases cited above have discussed the effect of a "*void*" suspension without pay, on the basis of a denial of natural justice, on the non payment of past salary. This has legal and practical difficulties. (See generally the article by Professor Campbell, *Liability to Compensate for Denial of a Right to a Fair Hearing*, Monash University Law Review, 1989, Vol 15, Nos 3 and 4, 383).

234 Some of these were discussed in *Chief Constable of North Wales Police v Evans* (1982) 3 All ER 141. There a constructive dismissal of a police constable, by his resignation, was found to be in breach of natural justice. The House of Lords had difficulty however in deciding on an appropriate remedy. Mr Evans was a probationary constable when he resigned. By the time of the proceedings almost four years had elapsed. The Court of Appeal simply made an order that the relevant decisions of the Chief Constable were "*void*" without spelling out the consequences of such an order. Lord Hailsham at 145 discussed what the consequences might be. For example, as a result of the decision being void, had Mr Evans been a constable in the police force for the intervening four years? Also "*since the only decision removing him from office was the decision now impugned has he now become an established constable? Has he acquired pension rights? Is he entitled to backpay?*" (145). Lord Brightman at 155 said that he thought the order made by the Court of Appeal was unsatisfactory and (with the agreement of the other members of the House of Lords) decided there should be a declaration affirming that, by reason of such unlawfully induced resignation, Mr Evans thereby became entitled to the same rights and remedies, not including reinstatement, as he would have had if the appellant had lawfully dispensed with his services. His Lordship said this declaration would clarify the status of the respondent with respect to the North Wales Police and leave him free to pursue other remedies such as damages. Order 53 r7 of the *Rules of the Supreme Court (NSW)* was cited in support of this conclusion and it specifically said that an applicant for judicial review may claim damages. On that point therefore the authority is not apposite.

235 *Macksville and District Court Hospital v Mayze* (1987) 10 NSWLR 708 was an appeal about a hospital board's purported termination of appointment of a visiting medical practitioner to a public hospital in breach of the rules of natural justice. At first instance the judge declared the resolution of the Board to be null and void and said the plaintiff was entitled to damages for wrongful revocation of his appointment, with the assessment of damages to be referred to the master. Of present relevance Mahoney JA, with whom Priestly JA agreed (Kirby P dissenting) said at 730 that accordingly the medical practitioner "*remained in the office of visiting medial officer until the expiration of the period of his appointment*". Although his Honour discussed the basis upon which damages could be obtained and assessed, it was decided that whether "*a basis for damages can be established in fact or in law is a matter to be determined during the enquiry to be held by the Master*". Significantly his Honour did not suggest that the order that the decision was void would necessarily lead to an award of the amount which the medical practitioner would have been paid if he had not been unlawfully terminated.

(v) Breach of Procedural Fairness and Damages

236 The issue of whether damages can generally be awarded for a breach of procedural fairness was authoritatively stated in *Jarratt* where McHugh, Gummow and Hayne JJ at [59] said that "*where there has been a denial of procedural fairness in the exercise of statutory or prerogative powers, the law does not recognise a cause of action for damages and confines the complaint to public law remedies*". Their Honours cited the reasons of Deane J in *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 45.

237 The reasons of Deane J were also cited in the same context in the earlier authority of *State of New South Wales v Paige* (2002) 60 NSWLR 371 at [159]. (Other authorities there cited were *Park Oh Ho v Minister for Immigration and Ethnic Affairs* (1989) 167 CLR 637 at 645, *Macksville* and *Dunlop v Woolahra Municipal Council* [1982] AC 158 where the Privy Council agreed with the decision of the New South Supreme Court that a failure by a public authority to give a person an adequate hearing before deciding to exercise a statutory power did not of itself amount to a breach of a duty of care "*sounding in damages*" (239)) At [171] and [172] in *Paige*, Spigelman CJ said the expansion of administrative law had "*not led to a significant role for monetary compensation …Compensatory damages for administrative error are available only in very limited circumstances*". At [175] his Honour said that "*the purpose of judicial review of administrative decisions is not compensatory. Its purpose includes such objectives as upholding the rule of law and ensuring effective decision making processes*".

238 The High Court in *Northern Territory v Mengel* (1996) 185 CLR 307 decided there that a government officer who acted without legal authority was not liable in tort outside the established categories of negligence, misfeasance in public office and breach of statutory duty.

239 This review of relevant authorities establishes that the assumption or submission by the appellant, that an order requiring payment to redress the past loss of remuneration followed axiomatically from the breach of procedural fairness, cannot be accepted. This point was made by the respondent's counsel at point 2 in the hearing and again at the hearing of appeal.

(vi) The Arbitrator's Jurisdiction to Make an Order Redressing Past Non Payment of Remuneration

240 The issue is further complicated as *the Act* does not expressly provide the Arbitrator with powers which include the making of orders for loss of past remuneration. This issue was not, because it was unnecessary to do so, explored in *Jones*. Nor has it been the subject, so far as I am aware, of any detailed discussion by the Full Bench. There were also no detailed submissions on the issue at first instance or on appeal. A relevant question is if as a matter of law a court would not have the power to award damages in the present circumstances, could the Arbitrator make orders of the type sought? As I have said earlier, in the exercise of the Arbitrator's jurisdiction and despite the equity and substantial merits direction, the law could not be ignored. The lack of any entitlement at law for payment for the period after the suspension without pay was at least a relevant consideration for the Arbitrator in deciding what orders to make.

(vii) Conclusion on Possible Order for Past Non Remuneration

241 Although the Arbitrator has been shown to have erred in not finding the decision to suspend without pay breached the requirements of procedural unfairness, I am not satisfied that the appellant has succeeded in establishing any basis upon which an order requiring payment for past non remuneration could or should have been made. I say this as it has not been established

that there was any legal entitlement to the order being made, or that the Arbitrator had the power to make such an order, or if the Arbitrator did have such a power, why it should be exercised in favour of Mr Moodie. As to the latter point, this might have been different if the appellant had tried to persuade the Arbitrator that the respondent ought to have made a decision to continue the suspension with pay; but the appellant did not approach the hearing in this way.

(viii) Future Remuneration

242 The payment of future remuneration is less complicated, as if the suspension without pay decision is nullified then it does to my mind follow that the respondent's previous decision to suspend Mr Moodie on "*full pay*" continues unless and until a contrary lawful decision is made.

(k) The Merits of Suspension Without Remuneration

243 In [26] and [27], the Arbitrator seems to have reasoned that:

(i) A suspension is of all rights and obligations under the contract including the right to payment.

(ii) From 7 July 2006 the obligation to perform work was suspended but all other rights and obligations continued.

(iii) When the respondent informed Mr Moodie of the decision to suspend without pay, the rights and obligations under the contract were placed in abeyance.

(iv) The obligation to pay Mr Moodie was therefore suspended.

244 This reasoning does not make clear what the position was if the decision to suspend without pay was "*void*" for procedural unfairness. Given however the context and text of [29], quoted earlier, I think the Arbitrator's process of reasoning was that if there was procedural unfairness this would have affected the validity of the decision to suspend without pay. That is the validity of the suspension of all rights and obligations including remuneration was dependent on the procedural fairness issue. However the Arbitrator's reasons are consistent with thinking that even if this was so it did not mean the merits favoured declaring the decision a nullity and making the consequential orders sought.

245 I have earlier set out and commented in part on [34] of the Arbitrator's reasons about the "*merits*". In my respectful opinion, the reasoning in [34], [36] and [37] was not sound.

246 **Firstly**, the lack of a "*proper process*" was by the failure to give Mr Moodie a right to be heard. In my opinion this failure was interwoven with the merits issue. The merits of whether it was appropriate to suspend Mr Moodie without pay could not fairly and properly be assessed without giving him an opportunity to be heard. Given that the Arbitrator did not know what Mr Moodie might have said if he had been given the opportunity to be heard, her assessment of the "*merits*" repeated the error of approach of the respondent. The reasons in favour of suspension without pay were looked at, but not any points which Mr Moodie may have wanted to put forward.

247 As mentioned the problem was possibly curable if the hearing was conducted upon the basis that it was the chance for Mr Moodie to make submissions on the merits. Neither party however conducted the hearing on that basis and the Arbitrator did not approach the hearing or her decision in this way. The Arbitrator's reasons make that clear.

248 **Secondly**, I have previously referred to the "*public interest*" issue in Mr Moodie being paid when he was not working, pending the criminal charges.

249 **Thirdly**, and related to the second point, the Arbitrator said the delay in the respondent being able to complete the "*investigation*" was through "*no fault of its own*", "*as a consequence of agreeing to Mr Moodie's request*" and of "*no benefit to the respondent to have a delay*". This ignores the point made earlier that the deferral of the "*investigation*" was a fair and proper thing to do, not just a benevolent action by the respondent in reply to Mr Moodie's request. It was to facilitate Mr Moodie's right to a fair trial. In my opinion there was a public benefit in this.

250 Accordingly as I have said earlier the conclusion in [39](d) was in error, as was the conclusion that the "*merits*" favoured suspension without pay. Like the respondent, the Arbitrator was not in a position to properly decide the "*merits*".

251 The appropriate course was for the Arbitrator to nullify the decision and direct the respondent that before it made any decision upon whether to suspend without pay, Mr Moodie should be given an opportunity to be heard on the issue. Making these orders would have been consistent with the way in which the equity and substantial merits direction is properly construed as set out above. The actions of the respondent were not lawful, and the Arbitrator was not in a position to properly "*deal with*" the question of suspension without pay, on the merits.

(l) No Service No Pay for Government Employees

252 The Arbitrator found there was a suspension of all rights and obligations including the right to remuneration. As I set out earlier the appellant at times appeared to cavil with this notion, but at others asserted the respondent could have made a lawful decision to suspend without pay.

253 There are some complexities in this issue generally for government employees and in Mr Moodie's case in particular. For example was the Arbitrator correct in saying all "*rights and obligations under the contract*" were "*placed in abeyance*"? ([26]). Did this include for example Mr Moodie's obligation to "*comply with public sector standards and codes of ethics and observe the principles of official conduct in section 9*" of the *PSMA*? (Contract clause 2(c)). Could Mr Moodie whilst suspended, contrary to the contract, engage in "*paid employment outside*" his duties? (Clause 10(b)). Was the restriction on disclosure of information "*[d]uring the employment*" applicable? (Clause 10(b)). Additionally if being bound by any of these obligations constituted at least partial "*service*" did the *Automatic Fire Sprinklers* doctrine apply?

254 It emerges from the passages of McCarry cited by the Arbitrator that whether suspension of a government employee is necessarily without pay depends upon the terms of the applicable statute and contract. The authorities which support this contention include *Grady* and *Cavanough*, discussed earlier, *Hunkin v Siebert* (1934) 51 CLR 538 at 541/2; *Chate v Commissioner of Police* (1997) 76 IR 70 at 77/8; *Browne v Commissioner of Railways* (1935) 36 SR (NSW) 21 at 24; and *Welbourn v Australian Postal Commission* [1984] VR 257 at 267 (cf *Reid v Australian Institute of Marine and Power Engineers and Others* (1990) 96 ALR 174 about the suspension of a union branch secretary). It may be therefore that insufficient attention was directed to this issue at first instance. In the circumstances however that does not need to be further considered.

255 The respondent argued that because Mr Moodie was not entitled to be paid this was a factor which was relevant to whether he should be paid while suspended. Assuming the premise on which the submission was based is correct, I agree. This submission acknowledged however, as discussed with counsel, that the decision as to whether to suspend with or without pay was discretionary. In the present case the problem was that the discretionary decision was beset with unacceptable unfairness; and for the reasons set out earlier this unfairness could not be "*cured"* by the hearing before the Arbitrator. Therefore this argument could not properly lead to the dismissal of the application before the Arbitrator.

(m) The Bowles Decision

256 It is necessary to say something more about *Bowles*. I do not accept the respondent's submission that *Bowles* decided both that the no work no pay principle applied to an invalid suspension and that it dictated Mr Moodie had no entitlement to remuneration. This is because the decision was specific to the facts and circumstances of Ms Bowles' employment. Ms Bowles was engaged pursuant to s64 of the *PSMA* as a prison support officer. The Director General as the Chief Executive Officer of the Ministry of Justice, without authority, purported to transfer Ms Bowles from Broome Regional Prison to Hakea Prison. After this occurred Ms Bowles did not do any work. Although for a time she was remunerated this then ceased. The Arbitrator made an order that the Director General should not have ceased paying Ms Bowles her salary, should reinstate her salary and pay the balance of the salary due from the date it ceased. This was appealed against.

257 The three members of the Full Bench each wrote separate reasons allowing the appeal. I have already referred to the reasons of Sharkey P. His Honour decided the "*suspension*" was without legal authority but following *Automatic Fire Sprinklers*, as no service had been performed, this could not "*found a claim for wages*" ([47]).

258 Scott C specifically said that as there was no suspension in accordance with s82 of the *PSMA* it was "*unnecessary to come to any conclusion as to the impact of a suspension on any entitlement or otherwise to payment*" ([68]).

259 Scott C said in [69]:

> "*The Commission may, during the course of dealing with matters on the basis of equity, good conscience and the substantial merits be required to have consideration to issues of breaches of contract and of law but the ultimate test relates to resolutions according to fairness. This was confirmed by their Honours E M Heenan J. and Hasluck J. in* Garbett v Midland Brick *[2003 [sic] WASCA 36 at paras 84-86 and 66 respectively]. Although that matter deals with a claim of harsh, oppressive or unfair dismissal made by an employee pursuant to s.29, the principle also applies to other matters before the Commission because of the requirements of s.26.*"

260 Scott C then said that whether Ms Bowles ought to be paid when she was not performing her duties depended on a conclusion of "*law and fairness*" ([70]). On the law, *Automatic Fire Sprinklers* applied. Scott C then considered the "*equitable resolution of the matter*". She said Ms Bowles' exclusion from prison was due to her "*conduct and attitude*" ([70]). Therefore, taking into account the interests of employer and employee, it was "*unfair to require the employer to pay*" after exclusion from the workplace ([70]).

261 Wood C at [82] said there was nothing in the contract preventing the employer from paying Ms Bowles whilst she did not work but the "*wisdom*" of doing so could be questioned. He then considered the issue of whether there was an entitlement to be paid. Wood C said that Ms Bowles had not been suspended under s82 of the *PSMA* but in any event she was not entitled to be paid. He did so after considering the *PSMA* and the *Public Service Award 1992* ([84]). Section 64 of the *PSMA* permitted appointment as a public service officer for an indefinite period as a permanent officer. Wood C said this did not entitle an officer to not attend work and still be paid ([88]). Ms Bowles was not entitled to be paid, but whether she should have been as a matter of discretion was "*another issue*" ([90]). Wood C said following *Automatic Fire Sprinklers* to its logical conclusion could "*lead to some unintended and wrong consequences, at least in matters involving public servants*" ([90]). After discussing some relevant examples, Wood C said *Automatic Fire Sprinklers* needed to be "*treated with some caution in this case*". Wood C then considered the equity and substantial merits direction and "*the interests of the community as a whole*" under s26(1)(c). Wood C said it was not in the interests of the community for Ms Bowles to benefit by being paid for 2 years, when she had not worked and the origin of the problem was her own actions. This was despite the inadequate processes of the appellant ([93]).

262 Accordingly:

(i) A majority in *Bowles* (Scott and Wood CC) did not decide it as a case of suspension or unlawful suspension.

(ii) The way in which at least Scott C took into account the equitable and substantial merits direction was, with respect, in error. This is discussed below.

(iii) The facts were distinguishable from the present because Ms Bowles was appointed under the *PSMA* and it was found to be her conduct which led to her exclusion from work.

(iv) Wood C questioned the applicability of *Automatic Fire Sprinklers*, in all situations, to the employment of public sector employees.

(v) No member of the Full Bench answered the question of whether the Arbitrator had jurisdiction to make the orders for payments to Ms Bowles.

263 As to (ii) I do not with respect agree with the broad proposition of Scott C at [69]. In my opinion Hasluck and EM Heenan JJ in *Garbett* were discussing the difference between an unlawful termination of employment and a harsh, oppressive or unfair dismissal. The point made was that the former may not necessarily constitute the latter. This is different from an assertion that in all matters "*the ultimate test …relates to fairness*". Fairness was emphasized in *Garbett* because an "*unfair*" dismissal was the gateway to orders being made in favour of the former employee. Fairness may not be the sole or even a relevant consideration in the determination of other matters in the exercise of the Commission's jurisdiction, as set out earlier.

(n) Appellant's Submissions on No Work No Pay

264 Although strictly unnecessary to do so, it is appropriate I think to make brief observations on some of the appellant's submissions.

265 The appellant argued that Dixon J in *Automatic Fire Sprinklers* did not have a narrow concept of "*service*" so, for example an employer who sent an employee on a holiday on full pay could be sued for "*wages*". This example is not now apposite as paid leave is now at least a minimum condition of employment under the *Minimum Conditions of Employment Act 1993* (WA). Also if it was agreed that the employee take a holiday upon "*full pay*" if payment of "*wages*" was not then forthcoming, the employer's liability is pretty obvious. The consequence, for remuneration, of an employee being directed to "*stand and wait*" depends on the specific law, facts and circumstances which apply to that employment relationship. I do accept however that as stated by Wood C in *Bowles*, following *Automatic Fire Sprinklers* to its logical conclusion may not be correct in all situations involving public sector employees.

266 At first instance the appellant also relied on *Csomore* in support of the proposition that an employer could waive the requirement for service in exchange for the right to be paid. Whilst this may be so, it does not assist in this case, where the respondent decided there was to be suspension from duty *and* no pay.

(o) Entitlement to Pay and Merits - Conclusion

267 As mentioned earlier, even if the respondent's submission that there was no entitlement to pay is accepted, this does not change my opinion that the Arbitrator could not adequately assess the merits of the respondent's decision to suspend without pay, in the absence of Mr Moodie having been given an opportunity to be heard by the respondent. If as a matter of law Mr Moodie could not in the absence of service enforce the payment of remuneration, this was a relevant factor but not necessarily decisive of the discretionary decision to be made by the respondent. The respondent's submissions do not therefore provide an alternative basis for the dismissal of the appeal.

Disposition of the Appeal

268 As I have set out earlier I would uphold grounds [2] – [3] of the appeal. I do not think ground [1] has been established, mainly because it asserts a broad proposition which to the extent that is relevant to the present appeal is subsumed in grounds [2] – [3]. I share at least some of the difficulties expressed by Wood C about understanding ground 4. The topics I think it covers however are adequately addressed elsewhere in my reasons. Accordingly I am prepared to simply say that it is not upheld as an independent ground.

269 I have also earlier set out my views on the orders the Arbitrator ought to have made at first instance. They were that decision of the respondent on 20 October 2006 to suspend Mr Moodie from his position, without remuneration, be nullified; and the respondent, before making any decision to suspend Mr Moodie from his position without remuneration, allow a reasonable opportunity to him to be heard.

270 As I have also said I am unpersuaded that the Arbitrator ought to have ordered the respondent to provide remuneration from 20 October 2006. In my opinion, as the decision of the respondent to suspend Mr Moodie without pay should be nullified, a consequence is that the respondent and Mr Moodie will again be in the position which they were prior to the impugned decision; that Mr Moodie is suspended on "*full pay*". I consider it appropriate, for completeness and to certainty, to make an order reflecting this.

271 A minute of proposed order should be published reflecting the reasons of the Full Bench, with the parties having their statutory entitlement to "*speak to*" it. In my preliminary opinion this could be done by the parties providing any submissions they wish to make, in writing within 14 days. If either party considers that some other procedure ought be adopted, they can advise the Full Bench in writing of their position, which the Full Bench will then consider.

BEECH CC:

272 The essential facts are relatively straightforward. On 7 July 2006 Mr Moodie, a member of the appellant union, was notified by the Director General of a number of allegations which could constitute serious breaches of discipline and gross misconduct (document 13, AB). The Director General noted that as the allegations are of a serious nature, he directed Mr Moodie to leave the workplace immediately, and to remain away from it until he is directed to return. Mr Moodie would remain on full pay during the absence until otherwise determined by the Director General.

273 An investigator was appointed and on 6 October 2006 Mr Moodie was informed of the outcome of the inquiry and given a copy of the investigator's report. Mr Moodie was asked whether there was any further information he wished to place before the Director General (document 27).

274 On 19 October 2006 Mr Moodie's solicitors wrote to the Director General informing him that Mr Moodie had been informed that the Corruption and Crime Commission intended to charge him with various criminal offences in connection with the first of the allegations and requested that any further consideration of the conduct of Mr Moodie by the Director General be deferred until the outcome of the criminal charges is known. The next day, 20 October 2006 the Director General wrote to Mr Moodie's solicitors stating that in light of the information of the intention to charge Mr Moodie with various criminal offences, Mr Moodie was to be suspended from duty without pay.

275 On that day also the appellant union referred a dispute to the Public Service Arbitrator (which became PSAC 28 of 2006). The schedule attached to the application, particularly paragraph 1, stated that the appellant union is in dispute with the Director General in regard to:

- allegations made against Mr Moodie,
- the lack of procedural fairness,
- the manner and nature of the investigation of the allegations,
- the failure of the employer to provide adequate time to respond to the allegations,
- the failure of the employer to provide adequate access to records, resources, equipment and personnel necessary for the union to be able to adequately respond to those allegations within the time permitted,
- the request for Mr Moodie to be on paid leave for an extensive period,
- the failure of the employer to maintain contact with Mr Moodie during this time, and
- the failure of the employer to utilise the usual or normal administrative policies, practices and procedures in an attempt to clarify and/or resolve the issues in question.

276 The union sought an order that the employer immediately cease taking its current course of action, an extension of time to respond, an opportunity for direct dialogue with a senior representative of the Director General to give him an opportunity to discuss and explain matters and a copy of all documents, files, materials, etc. necessary to enable him to properly and fully answer the allegations against him.

277 Subsequently, and after conciliation, a matter was referred for hearing and determination, that matter being set out at the commencement of the Arbitrator's decision (2007 WAIRC 01271; (2007) 87 WAIG 3120). The appellant union sought orders and a declaration that the decision of the Director General to suspend payment of Mr Moodie's remuneration be void and of no effect and that the Director General resume payment of his salary and reimburse him the amount he would have received had his salary not been suspended. Other orders were also sought regarding the return to Mr Moodie of his motor vehicle and associated entitlements however these do not appear to have been pursued and no further consideration needs to be given to them. It is against the dismissal of this matter that this appeal is brought.

278 The essence of the appellant union's position is that Mr Moodie was denied procedural fairness when the Director General decided to suspend him without pay. It asserts that a purported exercise of power against a person whilst denying that person procedural fairness would be liable to be set aside by a court exercising its judicial review jurisdiction and asks: why should any other result follow when the Public Service Arbitrator's dispute resolution jurisdiction is engaged?

279 I approach the appeal as follows. The Public Service Arbitrator first posed the question "*Is there a power to suspend?*" In these appeal proceedings, both the appellant union and the Respondent proceeded on the basis that the Director General had the power to suspend Mr Moodie without pay and I consider that they were correct to do so. Mr Moodie is not a "*public service officer*" within the meaning of s76(1) of the *Public Sector Management Act, 1994* because he is not employed within the "*Public Service*" as that term is defined in s34; therefore s82 of the *Public Sector Management Act, 1994* which provides a power to suspend a Government officer without pay, does not apply to him. However, as the Arbitrator concluded, correctly in my view with respect, the Respondent's power to appoint Mr Moodie brought with it the statutory power to suspend him: see s52 of the *Interpretation Act, 1984*.

280 The Arbitrator's further conclusion that the power to suspend Mr Moodie carries with it the removal of any obligation on the Director General to continue to pay Mr Moodie during the period of suspension was not challenged on appeal and is also correct in my view.

281 The Arbitrator then considered whether Mr Moodie should have been given an opportunity to be heard on the Director General's intention to suspend him without pay before the Director General in fact suspended him without pay. The Arbitrator concluded at [32] that:

> " *[u]nder normal circumstances, an employer is obliged to provide procedural fairness to an employee prior to making any decision which will have an adverse effect upon the employee*."

282 If the Arbitrator is saying that the Director General was obliged to give Mr Moodie an opportunity to be heard prior to suspending him without pay, then the Arbitrator was, in my view, entirely correct. However, by qualifying her conclusion with the words "*under normal circumstances*" it is not clear whether the Arbitrator found that Mr Moodie had indeed been denied procedural fairness.

283 Mr Moodie was denied procedural fairness and the Arbitrator should have so found. Before deciding to suspend Mr Moodie without pay, the Director General should have given Mr Moodie an opportunity to comment upon his intention to do so. It is unarguable that suspending Mr Moodie without pay would have an immediate and severe effect upon him financially. The decided authorities show that there is a common law duty to act fairly, in the sense of according procedural fairness in the making of an administrative decision which affects the rights, interests and legitimate expectations of a person, subject only to

the clear manifestation of a contrary statutory intention (*Kioa and Others v West and Another* (1985) 159 CLR 550 per Mason J at 584; *Dixon v Commonwealth of Australia* (1981) 61 ALR 173; *Everingham v Director General of Education* (1993) 31 ALD 741).

284 As Olsson AUJ said in *Re Kenner; ex parte Minister For Education* [2003] WASCA 37 at [56], "*Kioa stands as authority for the basic proposition that, when a decision is to be made which will deprive a person of some right or interest, that person is entitled to know the case sought to be made against them and to be given an opportunity of replying to it. This carries with it a concomitant duty to adopt fair procedures which are appropriate, in conformity with relevant statutory requirements, and adapted to the circumstances of the case.*"

285 This is so in the public sector in this State whether or not the administrative decision is made according to the common law or by statute. Thus, where an employer acting pursuant to s82 of the *Public Sector Management Act, 1994* intends to suspend a Government officer without pay, the employer has a duty to give the employee an opportunity to be heard on that intention: *Re Piper; Ex Parte Meloney* (1996) 63 IR 473.

286 Mr Moodie was not given an opportunity to be heard. Therefore the decision of the Director General to suspend Mr Moodie without pay would be quashed if it was brought before an administrative tribunal or a court exercising a judicial review jurisdiction. It is at this point that the appellant union complains that if that is the case, why should any other result follow before the Public Service Arbitrator?

287 The answer lies in the jurisdiction of the Arbitrator in s80E of the *Industrial Relations Act, 1979.* The Arbitrator had before her an industrial matter relating to a government officer (Mr Moodie being a government officer for the purpose of the jurisdiction of the Arbitrator, even if he is not a "*public service officer*" within the meaning of s76(1) of the *Public Sector Management Act, 1994*). The jurisdiction of the Arbitrator is to enquire into and deal with the industrial matter.

288 In doing so, the Arbitrator is to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms: see s26(1)(a) of the *Industrial Relations Act, 1979* as applied by s80G(1) of that Act. I consider that Mr Andretich is quite correct in his submission that the discretion vested in the Arbitrator, and for that matter in the Commission generally when acting under s26(1)(a) of *the Act*, goes further than merely quashing or declaring void the decision of the Director General. Section 80E(5) of *the Act* states:

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

289 Therefore, the Arbitrator is specifically empowered to review, nullify, modify or vary the decision of the Director General, "*in the course of*" the exercise by her of her jurisdiction to enquire into and deal with the matter. The reviewing, nullifying, modifying or varying a decision of the Director General may not of itself necessarily deal with the matter which is before the Arbitrator. In order to deal with the matter, a further step may be necessary.

290 As Wheeler J and Le Miere J observed in *Director-General Department of Justice v Civil Service Association of Western Australia Inc* [2005 WASCA 244]; (2005) 149 IR 160 at 169, there is no power conferred by the *Industrial Relations Act, 1979* upon the Public Service Arbitrator to engage in anything in the nature of "*judicial review*", or to make a bare declaration. That is jurisdiction of a kind quite different from the merits-based enquiry contemplated by s80E.

291 Therefore, a finding that Mr Moodie has been denied procedural fairness is not an end in itself; it is one step in determining how the industrial matter is to be dealt with. A breach of the rules of procedural fairness is but one relevant circumstance in the Arbitrator "*dealing with*" the industrial matter and in some cases it can be a most important circumstance (cf. *Shire of Esperance v Peter Maxwell Mouritz* (1991) 71 WAIG 891 per Kennedy J at 893). For that reason, Ground 1 is not made out.

292 After concluding at [32] that under normal circumstances an employer is obliged to provide procedural fairness to an employee prior to making any decision which will have an adverse effect upon the employee, the Arbitrator said:

> "*However, where it would be futile to do so, in that it would not alter the decision, then there is no such requirement.*"

293 In doing so, the Arbitrator relied upon the decision of the High Court in *Stead v State Government Insurance Commission* (1986) 161 CLR 141. However, I consider the Arbitrator went too far in concluding that *Stead* is authority for a proposition that the common law duty to act fairly, in the sense of according procedural fairness in the making of an administrative decision which affects the rights, interests and legitimate expectations of a person, subject only to the clear manifestation of a contrary statutory intention, is removed by any notion of "*futility*". The common law duty, in this case the right of Mr Moodie to be heard, remains. Even if it could be validly said in the context of this case that the evidence showed that the denial of natural justice did not deprive Mr Moodie of the possibility of a successful outcome, and I do not think it can be validly said, he was still denied natural justice. The Arbitrator erred in not so finding.

294 My conclusion that it could not be validly said in the context of this case that the evidence showed that the denial of natural justice did not deprive Mr Moodie of the possibility of a successful outcome is the substance of ground 2 of the appeal. In ground 2, the appellant union is critical of the conclusion of the Arbitrator at [33] that it would have made no difference to the Director General in his decision to suspend Mr Moodie without pay for Mr Moodie to have been given an opportunity to be heard. Ground 3 of the appeal alleges that the Arbitrator erred in assuming that the only matters about which Mr Moodie might have made submissions were those matters specified at [33] of the Arbitrator's reasons.

295 The Arbitrator's conclusion that there was "*little by way of the facts*" which he could have put to the Director General follows her observation that "*[t]here is no dispute about the facts surrounding the suspension*" and the Director General did not require him to respond to the investigation report at that time. That conclusion carries the assumption that if Mr Moodie had been given an opportunity to be heard about the Director General's intention to suspend him without pay, his submissions would be about matters of a factual nature in relation to the criminal charges and hence there was little which could be said by way of facts.

296 There is no warrant for such an assumption. There was no evidence before the Arbitrator about what Mr Moodie may have put to the Director General had he been given an opportunity to be heard. There may well have been, as the appellant union suggested, broader or at least different issues upon which Mr Moodie may have advanced submissions. As Rowland J observed in *Re Piper* (op. cit. at 477) "*[a]n employee in that situation can suffer severe hardship. He may have no other source of money on which to live and at the same time, as he is still employed he is usually unable to seek or obtain other employment.*"

297 In this appeal, it was submitted on behalf of the Director General that any submission could only be limited to Mr Moodie's personal circumstances and "*these would not have produced a different outcome*". If accepted, this submission suggests, with respect, that there is no point in giving an employee an opportunity to be heard regarding the intention of the employer to suspend without pay if all the employee will raise is his/her personal circumstances or the personal hardship which will be caused because that will not affect the employer's intentions.

298 That cannot be the case. First, those are the very issues identified by Rowland J as being the rationale behind the duty to afford procedural fairness. It will be about those very issues that the opportunity to be heard is to be given.

299 Secondly, having regard for the common law duty to act fairly, in the sense of according procedural fairness in the making of an administrative decision which affects the rights, interests and legitimate expectations of a person, the employer's mind cannot be closed to whatever the employee might say. The position cannot be pre-judged by the Director General. The Director General must have an open mind and judge each case according to its circumstances.

300 That being the case, even in the language of *Stead*, it was not possible to say that if Mr Moodie had been given an opportunity to be heard prior to the Director General suspending him without pay, it could not possibly have produced a different result. I consider with respect that Mr Borgeest, who appeared for the appellant union, is quite correct when he submitted that too ready an acceptance of a conclusion that to have afforded procedural fairness could have made no difference to the outcome would go a long way to reducing to nothingness a substantial common law obligation constraining the exercise of public power. I consider grounds 2 and 3 are made out.

301 The duty on the Arbitrator to decide the matter according to equity, good conscience and the substantial merits of the case entitled her to consider all of the circumstances before her. The Arbitrator did go on to consider that the nature and seriousness of the charges to be laid against Mr Moodie, the seniority and nature of the position held by him, the appropriateness of the Director General providing him with work, the lengthy delay before a trial, and that the deferral of the disciplinary proceedings was at Mr Moodie's request, all merited suspension without pay. This lead the Arbitrator to dismiss the matter.

302 However, whilst the Arbitrator followed a correct process, the failure of the Arbitrator to correctly hold that Mr Moodie had been denied procedural fairness together with the misapplication of the test in *Stead* must lead to the conclusion that the decision of the Arbitrator to dismiss the matter was contrary to the equity, good conscience and the substantial merits of the case. The conclusion reached took no account of the fact that the employer should have given Mr Moodie an opportunity to be heard. In the circumstances of this case I regard that fact as a most important circumstance; it was at the heart of the matter before the Arbitrator.

303 The appellant union seeks orders that the Director General's decision to suspend Mr Moodie with pay is a nullity and that he now be paid between the date of the suspension and the date of any order to issue from this appeal, and that the payment continue subject to any lawful cessation of payment. In my view the appropriate orders to made by the Full Bench in accordance with ss49(5) and (6) of *the Act* are to uphold the appeal and vary the decision of the Arbitrator so as to nullify the decision of the Director General and oblige the Director General to give Mr Moodie an opportunity to be heard in relation to the intention of the Director General to suspend him without pay.

304 If it was possible to make an order in these proceedings, as the appellant union seeks, requiring payment to Mr Moodie of the salary has had withheld from him to date, it could only be considered appropriate in accordance with ss49(5) and (6) if the evidence was clear that had Mr Moodie been given the opportunity to be heard his salary would not have been suspended. That is far from the case here.

305 The most that can be said on these facts is that if on 20 October 2006 (the date the Director General suspended Mr Moodie's salary) the Director General instead had given Mr Moodie an opportunity to be heard, his salary would not have been suspended on that day. He would merely have continued to be stood down from duties on full pay, as he had been since on about 7 July 2006. Whether, and from what date, the Director General would have then suspended Mr Moodie's salary is not known.

306 Equally, the most that can be said is that the effect of the Full Bench in these proceedings nullifying the decision of the Director General to suspend Mr Moodie's salary is to return Mr Moodie from the date of the Full Bench's order to the position he was in immediately prior to his suspension without pay, a position which will remain until at least any further decision of the Director General.

WOOD C:

Background

307 The brief history of this matter is that on 7 July 2006, Mr Moodie, Executive Director, Technology, Department of Health was directed to remain away from his workplace. An investigation was instituted into "*allegations of serious disciplinary issues*" following which the then Director-General of Health ("the Director-General") wrote to Mr Moodie on 6 October 2006 advising that he was "*considering what further action will be taken*" in respect of one of the allegations. That allegation being that Mr Moodie had submitted false documentation which resulted in him being paid monies to which he was not entitled. Mr Moodie was asked whether he wished to provide "*any further information*" before a decision was taken. He was requested to provide this information within five working days from receipt of the letter of 6 October 2006. That deadline, it would seem, was later extended to 24 October 2006.

308 On 19 October 2006, solicitors for Mr Moodie wrote to the Director-General advising that officers of the Corruption and Crime Commission ("the CCC") had informed them that the CCC intended to charge Mr Moodie with various criminal offences connected to the allegations he faced. They advised that Mr Moodie would be defending these charges and they requested that consideration of the alleged breach of discipline be deferred until the outcome of the criminal charges. Mr Moodie's solicitors went on to say that, "*Whilst we would hope that we can reach agreement in relation to the manner in which our client's employment should now be dealt with, for the sake of good order, we must record that all of our client's rights are reserved*".

309 Mr Moodie's solicitors received a letter from the Director-General the next day who advised that in light of the CCC's intention to charge Mr Moodie, he would be suspended without pay from close of business that day. On the face of it, the advice that the CCC intended to lay criminal charges led to a change of mind by the Director-General about the appropriateness of continuing to pay Mr Moodie his salary and benefits. There is no contest, on appeal, about the capacity of the Director-General to suspend without pay or that the decision was detrimental to Mr Moodie, or that no opportunity was provided to Mr Moodie to make submission as to why suspension without pay should not occur. The Director-General agreed to defer the disciplinary process on 23 October 2006, pending the outcome of the criminal charges.

310 The matter came to the Public Service Arbitrator shortly thereafter by way of an application pursuant to s44 of *the Act*. The dispute was not resolved and was arbitrated at hearing on 28 June 2007. The respondent maintained that they were able legally to suspend without pay, that it would be unreasonable and not in the public interest to set aside the suspension and that there was no right on the part of Mr Moodie to gain remuneration for services he had not rendered. The appellant maintained that the lack of procedural fairness meant the decision of the Director-General should be rendered void. The appellant claimed Mr Moodie should receive all remuneration as from 20 October 2006 until such time as the opportunity to respond had been given and the matter finalised. This summarises adequately the Memorandum of Matters referred for Hearing and Determination.

Grounds of Appeal

311 I have had difficulty in concluding my views on this appeal and, on reflection, this arises largely from a combination of the expression of the grounds of appeal, the manner in which the appellant has approached their case (both on appeal and at first instance) and the declaration and relief sought by the appellant.

312 The grounds of appeal and remedy sought are as follows:

> "*1. The Commissioner erred in that she had insufficient regard to the principle that the resolution of disputes according to equity, good conscience and the substantial merits of the case must ordinarily require that appropriate remedies be granted in response to violations of the rules of procedural fairness.*
>
> *2. The Commissioner erred in finding that it would have made no difference to the respondent in its decision to suspend Mr Moodie's salary for Mr Moodie to have been given an opportunity to be heard.*
>
> *3. The Commissioner erred in assuming that the only matters about which Mr Moodie might have made submissions upon, were he afforded an opportunity to be heard, were those matters specified in paragraph [33] of the reasons.*
>
> *4. The Commissioner erred in having regard to the reasonableness or otherwise of any requirement that the respondent provide work to Mr Moodie, as the respondent's prior decision to relieve Mr Moodie from the obligation to perform duties was not put in issue.*"
>
> *Remedy:*
>
> "*The appellant seeks orders that the decision and orders of the Commission below be set aside, orders that the respondent's decision to suspend Mr Moodie's remuneration be declared void, and orders that the respondent (a) pay to Mr Moodie the remuneration he would have received, but for the void decision, between the date of that decision and the date of the Full Bench's order, and (b) resume payments of Mr Moodie's remuneration, subject to any subsequent lawful cessation of that remuneration.*"

313 Having reviewed all submissions and material of the appellant, it would seem that grounds 1, 2 and 3 are directed toward the singular purpose of persuading the Full Bench that because there was a denial of procedural fairness to Mr Moodie in the decision to suspend him without pay, then the only remedy is to declare that decision void and pay him full remuneration from 20 October 2006 as if no decision had ever been made. This payment to continue until that matter, whether to suspend without pay or not, is resolved properly. The approach adopted by the appellant is automatic; the remedy must follow once a finding of denial of procedural fairness is made.

314 Ground 1 might appear to be a ground which argues that the Arbitrator erred by giving insufficient weight to a relevant factor (namely lack of procedural fairness) in discharging the obligation under s26 of *the Act*. Grounds 2 and 3 appear to be directed to the question of "*futility*" as discussed in *Stead v State Government Insurance Commission* (1986) 161 CLR 141 (*Stead*). I am not clear what Ground 4 means. The ground seems to suggest that the Arbitrator erred in having regard to an irrelevant factor, namely the reasonableness of having to provide work to Mr Moodie, and contends this was not a matter which formed part of the hearing at first instance. There was no direct submission on this ground by the appellant. Consequently, I regard ground 4 as having not been made out. I will concentrate on grounds 1, 2 and 3 which appear directed to the same purpose; the pivotal importance, in the view of the appellant, of the denial of procedural fairness.

315 Indeed the appellant in their outline of submissions identified the question to be addressed on appeal as follows:

> "*An employee of a public authority was denied procedural fairness in the exercise of a statutory power, the exercise of which directly and severely affected his rights and interests. The purposed exercise of power would be liable to be set aside by a Court exercising its judicial review jurisdiction. Why should any other result follow when the Public Sector Arbitrator's dispute resolution jurisdiction is engaged?*"

316 Later in covering the reasons by the Arbitrator of the "*merits*" of the application the appellant at paragraph [28] said:

> "*By focussing upon the "merits" of "the suspension without pay", the Arbitrator addressed herself to the wrong question. The only relevant "merits" were those of the decision to refuse to afford the employee an opportunity to be heard.*"

317 And later at paragraph [31]:

> "*The substantial interest of the appellant's member, Mr Moodie, is the interest in enjoying his common law right to be heard, on a matter of vital importance to him. The statutory injunction to give effect to 'equity, good conscience and the substantial merits of the case' is no licence to disregard a common law principle of procedural fairness. Quite the reverse. The substantial merits of the case require attention to the fact that a substantial common law right was infringed, and that the employer need not have incurred any very significant cost or delay in affording that right. Nothing about affording the right would have prevented the employer from ultimately having regard to, or giving effect to, such considerations as it considered relevant and determinative.*"

Futility

318 The issue of "*futility*" as enunciated in *Stead* was canvassed in detail by both parties at first instance and on appeal.

319 The Arbitrator in her reasons discussed *Stead* and identified the legal principle as:

> "*Under normal circumstances, an employer is obliged to provide procedural fairness to an employee prior to making any decision which will have an adverse effect upon the employee. However, where it would be futile to do so, in that it would not alter the decision, then there is no such requirement (Stead v SGIO (op cit)).*"

320 With respect I consider the Arbitrator misconstrued the principle in *Stead*. The question of futility as enunciated by the Arbitrator is self-defeating, namely the decision-maker decides that to grant procedural fairness would not alter their decision. It may arise in very limited circumstances where say an affected person has absconded and hence cannot be given an opportunity to be heard. However, *Stead* concerned the review of a decision by a Court as to whether a new trial should be ordered due to a lack of procedural fairness at first instance. The question of futility related to whether a new trial would be futile, as any new information (law or fact) could be said to be irrelevant. The hurdle applied to deciding "*futility*" was low. It is not that the new information has to be relevant, or that one has to prove it would lead to a different result. It is that the information is not irrelevant. There is a possibility, however small, that the decision maker at first instance could have come to a different result if procedural fairness had been afforded. *Stead* cautioned also that the review body should be more hesitant in matters of fact as opposed to matters of law; it being easier to determine, on review, the irrelevance of a matter of law. The original decision maker is in a better position to judge the importance of a factual matter. In any event, the point being that it is not for the original decision maker to judge the "*futility*" question. Such a proposition might lead to the ready denial of procedural fairness.

321 The Arbitrator then went on to conclude at paragraph [33]:

> "*As is usual in such cases where the employee may jeopardise his or her position before a criminal trial by making any statements to the employer the respondent agreed to the disciplinary process being held in abeyance pending*

> *the outcome of the criminal proceedings. In this case, that meant that the employer, at Mr Moodie's request, did not require him to respond to the investigation report at that time and it therefore could not conclude the disciplinary process. Therefore, there is little by way of the facts which Mr Moodie could have put to the respondent. Accordingly, it would have made no difference to the respondent in its decision to suspend without pay for Mr Moodie to have been given an opportunity to be heard it would have been futile.*"

322 With respect, I consider the Arbitrator erred also in her assessment of the futility or otherwise of providing Mr Moodie with an opportunity to be heard as to whether he should be suspended without pay. The Arbitrator decided effectively that because, for valid reasons relating to pending criminal charges, Mr Moodie did not wish to respond to the investigation report at that time, then it would have been futile to allow him an opportunity to address whether he should now be suspended without pay. However, the issues of the outcome of the disciplinary process and the suspension without pay are discrete. The Arbitrator says that because Mr Moodie had asked to have the disciplinary process deferred then he could say little "*by way of facts*" about the suspension without pay.

323 The decision to be taken in concluding the disciplinary process is not the same as the decision as to whether his pay should have been suspended or not. Many of the same factors might be considered in coming to a decision of these two issues, but they are not the same issue, and different factors may also be relevant in coming to any conclusions. Presumably the respondent had initially to decide, prior to the commencement of the disciplinary investigation, whether to suspend Mr Moodie without pay. The information reasonably available to the respondent at that earlier stage about any disciplinary breach was of course more limited.

324 With respect, as I consider the Arbitrator misconstrued the question of futility in the two ways I have just described, I consider that grounds 1, 2 and 3 of the appeal have been made out. Put differently, the issue of the lack of procedural fairness was a factor, and a significant factor, to be considered by the Arbitrator. As this issue was misconstrued it could not have then been weighed properly into the judgement which the Arbitrator was required to undertake. I need to qualify my comment in relation to grounds 1 and 3 and how they are expressed.

325 At face value ground 3 would appear to be made out for the reasons expressed above. Namely, the Arbitrator did conclude wrongly that the only matters upon which Mr Moodie might comment were those relating to the criminal charges as identified in paragraph [33] of the decision. However, the appellant uses the words "*assuming*" in relation to the Arbitrator, and "*might have made submission*" in relation to Mr Moodie. I have considerable difficulty with this ground given the manner in which the appellant presented their case before the Arbitrator. As stated the appellant adopted an automatic approach. They presented the view that they simply had to identify that the procedural unfairness had occurred and that would inevitably lead to a decision to void the suspension without pay and to payment of ongoing remuneration and damages. In my mind this misconceives the jurisdiction of the Arbitrator and the principle in *Stead*.

326 In *Stead* @ p.147 the High Court identified the principle as, "*All the appellant needed to show was that the denial of natural justice deprived him of the possibility of a successful outcome*". This suggests that the appellant had to "*show*" something other than simply the existence of the denial of procedural fairness. As I have stated, the hurdle to overcome is low. It is also dependent on the circumstances of the case. However, it is not, in my view, for the respondent to prove futility, as counsel for the appellant at times would seem to suggest. It is for the appellant who seeks the review to submit why overturning the decision (awarding a new trial) is not futile. This could be achieved by identifying the matters, not in any detail, which could have been put, had Mr Moodie had the opportunity to do so. The task is not to prove whether these matters would, or would not have, produced a different result. However, it is not for the review body to guess or "*assume*" that something "*might*" have been put if the opportunity was afforded. Put this way the exercise of the review body in deciding futility lacks the quality of decision-making; it becomes supposition.

