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FULL BENCH—Appeals against decision of Commission—

2009 WAIRC 00278

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	:	2009 WAIRC 00278
CORAM	:	THE HONOURABLE M T RITTER, ACTING PRESIDENT CHIEF COMMISSIONER A R BEECH COMMISSIONER P E SCOTT
HEARD	:	WEDNESDAY, 15 AUGUST 2007, WEDNESDAY, 12 SEPTEMBER 2007, TUESDAY, 15 JANUARY 2008, TUESDAY, 11 MARCH 2008, TUESDAY, 25 MARCH 2008, WEDNESDAY, 2 APRIL 2008, FRIDAY, 30 MAY 2008, THURSDAY, 3 JULY 2008, TUESDAY, 26 AUGUST 2008, MONDAY, 17 NOVEMBER 2008, MONDAY, 18 MAY 2009
DELIVERED	:	TUEDAY, 12 MAY 2009
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	:	**2006 WAIRC 04786**
File No	:	**U 116 of 2005**

CatchWords:

Industrial Law (WA) - Application for adjournment to December 2009 - Appellant medically unfit until July 2009 - Adjournment application to December opposed - Concern about continued delay - Adjournment granted until August 2009 - Minute of proposed order

Result:

Adjournment granted.

Representation:

Appellant	:	In person
Respondent	:	Ms R Hartley (of Counsel)

Reasons for Decision

RITTER AP:

Introduction

1 By an order dated 17 November 2008, the Full Bench required the appellant to file and serve proposed amended grounds of appeal on or before 4 May 2009 and listed the appeal for hearing on 18 May 2009.

The Application

2 On 23 April 2009 the appellant filed an application for a "variation" of these orders. The application was supported by a letter which set out the reasons for the application.

The Grounds for the Application

3 The letter said that the appellant had "very critical situations" which had caused him "many stresses" and he had been placed on anti-depressant tablets by his doctor. The letter elaborated that the appellant had recently been attacked by a group in Northbridge. The appellant said he suffered injuries to his head and face and had bruises "all over" his body. The letter said he had been admitted to Royal Perth Hospital for a few days and was still under treatment. Attached to the application were a series of photographs of the appellant which graphically demonstrated his injuries.

4 Also attached to the application was a letter from Dr John Crawford of the Joondalup Drive Medical Centre dated 29 April 2009. Dr Crawford confirmed the appellant was assaulted on 6 March 2009, knocked unconscious by his assailants and attended at the Royal Perth Hospital. Dr Crawford said the injuries were significant and he was still recovering. He suggested the appeal be deferred until July 2009 when the appellant would be "able to better prepare his documents".

5 The letter also said that before the attack the appellant had been to Egypt to see his brother who was ill after having a stroke. The appellant said that he was planning to return to Egypt to see his brother during August 2009 and would be there for 10 weeks. Attached to the application was an e-ticket receipt for travel from Perth to Cairo on 23 August 2009, returning on 9 November 2009.

6 The appellant's letter requested in effect, the deferral of the filing of the proposed amended grounds of appeal and the hearing of the appeal until he returned from Egypt.

7 In a subsequent letter to the Commission the appellant clarified that his application was for the appeal not to be heard until December 2009.

The Respondent's Position

8 The respondent provided her submissions upon the application by way of a letter to the Commission from her solicitors contained in an email dated 7 May 2009. The letter said that whilst the respondent was not "wishing to be unreasonable", she was not prepared to consent to the appellant's request for an adjournment until December 2009. The letter said that whilst there was sympathy for the appellant's plight the respondent could not see why such a lengthy adjournment was required. Reference was made to the letter from Dr Crawford requesting that the matter be adjourned until July 2009 and the "travel itinerary" which showed the appellant did not travel to Cairo until 23 August 2009. It was submitted that the appeal could and should be listed for hearing in August 2009, prior to the appellant's departure to Egypt. It was submitted that the appeal has been ongoing for some time and the respondent was eager to see it finalised.

Analysis

9 In my opinion the appellant has demonstrated that there are grounds which make it just to vacate the present date for the hearing of the appeal. I accept however the respondent's submission that there are insufficient grounds to defer the hearing of the appeal until December 2009. Dr Crawford's letter provides that the appellant is only medically unfit until July 2009. After that, there is time to hear the appeal before the appellant departs for Egypt. Additionally, at the directions hearing on 17 November 2008, when the present hearing date was set, both the respondent and the Full Bench indicated concern about the continued delay in the resolution of the appeal. The appeal has been pending for a considerable period of time and needs to be finalised.

Minute of Proposed Order

10 Accordingly, in my opinion the following orders should be made:

1. The orders made by the Full Bench on 17 November 2008 are revoked.
2. The appellant file and serve his proposed amended grounds of appeal on or before 5 August 2009.
3. The appeal be listed for hearing on 13 August 2009 at 10.30am.

11 A minute of proposed order should be issued in these terms with the parties having three days in which to provide written submissions by way of a "speaking to the minute".

BEECH CC:

12 I have read the Reasons for Decision of his Honour, the Acting President and I agree with those reasons and have nothing to add.

SCOTT C:

13 I have had the benefit of reading the Reasons for Decision of his Honour the Acting President. I agree with those Reasons and have nothing to add.

2009 WAIRC 00284

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, 15 MAY 2009
FILE NO	FBA 27 OF 2006
CITATION NO.	2009 WAIRC 00284

Decision	Adjournment granted.
Appearances	
Appellant:	In person
Respondent:	Ms R Hartley (of Counsel)

Order

Having heard Mr E Michael on his own behalf as the appellant, and Ms R Hartley (of Counsel) on behalf of the respondent, and reasons for decision having been delivered on 12 May 2009 it is this day, 15 May 2009, ordered that:

1. The orders made by the Full Bench on 17 November 2008 are revoked.
2. The appellant file and serve his proposed amended grounds of appeal on or before 5 August 2009.
3. The appeal be listed for hearing on 13 August 2009 at 10.30am.

By the Full Bench

(Sgd.) M T RITTER,
Acting President.

[L.S.]

2009 WAIRC 00282

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARINA SALDANHA
	APPELLANT
	-and-
	FUJITSU AUSTRALIA PTY LTD
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE M T RITTER, ACTING PRESIDENT
	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 13 MAY 2009
FILE NO	FBA 1 OF 2009
CITATION NO.	2009 WAIRC 00282

Decision	Consent order issued amending the name of respondent

Order

Whereas the respondent has filed in the Commission on 12 May 2009 a consent order to correct the name of the respondent, it is this day, 13 May 2009, ordered by consent that:

1. The name of respondent be changed to Fujitsu Australia Ltd.

By the Full Bench

(Sgd.) M T RITTER,
Acting President.

[L.S.]

2009 WAIRC 00299

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARINA SALDANHA
	APPELLANT
	-v-
	FUJITSU AUSTRALIA LTD
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE M T RITTER, ACTING PRESIDENT
	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER S J KENNER
DATE	FRIDAY, 22 MAY 2009
FILE NO.	FBA 1 OF 2009
CITATION NO.	2009 WAIRC 00299

Decision	Order issued re Practice Note 1 of 2008
Appearances	
Appellant	In person
Respondent	Ms F Stanton, (of Counsel)

Order

THE FULL BENCH having received a request from the appellant that because she will not be represented in the proceedings a direction be issued that she need not comply with Practice Note 1 of 2008, which is not objected to by the respondent, it is this day, 22 May 2009, ordered that:

1. The appellant is not required to comply with Practice Note 1 of 2008.

By the Full Bench

(Sgd.) M T RITTER,
Acting President.

[L.S.]

2009 WAIRC 00340

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2009 WAIRC 00340
CORAM	**:**	THE HONOURABLE M T RITTER, ACTING PRESIDENT
		CHIEF COMMISSIONER A R BEECH
		COMMISSIONER S J KENNER
HEARD	**:**	THURSDAY, 28 MAY 2009
DELIVERED	**:**	TUESDAY, 2 JUNE 2009
FILE NO.	**:**	FBA 1 OF 2009
BETWEEN	**:**	MARINA SALDANHA
		Appellant
		AND
		FUJITSU AUSTRALIA LTD
		Respondent

ON APPEAL FROM:

Jurisdiction	**:**	**Western Australian Industrial Relations Commission**
Coram	**:**	**Commissioner S Wood**
Citation	**:**	**[2009] WAIRC 71**
File No	**:**	**B 25 of 2008**

CatchWords:

Industrial Law (WA) - Appeal against decision to dismiss for lack of jurisdiction - Decision based on answers by Full Bench to referred questions of law - No error in dismissing application - Inappropriate for Full Bench to reconsider its decision on questions of law - Appeal dismissed.

Legislation:

Industrial Relations Act 1979 (WA), s29, s34(4), s90, s90(2)

Workplace Relations Act 1996 (Cth)

Result:

Appeal dismissed.

Representation:

Counsel:

Appellant	:	In person
Respondent	:	Ms F A Stanton (of Counsel), by leave

Solicitors:

Appellant	:	Not applicable
Respondent	:	McCallum Donovan Sweeney Barristers and Solicitors

Case(s) referred to in reasons:

Saldanha v Fujitsu Australia Pty Ltd (2008) 89 WAIG 76

Saldanha v Fujitsu Australia Pty Ltd (2009) 89 WAIG 484

Case(s) also cited:

Sealanes (1985) Pty Ltd v The Western Australian Industrial Relations Commission [2005] WASC 158

Reasons for Decision

RITTER AP:

The Appeal

1 This is an appeal against a decision made by Commissioner Wood on 17 February 2009. On that date the Commissioner made an order dismissing the appellant's application "for want of jurisdiction".

Procedural Background

2 The history of the proceedings leading up to the making of that order was set out in the preamble to the order. As is there recorded, Commissioner Wood, with my consent, had referred to the Full Bench two questions of law for hearing and determination. The questions were answered by the Full Bench in its reasons dated 17 December 2008 (*Saldanha v Fujitsu Australia Pty Ltd* (2008) 89 WAIG 76) and orders made on 23 December 2008. The way in which the questions were answered meant that if the respondent was a "constitutional corporation", as defined under the then *Workplace Relations Act 1996* (Cth), the Commission would not have jurisdiction to determine the appellant's claim for a denial of contractual benefits under s29 of the *Industrial Relations Act 1979* (WA) (*the Act*). It was apparently not in dispute that the respondent was a "constitutional corporation".

3 After the orders were made by the Full Bench a letter dated 12 January 2009 was sent by the Commission, under the authority of Commissioner Wood, to the parties to give them an opportunity to make submissions as to why an order dismissing the application for want of jurisdiction should not issue. The respondent replied by letter dated 23 January 2009 saying that it would welcome such an order being made. The appellant also replied by letter. In the order it was said to be dated 16 February 2009 but the letter is actually dated 13 February 2009. Nothing turns on this. In the letter the appellant argued that an order of dismissal should not be made. The appellant contended the Full Bench had made errors in answering the questions of law. The letter did not indicate that an appeal against the decision of the Full Bench had or would be made to the Industrial Appeal Court. The furthest the letter went was to say that the appellant thought there were "sufficient grounds for the matter to be referred to a higher court for a review of the decision" of the Full Bench.

4 As noted in the order made by Commissioner Wood, by the time that order was made, the time for filing an appeal against the decision of the Full Bench had passed. That time was, pursuant to s90(2) of *the Act*, "21 days from the date the decision" of the Full Bench.

The Grounds of Appeal

5 The "grounds for appeal" were set out in a schedule to an application which was made by the appellant on 1 April 2009 for an order to be "exempt" from the filing of appeal books. (See *Saldanha v Fujitsu Australia Pty Ltd* (2009) 89 WAIG 484). The schedule does not contend there was any error made by Wood C in dismissing the application. Instead, the schedule attacks the reasoning of the Full Bench in deciding the questions of law. It does so in a way similar to the letter dated 13 February 2009 which was sent to Commissioner Wood.

Determination of the Appeal

6 In my opinion, the appeal should be dismissed. Commissioner Wood made no error in dismissing the application. Indeed he was obliged to do so given the answers by the Full Bench to the questions of law and the agreement by the parties that the respondent was a "constitutional corporation".

7 In addition, I do not think it is appropriate for the Full Bench to re-visit its reasons and answers upon the questions of law. That is because the hearing and determination of the questions by the Full Bench was for the very purpose of deciding whether the Commission had jurisdiction to determine the appellant's application. If the appellant seeks to impugn the reasoning and conclusions of the Full Bench then that needs to be pursued, in my opinion, not back before the Full Bench but before the Industrial Appeal Court.

8 At the hearing we were told by the appellant that an application for leave to extend the time for appealing against the decision of the Full Bench, on the questions of law, has now been made to the Industrial Appeal Court and is listed for hearing on 3 July 2009. If leave is granted then presumably the appellant's contention that the Full Bench has erred can be decided by the Industrial Appeal Court. The appellant can also give consideration to filing an appeal against the present decision to the Industrial Appeal Court.

Conclusion

9 As I have said in my opinion the appeal should be dismissed.

BEECH CC:

10 I agree that this appeal should be dismissed. I do so because firstly Commissioner Wood, sitting as a single Commissioner, is bound by the decision of the Full Bench that he did not have the jurisdiction to determine Ms Saldanha's claim. Very properly, he then gave Ms Saldanha an opportunity to comment upon his intention to dismiss her claim for want of jurisdiction; in the circumstances however he had very little alternative. Had Ms Saldanha appealed the decision of the Full Bench to the Industrial Appeal Court then he might well have considered delaying the issuing of the order to await the outcome of the appeal. As there was no appeal against the decision of the Full Bench, he made no error in dismissing Ms Saldanha's application.

11 Second, Ms Saldanha's appeal is against Commissioner Wood's decision; it cannot be an appeal against the decision of the Full Bench which led to Commissioner Wood's decision. This is because when that Full Bench issued its order that there was no jurisdiction, it completed its function and is no longer available to now review its own decision as Ms Saldanha's grounds of appeal invite us to do. Under the Act, this Full Bench only has the function of considering Commissioner Wood's decision even though it is constituted by the same members as the earlier Full Bench.

12 This appeal cannot review the decision of the earlier Full Bench because that decision is not liable to be challenged, appealed against, reviewed, quashed, or called in question except as provided by the Act: see s34(4). The Act provides that the decision of the Full Bench is liable to be appealed against by an appeal to the Industrial Appeal Court: see s90. I would therefore dismiss this appeal.

KENNER C:

13 The brief background to the present appeal is set out in the reasons for decision of Ritter AP which I have had the benefit of reading in draft and gratefully adopt for present purposes. For the following reasons, which I can very shortly express, the appeal must be dismissed.

14 In essence the appellant complains that Wood C should not have made an order dismissing her application at first instance for want of jurisdiction, following the decision of the Full Bench on the matters of law referred, to the effect that the Commission had no jurisdiction to entertain the appellant's claim.

15 The Full Bench, having determined in the two questions of law referred to it, that the Commission did not have jurisdiction to entertain the appellant's contractual benefits claim at first instance, Wood C was bound in my view, to dismiss the appellant's substantive application. It is not now appropriate for the appellant to effectively re-argue on this appeal the issues that were heard and determined by the Full Bench on the questions of law referred. If an appeal from the decision of the Full Bench is heard by the Industrial Appeal Court in relation to these matters, then that is the occasion to deal with the substantive issues of law arising.

2009 WAIRC 00341

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARINA SALDANHA
	APPELLANT
	-and-
	FUJITSU AUSTRALIA LTD
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE M T RITTER, ACTING PRESIDENT
	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER S J KENNER
DATE	TUESDAY, 2 JUNE 2009
FILE NO	FBA 1 OF 2009
CITATION NO.	2009 WAIRC 00341

Decision	Appeal dismissed
Appearances	
Appellant	In person
Respondent	Ms F A Stanton (of Counsel), by leave

Order

This matter having come on for hearing before the Full Bench on 28 May 2009, and having heard Ms M Saldanha on her own behalf as the appellant, and Ms F A Stanton (of Counsel), by leave, on behalf of the respondent, and reasons for decision having been delivered on Tuesday, 2 June 2009, it is this day, 2 June 2009, ordered that:

1. The appeal is dismissed.

By the Full Bench

(Sgd.) M T RITTER,
Acting President.

[L.S.]

2009 WAIRC 00283

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2009 WAIRC 00283
CORAM	**:**	THE HONOURABLE M T RITTER, ACTING PRESIDENT SENIOR COMMISSIONER J H SMITH COMMISSIONER S M MAYMAN
HEARD	**:**	TUESDAY, 5 MAY 2009
DELIVERED	**:**	FRIDAY, 15 MAY 2009
FILE NO.	**:**	FBA 2 OF 2009
BETWEEN	**:**	THE DIRECTOR GENERAL DEPARTMENT OF EDUCATION AND TRAINING Appellant AND THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED) Respondent

ON APPEAL FROM:

Jurisdiction	**:**	**Western Australian Industrial Relations Commission**
Coram	**:**	**Commissioner J L Harrison**
Citation	**:**	**2009 WAIRC 00128**
File No	**:**	**C8 of 2009**

CatchWords:

Industrial Law (WA) - Appeal against interim order reinstating teacher to full duties - Public interest in considering the weight to be accorded to the loss of confidence of Director General in a teacher - Leave to appeal granted - Exercise of discretion - Whether there was an appealable error - Principles to be applied - Commission considered Director General's loss of confidence in employee - Whether adequate weight given to the Director General's loss of confidence in employee - Weight to be accorded dependent on facts and circumstances before the Commission - No identifiable error in the reasons - Appeal dismissed.