327 Counsel for the appellant before the Arbitrator stated:

> "*it would be helpful if I explained how narrow our application is. On the…on the basis of the authority of the High Court in Dixon which is not contradicted by the Department as I understand there's a duty of fairness which is attracted by the decision to suspend without pay. There was no attempt to discharge that obligation on the part of the Department and we say the authority…if you follow the authorities then it means that the decision is void and should be set aside and should be effectively undone. And, if that particular decision is undone we get back to the situation you were prior to the 20th of October, namely where Mr Moodie has been relived of his obligation to perform duty and the disciplinary process is incomplete. This is just because there has been failure to give an opportunity to be heard.*" (T9)

328 Later counsel for the appellant dealt with *Stead* and had the following exchange with the Arbitrator:

> "*Now it goes on to make it plain the it really has to the most exceptional circumstances…the most unusual and exceptional circumstances for a departure from the rules of natural justice could be forgiven. So to illustrate the point that they are making, the very narrow point, they say by way of illustration if all that happened at a trial was that a party was denied the opportunity of making submissions on a question of law, when the appellant*

> *court thinks that the question of law must clearly be answered against the aggrieved party then that's no basis to order a new trial.*
>
> *So, on its own terms Stead's case is dealing with exceptions that at the absolute margin. Now it's not clear - - -*
>
> ***SCOTT C**: Was it exceptions that won't in effect make any difference?*
>
> ***MR BORGEEST**: Well the word that the court used is if its futile. Now, I will have to wait and see how Mr Andretich advances the idea that anything Mr Moodie could have said would have made no difference. That would be a heroic submission I would say.*" (T20)

329 At the point where the Arbitrator was reviewing the decision of the employer and seeking to understand whether an "*exception*" might apply, counsel for the appellant submitted effectively that it was for the respondent to identify such an exception. Counsel for the appellant goes on to state:

> "*Mr Moodie wasn't there and there's all sorts of considerations that the employer might have had on its mind. Mr Moodie was never told about them. It might have been, for all Mr Moodie knew, it might have been that the employer was under some mistaken view that it had a legal obligation that it had no legal choice, that it had no discretion available to it. That is must suspend salary and there was nothing that it could do otherwise.*
>
> *Now, it's…for consideration like that had been advanced then Mr Moodie could have gone to his solicitors and they could look at the question and might have just been able to disabuse the employer of a mistaken view. We just don't know because none of these considerations were laid open before Mr Moodie.*" (T21)

330 This seems to suggest an entitlement to remain on pay unless the respondent could show good reason why Mr Moodie should not be paid; as opposed to the respondent giving Mr Moodie an opportunity to submit why he should not be suspended without pay. This approach makes more of the notion of procedural fairness than can be warranted in these circumstances. I am mindful of the words of Brennan J in *Kioa v West* (1985) 159 CLR 550 at 612:

> "*The principles of natural justice have a flexible quality which, chameleon-like, evokes a different response from the repository of a statutory power according to the circumstances in which the repository is to exercise the power.*"

331 The closest the appellant came before the Arbitrator to presenting some information which may be relevant in a *Stead* sense was when Mr Borgeest submitted:

> "*It shouldn't need to be said but having heard what's fallen from Mr Andretich already it needs to be said that Mr Moodie's entitled to be treated as innocent until proven guilty. It can easily be inferred further that the withdrawal of remuneration wrongly, the wrongful withdrawal of his remuneration since October has caused Mr Moodie and his family considerable hardship. Now there's no evidence to that. I am simply suggested what might be inferred from the fact that he is a employee and you told that he has a family.*
>
> *He is the person most directly affected and it is those interests which the commission is directed to take into account, not to the exclusion of other interests but directed to take into account under section 26.*" (T25)

332 The respondent then dealt with the issue of hardship. Mr Andretich said:

> "*We are now into almost the end of June 2007 and I only hear indirectly the submission that would be made on his behalf is economic hardship. That was all that was put forward and it would be, in my humble submission, the only one that he could put forward.*" (T31)

And further:

> "*Impliedly the submission that would be made and I would submit could only be sensibly made is a matter of hardship by which in the circumstance could not override the public interest of not having a person of his seniority for a protracted period of time being paid to stay at home. The employer was prepared to do that when it had some control over as to how long that would be, it has no control over that. You did hear from Mr Wilson that a hearing date has not been set. I don't think we know where those proceedings are or when they're likely to be finalised.*" (T33)

333 None of this was addressed by counsel for the appellant in reply.

334 Before the Full Bench, counsel for the appellant maintained, in written submission, a similar approach of non-disclosure. He submitted that:

> "*There may well have been broader issues, or at least different issues, upon which Moodie may have advanced submissions, analogous to the range of issues suggested by Deane J in the extract quoted above.*" (paragraph [25])

335 The respondent's alternate view was expressed in their outline of submissions as follows:

> "*11. The decision appealed against is a discretionary one in respect of which the Appellant has the burden of showing that there has been a miscarriage: House v. The King (1936) 55 CLR 499, Gromark Packaging v. FMWU (1992) 73 WAIG 220.*
>
> *12. Where there has been a denial of procedural fairness in the failure to accord a hearing the complainant must show that he or she could have submitted something of substance. Lord Willberforce neatly stated the position in Malloch v. Aberdeen Corporation [1971] 1 WLR 1578 at 1579 as follows:*
>
> > *"The Appellant has first to show that his position was such that he had in principle, a right to make representations before a decision was taken. But to show this is not necessarily enough, unless he can also show that if admitted to State his case he had a case of substance to make. A breach of procedure, whether called a failure of natural justice, or an initial administrative fault cannot give him a remedy in that courts unless behind it is something of substance which has been lost by the failure. The Court does not act in vain ….…..…"*
>
> *The Appellant did not at first instance put forward any case, whether of substance or otherwise, that Mr Moodie might have put if he had been given a hearing.*
>
> *13. The Respondent is entitled to waive a hearing where it could not have produced a different outcome: SGIO v. Stead (1986) 161 CLR 141 at 145.*
>
> *14. The Commissioner correctly concluded that insofar as the disciplinary matters were concerned the Appellant could say nothing of substance because Mr Moodie had requested consideration of these be deferred so as to not prejudice the hearing of the concurrent criminal charges (para 33 Reasons for Decision). Accordingly any submission could only be limited to the personal circumstances of Mr Moodie and how the decision would be productive of personal hardship for him. These would not have produced a different outcome.*"

336 I have made plain the difficulties I have with the approach as reflected in paragraph 13 and 14 of the respondent's submissions. It is also the case that the Arbitrator did not consider any question of hardship.

337 I later pressed Mr Borgeest on this matter. We had the following exchange:

> ***"WOOD C**: And what was the applicant going to do at that stage?*
>
> ***MR BORGEEST**: Ah, well that would be a matter for him. Ah, he would have…he would have…*
>
> ***WOOD C**: But having read these papers I am not clear what the applicant was going to do at that stage. I can tell you now that's important to me.*
>
> ***MR BORGEEST**: I can tell you the kind of submissions that may have been made. But I am saying that without instructions. I would be saying that - - -*
>
> ***WOOD C**: I don't need full colour submission, I simply want to know…you alluded it earlier in the submission that there were matters that could have been submitted, I don't need detail. I just need to know what sort of grounds are to be covered. I assume you are telling me the applicant wanted the opportunity and he was going to take advantage of that opportunity.*
>
> ***MR BORGEEST**: Yes and on the…based on all the cases that flow from Stead and the cases to which the Acting President refers last week and I'll come to those, there's not much more that needs to be shown by an applicant in these circumstances. The allegation that it's futile is built upon as assumption that you need to investigate precisely this question Commissioner, the question of well tell me how the opportunity would have been ah, used. Well the cases tell us firstly and I am not avoiding the question and I will*

> *answer the question, what the cases tell us is the really the obligation is on the person asserting the futility to demonstrate that it was impossible that anything that could have been said could have made difference, that's really our answer to the point in Stead.*
>
> *But to answer your question about what could have been raised, the topics plainly could have included the question of hardship and that's a question contemplated by Chief Justice King in Everingham. Also the important question of maintaining the integrity of the disciplinary process itself. The disciplinary process that had been established by the Director General required ah, that things move in a deliberate way, that he have consideration of properly investigated facts and that the…that the employee have proper opportunities to be heard. Now, it could well have been submitted on the basis of what is before the Full Bench that a decision to remove the salary would have placed a particular pressure on the employee to… a pressure which tended to make more likely that he would simply resign to get out of the circumstance and seek new income elsewhere rather then to stay in the process and advance what could be said within it. That's…and lastly…lastly an area would have been a…a set of challenges to the fairness of the process that had been undertaken thus far. And, that's…it's in relation to that point that I directed the Bench's attention earlier to the kinds of things that have been put in issue by Tottle Partners in the earlier correspondence about the timing, the bone fides of the Director General and so on.*" (T15)

338 It is not for the Arbitrator to "*assume*" what "*might*" have been put. Having expressed this difficulty with the conduct of the case, it is true that the issue of hardship was raised at first instance (T25), and a suggestion (I can put it no higher) that it was possible that Mr Moodie could have redressed some legal issue put forward by the respondent (T21). The latter point has no relevance, given all that has transpired. Mr Moodie has not had the opportunity to be heard on the question of hardship as it relates to suspension without pay.

339 I turn then to my reservations as to ground 1. This ground seems to suggest that the Arbitrator was required to weigh factors and gave insufficient weight to the lack of procedural fairness. Albeit, as covered already, the appellant maintained that only a lack of procedural fairness was relevant on review.

340 During the course of the hearing the Arbitrator described her task in brief as, "*Well, this matter appears to me to come down to an argument about issues both of law and fairness and whether the aspect of the failure to afford an opportunity to be heard on a particular point voids the decision or whether there are further considerations*". Counsel for the respondent agreed with this summation. Counsel for the appellant did not demur.

341 From paragraph [34] the Arbitrator considered the merits of the suspension without pay and said:

> "*it should be noted that the role of the Public Service Arbitrator as the constituent authority of the Commission, according to s 6 of the IR Act and s 26(1)(a) and (c) in particular, is the resolution of disputes according to equity, good conscience and the substantial merits of the case. It is not an administrative tribunal whose role is to examine the application of proper process and declare void those decisions which fall short of the appropriate standard. It is to provide practical and equitable resolutions. In this case, that requires consideration of whether the respondent's decision to suspend without pay was fair and equitable even if a proper process was not applied.*"

342 I am not clear whether in saying, "*even if a proper process was not applied*", the Arbitrator considered that the lack of procedural fairness was unfair. There is no explicit finding to this effect. However, with the exception of this last phrase the Arbitrator, in my respectful view, described properly her task. The Arbitrator undertook rightly a broader task than the automatic task submitted by the appellant.

343 The Arbitrator under s80E(5) had the power to "*review, nullify, modify or vary*" the decision of the Director-General to suspend Mr Moodie without pay. The nature of the Arbitrator's powers was expressed clearly by Wheeler J and Le Miere J in *Director-General Department of Justice v Civil Service Association of Western Australia Inc* [2005 WASCA 244] (2005 149 IR 160 at 169 as follows:

> "*28. Turning, then, to the question of the proper construction of s 80E(5), read with s 80E(1), in our view the controversy which has arisen relates to a false issue. As we have noted, there is no power conferred by the Act upon the Arbitrator to engage in anything in the nature of "judicial review", or to make a bare declaration. That is jurisdiction of a kind quite different from the merits-based inquiry contemplated by s 80E. To the extent that the reasons of the Full Bench might be read as suggesting that there is such power, they are in error.*
>
> *29. However, the powers of the Arbitrator are very wide. They are to inquire into and deal with any industrial matter. To the extent necessary, the exercise by an employer in relation to a government*

officer of a power relating to that industrial matter may be reviewed, nullified, modified, or varied by the Arbitrator.

30. An inquiry into an industrial matter will, where that industrial matter is affected by other legislation, or where the actions of persons involved in the industrial matter are, in some respect, governed by other legislation, involve an inquiry into what was done, in that legislative context. In order to determine how to "deal with" an industrial matter, the Arbitrator must find relevant facts. If it is the case that a relevant factual finding suggests that a person has been guilty of unlawful or improper conduct, that is a finding which it is open to the Arbitrator to make, not as an end in itself, but as a step in determining how the industrial matter is to be dealt with.

31. Where, as is presently the case, the way in which officers in the public service deal with each other is the subject of principles and requirements contained in legislation such as the PSM Act, it will often be desirable for the Arbitrator to consider whether the behaviour of individuals involved in the industrial matter has been in conformity with those principles and requirements. Again, findings of that kind would not be made as an end in themselves, but would be made in order to determine how, in the broad statutory context, it would be appropriate to deal with the industrial matter.

32. It will on occasion, as part of that process, be necessary for the Arbitrator to undertake a consideration of the relevant statutes, so as to ascertain how they apply to the facts as found. That exercise is undertaken, not in order authoritatively to declare the meaning of the statutory provision, but again as a step in the process of ascertaining what is required, in the statutory context, to deal with the industrial matter.

33. Those conclusions may on occasion lead to the view that it is necessary in order to deal appropriately with the industrial matter, to nullify, modify, or vary an action or decision of an employer, pursuant to s 80E(5). That subsection does not confer any independent jurisdiction to quash those decisions, but only to do so to the extent necessary to ensure that the industrial matter is dealt with as contemplated by s 80E(1). Similarly, the word "reviewed" in s 80E(5) is plainly not intended to confer some independent power to review any decision of an employer, but only a power to review (and, if necessary, to differ from) the decision where it is necessary to do so as part of the process of dealing with an industrial matter."

344 These reasons might also lead to some doubt as to whether the bold remedy sought by the appellant, namely to "*declare void*" the decision of the employer, is capable of being awarded. This is not a matter canvassed at first hearing or on appeal. Clearly the Arbitrator had the power to nullify the employer's decision and I consider the power to direct the parties as to the appropriate course in the dispute.

345 The Arbitrator's assessment of the relevant factors as to merit were expressed at paragraphs [35] - [38] as follows:

"*35. The respondent made submissions as to the criminal charges. If those submissions were intended, in some way, to suggest that the probability of Mr Moodie having committed the alleged breaches of discipline or being guilty of the charges is high, and that this constitutes good reason for not providing him with an opportunity to be heard prior to the decision to suspend being made, then this is not a relevant consideration. The issue of the suspension without pay does not relate to Mr Moodie's guilt or innocence. However, if the submission was that the nature and seriousness of the allegations is a consideration, then this is so. This factor goes to the appropriateness of continuing to have Mr Moodie undertaking work for the respondent during the time following his being charged with criminal offences, prior to their resolution.*

36. In the circumstances of the nature and seriousness of the allegations, and the seniority of the position held by Mr Moodie and the nature of that position it was indeed inappropriate for the respondent to provide him with work.

37. Also, given the lengthy period which was likely to pass before the criminal charges could be resolved, it would be unreasonable and contrary to the public interest for the respondent to be required to

continue to pay Mr Moodie while he was providing no work. This period of delay was beyond the control of the respondent and the respondent was unable to conclude its investigation through no fault of its own. This is as a consequence of agreeing to Mr Moodie's request. It is of no benefit to the respondent to have such a delay, although it is to Mr Moodie's benefit.

38. Therefore in the circumstances of:

(a) the nature and seriousness of the charges;

(b) the seniority and nature of the position held by Mr Moodie;

(c) the inappropriateness of the respondent providing him with work;

(d) the lengthy delay before a trial; and

(e) placing the disciplinary proceedings in abeyance at Mr Moodie's request,

the merits of the situation favour the suspension without pay."

346 The Arbitrator's assessments of those issues are expressed in brief terms. However, I have no doubt that each of those issues, with the exception of 38(e), were relevant considerations for the Director-General, and given all the circumstances weighed against Mr Moodie. This comment does not relate in any way to the innocence or otherwise of Mr Moodie. It is simply an assessment of the information on hand at that time which had relevance to the question of suspension without pay. Mr Moodie was entitled to request that the disciplinary process be put into abeyance, and this request was granted rightly. This matter (i.e. [38(e)]) should then not be held against him in considering suspension without pay.

347 The Arbitrator concluded at paragraph [39] that:

"*(c) it would have been futile to have provided Mr Moodie with an opportunity to be heard in respect of the suspension prior to the decision having been made; and*

(d) alternatively, in the circumstances, there was no unfairness in the suspension without pay."

348 I have dealt with the error concerning the Arbitrator's conclusion expressed at sub-paragraph [39(c)] of the decision. That sub-paragraph, as expressed, suggests that the application is disposed of for that reason of "*futility*". The error as to "*futility*" however, infects the judgement made at paragraph 39(d) in that it is not an alternative. It is a factor, and an important factor, to be weighed into the judgement of merit. Sub-paragraph [39(d)] commences "*alternatively*", which suggests that the application is dismissed for other reasons, namely "*in the circumstances, there was no unfairness in the suspension without pay*". This marries with paragraph [34] of the reasons where the Arbitrator says, "*In this case, that requires consideration of whether the respondent's decision to suspend without pay was fair and equitable even if a proper process was not applied.*" One could read the Arbitrator's reasons as suggesting that the "*proper process*" was of no importance in that judgement. I consider it would be incorrect to do so, however, it remains that the conclusion in [39(d)] could not be made without first construing properly the issue of futility.

349 Given the manner in which the appellant approached their case there is little in the grounds of appeal which go to challenge directly the balancing judgement the Arbitrator had to make about the merits of the application. As stated, the appellant at paragraph [28] of their outline of submission stated, "*The only relevant "merits" were those of the decision to refuse to afford the employee an opportunity to be heard.*" Nevertheless, with the caution I have expressed, I consider grounds 1, 2 and 3 have been made out.

350 The powers of the Full Bench on appeal are stipulated in ss49(5), (6) and (6a) as follows:

"*49. (5) In the exercise of its jurisdiction under this section the Full Bench may, by order —*

(a) dismiss the appeal;

(b) uphold the appeal and quash the decision or, subject to subsection (6), vary it in such manner as the Full Bench considers appropriate; or

(c) suspend the operation of the decision and remit the case to the Commission for further hearing and determination.

(6) Where the Full Bench varies a decision under subsection (5)(b) the decision as so varied shall be in terms which could have been awarded by the Commission that gave the decision.

(6a) The Full Bench is not to remit a case to the Commission under subsection (5)(c) unless it considers that it is unable to make its own decision on the merits of the case because of lack of evidence or for other good reason."

351 In my view, the Arbitrator should have nullified the decision of the Director-General to suspend Mr Moodie without pay and directed the Director-General to afford Mr Moodie a reasonable opportunity to submit why he should not be suspended without pay. The Full Bench has the power to now make the appropriate order. I consider that the appeal should be upheld on grounds 1, 2 and 3 and the Arbitrator's decision should be varied by requiring the Director-General to now afford Mr Moodie an opportunity to be heard as to whether he should be suspended on pay.

352 I would make one final comment. Given my reasons, it is not necessary to deal in any detail with the submissions made by counsel for the respondent about the application of *Automatic Fire Sprinklers Pty Ltd v Watson* (1946) 72 CLR 435 and the Full Bench decision in *Director-General, Department of Justice v Civil Service Association of Western Australia Inc* (2003) 83 WAIG 908 (*Bowles*). I was a member of that Full Bench and my judgement is there to be read. However, I do not consider that the conclusions which the respondent seeks to draw from the Full Bench's decision are valid.

2008 WAIRC 00258

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS) **APPELLANT** **-and-** DIRECTOR GENERAL OF HEALTH IN RIGHT OF THE MINISTER FOR HEALTH AS THE METROPOLITAN HEALTH SERVICE, THE SOUTH WEST HEALTH BOARD AND THE WA COUNTRY HEALTH SERVICE **RESPONDENT**
CORAM	FULL BENCH THE HONOURABLE M T RITTER, ACTING PRESIDENT CHIEF COMMISSIONER A R BEECH COMMISSIONER S WOOD
DATE	THURSDAY, 24 APRIL 2008
FILE NO/S	FBA 21 OF 2007
CITATION NO.	2008 WAIRC 00258

Decision	Appeal upheld, decision of Arbitrator varied
Appearances	
Appellant	Mr T Borgeest (of Counsel), by leave
Respondent	Mr R Andretich (of Counsel), by leave

Order

This matter having come on for hearing before the Full Bench on 11 February 2008 and having heard Mr T Borgeest (of Counsel) by leave on behalf of the appellant, and Mr R Andretich (of Counsel) by leave on behalf of the respondent, and reasons for decision having been delivered on 10 April 2008, it is this day, 24 April 2008, ordered that:-

1. The appeal is upheld.
2. The decision of the Arbitrator is varied as follows:
   (a) The application is allowed.
   (b) The decision of the respondent to suspend Mr Moodie from his position without remuneration is nullified.
   (c) The decision of the respondent on 7 July 2006, to direct Mr Moodie to remain away from the workplace until directed to return on "*full pay*" until otherwise determined by the respondent is restored from the date of the order of the Full Bench.
   (d) The respondent, before making any decision to suspend Mr Moodie from his position without remuneration, shall allow a reasonable opportunity to him to be heard.
3. The reasons for decision of the Full Bench are not to be published to anyone except the parties and their legal advisors until further order.

By the Full Bench

(Sgd.) M T RITTER,
Acting President.

[L.S.]

2008 WAIRC 00317

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS)
	APPELLANT
	-and-
	DIRECTOR GENERAL OF HEALTH IN RIGHT OF THE MINISTER FOR HEALTH AS THE METROPOLITAN HEALTH SERVICE, THE SOUTH WEST HEALTH BOARD AND THE WA COUNTRY HEALTH SERVICE
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE M T RITTER, ACTING PRESIDENT
	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER S WOOD
DATE	TUESDAY, 20 MAY 2008
FILE NO/S	FBA 21 OF 2007
CITATION NO.	2008 WAIRC 00317

Decision Order varied

Order

It is this day, 20 May 2008, ordered that:-

1. The order made by the Full Bench on 24 April 2008 is varied by the deletion of order number 3.

By the Full Bench

(Sgd.) M T RITTER,
Acting President.

[L.S.]

2008 WAIRC 00331

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2008 WAIRC 00331
CORAM	**:**	THE HONOURABLE M T RITTER, ACTING PRESIDENT
		CHIEF COMMISSIONER A R BEECH
		COMMISSIONER P E SCOTT
HEARD	**:**	TUESDAY, 25 MARCH 2008, WEDNESDAY, 2 APRIL 2008
DELIVERED	**:**	FRIDAY, 30 MAY 2008
FILE NO.	**:**	FBA 27 OF 2006
BETWEEN	**:**	EDWARD MICHAEL
		Appellant
		AND
		DIRECTOR GENERAL, DEPARTMENT OF EDUCATION AND TRAINING
		Respondent

ON APPEAL FROM:

Jurisdiction	**:**	Western Australian Industrial Relations Commission
Coram	**:**	Commissioner J L Harrison
Citation	**:**	86 WAIG 2627
File No	**:**	U 116 of 2005

CatchWords:

Industrial Relations (WA) – Appeal against order of the Commission in unfair dismissal claim – interlocutory applications – application to the Full Bench to consider "*new and additional*" documents – application to review video record of proceedings at first instance.

Additional documents – whether "*new*" documents/distinction between new and fresh evidence – "*George Moss"* test - most documents available to be used at first instance – appellant bound by the way in which he conducted his case at first instance – appellant bound by the actions of his counsel at first instance – application dismissed.

Application to the Full Bench to review video record of proceedings – coaching of witnesses – appellant able to observe conduct and make submissions at first instance – no submissions made – documents brought into evidence after hearing date not cogent – no injustice in Full Bench not receiving all documents - application dismissed.

Legislation:

Industrial Relations Act 1979 (WA)

s23A, s26(1)(b), s31(3), s49(4), s49(4)(a)

Public Sector Management Act 1994 (WA)

s79(5)

Result:

Order issued, Interlocutory Applications dismissed

Representation:

Appellant	:	The appellant appeared in person
Respondent	:	Ms R Hartley (of Counsel), by leave

Solicitors:

Respondent	:	The State Solicitors Office of Western Australia

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Case(s) referred to in reasons:

Appellant WADC of 2001 v Minister for Immigration and Multicultural and Indigenous Affairs [2002] FCAFC 298

Coulton v Holcombe (1986) 162 CLR 1

Federated Clerks' Union Australia, Industrial Union of Workers, WA Branch v George Moss Ltd (1990) 70 WAIG 3040

Devereaux-Warnes v Hall [2006] WASCA 268

Gould v Vaggelas [1985] HCA 75; (1985) 157 CLR 215

Hamersley Iron Pty Ltd v Association of Draughting, Supervisory and Technical Employees, Western Australian Branch (1984) 64 WAIG 852

Hanssen Pty Ltd v Construction, Forestry, Mining and Energy Union (Western Australian Branch) (2004) 84 WAIG 694

Iyer v Minister for Immigration & Multicultural Affairs [2000] FCA 1788

Kershaw v Sunvalley Australia Pty Ltd (2007) 87 WAIG 1169

McCarthy v Sir Charles Gairdner Hospital (2004) 84 WAIG 1304

Shortland v Lombardi Nominees Pty Ltd trading as Howard Porter (2007) 87 WAIG 1158

State Railway Authority of New South Wales v Codelfa Construction Pty Ltd [1982] HCA 51; (1982) 150 CLR 29

University of Wollongong and Others v Metwally (No. 2) (1985) 59 ALJR 481; 60 ALR 68

Wentworth v Woollahra Municipal Council [1982] HCA 41; (1982) 149 CLR 672

Reasons for Decision

RITTER AP:

Summary of Outcome

1 For the reasons which follow in my opinion the two applications by the appellant to the Full Bench to firstly receive additional documents in support of the appeal and to secondly view the video record of the proceedings at first instance should both be dismissed.

The Application at First Instance

2 On 14 October 2005 the appellant filed a notice of application seeking an order pursuant to s23A of the *Industrial Relations Act 1979* (WA) (*the Act*). The application was made on the ground that the appellant's dismissal as a state school mathematics teacher on 21 September 2005 was harsh, oppressive or unfair. He was then teaching at Pinjarra Senior High School but the dismissal was for a substandard teaching performance when at John Willcock College in Geraldton in 2004. The application was defended and proceeded to a hearing. The appellant was then represented by solicitors and counsel. The hearing took place before the Commission on 20 and 21 April 2006. Final written submissions were then filed and reasons for decision were delivered on 24 July 2006. On the same date an order was made dismissing the application.

The Notice of Appeal

3 On 14 August 2006 the appellant instituted an appeal against the dismissal of the application. At that time the appellant was still represented by his solicitors. The notice of appeal was accompanied by a document setting out 10 "*grounds of appeal*".

4 After the filing of the notice of appeal the appellant ceased to retain his solicitors.

5 The appeal was not progressed for a lengthy period of time, due to a number of reasons which do not need to be set out. In the latter half of 2007 the appeal was then re-activated.

The Two Interlocutory Applications

6 An appeal book and two interlocutory applications were filed on 27 August 2007.

7 The first was an application to the Full Bench to receive and consider new and additional "*materials*" not in evidence at first instance. These "*materials*" were documents. The second application was for the Full Bench to conduct what was described as a "*review of proceedings at first instance*". There were two aspects to this application. The first was for the Full Bench to ascertain whether there were errors in the transcript of the proceedings at first instance, as identified in a list prepared by the appellant. The second application was for the Full Bench to look at and listen to the video record of the proceedings at first instance. At a later directions hearing the appellant said the purpose of this was to support the appellant's contention that the respondent's advocate improperly coached witnesses. That advocate was not the respondent's counsel.

Orders by the Full Bench, Documents Consequently Filed and Transcript

8 Pursuant to an order made by the Full Bench on 15 January 2008 the respondent on 22 January 2008 filed and served an indexed file of all of the documents received as exhibit R1 by the Commission at first instance. This comprised 244 documents and 570 pages. Not all of these documents had been included in the appeal book. As later described this comprised all but one of the documents before the Commission.

9 The appellant was ordered to file the following documents:

(a) A statutory declaration that set out how he asserted he found out that documents which he had provided to his solicitor were not in evidence before the Commission and annexed a list of the documents attached to the application which:

(i) The appellant asserted were not in evidence before the Commission.

(ii) The appellant asserted were improperly changed.

(iii) In relation to (ii), identified the asserted changed version of the document which was in evidence before the Commission.

(b) A list of:

(i) The pages and paragraphs of the transcript said to be incorrect.

(ii) The asserted correct version of what was said at the hearing.

(iii) The date and time when this evidence was given.

(iv) The date and time on the video record of the proceedings where it is asserted there was coaching of the respondent's witnesses.

10 The appellant in effect complied with these orders on 6 February 2008.

11 The respondent had the opportunity to file and serve a statutory declaration in response to that of the appellant but did not do so.

12 Due to an assertion by the appellant that the transcript of the first instance hearing was inaccurate, the Commissioner arranged for the hearing to be transcribed a second time by a different organisation. In these reasons I will use quotations and page numbers from the second transcript. In the appellant's statutory declaration and the other documents he filed the page numbers in the first transcript were used.

The Appellant's Statutory Declaration

13 The appellant's statutory declaration contained a page of dot points with an attached list of what were described as the "*new documents*". This contained numbers for these documents, the page number of exhibit R1 to which the "*new*" document related, pages of the transcript where that document had been referred to and a summary of the point being made by the appellant about the new document. There were then two pages which had tables on them, one of which was headed "*more important documents were with my solicitor*" and the other "*additional documents*". Under these headings were tables in the same format as I have just described. Behind these tables were copies of the documents which the appellant wanted the Full Bench to consider in addition to the trial documents.

14 With one exception, explained below, the dot points in the statutory declaration were as follows except that for ease of reference I have changed the dot points to numbers:

> "*1. My Solicitor collected about **920 - 950** documents before the Court day from me and the Department Of Education, and he presented **ZERO** to the court. (transcript page number 7 last paragraph, and page number 8 last paragraph, first day 20/04/04)*

> 2. *My Solicitor presented only two documents in the last few minutes after the court finished in the and the witnesses left the court to go home (Ref:- transcript page 241 paragraph 6 & and page 243 paragraph 5 second day 21/04/04)*
>
> *1- Holly's letter*
>
> *2- the report from Pinjarra S.H.S*
>
> 3. *The Department Of Education presented 600 document (Transcript page number 7, last paragraph, first day 20/04/04),* ***they used only about 4.2%*** *from these document and the rest* ***95.8% they ignored it*** *because most of these documents* ***explaining facts against them,*** *some document were* ***(forged),*** *and the rest were* ***fabricated document***
>
> 5. ***Very important conversation*** *between my Solicitor and my self regarding to the commissioner in the beginning of the court day*
>
> 6. *Documents presented to commissioner Harrison by the respondent contained* ***forged signatures*** *and excluded important contents (lessons plans)*
>
> 7. ***Conflicting reports*** *by the respondent regarding my employment after Mt Magnet D.H.S (termination v placement request form)*
>
> 8. *A number of complaints and documents were presented by the respondent which I was never been made aware of until after Commissioner Harrison reached her decision*
>
> 9. ***A fabricated letter from Shane Hill MLA LAPOQA*** *which is far from the truth*
>
> 10. *Investigator report page 221 to 233 changed 143-155* ***(forged)***
>
> 11. *Commissioner Harrison refused to allow me the time to present my case by not granting my councilor [sic] the time to present very important facts. (Transcript page 55 first day on 20/04/04)*
>
> 12. *Commissioner Harrison assisted the respondent's witness (Mr. Pilkington) with his answers. (Transcript page 128 last paragraph and the time between 37:00:00 to 37: 12:00)*" ([sic] to all paragraphs and emphasis in original – T128 in the first transcript is T37 in the second)

15 The fourth dot point I have deleted. This contained information about settlement offers which had been made to the appellant and this was objected to by the respondent. It is not information which should be put before the Full Bench. Points 5, 11 and 12 are not about documents. Point 12 was not pursued by the appellant in the application to the Full Bench to view the video record.

16 The statutory declaration also contained a list of the page and paragraph references which the appellant asserted were incorrect and the correct version. There were six pages and paragraph numbers asserted to be incorrect in the transcript.

17 The appellant also provided five pages of tables setting out:

(a) The times "*when people from the Department of Education gave the answer for my lawyer's question in body language [sic]*" ("*Document 1*" at pages 1-2).

(b) The times "*when the camera wasn't on my lawyer when he ask [sic] the question*" ("*Document 2*" at pages 1-3).

The Additional Documents

18 For clarity and ease of reference set out below in a table is a list of the additional documents filed by the appellant in support of the application. I have given each document a number. The page numbers are as marked by the appellant on the document filed:

Document Number	Description of Document	Date (if any)	Page Number(s)
1	Grounds on which Full Bench should reverse decision		1
2	Letter from appellant to the Commission	27 August 2007	2
3	Letter from Mr K Pilkington to the appellant	18 August 2004	3
4	Letter to appellant from Ms Tracy Kelly	16 August 2004	4
5	Letter "*To Whom It May Concern*"	16 August 2004	5

Document Number— *continued*	**Description of Document**	**Date (if any)**	**Page Number(s)**
6	Letter from Mr Gary Savill to Ms Jillian Stewart	15 August 2004	6
7	Letter from C Jakovljevic to Mrs B Carey		7
8	Note by Ms Sarah Savill		8
9	Letter from Ms Tracy Kelly to the appellant	2 April 2004	9
10	Letter from C Jakovljevic to the appellant	17 May 2004	10
11	Memorandum from Mr K Pilkington to the appellant	23 August 2004	11
12	Record of conversation with Mr and Mrs Jackson and Corrina Jackson	20 August 2004	12 - 13
13	Letter from Mr and Mrs Jackson to Mr K Pilkington	20 August 2004	14
14	Letter to Mr K Pilkington from Corrina Jackson	21 August 2004	15
15	Letter from Mr K Pilkington to the appellant	17 December 2004	16
16	Letter from appellant to Mr K Pilkington	19 February 2005	17
17	Note to appellant from "*Jillian*" (Ms Stewart)	30 July 2004	18
18	Certificate from Cairo Ministry of Education about appellant		19
19	Letter from appellant to Mr K Pilkington		20 - 21
20	Letter from appellant to Mr K Pilkington		22 - 24
21	Note from Ms Stewart to appellant	21 June 2004	25
22	Facsimile from Mr T Vaughan, State School Teachers' Union of WA (SSTU), to appellant	25 May 2004	26
23	Letter from Department of Education and Training (DET) to Mr D Kelly, General Secretary, Australian Education Union (AEU)	15 January 2002	27
24	Letter from Dr John Crawford To Whom It May Concern	11 August 2007	28
25	Notes of maths game headed "*STEWARTZ!*", with annotations		29
26	Notes headed "*Explanation of Multiplying 15 x 5 was lost on most of the class*" typed by the appellant, with annotations		30
27	Letter from the appellant to Mr K Pilkington	10 August 2004	31 - 35
28	Lesson comments by Ms J Stewart, with annotations by the appellant	5 August 2004	36 - 38
29	Document typed by appellant with heading "*Block 2 Friday 25 June 2004 Year 9*"		39 - 50
30	Letter from the appellant to Complaints Management Unit, DET	18 November 2004	51
31	Memorandum to appellant from "*Anne*" at Mount Magnet District High School	1999	52
32	Athletic Award Certificate given to appellant	24 September 1999	53
33	Letter from Mr Ireland to appellant	18 February 2000	54
34	Annotated "*Action Plan*" for appellant		55
35	Blank page headed "*Lesson Plan*"		56
36	Lesson plan with annotations, unsigned	30 June 2004	57 - 59
37	Typed mathematical questions with annotations		60 - 69
38	Annotated lesson plan, signed	3 August 2004	70 - 71

Document Number— *continued*	**Description of Document**	**Date (if any)**	**Page Number(s)**
39	Attachment to lesson plan: Typed notes headed "*Writing Algebraic Expressions*", with annotations		72 - 76
40	Annotated lesson plan	11 August 2004	77 - 78
41	Attachment to lesson plan: Document of typed mathematics questions with annotations		79 - 82
42	Annotated lesson plan, unsigned	16 June 2004	83 - 84
43	Attachment to lesson plan: Typed mathematics questions headed "*Using fractions*"		85 – 87
44	Handwritten notes		88
45	Lesson plan	11 August 2004	89 - 91
46	Attachment to lesson plan: Typed mathematical questions with annotations		92 - 95
47	Attachment to lesson plan: Typed notes headed "*Writing Algebraic Expressions*"		96
48	Document headed "*Self Evaluation*" by the appellant, signed	13 August 2004	97
49	Letter from appellant to Mr K Pilkington	9 August 2004	98 - 102
50	Handwritten notes by Ms J Stewart, unsigned	25 June 2004	103
51	Letter from appellant to Mr A Huts, Executive Director Human Resources, DET	30 July 2005	104 - 110
52	Handwritten note from K Farrington, Geraldton Health Service to Mental Health Team re appellant	23 August 2004	111
53	Document by Ms J Stewart headed "*Appraisal Process*"	16 August 2004	112 - 113
54	Notes of observations by Ms J Stewart	9 August 2004	114 - 116
55	Typed document headed "*Second Test*"		117 - 118
56	Notes of observation	28 June 2004	119 - 120
57	Photocopies of pages of textbooks about "*Measurement*"		121 -124
58	Letter by appellant	7 December 2004	125 - 131
59	Note from Geraldton Regional Hospital to Mental Health Team about appellant		132
60	Letter from appellant to Ms Franklyn, SSTU	7 August 2004	133
61	Letter from Bruce Seymour, Head of Learning Area, Mathematics - To Whom It May Concern	9 November 2004	134
62	Letter from Mr Butcher, Principal, Katanning Senior High School -To Whom It May Concern	15 November 2004	135
63	Mathematical Association Certificate of Attendance to appellant	2003	136
64	Handwritten note by Holly Reynolds	7 June 2004	137
65	Letter from appellant to Ms Jack	20 August 2004	138
66	Document headed "*Appraisal Process*"	25 June 2004	139 - 143
67	Appraisal Process	28 June 2004	144 - 146
68	Handwritten notes by Ms J Stewart	25 June 2004	147
69	Letter from appellant to Director General, DET	14 May 2005	148
70	Notes by Mr K Pilkington	25 June 2004	149

Document Number— *continued*	**Description of Document**	**Date (if any)**	**Page Number(s)**
71	Document headed "*Lesson comment*" with annotations	5 August 2004	150 - 152
72	Letter from appellant to Director General, DET		153 - 154
73	Typed document headed "*Response to Saul Molina*" by the appellant		155 - 163
74	Typed notes about incidents		164 - 165
75	Email from Ms Tania Monument to Ms Beth Aitken	7 June 2005	166
76	Letter from Dr Crawford - To Whom It May Concern	25 August 2007	167
77	Email from Mr Newman to Ms Jack	10 September 2004	168
78	Worker's Compensation First Medical Certificate about appellant	3 September 2004	169
79	Handwritten notes about mathematic lessons		170 - 171
			There are no pages 172- 173
80	Geraldton Secondary College student referral of student KW	14 May 2004	174
81	Geraldton Secondary College student referral	2 August 2004	175
82	Geraldton Secondary College student referral of KW	24 May 2004	176
83	Notes of conversation between appellant and Mr K Pilkington		177
84	Typed notes headed "*Clarification of roles*"		178 - 179
85	Portion of typed lesson plan with annotations		180
86	Handwritten notes		181
87	Notes of "*drop in observation*" by Mr K Pilkington	25 June 2004	182
88	Notes of observation of lesson by Mr K Pilkington	30 June 2004	183 - 185
89	Handwritten notes about lesson observation by Mr K Pilkington	23 June 2004	186 - 188
90	Summary of lesson observation	23 June 2004	189
91	Handwritten note by Mr K Pilkington	25 June 2004	190
92	Notes of drop in observation Mr K Pilkington	25 June 2004	191
93	Self reflection by appellant	5 August 2004	192
94	Lesson plan	11 August 2004	193 - 194
95	Letter from Dr Crawford – To Whom It May Concern	16 November 2004	195
96	Handwritten note	19 August 2004	196
97	Note from Mr Jackson to the staff		197
98	Letter from Ms Tracy Kelly to Mr K Pilkington	16 August 2004	198
99	Notes to appellant by Ms Carey		199
100	Document of appellant headed "*Response to Saul Molina*"	27 January 2005	200 - 208
101	Progress report for student at John Willcock College Term 1 2004		209
102	Slater and Gordon file memorandum		210
103	Typed notes of questions		211

Document Number— *continued*	**Description of Document**	**Date (if any)**	**Page Number(s)**
104	Typed document headed "*Final interview most likely questions*"		212
105	Typed questions "*For Kevin*"		213
106	Typed summary of interview between appellant and Mr Peter Burgess	18 May 2005	214 - 220
107	Typed summary of interview between appellant and Mr Peter Burgess with tracked changes	18 May 2005	221 - 233
108	Handwritten notes of drop in observation by Mr K Pilkington	25 June 2004	234
109	Handwritten note from appellant to Ms Jack	24 September 2004	235
110	Form for mathematical problem solving		236
111	Letter from Mr K Pilkington to appellant	31 August 2004	237
112	Note to year 8 teachers from "*Jillian*"		238
113	Typed mathematical questions		239 - 261
114	Letter from Mr David Kelly, General Secretary, SSTU to the appellant	8 June 2007	262
115	DET Secondary Staffing facsimile	27 November (no year)	263
116	Letter from Mr Shane Hill MLA to Mr Rod Baker, DET	1 October 2004	264
117	Letter from Mr G Savill to Ms J Stewart	15 August 2004	265
118	Letter from appellant to Mr K Pilkington	Received 6 August 2004	266
119	Letter from appellant to Mr Pilkington	19 February 2005	267
120	John Willcock College "*Memo from Kathy Pilks*" to appellant	4 August 2004	268
121	Handwritten note headed "*Rescheduled meeting 5 August 2004*"		269
122	Geraldton Secondary College student referral	24 February 2004	270
123	Handwritten notes of mathematics game headed "*Stewartz!*"		271
124	Incomplete typed portion of memorandum or letter by appellant	17 January 2005	272
125	Certificate from Cairo Ministry of Education		273
126	Letter from Mr and Mrs Kelly to Mr K Pilkington	16 August 2004	274
127	Letter from Ms Tracey Kelly to appellant	16 August 2004	275
128	Letter from Mr and Mrs Kelly to Mr K Pilkington	3 August 2004	276
129	Document headed "*Viewing Edward Michael*"	11 August 2004	277
130	Memorandum from appellant to Mr K Pilkington		278 - 279
131	Letter from Ms Beth Aitken, Principal Pinjarra Senior High School to appellant	24 August 2005	280
132	Handwritten note by Ms J Stewart	25 June 2004	281
133	Pinjarra Senior High School "*Teaching Set List*"	6 May 2005	282
134	Typed and handwritten notes about mathematical problems		283
135	Signed memorandum by the appellant to Mr K Pilkington	27 August 2004	284

Document Number— *continued*	**Description of Document**	**Date (if any)**	**Page Number(s)**
136	Document headed – To Whom It May Concern by appellant		287
137	Letter from Mr Baker to appellant	14 September 2004	288
138	John Willcock College "*Memo From Kathy Pilks*" to appellant	29 April 2004	289
139	Handwritten note to "*Edward*" from "*Kathy*"	5 May 2004	290
140	Note to "*Kurt*" from "*Barbara Carey*"		291
141	Record of meeting about unsatisfactory performance	29 June 2004	292
142	Letter from Ms Jack to appellant	28 September 2004	293
143	Letter from Mr Baker to appellant	14 September 2004	294
144	Letter from Mr Baker to appellant	6 September 2004	295
145	Letter from Mrs Karen Gilligan to appellant	3 April 2004	296
146	Letter from Dr Proud to Ms Tania Monument, DET	2 March 2005	297 - 299
147	Letter from appellant to Mr John Ryan	12 April 2000	301
148	Letter from Dr Crawford – To Whom It May Concern	11 August 2007	302
149	Letter from appellant to Mr David Kelly, SSTU		303 - 305
150	Letter from appellant to Mr David Kelly, SSTU	25 June 2007	306 - 307
151	Facsimile journal report	1 September 2006	308
152	Letter from appellant to Ms Susan Hopgood	11 July 2007	309 - 310
153	Letter from appellant to Ms Hopgood	8 August 2007	311
154	Facsimile journal record	7 August 2007	312
155	John Willcock College "*Memo From Kathy Pilks*"	3 August 2004	313
156	Facsimile from SSTU to appellant	2 August 2004	314
157	Handwritten note from appellant to "*Kathy*"	4 August 2004	315
158	Letter from appellant to Ms Aitken	10 August 2007	316
159	Letter from appellant to Ms Aitken	16 August 2007	317 - 318
160	Facsimile journal report	16 August 2007	319
161	Letter from Ms Aitken to appellant	27 June 2005	320
162	Letter from Ms Aitken to Whom It May Concern	14 August 2007	321
163	Facsimile from Ms Aitken to appellant	13 August 2007	322
164	Letter from appellant to Ms Aitken	10 August 2007	323
165	Facsimile journal record		324
166	Letter from Ms Aitken to appellant	27 June 2005	325
167	Handwritten notes about lesson observations		326 - 328
168	John Willcock College "*Memo From Kathy Pilks*"	24 June 2004	329
169	Typed note by appellant "*re: Jodi Teacher Assistant*"		330
170	Copies of documents 170 and 169 put onto the same page		331
171	Handwritten note – To Whom It May Concern by appellant	27 August 2007	332
172	Undated, unsigned letter "*To Whoever It May Concern*"		333
173	Letter from appellant to Mr Shane Hill	9 July 2007	334

Document Number— *continued*	Description of Document	Date (if any)	Page Number(s)
174	Registered post customer receipt	11 July 2007	335
175	Letter from appellant to Ms Eva Sims	October 2004	336
176	School notes about KW	February - July 2004	337 - 338
177	Geraldton Secondary College Student Referral of KW	29 July 2004	339
178	John Willcock College Contact Record for KW	16 June 2004	340
179	John Willcock College Contact Record for KW	18 March 2004	341
180	Geraldton Secondary College Student Referral of KW	29 March 2004	342
181	Geraldton Secondary College Student Referral of KW	5 April 2004	343
182	Questionnaires completed by Mathematics Students		344 - 355
183	Unsigned letter by appellant to"*Simon*"	3 April 2006	356 - 360
184	Letter from a teacher to "*Whoever it may concern*"	12 July 2007	361
185	Letter from appellant to SSTU	10 January 2008	362
186	Facsimile Transmission Verification Report (time: 2:21pm)	10 January 2008	363
187	Facsimile Transmission Verification Report (time: 2:24pm)	10 January 2008	364

The Appellant's Self Representation and Hearing Dates

19 Whilst the applications were pending, the appellant was for a time represented by an industrial agent. He was then represented by a friend who was appointed as his agent but this did not continue up until the hearing of the interlocutory applications.

20 At the hearing the appellant represented himself. He did so with the assistance of an Egyptian interpreter who was able to assist him in understanding any language which was not clear. This did not happen on very many occasions.

21 The hearing of the applications occurred on 25 March and 2 April 2008. At the conclusion of the second day the Full Bench reserved its decision.

Appellant's Written Submissions and Documents Handed to the Full Bench.

22 At the commencement of the hearing the appellant handed to the Full Bench six sets of written submissions. These were:

(a) A summary of general points.

(b) A document headed "*The commissioner gave her decision based on:-*". (For ease of reference I will call this document "*Submissions on the Basis of the Commissioner's Decision*".)

(c) A first analysis of the documents in exhibit R1.

(d) A second analysis of the documents in exhibit R1.

(e) A third analysis of the documents in exhibit R1.

(f) A list of documents in exhibit R1 not previously seen by the appellant.

23 The appellant also provided to the Full Bench, without objection by the respondent, copies of two books which he had co-written for the Ministry of Education in the Republic of Egypt. The Full Bench were able to look at the books during the hearing of the applications and then photocopied the cover and first few pages of the books before returning them to the appellant.

24 On the second day of hearing the respondent, without objection by the appellant, provided the Full Bench with a copy of exhibit A1 tendered by the appellant's counsel at the hearing at first instance. This document had not been included in the appeal book.

Description and Analysis of the Appellant's Six Sets of Written Submissions

25 I will now describe and consider the relevance of these submissions.

(a) Summary of General Points

26 The Summary of General Points said at the outset that they did not "*relate in [sic] direct way to the matter*". The document said the points were important background. Whilst I accept the appellant believes this, none of the contents of this document are relevant to resolving the present applications.

(b) Submissions on the Basis of the Commissioner's Decision

27 This submission contained a list of 15 difficulties the appellant experienced at or in relation to the hearing. Some of these points may be relevant to the resolution of the appeal but they are not relevant to the present applications. I will only comment on those which may have relevance to these applications. Point 8 was that from 25 September 2005 to 19 April 2006 the appellant gave "*all the important documents*" to his solicitor but "*he choose not to presented at the hearing instead he kept it in his office [sic]*". Point 9 asserted the night before the hearing the appellant's solicitor received another 600 documents from the respondent to increase the number of documents in his office to 925, but he did not have any time for research or preparation. It was also asserted in point 11 that the appellant's solicitor did not do his job properly in for example not giving enough time to identifying the "*forge [sic] and fabricated documents*".

28 Point 14 was that the appellant was sitting in the back of the court with no files to check what people were talking about and watching the principal "*and his team and the two people from the Department of Education when they controlled the hearing completely by fabricated stories and 600 [documents]*". There was then listed the following division of the documents: 113 out of 600 or 18.8% of letters, emails, faxes and "*fabricated stories just to prove I am a mental person*"; 284 out of 600 or 47.3% they "*ignored all because they were against them*"; 162 out of 600 or 27% "*I didn't see them before or during the hearing…*"*;* 39 out of 600 or 6.5% "*at the hearing they mentioned about the page number only without any research (Transcript page 161,151,135,184.....)*" (sic, T105, 99, 89 and 120 of new transcript). Discussion of these points will occur as part of my final analysis of the application to receive additional documents.

29 Point 12 was that the appellant's solicitor was not ready to stop the extensive body language between the respondent's advocate and the witnesses. It was submitted he could not control them because he found out the limit of his power when the "*principal's wife*" (Mrs Pilkington) rudely stuck her tongue out at him. Point 15 asserted the respondent's advocate helped his witnesses during the hearing by giving them answers by body language. These points will be covered by my analysis of the application to view the video record.

(c) First Analysis of Documents

30 This submitted the documents in exhibit R1 were not "*checked*" in the hearing and were ignored because they were letters, messages, emails, general information and "*fabricated stories*" but nothing relating to the "*appellant's performance*". It was asserted a named employee of the respondent fitted all of the documents in a file "*to make them bigger*". It was said that some of the people had said they rang or met with the appellant but he had not met with them, known them or even talked to them on the telephone. It was asserted that such untrue allegations occurred in 113 out of the 600 pages of documents or 18.8%. A table was then set out showing the page numbers where the document was located, the number of pages and a summary. In my opinion this document is not of itself relevant to these applications because it does not provide any reasons why the Full Bench ought to receive the additional documents or view the video record of proceedings.

(d) Second Analysis of Documents

31 The second analysis of exhibit R1 asserted that 284 documents out of 600 or 47.3% were ignored because these documents were "*against them*". A table of the same type referred to in the previous paragraph was then set out. In the summary a number of these documents were referred to as being "*forged*" or "*fabricated*". The table does not of itself contain submissions relevant to the application to receive additional documents, save and except where any additional documents may support assertions of fabrication, forgery or have some potential impact upon the cogency of the documents referred to in the table. This will be later considered.

(e) Third Analysis of Documents

32 The third analysis of exhibit R1 asserted only 39 out of the 600 pages of documents or 6.5% were referred to at the hearing. The documents referred to by the appellant's counsel were asserted to be only 11 pages out of 600 which was 1.8%. A table set out the document number, who referred to it, the relevant page of the transcript, whether the document had been "*checked*" and a summary of what had occurred. Again the contents of this table do not themselves assist the application to put additional documents before the Full Bench. They may be relevant to the hearing of the substantive appeal.

(f) List of Documents Not Seen

33 This submission listed 162 pages of documents in exhibit R1 or 27% which the appellant said he had not seen until the hearing. The appellant said his solicitor got them the night before the hearing and they were generally ignored. A table set out the document number, the number of pages and an assertion that except in four occasions each document was not seen until after the hearing; and in those four occasions a slight variation of this. I will consider this submission when analysing the application to receive additional documents.

34 I will refer to the appellant's oral submissions when later analysing the applications.

***"Additional"* Documents Already Included in Exhibit R1**

35 It emerged during the hearing of the application that a number of the "*additional documents*" were included in exhibit R1 before the Commission.

36 Set out below is a table of these documents showing the number and page of the appellant's document and the page number of exhibit R1 where the same document appears:

Appellant's document	Page number of same document in exhibit R1
3 (3)	293
4 (4)	295
6 (6)	301
12 (12-13)	269
13 (14)	266
17 (18)	353
20 (22-24)	225
21 (25)	432
27 (31-35)	322
28 (36-38)	332
37 (64)	379
38 (70-71)	346
40 (77-78)	312
47 (96)	318
70 (149)	410
71 (150-152)	332
73 (155-163)	271
75 (166)	170
77 (168)	212
78 (169)	222
97 (197)	268
108 (234)	409
111 (237)	241
117 (265)	301
118 (266)	327
120 (268)	338
121 (269)	331
126 (274)	300
135 (284)	253
138 (289)	467
139 (290)	466
144 (295)	216
166 (325)	516
170 (331)	426

37 These documents are of course not additional documents and do not need to be considered for the purpose for deciding the present application.

Duplicated "*Additional Documents*"

38 Some of the additional documents filed by the appellant were duplicated. These were the documents numbered 16 and 119; 24 and 148; 28 and 71; 50 and 69; 87, 92 and 108; 137 and 143; 158 and 164.

39 Of course only one of the documents in the duplicate sets is an "*additional document*".

The Respondent's Position

40 The respondent opposed the applications, although as I will later set out, the issue of the errors in the transcript was resolved during and after the hearing of the applications. The basis of the respondent's opposition was summarised in outlines of submissions which were filed and which I will now summarise.

The Respondent's Submissions about the Additional Documents

41 The respondent relied upon s49(4)(a) of *the Act* which provides that an appeal to the Full Bench "*shall be heard and determined on the evidence and matters raised in the proceedings before the Commission*". Despite the breadth of the words of the subsection, the respondent accepted the Full Bench had decided there was a discretion to receive additional evidence within strict confines. The respondent cited *Federated Clerks' Union Australia, Industrial Union of Workers, WA Branch v George Moss Ltd* (1990) 70 WAIG 3040, where at 3041 the Full Bench said:

> "*Fresh evidence which is admissible on appeal is evidence which was not available to the Appellant at the time of the trial and which reasonable diligence in the preparation of the case could not have made available.*
>
> *Secondly, the evidence must be such that it would have had an important influence on the result of the trial, and it must be credible, but not necessarily beyond controversy [see Ventura v. Sustek (1976) 14 SASR 395, Orr v. Holmes 76 CLR 632 and Bristow Helicopters v. Global Marine Drilling Co (1981) WAR 108].*"

42 The respondent relied upon the approval of this passage in Full Bench decisions such as *McCarthy v Sir Charles Gairdner Hospital* (2004) 84 WAIG 1304 and *Hanssen Pty Ltd v Construction, Forestry, Mining and Energy Union (Western Australian Branch)* (2004) 84 WAIG 694.

43 It was submitted the documents which the appellant now wanted to rely upon did not fit the criteria specified in *George Moss*. This was because the evidence could have easily been made available with "*reasonable diligence in the preparation of*" the appellant's case. Most of the documents were given by the appellant to his counsel but then not put before the Commission. Additionally, the respondent rejected any assertion that the documents tendered at the hearing were anything other than the original, "*unadulterated versions of those documents*". The respondent submitted that before the hearing the appellant's solicitors and counsel were provided with copies of the documents in exhibit R1 and no objection was made to their tender during the hearing.

44 It was submitted that any issue about whether the documents before the Commission were genuine ought to have been made at first instance. This point was made about only one document, as later set out. The respondent relied upon *University of Wollongong and Others v Metwally (No. 2)* (1985) 59 ALJR 481; 60 ALR 68 and *Coulton v Holcombe* (1986) 162 CLR 1 as authority for the proposition that a party is bound by the conduct of their case at first instance. Reference was also made to the application of this principle by the Full Bench in *Hanssen* at [191].

The Respondent's Submissions about Viewing the Video Record of Proceedings

45 The respondent denied any suggestion that their advocate acted in any way inappropriately at the hearing. It was also submitted that if the appellant had any concern about this it should have been raised at the time and argued at first instance. It was again submitted the appellant was bound by the conduct of his case and could not now seek to have this matter dealt with on appeal to the Full Bench.

46 The respondent accepted that the Full Federal Court in *Appellant WADC of 2001 v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 298 reviewed the transcript and tape recording of proceedings before both the Refugee Review Tribunal and the primary judge to assess claims made by the appellant about how they were conducted. The respondent accepted that although the Full Bench did not discuss the issue of whether or not its role extended to reviewing the transcript and tape recordings of the earlier hearings, it proceeded on the basis that there was no reason why it could not do so. In effect however the respondent submitted that the issue did not need to be further considered in the present case because the appellant was, as already referred to, bound by the way in which he conducted his case at first instance.

Legal Principles Relevant to Both Applications

(a) Appellant Bound by the Conduct of his Counsel

47 As I have set out, the appellant was represented by counsel at the hearing before the Commission at first instance. Section 31(3) of *the Act* provides:

> "*(3) A person or body appearing by a legal practitioner or agent is bound by the acts of that legal practitioner or agent.*"

48 This means that the actions of the appellant's counsel at the hearing before the Commission at first instance as his representative are deemed to be the acts of the appellant. This has the effect that even if the appellant may have grounds for complaint against his counsel (as to which no opinion can be expressed by the Full Bench) it is not something which can assist his appeal. This principle was applied by the Full Bench in *Shortland v Lombardi Nominees Pty Ltd trading as Howard Porter* (2007) 87 WAIG 1158 at [20] and [52].

(b) Appellant Bound by Case Presented at First Instance

49 This is to some extent linked to the impact of s31(3) of *the Act*. It is a general principle that ordinarily a party is bound by the way in which they conduct their case at first instance. The principle was explained in the High Court decisions of *Metwally* and *Coulton*, relied on by the respondent and cited above.

50 The principle was referred to in *Kershaw v Sunvalley Australia Pty Ltd* (2007) 87 WAIG 1169 at [44]-[47]. I there quoted from the comprehensive summary of the relevant principles by the Full Federal Court in *Iyer v Minister for Immigration & Multicultural Affairs* [2000] FCA 1788 at [16]-[19]. That discussion was in the context of a ground of appeal raising an issue which was not argued at first instance. The following points were made:

(i) Where the issue could possibly have been opposed by the other party calling evidence at first instance or conducting their case differently the appellant will not be permitted to rely on it on appeal.

(ii) Where there is no dispute about the facts in the appeal, or the point is one of construction or law, then the appeal court can allow it to be argued if it is expedient and in the interest of justice to do so.

(iii) There is a public interest in ensuring the finality of litigation.

(iv) The parties being bound by the courses they deliberately choose at trial reduces unnecessary litigation and maintains "*fair play*".

(v) If these principles did not apply "*the main arena for settlement of disputes*" would move from courts at first instance to an appellate court. First instance hearings would be reduced to little more than a "*preliminary skirmish*" (see also *Coulton* at 7).

(vi) Any tendency to treat trials in that way should be discouraged.

51 These comments increase the difficulty of the appellant persuading the Full Bench that it ought to hear the appeal on the basis of grounds, arguments and evidence, including documents not before the Commission at first instance.

(c) Section 49(4) of *the Act* and Restrictions Upon Receipt of Additional Evidence

52 I have already referred to and quoted from s49(4)(a) of *the Act* in the context of summarising the respondent's outline of submissions. I have also set out the approach of the Full Bench to this subsection in the past.

53 In *George Moss*, Sharkey P for the Full Bench at page 3041 cited and quoted from *Hamersley Iron Pty Ltd v Association of Draughting, Supervisory and Technical Employees, Western Australian Branch* (1984) 64 WAIG 852. There Kennedy J at 855 referred to subsection 49(4) and said that the legislature "*has not elected to have the Full Bench deal with a matter as if it were hearing the initial application to the Commissioner*". Olney J at 857 said that "*the option open to the Commission at first instance to 'inform itself on any matter in such a way as it thinks fit' (s26(1)(b)) is not open to it when sitting as at Full Bench on appeal*".

54 In his reasons, Sharkey P said at 3042 that the "*discretion to admit fresh evidence on appeal is not specifically excluded*" in s49(4). The Full Bench therefore endorsed the fresh evidence "*rule*" referred to at page 3041 and quoted earlier.

55 In *Hanssen* a submission was made that the Full Bench should reconsider the principle in *George Moss*. Sharkey P on behalf of the Full Bench did so but concluded at [170] that *George Moss* should continue to be followed. As indicated the respondent did not on this occasion seek any review of the decision of *George Moss*.

56 In *Devereaux-Warnes v Hall* [2006] WASCA 268, Martin CJ stressed the importance of limiting the receipt of additional evidence on appeal when the Chief Justice said at [2]:

> "*… it is a mistake in principle to consider an appeal as merely another step in a serial process of litigation. There is a very strong public interest in the finality of litigation (see* Wentworth v Woollahra Municipal Council *[1982] HCA 41; (1982) 149 CLR 672 at 684;* State Railway Authority of New South Wales v Codelfa Construction Pty Ltd *[1982] HCA 51; (1982) 150 CLR 29 at 38;* Gould v Vaggelas *[1985] HCA 75; (1985) 157 CLR 215 at 275). This provides a powerful reason in public policy for strictly confining the circumstances in which a party will be permitted on appeal to augment the evidence led at trial. It is well established that the circumstances in which that course will be permitted are rare and exceptional.*"

57 Also in *Devereaux-Warnes*, Buss JA, with whom Martin CJ and Roberts-Smith JA agreed, reviewed the basis on which the Court of Appeal could receive additional evidence. His Honour at ([25] - [26]) said that if it was in "*the interests of justice*" to do so the Court could receive evidence which could "*have been obtained with reasonable diligence for use at the trial*". His Honour cited authorities of the Court of Appeal of New South Wales as well as earlier reasons of his own in support of the point. I will refer to it again later.

Resolution of Transcript Errors Issue

58 I will deal with this first given it has been resolved.

59 At the hearing of the applications it became apparent that there was little in dispute about this issue. After the hearing the respondent advised the Full Bench it was prepared to accept that in five of the six instances asserted by the appellant the transcript was in error. The sixth instance involved a place where the appellant submitted the transcript was confusing because it had omitted to put the name of the Commissioner in front of a question which had been asked. It was explained to the appellant that the way in which the transcript was typed was in the usual form. The Full Bench and the respondent both accepted the appellant's submission that the question had been asked by the Commissioner.

60 There is therefore no issue for the Full Bench to decide on this topic.

Context of Application to the Full Bench to Consider Additional Documents

61 To put the application into context it is necessary to set out the names of the witnesses who gave evidence, relevant events, what happened at the hearing about the receipt of documents as exhibits and the reasons for decision of the Commission.

(a) Witnesses

62 The appellant was the only witness who gave evidence in support of his case. The respondent called the following witnesses:

(i) Mr Kevin Pilkington, Principal of John Willcock College, Geraldton.

(ii) Mrs Kathy Pilkington, Deputy Principal at Geraldton Senior College and Deputy Principal at John Willcock College in 2004. (Mr and Mrs Pilkington were married).

(iii) Ms Jillian Stewart, Head of Mathematics Department at John Willcock College.

(iv) Ms Vicki Jack, at the relevant time the Manager of Operations at the Mid-West District Education Office, Department of Education and currently District Director of the Pilbara Education District.

(v) Ms Meredyth McLarty, at the relevant time the Acting Principal of Pinjarra Senior High School.

(vi) Mr Peter Burgess, investigator of the appellant's alleged substandard performance.

(b) Chronology of Events

63 From the reasons for decision of the Commissioner the following dates are relevant:

Late 1990	The appellant emigrated to Australia from Egypt. He had obtained a Bachelor of Science and Education in Cairo and taught in Egypt for a number of years.
1999	The appellant taught at Mount Magnet District High School for approximately 6 months.
2003	The appellant taught at Katanning Senior High School during terms 3 and 4.
2004	At the commencement of the school year the appellant was employed full-time in the mathematics department at John Willcock College, Geraldton.
20 May 2004	The appellant was formally advised by Mr K Pilkington that he was not performing to a satisfactory level and was then subject to two Performance Improvement Plans (PIPs).
14 June – 28 July 2004	The first PIP took place.
30 July – 27 August 2004	The second PIP took place.
20 August 2004	The appellant became unwell during the last week of the second PIP.
31 August 2004	The appellant returned to John Willcock College and was involved in an incident which led to him being directed to attend the Department of Education and Training (DET) District office. The appellant did not return to the College afterwards.
26 April 2005	The appellant commenced teaching at Pinjarra Senior High School.
5 July 2005	The appellant was advised the respondent intended to terminate his employment but was given the opportunity to provide written submissions about this intended action.
9 August 2005	The appellant's solicitor made written submissions to the respondent.
22 September 2005	The appellant was terminated from his employment as a teacher by the respondent.

(c) Documentary Exhibits at First Instance

64 On the first morning of the hearing on 20 April 2006 the appellant's counsel said that he had been provided by the respondent with two folders of documents containing "*about 600 pages*". Counsel then said the appellant did not "*have any further documents that we'll be referring to*" (T6). The respondent's advocate then explained some colour co-ordination of the files of documents. They were then received as exhibit R1 (T6). The appellant's counsel said the bundle of documents had been provided "*yesterday*" and that he had the chance of briefly going through all of them. He said he did not "*think that there is anything further that the [appellant] wishes to rely on but, because of the timing of the provision of the documents it may take me a while to go through the examination-in-chief*" (T6-7). The appellant then gave evidence. The appellant's examination-in-chief, cross-examination and re-examination were concluded that day. No other documents were received into evidence that day.

65 The respondent's witnesses gave evidence the next day. During their examination in chief, cross-examination and re-examination no additional documents were tendered by either party.

66 At the conclusion of the evidence there was discussion between the Commissioner and the appellant's counsel about the documents in exhibit R1. The Commissioner asked counsel whether he took issue with any of the documents (T157). Reference was made to the lack of any objection at the commencement of the hearing. Reference was also made to the evidence of the appellant that he did not sign a document said to include his signature (see T157; the evidence was at T61 and T71). This document was a lesson plan dated 3 August 2004 at page 347 of exhibit R1. After some discussion the appellant's counsel said he did not have the original of the document (T159). There was then discussion about the appellant's counsel being able to review the original of that lesson plan which could be discussed between advocates after the adjournment for the preparation of written submissions. (The issue was not raised in the written closing submissions).

67 The appellant's counsel then informed the Commissioner there was "*one further document that was referred to in [the appellant's] evidence-in-chief which we weren't able to locate … in the bundle of documents that have been provided*" (T159). Counsel described the document and requested it be received. This was not objected to by the respondent's advocate and the document became exhibit A1. This was a series of notes written by a Ms Ventouras at Pinjarra Senior High School covering the period 27 April 2005 to 29 April 2005.

68 Just before the proceedings were adjourned there was discussion about a handwritten note by a student called "*Holly*". The appellant's counsel made a deliberate decision not to tender this document (T161). This was because he said the evidence of the appellant which the note supported was already sufficiently supported by the document at exhibit R1 pages 436 - 437 which was another handwritten note by "*Holly*" dated 7 June 2004.

(d) Reasons for Decision

69 In her reasons for decision the Commissioner summarised the evidence given by each of the witnesses at the hearing. It is not necessary to discuss this in deciding the present applications. The Commissioner also set out a summary of the submissions made by both the appellant and the respondent. Again it is unnecessary to set this out.

70 The Commissioner said at [106] that she had "*concerns about the evidence given by the*" appellant who "*was not convincing when he claimed that the support given to him by his line managers to assist him with his performance was inappropriate and that his performance was consistently being unfairly criticised*". The Commissioner said the "*weight of evidence*" was against the appellant's claim.

71 The Commissioner also said she doubted the appellant's evidence that "*he was denied access to resources to effectively teach his classes*". The Commissioner referred to assertions by the appellant about being poorly treated by his line managers but said there was no evidence to "*corroborate these claims*". The Commissioner said the appellant was deliberately not forthcoming when giving evidence about interactions with Mr Pilkington on 31 August 2004. The Commissioner also found the appellant's claims that his teaching performance at Pinjarra Senior High School was excellent was not supported by documents relevant to the period he taught at that school.

72 The Commissioner also said she doubted a claim by the appellant that he did not sign a lesson plan dated 3 August 2004 as his signature on the document was similar to his signature on other relevant documents. The Commissioner said that in the circumstances "*I doubt the veracity of the evidence given by*" the appellant.

73 In contrast at [107] the Commissioner found all of the evidence by the respondent's witnesses honest and given to the best of their recollection. The Commissioner also commented on the significant amount of documentary evidence which supported their testimony and said she had no hesitation in accepting their evidence. At [108] the Commissioner said that whenever there was any inconsistency in the evidence given by the appellant and the respondent's witnesses she preferred the evidence given by the latter.

74 The Commissioner then referred to some legal issues before returning to the facts. The Commissioner made a finding that it was appropriate for the appellant's line managers at John Willcock College to decide his performance was substandard. As at 31 August 2004 it was open to Mr Pilkington to refer the issue to the respondent for further consideration ([118]). The Commissioner also said the respondent dealt with issues about the appellant's substandard performance in line with the requirements under the *Public Sector Management Act 1994* (WA) (the *PSMA*) and reviewed relevant documents including a report completed by Mr Burgess. The respondent therefore took into account "*relevant considerations*" before determining it was appropriate to terminate the appellant's employment due to substandard performance.

75 The Commissioner made a finding that the assistance available to the appellant during the PIPs formed part of a co-ordinated and systematic process designed in collaboration with the appellant to aid his improvement in required areas and that Mrs Pilkington, Ms Stewart and Ms Jack as well as a Ms Stone assisted with this ([126]).

76 The Commissioner found that although the time period for the second PIP was not completed due to the appellant's ill health, he had already been given sufficient time to improve his performance so that he was not disadvantaged. The Commissioner found that the appellant had made little if any progress in the required areas ([127]).

77 The Commissioner said she accepted the evidence of Mr Pilkington that the appellant returned to school on 31 August 2004 after being on sick leave for a week following an altercation with a parent, and became upset when told of a complaint made about him by a fellow mathematics teacher, Mr Molina. The Commissioner found the appellant left his classroom and went to Mr Pilkington's office and abused and threatened him. The Commissioner found Ms Jack overheard the altercation and telephoned the District Director who then contacted Mr Pilkington and told him to stand the appellant down from teaching at the College with immediate effect and to escort him off the premises.

78 The Commissioner found the appellant was offered procedural fairness during the PIPs. At [129] the Commissioner rejected the appellant's claim that "*his line managers at the College conspired against him to ensure that he was unable to perform successfully at the College and that as a result he had no chance of convincing his line managers that his performance could improve*" ([129]). The Commissioner went on to say that she found no evidence of conspiracies or collusion between Mr and Mrs Pilkington and between Mrs Pilkington and Ms Stewart.

79 The Commissioner rejected the appellant's claim that the College should have arranged for him to attend a professional development course to improve his English literacy ([131]). The Commissioner also rejected a claim that the appellant's line managers including Mr Pilkington solicited complaints from parents ([132]).

80 The Commissioner referred to the investigation undertaken by Mr Burgess under s79(5) of the *PSMA*. She accepted that "*Mr Burgess interviewed the [appellant] using a fair process and that after the interview the [appellant] was given a copy of his statement to review and to make any alterations*" ([138]). The Commissioner mentioned that Mr Burgess did not provide the appellant with background documents given to the former by the respondent, but the issue was not raised at the time by the

appellant. In addition, the appellant did not contest an assertion by the respondent that the documents were sent to him in December 2004. The Commissioner said she had some difficulty with witness statements of people Mr Burgess interviewed not being provided to the appellant but said that, as these people had given evidence, the "*issue has since been overtaken*" ([138]).

81 The Commissioner said that it was open to the respondent after receiving the appellant's submissions provided on 9 August 2005 to decide he should be terminated as his performance at the College had been substandard ([139]). The Commissioner also found it would have been open to the respondent to terminate the appellant's employment for gross misconduct because of the way he abused and threatened Mr Pilkington, using "*foul language*", on 31 August 2004 ([139]).

82 The Commissioner then concluded that the application should be dismissed.

Determination of Additional Documents Application

83 The documents filed by the appellant numbered and paginated 1 and 2 are not evidentiary documents in addition to those before the Commission at first instance. Accordingly they do not need to be considered as part of this application

(a) Documents Available For Use at First Instance

84 I have earlier referred to the legal principles about the appellant being bound by the conduct of his counsel at first instance and by the case argued at first instance. I have also set out the limitations within which the Full Bench has decided it can receive additional documents on appeal.

85 All of the additional documents, except for a few which I will later identify, were in existence and available to the appellant and his counsel to use at the hearing before the Commission. In arguing the application before the Full Bench, the appellant said there were three files containing 925 pages of documents which were with his solicitor from 25 September 2005 until 20 February 2006 (T58). These files included both documents contained in exhibit R1 and additional ones. I asked the appellant whether his "*complaint essentially is that there were, you say additional documents that you gave to your solicitor that he did not provide to the Commission*". The appellant said in reply: "*that's right*" (T58-59).

86 This was consistent with paragraphs 1 and 2 of the appellant's statutory declaration and points 8 and 9 of the "*Submissions on the basis of the Commissioner's Decision*".

87 In my opinion this concession is very significant. Compounding that is what happened at the hearing about documentary exhibits as I have earlier described.

(b) Documents in Existence Before the Hearing Should Not be Received by the Full Bench

88 As I have said, all of the additional documents that were in existence before the hearing were available for the use of the appellant and/or his counsel. This is because they were in the possession of one and/or the other. It seems that during the hearing they were either with the appellant's counsel or at the offices of his solicitor. They are not documents which were unable, with reasonable diligence, to be obtained and provided to the Commission at first instance. They cannot therefore be received according to the *George Moss* test.

89 The appellant may complain that these documents were available to his counsel and he did not make use of them. As set out earlier however the appellant is bound by the conduct of his counsel and the case presented at first instance. I do not believe that this is a situation where, given the legal principles earlier referred to, the Full Bench can receive the documents on the basis of an asserted error by counsel.

90 To do so would run counter to the principles based upon the decision of the Full Federal Court in *Iyer*. In particular, if the additional documents had been before the Commission at first instance, the respondent may well have adduced evidence or documents in response or argued additional or different points. As stated in *Iyer* the Full Bench cannot tolerate the hearing at first instance simply being a "*preliminary skirmish*". It would fit this character if the additional documents, evidence in response from the respondent and submissions about this evidence were heard and adjudicated upon appeal.

91 The appellant also provided orally to the Full Bench additional information and arguments about documents, some of which were not before the Commission at first instance. In my opinion for similar reasons these also cannot be taken into account by the Full Bench in deciding the appeal.

(c) Interests of Justice Do Not Support Application

92 I earlier referred to the observation by Buss JA in *Devereaux-Warnes* that additional evidence might be received on appeal if it was in the "*interests of justice*" to do so. It is not necessary in this appeal to decide if this applies to the Full Bench. This is because even if it did so I see no reason why in the circumstances it would be in the "*interests of justice*" to receive the additional documents. The reasons for this overlap with those I have already set out, but for the sake of clarity they are:

(i) The appellant was represented by counsel at the hearing.

(ii) Many of the documents were in fact generated by the appellant.

(iii) The additional documents were known to and in the possession of the appellant and/or his counsel prior to the hearing.

(iv) If counsel made the deliberate choice not to put the additional documents before the Commission or erred in not considering whether to do so, the appellant is, as stated in s31(3) of *the Act*, bound by the conduct of his counsel.

(v) To permit the receipt of the additional documents would be unfair to the respondent unless they had the opportunity to adduce evidence and make submissions about them. It is not appropriate in this case to allow the Full Bench to become the forum for this type of hearing.

(vi) The content of s49(4)(a) of *the Act*, at the very least, displays a legislative intention that ordinarily the Full Bench should not receive additional documents.

(d) The Appellant's Oral Submissions

93 I would also add, for the sake of completeness, that at the hearing of the application I carefully listened to the lengthy argument of the appellant about the additional documents and have read the transcript of the hearing and the written submissions of the appellant. In my opinion the additional documents do not individually or in combination have the strength to lead to a conclusion that there is a reasonable possibility the Commissioner would have made a different decision if they were before her.

94 I will refer to some examples to illustrate the point.

(e) Examples of Additional Documents Submissions

95 **Firstly** - the appellant took the Full Bench to additional document 23 (page 27) which was a letter from Mr Ryan of the DET to Mr Kelly, the General Secretary of the AEU. This letter was about a letter from Mr Kelly to Mr Ryan dated 5 December 2001 which was exhibit R1 page 508. The appellant asserted exhibit R1 page 508 contained incorrect information which was submitted by Mr Kelly "*just to support the Department of Education*" (T71). The Full Bench is not in a position to decide whether or not this is so. It is sufficient to say that additional document 23 was written in 2001 about events which occurred in 1999. It does not bear any apparent relationship to what happened in 2004 and 2005 and the appellant's termination from employment in September 2005 for substandard teaching performance.

96 **Secondly** - the appellant referred to additional document 156 (page 313) which was a memorandum to the appellant from Mrs Pilkington dated 3 August 2004. This was about a meeting the appellant wanted to have with Ms Mary Franklyn from the SSTU and the time during the day when the meeting could take place. The appellant also referred to additional document 157 (page 314) which was a facsimile from Ms Franklyn to the appellant dated 2 August 2004. She there said she was available to meet with the appellant between 9:30am – 11:45am (excluding morning recess) on Thursday of that week. The appellant also referred to his evidence before the Commission at first instance where he explained how Mrs Pilkington did not allow him adequate time to meet with Ms Franklyn (T32-33). This was contrasted with the evidence of Mrs Pilkington (T107). In particular the appellant referred to T108 where Mrs Pilkington said the appellant had 106 minutes to meet with Ms Franklyn.

97 The appellant submitted the additional documents showed the evidence of Mrs Pilkington was in error and his evidence that he had between 30-40 minutes to meet with Ms Franklyn ought to have been accepted. The appellant submitted this was important given the Commissioner found she accepted the respondent's witnesses' evidence in preference to his. The appellant agreed when I put it to him that in effect he was saying that if the Commissioner had been aware of this information she may have made different findings about credibility (T74). With respect, having regard to all of the evidence before the Commission at first instance and her reasons for decision, I cannot accept that this is a reasonable possibility. This is because the findings of the Commissioner were based on the totality of a large amount of evidence and not an isolated circumstance.

98 **Thirdly** - the appellant referred to additional document 141 (page 291) which was a note by another teacher, Ms Carey, about a student. The appellant said the student was "*used against him*" in the sense that lessons were observed when the student "*made trouble*". The appellant asserted however that additional document 141 and others showed the student had family problems and no one could control him at the school (T80). In my opinion the additional documents are not capable of proving this or undermining the findings made by the Commissioner about the appellant's substandard teaching and termination.

99 **Fourthly** - the report of Mr Burgess, the investigator, was within exhibit R1 at pages 45-158. The appellant asserted to the Full Bench that he had an interview with Mr Burgess. At the end of the interview Mr Burgess gave the appellant a "*floppy disk*" with his (Mr Burgess') summary of what had happened at the interview. The appellant asserted to the Full Bench that Mr Burgess said to him he could take this home, change it in any way he wanted and then give it back (T103). The appellant said he did so and prepared the document which is now additional document 107. The appellant said Mr Burgess' report in exhibit R1 at pages 45ff removed those bits which the appellant had included as tracked changes in additional document 107. The appellant confirmed however that additional document 107 was with his solicitor before the hearing (T103).

100 Additionally, at the hearing the appellant admitted he had seen the report of Mr Burgess at T53 and T54, but did not then say anything about additional document 107. This was his opportunity to do; the appeal is not. In addition, Mr Burgess could have been but was not cross-examined on this issue (see T151-153). For these reasons it is not "*just*" to permit additional document 107 to be received by the Full Bench.

101 **Fifthly** - I have earlier referred to the appellant's evidence at first instance that he had not signed the lesson plan dated 3 August 2004, which was at page 347 of exhibit R1 (see T61 and 71). I have also described the discussion about this between counsel and the Commissioner at the conclusion of the hearing. I have also set out the Commissioner's finding on this issue.

102 This was the only document at the hearing which was disputed in this way. At the hearing of the applications the appellant took the Full Bench to "*additional document*" 38 at page 70. This was a copy of the lesson plan dated 3 August 2004. It was as set out in the earlier table the same document as exhibit R1 pages 346-347. On both the second but not the first page had a signature purporting to be the appellants. As this is not truly an additional document it need be considered no further.

103 At the hearing of the applications however the appellant went further and said that any signatures on lesson plans purporting to be his, were forgeries (T90). The appellant took the Full Bench to a lesson plan dated 3 June 2004 which had signatures on exhibit R1 pages 374 and 376. This was compared to pages 57 and 59 of additional document 36 which were a copy of the same pages of the lesson plan without the signatures. Similarly, exhibit R1 page 433 was a signed lesson plan dated 16 June 2004 compared to additional document 42 (page 83) which was an unsigned copy. Exhibit R1 page 308 was a "*Self Evaluation"* apparently signed by the appellant and dated 17 August 2004, whereas additional document 48 (page 97) was in a different form.

104 With respect to these submissions it is sufficient to reiterate that all of these documents could have been used by the appellant and/or his counsel at first instance but were not; the appellant did not then give evidence about any forged signatures on them; and the copies of the documents without the signatures do not of themselves establish the appellant did not sign the corresponding documents in exhibit R1. I see no injustice in the Full Bench not receiving these documents on appeal.

105 **Sixthly** – the appellant asserted some of the additional documents demonstrated that those who were reviewing his teaching were not capable of doing so. I do not accept these documents tend to establish this. Also the documents could have been used to try and achieve this purpose at first instance but were not.

106 **Seventhly** - the appellant referred to additional document page 213 which was a list of questions he prepared for his counsel to ask at the hearing but did not. This document does not pass the *George Moss* test and there is no good reason why the Full Bench should receive it on the appeal.

107 In my opinion these examples are sufficient to illustrate why, having considered the submissions made by the appellant, I am not convinced that it would be "*just*" for the Full Bench to receive the additional documents which existed before the hearing.

108 As set out earlier the appellant submits there were many documents in exhibit R1 he did not see before or during the hearing. This does not however assist his application for two reasons. Firstly his counsel received these documents before the hearing, said he had looked at them did not object to their admission as exhibits and could have but did not ask the appellant about them. Secondly the appellant could have asked his counsel to look at the documents during suitable breaks in the hearing, during the day or overnight.

(f) Documents Created After the Hearing at First Instance

109 The following documents came into existence after the decision by the Commission and therefore need to be separately considered.

110 **Additional document 24** (page 28) is a letter from Dr Crawford To Whom It May Concern dated 11 August 2007. This said the appellant had been a patient of the Joondalup Drive Medical Centre since May 1999 and Dr Crawford had been his treating practitioner. Dr Crawford said the appellant had no illness likely to affect his ability in his work as a mathematics teacher. Dr Crawford said in the letter that the appellant had "*mentioned to me that his manager at work said to staff at the John Willcock College in Geraldton in 2004 that [the appellant] has heart and kidney problems. I can confirm that [the appellant] has fully functional heart and kidneys*".

111 Whilst this document only came into existence after the hearing, it is about facts occurring before then and accordingly evidence of this could have been given to the Commission. In addition the issue referred to in the letter was not important to the decision of the respondent to terminate the appellant's employment or the dismissal of the application by the Commission. (The same document was number 149 at page 302 of the additional documents).

112 **Additional document 150** (pages 306 – 307) is a letter from the appellant to Mr Kelly of the SSTU. In the letter the appellant describes some of the difficulties he had with his representation by them. If this was relevant to the hearing the evidence could have been adduced by the appellant. In my opinion however the issue was not material to either the decision made by the respondent or the Commission at first instance.

113 **Additional document 152** (pages 309 – 310) is a letter from the appellant to Ms Hopgood, the "*Federal Secretary*" (presumably of the AEU) to complain about officials of the SSTU. This letter falls into the same category as the previous one and should not be received by the Full Bench. Document 153 (page 311) is another letter from the appellant to Ms Hopgood dated 8 August 2007 which should not be received for the same reason.

114 **Additional document 158** (page 316) is a letter dated 10 August 2007 from the appellant to Ms Aitken at Pinjarra Senior High School requesting a copy of a letter she had previously given to the appellant and his response. Also requested was a letter confirming that when he was at Pinjarra Senior High School he taught years 9 to 12. Again the evidence referred to in this document could have been given at first instance and the contents are not of importance to the decisions of the respondent or the Commission.

115 **Additional document 159** (page 317) is a letter from the appellant to Ms Aitken dated 16 August 2007. For the same reasons as just stated this document should not be received by the Full Bench. It is a letter about earlier correspondence with Ms Aitken, a comment attributed to Ms Aitken about the appellant's file of work and the appellant's version of events when he was at Pinjarra Senior High School.

116 **Additional document 162** (page 321) is a letter from Ms Aitken dated 14 August 2007 setting out the dates when the appellant was employed at Pinjarra Senior High School. This was not a contested issue in the hearing at first instance and the document should not be received by the Full Bench.

117 **Additional document 163** (page 322) is a facsimile from Ms Aitken to the appellant dated 13 August 2007 in reply to his facsimile dated 10 August 2007. For the same reasons as earlier expressed the document should not be received by the Full Bench.

118 **Additional document 171** (page 332) is an undated handwritten form letter "*To Whom It May Concern*". It refers to unnamed people (designated by crosses) having written a letter supporting of the appellant but feeling that repercussions could affect their current or future employment. The contents of the letter are not relevant to the appeal.

119 **Additional document 173** (page 334) is a letter from the appellant to Mr Shane Hill MLA dated 9 July 2007. The letter refers to Mr Hill's letter to Mr Baker dated 1 October 2004 which was part of exhibit R1. In the letter the appellant asserts the contents of Mr Hill's letter were "*mostly*" fabricated. Although the appellant's letter was written after the hearing and decision by the Commission, Mr Hill's letter was in existence before the hearing and the appellant could have given evidence about it.

120 **Additional document 184** (page 361) is a letter written by a teacher which is positive about the appellant's work in 2004. (In a letter to the Commission the appellant requested that the teacher's name not be published). Although the letter was written after the hearing its contents are not "*fresh*". There is nothing before the Full Bench which suggests that either the teacher could not have given evidence at the hearing or at that time written a similar letter.

121 **Additional documents 185-7** (pages 362-364) is a letter and two facsimile reports about the same, from the appellant to Mr Kelly of the SSTU requesting documents for the purpose of the present application. The letter is not relevant to the decision of the Commission or therefore the appeal.

122 Accordingly none of the documents which came into existence after the hearing ought to be received by the Full Bench as part of the appeal.

(g) Conclusion on Additional Documents Application

123 For the reasons I have set out the application to the Full Bench to consider additional documents should be dismissed.

Application to View Video Record of Proceedings

(a) Legal Principles

124 The principles set out earlier about the appellant being bound by his case at first instance were again relied upon by the respondent in answer to this application and in my opinion are applicable. As submitted by the respondent's counsel, if there was inappropriate coaching of witnesses at first instance then the appellant and/or his counsel were able to observe this happening and it could have been brought it to the attention of the Commissioner. Additionally the appellant and/or his counsel could have requested the Commissioner at first instance to view the video record of proceedings.

(b) The Hearing at First Instance

125 There are some aspects of the hearing at first instance which are relevant. When Ms Jack was being cross-examined the following is recorded has having occurred:

> "*Now, did you have any contact ... you didn't have any contact with Mr Michael before you got to school the first time you evaluated him?---As I mentioned previously, we had a telephone conversation.*
>
> *Yes, okay. You don't need to keep looking at Mr Barnes?---I don't know where I'm supposed to – sorry.*
>
> *You can look at me, I'm not going to – because it just creates the impression that you are trying - - -?---I'll look at the Commissioner.*
>
> *Excellent, thanks. Now, you had one telephone conversation and that was it?---That's correct.*" (T140-141)

126 Nothing further was made of this issue in cross-examination.

127 As mentioned earlier final written submissions were provided. Both parties also replied in writing to the submissions which the other had filed.

128 In the "*Applicant's Closing Submissions*" filed on 5 May 2006, submissions were made about the credibility of witnesses based upon whether they "*maintained good eye contact with the [appellant's] representative*". The expression just quoted was an argument in support of the submission that Mr Pilkington was a "*credible witness*". By contrast it was later said that: "*Mrs Pilkington refused to maintain eye contact with the [appellant's] representative*". It was said of Ms Jack that she "*appeared evasive and often failed to make eye contact with the [appellant's] representative during cross-examination, preferring to maintain eye contact with the respondent's representative*". It was also submitted that "*Ms Stewart appeared evasive and often failed to make eye contact with the [appellant's] representative during cross-examination*".

129 The written submissions did not develop why the maintaining or not maintaining of eye contact with the "*[appellant's] representative*" or looking at the respondent's advocate when answering questions necessarily undermined credibility. Additionally, other than the episode I have earlier quoted involving Ms Jack, it was not put to any of the three witnesses referred to that they were not looking at the appellant's counsel, that this affected their credibility or they were being coached. Indeed coaching was not raised at all at first instance.

130 In a document entitled "*Response to Applicant's Closing Submission*" filed on 12 May 2006 the respondent submitted all witnesses "*were advised that their evidence was to the Commissioner and hence no negative inference can be drawn from them engaging in eye contact with the Commissioner*". Whilst this point does not answer the submission made about Ms Jack maintaining eye contact with the respondent's representative, it is illustrative of there being explanations for a witness not making eye contact with the person cross-examining them, which do not affect credibility.

131 The Commissioner did not specifically refer to these arguments in her reasons for decision.

(c) Analysis and Determination of Application

132 The submissions made by the appellant's counsel at the hearing demonstrate that he observed where witnesses were looking and with whom they were making eye contact when they gave evidence. As mentioned earlier, he did not submit there was any coaching. It was open to him to request that the Commissioner view the video record of the proceedings to substantiate the

points he did make; or to request to view the video record of proceedings himself and then provide the Commissioner with examples of when credibility was affected by where witnesses were looking.

133 I reiterate that the appellant is bound by the case argued at first instance. Coaching of witnesses could clearly have then been raised and submissions made about viewing the video record of proceedings. This did not occur and there is no good reason for the Full Bench to now view the video record.

134 The video recording of proceedings is a relatively new phenomenon. There are issues of some significance which arise both at first instance and on appeal. They include the circumstances in and purposes for which the video record should be viewed by decision-makers at first instance and the procedural fairness requirements which might follow. I also anticipate there will be a disinclination amongst appellate courts to readily accept applications to view video records of first instance proceedings. This is because of what is ordinarily the nature of an appellate jurisdiction. Relevant principles will need to be established. For present purposes however I think it is simply necessary to say is the Full Bench ought to be judicious in deciding whether to allow an application like the present and not lose sight of the legal principles I have earlier outlined.

(d) Conclusion of Application to View Video Record of Hearing

135 For the reasons I have set out the application of these principles in the present application leads to the conclusion that it should be dismissed.

Future Conduct of the Appeal

136 Although the two interlocutory applications should be dismissed, the appeal of course remains to be decided. There is however a lack of clarity about the grounds of appeal. As set out earlier grounds of appeal were included with the notice of appeal, but in the additional documents filed there is, as document number 1, a list of the reasons upon which the appellant wants the decision to be overturned.

137 In my opinion it is appropriate to now list another directions hearing to provide the appellant with the opportunity of providing a document which sets out the grounds which he would now like to argue to support the appeal. At that directions hearing the respondent will have the opportunity to make submissions about the grounds of appeal as then drafted.

138 At or after this directions hearing it will be appropriate to list the appeal for hearing.

Orders

139 At the present time the Full Bench should simply make the following orders:

(1) The appellant's application to the Full Bench to consider new and additional material dated 27 August 2007 is dismissed.

(2) The appellant's application to the Full Bench to listen to the audio record and view the video record of the proceedings at first instance dated 27 August 2007 is dismissed.