Legislation:

Industrial Relations Act 1979 (WA), s7, s44, s44(6)(ba), s44(6)(bb), s44(6)(bb)(ii), s49(2), s49(2a)

Public Sector Management Act 1994 (WA), Part 5, Division 3

Result:

Leave to appeal granted.

Application dismissed.

Representation:

Counsel/Advocate:

Appellant	: Mr R J Andretich (of Counsel), by leave
Respondent	: Mr M Amati, Industrial Advocate

Case(s) referred to in reasons:

Brown v President, State School Teachers Union of WA (Inc) (1989) 69 WAIG 1390

Coal and Allied Operations Pty Limited v Australian Industrial Relations Commission (2000) 203 CLR 194

Gronow v Gronow (1979) 144 CLR 513

House v The King (1936) 55 CLR 499

Jago v District Court (NSW) (1989) 168 CLR 23

Monteleone v The Owners of the Old Soap Factory [2007] WASCA 79

Murdoch University v The Liquor, Hospitality and Miscellaneous Union, Western Australian Branch (2005) 86 WAIG 247

Norbis v Norbis (1986) 161 CLR 513

State School Teachers' Union of WA (Inc) v Director-General of the Department of Education and Training (2008) 88 WAIG 2049

The State School Teachers' Union of WA (Inc) v Director-General of the Department of Education and Training (2008) 88 WAIG 698

Case(s) also cited:

Burswood Resort (Management) Ltd v Australian Liquor Hospitality and Miscellaneous Workers' Union, Western Australian Branch (2003) 83 WAIG 3556

G & M Partacini T/as Bayswater Powder Coaters v The Shop Distributive and Allied Employees' Association of WA (2005) 85 WAIG 51

Miles & Ors T/as The Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, W.A. Branch (1985) 65 WAIG 385

Perkins v Grace Worldwide (Aust) Pty Ltd (1997) 72 IR 186

Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union of WA and Ors (1989) 69 WAIG 990

State School Teachers Union of WA (Inc) v Honourable Minister for Education (1990) 70 WAIG 21

Reasons for Decision

RITTER AP:

Introduction

1 The appellant, whom I will call the Director General, seeks to appeal against a decision of the Commission, to the Full Bench pursuant to s49(2) and s49(2a) of the *Industrial Relations Act 1979* (WA) (*the Act*). It is accepted by the Director General that the decision appealed against is a "finding" as defined in s7 of *the Act*. This is because the order made did not "finally decide, determine or dispose of the matter to which the proceedings relate". Accordingly, pursuant to s49(2a) of *the Act*, an appeal does not lie "unless, in the opinion of the Full Bench, the matter is of such importance that, in the public interest, an appeal should lie". This issue will be later considered.

2 The order which is sought to be appealed was made by the Commission on 23 March 2009. Essentially, the order required the Director General to reinstate Ms Catherine Motteram to her former employment as a state school teacher. Other orders made at the same time, about the discovery of documents, are not sought to be impugned.

Background

3 The relevant background is that the present respondent, whom I will call the SSTU, applied to the Commission for a compulsory conference under s44 of *the Act*. That application was made on 27 February 2009. The application sought an order to quash a decision made by the Director General to dismiss Ms Motteram from her employment. The dismissal had taken effect on the date on which the application was filed.

4 Prior to her dismissal, Ms Motteram had been a state school teacher employed at Atwell College. The grounds of the application were that the disciplinary process against Ms Motteram was "unfair, oppressive and unduly prejudiced; as well as unlawful". A schedule attached to the application amplified these grounds in detail.

5 Amongst other things the application sought an interim order that Ms Motteram be reinstated to her position until the application was "fully heard and determined by the Commission".

6 The dismissal of Ms Motteram occurred after an inquiry and investigation had occurred under the auspices of the *Public Sector Management Act 1994* (WA) (*the PSMA*). The inquiry was into a charge that "between March 2007 and August 2007 at Albany, Ms Motteram established and maintained an inappropriate relationship with [a student at the] North Albany Senior High School". At that time, Ms Motteram was the head of the music department at North Albany Senior High School and the student was taking music as a TEE (Tertiary Entrance Examination) subject. In summary, Ms Motteram's dismissal occurred because the Director General had lost confidence in her ability to properly carry out the duties of a state school teacher. In particular, this was because of the nature and extent of the contact which Ms Motteram had with the student during the relevant period. It is appropriate to note however that it was not alleged there was any inappropriate physical contact or romantic relationship between Ms Motteram and the student.

7 The inquiry which was conducted under the auspices of *the PSMA* found that Ms Motteram's contact with the student constituted a serious breach of discipline. After receiving submissions from the SSTU on the penalty which should be imposed, the Director General informed Ms Motteram that her employment was terminated as her actions were "totally inappropriate and inconsistent with community expectations of what constitutes an acceptable professional relationship between a teacher and a student".

The Conference

8 Following the filing of the application under s44 of *the Act*, the Commission convened a conference on 3 March 2009. The conference did not resolve the dispute. No agreement was reached as to either the interim or final orders sought by the SSTU. Accordingly, the Commission required the parties to file written submissions about the application for interim orders. These were duly filed by the SSTU and the Director General on 5 March 2009 and 9 March 2009 respectively. As mentioned, the Commission made its order on 23 March 2009.

Jurisdiction to Make the Order

9 The order was made under the power provided in s44(6)(bb) of *the Act*. In particular s44(6)(bb)(ii) provides that "in the case of a claim of harsh, oppressive or unfair dismissal of an employee, [the Commission may] make any interim order the Commission thinks appropriate in the circumstances pending resolution of the claim". The Director General did not submit that the terms of the order made were outside the scope of this power.

The Reasons for Decision

10 The order took the common form of setting out the reasons for decision in a lengthy preamble and recitals.

11 The order commenced by setting out the background to the seeking of interim orders and the orders which were sought. The reasons then summarised the submissions in support of the application for interim orders made by the SSTU. This was by way of 10 dot points including numerous sub-dot points. The following is a summary of what is there recorded. The SSTU submitted the test to be applied in deciding whether the interim orders should be made was as set out in *Brown v President, State School Teachers Union of WA (Inc)* (1989) 69 WAIG 1390. The SSTU argued that in dismissing Ms Motteram the Director General had failed to take into account relevant facts and circumstances. These included that Ms Motteram had been employed by the Director General as a teacher for 14 years and not been the subject of any alleged misconduct prior to the present allegation. It was submitted that Ms Motteram's interaction with the student was not inappropriate and that the findings made in the inquiry were not sustainable on the balance of probabilities. It was also argued that the inquirer did not recommend the termination of Ms Motteram's employment and that she had been teaching since the allegation was raised, without any issues arising about her behaviour or performance.

12 It was contended the dismissal of Ms Motteram was unlawful for reasons including a failure to provide procedural fairness or properly apply the provisions of Part 5, Division 3 of *the PSMA*.

13 The SSTU also submitted the respondent would not suffer any detriment if the interim order for reinstatement was issued, however Ms Motteram would suffer "substantial detriment". This was because of her "extensive financial commitments" and that she would have difficulty finding a teaching position until the final determination of the application, as the Director General is the largest employer of teachers in Western Australia.

14 It was also argued that if interim orders were made they were not irreversible and the present application had been promptly made.

15 The Commissioner next summarised the submissions of the Director General against the interim reinstatement order being issued. This was in the same dot point format. The submissions included that Ms Motteram had "frequent and inappropriate out of hours contact with the student despite being advised by her Principal in March 2007 to stay within the professional boundaries between student and teacher …". It was also asserted that despite being advised of these concerns Ms Motteram "made no apparent attempt to reduce the level of out of hours contact with the student". It was also submitted that "teachers occupy a position of trust and as their ongoing employment is dependent upon public confidence they should therefore not put themselves in a position where suspicions arise as to the propriety of their dealings with students". The decision of *State School Teachers Union of WA (Inc) v Director General of the Department of Education and Training* (2008) 88 WAIG 2049 at 2060 was cited in support of this contention. Of particular relevance to the appeal is the following submission which was made by the Director General and set out by the Commissioner:

> "… the Director General has lost confidence in Ms Motteram's ongoing suitability for employment as a teacher as she did not demonstrate the requisite judgement and appreciation that a teacher must have with respect to his or her conduct with students and where an employer has lost confidence in an employee occupying a position of trust it would not be a proper exercise of the power granted under s 44 of the Act to order re-employment; …"

16 The Commissioner said the matter before her was an "industrial matter" and the Commission had jurisdiction to make the interim order sought. The Commissioner then said that she had formed the view that "an interim order should be considered in this instance pending arbitration of the issues in dispute; …".

17 The Commissioner quoted from the *Brown* decision and said this was the relevant test to apply in deciding whether to make the interim order.

18 The Commissioner then said that the "issuance of interim orders needs to take into account the interests of both parties without reaching any concluded view about the merits of such an application …". The Commissioner said she had formed the view that it was "just that an interim reinstatement order" should issue. The Commissioner expressly recorded that this view was formed "after considering the arguments put by both parties". With respect to the interim reinstatement order the Commissioner said her decision was supported by forming "preliminary views" which were set out in four numbered points as follows:

> "1. On the information currently before me it is my view that the applicant has demonstrated that there may be substantial issues to be tried in relation to Ms Motteram's termination with respect to the merits of this case and the manner of the investigation and inquiry and there is a *prima facie* case for relief if the applicant can demonstrate its case at hearing;
>
> 2. In issuing an interim reinstatement order I also take into account the applicant's submissions that prior to the respondent's investigation and inquiry into Ms Motteram's actions she has not been subject to any other disciplinary proceedings and since leaving North Albany Senior High School no other issues have been raised about her behaviour or performance. Additionally, Ms Motteram has been highly regarded as a music teacher at schools where she has previously worked;
>
> 3. I find that the balance of convenience in relation to whether or not the interim orders sought should issue lies with the applicant in this

> instance as I accept that Ms Motteram will have difficulty obtaining alternative employment and I accept that Ms Motteram will continue to suffer a financial detriment if an interim reinstatement order does not issue;
>
> 4. I find that the issuance of a reinstatement order pending the issue of Ms Motteram's ongoing employment with the respondent being dealt with is not irreversible and I accept that this application was lodged expeditiously as it was lodged on the same day Ms Motteram received her letter of termination; …"

19 A fifth numbered point was set out in support of the making of the discovery orders.

20 The relevant order was that Ms Motteram "be reinstated on full salary, without any loss of pay, entitlements and/or continuity of service, to a teaching position undertaking her normal duties at a school to be agreed between the parties until this application has been heard and determined by the Commission". It was also ordered that there be liberty to apply in relation to this and the other orders made.

Facts Subsequent to the Order

21 It is appropriate to record that the order made by the Commission has been acted upon. Ms Motteram has been reinstated to her position as a school teacher at Atwell College and has proceeded to perform her duties as such. An application to stay the operation of the interim reinstatement order was dismissed by me on 21 April 2009. The substantive application is to proceed to an arbitral hearing although a date has not as yet been set.

The Notice of Appeal

22 The notice of appeal contained three grounds. The first pleaded that the Commissioner erred in law by "giving no or insufficient weight to the conclusion that the Appellant had lost confidence in Ms Motteram as a teacher …". The second ground was that, essentially for the same reason as the first, it was "inappropriate" to have made the order. The second ground was not independently argued and its contents were wrapped up in the submissions made in support of the first ground.

23 The third ground was that to the extent that the order was made under s44(6)(ba) of *the Act*, there was no finding or evidence that the order was necessary to prevent, enable or encourage those matters set out in that subparagraph. This ground was not argued by counsel for the Director General. He quite properly conceded that the orders did not purport to be made under s44(6)(ba) of *the Act*. Ground 3 need not therefore be further considered.

24 The notice of appeal also set out the reason why it was contended that leave to appeal under s49(2a) of *the Act* should be granted. In summary this was because it was in the public interest for the Full Bench to decide the significance "required to be given to the loss of confidence by an employer in an employee holding a special position of trust, such as a teacher," when an order for interim reinstatement is sought.

Leave to Appeal

25 The first issue to decide is whether leave to appeal should be granted. In my opinion it should. This is because the subject matter of the proposed appeal is of sufficient importance so that an appeal should lie. The subject matter of the appeal meets the tests described in *Murdoch University v The Liquor, Hospitality and Miscellaneous Union, Western Australian Branch* (2005) 86 WAIG 247 at [13]-[15] and the cases there referred to. This is for the following reasons. State school teachers are public sector employees. There are a large number of them throughout the state. They occupy an important position in the community in educating school children. If a state school teacher is terminated because the Director General loses confidence in them, then that in itself is a matter of community or public interest. So too is whether the Commission, following an application to it, reinstates the teacher pending the determination of a challenge to the dismissal on the basis that it was unlawful or unfair. In determining such an application, the question of the significance to be given to the loss of confidence by the Director General is important. It is important to the Director General, state school teachers and the public who will be affected by the decisions made by the Commission. Accordingly, as I have said, leave to appeal should be granted.

Principles to be Applied

26 The Director General accepted that the order made by the Commission was a discretionary decision. As such, the decision is accorded significant deference by the Full Bench and there are limited circumstances in which such an order should be set aside. In my opinion those limitations are of particular significance in determining the appeal.

27 The relevant principles were set out in the joint reasons of Dixon, Evatt and McTiernan JJ in *House v The King* (1936) 55 CLR 499 at 504-505 as follows:

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

> unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred."

28 As there stated an appeal against a discretionary decision cannot be allowed simply because the appellate court would not have made the same decision. The reason why this is so was explained in the joint reasons of Gleeson CJ, Gaudron and Hayne JJ in *Coal and Allied Operations Pty Limited v Australian Industrial Relations Commission* (2000) 203 CLR 194 at [19]-[21]. At [19] their Honours explained by reference to the reasons of Gaudron J in *Jago v District Court (NSW)* (1989) 168 CLR 23 at 76, that a discretionary decision results from a "decision-making process in which 'no one [consideration] and no combination of [considerations] is necessarily determinative of the result'". Instead "the decision-maker is allowed some latitude as to the choice of the decision to be made". At [21] their Honours said that because "a decision-maker charged with the making of a discretionary decision has some latitude as to the decision to be made, the correctness of the decision can only be challenged by showing error in the decision-making process". Their Honours then quoted part of the passage of *House v King* which I have quoted above.

29 Similarly, Kirby J in *Coal and Allied* at [72] said that in considering appeals against discretionary decisions, the appellate body is to proceed with "caution and restraint". His Honour said this is "because of the primary assignment of decision-making to a specific repository of the power and the fact that minds can so readily differ over most discretionary or similar questions. It is rare that there will only be one admissible point of view". (See also *Norbis v Norbis* (1986) 161 CLR 513 per Mason and Deane JJ at 518 and Wilson and Dawson JJ at 535).

30 These principles are especially apt in deciding appeals against interim orders made after a s44 conference. This is because the Commissioner is best placed to understand the industrial "state of play" and decide what, if any, interim orders should be made. (See *Murdoch University* at [120] and *The State School Teachers' Union of WA (Inc) v Director-General of the Department of Education and Training* (2008) 88 WAIG 698 at [51]).

31 These principles of appellate restraint also have particular significance when it is argued that a court at first instance placed insufficient weight on a particular consideration. This was considered by Stephen J in *Gronow v Gronow* (1979) 144 CLR 513 at 519. There, his Honour explained that although "error in the proper weight to be given to particular matters may justify reversal on appeal, … disagreement only on matters of weight by no means necessarily justifies a reversal of the trial judge". This is because, in considering an appeal against a discretionary decision it is "well established that it is never enough that an appellate court, left to itself, would have arrived at a different conclusion", and that when "no error of law or mistake of fact is present, to arrive at a different conclusion which does not of itself justify reversal can be due to little else but a difference of view as to weight". (See also Aickin J at 534 and 537 and *Monteleone v The Owners of the Old Soap Factory* [2007] WASCA 79 at [36]).

Determination of the Appeal

32 I will first consider the assertion that in making the interim reinstatement order, no weight was given to the Director General's loss of confidence in Ms Motteram as a teacher. As I have said, the scheme of the reasons of the Commissioner was to set out the competing submissions of the SSTU and the Director General. In doing so the Director General does not submit that there was any error of fact or misdescription of the submissions made on her behalf. In particular it is not suggested that the Commissioner misdescribed the submission based upon loss of confidence.

33 After satisfying herself that the Commission had the jurisdiction to make the order sought, the Commissioner said she was to apply the tests set out in *Brown*. Neither party contended that this was an incorrect approach and therefore whether it was so does not fall for consideration in the present appeal.

34 In coming to her conclusion, the Commissioner said she had formed the view that it was "just" to make the interim reinstatement order. Critically, she said that this was so "after considering the arguments put by both parties". The Commissioner then set out the "preliminary views" which tipped the scales in favour of the granting of the order. In setting out those factors which did tip the scales, it was not necessary for the Commissioner to again refer to the loss of confidence point for it to be established that she had taken it into account. In my opinion the reasons as a whole establish the Commissioner did so. This is because of the earlier reference to that factor and the statement that she had considered the arguments put by both parties.