BEECH CC:

140 I have read in advance the Reasons for Decision of the Acting President and have nothing to add.

SCOTT C:

141 I have had the benefit of reading the draft Reasons for Decision of His Honour the Acting President. With respect, I agree with those Reasons and wish to add some comments.

142 As the Acting President noted, a party is bound by the conduct of his counsel (s31(3) *Industrial Relations Act 1979*) and by the case presented at first instance. If a party is not satisfied with the manner in which the legal practitioner represented him and conducted his case that is not a matter for an appeal. That is a matter for another place. If a party could seek to revisit the evidence presented and the conduct of the case on appeal by alleging that the case was not run as he would have wanted, this would turn the case at first instance into no more than a rehearsal (*Kershaw v Sunvalley Australia Pty Ltd* (2007) 87 WAIG 1169).

143 A good deal of the basis for the appellant's applications dealt with by the Acting President's Reasons seems to be his dissatisfaction with the way his case was conducted at first instance. He disagrees with his solicitor's choice of working from the respondent's Bundle of Documents; was concerned that he was sitting at the back of the court and was not able to check the documents as they were being dealt with; his solicitor did not make as much of, or the point that the appellant now makes about, the allegation of coaching of the respondent's witnesses, and was not able to raise issues of so called forgery or fabrication. These are not matters for an appeal and an appeal is not merely an opportunity to run the case differently to the way it was done at first instance, in the hope of a different outcome. The matters raised in the applications are not for the Full Bench to remedy, if they require remedy. As noted above they may be for another place.

144 I too, would dismiss the applications.

2008 WAIRC 00329

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	EDWARD MICHAEL
	APPELLANT
	-and-
	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION AND TRAINING
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE M T RITTER, ACTING PRESIDENT
	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER P E SCOTT
DATE	FRIDAY, 30 MAY 2008
FILE NO	FBA 27 OF 2006
CITATION NO.	2008 WAIRC 00329

Decision	Order issued
Appearances	
Appellant	Mr E Michael on his own behalf
Respondent	Ms R Hartley (of Counsel), by leave

Order

This matter having come on for hearing before the Full Bench on 25 March 2008 and 2 April 2008, and having heard Mr E Michael on his own behalf as appellant, and Ms R Hartley (of Counsel), by leave, on behalf of the respondent, and reasons for decision having been delivered on 30 May 2008, it is this day, 30 May 2008, ordered that:

(1) The appellant's application to the Full Bench to consider new and additional material dated 27 August 2007 is dismissed.

(2) The appellant's application to the Full Bench to listen to the audio record and view the video record of the proceedings at first instance dated 27 August 2007 is dismissed.

By the Full Bench

(Sgd.) M T RITTER,
Acting President.

[L.S.]

2008 WAIRC 00349

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION – FULL BENCH

BETWEEN:	EDWARD MICHAEL
	Appellant
AND:	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION AND TRAINING
	Respondent
CORAM:	THE HONOURABLE M T RITTER, ACTING PRESIDENT
	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER P E SCOTT
DATE:	30 MAY 2008 (CORRIGENDUM 10 JUNE 2008)
FILE NO:	FBA 27 OF 2006
CITATION NO.:	2008 WAIRC 00349
PLACE:	**PERTH**

CORRIGENDUM

1. In the last sentence of paragraph [134] of the reasons for decision of Ritter AP dated 30 May 2008 the word "is" is deleted so the sentence reads: "For present purposes however I think it is simply necessary to say the Full Bench ought to be judicious in deciding whether to allow an application like the present and not lose sight of the legal principles I have earlier outlined".

2. In the first sentence of paragraph [12] of the reasons for decision of Ritter AP dated 30 May 2008 the word "Commissioner" is replaced with the word "Commission" so the sentence reads: "Due to an assertion by the appellant that the transcript of the first instance hearing was inaccurate, the Commission arranged for the hearing to be transcribed a second time by a different organisation".

By the Full Bench

(Sgd.) M T RITTER,

[L.S.] Acting President.

Dated: 10 June 2008

FULL BENCH—Proceedings for Enforcement of Act—

2008 WAIRC 00346

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE REGISTRAR OF THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
	APPLICANT
	-and-
	LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE M T RITTER, ACTING PRESIDENT
	CHIEF COMMISSIONER A R BEECH
	SENIOR COMMISSIONER J H SMITH
DATE	MONDAY, 9 JUNE 2008
FILE NO/S	FBM 2 OF 2008
CITATION NO.	2008 WAIRC 00346

Decision	Orders and Directions
Appearances	
Applicant	Ms R Hartley (of Counsel)
Respondent	Mr M Aulfrey (of Counsel)

Order

This matter having come on for conference before the Full Bench on 9 June 2008, and having heard Ms R Hartley (of Counsel) on behalf of the applicant, and Mr M Aulfrey (of Counsel) on behalf of the respondent, it is this day, 9 June 2008, ordered that:

1. The respondent file and serve a statement of answer on or before 4.00pm on 16 June 2008.
2. The applicant file and serve witness statements and any documents on which it seeks to rely on or before 4.00pm on 23 June 2008.
3. The respondent file and serve witness statements and any documents on which it seeks to rely on or before 4.00pm on 30 June 2008.
4. The application be listed for hearing on dates to be fixed.

By the Full Bench

(Sgd.) M T RITTER,

[L.S.] Acting President.

FULL BENCH—Unions—Application for registration—

2008 WAIRC 00305

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTERN AUSTRALIAN PRINCIPALS' FEDERATION
	APPLICANT
	-and-
	STATE SCHOOL TEACHERS' UNION OF WESTERN AUSTRALIA (INC.)
	OBJECTOR
CORAM	FULL BENCH
	THE HONOURABLE M T RITTER, ACTING PRESIDENT
	SENIOR COMMISSIONER J H SMITH
	COMMISSIONER P E SCOTT
DATE	FRIDAY, 16 MAY 2008
FILE NO/S	FBM 3 OF 2007
CITATION NO.	2007 WAIRC 00305

Decision	Orders and directions
Appearances	
Applicant	Mr A J Power (of Counsel) by leave and with him Mr S Kemp (of Counsel) by leave
Objector	Mr T Borgeest (of Counsel) by leave

Corrected Order

This matter having come on for hearing before the Full Bench on 13 May 2008, and having heard Mr A J Power (of Counsel) by leave and with him Mr S Kemp (of Counsel) by leave on behalf of the applicant, and Mr T Borgeest (of Counsel) by leave on behalf of the objector, it is this day, 15 May 2008, ordered by consent that:

1. The following witnesses of the applicant are to be recalled for cross examination or further cross examination at the resumption of the hearing: (a) Noel Strickland; (b) Peter Fitzgerald and (c) Peter Holcz.

2. The applicant shall produce to the Commission, by delivery to the office of the Registrar on or by 12.00noon on Wednesday 21 May 2008, any documents in its possession, custody or power, including any electronic documents, relating to the following matters in question in the proceedings:

   (a) the business transacted at the inaugural meeting of the WAPF on 18 January 2007;

   (b) the terms of the constitution adopted at the abovementioned meeting; and

   (c) the identity of the body of persons which met on 20 February 2007,

   including, but not limited to:

      (i) any notice or other communication calling or notifying the meeting to be held on 18 January 2007;

      (ii) all notes or documents created before, during or subsequent to the meeting on 18 January 2007 relating to the holding of or the business transacted thereat;

      (iii) any communication or other documents received from Jackson McDonald Lawyers:

         (A) advising on the business that was to be transacted at the meeting on 18 January 2007; and/or

         (B) advising on the manner in which that business was to be transacted at the meeting on 18 January 2008; and/or

(C) recording the business transacted at the meeting and/or the manner of the transaction of that business;

(D) recording the actions taken by either Stephen Kemp or Karen Findlay-Grove at the meeting on 18 January 2008, including during any suspension of such meeting;

(iv) all drafts, versions or copies of the document entitled Constitution of the Western Australian Principals Federation.

3. In relation to any summons issued to the persons listed in Schedule A hereof, requiring the production of documents, the summons:

(a) must be limited to the category of documents specified in Order 2;

(b) must be served by no later than 12:00 noon on Monday 19 May 2008;

(c) may be complied with by:

i. delivery of documents subject of the summons to the office of the Registrar, by or before 12.00 noon on Wednesday 21 May 2008; or

ii. where there are no documents to produce, by delivery of the summons served upon the recipient to the office of the Registrar at or by the abovementioned time and date, and

(d) must include, in addition to any other requirements of the regulations, a notice which clearly states the manner, provided for by this order, in which it may be complied with.

4. Where:

(a) in relation to the order for production in order 2 hereof, the applicant; or

(b) in relation to any summons issued pursuant to order 3 hereof, the recipient of that summons,

objects to a document or part of a document within the scope of that order or summons (as the case may be) being inspected by the Objector, the following procedure shall be followed:

(A) all documents within the scope of the order or summons are to be delivered to the office of the Registrar as otherwise provided for by these orders;

(B) documents to which an objection refers are to be delivered in a sealed envelope marked "*Subject to Objection*";

(C) the contents of the envelope so marked are not to be available for inspection by the Objector (that is, the SSTUWA and/or its legal representatives) without further order of the Full Bench;

(D) the documents subject to objection are to be identified in a list which shall include, with respect to each such document or part thereof to which the objection relates, a succinct statement of the nature of the objection, and the list shall be delivered together with the documents and shall be available for inspection;

(E) in the case of any document in respect of which only part of the contents are subject to objection, a further copy of such document shall be delivered, and be available for inspection, but with the parts of the document subject to objection redacted.

5. Subject to the foregoing order, the objector and the applicant shall have leave to inspect and take copies of any documents delivered to the Registrar pursuant to the abovementioned summonses and the orders above.

6. The objector shall file and serve an outline of submissions, and list of authorities, in relation to the matters referred to in its Particulars of Objections as to Invalidities, on or before 4.00pm on Friday 23 May 2008.

7. The applicant shall file and serve an outline of submissions, and list of authorities, in relation to the matters referred to in the objector's Particulars of Objections as to Invalidities, on or before 4:00pm on Friday 30 May 2008.

8. Subject to Order 9 the further hearing of this application be adjourned to:

   (a) Tuesday 3 June 2008 commencing at 10.30am; and

   (b) Thursday 5 June 2008 commencing at 10.30am, and

   (c) Friday 6 June 2008 commencing at 10.30am; and

   (d) Tuesday 10 June 2008 commencing at 10.30am; and

   (e) Wednesday 11 June 2008 commencing at 10.30am.

9. Any interlocutory issue including but not limited to those arising out of compliance with these orders and in particular Orders 2, 3 and 4 be determined at the hearing on 3 June 2008.

By the Full Bench

(Sgd.) M T RITTER,
Acting President.

[L.S.]

Schedule A

Persons to whom order 3 relates:

Stephen Kemp;

Karen Findlay-Grove;

Colin Pettit;

Noel Strickland;

Jeff MacNish;

Ken Austin;

Kevin Brennan;

Denise Hilsz;

Stephen Breen;

Peter Holcz;

Nick Jakowyna;

Peter Fitzgerald;

Leah Vogler; and

Neil Hunt.

2008 WAIRC 00334

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES WESTERN AUSTRALIAN PRINCIPALS' FEDERATION

APPLICANT

-and-

STATE SCHOOL TEACHERS' UNION OF WESTERN AUSTRALIA (INC.)

OBJECTOR

CORAM FULL BENCH
THE HONOURABLE M T RITTER, ACTING PRESIDENT
SENIOR COMMISSIONER J H SMITH
COMMISSIONER P E SCOTT

DATE TUESDAY, 3 JUNE 2008

FILE NO/S FBM 3 OF 2007

CITATION NO. 2008 WAIRC 00334

Decision Orders

Appearances

Applicant Mr A J Power (of Counsel) by leave and with him Mr S Kemp (of Counsel) by leave

Objector Mr M Bromberg SC (of Counsel) by leave and with him Mr T Borgeest (of Counsel) by leave

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Order

This matter having come on for hearing before the Full Bench on 3 June 2008 and having heard Mr A J Power (of Counsel) by leave and with him Mr S Kemp (of Counsel) by leave on behalf of the applicant, and Mr M Bromberg SC (of Counsel) by leave and with him Mr T Borgeest (of Counsel) by leave on behalf of the objector, it is this day, 3 June 2008, ordered that:

1. The Summonses to Witness served upon the people named in Schedule A of the Order dated 16 May 2008 are discharged.
2. The Order dated 16 May 2008 is varied by the deletion of Order 1.

By the Full Bench

(Sgd.) M T RITTER,
Acting President.

[L.S.]

FULL BENCH—Procedural Directions and Orders—

2008 WAIRC 00172

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES BOB PEMBERTON

APPELLANT

-and-

CIVIL SERVICE INSURANCE AGENCY PTY LTD

RESPONDENT

AND

LOUISE MCGOVERN

APPELLANT

-and-

CIVIL SERVICE INSURANCE AGENCY PTY LTD

RESPONDENT

CORAM FULL BENCH
THE HONOURABLE M T RITTER, ACTING PRESIDENT
SENIOR COMMISSIONER J H SMITH
COMMISSIONER J L HARRISON

DATE FRIDAY, 14 MARCH 2008

FILE NO/S FBA 1 OF 2008, FBA 2 OF 2008

CITATION NO. 2008 WAIRC 00172

Order

Upon considering the three applications of the appellant dated 23 January 2008 and by consent it is ordered that:-

(1) Appeals FBA 1 of 2008 and FBA 2 of 2008 be consolidated into one proceeding.

(2) There be one set of appeal books and submissions.

(3) An extension of time until 28 February 2008 is granted for the lodging of appeal books.

By the Full Bench

(Sgd.) M T RITTER,
Acting President.

[L.S.]

INDUSTRIAL MAGISTRATE—Claims before—

2008 WAIRC 00354

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

PARTIES	JANE CHRISTINE CARGILL
	CLAIMANT
	-v-
	RE/MAX HARBOUR CITY REAL ESTATE PTY LTD
	FIRST RESPONDENT
	CECILY ROBERTSON
	SECOND RESPONDENT
CORAM	INDUSTRIAL MAGISTRATE PM HOGAN
HEARD	WEDNESDAY, 16 JANUARY 2008, THURSDAY, 17 JANUARY 2008
DELIVERED	TUESDAY, 26 FEBRUARY 2008
FILE NO.	M 51 OF 2007
CITATION NO.	2008 WAIRC 00354

CatchWords	Contravention of Australian Workplace Agreement, Failure to pay in accordance with Agreement, Undertaking referring to a Guarantee, Construction of Undertaking, Federal Minimum Wage, No-disadvantage Test.
Legislation	Workplace Relations Act 1996
	Workplace Relations Amendment (Workchoices) Act 2005
	Minimum Conditions of Employment Act 1993
	Property Sales Award Queensland – State 2005
Result	Claim proved
Representation	
Applicant	Mr G McCorry of *Labourline – Industrial and Workplace Relations Consulting* appeared as Agent for the claimant
Respondent	Ms E Needham (of Counsel) instructed by *Sparke Helmore* appeared for the respondent

REASONS FOR DECISION

1 This claim is brought pursuant to sections 718, 722 and 824(2) of the ***Workplace Relations Act 1996*** (Cwth) ("the WR Act"). The claim is that Re/Max Harbour City Real Estate Pty Ltd ("Re/Max") has contravened a provision of an Australian Workplace Agreement ("AWA") agreed between Re/Max and Ms Cargill and that Ms Robertson (a licensed real estate agent and a director of Re/Max) was involved in the non-compliance. Essentially, it is claimed that Ms Cargill was not paid in accordance with the AWA which included an undertaking that referred to a guarantee by the respondents that she would earn at least 125% of the rate of pay prescribed for her Award classification during each year of employment (or part thereof).

2 The respondents' case is that Ms Cargill was remunerated in accordance with the AWA and that the guarantee contained within the undertaking did not apply to her. Rather the respondents argue that the undertaking given was that Ms Cargill was able to demonstrate a personal work history which would provide a reasonable expectation of an earning capacity of at least 125% of the rate of pay prescribed for her Award classification.

3 There is no dispute that in or about January 2006 an agreement was reached between the parties that Ms Cargill would be employed by Re/Max as a real estate salesperson. Nor is it disputed that Ms Cargill agreed to be employed on a "*commission only*" basis.

4 Ms Cargill commenced a course, conducted by the Real Estate Institute of Western Australia ("REIWA"), and under the sponsorship of the respondents, on 6 February 2006 in order to obtain the necessary certification which would enable her to work as a real estate salesperson. The complainant obtained her certification on 17 March 2006. It is agreed that she commenced employment with the respondents on 18 March 2006 and that the AWA was effective from that date.

5 This claim turns upon the construction of the undertaking given by Ms Robertson on behalf of Re/Max.

6 The legislative background which explains the relationship between the undertaking and the AWA is as follows.

7 Before 27 March 2006 an employee remunerated solely by commission was excluded from the provisions of the ***Minimum Conditions of Employment Act 1993*** (WA). On 27 March 2006 the ***Workplace Relations Amendment (Workchoices) Act 2005*** (Cwth) brought employees of constitutional corporations (and there is no dispute that Ms Cargill was such an employee) under the umbrella of the WR Act. Section 183 of the WR Act provided that certain employees (such as those in Ms Cargill's position) must be paid a basic periodic rate of pay for each of their guaranteed hours that was at least equal to the standard Federal Minimum Wage ("FMW").

8 Prior to the Workchoices amendments of 27 March 2006, employees such as Ms Cargill could move into the Commonwealth industrial relations system by entering into a Commonwealth employment instrument such as an AWA. Here, of course, Ms Cargill elected to do that via the AWA agreed in February 2006.

9 At the relevant time the legislation required that, before an AWA could come into effect, it must pass the "*no-disadvantage test*". That test was set out in section 170XA of the WR Act which provided:

> *"(1) An agreement passes the no-disadvantage test if it does not disadvantage employees in relation to their terms and conditions of employment.*
>
> *(2) Subject to sections 170XB, 170XC and 170XD, an agreement disadvantages employees in relation to their terms and conditions of employment only if its approval or certification would result, on balance, in a reduction in the overall terms and conditions of employment of those employees under:*
>
> *(a) relevant awards or designated awards; and*
>
> *(b) any law of the Commonwealth, or of a State or Territory, that the Employment Advocate or the Commission (as the case may be) considers relevant."*

10 Section 183 of the WR Act of course required that Ms Cargill be paid the standard FMW from 27 March 2006. Hence the "*undertaking included*" AWA was required to provide that Ms Cargill not be disadvantaged, on balance, in comparison with the standard FMW.

11 Section 170VPB(2) of the WR Act provided that if the Employment Advocate had concerns about whether the AWA passed the no-disadvantage test, but those concerns were resolved by a written undertaking given by the employer and accepted by the Employment Advocate, then the Employment Advocate must approve the AWA. Given there was no relevant award regulating the employment of real estate salespersons in Western Australia ("WA"), the no-disadvantage test required the Employment Advocate to make a determination as to whether an existing award was appropriate for the purpose of deciding whether the AWA passed the no-disadvantage test. Such an award was defined as "*a designated award*".

12 Here, the AWA itself incorporated reference to the ***Property Sales Award Queensland – State 2005*** (at 1.1.3). It is confirmed in the Approval Notice given by the Employment Advocate with respect to the AWA that the award against which the AWA was assessed was that Queensland Award.

CONSTRUCTION OF THE UNDERTAKING

13 As the undertaking is deemed to be included in the AWA (section 170VPJ) it is part of a statutory employment instrument made pursuant to the provisions of the WR Act.

14 Putting aside the undertaking, the AWA makes no provision for the payment of a minimum wage as required since 27 March 2006. One must assume that the undertaking resolved the Employment Advocate's concerns as to Ms Cargill, as a commission-only employee, being disadvantaged by virtue of that commission-only status. There is of course no evidence before the Court as to how or why the Employment Advocate actually determined that the undertaking satisfied the no-disadvantage test.

15 Nevertheless the task for this Court is essentially a straightforward construction of the undertaking as a statutory instrument. The Court must bear in mind that the "*undertaking included*" AWA must provide for Ms Cargill not to be disadvantaged. The principle of no-disadvantage is not only enshrined in the Act via the no-disadvantage test but also within the principal object of the WR Act as set out in section 3. Of particular relevance to this matter is clause (c) of section 3 which makes reference to the provision of "*an economically sustainable safety net of the minimum wages and conditions for those whose employment is regulated by this Act*".

16 It appears that the document containing the undertaking was drafted by, or on behalf of, Don Tepper, Industrial Relations Manager of the Real Estate Employer's Federation SA. Exhibit 11 reveals that he emailed to Re/Max's office manager a copy of the undertaking, along with a very brief explanation, seeking approval for him to make the undertaking on behalf of the first respondent. Ms Robertson signed the undertaking as licensee of the first respondent and it appears that the undertaking was then returned to Mr Tepper and then forwarded to the Employment Advocate with a notation "*seen – Don Tepper*".

17 It is clear from that email (Exhibit 11) that the undertaking was lifted from the Queensland Award. Clause 15.2 of that Award provides as follows:

> "***15.2 Opting Out of Parts 12 and/or 14***
>
> *15.2.1 Qualifying to Opt Out – Assessment Criteria*
>
> *Where it can be demonstrated to the satisfaction of the QPIR, that an employee:*
>
> *(a) has held a Real Estate Agent's Licence for at least 2 continuous years; or*
>
> *(b) has at least 6 months' full-time equivalent recent experience in the industry and a historical earning capacity of at least 125% of the rate of pay prescribed for the employee's Award classification; or*
>
> *(c) can demonstrate a personal work history which would provide a reasonable expectation of an earning capacity of at least 125% of the rate of pay prescribed for the employee's Award classification; or*
>
> *(d) is guaranteed by the employer to earn at least 125% of the rate of pay prescribed for the employee's Award classification during each year of employment (or part thereof),*
>
> *the employee and the employer may freely elect to alter any of the provisions of Parts 12 and/or 14, subject to the conditions set out in Parts 15, 16 and 17.*
>
> *The alteration of the provisions of Parts 12 and/or 14 shall be known as Opting Out.*
>
> *15.2.2 No Disadvantage Test – Initial Assessment of Competence*
>
> *An employee may Opt Out of Parts 12 and/or 14 only after being assessed as competent to do so, under the criteria outlined in clause 15.2.1, by the QPIR, which is the sole entity approved by the Industrial Commission to assess whether the employee meets the requirements of clause 15.2.1.*
>
> *15.2.3 No Disadvantage Test – Recurring Assessment of Competence*
>
> *In order to ensure that the employee achieves a minimum safety-net income during the course of employment, the No Disadvantage Test assessment of the employee's competence to Opt Out shall be a recurring event, as prescribed in clause 16.3.2(b)(ii)(B)."*

18 The undertaking itself copied clauses (a), (b), (c) and (d) from 15.2.1.

19 Neither the email (Exhibit 11), the undertaking itself nor the Approval Notice give an indication as to which of the four alternatives contained within the undertaking in fact form the basis of the undertaking. Counsel on behalf of the respondents essentially submits that it was the third alternative, given that that was Ms Robertson's intention at the time of signing the undertaking. The Agent for the claimant submits that only the fourth alternative can have any application, essentially because the third option makes no sense in the WA context.

20 In my opinion Ms Robertson's intention at the time of signing the undertaking is irrelevant. I must say that even if it was relevant I would have some difficulty in relying on her evidence given her vague recollection as to how it was that she came to sign the undertaking and her incomprehensible explanation as to why it was that Ms Cargill, and others, were asked to enter into AWAs. (Whether that "*explanation*" was due to evasiveness or a genuine lack of understanding of the workchoices system, I cannot be sure). In relation to her evidence as to how she came to sign the undertaking, she said she was asked to sign it by Janet Roney, (the office manager to whom Mr Tepper's email was addressed). Ms Robertson could not recall whether she had actually seen Mr Tepper's email. She agreed that the email did not ask that one of the undertakings be chosen. She said she read "*or*" between the four alternatives and considered that Ms Cargill met the third option so she signed it.

21 As the Agent for the claimant sets out in his outline of submissions:

> "*Clause 12.1 of the Award provides –*
>
> > *Part 12 applies to all employees other than those who are approved to Opt Out in accordance with Part 15. In the case of employees who are approved to Opt Out in accordance with Part 15, the provisions of this Part shall apply unless they are varied or over-ridden by an Agreement registered in accordance with Parts 16 and 17.*
>
> *Clause 12.2 of Part 12 of the award provides for minimum weekly rates of pay for the classifications of the employees specified therein.*
>
> *Part 15 of the award allows an employer and an employee to opt out of Parts 12 and 14 of the award. An employer and an employee may opt out of Parts 12 and 14 of the award, only after the employee has been assessed as competent to do so, under the criteria outlined in clause 15.2.1, by the Queensland Property Industry Registry. The assessment is to be carried out by independent industry based peers in the real estate industry – clause 15.1.1 of award.*
>
> *Parts 16 and 17 of the award prescribe the effect of an opting out and the registration process."*

22 He then submits that:

> *"Parts 15 – 17 of the award are not relevant to the Claimant and the Respondent as the provisions can only be applicable in Queensland where the Queensland Property Industry Registry exists."*

23 When one reads the Queensland Award carefully one discovers that all employees covered by the Award must have a written employment agreement and that agreement must be registered with the Queensland Property Industry Registry ("QPIR") (1.3.2). The QPIR is administered by the Property Sales Association of Queensland and the Queensland Real Estate Industrial Organisation of Employers (1.6.12). Until an agreement is registered with the QPIR the employer must pay not less than the Award classification rate of pay and commission is not to be offset against paid leave entitlements (13.3(g)). Part 15 of the Award provides for a "*personal, stand-alone no-disadvantage test*".

> *"This Part, otherwise known as Stage 2 Employment, applies only to those employees who have been assessed by independent, industry-based peers, as demonstrating sufficient competence to make employment arrangements which differ from the provisions of Parts 12 and/or 14."* (15.1.1).

24 Parts 12 and 14 provide for minimum entitlements and payment of wages, allowances and/or commission. Those Parts do not provide for remuneration by way of commission only. The Award provides that the QPIR is the entity recognised to perform the assessments prescribed by Part 15 (15.1.5). Part 16 of the Award is intended to facilitate the existence of a central registry of individual employment arrangements in the industry, i.e. the QPIR (16.1.2). Under the Award an employer must provide an agreement and an application to QPIR to each person employed under the Award (16.2.1). Those employees seeking to be employed as commission only must seek approval from the QPIR to opt out. The Award provides a fall back provision for those employees who have opted for commission only who earn less than 125 percent of the rate of pay prescribed for their award classification in the first 12 months (see 16.3.2 (b)(iii)).

25 There is no evidence before the Court of any such Registry (or equivalent body in Western Australia) having conducted, in relation to Ms Cargill's election to opt out, such an assessment as must be conducted by the QPIR in Queensland. Rather, it appears that a representative of the Real Estate Employer's Federation SA drafted a document containing a list of alternatives lifted from the Award without giving any cognisance to the requirement for an independent assessment to be made or how, for example, the third option might apply in the WA context. It appears that Mr Tepper simply requested that the document be signed and that he did so without giving any guidance as to how the assessment was to be conducted. Indeed the request in the email was that he be given Re/Max's approval to make the undertaking on its behalf.

26 Clause 4.1.1 of the AWA expressly requires the Award to be read down to make sense for WA. Given the principal object of the WR Act and the apparent lack of any independent assessment process in Western Australia, I agree with the Agent for the claimant that Parts 15 to 17 of the Award are not relevant to the claimant and the respondents as such provisions can only be applicable in Queensland. Without the implementation of the requisite independent assessment process, it simply is not possible to read down the Award such that Parts 15 to 17 make sense for WA. Hence the third alternative provided in the undertaking has no applicability to Ms Cargill as a property salesperson in WA. The only alternative provided in the undertaking that can have any applicability to Ms Cargill's situation is the fourth alternative. Although the AWA attempts to provide remuneration by way of commission only it must be read subject to the undertaking which was a condition precedent to the approval of the AWA by the Employment Advocate.

27 As the Agent for Ms Cargill submits, for the "*undertaking included*" AWA to satisfy the no-disadvantage test in relation to both section 183 of the WR Act and the Award it must provide for Ms Cargill's remuneration and other entitlements on balance to be not less than the FMW and not less than the wage prescribed by the Award. The "*undertaking included*" AWA only satisfies the no-disadvantage test for Ms Cargill if the undertaking is construed as being constituted by the fourth alternative provided within the undertaking. As the fourth alternative provided in the undertaking is the only clause that has any applicability to Ms Cargill, then she is entitled to be remunerated in accordance with that provision.

Conclusion

28 There is no dispute that clauses (1) and (2) of the undertaking had no application to Ms Cargill. In construing whether the third option had applicability it is necessary to look at the purpose of the undertaking and the statutory context in which it was given.

29 The purpose of the undertaking was to satisfy the no-disadvantage test as set out in 170XA of the WR Act. The statutory regime in place at the time was that a worker could agree to opt out of certain entitlements if the employer could show that the worker would not be disadvantaged by so doing.

30 Here it is difficult to make a positive finding as to the employer's actual intention at the time of signing the undertaking. The claimant was not a party to the undertaking and the only witness called by the respondents gave vague and unreliable evidence as to its making. However, even if the employer intended to rely on the third option in the undertaking, a reading of the designated award, in accordance with clause 4.1.1 of the AWA, reveals that such an option could have no applicability in the WA context. Thus the undertaking must be read as one providing a guarantee as set out in the fourth option.

PM Hogan

Industrial Magistrate

2008 WAIRC 00355

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

PARTIES	JANE CHRISTINE CARGILL
	CLAIMANT
	-v-
	RE/MAX HARBOUR CITY REAL ESTATE PTY LTD
	FIRST RESPONDENT
	CECILY ROBERTSON
	SECOND RESPONDENT
CORAM	INDUSTRIAL MAGISTRATE PM HOGAN
HEARD	WEDNESDAY 7 MAY 2008
DELIVERED	THURSDAY 22 MAY 2008
FILE NO.	M 51 OF 2007
CITATION NO.	2008 WAIRC 00355

CatchWords	Order for payment of damages; Pre-judgment interest; Imposition of penalties.
Representation	
Applicant	Mr G McCorry of *Labourline – Industrial and Workplace Relations Consulting* appeared as Agent for the claimant
Respondent	Ms E Needham (of Counsel) instructed by *Sparke Helmore* appeared for the respondent

SUPPLEMENTARY REASONS FOR DECISION

INTRODUCTION

1 On 26 February 2008 the Court delivered its reasons for decision regarding the construction of the "*undertaking included*" Australian Workplace Agreement ("AWA") effective from 18 March 2006. A further hearing was conducted on 7 May 2008 to address the issues of damages and penalty.

DAMAGES

2 It is agreed that the amount of unpaid wages is $34,382.02 and the amount of unpaid superannuation is $3,094.38. However issues arise as to entitlement to annual leave, credit for certain payments made to the claimant and the quantum of any damages arising from the non-payment of superannuation. The respondents seek credit for the amount of $201.06 already paid to the Westscheme Superannuation Fund and credit for the $4,597.59 paid to the claimant by way of commission.

Annual Leave

3 Counsel for the respondents submits that the claimant was employed on a commission only basis and that under the AWA the claimant was entitled to a minimum wage if her commission earnings did not exceed that minimum wage.

4 Clause 4.1.2 of the AWA provides:

> *You agree that if the basis of your remuneration is "commission only" clause 4.1.1 of this AWA will not apply. That is you agree to opt out of 4.1.1 because you are on "commission only" (see clause 16.3.2(b)(i)(A) of the award).*

5 Counsel for the respondents submits that the undertaking incorporated in the AWA guaranteed only the minimum wage applicable, not any other conditions or entitlements.

6 Given the Court's construction of the undertaking the guarantee contained in the undertaking must be taken as having met the no-disadvantage test, hence enabling the claimant to be employed on a commission only basis.

7 Having been employed on that basis, the Court agrees with the submission that clause 4.1.2 does exclude the claimant from any entitlement to annual leave.

8 The agent for the claimant submits that, as the undertaking guarantees a minimum wage, the claimant was not engaged on a commission only basis. However the whole point of the undertaking was to satisfy the no-disadvantage test (in relation to the fact that the employer sought to pay the employee on a commission only basis rather than a minimum wage basis).

Credit for Commission Paid

9 The agent for the claimant submits that it is not possible to set off the commission paid against the entitlement to wages and points to clause 13.3(g)(ii) of the ***Property Sales Award Queensland – State 2005*** ("the Award"). As referred to in the Court's reasons dated 26 February 2008 that was the Award against which the AWA was assessed. Clause 13.3(g)(ii) provides:

> *Commission shall not be offset against paid leave entitlements.*

10 This clause of course refers to offset against paid leave entitlements not the minimum rate of pay.

11 The agent for the claimant also refers the Court to ***James Turner Roofing Pty Ltd v Peters*** **(2003) 83 WAIG 427** where at paragraph 21 Anderson J summarised the principles to be extracted from a number of authorities relating to the manner in which amounts which had been paid to a worker should be credited to the employer's obligations under an award. Those principles are as follows:

> *1. If no more appears than that (a) work was done; (b) the work was covered by an award; (c) a wage was paid for that work; then the whole of the amount paid can be credited against the award entitlement for the work whether it arises as ordinary time, overtime, weekend penalty rates or any other monetary entitlement under the award.*
>
> *2. However, if the whole or any part of the payment is appropriated by the employer to a particular incident of employment the employer cannot later claim to have that payment applied in satisfaction of his obligation arising under some other incident of the employment. So a payment made specifically for ordinary time worked cannot be applied in satisfaction of an obligation to make a payment in respect to some other incident of employment such as overtime, holiday pay, clothing or the like even if the payment made for ordinary time was more than the amount due under the award in respect of that ordinary time.*
>
> *3. Appropriation of a money payment to a particular incident of employment may be express or implied and may be by unilateral act of the employer debtor or by agreement express or implied.*
>
> *4. A periodic sum paid to an employee as wages is prima facie an appropriation by the employer to all of the wages due for the period whether for ordinary time, overtime, weekend penalty rates or any other monetary entitlement in respect of the time worked. The sum is not deemed to be referable only to ordinary time worked unless specifically allocated to other obligations arising within the employer/employee relationship.*
>
> *5. Each case depends on its own facts and is to be resolved according to general principles relating to contracts and to debtors and creditors.*

12 Relying on these principles, the agent for the claimant submits that the payment of commission on sales is different to the obligation under the AWA to pay the minimum wage. Counsel for the respondents submits that the circumstances of this case are very different to those referred to in the authorities considered by Anderson J. In those cases certain above award payments were sought to be setoff against payments in relation to distinct incidents of employment.

13 The Court notes the observation of Anderson J at point 5.

14 Here the employment was on a commission only basis guaranteed (for the purpose of satisfying the no-disadvantage test) by the payment of a minimum rate of pay. Clearly if the commissions earned equalled or exceeded 125% of the prescribed rate of pay for the claimant's Award classification there would be no entitlement to any further income. It is implicit in the undertaking that, should there be any shortfall between commissions earned and 125% of the prescribed rate of pay then the difference between the two amounts will be paid, not the entire 125%. The Court agrees with the submission that credit should be given for commission paid.

Superannuation

15 The Court agrees that credit should be given for superannuation paid. The agent for the claimant submits that further damages should be awarded for loss of earnings on the unpaid superannuation calculated at 19% (being the rate applicable to the Westscheme Fund for the financial year 2006/2007). Any calculation should be made net of any contributions tax payable. The Court agrees that to allow any additional amount for interest to date of judgment would amount to "*double dipping*".

16 Hence damages are assessed at:

- $29,784.43 (representing the agreed amount of underpaid wages of $34,382.02 less the amount of $4,597.59 paid to the claimant by way of commission) plus interest at 6% to 26 February 2008. In this regard the Court will hear the parties in relation to the commencement date for the calculation of such interest.
- $2,893.32 (representing the agreed amount of underpaid superannuation of $3,094.38 less the amount of $201.06 already paid to the Claimant's superannuation fund) plus interest at 19% for the period of 12 months (March 2006 to March 2007) in the sum of $549.73.

PENALTY

17 The Court has a discretion to impose a penalty in relation to breach of a provision of the ***Workplace Relations Act 1996*** ("the WR Act") The Court has found that the first respondent has contravened the AWA by failing to pay the claimant 125% of the prescribed rate of pay and that the second respondent was involved in that contravention.

18 The first respondent is an independent franchise of Re/Max Australia. At the relevant time the second respondent was the owner and sole director of the first respondent. The second respondent signed the undertaking in her capacity as licensee of the first respondent.

19 The undertaking is dated 7 July 2006. The Employment Advocate approved the AWA by notice dated 12 July 2006. It is accepted that the AWA has effect from the date the claimant commenced as a real estate salesperson on 18 March 2006. The AWA had in fact been agreed between the first respondent and the claimant in February 2006. At that time the second respondent was one of three directors of the company.

20 There can be no dispute that at the time the AWA was agreed the claimant understood that she was to be paid on a commission only basis. The claimant has an impressive work history and clearly expected to succeed in real estate. For reasons that are in dispute (and unnecessary to resolve for the purposes of these proceedings) she did not.

21 It is not entirely clear why the respondents sought to have the claimant enter into an AWA. The Court assessed the second respondent's evidence as vague and unreliable. This assessment applied both to her evidence regarding the introduction of AWAs and her intention at the time of signing the undertaking. Nevertheless there is no evidence to support a conclusion that the only rational inference that could be drawn from the circumstances is that the reason for having the claimant enter into an AWA was to avoid payment of the Federal Minimum Wage upon introduction of the Work Choices Legislation.

22 The second respondent's unchallenged evidence was that she had discussed the introduction of AWAs on a commission only basis with the franchise company prior to the introduction of the Work Choices Legislation. That the franchise company had some involvement in the issue is supported by the fact that Mr Tepper, an industrial relations manager for the Real Estate Employers Federation, was engaged to prepare AWAs. It was he who sent the email (Exhibit 11) enclosing the undertaking for signature. That email advised:

> *1. This is a standard email to RE/MAX offices in QLD & WA who did AWAs last Feb/Mar.*
>
> *2. The Employment Advocate is poised to approve the agreements* ***subject*** *to an undertaking by the employer. The undertaking is in relation to salespersons who are being paid "commission only" under the AWA.*
>
> . . .
>
> *4. Normally you can bargain out of award criteria but for some reason the Employment Advocate is not prepared to allow that on this occasion.*
>
> . . .
>
> *6. I need is* (sic) *your approval to make the undertaking on your behalf and then the Employment Advocate will approve the agreements.*
>
> . . .

23 It is relevant to note that the AWA negotiated with the claimant was in a context where it is common in the real estate industry for salespersons to be employed on a commission only basis. Indeed counsel for the respondents informed the Court that shortly after the claimant ceased her employment the Australian Industrial Relations Commission created a standard for commission only employment in the real estate industry.

24 It is also relevant that the claimant understood the agreement between herself and the first respondent and actually negotiated an amendment to it.

25 Having said that, it must be remembered that the undertaking itself was required to satisfy the Employment Advocate as to the no-disadvantage test. Until that could be satisfied the AWA could not come into affect. The Court was unable to accept as reliable the second respondent's evidence that the second respondent signed the undertaking having evaluated the four alternatives in relation to the claimant. The Court's assessment is that the second respondent signed the undertaking without taking care to consider the nature and purpose of the no-disadvantage test. The distinct impression gained after observing the second respondent under cross-examination was that she signed the undertaking because she was asked to. The document was poorly drafted. One would have expected a careful employer to seek clarification as to exactly what was being undertaken and what the implications were for the particular employee. It is this lack of care that has led to a serious situation whereby the respondents have not complied with their obligations under the Act.

26 The contraventions have led to the claimant being underpaid a significant amount in wages and superannuation. Although the failure to pay the minimum rate of pay was ongoing it clearly arises out of the same set of facts. The contravention should be dealt with on a global basis. Sentencing principles also require that regard be had to the fact that the second respondent is the sole director of the first respondent, was the person who signed the undertaking and appears to have been the person who introduced the requirement that the claimant enter into an AWA. In such circumstances it is appropriate to apportion between the two respondents the penalty that would have been imposed if there were only one respondent.

27 It is accepted that the first respondent is a franchise business. It is noted that the second respondent will need to borrow to pay damages and any penalty.

28 Counsel for the respondents submits that whether or not contrition has been demonstrated is irrelevant in the circumstances. The Court accepts that the respondents were entitled to seek a favourable interpretation of the undertaking. However it is noted that despite negative observations as to the reliability of the second respondent's evidence in the Court's reasons delivered on 26 February 2008, submissions have persisted in terms of the second respondent evaluating the provisions of the undertaking. Also noted is the lack of appreciation of the consequences of failing to carefully consider the rationale of the no-disadvantage test.

29 The Court understands this to be a one off situation for the respondents. Despite the observation in the preceding paragraph, specific deterrence is not considered to be of particular relevance. However the principle of general deterrence is. The Court has characterised the behaviour of the second respondent in terms of carelessness. It is a serious matter to fail to take sufficient care in assessing the applicability of an AWA in relation to a particular employee and in particular to fail to take sufficient care to address the requirements of the no-disadvantage test. The Court considers that in such circumstances a penalty should be imposed. The penalty needs to take into account the many mitigating factors referred to above including the fact that there is no evidence to indicate that the respondents believed they were not acting in accordance with the law. It must also be recognised that it is a serious matter, albeit through carelessness rather than a deliberate act, to contravene the provisions of an AWA. The penalties are set at a penalty of $4,000.00 payable by the first respondent and $1,000.00 payable by the second respondent.

30 Counsel for the respondents submits that the penalty should be paid to the Commonwealth rather than the claimant. The Court disagrees with this proposition. As the agent for the claimant submits, one rationale for awarding a claimant any penalty is to encourage workers to bring actions in relation to contraventions. This is particularly pertinent in a regime that promotes self regulation.

CONCLUSION

31 The Court will now issue a Schedule of Proposed Orders which will be completed with the insertion of the amount for interest in Order 2 following submissions from the parties

PM Hogan

Industrial Magistrate

2008 WAIRC 00350

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

PARTIES	GAYLE BALDING, WORKPLACE OMBUDSMAN
	CLAIMANT
	-v-
	LIQUID ENGINEERING 2003 PTY LTD (ACN 104 341 657)
	RESPONDENT
CORAM	INDUSTRIAL MAGISTRATE P HOGAN
HEARD	WEDNESDAY, 21 MAY 2008
DELIVERED	WEDNESDAY, 21 MAY 2008
FILE NO.	M 71 OF 2007
CITATION NO.	2008 WAIRC 00350

CatchWords	Breach of Federal Award, Alleged abuse of process, No Case submission, Application to Reopen Case, No Evidence of Consent to Commence Litigation
Result	Claim dismissed
Representation	
Claimant	Mr R Hassall (of Counsel) appeared for the Claimant.
Respondent	Mr G McCorry of *Labourline – Industrial and Workplace Relations Consulting* appeared as Agent for the Respondent

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REASONS FOR DECISION

(Given extemporaneously at the conclusion of the hearing, extracted from the transcript of proceedings and edited by Her Honour)

1 In this particular case the Claimant has closed its case. The Agent acting for the Respondent has made a no case submission based on a number of different arguments, but the one I am addressing at the moment is in relation to the issue of consent to commence litigation.

2 The Statement of Claim, amended and lodged this morning, makes it clear, as did the original Statement of Claim, that the Claimant was seeking an order that the Respondent pay a penalty. It is clear that since certain payments were made by the Respondent in September and October of 2007 that the proceedings have continued solely pursuant to the penalty provisions of the ***Industrial Relations Act 1996*** (the Act). It is clear from the lodgment of the Respondent's Outline of Defence on 5 March 2008 that the Respondent has alleged an abuse of process.

3 The Claimant has taken care to set out its case in considerable detail in the affidavit sworn by Ms Gayle Balding on 20 March 2008. It is clear that the provisions pursuant to which the penalty is sought, and the claim continued, are civil remedy provisions as provided for in section 727 of the Act. Section 729 of the Act provides that:

> *A court hearing a proceeding under a civil remedy provision must apply the rules of evidence and procedure for civil matters.*

4 This Court must also, in my opinion, bear in mind that the claim before it is one that has the potential to result in the imposition of substantial penalties upon the Respondent.

5 Section 167 of the Act makes provision for workplace inspectors and sets out certain legislative requirements in terms of their appointment and powers. Under section 167(7) the Minister is empowered by legislative instrument to give certain directions. Under subsection (8) a workplace inspector must comply with directions given under subsection (7).

6 Under cross-examination today, the Agent for the Respondent has elicited evidence that at the time this litigation commenced, which was on 26 September 2007, there was in place a legislative instrument; i.e. a direction to inspectors as

referred to in clause 7.1 of the current Litigation Policy of the Office of the Workplace Ombudsman. That policy was not in place at the time that this litigation was commenced, but it is clear from a provision within that policy that the direction was in place as of 4 July 2007, and that that was a direction that the person, Ms Balding, who recommended the litigation, was aware of at the relevant time.

7 There is no evidence before the Court that the consent which must be obtained prior to commencing litigation was, in fact, obtained and without such evidence the claim is flawed and must fail. Counsel for the Claimant submits that as this had had not been taken as a procedural point prior to the hearing today, and that therefore the Claimant was not given an early opportunity to meet the issue, then that opportunity should be given now by the Court enabling the Claimant to reopen its case and call evidence on that particular point.

8 The Respondent objects to that course.

9 The problem with that course is that the Claimant carries the burden of proving its claim and, as I see it, in circumstances where the issue of abuse of process was raised well before today, the onus was on the Claimant to prove its case in terms of establishing the basis for a penalty. The burden of proving the abuse of process issue is, of course, one carried by the Respondent. Nevertheless, it was an issue well and truly out in the open and one that the Claimant was expected to come to court prepared to meet.

10 The consent to commence litigation issue is not, of course, necessarily part of the abuse of process argument. It is an issue that goes to the validity if the instigation of the litigation. I consider, however, that because of the abuse of process issue it changes the complexion in terms of the presentation of the Claimant's case.

11 In presenting her case the Claimant has overlooked an important aspect. The Claimant has neither produced evidence of the consent required under ministerial direction, (required to be complied with under the legislation itself pursuant to section 167 of the Act) nor, indeed, has the Claimant produced the recommendation to litigate. Again, one would not necessarily expect these matters to be addressed in a standard claim directed at penalty, but as I have said earlier, I think the complexion changes when there is an abuse of process issue raised by the other side.

12 The Claimant has closed its case. The legislation, as I understand it, makes no provision which places the onus on a Respondent to raise such an issue as a procedural matter, as is the case in certain Acts providing for either criminal and/or traffic prosecutions. Given those observations I do not consider it appropriate that the Claimant be permitted to reopen its case.

13 Accordingly, the end result is that I have agreed with the Agent for the Respondent's submission that on that point alone the Claimant has failed to establish its claim and, having made those observations, I do not need to go on to consider the other issues raised by way of the no case submission.

14 There will be an order that the claim is dismissed.

PM Hogan

Industrial Magistrate

2008 WAIRC 00351

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

PARTIES	MICHAEL TKACZ
	CLAIMANT
	-v-
	WATSON HJ & ASSOCIATES
	RESPONDENT
CORAM	INDUSTRIAL MAGISTRATE G.N. CALDER
HEARD	WEDNESDAY, 14 MAY 2008
DELIVERED	WEDNESDAY, 14 MAY 2008
FILE NO.	M 87 OF 2005
CITATION NO.	2008 WAIRC 00351

CatchWords	Application for costs, frivolous or vexatious, whole of proceedings.
Result	Application for costs dismissed.
Representation	
Applicant	Mr DJ Garnsworthy appeared on behalf of the Claimant (the Respondent in the application).
Respondent	KJ Trainer appeared on behalf of the Respondent (the applicant in the application).

REASONS FOR DECISION

(Given extemporaneously at the conclusion of the hearing, extracted from the transcript of proceedings and edited by His Honour)

1 I am going to give an extempore decision and that is not a reflection upon the quality or quantity of the submissions that were made to me. They were extremely full, however, the view that I have come to is that the threshold has not been achieved; that is, I am not satisfied that the institution of the proceedings was either frivolous or vexatious.

2 My reasons are these. The exercise of the determination of the issue of costs in a case such as this is one where it could not be said on the initiating papers that were filed that the claim was self-evidently frivolous or vexatious and where the outcome of the claim depended upon my assessment of the witnesses, my conclusions of fact, my findings as to credibility and my findings, in particular, as to the circumstances of the relationship between the Claimant and the Respondent.

3 I do not agree with the submission that in order for a finding to be made that proceedings are frivolous or vexatious the case must be an extreme one. It seems to me that the case is either one that was instituted frivolously or vexatiously or it was not and I do not see that it adds anything to the description of those criteria. In practice, the awarding of costs is rare but that is not as a consequence, in my view, of anything more than a proper application of the meaning of the words "*frivolous*" and "*vexatious*" as used in section 83C of the ***Industrial Relations Act 1979*** (the Act). I do not think it is necessary to give any particular consideration as to why the legislation has such a provision in section 83C. That is, the provision that says that there are to be no costs unless it is established that the institution of the proceedings or the defence of them was frivolous or vexatious. Looking at those things may perhaps give some guidance and there is some comment on it by Le Miere J in the decision of the Industrial Appeal Court in ***Fisk v Kenji Auto Parts Ltd T/As SSS Auto Parts (WA) 87 WAIG 2443***. It may give some guidance as to what the Court may perhaps look for but I do not think it is of any great assistance to consider why there is a prohibition on costs other than in those particular circumstances where some additional assistance is required.

4 It can be, in my view, productive of error to put too much focus upon the outcome of the proceedings, upon discrete findings of fact, upon conclusions as to credibility and also to focus too much upon the issues that were in fact joined by the parties in the course of the hearing. Hearings are often dynamic in the sense that the focus can change, the relative importance of various aspects of the evidence can change, and the nature of the submissions that emerge can change. That frequently happens in adversarial proceedings and particularly in adversarial proceedings where there are not full pleadings.

5 What the Court must look at, in my opinion, is the circumstances that pre-existed the commencement of the claim; that is, immediately preceding the initial filing and lodgement of the proceedings. Those facts, in a case such as this are, generally, not going to fully emerge until all of the evidence has been heard and tested and the matter determined by the Court. That is when the sum of the facts emerges and it is the sum of those pre-existing facts that must be taken into account in deciding the issue of whether the institution of the action was frivolous or vexatious. That determination of those pre-existing facts, which of course include the knowledge of the Claimant, in my view, require an assessment of what the Claimant knew or ought to have known by the time of commencement of the proceedings. I use the words "*ought to have known*" intentionally, because I think there is an obligation on any person who initiates proceedings to take reasonable steps to ascertain whether the proposed factual basis of the claim and the proposed legal basis of the claim, in particular, the proposed factual basis of the claim, is actually one which justifies taking the step of initiating proceedings.

6 I did make adverse findings as to the credibility of Mr Tkacz. There were also parts of the evidence of Ms Watson that I had reservations about or that I did not accept. Of course, I did not canvass in my findings all of the evidentiary material that was put before me but, nevertheless, I was aware of all of the evidence that had been put before me. The case was one where it could not be said that it was never open to the Court to make findings of fact or law which would result in a favourable outcome to Mr Tkacz; that is, in his being successful. Where the onus of proof lay is something that must be borne in mind. A failure to succeed is, in effect, a failure to discharge the onus of proof. It does not necessarily follow that because a party fails to discharge the onus of proof that it never had a case and that it was unreasonable or "*frivolous or vexatious*" to commence proceedings.

7 In this particular case there were findings of primary fact that I needed to make concerning the relationship of the parties to one another. There were findings of primary fact that I had to make in relation to matters that did not directly concern the relationship between the parties and those facts included the receipt of Centrelink benefits by Mr Tkacz and also included correspondence and the contents of correspondence in various communications between Mr Tkacz and the New South Wales College of Law. I was required to draw inferences from those findings of primary fact.

8 In my opinion, it could not be said that the outcome of my assessment of the evidence, my findings as to primary facts and the inferences that I drew from those primary facts were so self-evident that at the commencement of the proceedings that it could be said that Mr Tkacz had a case in respect of which, objectively, it could be said he had absolutely no hope of success. It could not be said that, adopting the words used by Mr Garnsworthy for convenience of expression, the Claimant's case "*was manifestly groundless or doomed to failure*".

9 Almost self-evidently there was the potential for adverse findings of fact and credibility to be made arising out of the documentary material that was produced in the course of the trial relating to Centrelink benefits in particular and the inconsistencies between the claim of Mr Tkacz before me that he was employed and the contents of those documents which indicated that he was not employed and was willing to seek and obtain work. To a certain extent, my findings in relation to that are collateral to the question of whether or not he was in fact employed by the Respondent. By that I mean my findings related essentially to credibility. Arguably, it was not the case that, even if he was claiming and receiving

social security benefits (whether he was entitled to them or not), that such a finding was necessarily determinative of whether or not he was an employee of Ms Watson or H.J. Watson and Associates. As it transpired it was a significant factor in my conclusion as to his credibility. Those sorts of things, however, were collateral, in a sense, to the central issue. The central issue before me was whether or not the circumstances of the relationship between the Claimant and the Respondent were such that, either on the basis of direct evidence or on the basis of inference, it was open to the Court to conclude that there was a relevant employer-employee relationship.

10 There was an unusual aspect about the facts that existed at the time when the proceedings commenced. That was that there was such a long period of time during which, as I found, there existed a relationship similar to that of employer-employee in the sense that Mr Tkacz worked for the Respondent, but the difference being, as I found it, there was no contract of employment. There was no obligation to employ but the very fact that he worked for such a long time without pay was something which was unusual and in my view it could not be said that that circumstance, even taking into consideration the other evidence that emerged, was not one from which an inference could never have been drawn favourable to Mr Tkacz.

11 I also had to take into account, in determining whether or not the proceedings were vexatious, whether they were brought for any collateral purpose or purposes "*and not for the purpose of having the Court adjudicate on the issues to which they give rise*". I take those words directly from the summary provided to me, again by Mr Garnsworthy, from ***Attorney General v Wentworth (1988) 14 NSWLR 481*** at 491. In my view, as I mentioned earlier in discussion with Mr Trainer during his oral submissions, there is an element of subjectivity which I think necessarily comes into a consideration of whether proceedings are vexatious, adopting that description of the meaning of vexatious that I have just mentioned. To that extent it was necessary for me to take into account whether or not inferences may not have been properly drawn by Mr Tkacz as to the nature of the relationship between himself and Ms Watson arising from her conduct, his conduct and their mutual conduct, that may not have created an estoppel where, regardless of whether or not there was (and there was not) a written agreement, she may well have been estopped, on the basis of conduct reasonably entitling him to draw inferences as to the nature of the relationship, from denying the existence of a relevant employer-employee relationship. That is an example, I think, of the sort of thing that in this case, even in the circumstances that existed at the time when it was commenced, the Court was almost necessarily required to give consideration to, and the outcome of such consideration is not something which could be said to be so self-evidently one which would be a failure on the part of the Claimant, that it could be said either that the proceedings were frivolous or that they were vexatious. That is a factor that mitigates against a conclusion of frivolous or vexatious commencement.

12 I have mentioned ***Fisk*** (supra) and my understanding is that one of the primary aspects of the decision of Le Miere J is that the "*whole of the proceedings*" need to have been frivolous or vexatious. I have also taken into account, and with respect, agree with some of the matters mentioned by His Honour Magistrate Cicchini in the case of ***The Community and Public Sector Union v Vice Chancellor, Murdoch University 85WAIG 1998*** where His Honour was required to consider issues similar to those that are now before me. Reference has been made to certain parts of His Honour's judgment in Mr Trainer's submissions. His Honour said (para 36) in the context of proceedings being frivolous or vexatious:

> *The meaning of "without reasonable cause" has been the subject of judicial consideration.*

13 His Honour referred to the decision of Marshall J in ***Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Nestle Australia Ltd [2005] 146 IR 379***. In the course of a quote from the decision of Marshall J appears a quote from a decision of a Full Court in ***Spotless Services Australia Ltd v Marsh [2004] FCAFC 155*** , namely:

> *Whether a proceeding has been commenced without reasonable cause is relevantly established is a matter of objective fact.*

14 That criterion of objective assessment is to be applied to section 83C of the Act. Reading on, Marshall J said:

> *In Spotless, the Full Court considered that the application for prerogative relief was bound to fail. It ordered costs against the unsuccessful applicant. The expression "bound to fail" is similar to expressions such as "so obviously untenable that it cannot possibly succeed", "manifestly groundless" and "bad beyond argument" . . .*

15 In my view, none of those criteria can be properly applied to the institution of the proceedings by Mr Tkacz. There is a vast difference between a weak case or an unsuccessful one and a case which can be described in those terms, and that difference is not manifest in the present case. Further, Marshall J quotes von Doussa J in ***Hatchett v Bowater Tutt Industries Pty Ltd (1991) 28 FCR 324*** at 327, namely:

> *The test imposed by the expression "vexatiously or without reasonable cause" is similar to the one applied by a court on an application for the exercise of summary power to stay or strike-out proceedings: see Heidt v Chrysler Australia Ltd (1976) 26 FLR 257 at 272 to 273 . . .*

16 ***Heidt*** (supra) is another case that I have been referred to. Marshall J, in paragraph 6, has then referred to what Gibbs J said in ***R v Moore; Ex parte Federated Miscellaneous Workers Union of Australia (1978) 140 CLR 470*** at 473, namely:

> *In my opinion a party cannot be said to have commenced a proceeding "without reasonable cause", within the meaning of that section, simply because his argument proves unsuccessful.*

17 I appreciate that the terminology there used is different to that in section 83C of the Act. The sense that is conveyed by the term "*without reasonable cause*" and "*frivolous or vexatious*" is not the same but has similar characteristics and I think that the message that emerges from ***Heidt*** (supra), namely, simply because an argument proves unsuccessful does not mean that proceedings have been commenced frivolously or vexatiously applies to section 83C. In fact, I think that frivolously and vexatiously is arguably another step beyond commencing a proceeding without reasonable cause; not much of a step but I think it is arguable that there is a difference.

18 Suffice to say, without reading any more from the decision of His Honour Magistrate Cicchini, I agree, with respect, with the appropriateness of the matters that he has quoted therein and with his reasoning.

19 There is a difference between frivolous and vexatious. "*Vexatious*", I accept, can properly be described, as I have mentioned, as in ***Attorney General v Wentworth*** (supra) and as cited by Mr Garnsworthy in his written submissions. As to "*frivolous*", I refer to the decision of the Full Court of Western Australia in the matter of ***Coolgardie Gold v Copperfield Gold (1995) Library No 950263***. That matter involved a consideration of the term "*frivolous and vexatious*" in the context of the ***Mining Act***. His Honour Steytler J there quoted from the decision of the court in ***Norman v Mathews (1916) 85 LJKB 857*** at 859 per Lush J, namely, that for a case to be brought within the description of being a frivolous action, it must appear that the cause of action is one which, on the face of it, is clearly one which no reasonable person could properly treat as bona fide and contend that he had a grievance which entitled him to bring the matter before the Court. I do not think that Mr Tkacz's case could be said to fall within such a description.

20 I agree with Mr Garnsworthy that it must be clear-cut. It must be very clear before a Court can properly make a finding that proceedings are frivolously or vexatiously instituted. I have already indicated that the fact that there were negotiations is of no consequence in this case in connection with the determination of whether or not the proceedings were commenced frivolously or vexatiously. There is another aspect, I think, that needs to be addressed in respect of that. My understanding is that the negotiations that are referred to were negotiations which may have occurred after the proceedings had commenced. In the itemised bill of costs, item 9, there is a reference to "*Offer of settlement including the drafting of the terms and all negotiations*". That is consistent with negotiations having taken place during the trial.

21 I have taken into account, in reaching my views, the submissions that Mr Trainer has made in relation to inconsistencies between the facts as they existed, namely, working for the Respondent, and the statements of Mr Tkacz as set out in some of the documents that were tendered in evidence in relation to his admission as a solicitor and in relation to Centrelink benefits. In my view it could not be said that there was necessarily a critical inconsistency. There was a necessary inconsistency between saying in those documents that he was not working or that he was on work experience and saying in evidence that he was working as an employee of the Respondent. There was not necessarily an inconsistency between the nature of the proceedings and those documents. I say that because where he mentioned, for example, work experience and where he said that he was looking for work and not engaged in work, they are matters which might be untrue but do not necessarily affect the legal nature of the relationship between himself and the Respondent. He was not getting paid for his work. The person for whom he was working, namely Ms Watson, had not unequivocally said he was going to be paid. They were my findings of fact and I will say no more about that, other than to say that I have taken those things into account and they are certainly not determinative of the issue.

22 For those reasons it is not necessary for me to give consideration to some of the other potentially difficult matters that have been raised. They are my findings.

23 The application for costs will be dismissed.

GN Calder

Industrial Magistrate

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2008 WAIRC 00338

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CLAIRE ERIN ANDREWS
	APPLICANT
	-v-
	WHEATBELT GP NETWORK
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	WEDNESDAY, 4 JUNE 2008
FILE NO	U 41 OF 2008
CITATION NO.	2008 WAIRC 00338

Result Application discontinued

Order

WHEREAS this is an application pursuant to section 29(1)(b)(i) of the Industrial Relations Act 1979; and

WHEREAS the applicant advised the Commission on 22 May 2008 that she wanted to discontinue the application; and

WHEREAS the parties have waived their rights to speak to the Minutes of Proposed Order pursuant to s.35(4) of the Industrial Relations Act 1979;

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

THAT the application be and is hereby discontinued.

(Sgd.) S WOOD,
[L.S.] Commissioner.

2008 WAIRC 00342

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SARAH JANE BROWN
	APPLICANT
	-v-
	MAURICE MEADE
	RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE	THURSDAY, 6 JUNE 2008
FILE NO/S	U 191 OF 2007
CITATION NO.	2008 WAIRC 00342

Result	Application dismissed
Representation	
Applicant	No appearance
Respondent	No appearance

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(i) of the Industrial Relations Act 1979 ("the Act"), lodged on the 5th day of December 2007;

NOW THEREFORE, the Commission, pursuant to the powers conferred under the Act, hereby orders:

THAT this application be, and is hereby dismissed.

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

2008 WAIRC 00325

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THELMA J DOOHAN
	APPLICANT
	-v-
	KIM VU
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	MONDAY, 26 MAY 2008
FILE NO/S	U 179 OF 2007
CITATION NO.	2008 WAIRC 00325

Result	Discontinued
Representation	
Applicant	Mr G Doohan (as agent)
Respondent	Mr M Devlin (of counsel) and Ms M Speering (of counsel)

Order

WHEREAS this is an application pursuant to s29(1)(b)(i) of the Industrial Relations Act 1979; and

WHEREAS on 17 December 2007 the Commission convened a conference for the purpose of conciliating between the parties, however, agreement was not reached; and

WHEREAS the application was set down for hearing and determination on 3 and 4 April 2008; and

WHEREAS after the hearing had commenced on 3 April 2008 the Commission adjourned the hearing into a conference; and

WHEREAS at the conclusion of the conference the parties reached an agreement in principle in respect of the application; and

WHEREAS on 21 May 2008 the applicant filed a Notice of Discontinuance in respect of the application; and

WHEREAS on 22 May 2008 the respondent consented to the matter being discontinued;

NOW THEREFORE having heard Mr G Doohan as agent on behalf of the applicant and Mr M Devlin of counsel and Ms M Speering 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 this application be, and is hereby discontinued.

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

2008 WAIRC 00340

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RAYLENE DAWN FRANCIS
	APPLICANT
	-v-
	CORAL BAY SUPERMARKET & OUTDOOR CENTRE
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	THURSDAY, 5 JUNE 2008
FILE NO/S	U 29 OF 2008
CITATION NO.	2008 WAIRC 00340

Result	Order issued
Representation	
Applicant	Ms R Francis on her own behalf
Respondent	Mr R Bowering

Order

WHEREAS on 12 March 2008 Raylene Dawn Francis applied to the Commission for an order pursuant to the *Industrial Relations Act, 1979*; and

WHEREAS on 9 and 22 May 2008 the Commission conducted conferences between the parties pursuant to section 32 of the *Industrial Relations Act, 1979*; and

WHEREAS at the second conference settlement was reached between the parties where the respondent agreed to pay the applicant $2,000 nett by cheque, in full and final settlement of the applicant's unfair dismissal claim by no later than 29 May 2008; and

WHEREAS the parties agreed to an order issuing in the terms of the settlement;

NOW THEREFORE having heard Ms R Francis on her own behalf and Mr R Bowering on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, and by consent, hereby orders:

THAT the respondent pay the applicant $2,000 nett by cheque, in full and final settlement of the applicant's unfair dismissal claim by no later than 29 May 2008.

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

2008 WAIRC 00291

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BRADLEY DEAN GRANDILE
	APPLICANT
	-v-
	GLASKIN FAMILY
	RESPONDENT
CORAM	COMMISSIONER S WOOD
HEARD	WEDNESDAY, 30 APRIL 2008
DELIVERED	THURSDAY, 8 MAY 2008
FILE NO.	B 11 OF 2008
CITATION NO.	2008 WAIRC 00291

CatchWords	Contractual benefits claim -- Entitlements under contract of employment - Percentage of catch - Industrial Relations Act 1979 (WA) s 29(1)(b)(ii);
Result	Contractual entitlement to be paid
Representation	
Applicant	Mr BD Grandile
Respondent	Ms C Oliver

Reasons for Decision

1 This is an application pursuant to s.29(1)(b)(ii) of the Industrial Relations Act 1979 ("the Act"). The applicant, Mr Grandile, claims that he is entitled to 6% of the catch for the time he worked for the respondent. Mr Grandile worked as a deckhand on the respondent's boat between approximately 24 November 2007 and 20 December 2007. There is a difference in the evidence as to when he started employment, however, it is common ground that he commenced catching crayfish on 25 November 2007 and left his employment without notice sometime after finishing the catch on 20 December 2007. It is common ground also that a verbal employment contract was made between Mr Grandile and Mr Glaskin, a partner in the respondent's business, prior to Mr Grandile commencing work. It is common ground that Mr Grandile was to be paid at the rate of 7% of the catch. However, 1% of the 7% payment was to be withheld until the end of the season as an incentive for Mr Grandile to complete the season.

2 What is not common in the evidence is that the respondent's witnesses say that there was also an agreement that Mr Grandile would give notice prior to leaving his employment. Mr Grandile says that there was no such agreement. Additionally, Mr Grandile says that on 20 December 2007 his back was too sore for further work and so he left his employment without informing his employer. Ms Oliver, the other partner in the respondent's business says that they were not aware of Mr Grandile having a bad back. Mr Glaskin and Ms Oliver say that because of Mr Grandile's sudden absence, the business lost money, and the other deckhand lost money, as the boat could not be worked on 21 December 2007. Mr Grandile considers that the boat could have been operated on 21 December 2007. He says that the boat lacked proper maintenance. Put differently, he attributes fault to Mr Glaskin for the lack of catch on 21 December 2007.

3 Mr Grandile was paid one payment of 7% during his employment and one payment of $3,000 following his departure. Both payments were gross figures and it is common ground that Mr Grandile was responsible for his own taxation. He had deposited into his bank account one payment for $1,331.95 on 11 December 2007. This was for his work up to 30 November 2007. He is not sure why he was paid at the rate of 7%. Ms Oliver says that he was paid 7% of the catch as the respondent pays twice a month and the first payment covered only a portion of the monthly period. The next payment Mr Grandile received was for $3,000 which was deposited into his bank account on 24 December 2007. According to Ms Oliver this is a sum that Mr Glaskin and she decided to pay Mr Grandile, out of the kindness of their heart, as Mr Grandile has two children. She complains that the applicant had left suddenly and caused them to lose money. Mr Glaskin says that Mr Grandile was not due any money given his actions and the lack of notice in leaving.

4 The key difference in the evidence, which must be resolved based on an assessment of the credibility of the witnesses, is whether the employment contract, at the time of making the contract contained any provision for notice. Mr Glaskin says also that he told Mr Grandile that he had to give notice on one occasion when they were bringing the boat back. Mr Grandile and Mr Glaskin initially had a discussion which established the contract prior to Mr Grandile commencing employment. Mr Glaskin says that they spoke about a range of matters to do with the job, including relevantly that he would be paid 7% of the catch, but 1% of that would be kept until the end of the season as an incentive to ensure Mr Grandile completed the season. Mr Glaskin says that he also told Mr Grandile that if he left he would not be paid into his account. When further questioned by the Commission, Mr Glaskin's evidence was that the agreement was for one week of notice.

5 I do not consider, having seen and heard the witnesses, that the contract of employment contained any provision for notice. The contract is verbal, and minimal in content. The contract already contained a penalty for not completing the season of 1% of the catch. It is not apparent to me why then there would be a need for a notice provision, other than for the smooth operation of the business. The catch was disrupted for one day due to Mr Grandile's sudden departure. In my view, Mr

Glaskin, in his evidence, provided the Commission with a reason, in his view, why payment might be withheld as opposed to a true recollection of his conversation with the applicant when the employment contract was established. Ms Oliver was not party to any contractual discussions and could therefore provide no direct evidence as to the terms of the contract. I find that the employment contract contained no provision for notice. The contract simply provided that for his work Mr Grandile would be paid at the rate of 7% of the catch, and that 1% of that payment would be withheld until the end of the season, as an incentive for Mr Grandile to complete the season.

6 Mr Glaskin says also that the issue of notice was mentioned when they were coming down in the boat. Mr Grandile says that Mr Glaskin jokingly said that he would take out $50 if he left. This latter conversation could not amount to any agreed variation to the original contract.

7 I note also that the respondent's Notice of Answer and Counterproposal makes no mention of notice. The Answer states simply that, "money was withheld from Brad to compensate for loss of income for both boat and crew on 21/12/07, due to his sudden departure". I consider that is the true and sole reason for not paying Mr Grandile his correct percentage of the catch.

8 Exhibit R1 displays the amount of catch from 1 December 2007 until 20 December 2007. The total amount of payment due to Mr Grandile at the rate of 6% of the catch, for his entire employment was $8,774.02. He was paid in total $4,331.95. The difference between what he was paid and should have been paid was 4,442.07. Mr Grandile was paid at the rate of 7% for his initial payment, but I do not consider that this payment overrode or was an addition to the contract as originally struck. Mr Grandile said at hearing that he was claiming only 6% of the catch for the time he worked.

9 The Industrial Appeal Court in the matter of *Hotcopper Australia Ltd v David Saab* 81 WAIG 2704 set down the following conditions for a claim under s.29(1)(b)(ii). They stated:

> "34. The limitations (and/or conditions precedent to the exercise of jurisdiction and/or power) include the following:-
>
> (a) The claim must relate to an "industrial matter", as defined in s.7 of the Act.
>
> (b) The claim must be made by an "employee", as defined in s.7 of the Act.
>
> (c) The benefit claimed must be a contractual benefit, i.e. the claimant must be entitled to the claim under his/her contract of service.
>
> (d) The subject contract must be a contract of service.
>
> (e) The benefit must not arise under an award or order of the Commission.
>
> (f) The benefit must have been denied by the employer.
>
> (See also the discussion of the nature of s.29(1)(b)(ii) claims in *Ahern v AFTPI* 79 WAIG 1867 (FB).) "

10 All of these conditions are present in this matter. Mr Grandile completed his work up to and including 20 December 2007 and therefore, for the entire period of his employment, he should have received payment at the rate of 6% of the catch. He was overpaid by 1% for the initial period to 30 November 2007. He was paid $1,331.95 which was 7% of the catch. He should have been paid $1,141.67. Therefore he was overpaid $190.28 for that period. This amount, plus the additional $3,000 which he received, should be deducted from the figure for 6% of the catch from 1 December to 20 December 2007 inclusive. Ms Oliver provided the catch figures. The relevant figures are as follows:

Date	Catch	6%
1/12/2007	$ 2,395.80	$ 143.75
2/12/2007	$ 4,527.60	$ 271.66
3/12/2007	$ 4,677.20	$ 280.63
4/12/2007	$ 3,883.00	$ 232.98
5/12/2007	$ 2,756.60	$ 165.40
6/12/2007	$ 6,932.20	$ 415.93
7/12/2007	$ 6,457.00	$ 387.42
8/12/2007	$ 5,391.20	$ 323.47
9/12/2007	$ 5,710.90	$ 342.65
10/12/2007	$ 4,533.30	$ 272.00
11/12/2007	$ 2,571.40	$ 154.28
12/12/2007	$ 13,668.90	$ 820.13
13/12/2007	$ 17,091.30	$ 1,025.48
14/12/2007	$ 12,006.00	$ 720.36
15/12/2007	$ 7,902.80	$ 474.17
sub-total	$100,505.20	$ 6,030.31
16/12/2007	$ 4,261.90	$ 255.71
17/12/2007	$ 7,939.60	$ 476.38
18/12/2007	$ 6,451.50	$ 387.09
19/12/2007	$ 3,643.20	$ 218.59
20/12/2007	$ 4,404.50	$ 264.27
sub-total	$ 26,700.70	$ 1,602.04
TOTAL	$127,205.90	$ 7,632.35

11 Therefore Mr Grandile should receive $7,632.35 less $3,190.28, equals a sum of $4,442.07. I would order that the respondent pays to the applicant, within 7 days from the date of the order, the sum of $4,442.07.

2008 WAIRC 00303

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BRADLEY DEAN GRANDILE
	APPLICANT
	-v-
	GLASKIN FAMILY
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	FRIDAY, 16 MAY 2008
FILE NO	B 11 OF 2008
CITATION NO.	2008 WAIRC 00303

Result	Contractual entitlement to be paid
Representation	
Applicant	Mr BD Grandile
Respondent	Ms C Oliver

Order

HAVING heard Mr BD Grandile on his own behalf and Ms C Oliver on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the said respondent do hereby pay within 7 days of this order, as and by way of denied contractual entitlement the amount of $4,442.07 to Bradley Dean Grandile.

(Sgd.) S WOOD,
[L.S.] Commissioner.

2008 WAIRC 00323

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PETER GODFREY HARRIS
	APPLICANT
	-v-
	TIMES PUBLISHING GROUP
	RESPONDENT
CORAM	COMMISSIONER S WOOD
HEARD	TUESDAY, 22 APRIL 2008
DELIVERED	FRIDAY, 23 MAY 2008
FILE NO.	U 157 OF 2007, B 157 OF 2007
CITATION NO.	2008 WAIRC 00323

CatchWords	Repudiation of contract – Harsh, oppressive and unfair – Outstanding contractual entitlements - Industrial Relations Act 1979 (WA) s29(1)(b)(i) & (ii) – Whether fair go all round afforded – Contractual entitlements, annual leave, notice and underpaid wages - Failure to meet requirements of s41 of the Minimum Conditions of Employment Act 1993 - Performance issues - Reinstatement impracticable - Compensation
Result	Applicant unfairly dismissed; compensation awarded contractual entitlements claim awarded
Representation	
Applicant	Mr R Bower of Counsel
Respondent	Mr K Castellas

Reasons for Decision

1 The applicant, Mr Harris, commenced employment with the respondent as a Business Development Manager on 15 January 2007. He was responsible for a small sales team in the respondent's Perth office which sold advertising in magazines. On 11 July 2007 Mr Castellas, the General Manager of Operations for the respondent, presented the applicant with a new contract of employment which reduced his salary from $900 to $500 per week. The respondent then on 8 August 2007 informed the applicant that his place of work would change from Perth to Rockingham. Mr Harris did not accept the unilateral change to his employment contract and tendered his resignation on 21 August 2007. He left the respondent's employment on 22 August 2007.

2 Mr Harris claims that he was constructively dismissed and seeks compensation for the dismissal. He claims also that he is owed the following unpaid contractual benefits:

"1.	Outstanding wages	$1,832
2.	Payment in lieu of notice	$3,600
3.	Holiday pay	$596"

3 Mr Harris gave evidence that he never had any formal discussions with regard to his duties or his duty statement. There were never any discussions with regard to his current and expected performance. He said his primary role and duties were to lead and train the sales team and to recruit the sales team with sales being secondary to that.

4 In his original conversations with Ms Janice Chantler, he was told that he would be reporting directly to Ms Chantler. After starting at Times Publications his reporting function changed and he was to report to Mr Bolland, the National Sales Manager.

5 Mr Harris says he made numerous requests for the database, that is the primary source of contact to generate business, but this was denied to him and the staff working out of the Perth office. It was only available to the sales staff operating out of the Rockingham office.

6 Mr Harris says he interviewed Mr Castellas for a role of sales executive at the company. Subsequently Mr Castellas was appointed as General Manager and Mr Harris was asked to report to him.

7 Mr Harris says he interviewed Mrs Darcy York for a sales role, and gave a favourable report. Subsequently, she was interviewed by Mr Castellas and appointed as Sales Manager. Mr Harris was then to report to Mrs York.

8 Mr Harris says there were plenty of conversations with Mr Castellas with regard to sales and the need for sales. There was never any structured, organised assessment. There was no analysis of his individual sales. There was no direction as to making greater sales or any plan put in place at all.

9 Mr Harris says that, on 11 July 2007, he was called in to the office and offered a replacement contract. He was asked to read it at another time, consider the contract and respond to Mr Castellas if he agreed to it. This contract offered a retainer of $500 per week with a sales commission component, as against the $900 he was receiving. It was an inferior contract.

10 Mr Harris says that on the morning of 8 August 2007, Mrs Darcy resigned. Mr Castellas then met staff at around 4:00 pm and informed them that the office would be closed immediately. All staff would be required to work from the Rockingham office. His keys were taken from him and the office was locked. Shortly thereafter he had a physical and mental breakdown. The pressure over time, the frustration and confusion had taken its toll.

11 Mr Harris says that he was underpaid $200 on 21 March, 4 April, 18 April, 30 May, 13 June, 27 June 2007. He was also underpaid $183 on 20 July and $30 on 3 August 2007. He was underpaid in total an amount of $3,507.12.

12 Mr Harris says that he tendered his resignation on 22 August 2007. It was a very difficult time for him and continued to have some effect on him. He found other employment after a week. He does not wish to return to work at Times Publishing. He says the employment conditions at Times Publishing are inferior and totally changed. The relationship with Mr Castellas is now estranged.

13 Under cross-examination Mr Harris agrees that there was a clause in his contract which stated:

> "While in the process of finding and establishing a sales team we would expect you to generate sales of $5000 per week."

14 Mr Harris maintains that his main role was recruiting, training and managing a sales team. He says:

> "What was expected of me in terms of discussions with Janice Chantler, partner in the business, was that the sales roles was not the primary consideration." (T23)

15 Mr Harris says that he does not recall any conversation about shutting down the Perth office.

16 Mr Keith Castellas gave evidence that he has been the General Manager of Operations since 20 May 2007. He was responsible for the entire operation of the organisation. He was hired to manage the operation and assess the people within the organisation, assess the value of the Perth office in view of its failure to makes sales and therefore profit over an extended period of time. The Perth office had one more person over the Rockingham office. The Perth office failed to break even in every week that it was open. Mr Harris was appointed to help manage the office, hire and train the new sales staff and to achieve personal and team sales targets for which he was remunerated at a much higher level. Mr Harris' role would have been a challenging one purely due to the fact that it was a start up operation.

17 On 22 May 2007 Mr Castellas met with the Perth office staff and noted their likes and grievances, and what he could do to repair that. He says Mr Harris asked for a central, accessible data base and the top 100 clients to distribute to his team. He asked also for greater access to the editorial aspects of the business.

18 Mr Castellas says that within the first month he extracted the top 100 clients as well as all the clients from the Rockingham sales people. He took off all the clients that belonged to the Architect and Builder magazine, the cream of all the clients, and gave them to Mr Harris and his team. He reiterated to Mr Harris that he had every opportunity to research features and present them to the editor.

19 Mr Castellas says that over a 31 week period Mr Harris made his sales target only once. He had zero sales on 12 occasions. Mr Harris averaged $1,121 per week of sales as against his counterparts in the Rockingham office who averaged $6,386 and $5402 respectively. The principals of the business, Ms Chantler and Mr Berry on more than one occasion asked him to close the Perth office. Mr Castellas held weekly meetings and weekly figures were discussed. He says he went to the Perth office on several occasions, up to two or three times a week, to support and motivate staff and to discuss how to improve the operation. Ms Chantler and he had a meeting with the entire team at the Perth office and informed them that the office would have to close if there was no further improvement, as they were losing over $4000 to $5000 per week.

20 With regard to the errors in pay, Mr Castellas says he asked Mr Harris to prepare a reconciliation and the amount of $770 was paid subsequently.

21 Under cross-examination, Mr Castellas said that the effort of the Perth office staff was poor as compared to the Rockingham staff. Ms Chantler on several occasions sent a printed copy of the entire data base over to the Perth office as well as an electronic copy of the entire database. Mr Castellas said that the comments like, "don't touch this client, it's mine" were to be ignored and only used as a contact rather than anything else. Mr Castellas agreed also that Mr Harris had developed some feature items and editorial material. Sales staff were able to sell advertising into those entities that were the subject of those articles.

22 Mr Castellas said he hired Mrs York in the hope that she would be able to help motivate and train and do what Mr Harris had not done in the period of six months.

23 With regard to the new contract, Mr Castellas said that he gave the new contract to Mr Harris and told him that he had a period of time to think about it. He denies giving him a month to do so. He said that there were so many opportunities given to Mr Harris to produce an achievable target but this was not done. Hence the contract was put into place immediately.

24 Mr Castellas says that Mr Harris must have known the Perth office was closing because he has very good documentation of all the emails and information during that time.

25 Mr Castellas says that although there was a reduction in salary, the new commission structure that was in place would have enabled Mr Harris to exceed his current level of income if he had met the targets. He believes that the company had every right to change the contract but should have given Mr Harris four weeks' notice. Mr Castellas says he expected Mr Harris to travel to the Rockingham office.

26 Mr Castellas says that Mr Harris did not take any annual leave so there was an accrual of 73.8 hours of holiday pay and 42.1 hours sick leave. He deducted 37.5 hours from the 42.1 hours of sick leave which left 4.6 hours remaining. For the last 3 days of Mr Harris' work he deducted 4.6 hours plus 17.9 hours from the holiday pay leaving an amount of 55.9 hours holiday pay.

27 There can be no doubt that the respondent made a unilateral and substantial change to the applicant's employment contract. Mr Castellas says that Mr Harris could have earned more through commission. This is not to the point. There was an immediate detriment to Mr Harris of which the respondent took no account and about which the respondent did not consult Mr Harris. Mr Castellas says that they had no intention of terminating the services of Mr Harris. I accept this evidence. However, Mr Harris suffered an immediate and substantial economic penalty due to the actions of the respondent. Mr Harris was entitled to treat such a breach as a repudiation of his contract and he did so; not immediately but soon thereafter. In that way the termination was at the hands of the employer. Mr Harris suffered stress and had to seek medical treatment as a result of the actions of his employer. The respondent without any consultation with Mr Harris gave him a new contract and proceeded to implement that contract to the disadvantage of Mr Harris.

28 It appears to me from the evidence that the final straw for Mr Harris was the change in location of his employment to Rockingham. Again there was no consultation with Mr Harris over the move; at best he simply was informed. His initial contract stipulated that his job would be located in "the Perth Office of Times Publications". At that time the main operations of the company were in Rockingham. Mr Harris perceived the change of location as a disadvantage to him. I accept this explanation.

29 Much of the respondent's cross-examination of Mr Harris centred on the alleged poor performance of the applicant and the Perth office. I have no doubt having reviewed the transcript of all the evidence that the sales figures of the Perth office were not good. Mr Harris does not say they were good. He says that there were no sales targets, yet agrees that his contract, in the duty statement which forms part of the contract, included a figure of $5,000 per week. Mr Harris concentrated more in his evidence on the difficulties faced by the Perth office due to a lack of support, change of management and a lack of access to a proper client database. Mr Castellas says this data was provided. I have no other evidence to assist me in deciding the validity of whether such data was provided. However, whether it was or not is not entirely relevant. I accept the performance of the Perth office was poor. However, the relevant issue is the unilateral action of the employer.

30 Mr Harris says also that he was not counselled about his performance and that anything that was said about performance was only "conversational". Mr Castellas asked interestingly Mr Harris the following question, "But, had anything been penned in that regard that could have been of a negative nature and then impaired performance?" It would seem from this statement/question and the evidence of Mr Castellas that he sought to encourage better performance, but did not engage in any formal performance counselling or warning. Mr Harris says that the discussions were about lifting sales but without any real support.

31 Given inadequate sales figure from the Perth office it was of course within the prerogative of the respondent to close the Perth office. However, the manner in which they chose to do so and the manner in which Mr Harris was treated, ie a substantial and immediate reduction of contract, was plainly unfair (see *Shire of Esperance –v- Peter Maxwell Mouritz* 71 WAIG 891 and *Undercliffe Nursing Home –v- Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* 65 WAIG 385). He was not afforded a fair go all round. In fact, the actions of the respondent were in breach of s.41(1)(a) and (2) of the Minimum Conditions of Employment Act 1993 which states:

> "41. Employee to be informed
>
> (1) Where an employer has decided to —
>
> (a) take action that is likely to have a significant effect on an employee; or
>
> (b) make an employee redundant,
>
> the employee is entitled to be informed by the employer, as soon as reasonably practicable after the decision has been made, of the action or the redundancy, as the case may be, and discuss with the employer the matters mentioned in subsection (2).
>
> (2) The matters to be discussed are —
>
> (a) the likely effects of the action or the redundancy in respect of the employee; and
>
> (b) measures that may be taken by the employee or the employer to avoid or minimize a significant effect,
>
> as the case requires."

(See also *Garbett v Midland Brick Company* 83 WAIG 893).

32 I find the termination of Mr Harris' employment to be caused by the employer's breach of contract and I find Mr Harris' dismissal to be harsh and unfair in all the circumstances. Mr Harris does not seek reinstatement and has found alternative employment. I am convinced by his reasons that the employment relationship could not be reinstated. The necessary trust would be absent given what has transpired between the parties.

33 His evidence is that he found work one week after he finished his employment with the respondent and his new remuneration of $50,000 per annum is slightly more than he received with the respondent. The loss he has suffered is therefore one week of income. The rate at which this must be paid is $900 per week, which is the wage rate he would have received if his original contract had continued. He did not accept the new contract, hence his loss cannot be said to be the loss he would have suffered under that contract (see *Budget Airconditioning v Steven Rainsford Penn* 84 WAIG 2171).

34 Mr Harris gave some medical evidence in relation to the stress and high blood pressure he suffered and for which he consulted a medical practitioner. It is the case that dismissals can often be stressful. In *AWI Administration Services Pty Ltd v Andrew Birnie* 81 WAIG 2849 Coleman CC and Smith C in a joint judgment observed at [200]:

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

35 The suddenness of this dismissal was indeed difficult for Mr Harris. He says that there has been an ongoing impact, but I have no medical evidence about this. To his credit though he soon obtained new employment and continues to work at full-time employment. I have considered whether some element of injury should be incorporated into the compensation, I do not consider that the circumstances are of such severity to warrant an award for injury (see *Lynam –v- Lataga Pty Ltd* (op cit) and *Peta Mary Bizzill v Penzar Pty Ltd t/f Gow Trust t/a Gow Real Estate* 86 WAIG 3399 at [73] and [74]).

36 As for the claims of denied contractual benefits they should be treated as follows. Mr Harris' contract of employment provides for one month of notice. Therefore he should have been paid notice for the period 12 July to 11 August inclusive at the rate of $900 per week. This is for the month following his change of contract. The employer by their actions brought the original contract to an end. After this date Mr Harris remained on leave until the time of his departure, i.e. 22 August 2007. Therefore his outstanding leave (both sick and annual) should also be paid at the rate of $900 per week. This is the rate of pay at which the leave accrued in accordance with the original contract.

37 The calculations of denied contractual benefits, when seen in this manner, are twofold. Firstly, for any week of work from the date of commencing employment to 22 August 2007, was Mr Harris paid less than $900 per week? In making this calculation, all sums paid to him must be brought to account. Secondly, what was the remaining annual leave credit at the time of his departure on 22 August 2007? In making this calculation, the respondent was entitled to recoup from annual leave any period of sick leave not covered by accrued sick leave credits.

38 Calculations re annual leave and underpayment.

Pay period	Amount paid	underpayment	
8/03/07-21/03/07	$1600	$200	
22/03/07-4/04/07	$1600	$200	
5/04/07-18/04/07	$1600	$200	
17/05/07-30/05/07	$1600	$200	$400 was paid as bonus
31/05/07-13/06/07	$1600	$200	
14/06/07-27/06/07	$1600	$200	
12/07/07-25/07/07	$1617	$183	
26/07/07-8/08/07	$1770	$30	
9/08/07-22/08/07	$1061.32	$738.68	
TOTAL		$1751.68	($2151.68- $400)

Sick leave entitlement: 220 days / 365 days x 76 hours = 45.81 hours

Annual leave entitlement: 220 days / 365 days x 152 hours = 91.62 hours

The period from 9 August 2007 to 22 August 2007 includes 45.8 hours sick leave and 30.2 hours annual leave. The balance of annual leave (i.e. 91.62 hours less 30.2 hours = 61.42 hours) @ $900 per week amounts to $727.34.

39 Therefore the order to issue should:

(1) declare that Mr Harris was dismissed harshly and unfairly;

(2) declare that reinstatement is impractical;

(3) order that Mr Harris be paid compensation for the dismissal of $900, less any taxation payable to the Commissioner for Taxation;

(4) order that Mr Harris be paid $1751.68 by way of underpayment, less any taxation payable to the Commissioner for Taxation;

(5) order that Mr Harris be paid $727.34 by way of outstanding annual leave, less any taxation payable to the Commissioner for Taxation.

These amounts to be paid by the respondent to the applicant within 7 days of the date of the order.

2008 WAIRC 00335

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES PETER GODFREY HARRIS

APPLICANT

-v-

TIMES PUBLISHING GROUP

RESPONDENT

CORAM COMMISSIONER S WOOD

DATE WEDNESDAY, 4 JUNE 2008

FILE NO B 157 OF 2007

CITATION NO. 2008 WAIRC 00335

Result Contractual entitlements claim awarded

Representation

Applicant Mr R Bower of Counsel

Respondent Mr K Castellas

Order

HAVING heard Mr R Bower of Counsel on behalf of the applicant and Mr K Castellas 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 said respondent do hereby pay within 7 days of this order, as and by way of underpayment of wages, the amount of $1,751.68 to Peter Godfrey Harris, less any taxation that may be payable to the Commissioner of Taxation.

(2) THAT the said respondent do hereby pay within 7 days of this order, as and by way of outstanding annual leave, the amount of $727.34 to Peter Godfrey Harris, less any taxation that may be payable to the Commissioner of Taxation.

(Sgd.) S WOOD,
[L.S.] Commissioner.

2008 WAIRC 00336

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES PETER GODFREY HARRIS

APPLICANT

-v-

TIMES PUBLISHING GROUP

RESPONDENT

CORAM COMMISSIONER S WOOD
DATE WEDNESDAY, 4 JUNE 2008
FILE NO U 157 OF 2007
CITATION NO. 2008 WAIRC 00336

Result Applicant unfairly dismissed; compensation awarded
Representation
Applicant Mr R Bower of Counsel
Respondent Mr K Castellas

Order

HAVING heard Mr R Bower of Counsel on behalf of the applicant and Mr K Castellas on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby :

(1) DECLARES that the applicant, Peter Godfrey Harris, was harshly and unfairly dismissed by the respondent on the 22nd day of August 2007;

(2) DECLARES that reinstatement is impracticable;

(3) ORDERS that the said respondent do hereby pay within 7 days of this order, as and by way of compensation, the amount of $900 to Peter Godfrey Harris, less any taxation that may be payable to the Commissioner of Taxation.

(Sgd.) S WOOD,
[L.S.] Commissioner.

2008 WAIRC 00337

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES MELISSA HODGES

APPLICANT

-v-

CATHY LEWIS (SPOIL YOURSELF)

RESPONDENT

CORAM COMMISSIONER S WOOD
DATE WEDNESDAY, 4 JUNE 2008
FILE NO U 42 OF 2008
CITATION NO. 2008 WAIRC 00337

Result	Application discontinued
Representation	
Applicant	Ms M Hodges
Respondent	Ms C Lewis

Order

WHEREAS this is an application pursuant to section 29(1)(b)(i) of the Industrial Relations Act 1979; and

WHEREAS a conciliation conference was convened on 14 May 2008 at the conclusion of which the matter was resolved; and

WHEREAS the applicant advised the Commission on 22 May 2008 that she wanted to discontinue the application; and

WHEREAS the parties have waived their rights to speak to the Minutes of Proposed Order pursuant to s.35(4) of the Industrial Relations Act 1979;

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

THAT the application be and is hereby discontinued.