35 This leaves for consideration the submission that insufficient weight was placed upon this factor. That argument brings into sharp focus the principles I earlier described. From the structure and content of the reasons it is not possible to see the precise weight which was placed upon the loss of confidence factor by the Commissioner; other than that she did not regard it as a factor so weighty as to preclude the making of the order. Counsel for the Director General accepted this and submitted the making of the order in itself showed that insufficient weight was placed upon the Director General's loss of confidence.

36 In my opinion the Full Bench cannot be too prescriptive in setting out the weight which should be applied to the Director General losing confidence in a state school teacher to properly perform their duties as a teacher, in deciding whether to make an interim reinstatement order. This is because whether an order should be made must depend upon the particular facts and circumstances which are before the Commission. Those facts and circumstances will inevitably vary from case to case. They will include the reasons for the loss of confidence occurring and the teacher's prior performance. Despite this, it is in my opinion a factor of considerable importance. In part this is because of the duties of care which the Director General has to school children and the public to ensure that only properly performing teachers are working in state schools. The importance of the factor is also enhanced because the Director General will have formed her opinion after an investigation and inquiry of the alleged misconduct under *the PSMA*.

37 In the present case, the factor of loss of confidence had a particular significance because of the basis upon which the opinion was formed. This was that Ms Motteram had engaged in an inappropriate relationship with a student with whom she was teaching, over a considerable period of time and despite, at the very least, strong advice from her school principal to limit the contact between her and the student. Furthermore, there was before the Director General the opinions of the deputy principal at the school, other teachers, the school psychologist and school chaplain which supported the conclusion that the nature and extent of the relationship between Ms Motteram and the student was inappropriate. There was also information before the Director General that there had been some concern about the level of contact between Ms Motteram and the student, by the student's grandmother, with whom he had been living.

38 For these reasons in the present case the loss of confidence which the Director General had in Ms Motteram to properly perform her duties as a teacher had substantial weight in deciding whether to make the interim reinstatement order.

39 Given the weight of the loss of confidence factor, I have serious doubts as to whether I would have made the same decision as the Commissioner. However as I have been at pains to set out, this is not the test of whether the appeal should be allowed. As there is no identifiable error in the reasons which the Commissioner expressed to support her decision, the appeal can only be allowed if the decision was not open. This would only be so if the order could not properly have been made if the loss of confidence factor was accorded adequate weight.

40 On that point, after giving the matter anxious consideration, I am not satisfied that it was not open to the Commissioner to make the decision she did. It was a decision which was open given the factors set out in paragraphs 1-4, quoted above at [18], despite the substantial weight which had to be accorded to the Director General's loss of confidence. Of these factors, in my opinion the following in combination were weighty:

(a) The SSTU had demonstrated a prima facie case for relief.

(b) Prior to the present matter, Ms Motteram had been employed as a state school teacher for 14 years without being the subject of any alleged misconduct.

(c) Prior to the present matter, Ms Motteram was highly regarded as a music teacher at the schools where she had worked.

(d) No issue had been raised about Ms Motteram's behaviour or performance since leaving North Albany Senior High School.

41 I would add to this the significance of Ms Motteram no longer teaching the relevant student and that it was not suggested there had been any inappropriate physical contact or romantic involvement or that the student had suffered because of his interaction with Ms Motteram. Also, the recommended penalty by the inquirer was not dismissal but a reprimand and transfer to a school away from Albany.

42 For these reasons I am not satisfied that the Commissioner erred in making the interim reinstatement order. That is, it was open to her to make such an order despite the fact that the Director General's loss of confidence in Ms Motteram as a teacher was a factor which should have been given substantial weight.

Limits of the Decision

43 I emphasise however that my decision on the present appeal does not in any way cast doubt upon the decision of the Director General to dismiss Ms Motteram. The fairness and legality of that decision remains to be determined by the Commission. I would also add that it is in the interests of both parties and the public that the substantive application be determined as expeditiously as practicable.

Minute of Proposed Order

44 In my opinion a minute of proposed order should be published in terms that:

1. Leave to appeal is granted.
2. The appeal is dismissed.

SMITH SC:

45 I have had the benefit of reading the reasons to be published by the Acting President. For the reasons given by the Acting President I agree that leave to appeal should be granted and the appeal be dismissed.

MAYMAN C:

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

2009 WAIRC 00292

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE DIRECTOR GENERAL DEPARTMENT OF EDUCATION AND TRAINING
	APPELLANT
	-and-
	THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE M T RITTER, ACTING PRESIDENT
	SENIOR COMMISSIONER J H SMITH
	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 19 MAY 2009
FILE NO	FBA 2 OF 2009
CITATION NO.	2009 WAIRC 00292

Decision	Leave to appeal granted.
	Application dismissed.
Appearances	
Appellant	Mr R J Andretich (of Counsel), by leave
Respondent	Mr M Amati, Industrial Advocate

Order

This matter having come on for hearing before the Full Bench on 5 May 2009, and having heard Mr R J Andretich (of Counsel), by leave, on behalf of the appellant, and Mr M Amati, Industrial Advocate, on behalf of the respondent, and reasons for decision having been delivered on 15 May 2009, it is this day, 19 May 2009, ordered that:

1. Leave to appeal is granted.
2. The appeal is dismissed.

By the Full Bench

(Sgd.) M T RITTER,
Acting President.

[L.S.]

PRESIDENT—Matters dealt with—

2009 WAIRC 00200

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PRESIDENT

CITATION	**:**	2009 WAIRC 00200
CORAM	**:**	THE HONOURABLE M T RITTER, ACTING PRESIDENT
HEARD	**:**	THURSDAY, 16 APRIL 2009
DELIVERED	**:**	TUESDAY, 21 APRIL 2009
FILE NO.	**:**	PRES 3 OF 2009
BETWEEN	**:**	THE DIRECTOR GENERAL OF THE DEPARTMENT OF EDUCATION AND TRAINING
		Applicant
		AND
		STATE SCHOOL TEACHERS' UNION OF WA (INCORPORATED)
		Respondent

CatchWords:

Industrial Law (WA) - Application to stay operation of interim order - Notice of appeal filed - Stay of order principles - Consequences granting/not granting stay orders - Appeal not rendered nugatory if stay not granted - Application dismissed - *Industrial Relations Act 1979* (WA) (as amended), s44, s44(6), s44(6)(ba)(ii), s44(6)(bb)(i), s44(6)(bb)(ii), s49(2a), s49(11) - *Public Sector Management Act 1994* (WA)

Legislation:

Industrial Relations Act 1979 (WA), s44, s44(6), s44(6)(ba)(ii), s44(6)(bb)(i), s44(6)(bb)(ii), s49(2a), s49(11)

Public Sector Management Act 1994 (WA)

Result:

Application dismissed.

Representation:

Counsel/Advocate:

Applicant	:	Mr D J Matthews (of Counsel), by leave
Respondent	:	Mr M Amati, Industrial Advocate

Case(s) referred to in reasons:

Brown v President, State School Teachers' Union of WA (Inc) (1989) 69 WAIG 1390

John Holland Group Pty Ltd v The Construction, Forestry, Mining and Energy Union of Workers (2005) 85 WAIG 3918

Merredin Customer Service Pty Ltd v Green (2007) 87 WAIG 133

MRTA of WA Inc v Tsikisiris (2007) 87 WAIG 2577

Murdoch University v The Liquor, Hospitality and Miscellaneous Union, Western Australian Branch (2005) 86 WAIG 247

Seacode Nominees Pty Ltd v Penfold (2005) 85 WAIG 3926

State School Teachers' Union of WA (Incorporated) v Director-General, Department of Education and Training (2008) 88 WAIG 698

Case(s) also cited:

Burswood Resort (Management) Ltd v Australian Liquor, Hospitality and Miscellaneous Workers' Union, Western Australian Branch (2003) 83 WAIG 3556

Commissioner of Taxation v The Myer Emporium Limited [No. 1] (1986) 160 CLR 220

Eastland Technology Australia Pty Ltd v Whisson (2003) 28 WAR 308

G & M Partacini T/as Bayswater Powder Coaters v The Shop Distributive and Allied Employees' Association of WA (2005) 85 WAIG 51

Hamersley Iron Pty Ltd v Lovell (No 2) (1998) 20 WAR 79

House v The King (1936) 55 CLR 499

Norbis v Norbis (1986) 161 CLR 513

Perkins v Grace Worldwide (Aust) Pty Ltd (1997) 72 IR 186

Rendezvous Observation City Hotel v Ian Mumme (2006) 86 WAIG 415

State School Teachers' Union of WA (Inc) v Honourable Minister for Education (1989) 70 WAIG 21

Reasons for Decision

RITTER AP:

Introduction

1 This is an application for the stay of the operation of an order made by a Commissioner pending the hearing and determination of an appeal against that order. The application is properly brought under s49(11) of the *Industrial Relations Act 1979* (WA) (*the Act*).

Background

2 The background to the application is that the present respondent, whom I will call the SSTU, applied to the Commission for a conference under s44 of *the Act*. That application was made on 27 February 2009. The application sought an order quashing a decision made by the present applicant, whom I will call the Director General, to dismiss Ms Catherine Motteram from her employment. Prior to her dismissal, which occurred on the same date as the application was filed, Ms Motteram had been a state school teacher employed at Atwell College. The grounds on which the application was made was that the disciplinary process against Ms Motteram was "unfair, oppressive and unduly prejudiced; as well as unlawful". These grounds were set out in more detail in a schedule attached to the application.

3 The application also sought an interim order that Ms Motteram be reinstated into her position until the application had been "fully heard and determined by the Commission".

4 The dismissal of Ms Motteram occurred after an inquiry and investigation had been engaged in for the Director General under the auspices of the *Public Sector Management Act 1994* (WA) (*the PSMA*). The reasons for dismissal were summarised in the submissions of the Director General in support of the present application. Essentially, the dismissal occurred because the Director General had lost confidence in the ability of Ms Motteram to properly carry out the duties of a state school teacher. This was because of the conduct of Ms Motteram when a school teacher at North Albany Senior High School in 2007. The conduct involved the nature and extent of the contact which Ms Motteram had with a school student in the 2007 year. (I pause to note, in fairness to Ms Motteram, that it was not alleged that there was any inappropriate physical contact or romantic relationship between her and the student).

5 An inquiry conducted under the auspices of *the PSMA* found that Ms Motteram's contact with the student was a serious breach of discipline. On this basis the Director General informed Ms Motteram that her employment was terminated as her actions were "totally inappropriate and inconsistent with community expectations of what constitutes an acceptable professional relationship between a teacher and a student".

The Conference

6 As a consequence of the filing of the application under s44 of *the Act*, the Commission convened a conference on 3 March 2009. This conference did not however resolve the matter with respect to either the interim or final orders which were sought by the SSTU. Accordingly, the Commission required the parties to file written submissions upon the application for interim orders. These were duly filed by the SSTU and the Director General on 5 March 2009 and 9 March 2009 respectively. The Commission made its order on 23 March 2009.

The Order

7 The order took the common form of setting out the reasons for decision in a lengthy preamble and recitals in the order. It is unnecessary in determining the present application to descend to the detail of the submissions made by the parties and the reasons of the Commissioner as contained in the order. It is sufficient to record the following. Amongst other things the SSTU submitted that the Director General would not suffer any detriment if the interim orders were made however Ms Motteram would suffer a "substantial detriment … as she has extensive financial commitments and she will have difficulty finding a teaching position until the final determination of this matter as the [Director General] is the largest employer of teachers in Western Australia". The SSTU also argued that if the interim order was made it was not irreversible.

8 Amongst other things the Director General submitted that she had "lost confidence in Ms Motteram's ongoing suitability for employment as a teacher as she did not demonstrate the requisite judgment and appreciation that a teacher must have with respect to his or her conduct with students and where an employer has lost confidence in an employee occupying a position of trust it would not be a proper exercise of the power granted under s44 of *the Act* to order re-employment". The Director General also submitted that the interim order sought was unnecessary to prevent the deterioration of industrial relations between the parties or to enable the proper conciliation or arbitration of the dispute.

9 The Commissioner said that what was before her was an industrial matter and she had jurisdiction under s44(6)(ba)(ii) and s44(6)(bb)(i) and (ii) of *the Act* to make the interim order sought. That is not challenged by the Director General either in the appeal or present application.

10 The Commissioner said the relevant principles to apply in deciding whether or not to make the interim order were described in *Brown v President, State School Teachers' Union of WA (Inc)* (1989) 69 WAIG 1390. These were then set out.

11 The Commissioner then said that she had formed the view that an interim reinstatement order and orders for discovery, which had also been sought, should issue. The Commissioner said that this view was formed "after considering the arguments put by both parties". The Commissioner also said the orders were based on preliminary views numbered 1-5 as then set out. Paragraphs 1-4 were relevant to the interim reinstatement order. In summary they were:

(a) There may be substantial issues to be tried in relation to Ms Motteram's termination and there was a *prima facie* case for relief, if the SSTU could demonstrate its case at hearing.

(b) Ms Motteram had not been subject to any previous disciplinary proceedings and no issues had been raised about her behaviour or performance since leaving North Albany Senior High School. She had also been highly regarded as a music teacher at other schools.

(c) The balance of convenience favoured the granting of the order as Ms Motteram would have difficulty in obtaining alternative employment and would continue to suffer a financial detriment.

(d) The application was expeditiously made and an interim reinstatement order was not irreversible.

12 The relevant order was that Ms Motteram "be reinstated on full salary, without any loss of pay, entitlements and/or continuity of service, to a teaching position undertaking her normal duties at a school to be agreed between the parties until this application has been heard and determined by the Commission". The Commissioner also ordered that there be liberty to apply in relation to this and the other orders made.

The Appeal

13 The Director General filed a notice of appeal on 31 March 2009. Essentially the grounds of appeal were that the Commissioner erred in law in making the interim reinstatement order by giving "no or insufficient weight to the conclusion that the [Director General] had lost confidence in Ms Motteram as a teacher, such that the Commission erred in exercising the discretion conferred by s44(6)" of *the Act*.

The Stay Application

14 The present application was filed on 6 April 2009. The grounds upon which the stay is sought are set out in the application as being:

> "(i) the Director General has lost confidence in Ms Motteram's ability to observe those behavioural requirements essential to a person's continued employment as a teacher; and
>
> (ii) while the issue of Ms Motteram's fitness to be a teacher remains in question and having regard to (i) and the public interest that there must be confidence in teachers, it was inappropriate for interim order to be made requiring reinstatement."

15 The application was opposed by the SSTU who provided detailed written submissions which were amplified at the hearing.

16 I was informed at the hearing that the order made by the Commission has been acted upon. Ms Motteram has been reinstated to her position as school teacher at the Atwell College and has proceeded to perform her duties as such. I was also informed that the substantive application is to proceed to an arbitral hearing before the Commission, although a date has not as yet been set. With respect to the appeal, appeal books have been filed, the appeal is ready to be set down for hearing and may be heard with expedition.

17 Therefore the position is that Ms Motteram has been reinstated as a school teacher and has been working at a school. If however the present application is granted, and the order of the Commission at first instance is stayed, then Ms Motteram's status will return to that of a dismissed employee and she will no longer be engaged as a teacher. If the present application is dismissed but the appeal succeeds, then the same result will follow, in that Ms Motteram's status will again be that of a dismissed employee and she will no longer be engaged as a teacher.

Relevant Principles

18 I have discussed the principles applicable to an application of this type in a number of cases; for example *John Holland Group Pty Ltd v The Construction, Forestry, Mining and Energy Union of Workers* (2005) 85 WAIG 3918 at [31]-[38]; *Seacode Nominees Pty Ltd v Penfold* (2005) 85 WAIG 3926 at [6]-[8] and [13]-[17]; *Merredin Customer Service Pty Ltd v Green* (2007) 87 WAIG 133 at [17]-[24] and *MRTA of WA Inc v Tsikisiris* (2007) 87 WAIG 2577 at [70]-[74]. It is unnecessary in the present application to review or repeat that discussion. Neither party submitted that it was appropriate to determine the present application other than in accordance with the principles I there set out.

19 As I have set out in these decisions, *the Act* does not provide that the filing of a notice of appeal of itself operates as a stay of the decision appealed against. Ordinarily the successful party at first instance is entitled to enjoy the "fruits of the litigation" unless and until there has been a successful appeal. It is for the applicant to satisfy the Commission that a stay should be granted. It is often said that there needs to be "special circumstances" before a Court will make an order for a stay. Whether this or some other epithet such as "unusual circumstances" is used, overall there must be something about the particular circumstances of the case which make it just and fair to make an order for a stay. I summarised the position in *John Holland* at [38] in the following way:

> "Accordingly, in my opinion, the primary focus is upon the consequence of a stay being granted or not granted. Where, for example, the absence of a stay would render the appeal nugatory or futile, special circumstances warranting the grant of a stay may exist. It will also be necessary to consider matters such as the arguability of the appeal and the balance of convenience."