(Sgd.) S WOOD,
[L.S.] Commissioner.

2008 WAIRC 00324

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PETER JAMES SPENCER; SHAE MAREE SPENCER **APPLICANT** **-v-** REST POINT HOLIDAY VILLAGE **RESPONDENT**
CORAM	COMMISSIONER J L HARRISON
HEARD	TUESDAY, 12 FEBRUARY 2008, WEDNESDAY, 13 FEBRUARY 2008
WRITTEN SUBMISSIONS	WEDNESDAY 27 FEBRUARY 2008, TUESDAY 4 MARCH 2008
DELIVERED	MONDAY, 26 MAY 2008
FILE NO.	U 151 OF 2007, B 151 OF 2007, U 152 OF 2007, B 152 OF 2007
CITATION NO.	2008 WAIRC 00324

Catchwords	Industrial Law (WA) - Terminations of employment - Claims of Harsh, oppressive and unfair dismissals - Principles applied - Applicants unfairly dismissed - Applications upheld - Reinstatement impracticable - Compensation ordered - Contractual benefit claims - Entitlements under contract of employment - Payment in lieu of Notice - Applications upheld - *Industrial Relations Act 1979* (WA) s 7, 29(1)(b)(i), s 29(1)(b)(ii)
Result	Upheld and Order issued
Representation	
Applicant	Mr P Spencer and Ms S Spencer on their own behalf
Respondent	Mr R Hughes

Reasons for Decision

1 These are applications by Peter James Spencer and Shae Maree Spencer ("the applicants") made pursuant to s29(1)(b)(i) and (ii) of the *Industrial Relation Act 1979* ("the Act"). The applicants allege that they were unfairly terminated from their positions as cleaners and caretakers with Rest Point Holiday Village ("the respondent") on 19 August 2007. The applicants

also maintain that they are each owed an additional three weeks' pay in lieu of notice pursuant to their written contracts of employment with the respondent. The respondent argues that the applicants were not unfairly terminated and disputes that they are owed any monies under their contracts of employment with the respondent.

2 As these applications deal with essentially the same facts and circumstances all four applications were heard together.

Background

3 It was not in dispute that the applicants commenced employment with the respondent on or about 8 April 2007 and were terminated on 19 August 2007. The applicants were employed on a full time basis and their salary was $30,000 gross per year. The applicants' conditions of employment were confirmed in written contracts of employment which were not finalised and signed by the parties until some months after they commenced employment with the respondent as the applicants proposed variations to the contracts initially given to them by the respondent and it took some time for these variations to be agreed on and included in revised contracts. The respondent operates a holiday village that has caravan park facilities and on-site units and cabins ("the village"). Cleaning duties undertaken by the applicants included cleaning units, amenities blocks and cabins and Mr Spencer also carried out general maintenance of these buildings and other facilities. During the period the applicants were employed, the respondent employed three other full time employees - Ms Alice Burton who was the head cleaner and Mr David Jones and Ms Paula Jones who managed the village and supervised the applicants. It was not in dispute that Ms Jones completed mainly office duties and Mr Jones completed maintenance at the village and supervised the general running of the village.

4 In July 2007 Mr and Ms Jones took annual leave and travelled to Queensland for a five week holiday and returned on or about 2 August 2007. During their absence neither the applicants nor Ms Burton were appointed to be in charge of the village. Whilst on leave Mr and Ms Jones visited the respondent's owner Mr Raymond Hughes who resides in Queensland. Soon after the applicants commenced employment with the respondent Mr Hughes visited the village and he did not return to the village subsequent to that date during the period the applicants were employed by the respondent.

5 There was a dispute between the parties about the duties undertaken by the applicants. Mr Spencer maintains that 80 per cent of his duties consisted of maintenance work and the remaining 20 per cent involved cleaning the respondent's facilities however at the hearing the respondent claimed that Mr Spencer spent approximately 70 per cent of his time cleaning and 30 per cent of his time undertaking maintenance duties. Mr Spencer maintains that he worked in excess of 50 hours per week during the period he was employed by the respondent but the respondent claims that he worked between 10 and 30 hours per week. Ms Spencer claims that approximately 50 per cent of her duties were cleaning and the rest of her duties included office administration and maintenance duties and Ms Spencer maintained that she worked in excess of 50 hours per week. In contrast the respondent maintains that approximately 80 per cent of her duties involved cleaning, 10 per cent was spent gardening and undertaking small maintenance duties and the other 10 per cent of her time was spent undertaking office work. The respondent also maintains that Ms Spencer worked between 15 and 25 hours per week. It was not in dispute that the terms of the *Cleaners and Caretakers (Car and Caravan Parks) Award 1975 No 5 of 1975* ("the Award") applied to the applicants and the respondent.

6 There was a dispute between the parties about whether or not the applicants were on probation when they were terminated. The applicants maintain that as they were terminated on 19 August 2007 their three month probationary periods had ceased by the time they were terminated but the respondent claims that as the applicants did not sign their revised contracts until 29 June 2007 their probationary period commenced on this date and as a result the applicants were on probation when they were terminated.

7 When the applicants were terminated at a meeting held on 13 August 2007 they were given one week's notice which they were expected to work. At this meeting they were handed a letter which was composed by Mr Hughes. This letter, dated 12 August 2007, is as follows (formal parts omitted):

> "I have completed a full review of all individual job responsibilities and performances of Rest Point Holiday Village employees as completion of probationary periods draw to an end.
>
> The probationary period is an opportunity for all employees and the company to ascertain job satisfaction, qualities and capabilities necessary to perform duties assigned at an acceptable level.
>
> In terms of the review you are hereby given notice that your employment with Rest Point Holiday Village will be terminated as in accordance with your employment agreement dated 29th June 2007.
>
> Accordingly, and in the terms of the for (sic) mentioned employment agreement your employment will cease as of Monday 20th August 2007. This decision has been made in the best interest of Rest Point Holiday Village and (sic) would be appreciated if you will make the necessary arrangements to vacate Rest Point premises by the end of the month. All outstanding salary will be adjusted accordingly to the date of Monday 20th August 2007.
>
> I take this opportunity to wish you well in the future and would like to thank you for past services to Rest Point."
>
> (Exhibit A6)

8 After their termination the applicants were issued with separation certificates stating that the reason for their termination was 'Unsuitability for this type or work' (see Exhibit A7).

9 On 28 August 2007 Mr Hughes made the following response to a letter from the applicants dated 23 August 2007 which detailed a number of claims the applicants made against the respondent (formal parts omitted):

> "Thank you for your letter dated the (sic) 23 August 2007, and in response I wish to point out the following:
>
> 1. Your employment was based on a common law contract which commenced on the date of your signing which was the 29th of June 2007.

2. Your probation period, under the contract, commenced on this date and was due to expire on the 29th of September 2007.
3. Your termination was within the 3 month probation period as per the terms of the contract.
4. Your termination was for unsatisfactory work performance as was discussed with you on several occasions prior to your termination.
5. You were employed under a common law contract, therefore not subject to any award.
6. However, your contract pay was above the award rate (including any allowance for cleaning toilets).
7. Your weekly salary was for a minimum of 38 hours plus any reasonable overtime required to complete your duties. Our records show that no unreasonable overtime was ever worked and in fact most weeks you worked less that (sic) the minimum of 38 hours.

You were given the required 1 weeks (sic) notice of your termination as required by law for employees with less than 12 months service, and the final pay given to you also included any accumulated annual leave entitlements.

We have fulfilled all of our legal requirements in relation to the termination of your employment and therefore will not be making any additional payments as requested by you in your letter."

(Exhibit A12)

Applicants' evidence

10 Prior to working with the respondent Mr Spencer gave evidence that he worked in sales, administration, labouring and had supervisory and managerial experience and he has also held a position in the public sector. Mr Spencer maintained that he was a quick learner, he had the ability to move forward and plan, he avoided conflict wherever possible to maintain harmony and he stated that he was quick to raise issues of concern. Mr Spencer stated that after hearing a radio advertisement in Brisbane in September 2006 for cleaners and caretakers to work at the village, he rang Mr Hughes and the applicants were then interviewed by Mr Hughes. Mr Spencer stated that during this discussion Mr Hughes mentioned that some maintenance work would be required to be undertaken at the village and he told Mr Hughes that he was not a tradesperson but he was handy at doing general house maintenance and Mr Spencer also told Mr Hughes that he had experience undertaking commercial cleaning. Mr Spencer said that both he and Ms Spencer were offered an annual package of $70,000 gross to work at the village, the respondent undertook to reimburse their relocation costs after 12 months in the position, the applicants would be subject to a three month probationary period, they would each work hours as required (approximately 40 hours per week) and accommodation would be provided free of charge. Mr Spencer stated that the applicants were initially unsuccessful for this position but he told Mr Hughes that they would be interested if a similar position came up in the future. Mr Spencer stated that in February 2007 Mr Hughes contacted the applicants to see if they were still interested in the cleaner/caretaker positions and Mr Spencer understood there was the opportunity to become assistant managers at the village and they would manage the village when the managers were on leave. Mr Hughes asked the applicants to contact the current managers Mr and Ms Jones which he did and after having a discussion with them the applicants were offered employment and relocated to Walpole at a cost of approximately $800. Mr Spencer gave evidence that during the second discussion he had with Mr Hughes about working with the respondent the same conditions of employment that had initially been discussed between them were offered to the applicants.

11 Mr Spencer stated that both he and Ms Spencer were to commence working at the village on 8 April 2007 but they were given that day off and did not start undertaking their duties until 9 April 2007. Mr Spencer gave evidence that in the previous week the applicants had undertaken approximately one and a half days of training at the village.

12 Mr Spencer stated that on 17 April 2007 the applicants had a meeting with Mr Hughes and other staff members at the village and he stated that cleaning standards at the village were discussed and it was stated at this meeting that the standard of cleaning at the village needed to improve from what it was in the past.

13 Mr Spencer stated that on 12 April 2007 Ms Jones gave the applicants copies of their written contracts of employment and after considering the contracts Mr Spencer proposed some amendments, which he discussed with Mr Hughes on 17 April 2007, including the issue of intellectual property, the payment of a bonus after three months and not 12 months and the applicants having the right to undertake additional work outside of the village. Mr Spencer stated that he gave the revised contracts with proposed changes to Ms Jones on or about 21 April 2007 after Mr Hughes had returned to Queensland. Mr Spencer stated that after giving the revised contracts to Ms Jones to type up and send to Mr Hughes to review the changes he asked her several times what Mr Hughes was doing with the contracts and she undertook to follow up with Mr Hughes. Mr Spencer stated that meanwhile everything was going well at the village and Mr and Ms Jones and Ms Burton told the applicants that their work was good and they were told that they wanted the applicants to stay on. Mr Spencer gave evidence that the applicants were told "… we love you guys. We love your work". Ms Burton told Mr Spencer that he was a really good worker and Mr Spencer stated that he was praised by Mr Jones for trying to sort out issues with Ms Burton.

14 Mr Spencer stated that at a staff meeting held on 29 June 2007 before Mr and Ms Jones went on leave a document detailing a cleaning audit done on cabin units between 5 and 23 June 2007 was given to the applicants by Ms Jones. Mr Spencer gave evidence that there was no indication on the document about who had cleaned the cabins and he understood that these were things to check and concentrate on whilst Mr and Ms Jones were away. Mr Spencer gave evidence that Mr Jones stated at this meeting that he was comfortable with the applicants' performance, that he had advised Mr Hughes of this and that he would not have left for five weeks if he was not comfortable with the team he was leaving at the village. Mr Spencer stated that at that point in time he believed that everything was going well at the village.

15 Mr Spencer gave evidence that in the week prior to 29 June 2007 he and Ms Spencer were given copies of their contracts by Ms Jones and she told them that she needed them signed before they went on leave. Mr Spencer stated that prior to giving

back the contracts to Mr Jones he made photocopies of them and Mr Spencer stated that prior to returning the contracts to Mr Jones he and Ms Spencer signed their contracts and initialled each page (Exhibit A2).

16 Mr Spencer stated that after the meeting held on 29 June 2007 finished he and Ms Spencer were told to re-sign their contracts as they had been signed in the wrong places and he stated that the signatory pages of each contract were re-printed, signed by the applicants and added to the original contracts. Mr Spencer stated that he and Ms Spencer never received copies of their signed contracts after they had been given to Mr Hughes for signing and Mr Spencer stated that when he asked for copies of their contracts he was told that Mr Hughes had them in Queensland. Mr Spencer gave evidence that the contracts provided to the applicants subsequent to their termination through discovery were not the contracts signed by the applicants. Mr Spencer stated that this was the case because the weekly hours to be worked contained in the revised contract had been changed from 40 to 38, the amount of pay in lieu of notice had been reduced from one month to one week, the pages were not initialled, the employment commencement dates had been changed to 29 June 2007 and the contracts' covering letter was not included.

17 Mr Spencer stated that prior to Mr and Ms Jones going on leave in July 2007 they instructed Mr Spencer to deliver pamphlets to Busselton if they arrived before the second week of July, which he did. Mr Spencer stated that he continued to undertake his duties as usual and he stated that he completed cleaning and maintenance required of him during this period. Mr Spencer stated that he was told by Mr and Ms Jones to pass on any messages for them to Ms Burton whilst they were away as they would be in regular contact with her.

18 Mr Spencer stated that the hours he normally worked were usually 7.00am to 5.00pm over five days per week and he stated that he sometimes worked later than 5.00pm. Mr Spencer gave evidence that approximately 20 per cent of his time was spent undertaking cleaning duties and the remaining 80 per cent of his time was spent undertaking maintenance duties.

19 Mr Spencer stated that after Mr and Ms Jones returned to the village on or about 2 August 2007 they kept to themselves. Mr Spencer stated that he wanted to speak to Mr Jones about the work that he had done whilst they were on holidays which he had recorded in a notebook but Mr Jones said "No, not yet" as they had not started back at work. Mr Spencer stated that after Mr and Ms Jones returned from leave he felt that they isolated themselves from the applicants and Mr Spencer stated that when he did have the opportunity to speak to Mr Jones on or about 8 August 2007 he discussed items written in his note pad that he had attended to and he gave evidence that Mr Jones was happy with him after this discussion.

20 Mr Spencer made a number of diary entries about his employment with the respondent which he claimed were made contemporaneously (see Exhibit A5).

21 Mr Spencer described his performance as good, adequate and innovative and he claimed he made a number of alterations to buildings and processes at the village, for example, putting a unit on a vehicle to dry mops.

22 Mr Spencer stated that he was not given any verbal or written warnings about any deficiencies in his performance nor was the prospect of termination ever discussed with him. Mr Spencer stated that Ms Burton provided the applicants with some training as she worked with them occasionally however he claimed she had no experience in training people and he stated that she was very moody and a poor communicator.

23 Mr Spencer stated that when the applicants were asked by Ms Jones to attend the office on 13 August 2007 he thought that he may be terminated. Mr Spencer gave evidence that Mr Jones told him "please don't shoot the messenger" and he stated that "… we love you guys. We've got nothing against you" and there were just little things that were problems. Mr Spencer stated that he was then given an envelope that contained the applicants' letter of termination (Exhibit A6). Mr Spencer stated that Ms Jones and Mr Jones stated that they were shocked and surprised and disappointed by Mr Hughes' decision to terminate the applicants and Mr Spencer stated that Mr Jones told him that it was Mr Hughes' decision to terminate them. Mr Spencer stated that he was told that Mr and Ms Jones had known about their termination for two days as they had to draw up the termination letter. Mr Spencer stated that the applicants were given no opportunity to "change anything" and he reiterated that they were not given any warnings but he conceded that there was an attempt to increase overall performance at the village as a team effort. Mr Spencer stated that after this meeting he returned to his duties and worked as normal for another week. Mr Spencer stated that during this period he and Ms Spencer looked for alternative accommodation for themselves and their 16 month old son and 16 year old daughter and on 20 August 2007 they moved into a caravan in an alleyway in Walpole as they had been told they had to leave the village by the end of that month.

24 Mr Spencer stated that subsequent to his termination he made approximately eight applications seeking alternative employment and he eventually obtained employment in Albany commencing on 15 October 2007 as an employment consultant. Mr Spencer is currently earning $37,603.28 gross per annum and as at the time of the hearing he remains in this position (Exhibit A9).

25 Mr Spencer maintains that the applicants have suffered substantial losses as a result of their terminations and he detailed their losses as follows:

1.	Three weeks' pay in lieu of notice at $577 per week:	$1,731
	Mr Spencer	$1,731
	Ms Spencer	
2.	Loss of income:	$4,616
	Mr Spencer 20/08/2007-15/10/2007 - 8 weeks at $577 per week	$4,616
	Ms Spencer 20/08/2007-18/10/2007 - 8 weeks at $577 per week	
3.	Loss of opportunity to be reimbursed for relocation costs from Queensland (fuel and accommodation)	$1,134

4.	Emergency Accommodation costs after termination 30/08/07-7/10/07 - 5 weeks at $80 per week	$400
5.	Costs for redeployment to Albany to gain sustainable employment, includes temporary accommodation for 2 weeks	$600
6.	Lost wages for part-time position as Youth worker in Walpole at $80 per week for 8 weeks	$640
7.	Injury, loss of security, mental stress, anxiety due to termination 4 weeks wages each at $577	$4,616
8.	Benefits to be repaid to Centrelink	$1,248.43
	Mr Spencer	$777.22
	Ms Spencer	

26 Under cross-examination Mr Spencer stated that after the applicants were terminated they were given some leeway about moving out of their accommodation at the village but he said it was too uncomfortable for the applicants to remain at the village.

27 Mr Spencer stated that he initially started work at 7.00am but this changed to 8.00am in winter.

28 When it was put to Mr Spencer that the hours recorded in his diary did not accurately reflect the time spent cleaning Mr Spencer responded by saying that sometimes cleaning duties were held over and he then stated that most of his time was spent undertaking maintenance duties. Mr Spencer was adamant that he worked the hours specified in his diary because of the necessity to undertake maintenance duties. Mr Spencer reiterated that no discussions were held with him about poor performance nor were any warnings given to him. Mr Spencer stated that he was offered the position of assistant manager by Mr Hughes when he was in Queensland but this did not eventuate after he and Ms Spencer arrived at the village. When it was put to Mr Spencer that meetings were held in regard to the applicants' poor performance he stated that there was some general discussion about these issues in meetings and he stated that the issues were not directed at him but rather the 'team'. Mr Spencer stated that there was no mention about the possibility of him being terminated nor was any notice given to him that the issues were serious, nor were any warnings given to him. Mr Spencer maintained a video of him working on a bobcat at the village related to him charging the battery and Mr Spencer denied that work he completed on the village's sewerage system was illegal and he maintained that he was instructed to undertake this work by Mr Jones and that Mr Jones had also completed this type of work before.

29 Ms Elsie Buck is a regular visitor to the village and she stayed there for one week in August 2007. Ms Buck stated that during this period the applicants were always busy cleaning toilets and Ms Buck stated that lots of maintenance is required at the village because it is old. Ms Buck stated that the toilet block on which the applicants worked was in good condition after they had completed maintenance work on it.

30 Ms Shae Spencer confirmed that she and Mr Spencer had two meetings with Mr Hughes prior to commencing work at the village, the first in September 2006 and the second in February 2007. Ms Spencer stated that she commenced working at the village on 8 April 2007. Ms Spencer stated that the applicants were given a unit to clean on 9 April 2007 which was inspected and they were advised of things that had been overlooked and Ms Spencer stated that issues of this nature were also discussed at a general staff meeting the following day. Ms Spencer stated that during this staff meeting no warnings were given to her about her performance. Ms Spencer stated that she was quickly shown the cleaning procedures and she stated that no specific procedures to undertake cleaning duties were explained to her until a cleaning procedure was given to her and Mr Spencer on 20 April 2007 by Ms Jones. Ms Spencer stated that over time these procedures were changed by Ms Burton and additional cleaning duties were added but no extra time was given to undertake these duties (Exhibit A16).

31 Ms Spencer stated that she completed the duties Ms Burton told her to undertake and Ms Spencer stated that she felt intimidated by Ms Burton who was moody, abrupt and at times rude.

32 Ms Spencer stated that at no stage was her performance reviewed nor were any discussions held with her "one-on-one" about her performance and she stated that no warnings were given to her nor was she told of any consequences if her performance was poor. Ms Spencer stated that some verbal feedback was given to staff at the team meetings and Ms Spencer then stated that soon after she commenced employment with the respondent Mr Jones asked her how she was going and she told him that things were okay and in return Mr Jones stated that "we've been hearing different". Ms Spencer stated that Mr Jones and Ms Jones never cleaned the units or amenities or observed the applicants when they were cleaning them.

33 Ms Spencer stated that at the meeting where the applicants were terminated Mr Jones told her that Mr Hughes had made the decision to terminate the applicants and he told them "don't shoot the messenger", he stated that he did not like terminating them and he stated that "I don't have a problem with you guys". Ms Spencer stated that at this meeting Mr Jones said to her that he thought that she was struggling a bit and that Mr Spencer responded saying "you liked our work - that you were happy with us before" you went on leave and Mr Jones responded by saying "Yes, I remember saying that". Ms Spencer stated that on at least two occasions prior to Mr and Ms Jones going on leave the applicants were told by them that they loved their work, they were a great team together and they would not have gone on holidays if things were not okay.

34 Ms Spencer stated that she felt good working with the respondent, she enjoyed her work and she was content and Ms Spencer stated that even though she had a young baby she did not believe this affected her work.

35 Ms Spencer stated that the only discussions she had with Mr and Ms Jones were at staff meetings. Ms Spencer stated that she usually completed her work between 7.00am and 5.00pm when she first started at the village and she started work at 8.00am in winter. Ms Spencer stated that her daughter looked after her baby when she was working.

36 Ms Spencer stated that prior to working with the respondent she cleaned at a variety of workplaces.

37 Ms Spencer stated that she and Ms Burton were the main cleaners of units at the village and she stated that Mr Spencer helped out when a lot of units needed cleaning.

38 Ms Spencer stated that the second written contracts which included the changes requested by the applicants were given to them on 23 June 2007 and she stated that she and Mr Spencer copied and reviewed the contracts and then signed them and returned them to Ms Jones prior to the meeting held on 29 June 2007. Ms Spencer stated that she re-signed the signature page because it was signed in the incorrect place and she stated that she did not see a copy of her final contract until after the applicants were terminated.

39 Ms Spencer stated that after Mr and Ms Jones returned from leave around 2 or 3 August 2007 the applicants had limited communication with them and she maintained that their attitude towards the applicants was cold. Ms Spencer then stated that at one point Ms Jones told her that the place looked good.

40 Ms Spencer stated that she did not look for another job after she was terminated as her daughter commenced employment and there was no child care available in Walpole for her baby and Ms Spencer stated that she therefore remains out of the work-force. The applicant stated that she was very distressed at being terminated given that she was given no indication that this would occur and she stated that the applicants had nowhere to go as there was limited accommodation in Walpole.

41 Under cross-examination Ms Spencer agreed that meetings were held with her to discuss her cleaning standards but she maintained that these were not regular meetings. Ms Spencer stated that even though she was given an opportunity to respond to statements made about her performance at these meetings she felt intimidated by Ms Burton who she claimed was demanding and stood over her.

42 Ms Kaye Peckover is Ms Spencer's daughter. Ms Peckover confirmed that she looked after the applicants' son Brayden on the days that the applicants worked, from approximately 7.00am to 5.00pm and sometimes later. Ms Peckover confirmed that from June 2007 onwards the applicants commenced employment at 8.00am and not 7.00am.

43 Ms Maureen Moore met the applicants in May 2007 and they became friends in August 2007. Ms Moore stated that she and her husband Mr Pete Moore worked as co-caretakers/cleaners alongside Mr and Ms Jones from 15 November 2006 to March 2007. Ms Moore stated that they were only given feedback about their work on one occasion. Ms Moore stated that her relationship with Mr Hughes started out alright but she stated that after she gave one month's notice of resignation she had no response from him until the day she was leaving. Ms Moore stated that she normally worked between 7.00am and 5.00pm and as it was a busy period at the village she cleaned 8 to 10 units per day as well as the amenities blocks. Ms Moore stated that lawns at the village needed to be looked after and mowed, bins emptied and general maintenance had to be undertaken. Ms Moore stated that she offered the applicants a caravan to live in after they were terminated.

44 Under cross-examination Ms Moore stated that she resigned from the respondent because she felt ignored and felt she was being treated like an idiot.

45 Mr Moore came to know the applicants through Ms Moore's contact with them. Mr Moore stated that when he and Ms Moore worked with the respondent from November 2006 through to March 2007 they were caretakers and cleaners and they undertook maintenance work. Mr Moore stated he worked from 7.00am to 5.00pm and sometimes even later and Mr Moore stated that he cleaned units and cabins, mowed lawns, he completed general maintenance and he looked after the patrons. Mr Moore stated that he was given no feedback whilst employed by the respondent and he described Mr and Ms Jones as not being team players.

Respondent's evidence

46 Mr Hughes is based in Queensland and he stated that he employed both Mr and Ms Moore and the applicants from Queensland because it was difficult to get staff in Western Australia. Mr Hughes confirmed that he had two meetings with the applicants in September 2006 and February 2007 about possible employment with the respondent and Mr Hughes stated that during his discussions with the applicants in February 2007 he told them that the job involved mostly cleaning with some maintenance of the 19 units at the village. Mr Hughes told the applicants that they were to be paid $30,000 each to work full time even though the required duties did not entail working full time hours for all of the year and he stated that the applicants would be paid a bonus of $5,000 each if they stayed for 12 months.

47 Mr Hughes confirmed that the applicants commenced work with the respondent on or about 9 April 2007 and he stated that he visited the village approximately one week after the applicants started on or about 19 April 2007. Mr Hughes stated that during his visit he had a meeting with all staff and he told them that cleaning was a priority, he stated that cleaning standards were discussed and that the applicants were made aware of what was required of them with respect to this issue.

48 Mr Hughes stated that he was aware that the applicants wanted some changes to their written contracts and he told them to give these changes to Ms Jones for him to consider and Mr Hughes stated that he received an email from Ms Jones on 6 May 2007 detailing these changes (Exhibit R3). Mr Hughes stated that he confirmed with Ms Jones that all of the changes requested by the applicants were acceptable except for payment of their $5,000 bonus after three months and he told Ms Jones to incorporate the agreed changes into their contracts and give the revised contracts to the applicants to sign. Mr Hughes stated that he understood that the applicants did not return their signed revised contracts to Ms Jones until 29 June 2007. Mr Hughes stated that when Ms Jones gave him the applicants' contracts on 23 July 2007 he then signed them and gave the originals back to Ms Jones. Mr Hughes stated that he retained copies of their contracts and Mr Hughes understood that Ms Jones gave copies of

the contracts to the applicants when she returned from holidays however when he later discovered that this did not happen he mailed copies of their contracts to the applicants in September 2007, after they were terminated (Exhibit R4).

49 Mr Hughes stated that he spoke weekly to Mr and Ms Jones and he was aware through these discussions that the applicants had been advised that the quality of their work was not up to speed and they had been advised that their ongoing employment was in jeopardy if they did not improve their standards.

50 Mr Hughes stated that when Mr and Ms Jones came to Brisbane on or about 22 July 2007 they told him that there were issues with the applicants' cleaning and maintenance standards and Mr Hughes was told that they had been given warnings about their performance and he was told that the applicants did not follow instructions given to them. Mr Hughes stated that it was decided that it would be difficult for the applicants to handle an increased work-load during busy periods at the village if they were experiencing difficulties coping with their jobs during the slow period during winter.

51 Mr Hughes stated that he and Mr and Ms Jones decided that if there had been no improvement in the applicants' performance during their absence in July 2007 then the applicants would be terminated and Mr Hughes stated that he was aware that it was difficult to find replacement staff so he did not take his decision to terminate the applicants lightly. Mr Hughes stated that when Mr and Ms Jones returned from leave he understood they reviewed the quality of the work completed by the applicants and spoke to Ms Burton about their work and he understood that Ms Burton confirmed that there had been no change to the applicants' work standards. As a result Mr Hughes decided to terminate the applicants and he paid them the entitlements due to them under their contracts of employment. Mr Hughes stated that the applicants were not required to leave the village immediately and he stated that it was up to the applicants to decide when to leave.

52 Mr Hughes tabled the cleaning records of the units at the village during the period that the applicants were employed by the respondent and a summary of the hours that would normally be taken to clean these units (Exhibit R5).

53 Under cross-examination Mr Hughes confirmed that even though there was a standard timeframe for cleaning units there were exceptions to these timeframes. Mr Hughes stated that records were only kept with respect to the cleaning of units and he was unaware of any record that was kept of maintenance duties which had been completed.

54 Mr Hughes stated that he decided to terminate the applicants after having discussions with Mr and Ms Jones about their performance and he stated that he typed up the applicants' termination letter and sent it over to Mr and Ms Jones. Mr Hughes said that in deciding to terminate the applicants he took into account their attitude to the job from reports received from Mr and Ms Jones and he maintained that if the applicants had improved their performance they would have remained employed by the respondent. Mr Hughes stated that the final decision to terminate the applicants was not made until Mr and Ms Jones had returned from holidays and reviewed the quality of the applicants work in their absence.

55 Mr Hughes stated that the applicants told him they wanted to change their contracts at the meeting he had with them at the village on or around 19 April 2007 and he stated that he told them to put these changes to him via Ms Jones. Mr Hughes stated that the first time he was aware of the nature of these changes was when he received the email from Ms Jones on 6 May 2007 (Exhibit R3). Mr Hughes stated that he was unaware why there was a delay in receiving the revised contracts from the applicants. Mr Hughes confirmed that the period of notice in Mr and Ms Moore's contracts was one month and he gave evidence that after Mr and Ms Moore left the respondent the notice period in all contracts changed from one month to one week (Exhibit A17). Mr Hughes stated that all employees were given the same standard contract and that occasionally small changes were made to them. Mr Hughes stated that he took the start of each employee's probationary period from the date their contract was signed. Mr Hughes stated that even though Clause 10.2(c) of the applicants' contracts stated that written warnings are to be given to employees no written warnings were given to the applicants however he stated that the applicants were given verbal warnings.

56 Mr Hughes disputed that the applicants were offered positions as assistant managers. Mr Hughes agreed that Mr and Ms Jones were paid $35,000 per year each as managers of the village and he stated that Ms Burton was paid the same quantum as the applicants. Mr Hughes confirmed that he did not document the review of the applicants' performance mentioned in their termination letter.

57 Mr Hughes confirmed that the cleaning schedule and the time taken to clean units would change and vary over time.

58 Mr Hughes confirmed that Mr and Ms Jones had the authority to make day to day decisions with respect to the running of the village and he dealt with issues that were out of the ordinary and that Mr and Ms Jones also had the capacity to hire and fire staff. Mr Hughes stated that he had not terminated an employee in many years.

59 Ms Jones is the respondent's office manager. Ms Jones stated that she, Mr Jones and Ms Burton had regular meetings with the applicants about cleaning standards and Ms Jones stated that Ms Burton had improved the cleaning standards at the village and the applicants were told that this standard needed to be kept up. Ms Jones said that staff meetings were initially held weekly, then fortnightly and then every three weeks and she stated that cleaning standards and expectations were discussed at these meetings. Ms Jones said that the applicants were given warnings at every meeting that their work was not up to standard and they were told that the meetings were the place to discuss these types of issues or they could approach Mr or Ms Jones if they had any issues or concerns. Ms Jones said that Ms Spencer was struggling to complete her duties, she stated that the applicants would not follow instructions and she maintained that they completed their work in their own way and she had to fix problems caused by this. Ms Jones maintained that the applicants were given every opportunity to prove themselves and she stated that they were told that if they had any concerns they could raise them at staff meetings or on a one-on-one basis. Ms Jones stated that she endeavoured to make the applicants part of their team but they stopped spending time with her and Mr Jones during breaks after they returned from leave. Ms Jones stated that when she and Mr Jones went to Queensland on holidays they discussed in detail with Mr Hughes issues concerning the applicants. Ms Jones stated that when the tasks that the applicants had been asked to do during this period had not been done Mr and Ms Jones again had discussions with Mr Hughes by telephone and a decision was made to terminate the applicants.

60 Ms Jones stated that inspection reports both written and verbal were given to the applicants and she stated that the applicants could not handle the work required of them nor follow instructions during a period when the village was not busy and she stated that during the winter when there was a lot of rain a lot of tasks could not be undertaken. Ms Jones emphasised that at staff meetings both she and Mr Jones spoke to the applicants about their poor cleaning standards and she maintained that they were given warnings about this issue. Ms Jones stated that the applicants were given a document identifying issues with the cleaning of particular units and cabins and she stated that these were recurring problems that had been raised at meetings and the list was drawn up for them to concentrate on and be aware of whilst Mr and Ms Jones were on leave. Ms Jones stated that this document did not relate to Ms Burton's cleaning standards. Ms Jones said that Mr Spencer did not like to be told if he was doing anything wrong and did not take criticism well and he told her that he believed that his cleaning was always at an acceptable standard.

61 Ms Jones stated that on or about 12 April 2007 she gave the applicants written contracts to sign and after the applicants requested changes to these contracts she emailed these changes to Mr Hughes who then approved some of the changes. Ms Jones then gave the contracts to the applicants to sign and she stated that they were not returned to her until 29 June 2007 just prior to her going on leave. Ms Jones stated that because Mr Spencer had signed his contract in the incorrect place several times she reprinted the front page and the two signature pages for him to re-sign in front of her.

62 Ms Jones stated that during the period Mr and Ms Jones were on leave that the priority for the applicants was to clean the units and to complete work on the amenities block. Ms Jones stated that the village is very busy in the summer and in winter there are fewer units and cabins to clean. Ms Jones stated that during winter two of the three amenities blocks are closed, the lawns are not mowed during winter nor the gardens tended and she stated that only general cleaning duties can be undertaken given weather conditions.

63 Ms Jones stated that she reviewed the applicants' cleaning on a number of occasions and she also stated that they often finished work early. Ms Jones said an A-frame cleaned by the applicants in the period immediately prior to their termination was not properly cleaned and she stated that Ms Burton had to clean it again after the applicants had ceased working with the respondent.

64 Under cross-examination Ms Jones stated that she may have mentioned that during the winter period staff were to catch up on maintenance duties. Ms Jones maintained that Ms Burton had lifted the cleaning standards at the village and she stated that she had verbally told the applicants to adhere to these standards.

65 Ms Jones stated that she made notes of the meetings held with the applicants in her diary (Exhibit R6). Ms Jones stated that her diary entry of 9 April 2007 confirms that cleaning standards to be applied at the village were discussed at this meeting and she stated that the applicants were told that Ms Burton would assist them to reach the standard as part of their training. At further meetings held on 17 April 2007 and 19 April 2007 Ms Jones maintains the applicants were told to improve their cleaning standards and the applicants were advised that Ms Burton would assist them because their cleaning was not "up to scratch". Ms Jones said that she checked units cleaned by the applicants and she also had feedback from Ms Burton about the applicants' work. Ms Jones stated that at the meeting held on 26 May 2007 employees were allocated jobs to be done whilst she and Mr Jones were on leave and she said that everyone knew what to do and therefore no one was appointed to be in charge.

66 Ms Jones stated that the applicants were told when they started that Ms Burton was the head cleaner.

67 Ms Jones stated that at a meeting held on 26 June 2007 she had a discussion with the applicants about their contracts and she stated that she told them that she needed their contracts to be signed because she wanted to take them to Queensland to give to Mr Hughes. Ms Jones maintained that the applicants were advised at this meeting that they needed to improve their cleaning standards and told that no more warnings would be given to them. Ms Jones gave evidence that her diary entry of this meeting was not added after the meeting took place. Ms Jones said that approximately five staff meetings were held after the applicants commenced employment with the respondent and she maintained that she also had other informal discussions with the applicants. Ms Jones then agreed that staff meetings were irregular towards the end of the applicants' employment with the respondent and when asked why this was the case if the applicants' performance was deteriorating Ms Jones stated that she held other discussions with the applicants and Mr Spencer had also stated that the meetings were pointless because they were not productive and he appeared not to be listening at meetings.

68 Ms Jones stated that she was not aware of all of the work completed by the applicants when she was on leave as a lot of things had been allocated to Mr Spencer by Mr Jones.

69 Ms Jones stated that Mr and Ms Moore's cleaning standards were not as good as the applicants' cleaning standards and she agreed that they were not terminated.

70 Ms Jones stated that she was aware of the applicants' cleaning standards by undertaking inspections of units and the amenities blocks and by obtaining feedback from Ms Burton. Ms Jones stated that she could not recall the specific words she said to the applicants when disciplining them but she stated that she was aware that the applicants had been reminded by Ms Burton about problems with their cleaning standards. Ms Jones confirmed that after she and Mr Jones returned from leave they did not have a meeting with the applicants.

71 Ms Jones stated that she had individual meetings with the applicants about their performance and she told Ms Spencer in particular that she was struggling but she could not recall the date of this discussion. Ms Jones could not recall changing the dates on the applicants' original contracts but she conceded that the contracts may have had outdated dates on them as the contracts were taken from the respondent's filing system. Ms Jones could not recall what happened to the original contract that Mr Spencer handed to her with changes written on it and Ms Jones stated that she thought it had been returned to Mr Spencer. Ms Jones could not recall if the applicants' contracts had been signed on each page but she recalled reprinting the signature pages and the front pages of each contract as they had been signed in the wrong place.

72 Ms Jones stated that she made the comment in her email to Mr Hughes dated 6 May 2007 that things were going well at the village because she did not want to worry Mr Hughes about issues concerning the applicants' performance. Ms Jones stated that she thought issues with the applicants could be resolved in-house and she believed at that point that the applicants' performance would improve.

73 Ms Jones stated that the applicants' substandard cleaning performance was an ongoing issue and Ms Jones maintained that verbal warnings were given to both applicants at meetings and the applicants were told "three strikes and you're out". Ms Jones stated that the last warning given to the applicants was at the meeting held on 29 June 2007.

74 Ms Jones said that she did not feel good when the applicants were terminated but this had to be done as they could not handle the work required of them at the village during a quiet period. Ms Jones stated that issues she considered when determining that the applicants' performance was not up to the required standard included unfinished work in the amenities blocks and information from Mr Jones after he had held discussions with Mr Spencer and from information from Ms Burton. Ms Jones stated that the decision to terminate the applicants was made a few days prior to them being given notice of their termination and she confirmed that she had no direct discussions with the applicants at the time about work that they had and had not completed. Ms Jones was unaware of the specific maintenance work completed by Mr Spencer.

75 Ms Burton is the head cleaner at the village and she cleans cabins, units, amenities and trains new staff and her role is also to review new staff and report on the quality of their work to Mr and Ms Jones. Ms Burton stated that she initially showed the applicants how to clean the amenities blocks, the cabins and units and she stated that over time she regularly had to check on the applicants' work and point out unsatisfactory work and she had to remind them about the required standards.

76 Ms Burton stated that Ms Spencer struggled from the commencement of her employment with the respondent. Ms Burton stated that it was hard for her to get a routine going and she was worried about how she would cope during the summer months which were busier. Ms Burton stated that Ms Spencer was told that if her cleaning standards did not improve the applicants' jobs would be on the line and in response she shrugged her shoulders. Ms Burton stated that she tried to negotiate with the applicants to establish ways to improve their performance but she had no positive response from them. Ms Burton stated that at times she felt intimidated by Mr Spencer.

77 Ms Burton stated that at staff meetings the applicants were told to improve their cleaning standards or else their jobs would be on the line and she stated that this happened at each meeting and Ms Burton stated that Ms and Mr Jones told staff at these meetings that if they had issues with cleaning they could raise them at the meetings or raise it individually with Ms or Mr Jones. Ms Burton said that inspection reports were drawn up for the applicants to assist them to improve their performance. Ms Burton stated that during the winter months employees occasionally worked late and she stated that sometimes Ms Jones assisted employees. Ms Burton also stated that at times employees finished early.

78 Under cross-examination Ms Burton said that from her perspective there were no issues between herself and the applicants.

79 Ms Burton said that she reviewed the applicants' work on a continuous basis and she stated that she discussed the necessity for the applicants to improve their standards at least six times with them and she stated that when these discussions were held she pointed out things that had been missed or not done properly. Ms Burton recalled one instance when she praised the applicants but she said the required cleaning standards were not maintained after this discussion. Ms Burton said that cabin inspection reports were discussed at the meeting held on 29 June 2007 and the applicants were given a warning at this meeting that they were to improve their standards or their jobs were in jeopardy and/or on the line. Ms Burton stated that the applicants were told "Your standard was told to pick up. You were given a warning: if the standard didn't pick up, your job (sic) was in jeopardy" (T149).

80 Ms Burton said that when Mr Hughes was at the village in April 2007 staff were told to keep up the standard of cleaning at a staff meeting and staff were told "three strikes, we were out". Ms Burton said that when Mr and Ms Jones were on leave she communicated with Ms Jones on a regular basis and she confirmed that no one was left in charge of the village. Ms Burton stated that the applicants raised an issue about a mower during this period but she decided to leave this issue until Mr and Ms Jones returned. Ms Burton stated that during this period the applicants' cleaning performance was the same as normal and she stated that on one occasion she spoke to Ms Spencer about the work she had completed on Unit 1. Ms Burton stated that maintenance work completed by Mr Spencer during the time Mr and Ms Jones were on leave included replacing a shower floor, mowing and working in one of the amenities blocks.

81 Ms Burton stated that she told Mr and Ms Jones that the applicants' cleaning standards were not up to speed and that they would not cope with the busy summer period. In response to a question about what actions were taken to improve the applicants' performance, Ms Burton stated that the applicants were provided with inspection reports and the applicants had been taken back to units to point out what was incorrectly completed. Ms Burton confirmed that the inspection reports tabled at the meeting held on 29 June 2007 were for the applicants. Ms Burton stated that she tried to make the required tasks easier for the applicants to undertake but they were not enthusiastic.

82 Mr Jones was initially employed as a cleaner at the village but he was appointed as the manager after the previous managers resigned and his role was to manage the village as well as undertake general maintenance. Mr Jones confirmed that Mr Spencer's duties included maintenance and cleaning and Mr Jones oversaw the maintenance work undertaken by Mr Spencer. Mr Jones maintained that many meetings were held with the applicants where cleaning standards were discussed and they were told how to perform and they were told that they had "to come up to speed".

83 Mr Jones described Mr Spencer's maintenance skills as that of a back yard handy person and he stated that he would not ask for help and Mr Jones stated that many items completed by Mr Spencer have had to be repaired.

84 Mr Jones stated that at a number of staff meetings the issue of the applicants' cleaning standards was discussed and the applicants were told to come up to speed in line with Ms Burton's standards and Mr Jones stated that warnings were given to

the applicants at staff meetings. Mr Jones stated that at the meeting when Mr Hughes was in attendance the applicants were told the following "We told them about their standards of cleaning which at first they both struggled with. We gave them leeways (sic) to come up to speed. They were told by you that they had three strikes and that they would because (sic) given three strikes" (transcript page 158). Mr Jones stated that both applicants struggled meeting the required standards particularly Ms Spencer and Mr Jones stated that he told her if she needed help he would assist but she did not ask for help.

85 Mr Jones stated that when he and Ms Jones visited Mr Hughes in Queensland they told him that the applicants were struggling and they decided to review their performance when they returned to the village. Mr Jones stated that he gave the applicants only a couple of jobs to do when they were away but they were not done and Mr Jones stated that the applicants' performance did not improve during this period.

86 Mr Jones stated that it was Mr Hughes who decided to terminate the applicants.

87 Mr Jones stated that when he terminated the applicants he felt "sick in the stomach", he "didn't feel too good" but he had to do it and he tried to "let them down as easy as" he could. Mr Jones stated that he told Mr Spencer that some of the jobs he completed were okay but he stated that Ms Spencer was struggling and he blamed Mr Hughes for their termination. Mr Jones said that he tried to make parting easy. Mr Jones did not believe that the applicants were shocked when they were terminated because they had been given warnings and they knew "the writing was on the board". Mr Jones said that it took approximately four months to find staff to replace the applicants.

88 When it was put to Mr Jones under cross-examination that if staff were incompetent why would he go on leave he stated that the applicants were doing their job at an average standard. Mr Jones conceded that he praised Mr Spencer a couple of times but not Ms Spencer and he could not recall telling the applicants "We love you guys" and "We love the job you do" and he stated that this was not the language that he would use to employees.

89 Mr Jones maintained that he had some contact with the applicants after he returned from leave but not much initially. Mr Jones stated that after he returned from holidays he told Mr Spencer that he was disappointed with the standard of the work he had completed in the amenities block and he stated that he did not praise the applicants. Mr Jones stated that he told the applicants that they "needed to step up to the line". Mr Jones gave evidence that he did not have a meeting with the applicants after he and Ms Jones returned from leave but he maintained that he did not deliberately ignore the applicants during this period. He then stated that he did not speak to Mr Spencer until about five days after he returned from leave.

90 Mr Jones maintained that the applicants were given feedback about their poor performance at staff meetings and Mr Jones stated that warnings were given to the applicants at the last few staff meetings and the applicants were told that they needed to step up and improve their standards. Mr Jones maintained that the word "warning" was used at "one particular" meeting and that the issues discussed were serious and Mr Jones gave evidence that on a couple of occasions he spoke to Mr Spencer about his poor performance.

91 Mr Jones stated that he worked once or twice with Mr Spencer undertaking maintenance work.

92 Mr Jones stated that at the meeting where the applicants were terminated he told Mr Spencer that he did some jobs well and some "poor" (sic) and he again stated that Mr Spencer did not look shocked. Mr Jones stated that the decision to terminate the applicants was made after reviewing the work completed by the applicants and he stated that both applicants were struggling even though they had been offered help. Mr Jones confirmed that nothing was put in writing about the applicants' performance but he stated that he had inspected units after they had been cleaned by the applicants and he was aware of the required cleaning standards because he used to previously clean.