Analysis

20 With respect to the arguability of the appeal, there are in my opinion hurdles in front of the Director General being successful. These include the following. Firstly, as the decision appealed against is an interim order, the Director General must, pursuant to s49(2a) of *the Act* convince the Full Bench that "the matter is of such importance that, in the public interest, an appeal should lie", before the appeal can be determined. Secondly, the decision of the Commissioner appealed against was made in the exercise of a discretion. Ordinarily, such a decision is accorded considerable deference on appeal and is only interfered with if clear error is shown. This is particularly so when the decision made is an interim one. With respect to interim orders made at a s44 conference it has been acknowledged that the Commissioner is better placed to understand the industrial state of play and decide what if any interim orders should be made (see *Murdoch University v The Liquor, Hospitality and Miscellaneous Union, Western Australian Branch* (2005) 86 WAIG 247 at [120] and *State School Teachers' Union of WA (Incorporated) v Director-General, Department of Education and Training* (2008) 88 WAIG 698 at [51]). Thirdly, in her reasons the Commissioner said she had considered the arguments of both parties.

21 Despite these hurdles, my present and necessarily preliminary view, is that it is arguable that leave to appeal will be granted and the appeal will succeed. With respect to the former this is because it is arguable that there is a public interest in the Full Bench considering the extent to which the Director General losing confidence in a teacher should affect the making of an interim reinstatement order. With respect to the latter, there is arguability primarily on the basis that in recording the reasons which favoured the granting of the interim order, the Commissioner did not expressly refer to the issue of the Director General's loss of confidence in Ms Motteram properly performing the duties of a teacher.

22 In my opinion however it is the consequences of the making or not making of the stay order sought which is decisive in determining the present application. If the application is not granted, the appeal will not be rendered nugatory or futile. This is

because, as set out earlier, if the present application is unsuccessful, but the appeal is not, there will simply be a delay in Ms Motteram's removal from her present teaching position. In other words the outcome which the Director General hopes to achieve from the appeal can still be achieved if a stay is not ordered.

23 Counsel for the Director General contended that there will be two adverse consequences if the present application was not granted. The first is that the Director General will suffer the prejudice of paying Ms Motteram from the public purse in circumstances where there is no confidence in her as a teacher. The second is that the continuation of the interim order will undermine the significance of the Director General deciding she has a lack of confidence in Ms Motteram as a teacher. It was submitted this was particularly important given the position of a teacher in relation to school children.

24 I am not satisfied that these arguments favour the granting of a stay. With respect to the first, whilst it is correct that the Director General will continue to have to pay Ms Motteram, it can be readily inferred that this is no great amount given the budget of the Director General as a whole. The continued payment of Ms Motteram will not cause any financial hardship to the Director General. As to the second point, whether the Commissioner appropriately took into account the Director General's loss of confidence in Ms Motteram will be considered in the appeal, if leave is granted. I do not think it is an issue which ought to cause the Commissioner's order to be stayed. The Commissioner had the benefit of full argument on the issue before making the order; I have not. In my opinion a full and proper consideration of the issue should await the hearing of the appeal and I should not pre-empt the decision of the Full Bench or undermine the decision of the Commissioner by making an order for a stay.

25 The Director General did not make any additional submissions directed to the issue of the balance of convenience. In my opinion however this favours the non granting of a stay. This is because, if the stay is granted, Ms Motteram will lose her income and be placed in circumstances where it will be difficult for her to obtain alternative employment in her profession.

Conclusion

26 For these reasons the Director General has not persuaded me that there are sufficient grounds to make it just and fair to make an order for a stay. Accordingly, the application will be dismissed.

2009 WAIRC 00201

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE DIRECTOR GENERAL OF THE DEPARTMENT OF EDUCATION AND TRAINING
	APPLICANT
	-and-
	STATE SCHOOL TEACHERS' UNION OF WA (INCORPORATED)
	RESPONDENT
CORAM	THE HONOURABLE M T RITTER, ACTING PRESIDENT
DATE	TUESDAY, 21 APRIL 2009
FILE NO	PRES 3 OF 2009
CITATION NO.	2009 WAIRC 00201

Decision	Application dismissed
Appearances	
Applicant	Mr D J Matthews (of Counsel), by leave
Respondent	Mr M Amati, Industrial Advocate

Order

This application having come on for hearing before me on 16 April 2009, and having heard Mr D J Matthews (of Counsel), by leave on behalf of the applicant, and Mr M Amati, Industrial Advocate on behalf of the respondent, and reasons for decision having been delivered on 21 April 2009, it is this day 21 April 2009 ordered that:

1. The application is dismissed.

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

PRESIDENT—Unions—Matters dealt with under Section 66—

2009 WAIRC 00323

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES IAIN AGNEW

APPLICANT

-and-

UNITED FIREFIGHTERS UNION OF AUSTRALIA WEST AUSTRALIAN BRANCH

RESPONDENT

CORAM THE HONOURABLE M T RITTER, ACTING PRESIDENT

DATE WEDNESDAY, 27 MAY 2009

FILE NO/S PRES 1 OF 2008

CITATION NO. 2009 WAIRC 00323

Result Application discontinued

Representation

Applicant Mr I Agnew, in person

Respondent Ms L Anderson (industrial officer)

Order

Having received a notice of discontinuance from the applicant on 12 May 2009 it is this day, 27 May 2009, ordered that:

1. The application is discontinued.

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

2009 WAIRC 00211

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PRESIDENT

CITATION : 2009 WAIRC 00211

CORAM : THE HONOURABLE M T RITTER, ACTING PRESIDENT

HEARD : WEDNESDAY, 18 MARCH 2009, WEDNESDAY, 8 APRIL 2009

DELIVERED : FRIDAY, 24 APRIL 2009

FILE NO. : PRES 2 OF 2009

BETWEEN : ROBERT MCJANNETT - MEMBER CFMEUW

APPLICANT

-v-

KEVIN NOEL REYNOLDS, THE SECRETARY - THE CONSTRUCTION, FORESTRY, MINING & ENERGY UNION OF WORKERS

FIRST RESPONDENT

-and-

DARREN KAVANAGH

SECOND RESPONDENT

-and-

WAYNE NICHOLSON RETURNING OFFICER WA ELECTORAL COMMISSION

THIRD RESPONDENT

-and-

INTERVENER THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS

CatchWords:

Industrial Law (WA) - Section 66(2)(e) application - Jurisdiction of Commission - Whether there was an irregularity "in connection with" an election - Candidates allegedly provided with electoral roll with telephone numbers by returning officer - Whether allegations are moot when new election had been ordered - Whether actions of returning officer breached s69 of *Industrial Relations Act 1979* or reg 12 of the *Industrial Arbitration (Union Elections) Regulations 1980* - Application dismissed - *Industrial Relations Act 1979* (WA), s7, s7(1), s26(1), s26(1)(a), s26(1)(b), s26(1)(c), s27(1)(a), s27(1)(a)(iv), s66, s66(2), s66(2)(e), s69, s69(9) - *Industrial Arbitration (Union Elections) Regulations 1980* - Reg 12, 12(4) - *Workplace Relations Act 1996* (Cth)

Legislation:

Industrial Relations Act 1979 (WA), s7, s7(1), s26(1), s26(1)(a), s26(1)(b), s26(1)(c), s27(1)(a), s27(1)(a)(iv), s66, s66(2), s66(2)(e), s69, s69(9)

Workplace Relations Act 1996 (Cth)

Industrial Arbitration (Union Elections) Regulations 1980, reg 12, reg 12(2), reg 12(4)

Result:

Application dismissed.

Representation:

Counsel:

Applicant:	In person
First Respondent:	Mr K J Bonomelli (of Counsel), by leave
Second Respondent:	No appearance
Third Respondent:	Ms N Eagling (of Counsel), by leave
Intervener:	Mr R C Kenzie QC, by leave and with him
	Mr T J Dixon (of Counsel), by leave

Solicitors:

Applicant:	Not applicable
First Respondent:	Jeremy Noble Barristers & Solicitors
Second Respondent:	Leask & Co
Third Respondent:	State Solicitor for Western Australia
Intervener:	Slater and Gordon Lawyers

Case(s) referred to in reasons:

Civil Service Association of Western Australia Inc v Commissioner of Police, Western Australian Police (2006) 86 WAIG 639

Confederation of Western Australian Industry (Incorporated) v Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch (1990) 70 WAIG 1281

Harken v Dornan (1992) 72 WAIG 1727

R v Gray; Ex parte Marsh (1985) 157 CLR 351

Re Collins; Ex parte Hockings (1989) 167 CLR 522

Thompson v Reynolds (2009) 89 WAIG 287

Veloudos v Young (1981) 56 FLR 182

Case(s) also cited:

Jones v Civil Service Association Inc [2003] WASCA 321

Mcjannett v Reynolds & Ors (2008) 88 WAIG 2086

Stacey v Civil Service Association of Western Australia (Incorporated) (2007) 87 WAIG 1229

Reasons for Decision

RITTER AP:

Introduction

1 On 23 February 2009 the applicant filed an application seeking, under s66 of the *Industrial Relations Act 1979* (WA) (*the Act*), an inquiry into the election for offices in the Construction, Forestry, Mining and Energy Union of Workers (CFMEUW). The application was, after being filed, endorsed with directions in the usual manner. One of those directions was that the application be served upon the CFMEUW. The reason for this was because of its obvious interest in the application. The endorsed directions also included that there be a directions hearing on 18 March 2009. The longer than usual length of time between the filing of the application and the first directions hearing occurred at the request of the applicant.

Leave to Intervene

2 At the directions hearing the CFMEUW applied for leave to intervene in the proceedings. This was not objected to by the applicant or any of the respondents. The application was granted and an order made accordingly.

The Summary Dismissal Application

3 Prior to the directions hearing the CFMEUW also foreshadowed that, if leave to intervene was granted, it would apply for the proceedings to be summarily dismissed. The primary basis for this was that the contentions made in the substantive application could not, as a matter of law and fact, constitute "irregularities" for the purpose of s66(2)(e) of *the Act.* Accordingly there was no jurisdiction to inquire into the election and the application must fail. Further or alternatively it was submitted that the application should be dismissed under s27(1)(a) of *the Act*. The reason for this submission was that the contentions in the application did not relate to the present election for offices and were therefore moot; in the sense of having being overtaken by events and accordingly irrelevant to the present election. The application of the CFMEUW was supported by the respondents.

4 At the directions hearing, after discussions with the parties, I made orders for the filing and service of submissions on the summary dismissal application. That application was then listed for hearing on 8 April 2009.

5 It was accepted by the CFMEUW and the respondents that the basis upon which the application for dismissal should be considered was to take the applicant's case "at its highest". In other words the question is whether, assuming the applicant could prove the facts which he contended had occurred, they could properly support, as a matter of fact and law, an inquiry under s66 of *the Act.* It is also appropriate to record at this stage that the parties and the CFMEUW do not accept that all of the facts occurred, which are alleged by the applicant. This point is particularly made by the third respondent.

Background to the Election

6 The present election for offices is to occur because of orders I made in proceedings PRES 3-6/2008. Those proceedings involved an inquiry into alleged irregularities in the elections for offices which were, pursuant to the rules of the CFMEUW, scheduled to occur in the second half of 2008. I published reasons for decision in those proceedings on 23 January 2009 ("the first reasons" – see *Thompson v Reynolds* (2009) 89 WAIG 287). In the first reasons I set out the relevant statutory provisions, rules of the CFMEUW, claims which were made, relevant evidence, issues which emerged and my analysis of those issues. I concluded that an irregularity had occurred in the compilation of the roll for the 2008 election for offices in the CFMEUW.

7 After hearing from the parties I made orders on 28 January 2009. The first of these was a declaration that the irregularity had occurred. The second order was that an "election proceed pursuant to Rule 23 of the CFMEUW Rules for all offices and such election be arranged by the Registrar and the Electoral Commissioner appointed under s 69 of the *Industrial Relations Act 1979* (WA) in accordance with the following scheme and timetable…". The scheme and timetable were then set out. For present purposes it is relevant to note that it was ordered that nominations were to open on 17 April 2009 and close on 1 May 2009. The ballot was ordered to commence on 22 May 2009 and conclude on 19 June 2009.

8 It is also relevant to note at this stage that as set out in the first reasons, although the electoral process had in accordance with the CFMEUW rules commenced for the 2008 election, I ordered on 16 September 2008 that the returning officer should not take any steps to proceed with the election until further order.

The Present Application

9 The application in the present proceedings set out as the grounds of the application, the following:

> "WA Electoral Commission unlawfully assisting individual candidates Kevin Reynolds and Darren Kavanagh. WA Electoral Commission supplied private phone numbers to Darren Kavanagh who then canvassed members with SMS messages on several occasions to assist his election campaign. WA Electoral Commission and or CFMEU contravened sections 12 (2) and (4) of the Industrial Arbitration (union elections) regulations, 1980 and section 69(9) on the Industrial Relations act 1979. WA Electoral commission and or Darren Kavanagh further contravened the Federal privacy act 1988 and other privacy regulations with unlawful use of private telephone numbers. as per attached schedule 1 [sic]."

10 "Schedule 1" was an affidavit sworn by the applicant, which set out facts and annexed documents which were said to support the application.

11 It is appropriate at this juncture to say that the broad and unparticularised allegations in the application that there had been a breach of, "the *Federal Privacy Act* and other privacy regulations" was not the subject of any relevant evidence or submissions. As a result I do not think that allegation could support an inquiry under s66 of *the Act*.

12 It is also pertinent to note at this stage that the alleged supply of private telephone numbers did not occur at a time after the order which I made for an election on 28 January 2009. Instead it allegedly occurred in relation to the election then scheduled to take place in the second half of 2008 and before the order made on 16 September 2008.

The Allegations Made by the Applicant

13 The following is taken from the applicant's affidavit and the annexed documents.

14 The applicant was a candidate for the position of assistant secretary in the 2008 elections of the CFMEUW. The applicant said that on 21 August 2008 he met with the returning officer, Mr Nicholson (the third respondent), at the offices of the Western

Australian Electoral Commission (the WAEC). He there requested a copy of the electoral roll. The applicant said he was told by Mr Nicholson that no candidate would be receiving any copies of the roll and it would only be available for inspection at his office at a later date.

15 On the following day the applicant wrote to Mr Nicholson with a complaint about the conduct of the elections. In the letter, the applicant requested a copy of the roll on the grounds that Mr Reynolds and Mr Kavanagh (candidates for the position of secretary) had already received copies of the roll.

16 On 29 August 2008 the applicant received a letter of reply from the Electoral Commissioner dated 27 August 2008. In that letter it was said that, in accordance with the rules of the CFMEUW, an election was not formally underway until nominations were opened and closed. The letter said that the list of eligible voters had closed, in accordance with the rules, on 23 July 2008. It also said that the returning officer had not issued any voter lists for the election. The letter said that under regulation 12 of the *Industrial Arbitration (Union Elections) Regulations 1980* (*the Union Election Regulations*), the returning officer was to make the electoral roll available for inspection by members of the union or other authorised persons. Section 69(9) of *the Act* was also mentioned. It entitles members and candidates to inspect and take extracts from the list of eligible voters.

17 The applicant deposed that on 10 September 2008 he received a telephone call from a CFMEUW official alleging that Mr Kavanagh had been given a membership roll by the WAEC containing "numerous phone numbers belonging to CFMEU [sic] members and Mr Kavanagh and his associates were sending campaign text messages to those persons". The applicant said that union members had complained to the WAEC about this. The WAEC had then recalled the roll form Mr Kavanagh.

18 The applicant said that after receiving this information he attended the offices of the WAEC and met with Mr Nicholson and Mr Botterill. (Mr Botterill became the substitute returning officer for the 2008 elections following the calling of the Western Australian State Parliamentary Election). The applicant said that during this meeting Mr Nicholson and Mr Botterill denied supplying a roll to Mr Kavanagh or Mr Reynolds containing telephone numbers. They also said that the rolls were recalled due to other problems such as "workplace addresses". The applicant deposed that at the meeting the returning officers did not explain why Mr Reynolds and Mr Kavanagh had been given membership rolls in "contradiction of their earlier stated position".

19 The applicant then referred to and annexed to his affidavit a letter by him to the Electoral Commissioner dated 18 September 2008. This was sent via email on that date. Relevantly that letter referred to an earlier letter by the applicant dated 10 September 2008, as to which he had not received a reply. The letter dated 18 September 2008 also referred to another letter sent earlier that day. The earlier letter had referred to the non reply to his letter dated 10 September 2008. The second 18 September 2008 letter then said the applicant had received a telephone call from Mr Botterill in response to the first letter sent on 18 September 2008. The second letter said it was not appropriate to respond to "these important issues in any manner other than in writing".

20 The letter then went on to request details of the membership roll which Mr Kavanagh had been provided with which was later removed from his possession.

21 A letter in reply, dated 18 September 2008, was sent by the Electoral Commissioner to Mr Mcjannett and received by him on 22 September 2008. That letter referred to Mr Mcjannett's letters of 10 and 18 September 2008 and also the order, described earlier, which I made on 16 September 2008.

22 The letter then said that the returning officer had an obligation to ensure that the electoral roll was in "in good order". The letter said the list of members was withdrawn from all candidates because of the requirement to have residential addresses shown on the electoral roll. The letter said that "[a]ll lists [had] been returned to the Commission and work [was] continuing to finalise the election roll".

23 The applicant's affidavit then detailed a freedom of information request which he made "concerning the illicit supply and use of private telephone numbers". The freedom of information request was made by letter to Mr Nicholson dated 8 December 2008.

24 The Freedom of Information Officer of the WAEC provided a detailed reply to the applicant's freedom of information request by letter dated 5 February 2009. This was received by the applicant on 9 February 2009. In that letter the officer said he had decided to refuse the application for a copy of the "CFMEUW roll that was issued in September 2008 to Mr Kevin Reynolds and Mr Darren Kavanagh and any mobile telephone numbers contained therein". The letter set out relevant factual background. The letter said that "[a]fter the conclusion of the nomination period [on] 4 September 2008 the Electoral Commission sent a copy of the CFMEUW roll to Mr Reynolds and Mr Kavanagh"; but before doing so both of these men had to sign a "Roll Use of Agreement contract with the Electoral Commission". That agreement set out the basis upon which the roll was provided.

25 The letter said that after the roll was sent to Mr Kavanagh and Mr Reynolds it was discovered that "one of the rolls supplied had some mobile telephone numbers of CFMEUW members included. As soon as this was discovered the returning officer contacted (via telephone) the appropriate candidate and requested that the candidate not use the roll containing this personal information and requested that the roll be returned to the Electoral Commission. The candidate obliged with this request immediately".

26 The letter then referred to the applicant's correspondence to the returning officer and the order which I made on 16 September 2008. The letter also referred to an email sent by the applicant to the returning officer requesting a copy of the CFMEUW roll. The letter said the request "could not be actioned because the CFMEUW election had been suspended".

27 The letter then recorded the decision of the Electoral Commissioner about the freedom of information request. The request was refused on the basis that disclosure "would reveal personal information about an individual". The letter said that the Electoral Commissioner did not think it was in the public interest to provide that information to the applicant.

28 The letter then set out the applicant's rights of appeal.

29 In his affidavit, the applicant contended that the letter dated 5 February 2009 contained "many inaccuracies". The affidavit also said however that there is "abundant evidence" that Mr Kavanagh and his "Renew the CFMEU team", did not comply with the request to return the roll but used the telephone numbers to send out text messages to thousands of members on the eve of the "Federal Union Election". I mention at this stage that, as described in the first reasons, elections for offices in the Construction, Forestry, Mining and Energy Union, registered under *the Workplace Relations Act 1996* (Cth) were scheduled to and did occur in the second half of 2008. The applicant's affidavit then referred to complaints made by members of "the union" to the Australian Electoral Commission about the supply of their telephone numbers to Mr Kavanagh. The applicant asserted he had in his possession copies of messages sent by the "Renew the CFMEU team" which had also been "downloaded onto computer equipment". The applicant's affidavit then concluded that: "the election process past and present had been corrupted".

30 In summary, the applicant's complaint is that an irregularity has occurred because the WAEC wrongly assisted Mr Kavanagh and Mr Reynolds by providing them with an electoral roll which contained private telephone numbers of CFMEUW members and that this roll had been used by Mr Kavanagh to solicit votes from members. Additionally, this roll was not provided to the applicant.

The Submissions on Jurisdiction

31 As set out earlier, the first basis upon which dismissal of the proceedings was sought was because what has been alleged by the applicant cannot, as a matter of law and fact, constitute an "irregularity" as defined in *the Act*.

32 Relevantly, s66(2)(e) of *the Act* provides that the President may:

> "…
>
> (e) inquire into any election for an office in the organisation if it is alleged that there has been an irregularity in connection with that election and make such orders and give such directions as the President considers necessary –
>
> (i) to cure the irregularity including rectifying the register of members of the organisation; or
>
> (ii) to remedy or alter any direct or indirect consequence thereof;
>
> …"

33 "Irregularity" is defined in s7 of *the Act* in the following way:

> "***irregularity***, in relation to an election for an office, includes a breach of the rules of an organisation, and any act, omission, or other means by which the full and free recording of votes, by persons entitled to record votes, and by no other persons, or a correct ascertainment or declaration of the results of the voting is, or is attempted to be, prevented or hindered;"

34 In support of its argument, the CFMEUW referred to discussion by the High Court about the substantially similar definition of "irregularity" in the then applicable Federal legislation, about the elections for offices in federally registered unions. This discussion has been held to be applicable to determining whether an irregularity has occurred under *the Act* (see *Harken v Dornan* (1992) 72 WAIG 1727 and also the first reasons at [201]-[208]).

35 In particular, the CFMEUW relied upon the observations of Gaudron J in *Re Collins; Ex parte Hockings* (1989) 167 CLR 522. At 528, Gaudron J said that the hindering or prevention of "the full and free recording of votes", in the definition of irregularity, referred "to the processes involved in obtaining, marking and returning a ballot paper and not the process by which a voter decides for whom to vote". Her Honour cited *R v Gray; Ex parte Marsh* (1985) 157 CLR 351 in support of this proposition. Her Honour quoted from the reasons of Gibbs CJ in *Ex parte Marsh* at 368, where the Chief Justice said: "[t]he notion of an irregularity, in relation to an election, involves the idea of some departure from some rule, established practice or generally accepted principle governing the conduct of the election". Her Honour concluded at 531 that "the expression 'irregularity in or in connection with an election', as used in the [Federal] Act, does not encompass those activities by which candidates or persons acting in their interests seek, by their advocacy or by promoting or publicising such advocacy, to influence voters in their decision for whom to vote".

36 The CFMEUW also cited the reasons of Toohey and McHugh JJ in *Re Collins* in support of the proposition that even breaches of an organisation's rules do not necessarily give rise to an irregularity. Their Honours said at 526:

> "Conduct which constitutes a breach of the rules of an organization but which goes no further than supporting the candidature of members of a particular "team" amounts to an irregularity but it does not give rise to an irregularity in or in connexion with an election because it does not involve a departure from some rule, practice or principle governing the conduct of the election."

37 It was submitted on the basis of the reasons in *Re Collins* that what the applicant here alleged could not constitute an "irregularity in connection with" the election which is to take place.

38 The CFMEUW did acknowledge that the definition of "irregularity" in s7 was inclusive rather than exclusive. This point was made by Gibbs CJ in *Ex parte Marsh* at page 365, with respect to the then applicable Federal legislation. The Chief Justice referred to other examples of irregularities as being a threat which induced the withdrawal of a candidature or, without any

breach of a union's rules, a returning officer failing to make available any reasonable facility for the receipt of nominations, so that persons who desired to be candidates were prevented from nominating. The CFMEUW submitted however that there was nothing of this ilk in the applicant's contentions.

39 The CFMEUW submitted that even if the WAEC had supplied telephone numbers to one or more of the candidates this was at most an "electioneering irregularity" which was not an "irregularity" for the purposes of the definition in s7(1) of *the Act*. The CFMEUW cited in support of this contention the reasoning of the Industrial Appeal Court in *Harken*. There, the then President had found that there were irregularities because a candidate had used the resources of the union for his own purposes in endeavouring to persuade electors to vote for him at an election. However an appeal against this decision was allowed by the Court, following the reasoning in *Re Collins*.

40 Accordingly the CFMEUW submitted, in effect, that:

(a) There was no allegation of a breach of the rules of the CFMEUW.

(b) The alleged acts or omissions were not those by which:

(i) the full and free recording of votes; or

(ii) a correct ascertainment or declaration of the results of the voting,

was, or was attempted to be, prevented or hindered.

(c) What was alleged did not otherwise constitute an irregularity in connection with the election for offices in the CFMEUW.

41 Each of the respondents adopted the submissions of the CFMEUW on the issue of jurisdiction.

42 In his submissions, the applicant did not accept that the facts he relied upon did not constitute an irregularity in relation to an election for office. The applicant provided few details however to support this fairly diffident submission. The applicant did, correctly, submit that the authorities relied upon by the CFMEUW did not involve allegations of "serious illegal conduct" by a returning officer or Electoral Commissioner, or the unlawful use of private telephone numbers, as he argued had been released by the WAEC to Mr Reynolds and Mr Kavanagh.

43 It was also submitted that the Commission has a wide range of powers under s66. In addition reliance was placed upon s26(1)(a)-(c) of *the Act*.

44 The applicant also argued that the provision of the roll by the WAEC to Mr Reynolds and Mr Kavanagh was in contravention of s69(9) of *the Act* and regulation 12(4) of the *Union Election Regulations*.

45 Section 69(9) of *the Act* provides:

> "The Secretary of the organisation shall, within such time as the Registrar may require, lodge with the Registrar a copy of the register of members referred to in section 63 and that register shall be open for inspection and extracts may be taken therefrom, at the office of the person conducting the election, by any member of the organisation or candidate at the election."

46 Regulation 12(4) of the *Union Election Regulations* provides:

> "The returning officer shall, at the place where he carries out his functions as returning officer, make the electoral roll applicable to an election for an office available for inspection by members of the union, or by any person authorised by the returning officer, during the ordinary hours of business until the day on which the result of the election is declared."

47 The applicant submitted that the provisions did not authorise the giving of a copy of the entire electoral roll to a candidate. With respect to s69(9) of *the Act* the applicant contended the use of the word "extract" meant that only something less than the entire roll could be provided.

The Submissions on Whether the Allegations are Moot

48 With respect to the contention that the allegations made by the applicant were now moot, so that the application should be dismissed for that reason, the lead submissions were made by the third respondent. The other respondents and the CFMEUW adopted his submissions.

49 The third respondent submitted that the order that I made on 28 January 2009 was for "a new election to proceed in accordance with a new timetable. This new timetable included the compilation of a new roll". Accordingly, the question of the use made by the roll supplied by the WAEC to Mr Kavanagh in the "previous election" was a "dead issue". It was then submitted that courts would not decide a question that is academic in the sense that it is "useless, merely hypothetical, raised prematurely or a dead issue", although there was a discretion to determine a question which has ceased to be a live issue between the parties, where the determination is in the public interest. The third respondent cited *Veloudos v Young* (1981) 56 FLR 182 at 190, *Confederation of Western Australian Industry (Incorporated) v Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1990) 70 WAIG 1281 at 1282 and *Civil Service Association of Western Australia Inc v Commissioner of Police, Western Australian Police* (2006) 86 WAIG 639 at [11], in support of this proposition. It was also submitted that whether there was a supplied roll that incorrectly contained telephone numbers or whether those numbers were used to contact members of the CFMEUW in 2008 was not a matter of public interest.

50 Accordingly the Commission should use its powers under s27(1)(a)(iv) of *the Act* to dismiss the proceedings.

51 In supporting the submissions made by the third respondent, the CFMEUW said that the election process for the elections which were to be held in the second half of 2008 were "superseded by an entirely new electoral process". Accordingly there could not now be any relief granted in relation to the "original election".

52 On this issue, the applicant submitted, again rather baldly, that the election which was scheduled to occur in the second half of 2008 has not been superseded. It was submitted that would not occur until "such time as an election period has commenced and finalised". It was submitted that it was not possible for the present election to be conducted "on a level playing field", until "an inquiry has discovered on what basis a solitary candidate was supplied [with] thousands of private [tele]phone numbers by the returning officer and on what basis high ranking public servants within the WAEC were apparently lying about it to the applicant".

53 It was submitted that given what the applicant had ascertained by reason of the letter from the FOI officer of the WAEC in February 2009, the inquiry leading to the first reasons did not "delve far enough".

Analysis

54 As I said earlier, in determining the present application I assume that the applicant will be able to establish that the facts he has deposed to did occur. I am not satisfied however that those facts provide a jurisdictional foundation for an inquiry under s66(2)(e) of *the Act*. This is because that jurisdiction is founded upon there being an allegation "that there has been an irregularity in connection with" the election into which the inquiry is to be made or sought to be made. In my opinion what the applicant complains about is not of this character. The applicant alleges irregularities in relation to the electoral process for the elections which were to take place in 2008; not the election which I ordered to take place on 28 January 2009. I do not accept the applicant's point that, in effect, the 2008 electoral process has continued. That electoral process was halted by the order I made on 16 September 2008. The order which I made on 28 January 2009 was for a new election. This is clear in my opinion because as a consequence of the orders I made:

(a) A new electoral roll was to be compiled.

(b) There was to be a new timetable for elections.

(c) Nominations for offices were again to be called for by the returning officer.

(d) Candidates who had nominated for the 2008 election would again have to nominate if they wished to contest the election.

55 Accordingly, in my opinion, the supply of the 2008 electoral roll to Mr Reynolds and Mr Kavanagh, prior to 16 September 2008, is not an irregularity in connection with the election which I ordered to take place on 28 January 2009. To illustrate this point, Mr Kavanagh may not even nominate for the position of secretary or any other office in the present election.

56 I also accept the submissions of the CFMEUW about the meaning of "irregularity" in ss7 and 66(2) of *the Act*. Additionally, I accept the submissions of the CFMEUW that what the applicant has alleged could not as a matter of law and fact constitute such an irregularity.

57 To the extent to which what the applicant alleges is argued to constitute an irregularity in connection with the scheduled 2008 election, it has been overtaken by events. Those events are the orders I made on 16 September 2008 and 28 January 2009. Accordingly I accept the submission of the third respondent that the allegations made are moot, with respect to the 2008 election, and there would be no public interest in inquiring into them.

58 I also do not accept that the actions which the WAEC has allegedly engaged in could constitute a breach of regulation 12(4) of the *Union Election Regulations*. This regulation requires the Returning Officer to make an electoral roll available for inspection by the persons there described. It does not provide that a copy of the electoral roll cannot be provided to candidates for an office.

59 Not dissimilarly, s69(9) of *the Act* provides that a lodged copy of the register of members "shall be open for inspection and extracts may be taken therefrom", from "the office of the person conducting the election, by any member of the organisation or candidate at the election". The subsection is permissive in the sense of giving an entitlement to candidates or members of an organisation, rather than restrictive of what the person conducting an election may do. That is the subsection does not in its terms prevent a returning officer from providing a candidate with a copy of the register of members.

60 The applicant's reliance on s26(1) of *the Act* also does not assist him. That subsection is about how the jurisdiction of the Commission is to be exercised – it does not provide any avenue for the jurisdiction of the Commission to be added to.

Conclusion

61 For these reasons I do not accept that the allegations made by the applicant could form a proper basis for an inquiry under s66(2)(e) of *the Act*. Accordingly, the Commission has no jurisdiction to conduct such an inquiry and the application must be dismissed.

2009 WAIRC 00212

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ROBERT MCJANNETT - MEMBER CFMEUW
	APPLICANT
	-v-
	KEVIN NOEL REYNOLDS, THE SECRETARY - THE CONSTRUCTION, FORESTRY, MINING & ENERGY UNION OF WORKERS
	FIRST RESPONDENT
	-and-
	DARREN KAVANAGH
	SECOND RESPONDENT
	-and-
	WAYNE NICHOLSON RETURNING OFFICER WA ELECTORAL COMMISSION
	THIRD RESPONDENT
	-and-
INTERVENER	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS
CORAM	THE HONOURABLE M T RITTER, ACTING PRESIDENT
DATE	FRIDAY, 24 APRIL 2009
FILE NO/S	PRES 2 OF 2009
CITATION NO.	2009 WAIRC 00212

Result	Application dismissed
Representation	
Applicant	In person
First Respondent	Mr K J Bonomelli (of Counsel), by leave
Second Respondent	No appearance
Third Respondent	Ms N Eagling (of Counsel), by leave
Intervener	Mr R C Kenzie QC, by leave and with him Mr T J Dixon (of Counsel), by leave

Order

This application having come on for hearing before me on 18 March 2009 and 8 April 2009 and having heard Mr R P Mcjannett on his own behalf as applicant, Mr K J Bonomelli (of Counsel), by leave, on behalf of the first respondent, Ms N Eagling (of Counsel), by leave, on behalf of the third respondent, and Mr R C Kenzie QC, by leave and with him Mr T J Dixon (of Counsel), by leave, on behalf of the intervener, it is this day, 24 April 2009, ordered that:

1. The application is dismissed.

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

2009 WAIRC 00372

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GEOFFREY A. DAVIS AM, RETURNING OFFICER OF THE STATE SCHOOL TEACHERS UNION OF WA
	APPLICANT
	-and-
	THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)
	RESPONDENT
CORAM	THE HONOURABLE M T RITTER, ACTING PRESIDENT
DATE	WEDNESDAY, 10 JUNE 2009
FILE NO	PRES 4 OF 2009
CITATION NO.	2009 WAIRC 00372

Decision	Orders and Directions
Appearances	
Applicant	In person
Respondent	Mr S Millman (of Counsel), by leave

Order

This matter having come on for directions hearing before me on 10 June 2009, and having heard Mr G A Davis AM on his own behalf as the applicant, and Mr S Millman (of Counsel), by leave, on behalf of the respondent, it is this day, 10 June 2009, ordered that:

1. The directions hearing be adjourned until Wednesday, 24 June 2009 at 10:00am.
2. Direction 3, endorsed on the application dated 29 May 2009, is varied so that the date is 2:30pm on Monday, 22 June 2009.