93 Mr Jones maintained that the applicants did not approach him about being given different directions and Mr Jones maintained that a sump pit installed by Mr Spencer was not done under his instruction.

Applicants' submissions

94 Both applicants claim that they were unfairly dismissed and they are owed benefits under their contracts of employment.

95 The applicants maintain that the respondent treated them unfairly because at no time were they given any verbal or written warnings that their employment with the respondent was at risk nor were they advised of any under-performance issues. The applicants also argue that no performance reviews were ever undertaken by the respondent prior to their termination. Both applicants claim that they were never told that they will or may be terminated or that their jobs were in jeopardy and the applicants argue that they were only given general feedback at staff meetings about their performance as part of a group of employees. The applicants dispute that they were told at staff meetings and privately that if they did not meet the required standard their employment was at risk and the applicants maintain that they did not seek help or feedback because they did not require any and any feedback that they did receive was positive and things were going well up until their last week of employment with the respondent. The applicants maintain that the word termination was also not used by Mr and Ms Jones and they only referred to the term 'three strikes'.

96 The applicants maintain that they were not shocked when they were terminated on 13 August 2007 given the way in which Mr and Ms Jones treated the applicants after they returned from leave on 2 August 2007 and the applicants claim that Mr Jones did not have any discussions with the applicants about their performance after they returned from leave. The applicants also claim that they were praised by Mr Jones at the termination interview. The applicants maintain that information from Ms Burton about the applicants' performance whilst Mr and Ms Jones were on leave was inaccurate and she was not in charge of the village during July 2007.

97 The applicants maintain that the cleaning standards at the village changed during their employment with the respondent and the applicants were expected to complete additional tasks without being given increased time to complete units.

98 The applicants maintain that they were not given any formal training or induction and claim that the only training they completed was for a day and a half prior to 8 April 2007 with Ms Burton and other feedback given to them was only on the job advice provided in an ad hoc fashion. The applicants also maintain that staff meetings were not held regularly as confirmed by the evidence of Ms Jones.

99 The applicants argue that Ms Jones' diary notes were fabricated, for example, an event was mentioned on 26 June 2007 that had not yet occurred and the applicants maintain that copies of their contracts which were submitted into the evidence by the respondent were also fabricated. In contrast the contracts given to Mr and Ms Moore are in similar terms to the applicants' contracts with the exception of the amendments proposed by the applicants to Mr Hughes. The applicants also rely on the commencement date and effective date in the definitions section of the contracts as confirmation that their contracts of employment with the respondent commenced on 8 April 2007.

100 The applicants argue that it is unclear why they were terminated and their separation certificates refer to 'unsuitability for this type of work' and not 'unsatisfactory work performance'.

101 The applicants take issue with some of the evidence given by the respondent's witnesses. The applicants maintain that at the hearing Ms Burton focussed on the applicants' poor cleaning standards yet her diary entry of 21 July 2007 praises Mr Spencer. The applicants claim that Ms Jones never cleaned with either applicant and the evidence she gave about the applicants' performance was provided from Ms Burton.

102 The applicants claim that Mr Jones confirmed Mr Spencer's evidence that approximately 20 per cent of his duties included cleaning and the rest was maintenance which was contrary to Mr Hughes' claims about the duties performed by Mr Spencer. The applicants claim that as no one was in charge whilst Mr and Ms Jones were on leave in July 2007 if they were so incompetent Ms Burton should have been put in charge.

103 The applicants argue that Mr Hughes decided to terminate the applicants without any proper investigation nor without obtaining feedback from both applicants and he only relied on hearsay information from Mr and Ms Jones and Ms Burton when reaching his decision.

104 Mr Spencer maintains that at times the respondent failed to adequately supervise him and the applicants maintain that Ms Spencer's work was never affected by her having a young child and both applicants never had any time off related to their son's care.

105 The applicants argue that they undertook whatever tasks were asked of them and at times more than that and claim that any feedback that was given to them was infrequent and in the main positive and encouraging. Additionally, the email Ms Jones sent to Mr Hughes dated 6 May 2007 states that things were going well at the village which demonstrates that the respondent's evidence lacks credibility with respect to the applicants' performing poorly.

106 The applicants maintain that they were terminated without valid reason and consultation and nor did they have an opportunity to address any concerns that the respondent had within a reasonable timeframe. The applicants also argue that they were terminated outside of their probationary period as set out in the contracts they signed and contrary to the terms contained in their contracts. The applicants argue that they should be paid four weeks' pay in lieu of notice not one week's pay as the contracts they tendered into evidence were the contracts signed by the applicants.

107 The applicants are seeking compensation for their unfair dismissal, monies owed to them under their contracts of employment with the respondent, the recovery of costs arising as a consequence of their termination and damages.

Respondent's submissions

108 The respondent maintains that both applicants were not unfairly or harshly dismissed. The respondent argues that the applicants were given fair warning about their poor performance and they were paid their full entitlements at termination.

109 The respondent claims that throughout their employment the applicants were told about the poor quality of their cleaning standards at staff meetings and they were told of these problems face to face by Mr and Ms Jones and Ms Burton who was the head cleaner. The applicants were shown units that they had not cleaned properly and were told what should be done and both applicants were reminded that the respondent had a cleaning standard which needed to be maintained. The respondent argues that the applicants were told that if they were unable to raise the quality of their work their future employment with the respondent was at risk on several occasions however the applicants did not seek assistance or discuss the problem with the managers or at staff meetings and the applicants chose to ignore this issue.

110 The respondent maintains that both applicants were given every opportunity to achieve the required cleaning levels and the respondent maintains that both applicants were told that they would be given three warnings and then terminated if they did not reach these standards. Even though the respondent has found it difficult in recent years to source and retain staff it was appropriate to terminate the applicants given their poor performance.

111 The respondent maintains that the applicants were treated fairly as they were supplied free accommodation which included electricity, gas and a phone connection, they had the use of a computer and the applicants were offered flexibility in the hours they worked and in Ms Spencer's case flexibility with her start times given that she had a young baby.

112 The respondent maintains that the reason for the delay in Mr Hughes signing the applicants' contracts was because the applicants wanted to make changes to their contracts and when these were finalised the changes were given to Ms Jones and then emailed to Mr Hughes on 6 May 2007. After Mr Hughes agreed to these changes except for the change to the date of payment of the retention bonus the contracts were rewritten with the approved changes and given to the applicants to read and sign and despite several requests the contracts were not returned to Ms Jones until the end of June 2007. The contracts then had to be re-signed by the applicants as they were signed in the incorrect places thus causing further delays and the contracts were finalised once they were brought to Queensland by Mr and Ms Jones.

113 The respondent argues that the applicants were given adequate time to move from their unit at the village after they were terminated however they chose to move elsewhere of their own accord and both applicants were given one week's notice in accordance with their contracts and were paid their wages up until the day they finished. The respondent rejects the applicants' claim that they worked in excess of 50 hours per week given the number of bookings at the village during the period they were employed there and it being the off season. Additionally high winter rainfall meant that maintenance duties were difficult to undertake during this period.

Findings and conclusions

Credibility

114 I listened carefully to the evidence given by each witness and closely observed each witness.

115 I have concerns about some of the evidence given by both applicants. A review of the evidence given by them demonstrates that much of the evidence they gave was almost exactly the same on critical issues and this leads me to conclude that their evidence was to some extent rehearsed thereby in my view diminishing the credibility of their evidence in general. Additionally, I find that at times Mr Spencer was unconvincing whilst giving his evidence, some of the evidence he gave was inconsistent and I formed the view that Mr Spencer was not being as candid as he could have been when describing his interactions with Ms Burton and Mr and Ms Jones. For example, Mr Spencer claimed that the applicants were continuously told that their performance was acceptable and no issues were raised with the applicants about their poor performance however he admitted that the applicants were given an audit of cleaning items that were not completed on a number of units at the staff meeting held on 29 June 2007 (transcript pages 9 and 17). Mr Spencer gave evidence that quite often the applicants worked excessive hours to complete their duties and sometimes worked until 7.00pm and beyond to 10.45pm however these times are not consistent with the hours included in Mr Spencer's diary and this evidence was also inconsistent with the evidence given by Ms Spencer about the hours she worked (see transcript page 24, Exhibit A5 and transcript page 65). Mr Spencer claimed that when issues about cleaning standards were raised at staff meetings these concerns were directed at all staff however it is clear that these concerns related to the applicants as they reported to the head cleaner Ms Burton who had raised these concerns with Mr and Ms Jones and they were the only other persons in attendance at these meetings. As the evidence Ms Spencer gave was in similar terms to the evidence given by Mr Spencer about the lack of negative feedback about the applicants' performance and her cleaning standards being satisfactory I also find her evidence to lack credibility. Furthermore, Ms Spencer gave inconsistent evidence at times, for example, Ms Spencer gave evidence that Mr Jones told her that he had been advised that she was experiencing some difficulties which was inconsistent with her claim that she was not given any feedback about her performance (transcript page 61).

116 I have concerns about some of the evidence given by Mr and Ms Jones. In my view their evidence was also rehearsed at times, particularly in relation to specific warnings they claim were given to the applicants at staff meetings and it is my view that both Mr and Ms Jones were not convincing at times when giving evidence about their day to day interactions with the applicants. In particular I find that Ms Jones was not being as candid as she could have been when giving evidence about when she made her diary entries and I question the veracity of some of the diary entries made by her with respect to concerns about the applicants' performance being raised with them and warnings being given to them as it is my view that many diary entries were self-serving and were deliberately included after the event to support the case for the respondent against the applicants.

117 I am of the view that at times Mr Hughes made assertions and gave evidence that was designed to suit the respondent's case. For example, Mr Hughes claimed that the cleaning schedules at the village during the applicants' employment with the respondent demonstrated that the applicants could not have worked the hours they claimed they worked given the occupancy rates at the village yet he conceded under cross-examination that the time taken to clean units varied depending on the nature of the cleaning to be done. Mr Hughes claimed that all employees had written contracts of employment with one week's written notice included in them after Mr and Ms Moore ceased employment with the respondent and he maintained that a number of the respondent's employees had contracts which supported this contention yet none of these contracts were tendered into the evidence. Mr Hughes also maintained that the only difference between the applicants' contracts and that of Mr and Ms Moore was the notice period however the weekly hours to be worked by the applicants and Mr and Ms Moore were different to the hours included in the applicants' contracts of employment which were tendered by the respondent. In the circumstances I treat the evidence given by Mr Hughes with caution.

118 I accept the evidence given by Ms Burton about her interactions with the applicants as she gave her evidence in a forthright manner and her evidence was not broken down during cross-examination. I also take into account that Ms Burton was head cleaner at the village and in this role she supervised the applicants, she developed the cleaning procedures and cleaning standards for the village and she worked alongside the applicants, particularly Ms Spencer. I also accept her evidence about her interactions with the applicants because in her role as head cleaner she gave the applicants feedback about meeting the required cleaning standards (Exhibit A1).

119 I find that the evidence given by all of the other witnesses in these proceedings was given honestly and to the best of their recollection and I therefore accept the evidence they gave.

120 As I have doubts about the reliability and veracity of the evidence given by both applicants and Mr and Ms Jones I rely on the evidence of other witnesses who gave evidence in these proceedings and an analysis of the events and documentary evidence which I accept as accurate in order to reach conclusions relevant to the issues in dispute between the applicants and the respondent.

121 The respondent argues that as the applicants were on probation when they were terminated the respondent was not required to give reasons for their termination and it maintains that in any event the applicants were terminated on the basis that they did not meet the required performance standards during this probationary period. The first issue to deal with therefore is whether or not the applicants were on probation when they were terminated.

122 It was common ground that the applicants were initially employed on a probationary period of three months which could be extended by mutual agreement and their employment was able to be terminated by either party giving one week's notice within the probationary period (see Clause 2 Exhibit A2).

123 I reject the respondent's claim that the applicants were on probation when they were terminated on the basis that their contracts of employment with the respondent were finalised on 29 June 2007 and their probationary period therefore commenced on this date. It was not in dispute and I find that the applicants were given written contracts of employment to sign when they first commenced employment with the respondent on or about 8 April 2007 and these contracts stated that the applicants commenced employment with the respondent on this date and it was not in dispute that the applicants commenced their duties at the village on or about this date. It was also not in dispute and I find that the applicants were given one week's notice of their termination on 13 August 2007, over four months after they commenced employment with the respondent. Additionally, all of the contracts contained in Exhibit A2 and Exhibit R4 state that the applicants' period of probation commences from the date of commencement of employment. I find that the amended contracts which the applicants photocopied and then signed in June 2007, which state that the commencement of their probationary period was 8 April 2007 are the contracts which apply to them as the applicants tendered confirmation that one of these contracts was copied by them (see Exhibit A3). In the circumstances I find that as the applicants commenced working with the respondent under the terms of their written contracts of employment on 8 April 2007 as later amended by the parties and as there was no evidence given in these proceedings that the applicants' probationary period was extended by mutual agreement between the parties for more than three months the applicants' probationary period commenced on 8 April 2007 and ceased on 8 July 2007 and the applicants were therefore not on probation when they were terminated. Even though the applicants' contracts were varied subsequent to 8 April 2007 these variations did not relate to any change in their probationary period, nor was there any agreement between the parties to vary the commencement date of the applicants' employment with the respondent.

124 Even if Mr Hughes was correct in holding the view that the applicants' probationary period commenced on 29 June 2007, which I do not accept, I find in any event the contracts relied upon by Mr Hughes, which includes a commencement date of 29 June 2007 does not constitute the agreement made between the parties when the applicants signed their contracts on 29 June 2007 (see paragraph 150 of this decision for my reasons for reaching this conclusion).

125 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 applicants 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 applicants 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 applicants 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.

126 An employee should be warned that his or her employment is in jeopardy and be given an adequate opportunity to improve their performance in the required areas prior to a termination being effected. In *Margio v Fremantle Arts Centre Press* (1990) 70 WAIG 2559 the Full Bench found that the Commission at first instance gave no or insufficient weight to a number of relevant issues including volume of work, staffing and to the inadequacy of warnings given to the appellant and the Full Bench held that insufficient warnings and no opportunity being given to an employee to improve his work if improvement was needed or justified amounted to an unfairness. The decision in *Margio v Fremantle Arts Centre Press* (op cit) was re-affirmed by the Full Bench in *DVG Morley City Hyundai v Fabbri* (2002) 82 WAIG 3195 where the Honourable President P Sharkey with whom Wood C agreed held at 3202:

> "Nonetheless, I also want to make it clear that I do not consider it to be only procedurally unfair if an employee is dismissed without reprimand or warning that his position is in jeopardy, or without being given the chance to remedy defects in her or his performance.
>
> There was clear evidence in defining that he was dismissed in this manner (see paragraph 54-55). There may well be exceptions to this requirement in relation to a particularly serious matter (but this is not one of them).
>
> The failure to give such warnings or reprimands or an opportunity to improve a performance amounts in my opinion to substantive unfairness. In this case the failure, which the Commissioner found, amounted to both procedural and substantive unfairness."

127 Paragraphs 3 to 9 set out the background to this application and the nature of the respondent's operations.

128 I find on the evidence that when the applicants commenced employment with the respondent on or about 8 April 2007 Ms Spencer's main duties included cleaning and some minor administration work and Mr Spencer's main duties included undertaking maintenance tasks and from time to time he also assisted Ms Spencer with cleaning duties. I find that in her role as head cleaner Ms Burton trained and supervised the applicants and carried out cleaning duties alongside the applicants and she gave ongoing feedback to both applicants about the cleaning standards required of them. I find that as managers of the village Mr and Ms Jones were ultimately in charge of the cleaning and maintenance standards at the village and they held staff meetings to give Ms Burton and the applicants feedback about relevant issues and concerns.

129 It was not in dispute and I find that five staff meetings were held during the applicants' employment with the respondent and I find that the issue of cleaning standards was raised at these meetings and the applicants were specifically told by Mr and Ms Jones about the required cleaning standards at the village, as specified and determined by Ms Burton. I also find that the

applicants were told at these meetings that these standards constituted the benchmark that they were expected to achieve and that they had to improve on the quality of their work in order to meet those standards.

130 I find that up until Mr and Ms Jones went on leave in July 2007 the applicants' relationship with Mr and Ms Jones and Ms Burton was in the main uneventful apart from some minor difficulties between Mr Spencer and Ms Burton. I find that during this period the respondent had some concerns about the applicants' capacity to reach and maintain the required cleaning standards and I accept that Ms Spencer in particular was struggling with the volume of cleaning work required of her notwithstanding the assistance she had received from both Ms Burton and Mr Spencer. I also find that during this period Ms Burton informally told Ms Spencer about her concerns with respect to her quality of work in particular her organisational skills and her inability to improve her work standards to the level required by Ms Burton.

131 It is clear that whilst Mr and Ms Jones were on leave and after having discussions with Mr Hughes in Queensland the respondent began to doubt the applicants' capacity to fulfil the duties required of them in the long term, especially Ms Spencer, as the applicants were experiencing difficulties in meeting the required cleaning standards during a period of low occupancy at the village in the winter months and when two of the three amenities blocks were closed. Additionally, prior to Mr and Ms Jones going on leave Ms Spencer was required by Ms Burton to review a unit that she had already cleaned and the applicants were given a number of basic cleaning tasks that they were required to concentrate on whilst Mr and Ms Jones were away (see Exhibit A1). I find that after having discussions with Mr and Ms Jones in Queensland Mr Hughes came to the view that if the applicants continued to struggle to meet the required standards after Ms and Mr Jones returned from leave, then Mr Hughes and Mr and Ms Jones would evaluate whether or not the applicants should continue their employment with the respondent.

132 I find that after Mr and Ms Jones returned from leave they consulted Ms Burton about the applicants' cleaning standards and they reported to Mr Hughes that there had been little change in quality of the applicants' work and they advised him that problems remained with the applicants' performance and their ongoing inability to meet the required cleaning standards. I also find that after Mr and Ms Jones returned from leave their relationship with the applicants was strained and this led to a deterioration in their relationship with the applicants which may have also contributed to the respondent deciding to terminate the applicants. I find that after receiving this feedback Mr Hughes decided to terminate the applicants as they were struggling to fulfil the required cleaning duties to an acceptable standard during a period of low occupancy at the village and when two of the three amenities blocks were closed and did not require cleaning. It was not in dispute and I find that the applicants were then terminated by Mr Jones at a meeting with the applicants held on 13 August 2007 where the applicants were given one week's notice and handed a letter of termination written by Mr Hughes and after the applicants were terminated they worked out their one week's notice. I also accept that even though they were not required to leave their rent free accommodation at the village at the end of this week they did so as they felt uncomfortable staying at the village.

133 Even though I am of the view that the respondent had reason to be concerned about the applicants' ability to fulfil their cleaning roles to the required standard I find that the applicants were denied procedural fairness and natural justice given the manner of their termination. I find that the respondent did not directly put the applicants on notice at any point during their employment that their ongoing employment was at risk due to performance concerns and I find that even though the respondent had some concerns about the quality of the applicants' cleaning standards prior to Mr and Ms Jones going on leave in July 2007 I find that the applicants were not given specific warnings, either written or verbal during their employment with the respondent, that their ongoing employment was in jeopardy unless specific improvements were made by them. Given my doubts about the veracity of the evidence given by Mr and Ms Jones about what was stated at staff meetings I find that specific warnings were not given to the applicants at the five staff meetings held during the applicants' employment with the respondent and I find the diary entries made by Ms Jones to this effect are not accurate because of the unconvincing way in which Ms Jones gave evidence about how and when she made these diary entries and given the nature of these entries and their focus on singling out and concentrating on the applicants.

134 In reaching the view that the applicants were not warned that their ongoing employment with the respondent was in jeopardy unless specific improvements were made with respect to their performance I note that no one was left in charge of the applicants whilst Mr and Ms Jones were away which in my view was a signal that Ms Burton and the applicants were handling what was required of them at the time and I also take into account that Ms Jones told Mr Hughes in early May 2007 after three staff meetings had already been held with the applicants that she did not have any concerns with the applicants' performance in an email to Mr Hughes, dated 6 May 2007. This email states in part as follows:

> "Hi there Ray,
>
> All is really good here, everything going great, everyone getting on great. I think things will work out just fine, we seem to have a good team together this time. It is starting to get very cold here, we had about 5 straight days of rain which was great, everything greening up beautifully.
>
> Sending you through the changes to Peter and Shae's contract they have made. In regards to their wage, from what you said to me they will get their extra $5,000 each at the end of the 12 months but Peter said they will get it at the end of their 3 month probationary period as you will see from the changes he's made to the contract. Can you please clarify this for us and change if need be."
>
> (Exhibit R3)

135 In summary I find that specific verbal and written warnings were not given to both applicants at any stage during their employment with the respondent that their ongoing employment with the respondent was in jeopardy unless their cleaning standards improved in specific areas and it is also my view that contrary to the claims made by the respondent, it was not made sufficiently clear to the applicants that they had to improve their performance in order to retain their ongoing employment with the respondent.

136 It was not in dispute that Mr and Ms Jones did not have a meeting with the applicants after Mr and Ms Jones returned from leave and the applicants were not advised that their ongoing employment was in jeopardy. I find that as a result the applicants were denied procedural fairness when the respondent failed to raise with the applicants the fact that their performance was being monitored with a view to possible termination and the applicants did not have any opportunity to respond to the respondent's views about their performance difficulties.

137 At the meeting where the applicants were terminated on 13 August 2007 they were not given specific and clear reasons as to why they were terminated and the applicants' letter of termination does not specify any reason for their termination. Additionally, Mr Jones gave evidence that the only issues he raised with the applicants at the meeting where they were terminated were only minor and he relied on Mr Hughes to make the decision to terminate the applicants. In the circumstances I find that the applicants were not given a proper opportunity to respond or to contest the respondent's decision to terminate them and they were thus denied natural justice.

138 To the extent that the applicants were denied procedural fairness and natural justice I find that the applicants were unfairly terminated (see *Undercliffe Nursing Home v Federated Miscellaneous Workers Union of Australia, Hospital Service and Miscellaneous WA Branch* (op cit)).

139 I am satisfied on the evidence that the working relationship between the applicants and respondent has broken down such that an order for re-instatement or re-employment would be impracticable and in any event the applicants are not seeking re-instatement.

Compensation

140 I therefore now turn to the issue of compensation. I apply the principles set out in *Bogunovich v Bayside Western Australia Pty Ltd* (1998) 78 WAIG 3635 and *Tranchita v Wavemaster International Pty Ltd* (1999) 79 WAIG 1886. On the evidence I accept that Mr Spencer looked for and obtained alternative employment and I am therefore satisfied that he took reasonable steps to mitigate his loss however it is clear that Ms Spencer did not seek nor find alternative employment as she had difficulty obtaining child care for her son and she remains unemployed.

141 Even if the applicants were afforded procedural fairness and natural justice and put on notice about the respondent's concerns about their performance and given a proper opportunity to demonstrate the required performance improvements it is my view that they would still not have attained the required performance standards had their employment with the respondent continued for an extended period. When taking into account all of the circumstances of this case especially the oral and written feedback given by Ms Burton and Ms Jones about the applicants failing to regularly complete a range of basis cleaning tasks and given the fact that the applicants faced these difficulties during a period of low occupancy at the village and when two of the amenities blocks were closed it is my view that the applicants would not have continued their employment with the respondent any longer than another six weeks after being terminated in August 2007. I have reached this conclusion on the basis that this period would have been a sufficient timeframe for the applicants to be formally put on notice and warned that if they failed to improve their performance in the required areas within this timeframe then they would be terminated on notice. In my view this timeframe is also a sufficient period because the applicants had already been given previous feedback about the difficulties they were experiencing in meeting the standards required of them and Ms Burton had already given them on-the-job training and guidance about the work required of them. I therefore conclude that a period of another six weeks would be a sufficient timeframe for the applicants to be formally warned that a failure to improve in the required area within this timeframe would result in their termination on notice.

142 I find on the evidence that Mr Spencer's main role was to undertake maintenance duties and the respondent gave some evidence about some difficulties he experienced undertaking these duties however this was denied by the applicant. In my view nothing turns on this as both applicants were terminated for their failure to meet the required cleaning standards during a period of low occupancy at the village and cleaning duties were required of both applicants (see schedules attached to their contracts Exhibit A2 and Exhibit A13).

143 In the circumstances I find that the applicants are each entitled to be paid six weeks' remuneration over and above the notice period owed to them as compensation for their unfair dismissals and a minute of proposed order to that effect will issue. I find that Ms Spencer is owed $3,462 gross ($30,000 ÷ 52 = $577 x 6 weeks) and Mr Spencer is owed $3,462 gross ($30,000 ÷ 52 = $577 x 6 weeks) minus any wages he was paid during this period.

144 The applicants have made a number of other claims with respect to additional compensation which they maintain is owed to them and paragraph 25 of this decision contains details about these claims including loss of wages, relocation costs, emergency accommodation costs, costs associated with redeployment to Albany to gain sustainable employment, loss of community position and injury including loss of security and mental stress. As no evidence was given by the applicants during the hearing with respect to the specifics of these claims and how they arise and the basis upon which they are due to the applicants I am unable to make any findings that these amounts are due to be paid to the applicants. In reaching this conclusion I also note that the applicants gave evidence that the re-imbursement for relocation costs would only be paid to the applicants after 12 months' service which they would not have completed even if they had remained employed by the respondent for an additional six weeks plus their notice period. It was also the case that apart from experiencing difficulties in obtaining alternative housing no specific evidence was given by the applicants as to any injury suffered by them as a result of their termination.

Denied Contractual Benefits

145 The applicants were terminated on one week's notice and the applicants claim that the written contracts of employment offered to them and signed by them in June 2007 contained a clause that one month's notice would be given to them at termination (see Exhibit A2 and covering letter). In the alternative the respondent maintains that the applicants' contracts provided for one week's notice at termination (Exhibit R4).

146 These claims before the Commission are for alleged denials of contractual benefits. 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.

147 There is no issue in this matter that at all material times the applicants were employees of the respondent and were employed under written contracts 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 applicants claim are due to them which arise out of the applicants' employment with the respondent. It is also common ground that the benefits that the applicants are claiming do not arise under an award or order of this Commission. The issue to be determined therefore is the terms of the applicants' contracts of employment with the respondent and whether it was a term of the contracts of employment that the applicants are entitled to the payments they are seeking.

148 During the hearing the following employment contracts were tendered into the evidence:

- two different contracts covering the applicants' employment with the respondent (Exhibit A2 dated 8 April 2007 and Exhibit R4 dated 29 June 2007)
- the contracts of Mr and Mrs Moore (Exhibit A17 dated 4 November 2006)

149 The applicants argue that as the contracts given to them when they commenced employment with the respondent and the amended contracts given to them by Ms Jones for signing in June 2007 had the same notice period as the contracts signed by Mr and Ms Moore then this supports their claim that they are owed an additional three weeks pay by way of notice. As Mr Hughes confirmed that the contracts of Mr and Ms Moore were true copies of their contractual arrangement with the respondent I accept that they were entitled to one month's notice at termination and even though Mr Hughes maintained that after Mr and Ms Moore ceased employment with the respondent all of the respondent's employees had written contracts which contained a period of one week's notice on termination or resignation no other contracts of any of the respondent's employees, including the witnesses who gave evidence for the respondent at the hearing, were tendered by the respondent confirming that all of the respondent's employees since Mr and Ms Moore were/are subject to one week's notice at termination as claimed by Mr Hughes. Given that Mr and Ms Moore's contracts provided for one month's notice at termination and as the applicants tendered evidence corroborating that they photocopied at least one of their revised contracts in June 2007 which included the revised clauses in these contracts (except one rejected by Mr Hughes) and one month's notice at termination I find that the contracts given to the applicants by the respondent and photocopied and then signed by them and then returned to Ms Jones for signing by Mr Hughes are the contractual terms covering the applicants' employment with the respondent. In the circumstances I find that the applicants' contracts included the requirement that they be given one month's notice at termination.

150 In reaching this conclusion I reject the respondent's claim that the applicants' contracts, tendered by the respondent and dated 29 June 2007, were the contracts signed by the applicants in June 2007 and signed by Mr Hughes. It is my view that these contracts were deliberately altered by the respondent to suit the respondent's claims that the applicants were due one week's notice at termination. In reaching this conclusion I note that there was no evidence given by either the applicants or the respondent that there was any agreement to vary the commencement date of their contracts or the commencement of their period of probation to 29 June 2007 as contained in the contracts at Exhibit R4 and there is also no covering letter attached to the applicants' contracts tendered by the respondent detailing the period of notice being one week in contrast to the original contracts given to the applicants and the contracts of Mr and Ms Moore. I also note that the contracts tendered by the respondent include a 38 hour working week which contrasts with a 40 hours working week in the contracts signed by the applicants in June 2007 as well as the contracts signed by Mr and Ms Moore and I also take into account the following evidence given by Mr Hughes about why 29 June 2007 was an appropriate date for the commencement of the applicants' probation which in my view confirms that Mr Hughes changed the applicants' commencement date after the applicants' signed their contracts:

> "All right. Thank you for that. If I could have those exhibits back, please. Anything arising from those questions, Mr Spencer?
>
> **MR SPENCER:** Yes, there is, commissioner. It's stated that the contract - the original - he was trying to say that that was the one we had signed. That couldn't be possible because they were dated 29 June. So how could it be possible that that was the original given to us? ---The date, 29 June, is the date you signed it. So the front page, right, when it's printed out for you it shows you the date - because it's all about - as far as I'm concerned - when that contract starts. So the date at the front of the contract says, "Your probation period" - or whatever - "starts from the 29th" - which is the day you signed it. Now, whether or not it's incorrectly done, I don't know. I have just - that's how it comes out of the - that's how it comes out. You signed it to say you were happy with the conditions of that - it was done in front of you, the date was there and you signed it. Now, that's the same contract in writing - the date would have changed because you kept changing the date. The initial contract you got would have had the 12th - the day you started.

And where is that contract?---I don't have it. Because - - -

That was the one that we wrote on and gave to David and Paula Jones?---I don't have that.

Paula Jones had made the changes and put in that email to you, right - taken that from - - -"

(Transcript 110/111)

151 As the applicants were given one week's notice when they were terminated I find that the applicants are each entitled to an additional payment of three weeks' notice over and above the compensation to be paid to them for their unfair dismissals (3 x $577 = $1,731 gross) and an order will issue to that effect.

2008 WAIRC 00328

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PETER JAMES SPENCER; SHAE MAREE SPENCER
	APPLICANT
	-v-
	REST POINT HOLIDAY VILLAGE
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	THURSDAY, 29 MAY 2008
FILE NO/S	U 151 OF 2007, B 151 OF 2007, U 152 OF 2007, B 152 OF 2007
CITATION NO.	2008 WAIRC 00328

Result Upheld and Order issued

Order

HAVING HEARD Mr P Spencer on his own behalf, Ms S Spencer on her own behalf and Mr R Hughes on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby:

1. DECLARES THAT the dismissal of Peter James Spencer by the respondent was unfair and that reinstatement is impracticable.
2. ORDERS THAT the respondent pay Peter James Spencer compensation in the sum of $3,462 gross within 14 days of the date of this order.
3. DECLARES THAT the dismissal of Shae Maree Spencer by the respondent was unfair and that reinstatement is impracticable.
4. ORDERS THAT the respondent pay Shae Maree Spencer compensation in the sum of $3,462 gross within 14 days of the date of this order.
5. DECLARES THAT the respondent denied Peter James Spencer a benefit under his contract of employment.
6. ORDERS THAT the respondent pay Peter James Spencer $1,731 gross within 14 days of the date of this order.
7. DECLARES THAT the respondent denied Shae Maree Spencer a benefit under her contract of employment.
8. ORDERS THAT the respondent pay Shae Maree Spencer $1,731 gross within 14 days of the date of this order.

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

2008 WAIRC 00304

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WILLIAM THOMAS JOHN VALLI
	APPLICANT
	-v-
	JULIE ANNE FRIESBOURG J.A.F. PROMOTIONS
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	FRIDAY, 16 MAY 2008
FILE NO	U 38 OF 2007
CITATION NO.	2008 WAIRC 00304

Result Application discontinued

Order

WHEREAS this is an application pursuant to section 29(1)(b)(i) of the Industrial Relations Act 1979; and

WHEREAS a conciliation conference was convened on 7 April 2008 at the conclusion of which the matter was adjourned; and

WHEREAS the applicant advised the Commission on 7 May 2008 that he wanted to discontinue the application; and

WHEREAS the parties have waived their rights to speak to the Minutes of Proposed Order pursuant to s.35(4) of the Industrial Relations Act 1979;

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

THAT the application be and is hereby discontinued.

(Sgd.) S WOOD,
[L.S.] Commissioner.

CONFERENCES—Matters arising out of—

2008 WAIRC 00292

DISPUTE RE FAILURE OF TEACHERS AND ADMINISTRATORS TO DISCHARGE THEIR DUTIES

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE DIRECTOR GENERAL, DEPARTMENT OF EDUCATION AND TRAINING

APPLICANT

-v-

THE STATE SCHOOL TEACHERS' UNION OF WA (INCORPORATED)

RESPONDENT

CORAM COMMISSIONER J L HARRISON
DATE THURSDAY, 8 MAY 2008
FILE NO/S C 13 OF 2008
CITATION NO. 2008 WAIRC 00292

Result Order issued
Representation
Applicant Mr J Ridley, Mr J Serich and Mr G Murdoch
Respondent Mr M Amati, Ms A Gisborne and Mr D Kelly

Order

WHEREAS this application was lodged pursuant to s44 of the *Industrial Relations Act, 1979* ("the Act") on 5 May 2007 whereby the applicant sought an urgent conference seeking the Commission's assistance to resolve a dispute between the parties involving the respondent issuing its members a directive to ban teachers and administrators from implementing the National Assessment Program Literacy and Numeracy ("NAPLAN") to take place in the week beginning 12 May 2008; and

WHEREAS the applicant claimed in its application that if this directive is followed teachers and administrators would not be discharging their ordinary duties in the course of their employment; and

WHEREAS conferences with respect to this application were held on 7 and 8 May 2008; and

WHEREAS at the conference held on 7 May 2008 the applicant advised the Commission that the respondent had issued a directive on 22 April 2008 to its members that reads in part as follows:

> "*THAT THE SSTUWA DIRECT ITS MEMBERS NOT TO IMPLEMENT NAPLAN AND THAT SUPPORTING INFORMATION BE FORWARDED TO SCHOOLS AND PARENTS ON THIS POSITION*" ("the Directive"); and

WHEREAS the applicant argues the following in support of its claim that an order issue that the Directive by lifted:

- that the implementation of the NAPLAN testing for years 3, 5 7 and 9 forms part of the normal assessment duties of a teacher and is lawfully required of teachers by virtue of the terms of ss 61 and 64 of the *School Education Act 1999* ("the SE Act") and Clause 18 of the *School Education Act Employees' (Teachers and Administrators) General Agreement 2006* ("the Agreement");
- that the non-performance by a teacher of duties required to be undertaken is an industrial matter;
- that through school principals, primary and secondary teachers and administrators have been advised of the requirements of NAPLAN, which is to be administered in the same week nationwide, since October 2007;
- that all States have agreed to the implementation of NAPLAN and no other teacher union in the other States have issued a directive banning its members from conducting these tests;
- that if a student does not participate in the NAPLAN testing they potentially will miss out on Federal Government funding designed to assist students who fail to reach benchmark levels;
- that notwithstanding that the applicant has made arrangements to ensure that as many students as possible sit the NAPLAN testing the Directive frustrates the implementation of NAPLAN as a significant number of the respondent's members have indicated that they will abide by the Directive;
- that adherence to the Directive by teachers will exacerbate the already fragile industrial relationship between the parties;
- that the respondent's ban on its members undertaking NAPLAN testing is not in the public interest and contrary to a number of objects in the Act and s26 requirements; and

WHEREAS the applicant is seeking the following orders:

1. THAT the respondent, its officers, agents, employees and members lift the directive (issued by the respondent's Executive on 22 April 2008) to its members not to implement the National Assessment Program Literacy and Numeracy (NAPLAN);
2. THAT the respondent, its officers, agents and employees are to take reasonable steps to immediately inform its members about the terms of this order and the lifting of the directive not to implement NAPLAN;
3. THAT the respondent directs its members to comply with this order, and formally notify the applicant and the Commission that it has done so by Friday, 9 May 2008;
4. THAT the respondent, its officers, employees and members are not to engage in any activity to prevent or hinder the implementation of the NAPLAN testing, which the applicant lawfully requires of teachers and administrators, including the respondent's members;
5. THAT this order remains in force until revoked or varied by the Commission; and

WHEREAS the respondent argued the following in support of its claim that no order should issue lifting the Directive:

- that even though its members have been advised by principals that they are to conduct the testing, as NAPLAN is a national assessment process, it is not contemplated under the terms of s65 of the SE Act and the normal duties of a teacher given the duties teachers are required to undertake under Clause 18 of the Agreement;
- that even though some students may not receive funding to assist them to reach benchmark levels if they do not undertake NAPLAN testing this assistance has not previously been delivered to students in a timely and effective manner;
- that the publication of NAPLAN testing results may adversely impact on the quality of education at a school and it is unclear if a student's results and therefore his or her teacher's performance will be kept confidential;
- that to ensure consistency and the efficacy of testing outcomes a student's teacher should not administer the NAPLAN testing;
- that the balance of convenience lies with the respondent as schools are capable of making alternative arrangements for the NAPLAN testing to take place if teachers are unavailable to do so and the negative consequences of the Directive remaining in place are therefore minimal;
- that as the foreshadowed industrial action is not linked to the current enterprise bargaining negotiations between the parties there is therefore no prospect of any deterioration in the industrial relationship between the parties and furthermore the respondent has been opposed to this type of testing and has had bans in place with respect to this testing for nine years; and

WHEREAS the Commission is of the view that the matter before it is an industrial matter as it relates to the obligations and rights of the applicant's employees; and

WHEREAS the Commission is of the view that it has jurisdiction to issue the orders sought pursuant to s44 of the Act which enables the Commission to issue orders with respect to an industrial matter; and

WHEREAS having heard from the applicant and the respondent and having weighed up the varying contentions of the parties and when taking into account equity and fairness and the substantial merits of this case and the objects of the Act the Commission has formed the view that the industrial action contemplated under the Directive should not occur; and

WHEREAS in reaching this conclusion the Commission has particularly taken into account that the interests of those persons directly involved in this dispute, particularly students, will be compromised if the Directive is implemented; and

WHEREAS the Commission is of the view that further discussions should take place between the parties in an endeavour to reach agreement with respect to the issues in dispute concerning NAPLAN;

NOW THEREFORE having heard Mr J Ridley, Mr J Serich and Mr G Murdoch on behalf of the applicant and Mr M Amati, Ms A Gisborne and Mr D Kelly on behalf of the respondent, the Commission having regard for the interests of the parties directly involved, the public interest and to prevent the further deterioration of industrial relations, and pursuant to the powers vested in it by the Act, and in particular s44(6)(ba)(i) and (ii) and s44(6)(bb)(i) of the Act, hereby orders:

1. THAT the respondent, its officers, agents, employees and members lift the Directive and cease the foreshadowed industrial action in the form of its members not implementing the NAPLAN testing.
2. THAT the respondent, its officers, agents and employees are to take reasonable steps to immediately inform its members about the terms of this order and the lifting of the Directive and direct its members to comply with this order.
3. THAT the respondent, its officers, employees and members are not to engage in any activity to prevent or hinder the implementation of the NAPLAN testing whilst this order remains in force.
4. THAT further discussions are to be held between the parties with a view to resolving the issues in dispute between the parties with respect to NAPLAN testing and a report back conference will be held in the Commission in June 2008 to review the progress of these negotiations.
5. THAT this order is to remain in force until revoked or varied by the Commission.
6. THAT both parties have liberty to apply to vary this order.

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

2008 WAIRC 00312

DISPUTE RE THE USE OF FIXED TERM CONTRACT EMPLOYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE WESTERN AUSTRALIAN BRANCH OF THE AUSTRALIAN MEDICAL ASSOCIATION **APPLICANT** **-v-** THE MINISTER FOR HEALTH INCORPORATED AS THE BOARD OF THE HOSPITALS FORMERLY COMPRISED IN THE METROPOLITAN HEALTH SERVICE BOARD, UNDER S7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 (WA) TRADING AS SIR CHARLES GAIRDNER HOSPITAL **RESPONDENT**
CORAM	PUBLIC SERVICE ARBITRATOR COMMISSIONER P E SCOTT
DATE	MONDAY, 19 MAY 2008
FILE NO	PSAC 10 OF 2008
CITATION NO.	2008 WAIRC 00312

Result	Order issued
Representation	
Applicant	Mr S Ellis, of Counsel
Respondent	Mr R Bathurst, of Counsel

Order

WHEREAS on Friday the 16th day of May 2008 the applicant lodged with the Registrar an application for a conference pursuant to s44 of the *Industrial Relations Act 1979* ("the *IR Act*") and "for orders that the respondent continue the employment of Mr Emil Popovic pending further orders of the Commission"; and

WHEREAS there is no dispute between the parties that:

1. The applicant and the respondent are parties to the *Department of Health Medical Practitioners (Metropolitan Health Service) AMA Industrial Agreement* (PSA AG 2 of 2008) ("*the Agreement*");
2. Mr Popovic has been employed by the respondent at Sir Charles Gairdner Hospital as a sessional neurosurgeon and subject to a series of fixed term contracts since February 2004;
3. The contracts for periods from 4 July 2007 onwards have been for periods of approximately one month each, the last contract being for the period 6 May 2008 to 19 May 2008;

4. In June 2006, Mr Popovic's professional conduct was examined by the Conduct Review Panel which resulted in a recommendation that Mr Popovic required supervision, and supervision was to commence on 4 September 2006 and continue for six months, however such supervision continued for a longer period;
5. By letter dated 2 November 2007 the respondent advised Mr Popovic that it considered that he had "satisfactorily completed the period of supervision and should therefore return to unsupervised practice" (Applicant's Bundle of Documents Page 17);
6. By letter dated 5 November 2007, the respondent invited Mr Popovic to "Apply For Re-appointment to the Clinical Staff of Sir Charles Gairdner Hospital" for a period of five years (Applicant's Bundle of Documents, page 6); and

WHEREAS the applicant says that the respondent has treated Mr Popovic unfairly regarding a number of issues since at least December 2005, including but not limited to allegations made against him to the Medical Board of Western Australia; the supervisory requirements and operating restrictions imposed by the Conduct Review Panel in August 2006; whether the supervisory requirements were disproportionate and beyond power; whether the Conduct Review Panel's recommendations advised to Mr Popovic were in fact the conclusion of the majority of that panel; and a number of other complaints; and

WHEREAS the applicant says that in accordance with *the Agreement*, the respondent is required to appoint for five years unless there is a written agreement to the contrary between the employer and the practitioner, and to meet short term exigencies, the respondent may employ a practitioner on a short term contract of up to six months, (Clause 21 – Contract of Employment, subclause (1)(a) and (1)(b)), and accordingly, the respondent's use of short term contracts in respect of Mr Popovic has been contrary to *the Agreement*; and

WHEREAS the applicant seeks that the respondent comply with the requirements of Clause 52 – Dispute Resolution Procedure of *the Agreement*, in particular for the status quo to remain while the dispute between the parties is resolved; and

WHEREAS the applicant also relies upon the provisions of Clause 52 – Dispute Resolution Procedure in respect of the requirement on the employer to apply the principles of natural justice in seeking to discipline or dismiss Mr Popovic; and

WHEREAS the applicant seeks the orders of the Public Service Arbitrator ("the Arbitrator") pursuant to s44(6)(ba) and/or (bb) of the *IR Act* maintaining Mr Popovic's employment pending resolution of the issues raised in the application in accordance with the dispute resolution procedure; and

WHEREAS the respondent says that it has had ongoing concern for some years as to whether Mr Popovic performs to the required standard, albeit none of these concerns is sufficient to justify termination of employment, and according to its processes, invited Mr Popovic to apply for a five year contract of employment; and

WHEREAS the respondent says that the dispute between the parties relates to an issue of appointment which is covered by the "Recruitment, Selection and Appointment Standard" made pursuant to the *Public Sector Management Act 1994* ("the *PSM Act*"), and according to s80E(7) of the *IR Act*, the Arbitrator does not have jurisdiction to deal with the matter; and

WHEREAS the respondent also says that it has provided Mr Popovic with natural justice in that he has been given an opportunity to be heard, however, in respect of questions he has raised in seeking further details as to referees' reports and the like, that there is no requirement to provide such detail in a selection and appointment process (*Director-General Department of Justice v Civil Service Association of Western Australia Inc* [2005] WASCA 244); and

WHEREAS the respondent says that the provisions of the Dispute Settlement Procedure contained in *the Agreement* which deal with dismissal and discipline are not relevant as the matter relates to selection and appointment, which is excluded from the Arbitrator's jurisdiction; and

WHEREAS the Arbitrator has considered the views of the parties and has concluded that the issues in dispute between the parties relate not merely to an issue of recruitment and selection but to:

1. A long running dispute about fair processes and outcomes during Mr Popovic's employment with the respondent;
2. Whether the respondent's conduct and attitude towards Mr Popovic over a period of time has unfairly affected its processes and decision-making in offering him only a series of short term contracts; and
3. If the respondent has not complied with the requirements of *the Agreement* by engaging Mr Popovic on a series of short term contracts, and in the application of the Dispute Settlement Procedure, in the context of the history between Mr Popovic and the respondent, whether the respondent has treated Mr Popovic unfairly.

WHEREAS the Arbitrator concludes that there is no impediment to the exercise of jurisdiction pursuant to s44 of the *IR Act* by virtue of the s80E(7) of the *IR Act*; and

WHEREAS the Arbitrator is of the opinion that to allow the possibility of Mr Popovic's employment coming to an end at the conclusion of his current contract with the respondent on 19 May 2008 would cause a deterioration in industrial relations between the parties; and

WHEREAS the Arbitrator is of the opinion that it would be consistent with the requirements of the Dispute Settlement Procedure contained within *the Agreement*, with the Objects of the *IR Act*, and in particular with s44(6)(ba) of the *IR Act* to issue an order requiring the respondent to extend Mr Popovic's current contract of employment for a further period of four weeks to enable further conciliation between the parties, and the further pursuit of the Dispute Settlement Procedure in *the Agreement*; and

WHEREAS such an order would not be irreversible and the balance of convenience lies with the applicant;

NOW THEREFORE, the Public Service Arbitrator, pursuant to s44 of the *Industrial Relations Act* 1979 hereby orders:

1. That the respondent shall extend the current contract of employment with Mr Emil Popovic for a period of four weeks for the purpose of enabling further conciliation between the parties and the operation of the Disputes Settlement Procedure set out in the *Department of Health Medical Practitioners (Metropolitan Health Service) AMA Industrial Agreement*; and
2. That the Arbitrator shall convene a further conference between the parties for the purposes of conciliation, at a date and time to be fixed; and
3. That either party shall have liberty to apply to amend or rescind this Order.