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

2009 WAIRC 00298

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE REGISTRAR OF THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
	APPLICANT
	-and-
	THE DISABLED WORKERS' UNION OF WESTERN AUSTRALIA
	RESPONDENT
CORAM	THE HONOURABLE M T RITTER, ACTING PRESIDENT
DATE	FRIDAY, 22 MAY 2009
FILE NO/S	PRES 1 OF 2009
CITATION NO.	2009 WAIRC 00298

Decision	Variation of orders and directions
Appearances	
Applicant	Mr R J Andretich (of Counsel), by leave
Respondent	Mr K J Trainer, as agent

Order

Having received requests from the respondent, on 5, 6 and 21 May 2009, that the directions hearing listed for 7 May 2009 be adjourned and that orders 4 and 5 made on 3 March 2009 be varied, which is not objected to by the applicant, it is this day, 22 May 2009, ordered that:

1. Order 4 of the orders made on 3 March 2009 be varied so as to provide that on or before 18 June 2009 the respondent shall file and serve:
   (a) A detailed report about the membership and financial membership of the respondent, including all of the information required in an annual return under the *Industrial Relations Act 1979* (WA); and
   (b) A financial report prepared by an accountant.
2. Order 5 of the orders made on 3 March 2009 be varied so as to provide that the directions hearing be adjourned to 25 June 2009 at 10:00am.

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

AWARDS/AGREEMENTS—Variation of—

2009 WAIRC 00287

CHILDREN'S SERVICES (PRIVATE) AWARD 2006

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION
	APPLICANT
	-v-
	BASSENDEAN TOWN COUNCIL AND OTHERS
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	MONDAY, 18 MAY 2009
FILE NO/S	APPL 107 OF 2008
CITATION NO.	2009 WAIRC 00287

Result	Award varied
Representation	
Applicant	Mr B Owen
Respondents	No Appearance

Order

HAVING heard Mr B Owen on behalf of the applicant and there being no appearance on behalf of the respondents, the Commission, pursuant to the powers conferred under the *Industrial Relations Act, 1979*, hereby orders:

THAT the *Children's Services (Private) Award 2006 (No. A 10 of 1990)* be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 18 May 2009.

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

SCHEDULE

1. Clause 10. – Meal Breaks and Allowances: Delete subclause (1) of this clause and insert the following in lieu thereof:

(1) Where an employee, without being notified on the previous day, is required to continue working after the usual ceasing time for two hours or more the employee shall be provided with a meal free of charge or be paid $9.85 for such meal.

2009 WAIRC 00318

NURSES' (DAY CARE CENTRES) AWARD 1976

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ON THE COMMISSION'S OWN MOTION
CORAM	CHIEF COMMISSIONER A R BEECH
HEARD	THURSDAY, 30 APRIL 2009
DELIVERED	WEDNESDAY, 27 MAY 2009
FILE NO.	APPL 12 OF 2009
CITATION NO.	2009 WAIRC 00318

CatchWords	Award - Award variation - on Commission's own motion to reflect statutory requirements - Industrial Relations Act 1979 (WA) s 40B
Result	Award varied

Reasons for Decision (extemporaneous)

1 On 1 April 2009 the Registrar notified the Australian Nursing Federation WA Branch, Industrial Union of Workers (ANF) and the named parties to this Award of the Commission's intention to vary this Award on the Commission's own motion under s 40B(1)(d) of the *Industrial Relations Act, 1979* (the Act). Section 40B of the Act permits the Commission to amend an Award for a wide range of reasons. This application is limited in that it is to amend the Clause 20. - Wages to simplify the clause prior to the application of the next State Wage order. The clause contains wage rates operative in 1988 and 1989. The Commission proposed to delete the columns of wages other than the current wage rate as the Commission considers that it would be efficient for the clause to merely specify the current wage rate. Accordingly, the Commission proposed to delete the references to Arbitrated Safety Net Adjustments also contained in subclause 20(1).

2 The Commission also proposed to:

- Delete the reference to "1976" in the Title clause of the Award,
- Amend Clause 3. - Scope to reflect reference to current legislation,
- Delete Clause 5. - Term,
- Delete Clause 7. - Contract of Employment,
- Amend Clause 10. - Sick Leave to include reference to the *Minimum Conditions of Employment Act, 1993*,
- Delete or amend Clause 15. - Time and Wages Record with a reference to the Act,
- Delete Clause 21. - Liberty to Apply,
- Rename Schedule "A" – Respondents to Schedule A - Named Parties to the Award, and
- Delete Appendix - s.49B - Inspection of Records Requirements.

3 The notification from the Registrar advised that this matter would be listed for 30 April 2009. There were no appearances at the hearing, however the notification stated that there was no obligation on any party to appear unless they wished to make particular submissions.

4 Written responses were received from the Labour Relations Division of the Department of Commerce on behalf of the Minister for Commerce on 21 April 2009 and from the ANF on 28 April 2009.

5 The Minister raised three issues, being matters of detail which the Minister had picked up. I record my thanks for the matters being drawn to my attention. The amendments to issue in relation to this Award will take into account the details raised by the Minister.

6 The ANF did not object to the proposed amendments.

7 In relation to Clause 7. - Contract of Employment, I have decided that the Commission will not proceed with that amendment at this stage. It was to delete the clause because of the overriding provisions of the *Workplace Relations Act, 2006.* However, given that that legislation is due to continue only for another two months and be replaced by the Fair Work Act on 1 July 2009, the amendments to be made to the Award ought await the promulgation of the Fair Work Act on 1 July.

8 Also, in relation to amending the title of Schedule "A" - Respondents, I have decided that the Commission will not proceed with that amendment at this stage because of the reference in the Scope clause of the Award to "the respondents". Amending the title of Schedule "A" - Respondents without correspondingly amending the Scope clause may cause some uncertainty about the Award's scope.

9 Therefore the proposed amendments to Clause 7 and Schedule A will not proceed and they can be addressed in a subsequent application.

10 In all other respects the Award will be varied as set out in the Registrar's letter and an order will issue to that effect.

11 Therefore the proposed amendment to that clause will not proceed and it can be addressed in a subsequent application after that time.

2009 WAIRC 00319

NURSES' (DAY CARE CENTRES) AWARD 1976

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ON THE COMMISSION'S OWN MOTION
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	WEDNESDAY, 27 MAY 2009
FILE NO/S	APPL 12 OF 2009
CITATION NO.	2009 WAIRC 00319

Result	Award varied
Representation	No appearances

Order

WHEREAS on 10 February 2009 the Commission on its own motion created this application pursuant to s 40B(1)(d) of the *Industrial Relations Act*, 1979 (the Act) to vary the above Award;

AND WHEREAS the proposed variations are to ensure that the Award does not contain provisions that are obsolete or which need updating;

AND WHEREAS on 1 April 2009, the Commission advised the named parties to the Award and the persons mentioned in s 40B(2) of the Act, of its intention to vary the Award below and the proposed variations;

AND WHEREAS on 1 April 2009 the Commission advised it would sit on 30 April 2009 to hear submissions from the parties;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under s 40B(1)(d) of the Act, being of the opinion that the award should be varied to amend or delete certain provisions which are obsolete or which need updating hereby order –

THAT the Nurses' (Day Care Centres) Award 1976 be varied in accordance with the following schedule and that such variations shall have effect from the first pay period commencing on or after the 27th day of May 2009.

(Sgd.) A R BEECH,
[L.S.] Chief Commissioner.

SCHEDULE

1. Clause 1. - Title: Delete this clause and insert the following in lieu thereof:

1. - TITLE

This award shall be known as the Nurses' (Day Care Centres) Award.

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

2. - ARRANGEMENT

3. Clause 3. – Scope: Delete this clause and insert the following in lieu thereof:

3. - SCOPE

This award shall apply to workers who are registered or entitled to be registered under the Nurses and Midwives Act 2006 and who are employed by the respondents by virtue of Part 3 - Division 2 of the Child Care Services (Child Care) Regulations 2006.

4. Clause 5. – Term: Delete this clause.

5. Clause 10. – Sick Leave:

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

(b) An employee, other than a casual employee, is entitled for each year of service to paid leave for the number of hours the employee is required ordinarily to work in a 2 week period during that year, up to 76 hours, and the entitlement accrues pro rata on a weekly basis.

B. In subclause (2) of this clause delete the words: Provided that a worker shall not be entitled to claim payment for any period exceeding ten weeks in any one year of service.

6. Clause 15. – Time and Wages Record: Delete this clause and insert the following in lieu thereof:

15. - TIME AND WAGES RECORD

Access to employment records is provided for in section 49E of the Industrial Relations Act, 1979.

7. Clause 20. – Wages: Delete this clause and insert the following in lieu thereof:

20. - WAGES

	Per Week $
Registered General Nurse	
1st year	585.50
2nd year	594.50
Registered Mothercraft Nurse	
1st year	585.40
2nd year	585.40

8. Clause 21. – Liberty to Apply: Delete this clause.

9. Appendix – S.49B. – Inspection of Records Requirements: Delete this Appendix.

AWARDS/AGREEMENTS AND ORDERS—Application for variation of—No variation resulting—

2009 WAIRC 00325

CHILD CARE (LADY GOWRIE CHILD CENTRE) AWARD (NO A 3 OF 1984)

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION - WA BRANCH
	APPLICANT
	-v-
	LADY GOWRIE CHILD CENTRE (WA) INC
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	THURSDAY 28 MAY 2009
FILE NO/S	APPL 8 OF 2006
CITATION NO.	2009 WAIRC 00325

Result Discontinued

Order

WHEREAS this is an application to vary the *Child Care (Lady Gowrie Child Centre) Award (No A 3 of 1984)* ("the Award"); and

WHEREAS on 13 April 2006 the Commission convened a conference for the purpose of conciliation and at the conclusion of the conference the parties were given time for further discussions in respect to varying a number of Child Care awards, including the Award; and

WHEREAS the Commission set down a further conference on 13 June 2006 which was vacated on 12 June 2006 at the request of the applicant and the matter was adjourned pending the finalisation of related matters in the Australian Industrial Relations Commission; and

WHEREAS the Commission contacted the applicant on a number of occasions to ascertain the status of the matter and the applicant's intentions in relation to the application; and

WHEREAS as no contact was made by the applicant after 13 June 2007 about this application, the Commission listed the matter for a show cause hearing on 9 December 2008; and

WHEREAS on 8 December 2008 the applicant filed a Notice of Discontinuance in respect of the application and the hearing was vacated;

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

THAT this application be, and is hereby discontinued

(Sgd.) J L HARRISON,
Commissioner.

[L.S.]

2009 WAIRC 00293

CHILDREN'S SERVICES (PRIVATE) AWARD (NO A10 OF 1990)

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	JAY BEE DAY CARE CENTRE AND OTHERS
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 20 MAY 2009
FILE NO/S	APPL 944 OF 2005
CITATION NO.	2009 WAIRC 00293

Result Discontinued

Order

WHEREAS this is an application to vary the *Children's Services (Private) Award (No A 10 of 1990)* ("the Award"); and

WHEREAS on 24 March 2006 the Commission issued an order to vary the Award; and

FURTHER the order contained a provision that further proceedings would take place to determine whether or not the variations to the Award contained in the order should apply to employers represented by warrant at the hearing by Ms Kathy Reid; and

WHEREAS as there was no further contact from the applicant about this application the matter was listed for a show cause hearing on 9 December 2008 and at this hearing, and at the request of the applicant, the matter was adjourned until mid January 2009 for the applicant to consider how it wished to deal with the application with respect to the employers represented by Ms Reid; and

WHEREAS on 27 January 2009 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby discontinued.

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

2009 WAIRC 00327

FUNERAL DIRECTORS' ASSISTANTS' AWARD NO. 18 OF 1962

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION
	APPLICANT
	-v-
	WILLIAM BARRETT & SONS AND OTHERS
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	THURSDAY, 28 MAY 2009
FILE NO/S	APPL 56 OF 2006
CITATION NO.	2009 WAIRC 00327

Result Discontinued

Order

WHEREAS this is an application to vary the *Funeral Directors' Assistants' Award No 18 of 1962;* and

WHEREAS on 6 June 2006 the Commission convened a conference for the purpose of conciliating between the parties and at the conclusion of the conference the applicant was given time for further discussions; and

WHEREAS the Commission contacted the applicant on a number of occasions to ascertain the status of the matter; and

WHEREAS as there was no response to a request sent to the applicant on 1 October 2008 asking that it advise its intentions in relation to this matter, the matter was listed for a show cause hearing on 9 December 2008; and

WHEREAS on 8 December 2008 the applicant filed a Notice of Discontinuance in respect of the application and the hearing was vacated;

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

THAT this application be, and is hereby discontinued.

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

2009 WAIRC 00326

MOTEL, HOSTEL, SERVICE FLATS AND BOARDING HOUSE WORKERS' AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION
	APPLICANT
	-v-
	CANNING BRIDGE AUTO LODGE AND OTHERS
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	THURSDAY, 28 MAY 2009
FILE NO/S	APPL 53 OF 2006
CITATION NO.	2009 WAIRC 00326
Result	Discontinued

Order

WHEREAS this is an application to vary the *Motel, Hostel, Service Flats and Boarding House Workers' Award 1976 (No 29 of 1974)*; and

WHEREAS on 6 June 2006 the Commission convened a conference for the purpose of conciliating between the parties and at the conclusion of that conference the parties sought time for further discussions; and

WHEREAS the Commission set down further conferences on 25 July 2006 and 29 August 2006 however the conferences were vacated at the request of the applicant; and

WHEREAS the Commission contacted the applicant on a number of occasions to ascertain the status of the matter; and

WHEREAS as there was no response to a request sent to the applicant on 1 October 2008 asking that it advise its intentions in relation to this matter, the matter was listed for a show cause hearing on 9 December 2008; and

WHEREAS on 8 December 2008 the applicant filed a Notice of Discontinuance in respect of the application and the hearing was vacated;

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

THAT this application be, and is hereby discontinued.

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

AWARDS/AGREEMENTS AND ORDERS—Interpretation of—

2009 WAIRC 00291

INTERPRETATION OF CLAUSE 16(2) OF THE GARDENERS (GOVERNMENT) 1986 AWARD NO. 16 OF 1983

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	THE EXECUTIVE DIRECTOR, PILBARA TAFE
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
HEARD	THURSDAY, 5 MARCH 2009
DELIVERED	TUESDAY, 19 MAY 2009
FILE NO.	APPL 76 OF 2008
CITATION NO.	2009 WAIRC 00291

Catchwords	Award interpretation - Clause 16(2) of the *Gardeners (Government) 1986 Award No 16 of 1983* - Whether Union member was a first aid officer in accordance with Clause 16(2) - Relevant principles to be applied - *Industrial Relations Act 1979* s 46
Result	Declaration made
Representation	
Applicant	Mr M Aulfrey (of Counsel)
Respondent	Mr D Matthews (of Counsel)

Reasons for Decision

1 On 12 September 2008 the Liquor, Hospitality and Miscellaneous Union, Western Australian Branch ("the applicant") lodged an application pursuant to s 46 of the *Industrial Relations Act 1979* ("the Act") for an interpretation of subclause (2) of Clause 16. – First Aid–Kits and Attendants of the *Gardeners (Government) 1986 Award No 16 of 1983* ("the Award"). This application was lodged subsequent to the applicant lodging application C 72 of 2006, pursuant to s 44 of the Act, which dealt with issues relevant to this application. The background relating to both applications is contained in the memorandum of matters referred for hearing and determination with respect to application CR 72 of 2006 and is as follows:

> "1. The applicant claims that Mr Detlev Swoboda was and continues to be a first aid officer as provided for in subclause (2) of Clause 16. – First Aid – Kits and Attendants of the *Gardeners (Government) 1986 Award No 16 of 1983* ("the Award"), which reads as follows:
>
> *(2) The employer shall, wherever practicable and where there are two or more employees, appoint an employee holding current first aid qualifications from St John Ambulance or similar body to carry out first aid duty at all works or depots where employees are employed. Such employees so appointed in addition to first aid duties, shall be responsible under the general supervision of the supervisor or foreperson for maintaining the contents of the first aid kit, conveying it to the place of work and keeping it in a readily accessible place for immediate use.*
>
> *Employees so appointed shall be paid the following rates in addition to their prescribed rate per day:*
>
> | *Qualified Attendant* | *$ Per Day* |
> |---|---|
> | *10 employees or less* | *1.20* |
> | *In excess of 10 employees* | *2.04* |
>
> The applicant therefore argues that the Commission should issue the following declaration:
>
> That Mr Swoboda holds a current first aid qualification from St John Ambulance and was appointed by the respondent to carry out first aid duties pursuant to Clause 16(2) of the Award since the commencement of his employment with the respondent.
>
> 2. The Respondent denies the claim and opposes the declaration being sought by the applicant.

Contentions:

Applicant

The applicant claims that Mr Swoboda's name was added to a list of first aid officers at the South Hedland TAFE from around April 2000 and that in this role he was responsible for the upkeep of the first aid kit in his department. The

applicant also claims that as Mr Swoboda was appointed as a first aid officer then he should be receiving payment of an allowance as an appointed first aid officer in accordance with Clause 16 of the Award.

Respondent

The respondent disputes that Mr Swoboda was appointed as a first aid officer in accordance with Clause 16(2) of the Award. The respondent also argues that in order for the first aid allowance to be paid to Mr Swoboda pursuant to Clause 16(2) of the Award there must be two or more employees employed in Mr Swoboda's section. As the respondent employs one gardener the necessary preconditions for the payment of the first aid allowance have not been met.

Agreed facts:

1. Mr Swoboda commenced employment with the respondent as a Gardener in March 1999 at South Hedland TAFE and his employment conditions are in part contained in the Award.
2. When Mr Swoboda commenced employment with the respondent he had a first aid qualification."

2 On 17 October 2008 the applicant filed the following statement as a schedule attached to application Appl 76 of 2008:

"1. The title and sections of the relevant award in question is the *Gardeners (Government) Award 1986*, clause 16(2).

2. The facts giving rise to the application are as follows:

2.1 Mr Detlev Swoboda was employed by the Respondent as a Gardener at South Hedland TAFE, commencing in March 1999.

2.2 Mr Swoboda advised (sic) in his interview prior to commencement with South Hedland TAFE whether he had a first aid certificate, and responded that he did.

2.3 From April 2000 Mr Swoboda's name was added to a list listing all first aid officers on campus. He was also responsible for the upkeep of the first aid kit in his Department.

2.4 Pursuant to clause 16(2) of the *Gardeners (Government) Award 1986*, Mr Swoboda contends he was entitled to an allowance for his position relating to first aid at the TAFE.

2.4(sic) Mr Swoboda has since ceased employment with the respondent.

3. The questions (sic) to be decided in this application are (sic) as follows:

3.1 Whether Mr Swoboda was a first aid officer in accordance with clause 16(2) of the *Gardeners (Government) Award 1986*."

Applicant's evidence

3 Mr Detlev Swoboda confirmed that he was employed by the respondent in March 1999 as a gardener at the respondent's Hedland College ("the College"). Mr Swoboda holds an Associate Diploma in Horticulture, a B class driver's licence and a Senior First Aid Certificate which was current throughout his employment with the respondent. Mr Swoboda also qualified as a Senior First Aid Instructor during the time he was employed by the respondent (see Exhibit A1).

4 Mr Swoboda gave evidence that when he was interviewed for his job by telephone Mr Tom McQuire, the respondent's Manager of Facilities, asked him about his qualifications in horticulture as well as his first aid qualifications. Mr Swoboda stated that after he commenced working with the respondent Mr McQuire asked him if he wanted to be a senior first aid officer and if he agreed to having his name put on the list of first aid contacts and Mr Swoboda stated that he consented to his name being put on this list. Mr Swoboda gave evidence that he was aware that holding a first aid certificate was not a prerequisite to undertaking his role as a gardener but he stated that it was a desirable qualification. Mr Swoboda also confirmed that carrying out the role of a first aid officer was not on his Job Description Form ("JDF").

5 Mr Swoboda stated that after he commenced employment with the respondent he was placed on the respondent's list of first aid officers and as a result he could be contacted to undertake first aid duties. Mr Swoboda gave evidence that this list was distributed throughout the College and placed on pin up boards and was regularly updated (see Exhibit A2).

6 Mr Swoboda gave evidence that he updated the contents of the first aid box stored in the gardeners' storeroom and he stated that he undertook first aid duties from time to time and occasionally filled out incident and accident report forms. Mr Swoboda stated that on three occasions he was appointed to undertake senior first aid officer duties. One occasion was during National Aboriginal and Islander Day Observance Committee ("NAIDOC") week and the others were when he attended at least two Welcome to Hedland nights. Mr Swoboda stated that he was paid $1.92 for undertaking work as a first aid officer on these occasions and he maintained that these payments were detailed on his payslips.

7 Mr Swoboda stated that his name was taken off the first aid officer list in October 2006 after application C 72 of 2006 was lodged in the Commission.

8 Under cross-examination Mr Swoboda stated that he attended the Welcome to Hedland nights on a voluntary basis after Mr McQuire and other managers asked him to attend these functions. Mr Swoboda agreed that his attendance at NAIDOC week was voluntary but he stated that this event was held during normal working hours.

9 Mr Swoboda maintained that he was given little opportunity to refuse to have his name included on the first aid contact list and he said that he agreed to have his name put on this list as an act of good faith towards the respondent.

10 Mr Swoboda gave evidence that he first raised the issue of being paid the first aid allowance with Ms Elaine Griggs in 2003 or 2004 and he followed up this claim in June 2006 in a letter he sent to Ms Nerida Kickett (Exhibit R3). Mr Swoboda stated that he did not raise the payment of this allowance before this time as he was unaware that he had an entitlement to be paid this allowance. Mr Swoboda stated that he raised the payment of the allowance after experiencing difficulties with one of his

managers and Mr Swoboda maintained that as soon as he became aware of his entitlement to the payment of a first aid allowance he immediately followed up this issue.

11 Mr Swoboda believed he had been appointed as a first aid officer pursuant to the Award because his name was on the contact list of first aid officers.

12 Under re-examination Mr Swoboda stated that Ms Norma Robinson, a colleague, had made him aware that he had an entitlement under the Award to the payment of the first aid allowance.

13 +Mr Swoboda stated that his work place was located in the gardening/nursery section of the College and a workshop was attached to this section, which was where the first aid box was located and he stated that employees from the mechanical workshop, which was located opposite his shed, used the first aid box located in his workshop. Mr Swoboda stated that one other gardener was employed by the respondent at the respondent's other campus at Pundulmurra, which was approximately 1.5 kilometres from the College. Mr Swoboda stated that occasionally gardeners were engaged by the respondent on a subcontract basis to undertake gardening duties for a few days at a time and he gave evidence that he was part of a facilities team which included two technicians, a storeperson, a manager and Mr Tallip Groom who was the other gardener working at Pundulmurra. Mr Swoboda reported to the respondent's Manager of Facilities who was based in an office near his workshop.

Respondent's evidence

14 Ms Kickett is the respondent's Director of Business Services and she has held this position since January 2006. Ms Kickett was the respondent's Human Resource Manager between July 2005 and January 2006. Ms Kickett confirmed that Pundulmurra and the College merged to become one entity in January 2000.

15 Ms Kickett stated that Mr Groom is employed at Pundulmurra to undertake bus driving duties, he assists in maintaining the facilities at Pundulmurra and he is also the facilities caretaker at Pundulmurra. Ms Kickett stated that Mr Groom is not employed as a gardener and she understands that he is employed under the terms of the *Government Officers Salaries, Allowances and Conditions Award 1989 (No PSAA 3 of 1989)* ("the GOSAC Award").

16 Ms Kickett stated that all of the respondent's staff are offered the opportunity to undertake professional development to obtain first aid qualifications and she stated that there was no link between the offer of this professional development and an employee becoming a first aid officer.

17 Ms Kickett stated that the Welcome to Hedland activities were not held on the respondent's premises but she confirmed that NAIDOC week was held at the Pundulmurra campus.

18 Ms Kickett stated that the list containing employees holding a first aid certificate was a source for employees to locate persons trained in first aid and Ms Kickett stated that no employee was paid for having his or her name on this list. Ms Kickett stated that to her knowledge the respondent had no documentation confirming that Mr Swoboda was appointed as a first aid attendant under Clause 16 of the Award.

19 Under cross-examination Ms Kickett stated that employees were expected to participate in NAIDOC week. Ms Kickett stated that Mr Groom resides at the Pundulmurra campus and to the best of her knowledge he may undertake some gardening duties. Ms Kickett stated that she was aware that Mr Swoboda had been paid for undertaking first aid duties during NAIDOC week and for working at Welcome to Hedland nights.

20 Ms Kickett was unaware if Mr Swoboda had ever undertaken first aid duties whilst employed by the respondent and she did not know if he had completed any incident reports. Ms Kickett knew that a first aid kit was located in the gardening workshop but she maintained that facilities employees and not Mr Swoboda stocked this kit however Ms Kickett conceded that Mr Swoboda could have emailed a facilities employee with information to ensure that the first aid kit was properly stocked. Ms Kickett disagreed that Mr Swoboda was appointed as a first aid officer.

Submissions

Applicant

21 The applicant maintains that the Commission has jurisdiction to deal with this application as this application does not relate to the enforcement of an award entitlement because the issue in dispute turns on the definition of an employee in Clause 16 of the Award and whether or not an employee, in this case Mr Swoboda, was appointed to be a first aid attendant.

22 The applicant argues that the provision in the Award that there must be two or more employees does not have to be met before an employee can be paid the first aid allowance in Clause 16(2) of the Award. The applicant also submits that in any event the reference in Clause 16(2) of the Award to employees includes employees other than those covered by the Award and includes Mr Groom whose work is in connection with the area and scope of the Award. The applicant also argues that the reference to teaching or clerical staff being appointed as first aid attendants in Clause 16(3) of the Award contemplates that employees other than those covered by the Award falls under the ambit of the Award for the purposes of Clause 16 of the Award.

23 The applicant argues that Mr Swoboda was appointed as a first aid attendant from the commencement of his employment with the respondent even though the respondent had no formal appointment process in place for appointing a first aid attendant. The applicant argues that Mr Swoboda's attendance at NAIDOC week and Welcome to Hedland nights as a first aid officer and the fact that Mr Swoboda was paid three times to undertake first aid duties confirms Mr Swoboda's appointment as a first aid officer. The applicant also submits that the removal of Mr Swoboda's name from the list of persons available to undertake first aid duties in 2006, after he claimed payment for the first aid allowance, was done by the respondent to avoid any further liability with respect to the payment of the allowance. Additionally, the applicant relies on the discussion between Mr Swoboda and Mr McQuire about Mr Swoboda holding a first aid certificate during Mr Swoboda's initial interview for his position prior to him commencing employment with the respondent.

24 The applicant submits that Ms Kickett was not in a position to know about the first aid duties undertaken by Mr Swoboda nor would she be aware of any of the incident reports he completed.

25 The applicant argues that Mr Swoboda's evidence should be accepted as he was a credible witness and his evidence was not shaken under cross-examination.

Respondent

26 The respondent submits that the Commission does not have jurisdiction to deal with this application because what is being sought by the applicant constitutes the enforcement of the payment of the attendant allowance to Mr Swoboda and the respondent argues that the declaration being sought by the applicant is unhelpful and does not advance the applicant's case. Specifically, the respondent argues that the applicant is not seeking an interpretation of the Award but a declaration that Mr Swoboda was appointed as a first aid attendant pursuant to Clause 16(2) of the Award and is therefore entitled to the benefit of the payment of the allowance included in this clause.

27 On the issue of merit the respondent submits that Mr Swoboda was not appointed to the position of first aid attendant and he is therefore not entitled to receive the payment contained in Clause 16(2) of the Award and even though the issue of Mr Swoboda having a first aid certificate was mentioned during his interview for employment with the respondent Mr Swoboda was never appointed to be an attendant. The respondent maintains that the list of first aid officers compiled by the respondent is just a list and does not constitute a formal appointment of first aid attendants. The three times that Mr Swoboda was paid to undertake first aid duties were for very short periods and therefore little weight can be placed on these payments. Furthermore, they did not amount to an appointment under Clause 16(2) of the Award. The respondent argues that the removal of Mr Swoboda's name from the first aid list is irrelevant as Mr Swoboda was not appointed to the position of first aid attendant and his removal from the list was only done by the respondent out of an abundance of caution. Additionally, the JDF for Mr Swoboda's position does not refer to having a first aid certificate as a prerequisite to holding this position.

28 The respondent argues that the reference to employees in Clause 16(2) of the Award can only mean employees employed under the Award and given the way in which the Award is read as a whole it cannot be read in any other way. As only one employee was employed by the respondent under the Award Mr Swoboda is not entitled to be paid the daily allowance provided for under Clause 16.

Findings and Conclusions

29 The applicant is seeking an answer to the following question:

> Whether Mr Swoboda was a first aid officer in accordance with clause 16(2) of the *Gardeners (Government) Award 1986*.

Jurisdiction

30 The respondent argues that the Commission does not have jurisdiction to deal with this application on the basis that what is being sought by the applicant constitutes the enforcement of the terms of Clause 16(2) of the Award with respect to the payment of the first aid allowance to Mr Swoboda. In contrast the applicant argues that the issue to be determined by the Commission does not involve the enforcement of the provisions in Clause 16(2) of the Award. The applicant maintains that the issue before the Commission is not about the respondent paying the first aid allowance to Mr Swoboda but relates to whether or not an employee in Mr Swoboda's situation was appointed as a first aid attendant which includes the interpretation of the definition of an employee in Clause 16(2).

Consideration

31 I find that the nature of the dispute before the Commission is not one which constitutes the enforcement of the terms of Clause 16(2) of the Award and the Commission therefore has jurisdiction to deal with this application. In my view the question the applicant is seeking to be answered requires an analysis and interpretation of Clause 16(2) of the Award to determine whether Mr Swoboda was appointed as a first aid attendant taking into account the requirements included in Clause 16(2) of the Award for an employee to be paid the first aid attendant allowance and even if the Commission finds that Mr Swoboda was appointed as a first aid attendant pursuant to Clause 16(2) this cannot result in any order requiring the respondent to pay Mr Swoboda the benefit of the first aid attendant allowance.

Credibility

32 I listened carefully to the evidence given by each witness and closely observed them. I find that Mr Swoboda gave his evidence honestly and to the best of his recollection and as a result, I accept his evidence. In particular I found Mr Swoboda to be a forthright witness who gave his evidence in a clear and considered manner and his evidence in my view was not shaken during cross-examination. Even though Mr Swoboda was questioned closely about a letter he sent to Ms Kickett where he referred to a first aid certificate being a requirement of his job, which was incorrect, I accept his explanation as to why and how this statement came about. I am of the view that Ms Kickett gave her evidence to the best of her ability however I formed the impression that she was being less than forthcoming when asked about her knowledge as to whether or not Mr Swoboda had undertaken first aid duties as she was aware that he was on the list of employees who were available to undertake first aid duties and she also knew that he had been asked to be available to undertake first aid duties during NAIDOC week and during Welcome to Hedland evenings. In the circumstances, where there is any conflict in the evidence, I prefer the evidence given by Mr Swoboda.

33 The interpretation of an award is a matter of law. When interpreting an award one must read the terms of the award, give the words in the clause or clauses in question their ordinary commonsense meaning and ascertain whether the words used have an unambiguous meaning. If the terms of the Award are clear and unambiguous it is not permissible to look at extrinsic material to qualify the meaning of the clause or clauses in issue (see *Norwest Beef Industries Limited and Another v West Australian Branch, Australian Meat Industry Employees Union, Industrial Union of Workers* (1984) 64 WAIG 2124).

34 In *Brown & Root Energy Services Pty Ltd v Construction Industry Long Service Leave Payments Board* (2001) 81 WAIG 665 at 671 Smith C, as she was then, observed the following:

> "In interpreting industrial instruments tribunals usually do not apply a literal approach, as awards and enterprise agreements may have been drafted by industrial rather than skilled draftsmen (*Robe River Iron Associates v Amalgamated Metal Workers' and Shipwrights' Union* per Kennedy J at 1100). This approach to interpretation was explained by Street J in *Geo A Bond and Co Ltd (in liq) v McKenzie* (1929) 28 AR 499 at 503-504—
>
> > 'Now, speaking generally, awards are to be interpreted as any other enactment is interpreted. They lay down the law affecting employers and employees in their relation as such, and they have to be obeyed to the same extent as any other statutory enactment. But at the same time, it must be remembered that awards are made for the various industries in the light of the customs and working conditions of each industry, and they frequently result, as this award in fact did, from an agreement between parties, couched in terms intelligible to themselves but often framed without that careful attention to form and draughtsmanship which one expects to find in an Act of Parliament. I think, therefore, in construing an award, one must always be careful to avoid a too literal adherence to the strict technical meaning of words, and must view the matter broadly, and after giving consideration and weight to every part of the award, endeavour to give it a meaning consistent with the general intention of the parties to be gathered from the whole award.'"

35 It was not in dispute and I find that Mr Swoboda commenced employment with the respondent as a gardener in March 1999, he worked in this role at the College until July 2007, throughout the period that Mr Swoboda worked for the respondent he held a current first aid certificate and during Mr Swoboda's employment with the respondent he qualified as a Senior First Aid Instructor. I also find on the evidence that Mr Swoboda was the only employee employed by the respondent pursuant to the Award. It was not in dispute and I find that the respondent placed Mr Swoboda's name on a list of employees to contact if an employee was in need of first aid assistance soon after he commenced employment with the respondent and the respondent removed Mr Swoboda's name from this list in October 2006 after the applicant lodged application C 72 of 2006. It was also the case and I find that Mr Swoboda was asked to and did attend one NAIDOC week celebration and at least two Welcome to Hedland evenings in his capacity as a first aid officer and he was paid a first aid allowance for attending these functions.

36 Clause 16. – First Aid – Kits and Attendants of the Award reads as follows:

"(1) The employer shall provide at each depot an adequate first aid kit for the use of the employees in case of accident, and such first aid kit shall be kept renewed and in proper condition.

(2) The employer shall, wherever practicable and where there are two or more employees, appoint an employee holding current first aid qualifications from St John Ambulance or similar body to carry out first aid duty at all works or depots where employees are employed. Such employees so appointed in addition to first aid duties, shall be responsible under the general supervision of the supervisor or foreperson for maintaining the contents of the first aid kit, conveying it to the place of work and keeping it in a readily accessible place for immediate use.