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

CONFERENCES—Matters referred—

2008 WAIRC 00339

DISPUTE REGARDING RECLASSIFICATION OF POSITION OF UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA (INCORPORATED)
	APPLICANT
	-v-
	THE MINISTER FOR PUBLIC SECTOR MANAGEMENT, COMMISSIONER CORRUPTION AND CRIME COMMISSION
	RESPONDENTS
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 4 JUNE 2008
FILE NO.	PSACR 27 OF 2006
CITATION NO.	2008 WAIRC 00339

Catchwords	Industrial Law (WA) – Public service officer – Appointment to staff of Corruption and Crime Commission – Level of appointment to the Public Service after appointment with Corruption and Crime Commission terminated – Principles to be considered under the *Corruption and Crime Act 2003 – Industrial Relations Act 1979* (WA) ss 44, 80E – *Corruption and Crime Commission Act 2003* s 180 – *Public Sector Management Act 1994 – Public Sector Management (Redeployment and Redundancy) Regulations 1994*
Result	Orders issued
Representation	(By Written Submissions)
Applicant	Mr W Claydon for the Civil Service Association of Western Australia Incorporated
Respondent	Mr M Hemery (of counsel) for the Commissioner of The Corruption and Crime Commission,
	Mr R Andretich (of counsel) for the Minister for Public Sector Management

Supplementary Reasons for Decision

1 On Thursday 20 March 2008 Reasons for Decision were issued in this matter, however the parties were invited to make further submissions in respect of one aspect. The Memorandum of Matters Referred for Hearing Determination Under Section 44, issued on 21 June 2007, contains a schedule which sets out the positions of the respective parties and clause 2 notes the remedies sought by the applicant. By clause 2(c)(ii) the applicant sought "(a) declaration as to the principles the Minister ought to consider when exercising discretion under s 180(3) of the *CCC Act*".

2 The Reasons noted at [64] onwards:

> *"64 Section 180(3) of the CCC Act provides that Mr Ross is entitled to be appointed to a position under Part 3 of the PSM Act of at least equivalent level to that of the position Mr Ross occupied prior to his employment with the CCC. In this case, that means no less than Level 7.3. Whether it ought to be a higher level than that is a matter for consideration of a range of issues. Although those issues have not been canvassed before me, it would be reasonable to assume that they should include an objective assessment of:*
>
> *1. The availability of positions at the equivalent level and above;*
>
> *2. The nature of those positions;*

> *3. The experience, skills and qualifications required for those positions and the experience, skills and qualifications of the officer concerned.*
>
> *65 One would expect that the officers concerned would either be invited, or would take the initiative, to state a case to the organisation which was to appoint them as to the appropriate level of position to which they ought to be appointed.*
>
> *66 It may be that the officers are appointed to the CCC at the same level as the position they previously substantively held. The officers may or may not have developed and utilised higher level skills, experience and qualifications in the time of appointment to the CCC. If the work and experience were at the same level as previously, there may be no call or justification to appoint to other than the same level as the previous substantively held position.*
>
> *67 On the other hand, the appointment to the CCC may have been at a higher level than the previously held substantive position. What should happen if there are no positions available which utilise or require the special skills or experience the officer gained or utilised in the appointment to the CCC? For example, if the appointment to the CCC involved the officer developing skills and experience at a much higher level than before, but there are no positions at all or no positions available, which match those particular higher level skills and experience. One would not expect the officer to be appointed to a position at the higher level without being skilled or experienced in the areas required by that position.*
>
> *68 Given the circumstances under which Mr Ross accepted appointment to the DPC following over a year of unsuccessful negotiations with the CCC, and given that Mr Ross accepted the appointment, to use the words of the email of 22 February 2007, "under duress" (Exhibit 5, Attachment "P"), it would hardly be surprising if negotiations as to the position for him to be appointed to were unsatisfactory to him.*
>
> *69 As these matters have not been fully canvassed before me, I am unable to come to any final conclusions about the principles to be applied under s 180(3) of the CCC Act without inviting further submissions from the parties. The parties may consider that the issues canvassed in paras (64) to (67) are sufficient for their purposes. If, however, they wish to have the matter addressed further, then they should advise within 14 days."*

3 The parties agreed to a process for the making of further submissions. This included that the applicant lodged further submissions on 15 April 2008. In those submissions the applicant addressed in considerable detail the approach it believes is appropriate under s 180(3) of the *Corruption and Crime Commission Act* (the CCC Act), examining parliamentary intent and looking at an objective test to be applied to the consideration of the level at which an officer could return to the public service. The applicant also made reference to the arrangements in the public service in respect of the *Public Sector Management (Redeployment and Redundancy) Regulations 1994 (PSM R & R Regulations)* as they relate to the rate of pay applicable and identifying suitable alternative positions for redeployees in those circumstances. It also referred to the principles of equity which says it requires consideration including whether the officer went to the Corruption and Crime Commission (the CCC) on promotion or was subsequently promoted following "the transfer"; whether the selection was undertaken in accordance with the Standards of Recruitment Selection and Appointment; whether the return to the public service was at the initiative of the employee or the employer and the incremental steps applicable to the classification level. The applicant also addressed issues of administrative convenience referred to in the evidence of Mr Volaric of the Department of Premier and Cabinet as to the ease with which redeployment at Level 9 may take place.

4 The applicant also said that there is a lack of clarity in s 180(3) and attempted to give some clarity to it. Finally, the applicant referred to the review of the *CCC Act* recently undertaken by Gail Archer SC (the Archer Review) including the recommendation "…that the Act be amended to ensure that staff return to the public sector at the level they reached in the CCC" (Recommendation 11).

5 The second respondent filed a submission dated 28 April 2008 (filed on 29 April 2008) which, in essence, said that it is not possible to proceed beyond the general considerations raised in the Reasons for Decision at [64] to [67] because each case requires consideration on its own merits. It says the right of return provisions contained within the *Public Sector Management Act 1994* ("the *PSM Act*") are irrelevant because of the particular appointment arrangements for staff of the CCC.

6 As to the Archer Review, the second respondent said that this has not been accepted by government and that Recommendation 11 in particular has not been accepted. The second respondent said that the appointment pursuant to s 180(3) of the *CCC Act* requires an exercise of discretion taking account of best matching the qualifications and experience of the officer with positions which are available but to be not less than the officer enjoyed prior to appointment to the staff at the CCC.

7 The first respondent's submission of 2 May 2008 said that the issue of the right of return was not a matter for it and therefore it is not appropriate to comment. However, the first respondent raised the issue of the gap between the end of Mr Ross's appointment with the CCC and the commencement of the appointment he took up with the Department of Premier and Cabinet and said that that matter requires resolution. The CCC put forward a proposed order as to the level at which Mr Ross would receive entitlements until his appointment with the Department of Premier and Cabinet.

8 On 5 May 2008, the second respondent wrote to the Public Service Arbitrator (the Arbitrator) seeking clarification of the issue to be addressed by the parties in their submissions on the basis that it claimed that submissions had not been invited on the issue raised by the first respondent. Following correspondence from the applicant and the first respondent the Arbitrator's Associate then wrote to the second respondent, providing a copy to the other parties. The substantive part of that letter reads as follows:

"Paragraphs 64 to 69 of the Reasons for Decision deal with the issue of the principles to be applied to the question of the level at which appointment is to be made under s 180(3) of the Corruption and Crime Commission Act 2003 (WA), where the officer is to be appointed to a position under Part 3 of the Public Sector Management Act 1994. The issue which the second respondent has raised in its Further Submission of 2 May 2008 relates to the gap between Mr Ross' cessation of his office with the Corruption and Crime Commission and his appointment by the Department of Premier and Cabinet.

The Public Service Arbitrator is of the view that the issue raised by the Corruption and Crime Commission is not one which was dealt with by the Reasons for Decision in such a way as to invite submissions in regard to that point. The issue for submission was set out in paragraphs 64 to 69 as being the principles to be considered by the Minister in appointing to an office under Part 3 of the Public Sector Management Act 1994."

9 On 16 May 2008 the applicant filed a submission in response as provided for in the process agreed between the parties for the filing of further submissions. The applicant again referred to the *PSM R & R Regulations* as providing a benchmark for considering Mr Ross's case. The applicant raised the issue of who would determine which position would match the qualifications of the displaced officer, and other questions associated with assessment and appointment process. The applicant queried whether, in the absence of the application of the *PSM R & R Regulations*, there is any mechanism to resolve such issues.

Consideration and Conclusions

10 The issue upon which submissions were invited, which was the issue about which the applicant sought a declaration, was principles related to the Minister for Public Sector Management exercising discretion under s 180(3) of the *CCC Act*. That matter relates to the level at which an officer is to be appointed to the public service after his appointment with the CCC has terminated. That is the issue upon which I intend to deal with the further submissions. The issue which the second respondent now raises has not previously been raised and does not constitute a matter which was previously before me.

11 The issues which I raised in [64] to [67] of the Reasons of 20 March 2008 are those which deal with the issue raised by the applicant in clause 2(c)(ii) of the matter referred for determination, being the principles the Minister ought to consider when exercising discretion under s 180(3) of the *CCC Act*. The applicant's submission raises some additional considerations which it says ought to be included.

12 As noted by the applicant, the CCC was established in such a manner as to provide it with the capacity to engage staff separately from, and independent of, the public service. It has chosen to use certain aspects of public sector employment arrangements. However, the two systems may not always merge. To require that all staff return to the public service at the same level they reached in the CCC, as recommended by the Archer Review, without consideration of other issues, ignores the uniqueness of the CCC and its role and functions. This affects the nature of the work of its officers and the skills, experience and qualifications required of them and the skills, experience and the qualifications they gain during their employment with the CCC. Those skills, experience and qualifications gained at the CCC may not be transferable to many or any positions, or available positions, within the public service. It also ignores the need to maintain the integrity of the public service classification system which applies across the sector. The CCC is free to modify its own staff arrangements and deviate from those applying in the public sector.

13 Whilst I accept the applicant's submission that administrative convenience or difficulties are not proper considerations in interpreting legislation, the practicality of appointing staff to particular levels and positions within the public service requires consideration of practical aspects such as the nature and requirements of available positions.

14 Employees who choose to leave the public service for the purposes of employment with the CCC or with any other organisation, be it a government agency outside of the public service or in the private sector, do so for particular purposes. What they are guaranteed in this case is a right of return at no lesser level than they left the public service. One would anticipate that their service with the CCC would provide them with opportunities to increase their skills in particular areas however whether those new or higher level skills are transferable back into the public service will depend upon what positions exist within the public service. It may be that no positions exist within the public service which require the new or increased level of skill in the particular area of skill or expertise which the person seeking to re-enter has developed in their time with the CCC.

15 The same would apply in respect of an employee who left the public service to work in the private sector and seeks to return, or to a new entrant to the public service. However, in the case of those seeking to return to the public service from the CCC, their minimum level of re-entry is protected.

16 The situation is not analogous to redeployment and redundancy and the *PSM R & R Regulations* do not apply. Those Regulations provide for a particular regime in circumstances where the officer was and continues to be a government officer, appointed and engaged within the processes applied across the public sector.

17 As to the applicant's proposed criteria of principles of equity, whether the officer went to the CCC on promotion or was subsequently promoted and whether the return to the public service was at the initiative of the employee or the CCC, these are not matters which relate to the objective assessment and matching of the available positions with the officer's experience, skills and qualifications. The officer is guaranteed that his or her level upon leaving the public service will be maintained. If he or she has developed particular skills or gained qualifications which relate only to work for the CCC, or relate to positions in the public service where there are no vacancies, then to appoint the officer to a position at a level commensurate with his or her level gained in employment at the CCC would be to compromise the proper appointment and classification systems in the public service.

18 However, if the officer has, during his or her time with the CCC gained experience and skills relevant to an available position in the public service, which is at a higher level than the position he or she held before the CCC position, then that CCC experience and skills would be relevant and ought to be recognised.

19 Whether the officer was appointed to the CCC position at a higher level than he/she left the public service, or was promoted while there, is not relevant to the officer's capacity to meet the requirements of an available position within the public service.

20 If the additional experience, skills or qualifications gained while employed by the CCC are not transferable to an available position, then it does not matter whether the officer left the CCC at his own or the CCC's initiative.

21 The issues the applicant raises as to the timing of the availability of positions, and who is to exercise the power to decide which positions best match the qualifications and experience of the officer, as well as what is to happen if the department which has the vacancy does not wish to accept the officer, are all valid issues, but they go beyond the issue at hand. In this case the second respondent has actually offered and Mr Ross has accepted, albeit under protest, a position with it. In any event, it appears that the Department of Premier and Cabinet has assumed the role of dealing with or co-ordinating the return of officers of the CCC to the public service.

22 Whether the issues raised by the applicant will arise, and whether they are within the Arbitrator's jurisdiction because of the provisions of s 80E(7) of the *Industrial Relations Act 1979*, are matters for another day.

23 Accordingly, taking account of the submissions made by the parties in response to the invitation to make additional submissions, I am not able to further develop objective tests which would apply as matters of principle. There will always be individual circumstances which require particular consideration. However for the purposes of a declaration as to general principles to apply, those issues set out within [64] to [67] of the Reasons for Decision of 20 March 2008 shall apply. Accordingly a declaration shall issue to the effect that:

The principles the Minister ought to consider when exercising discretion under s 180(3) of the *CCC Act* are:

a. the availability of positions within the public service at the equivalent level of classification and above as the officer occupied immediately prior to appointment under s 179 of the *Corruption and Crime Commission Act 2003 (WA)*;

b. the nature of those positions;

c. the experience, skills and qualifications required of those positions and the experience, skills and qualifications of the officer concerned.

2008 WAIRC 00353

DISPUTE REGARDING RECLASSIFICATION OF POSTION OF UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA (INCORPORATED)
	APPELLANT
	-v-
	THE MINISTER FOR PUBLIC SECTOR MANAGEMENT, COMMISSIONER CORRUPTION AND CRIME COMMISSION
	RESPONDENTS
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 11 JUNE 2008
FILE NO	PSACR 27 OF 2006
CITATION NO.	2008 WAIRC 00353

Result	Orders issued
Representation	
Applicant	Mr W Claydon for the Civil Service Association of Western Australia Incorporated
Respondent	Mr M Hemery (of counsel) for the Commissioner of the Corruption and Crime Commission, Mr R Andretich (of counsel) for the Minister for Public Sector Management

Order

HAVING heard Mr W Clayton on behalf of the applicant, Mr M Hemery (of counsel) on behalf of the Commissioner of the Corruption and Crime Commission and Mr R Andretich (of counsel) on behalf of the Minister for Public Sector Management the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby:

1. Declares that the principles the Minister ought to consider in appointing a person under s 180(3) of the *Corruption and Crime Commission Act 2003 (WA)* are:

   a. the availability of positions within the public service at the equivalent level of classification and above as the officer occupied immediately prior to appointment under s 179 of the *Corruption and Crime Commission Act 2003 (WA)*;

   b. the nature of those positions;

   c. the experience, skills and qualifications required of those positions and the experience, skills and qualifications of the officer concerned.

2. Orders that the matter otherwise be dismissed.

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

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Western Australia Police Traffic Escort Wardens Industrial Agreement 2007 AG 6/2008	23/05/2008	The Commissioner of Police	Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch	Senior Commissioner J H Smith	Agreement registered

INDUSTRIAL AGREEMENTS—BARGAINING—Matters dealt with—

2008 WAIRC 00341

DECLARATION PURSUANT TO SECTION 42H.

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES DIRECTOR GENERAL, DEPARTMENT OF EDUCATION AND TRAINING

APPLICANT

-v-

STATE SCHOOL TEACHERS' UNION OF WESTERN AUSTRALIA

RESPONDENT

CORAM COMMISSIONER J L HARRISON

DATE FRIDAY, 6 JUNE 2008

FILE NO/S APPL 12 OF 2008

CITATION NO. 2008 WAIRC 00341

Result Declaration and Orders issued

Declaration and Order

WHEREAS on 10 January 2008 the Director General of the Department of Education and Training ("the applicant") lodged a Notice to Initiate Bargaining with the State School Teachers' Union of WA (Incorporated) ("the respondent") to negotiate on an industrial agreement under s42 of the *Industrial Relations Act, 1979* ("the Act") for school teachers and school administrators employed by the applicant in Western Australia; and

WHEREAS on 31 January 2008 the respondent responded to the Notice to Initiate Bargaining stating that it wished to enter into negotiations to reach agreement on an industrial agreement; and

WHEREAS between 31 January 2008 and 9 April 2008 the parties negotiated both in the Commission and outside of the Commission with a view to reaching agreement on a proposed agreement and on a number of occasions the parties reported back to the Commission with respect to the progress of these negotiations (see C 4 of 2008); and

WHEREAS on 9 April 2008 the applicant lodged an application seeking that the Commission issue a declaration pursuant to s42H of the Act that bargaining between the parties has ended and the applicant filed detailed submissions in support of its application; and

WHEREAS on 15 April 2008 the applicant lodged an amended application which amongst other things changed the name of the applicant from Director General to Director General, Department of Education and Training; and

WHEREAS on 15 April 2008 the respondent lodged a Notice of Answer and Counter-Proposal opposing the application for a declaration pursuant to s42H of the Act that bargaining had ended; and

WHEREAS on 15 April 2008 the Commission advised the parties that the application seeking a declaration pursuant to s42H of the Act would be discussed at a report back conference being held with respect to application C 4 of 2008 on 16 April 2004; and

WHEREAS at this conference as the parties believed that further negotiations would be useful the Commission did not deal with the applicant's application to end the bargaining period and the parties continued to meet and negotiate on the terms of an industrial agreement both before and outside of the Commission; and

WHEREAS the applicant advised the Commission on 13 May 2008 that even though the parties had met on numerous occasions to reach agreement on an industrial agreement and whilst progress had been made between the parties on some matters to be included in the proposed agreement after it had made application for a declaration to end the bargaining period, the applicant was now of the view that there was no prospect of the parties reaching agreement on all issues to be incorporated in an industrial agreement; and

WHEREAS on 23 May 2008 the respondent filed and served submissions with respect to the application seeking a declaration pursuant to s42H of the Act; and

WHEREAS the Commission convened a conference on 28 May 2008 to hear further from the parties as to whether a declaration pursuant to s42H of the Act should issue; and

WHEREAS on or about 15 May 2008 a confidential document detailing class sizes within the Western Australian Government school system which had been exchanged during the negotiations between the parties was provided to the press; and

WHEREAS subsequently and at the Commission's request, the parties undertook to retain all documents generated as part of the negotiations in a secure place with one person accessing and controlling these documents; and

WHEREAS the Commission invited the parties to make submissions as to what if anything should happen to these documents if a declaration issued that bargaining has ended; and

WHEREAS s42H of the Act provides as follows:

"**42H. Commission may declare that bargaining has ended**

(1) If, on the application of a negotiating party, the Commission constituted by a single commissioner determines 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,

the Commission may declare that the bargaining has ended between those negotiating parties.

(2) Despite section 49, no appeal lies from a declaration under subsection (1)."; and

WHEREAS the applicant argued the following in support of its application that a declaration that bargaining between the parties has ended should issue:

- the applicant has bargained in good faith and has complied with the requirements under s42B(2) of the Act;
- since the applicant's second offer was rejected by the respondent and its members in December 2007 the applicant has proposed different negotiating items in response to that rejection and increased the quantum of salaries to be offered to the applicant's members to be included in a three year agreement;
- despite the parties holding a number of meetings and attending report back and negotiating conferences in the Commission since the recommencement of negotiations between the parties on 24 January 2008 a significant disparity remains between the positions of the applicant and the respondent and as a result bargaining has failed;
- the applicant believes that there is therefore no reasonable prospect of the parties reaching an agreement on all of the issues in dispute;
- the applicant maintains that whilst agreement has been able to be reached between the parties on some minor issues the parties are unable to reach agreement on all issues with respect to salaries, allowances, DOTT time (Duties Other Than Teaching), employee workloads, class sizes, additional staff meetings and professional development, flexible working conditions and items to be removed from the current agreement; and

WHEREAS the applicant argued that if the Commission issues a declaration that bargaining has ended the following orders should issue given the leaking of confidential information to the press on or about 15 May 2008, which was exchanged between the parties during negotiations:

- all documents, including information and data exchanged between the parties since the commencement of negotiations in 2007 are to be returned to the party originally providing these documents as well as documents which include amendments to and/or positions of both parties;
- all information, data, statements or the positions of either party arising out of the negotiations not be adduced as evidence in any arbitral proceeding or enter the public domain;

- copies of all returned documents may be requested from the other party and such information can be given to the requesting party if the other party agrees;
- the party that originally provided information or data may use it for its own purposes; and

WHEREAS the respondent argued the following in support of its claim that a declaration that bargaining between the parties has ended should not issue:

- the respondent believes that the applicant has not bargained in good faith as it has capriciously withdrawn and added items to be negotiated since its second offer was rejected in December 2007 such as the quantum of allowances to be paid to teachers;
- on the information before it the respondent is not satisfied that the applicant has offered any additional funding since the rejection of the applicant's second offer;
- the respondent disputes that bargaining between the applicant and the respondent has failed with respect to DOTT time and workloads as the parties are close to reaching agreement on these issues;
- even though the respondent maintains that there is no prospect of reaching agreement on all matters with respect to salaries, allowances, class sizes, additional staff meetings and professional development and items to be removed from the current agreement in the short term it argues that if the parties were able to continue negotiations the respondent could also negotiate with the Western Australian Government directly for additional funding and as a result a range of issues in dispute between the parties could be finalised; and

WHEREAS the respondent argued that if the Commission issues a declaration that bargaining has ended the following orders should issue given the leaking of confidential information to the press on or about 15 May 2008, which was exchanged between the parties during negotiations:

- all documents generated by the parties continue to be contained under the management of the designated person as arranged in the Commission during discussions concerning the leaking of documents to the press;
- any party may use documents in a future arbitration hearing which they have previously tendered during the negotiating process;
- neither party would be able to table a document generated by the other party in any future proceedings unless it has sought and obtained permission to do so from the other party; and

WHEREAS the tests to be considered by the Commission in deciding whether a declaration pursuant to s42H of the Act should issue are whether:

- the applicant has bargained in good faith;
- bargaining between the applicant and another negotiating party has failed; and
- there is no reasonable prospect of the negotiating parties reaching an agreement; and

WHEREAS the Commission is aware that the parties have participated in a number of lengthy meetings as well as conciliation and negotiating conferences in the Commission with a view to reaching agreement on the terms of an industrial agreement and the Commission is aware from report back meetings held in the Commission that both parties have exchanged information where relevant and discussed proposals and moved their positions with a view to reaching agreement on a range of matters however the parties remain in dispute on a number of issues; and

WHEREAS on the information before it the Commission is of the view that the applicant has bargained in good faith as it has stated its position on a range of matters, it has met with the respondent on a number of occasions and at reasonable times, it has disclosed relevant and necessary information, it has acted honestly and openly and not capriciously, it has dedicated sufficient resources to the bargaining process and in the Commission's view the applicant has genuinely bargained; and

WHEREAS the Commission has formed the view that given the current impasse between the parties with respect to being unable to reach agreement on a number of significant issues notwithstanding lengthy negotiations to date that bargaining between the applicant and the respondent has failed; and

WHEREAS the Commission is of the view that there is no reasonable prospect of the negotiating parties reaching an agreement given the entrenched positions of the parties with respect to salaries, allowances, class sizes, staff meetings and professional development, items to be excluded from the current agreement and flexible working arrangements; and

WHEREAS having reached the conclusion that the applicant has bargained in good faith, that bargaining between the applicant and the respondent has failed and there is no reasonable prospect of the negotiating parties reaching an agreement on a range of significant issues, and when taking into account the requirements under the Act it is the Commission's view that a declaration that bargaining between the parties has ended should issue; and

WHEREAS after having considered the orders being sought by the parties if a declaration that bargaining has ended should issue and given the Commission's powers under s27 of the Act, the Commission is of the view that orders should issue with respect to documentation exchanged between the parties during the negotiation process to retain the integrity of this documentation and information; and

WHEREAS given the Commission's powers under s27(1) of the Act and the consent of the parties and having formed the view that it is appropriate in the circumstances to amend the name of the applicant an order will issue that Director General be deleted as the named applicant in this application and be substituted with Director General, Department of Education and Training; and

WHEREAS after the minute of proposed declaration and orders issued some minor grammatical errors in the minute were raised with the Commission and with the consent of the parties these errors were corrected;

NOW THEREFORE the Commission pursuant to the powers vested in it under s42H and under s27 of the Indust*rial Relations Act, 1979* hereby:

1. ORDERS THAT the name of the applicant be deleted and that Director General, Department of Education and Training be substituted in lieu thereof.
2. DECLARES THAT the bargaining between the Director General of the Department of Education and Training and the State School Teachers' Union of WA (Incorporated) initiated by the Director General of the Department of Education and Training on 10 January 2008, has ended.
3. ORDERS THAT all documents, information and data exchanged between the parties since the commencement of negotiations in 2007, as well as any documents which include amendments to and/or the positions of both parties, be returned to the originating party by 4.00pm 11 June 2008.
4. ORDERS THAT no copy of the documentation referred to in Order 3, which has been returned to the originating party, is to be retained by the other party.
5. ORDERS THAT copies of returned documents may be requested by the other party and such information can be handed over if the originating party agrees.
6. ORDERS THAT the party that originally provided information or data may use it for its own purposes.
7. ORDERS THAT liberty to apply is granted with respect to Orders 3 to 6.

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

PUBLIC SERVICE APPEAL BOARD—

2008 WAIRC 00345

APPEAL AGAINST THE DECISION MADE ON 20 DECEMBER 2007 RELATING TO TERMINATION OF EMPLOYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MRS ELSA C. WADE
	APPELLANT
	-v-
	DRUG AND ALCOHOL OFFICE
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER P E SCOTT - CHAIRMAN
	MR S SEEDS - BOARD MEMBER
	MR C FLOATE - BOARD MEMBER
HEARD	TUESDAY, 25 MARCH 2008, THURSDAY, 27 MARCH 2008, WEDNESDAY, 21 MAY 2008
DELIVERED	MONDAY, 9 JUNE 2008
FILE NO.	PSAB 1 OF 2008
CITATION NO.	2008 WAIRC 00345

CatchWords	Industrial Law (WA) – Fixed term contract or permanent employment – government officer – Law of contract – unilateral mistake – *Industrial Relations Act 1979*
Result	Appeal dismissed
Representation	
Applicant	Mrs Elsa C Wade on her own behalf
Respondent	Mr J Ross on behalf of the Respondent

Reasons for Decision

(Given extemporaneously at the conclusion of the proceedings,

taken from the transcript as edited by the Public Service Appeal Board)

1 These are the unanimous Reasons for Decision of the Public Service Appeal Board (the Board).

2 On 4 January 2008, the appellant filed an appeal said to be against the decision to terminate her contract of employment given on 20 December 2007. The effect of the appeal is to seek to enforce a contract which was entered into between the parties, and a central term of the contract being the period for which it was to apply.

The Facts

3 The Agreed Facts in this matter are that:

"1. On 16 March 2007 the DAO advertised position number DAO 722003 Finance & Budget Officer as a 6-month fixed term contract or secondment opportunity.

2. The advertisement stated it was a 6-month contract position and may be available for extension (up to 2 years) dependent on operational reasons and pending return of the substantive occupant from acting opportunities.

3. Ms Wade applied for the fixed term contract position online.

4. A Mr A Davies and Ms Joyce Naidoo interviewed Ms Wade for the fixed term contract position.

5. The fact that the position was only available on a fixed term contract was made clear to Ms Wade at interview. Neither Mr Davies nor Ms Naidoo made any reference to any other type of employment arrangements being available.

6. At interview Mr Davies and Ms Wade agreed that her appointment would be on a fixed term contract basis.

7. Ms Wade was provided with an offer of employment by letter dated 3 May 2007 stating her offer of employment was on a fixed term basis and requiring her to sign and return the acceptance of that offer.

8. On 7 May 2007, Ms Wade made further enquiries of Mr Davies as to the transfer of accrued leave entitlements from the Ministry of Justice.

9. On 9 May 2007 Mr Davies advised Ms Wade, that DAO only accepts transfer of leave credits on permanent appointments and that they did not accept the transfer of leave credits on fixed term appoints as in Ms Wades situation.

10. On 9 May 2007 Ms Wade acknowledged receipt of Mr Davies' advice

11. On 10 May 2007 Ms Wade signed the Offer Of Employment Form and returned it to DAO.

12. When accepting the offer of employment on 10 May 2007, Ms Wade was fully aware that she was accepting the offer of a fixed term contract appointment to position DAO722003 - Finance & Budget.

13. Ms Wade commenced employment in position DAO 722003 on 21 May 2007.

14. Health Corporate Network forwarded Ms Wade a permanent contract of employment for position DAO722003 on 21 May 2007, which Ms Wade signed on 25 May 2007 and allegedly returned to HCN.

15. Ms Wade did not advise Mr Davies or Ms Naidoo that the contract she had received from Health Corporate Network for the DAO722003 position was not in accordance with the offer and acceptance she signed and returned on 10 May 2007.

16. On or about 27 August 2007 Ms Wade received the renewal fixed term contract for a further three months, as a result of the payroll flagging the end date of the first fixed term contract. (Agreed)

17. On receiving the renewal fixed term contract, Ms Wade advised the DAO and HCN that she had signed a permanent contract and provided a copy of that signed permanent contract of employment to HCN.

18. HCN have no record of receiving the signed permanent contract allegedly returned by Ms Wade.

19. On 27 August 2007 Mr Davies and Ms Janelle Zandvliet (HR Change Manager – HCN) both advised Ms Wade that the permanent contract was issued in error and it was never the intent that she be permanently appointed to the position.

20. Ms Wade refused to sign the renewal 3 month fixed term contract from 21 August 2007 to 20 November 2007, claiming the only valid contract was the permanent contract she had signed on 25 May 2007.

21. Ms Wade also refused to sign the fixed term contract for the period 21 November to 20 December 2007."

4 In her evidence before the Board Ms Wade said that what she had agreed to at interview was a six month contract. Had she subsequently been given a three-month contract when the intention of both parties was to enter into a six-month contract, then she would not have accepted it because, she said, that was not what she had agreed to. However, she now seeks to rely on the so called permanent contract which was provided to her.

5 The respondent says that there has been a unilateral mistake in issuing a document which erroneously indicated permanent employment.

Consideration and Conclusions

6 The onus is on the mistaken party to show that the other party knew or must have known that he or she intended terms different from the terms of the offer or acceptance. It must be obvious that the offerer did not intend to make an offer on those terms. *Cheshire and Fifoot's Law of Contract* (Seddon NC and Ellinghaus MP, *9th Australian Ed.)* deals with unilateral mistake and unconscionability and says at [12.51]:

"As already noted, it should be made clear that a mistake, however fundamental, made by one party by itself has no legal effect. There must be something more. That extra ingredient is actual or constructive knowledge of the mistake by the other party such that to insist on the contract would be unconscionable."

7 The facts demonstrate that there was a unilateral error in that the respondent advertised and the appellant applied for a job with a fixed term contract. The interview took place on that basis. Both parties knew that that was to be the basis of the contract and that was the meeting of minds. Further the respondent did not have a permanent position to offer at the time as the position was already substantively occupied.

8 When the written contract arrived, the appellant knew that there was an error and that it was to her advantage. According to the law of contract, the appellant is not able to rely on the unilateral mistake. The appellant is not able to rely on the contract as there was a unilateral mistake therefore the appellant was not engaged on a permanent contract.

9 The contract on which there was a meeting of minds was a fixed term contract and it expired and a further month's work was provided. Therefore, there was no decision to terminate the contract. It expired by the effluxion of time.

10 As the appeal is based on a claim of a decision to terminate and there was no such decision, the appeal must be dismissed.

2008 WAIRC 00344

APPEAL AGAINST THE DECISION MADE ON 20 DECEMBER 2007 RELATING TO TERMINATION OF EMPLOYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MRS ELSA C. WADE
	APPELLANT
	-v-
	DRUG AND ALCOHOL OFFICE
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER P E SCOTT - CHAIRMAN
	MR S SEEDS - BOARD MEMBER
	MR C FLOATE - BOARD MEMBER
DATE	MONDAY, 9 JUNE 2008
FILE NO	PSAB 1 OF 2008
CITATION NO.	2008 WAIRC 00344

Result	Appeal dismissed
Representation	
Applicant	Mrs Elsa C Wade on her own behalf
Respondent	Mr J Ross on behalf of the respondent

Order

HAVING heard the appellant on her own behalf and Mr J Ross on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT this appeal be, and is hereby dismissed.

(Sgd.) P E SCOTT,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

RECLASSIFICATION APPEALS—

2008 WAIRC 00320

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOHAN MARITZ WILLERS AND OTHERS
	APPELLANTS
	-v-
	WORKCOVER, WESTERN AUSTRALIAN AUTHORITY;
	WORKCOVER WA;
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER P E SCOTT
HEARD	WEDNESDAY, 26 MARCH 2008
DELIVERED	WEDNESDAY 21 MAY 2008
FILE NO.	PSA 24 OF 2007, PSA 25 OF 2007, PSA 26 OF 2007, PSA 27 OF 2007, PSA 28 OF 2007, PSA 29 OF 2007, PSA 30 OF 2007, PSA 31 OF 2007, PSA 32 OF 2007, PSA 33 OF 2007, PSA 34 OF 2007, PSA 43 OF 2007
CITATION NO.	2008 WAIRC 00320

CatchWords	Reclassification Appeal – Conciliation – Approved Procedures – BI/PERS Assessment – Approved classification tool – Cullen Egan Dell Assessment – limited flow on effect – *Industrial Relations Act 1979* WA s32(8) – *Public Sector Management Act 1994* – Approved Procedures 1 and 6
Result	Recommendation Issued
Representation	
Appellants	Mr A Birkelbach for the Appellants other than Mr S Melville
	Mr S Melville on his own behalf
Respondent	Mr J McDonough and Mr B Underwood for the Respondent

Reasons for Decision

1 The appellants are appointed to the position of Arbitrator within the Dispute Resolution Directorate of the respondent and they seek reclassification of their positions. The respondent says that it has acted in accordance with the procedures set down for the review of the classification of positions of this nature and in doing so has undertaken a BI/PERS assessment which has not resulted in the positions being at the level of classification which the appellants claimed.

2 The appellants seek an order of the Arbitrator that the respondent undertake an assessment known as Cullen Egan Dell Job Evaluation System ("CED") assessment of the positions they hold as they say that such an assessment is more relevant to the positions they hold than a BI/PERS assessment. They say that a BI/PERS assessment is more appropriate to a position which undertakes line management responsibilities and has certain financial accountabilities whereas the positions they hold are more akin to judicial positions. They say that an order pursuant to section 32(8)(a)(ii) of the *Industrial Relations Act 1979* ("the *IR Act*") would assist in the resolution of the dispute with the respondent in that whatever the outcome of a CED assessment, it would enable the parties to reconsider their respective positions with a view to resolving the reclassification appeals by agreement.

3 The appellants say that their positions are unique in the public sector and that there is provision within Approved Procedures for an assessment other than through BI/PERS.

4 The respondent says that whilst it does not oppose the use of a CED assessment, it says that it is bound by the processes set out by the Department of Premier and Cabinet which manages public sector employment and classification issues. The respondent also says that the express approval of the Department of Premier and Cabinet is required for any activities under Approved Procedures which deal with a review of classification.

5 The respondent has submitted into evidence a letter addressed to the Chief Executive Officer of the respondent from the Director General of the Department of Premier and Cabinet (Exhibit R1) to the effect that there is a question as to the capacity of the Public Service Arbitrator to issue an order that results in the employer contravening Approved Procedure 1 – Approved Classification System and Procedures established under the *Public Sector Management Act 1994* which prescribes BI/PERS as the approved classification tool. The Department of Premier and Cabinet also expresses concern that there is potential for flow on and inconsistencies for classification levels within the broader public service should such an order be issued.

6 **Section 32 – Reference of industrial matters for conciliation**, of the *IR Act* requires the Commission to endeavour to resolve matters by conciliation and to "do all such things as appear to it to be right and proper to assist the parties to reach an agreement on terms for the resolution of the matter" (subclause (2)).

7 Subclause (3) lists a number of such things that the Commission might use for the purposes of conciliation, including arranging conferences and arranging for the parties to confer. Subsection (8) provides that:

> *"(8) For the purposes of this section the Commission may —*
>
> *(a) give such directions and make such orders as will in the opinion of the Commission —*
>
> *(i) prevent the deterioration of industrial relations in respect of the matter until conciliation or arbitration has resolved the matter;*
>
> *(ii) enable conciliation or arbitration to resolve the matter; or*
>
> *(iii) encourage the parties to exchange or divulge attitudes or information which in the opinion of the Commission would assist in the resolution of the matter;*
>
> *(b) give any direction or make any order or declaration which the Commission is otherwise authorised to give or make under this Act."*

8 The appellants seek that the order be made under subsection (8)(a)(ii) on the basis that they argue that the order sought would enable conciliation or arbitration to resolve the dispute.

9 Neither of the parties has argued before me that there is no capacity for the Arbitrator to make the order sought. The only objection in that regard is expressed in the letter to the respondent (Exhibit R1).

Approved Procedures

10 In accordance with various provisions of the *Public Sector Management Act 1994* ("the *PSM Act*"), a number of Approved Procedures have been issued. Approved Procedure 1 – Approved Classification System and Procedures established under the *PSM Act* provides for classification determination systems and procedures which are in accordance with the principles set out in sections 7 and 8 of the *PSM Act*. It notes that "CEOs or other relevant employing authorities have the authority to determine the classification of jobs up to and including Level 8". Beyond Level 8, the authority of the Department of Premier and Cabinet is required (according to Approved Procedure 2 – Approved Classification System and Procedures established under the *PSM Act*). Assessments of classification are to be made according to the work value of the position and the approved job evaluation tool is specified as being BI/PERS.

11 Approved Procedure 6 – Approved Classification System and Procedures established under the *PSM Act* relates to "Specialist Positions". The objective of this procedure is specified as being:

> *"To provide for a method of remunerating employees in specialist positions where the market forces, uniqueness, expertise or experience required is beyond the scope of Approved Procedure 1 or is not covered by an award, order or agreement under the* Industrial Relations Act 1979 *or* Workplace Relations Act 1996*".*

12 "Specialist position" is not defined, however the procedure says that:

> *"The remuneration of a specialist position will depend on the existence of the factors specified. These are:*
>
> - *specialist knowledge, skills or experience required to undertake the position;*
> - *the uniqueness of the work to be performed;*
> - *an independent assessment of the market rate for such a position."*

13 It is noted that this Approved Procedure is only to be applied to positions where appointment is subject to a fixed term contract, and that such contracts are to be prepared by the Department of Premier and Cabinet.

Conclusions

14 There are a number of aspects of this claim which cause me some concern. The first is that there is a latent issue of jurisdiction raised in Exhibit R1 but which has not been properly addressed by either the appellants or the respondent, and the Department of Premier and Cabinet has made no request to be heard on the matter.

15 Secondly, I have some concerns as to whether Approved Procedure 6 – Approved Classification System and Procedures established under the *PSM Act* can formally apply to the positions of the appellants on the basis that the appointments are required to be for a fixed term and whether these positions are subject to fixed term appointments is not before me. Otherwise, I am satisfied, based on the material before me, that these positions are indeed unique within the public service and require specialist knowledge, skills or experience.

16 I note, too, the description of the CED as compared with the BI/PERS job evaluation tool. Based on the information before me, I conclude that the positions the subject of these appeals, subject to the concerns expressed above, would meet the factors applicable under Approved Procedure 6 – Approved Classification System and Procedures established under the *Public Sector Management Act 1994*, and accordingly may warrant assessment and evaluation under that Approved Procedure.

17 The prospect of flow-on seems to be extremely limited, if there is any such prospect, given the uniqueness of these positions.

18 In those circumstances, a CED assessment as opposed to a BI/PERS assessment may be appropriate.

19 The nature of the current application is for an order requiring the respondent to undertake a CED assessment, as an aid to conciliation of the appeals. The difficulty here is that the Department of Premier and Cabinet's approval for such an assessment is a requirement under Approved Procedures.

20 Given the concerns raised earlier, and noting that the Department of Premier and Cabinet is not a party to these appeals, I am of the view that it would be inappropriate to issue the orders sought. However, I am very firmly of the view that an assessment

of these positions, according to Approved Procedure 6 and using the CED would be appropriate. Therefore, while I am not prepared to issue an order to that effect, I believe that such an assessment would be of considerable assistance to the parties in seeking to resolve these appeals by agreement and intend to issue a recommendation that it be undertaken.

21 I note, too, that should the respondent not accept, or not be able to accept, the Recommendation, the appellants may still pursue their reclassification appeals and in doing so would not be prevented from arguing at that point that the respondent has declined their claims for reclassification based on an inappropriate or erroneous assessment.

2008 WAIRC 00319

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOHAN MARITZ WILLERS AND OTHERS
	APPELLANTS
	-v-
	WORKCOVER, WESTERN AUSTRALIAN AUTHORITY;
	WORKCOVER WA
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 21 MAY 2008
FILE NO.	PSA 24 OF 2007, PSA 25 OF 2007, PSA 26 OF 2007, PSA 27 OF 2007, PSA 28 OF 2007, PSA 29 OF 2007, PSA 30 OF 2007, PSA 31 OF 2007, PSA 32 OF 2007, PSA 33 OF 2007, PSA 34 OF 2007, PSA 43 OF 2007
CITATION NO.	2008 WAIRC 00319
Result	Recommendation issued

Recommendation

WHEREAS the appellants appeal to the Public Service Arbitrator pursuant to s 80E(2)(a) of the *Industrial Relations Act 1979*, against the respondent's decision rejecting their claims for reclassification; and

WHEREAS the appellants seek an order requiring the respondent to undertake a Cullen Egan Dell Job Evaluation in respect of the positions they occupy, as a means of assisting the parties to reach agreement as to the appropriate level of classification for the positions they occupy, for the purpose of resolving the appeals before the Arbitrator; and

WHEREAS the Arbitrator has heard from the parties and has considered whether a Cullen Egan Dell Job Evaluation may assist the parties to reach agreement and has concluded, on the basis of the information put before the Arbitrator that such an evaluation would assist the parties to reach agreement on terms for the resolution of the appeals:

NOW THEREFORE, in accordance with the powers set out in s80E and s32 of the *Industrial Relations Act* 1979, the Public Service Arbitrator hereby recommends:

THAT the respondent undertake an assessment of the positions the subject of these appeals by a Cullen Egan Dell Job Evaluation.

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

RECLASSIFICATION APPEALS—Notation of—

File Number	Appellant	Respondent	Commissioner	Decision	Finalisation Date
PSA 39/2005	Sing Lun Lau	Minister For Health in right of the Metropolitan Health Service	Scott C	Discontinued	Not Applicable

OCCUPATIONAL SAFETY AND HEALTH ACT—Matters Dealt With—

2008 WAIRC 00332

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SITTING AS
THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	KEN MARSHALL AND OTHERS
	APPLICANTS
	-v-
	PATRICK TERMINALS
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 3 JUNE 2008
FILE NO/S	OSHT 2 OF 2007
CITATION NO.	2008 WAIRC 00332

Result	Application discontinued
Representation	
Applicant	Mr C Cain (as agent)
Respondent	Mr C Hennessy

Order

WHEREAS this is an application pursuant to section 28(2) of the *Occupational Safety and Health Act 1984*;

AND WHEREAS on 20 August 2007 the Tribunal convened a conference for the purpose of conciliating between the parties;

AND WHEREAS at the conclusion of the conference agreement was reached between the parties;

AND WHEREAS the Tribunal attended site on 4 September 2007 and 27 March 2008;

AND WHEREAS on 5 May 2008 the applicant filed a Notice of Discontinuance in respect of the referral;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred under the *Occupational Safety and Health Act 1984*, hereby orders –

THAT this application be, and is hereby discontinued.

(Sgd.) S M MAYMAN,
[L.S.] Commissioner.

2008 WAIRC 00046

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SITTING AS
THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	THE MARITIME UNION OF AUSTRALIA
	APPLICANT
	-v-
	P & O AUTOMOTIVE & GENERAL STEVEDORING
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 24 JANUARY 2008
FILE NO/S	OSHT 1 OF 2008
CITATION NO.	2008 WAIRC 00046

Result	Order Issued
Representation	
Applicant	Mr L Edmonds of counsel
Respondent	Mr D Pearson of counsel

Order

Having heard Mr L Edmonds of counsel on behalf of the applicant and Mr D Pearson of counsel on behalf of the respondent, and Mr T Dawson on behalf of the Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch, the Commission, pursuant to powers conferred on it under the *Industrial Relations Act 1979*, hereby orders –

THAT the Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch be and is herby joined as a party to these proceedings.

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

2008 WAIRC 00066

REFERRAL OF DISPUTE RE DISMISSAL OF EMPLOYEE AND ALLEGED SAFETY BREACHES

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	THE MARITIME UNION OF AUSTRALIA AND OTHERS
	APPLICANT
	-v-
	P & O AUTOMOTIVE & GENERAL STEVEDORING
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 5 FEBRUARY 2008
FILE NO/S	OSHT 1 OF 2008
CITATION NO.	2008 WAIRC 00066

Result	Application dismissed for want of jurisdiction
Representation	
Applicant	Mr L Edmonds of counsel
Respondent	Mr R Allen of counsel
	Mr A Kennedy of counsel

Order

Having heard Mr L Edmonds of counsel on behalf of the applicant and Mr R Allen of counsel on behalf of the respondent, the Commission, pursuant to powers conferred on it under the *Industrial Relations Act 1979*, hereby orders –

THAT the application be and is hereby dismissed for want of jurisdiction.

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