Employees so appointed shall be paid the following rates in addition to their prescribed rate per day:

Qualified Attendant	$ Per Day
10 employees or less	1.40
In excess of 10 employees	2.35

(3) At Education Establishments where the First Aid Attendant is appointed from the teaching or clerical staff, the First Aid Kit will be available for the use of employees covered by this award."

37 Clause 3. - Area and Scope of the Award reads as follows:

> "This award shall apply throughout the State of Western Australia to all employees employed by the respondents to this award in connection with mowing and gardening, and the establishment and/or maintenance of all manner of grounds, gardens, lawns, ovals, propagation, landscaping and horticulture."

38 The issue in dispute with respect to this application turns on an interpretation of the terms of Clause 16(2) of the Award. In particular it is necessary to determine whether Mr Swoboda was appointed by the respondent pursuant to Clause 16(2) of the Award to carry out first aid duties and if all of the prerequisites for this appointment detailed in Clause 16(2) of the Award were satisfied.

39 In my view the terms of Clause 16(2) of the Award within the context of Clause 16. – First Aid - Kits and Attendants of the Award and the Award as a whole are clear and unambiguous.

40 Clause 16(1) requires the employer to provide an adequate first aid kit for the use of the employees at each depot in case of an accident and the kit is to be renewed on an ongoing basis. A Depot is defined in the *Australian Concise Oxford Dictionary* (2nd Edition, 1992) as:

> "**1** a storehouse. **2** *Mil*. **a** a storehouse for equipment etc. **b** the headquarters of a regiment. **3 a** a building for the servicing, parking, etc. of esp. buses, trains, or goods vehicles. **b** *US* a railway or bus station."

41 It was not in dispute and I find that at Mr Swoboda's 'depot' or the gardening workshop where Mr Swoboda was based, a first aid kit was provided by the respondent. I also find that the reference to this kit being supplied for the use of the employees in Clause 16(1) refers to employees covered by the scope clause of the Award given the reference to the kit being provided for the employees at each depot.

42 Clause 16(2) provides that where practicable and where there are two or more employees the employer is to appoint an employee who holds current first aid qualifications to carry out first aid duty at all works or depots where employees are employed and such employees shall be responsible, under the supervision of a supervisor, for maintaining the contents of the first aid kit and keeping it in a ready and accessible place for immediate use. When employees are so appointed they are to be paid a prescribed rate per day and the quantum varies according to whether or not ten employees or less or in excess of ten employees work at the depot.

43 I am of the view that Mr Swoboda was appointed by the respondent to be a first aid officer or attendant however, as all of the pre-conditions for an appointment of this nature in order for the payment of the attendant allowance to be made to Mr Swoboda, as contained in Clause 16(2) of the Award have not been met, I conclude that Mr Swoboda was not appointed as a first aid attendant pursuant to Clause 16(2).

44 The word appoint is defined in the *Australian Concise Oxford Dictionary* (2nd Edition, 1992) as:

> "**1** assign a post or office to (*appoint him governor; appoint him to govern; appointed to the post)*…".

Even though there was no evidence that Mr Swoboda was officially appointed to be a first aid attendant by the respondent and the respondent did not have a formal process in place to appoint first aid attendants pursuant to the Award or any other industrial instrument covering the respondent's employees, I find that Mr Swoboda was appointed by the respondent to be a first aid officer or attendant. I have reached this conclusion based on the following findings. It was not in dispute and I find that Mr Swoboda held a current first aid certificate throughout his employment with the respondent and the respondent encouraged Mr Swoboda to update these qualifications, the respondent asked Mr Swoboda to consider being place on the first aid contact list and when Mr Swoboda agreed to being on the list he was placed on the respondent's list of employees who were available to render first aid assistance to the respondent's employees until October 2006 when his name was removed from the list by the respondent after application C 72 of 2006 was lodged. During the period that Mr Swoboda was on the respondent's first aid contact list he was ready and available to render first aid assistance to the respondent's employees as required, until his name was removed from the list, and on three occasions – once during NAIDOC week and twice during Welcome to Hedland evenings - Mr Swoboda was asked by the respondent and he was available to undertake first aid duties as required and he was paid to undertake these duties. I also find on the evidence of Mr Swoboda that from time to time he also carried out first aid duties and filled out accidents and incident reports as a result of being placed on the respondent's list of employees holding first aid qualifications. It is therefore my view and I find that all of this points to Mr Swoboda being appointed by the respondent to undertake first aid officer or attendant duties.

45 Clause 16(2) of the Award requires that the following conditions be in place before an employee can be appointed as a first aid attendant pursuant to this clause and is then eligible to be paid a daily rate of pay in exchange for that employee being available to undertake first aid attendant duties:

1. the employer shall appoint an employee holding a current first aid qualification where practicable; and
2. the employer shall appoint an employee holding a current first aid qualification as a first aid attendant to carry out first aid duty at all works or depots where employees are employed, where there are two or more employees.

It is also the case that Clause 16(2) provides that where an employee has been appointed as a first aid attendant he or she shall, under the supervision of his or her supervisor or foreperson maintain the contents of the first aid kit, convey it to the place of work and keep it in a readily accessible place for immediate use however this is not a pre-condition to appointment but specifies one of the roles of a first aid attendant.

46 The first requirement is that the appointment of a first aid attendant be practicable. Practicable is defined in the *Australian Concise Oxford Dictionary* (2nd Edition, 1992) as:

> "**1** that can be done or used. **2** possible in practice …"

I find in this instance that it was clearly practicable to appoint Mr Swoboda as a first aid attendant. Mr Swoboda held a current first aid certificate throughout his employment with the respondent and he was willing to undertake the role of first aid attendant. In my view it was therefore possible or practicable to appoint Mr Swoboda to be a first aid attendant.

47 The other prerequisite to this appointment relates to whether or not the two or more employees referred to in Clause 16(2) must be employees covered by the Award. The applicant argues that the reference to two or more employees in this clause refers to any or all of the respondent's employees, including Mr Groom, and is not restricted to employees covered by the Award. The applicant also argues that as Clause 16(3) of the Award refers to teaching or clerical staff being appointed as first aid attendants this adds weight to its view that the reference to employees in Clause 16(2) contemplates other employees apart from employees covered by the Award. In the alternative the respondent argues that the reference to two or more employee in Clause 16(2) relates only to employees covered by the Award and this is the only interpretation that can be made given the way in which Clause 16 and the Award as a whole is written.

48 It is my view that on a careful reading of Clause 16 and the Award as a whole, the reference to two or more employees in Clause 16(2) means employees bound by the scope clause of the Award and therefore applies to employees employed by the respondent who undertake work in connection with mowing and gardening and associated duties. In reaching this view I take into account that Clause 16(1) refers to a first aid kit being made available for the employees attached to a depot which I have already found refers to employees bound by the Award. In my view it follows that the reference in Clause 16(2) to a first aid attendant being appointed, wherever practicable, to carry out first aid duties at depots or works where there are two or more employees, means that the two or more employees must be employees who are covered by the Award. I conclude, therefore, that there must be at least two employees covered by the Award before a first aid attendant can be appointed pursuant to Clause 16(2) and receive the allowance provided for under this clause. I find that the reference to employees not covered by the Award in Clause 16(3) does not assist the applicant's argument as this clause relates to a situation where the first aid kit at

an education establishment is not located at the depot of employees covered by the Award. For completeness, I find that Mr Swoboda updated and maintained the contents of the first aid kit stored in the gardening workshop even though it is not a pre-condition to appointment as a first aid attendant or for the payment of the first aid attendant allowance.

49 As the evidence was clear that Mr Swoboda was the only employee employed by the respondent under the terms of the Award and was the only employee based at the gardener's workshop at the College then the second pre-condition for appointment as a first aid attendant pursuant to Clause 16(2) is not satisfied. Whilst it appears that Mr Groom undertakes some gardening duties at the respondent's Pundulmurra campus Ms Kickett gave uncontradicted evidence, which I accept, confirming that Mr Groom was employed pursuant to the terms and conditions of the GOSAC Award.

50 In summary I find that Mr Swoboda was appointed by the respondent as a first aid officer or attendant, he updated and maintained the contents of the first aid kit stored in the gardening workshop, it was practicable to appoint Mr Swoboda as a first aid attendant and Mr Swoboda held a current and relevant first aid qualification throughout the period he was employed by the respondent. However the pre-condition of the appointment as a first aid attendant that there be two or more employees employed by the respondent at all works and depots who are employed pursuant to the Award has not been met as Mr Swoboda was the only employee employed by the respondent under the terms of the Award. In the circumstances, the answer to the question posed by the applicant is that Mr Swoboda was not appointed as a first aid officer in accordance with Clause 16(2) of the *Gardeners (Government) 1986 Award No 16 of 1983.*

51 I will therefore issue the following declaration:

> THAT Mr Detlev Swoboda was not a first aid officer in accordance with Clause 16(2) of the *Gardeners (Government) 1986 Award No 16 of 1983*.

2009 WAIRC 00297

INTERPRETATION OF CLAUSE 16(2) OF THE GARDENERS (GOVERNMENT) 1986 AWARD NO. 16 OF 1983

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	THE EXECUTIVE DIRECTOR, PILBARA TAFE
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	FRIDAY, 22 MAY 2009
FILE NO.	APPL 76 OF 2008
CITATION NO.	2009 WAIRC 00297

Result	Declaration made
Representation	
Applicant	Mr M Aulfrey (of Counsel)
Respondent	Mr D Matthews (of Counsel)

Declaration

HAVING HEARD Mr M Aulfrey of Counsel on behalf of the applicant and Mr D Matthews of Counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby declares:

1. THAT the Commission has jurisdiction to deal with this application.

2. THAT Mr Detlev Swoboda was not a first aid officer in accordance with Clause 16(2) of the *Gardeners (Government) 1986 Award No 16 of 1983.*

(Sgd.) J L HARRISON,
Commissioner.

[L.S.]

NOTICES—Award/Agreement matters—

2009 WAIRC 00361

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. PSAAG 2 of 2009

APPLICATION FOR A NEW AGREEMENT ENTITLED

"DEPARTMENT OF ENVIRONMENT AND CONSERVATION COMMON FIRE SERVICE PROVISIONS AGREEMENT 2009"

NOTICE is given that an application was made to the Commission, on 28 May 2009, by The Civil Service Association of Western Australia Incorporated, under the Industrial Relations Act 1979, for registration of the above named Agreement.

As far as relevant, those parts of the proposed Agreement which relate to area of operation or scope are published hereunder.

3 DEFINITIONS

For the purposes of this Agreement the following definitions shall apply.

…

"Award" means the:

- Public Service Award 1992 No PSA A 4 of 1989 (PSA);
- Public Service Allowances (Fisheries and Wildlife Officers) Award 1990 No PSA A5 of 1986;
- Government Officers Salaries Allowances and Conditions Award 1989 No PSA A3 of 1989;
- Rangers (National Parks) Consolidated 2000 and
- Miscellaneous Government Conditions And Allowances Award No.A Of 1992

…

"This Agreement" means the Department of Environment and Conservation Common Fire Service Provisions Agreement 2009.

…

"Unions" means:

- The Civil Service Association of Western Australia Incorporated ("CSA") and
- Liquor Hospitality and Miscellaneous Union, Western Australian Branch ("LHMU")

…

5 APPLICATION AND PARTIES BOUND

5.1 The parties bound by this Agreement are The Civil Service Association of WA Incorporated and the Liquor Hospitality and Miscellaneous Union, Western Australian Branch and the Director General of the Department of Environment and Conservation.

5.2 This Agreement shall apply to all employees employed within the Department engaged in fire control duties and who are covered industrially by the Unions party to this agreement

5.3 Where the provisions of the respective Awards are inconsistent with this Agreement, the provisions of this Agreement shall prevail.

5.4 This Agreement over rides the provisions of the Public Services Allowances (Fisheries and Wildlife Officers) Award 1990 in respect of employees who receive commuted overtime allowances, and who undertake fire duties as provided for by the Agreement for the duration that such duties are undertaken.

5.5 (a) Agreement shall be read in conjunction with the CSA Agency Specific Agreement and the Rangers (National Parks) General Agreement 2007.

(b) Where the provisions of the aforementioned Agreements are inconsistent with this Agreement, the provisions of this Agreement shall prevail to the extent of any inconsistency.

5.6 The number of employees covered by this Agreement upon registration is estimated to be 800

A copy of the proposed Agreement may be inspected at my office at 111 St. Georges Terrace, Perth.

(Sgd.) J A SPURLING,
Registrar.

[L.S.]

3 June 2009

POLICE ACT 1892—APPEAL—Matters Pertaining To—

2009 WAIRC 00358

APPEAL AGAINST A DECISION OF THE COMMISSIONER OF POLICE TO TAKE REMOVAL ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ALISTAIR LINDSAY GORDON
	APPELLANT
	-v-
	COMMISSIONER OF POLICE
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER S J KENNER
	COMMISSIONER S WOOD
DATE	MONDAY, 8 JUNE 2009
FILE NO/S	APPL 38 OF 2009
CITATION NO.	2009 WAIRC 00358

Result	Appeal adjourned
Representation	
Appellant	Ms C Adams (of counsel), by correspondence
Respondent	Ms D Scaddan (of counsel), by correspondence

Order

WHEREAS on 25 May 2009 Alistair Lindsay Gordon lodged an appeal in the Commission pursuant to s 33P of the *Police Act 1892* ("Police Act") against his removal from the WA Police on 29 April 2009;

AND WHEREAS on 3 June 2009 the Commissioner of Police pursuant to s 33T(2) of the Police Act requested that the hearing of the appeal be adjourned for a period not exceeding 12 months;

AND WHEREAS on 3 June 2009 the appellant advised that he has no objection to the appeal being adjourned as above;

AND WHEREAS on the information before it, the WAIRC is of the view that it is in the interests of justice to adjourn the hearing of the appeal,

NOW THEREFORE, the WAIRC, pursuant to the powers conferred on it under s 33T of the Police Act, hereby orders -

1. THAT the hearing of the appeal be adjourned until Wednesday, 2 June 2010.
2. THAT compliance with regulations 90(a)(ii) and (iii) of the *Industrial Relations Commission Regulations 2005* by the appellant and regulation 91 by the Commissioner of Police need not occur until further order.
3. THAT either party may apply to vary the terms of this order.

(Sgd.) A R BEECH,
Chief Commissioner,
[L.S.] On Behalf of the Western Australian Industrial Relations Commission.

2009 WAIRC 00301

APPEAL AGAINST A DECISION OF THE COMMISSIONER OF POLICE TO TAKE REMOVAL ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GERALD JEAN-NOEL LAURENT
	APPELLANT
	-v-
	COMMISSIONER OF POLICE
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
	SENIOR COMMISSIONER J H SMITH
	COMMISSIONER P E SCOTT
DELIVERED	MONDAY, 25 MAY 2009
FILE NO.	APPL 135 OF 2008
CITATION NO.	2009 WAIRC 00301

CatchWords	*Removal of Police Officer - loss of confidence by Commissioner of Police - application for adjournment of hearing of appeal - Police Act 1892 (WA) - s 33S; Industrial Relations Act 1979 (WA) s 27(1)(f)*
Result	Application dismissed
Representation	
Appellant	Mr G J Laurent, by written submissions
Respondent	Ms D P Scaddan, of counsel, by written submissions

Reasons for Decision – Application for an Adjournment

Background

1 On 6 May 2009 Mr Laurent faxed to the Commission a letter requesting the WAIRC "for an adjournment to allow me time to seek treatment for injury I am currently suffering" (*sic*). Mr Laurent also stated:

> "I am currently waiting for funds to allow me to seek treatment in the hope to allow proceeding at trial without suffering more medical incapacitation and episode. I am not sure how long I will be required treatment or time to heal, however I intend to inform the WAIRC as soon as possible of the course of my recovery. I intend to submit more grounds and articulate the allegations previously submitted so that the WAIRC does get a complete understanding of my claim."

2 The balance of the letter referred to Mr Laurent's intention to also rely upon further documentation which is in his possession and other matters which do not seem to refer to his reasons for seeking an adjournment. The letter concludes:

> "I have forwarded witness statements and medical reports to support that I am suffering injury. I intend to seek treatment to allow me to better cope in the hope not to suffer further episodes prior or at the forthcoming trial at the Western Australian Industrial Relations Commission".

3 The WAIRC notes that the letter did not have attached to it the witness statements or medical reports referred to and they have not been otherwise forwarded to the WAIRC. At the direction of the WAIRC, Mr Laurent was contacted by the Chief Commissioner's Associate to clarify some points in the letter. It is the WAIRC's understanding from his response that Mr Laurent is seeking an adjournment of 2 months but that his request does not apply to the application he currently has before the WAIRC for an order that the Commissioner of Police produce to him certain documents.

4 The WAIRC ensured that the Commissioner of Police was aware of the request for an adjournment and the further information regarding the length of the adjournment and that the request did not apply to the proceedings regarding the order for the production of documents. On 12 May 2009, the Commissioner of Police advised that he did not consent to the request for an adjournment. The Commissioner of Police pointed out that no medical evidence has been provided in support of the assertion or in support of the timeframe requested and stated that Mr Laurent's letter "is predominantly directed towards all of the matters he intends to do in preparation for the appeal hearing, which gives the distinct impression that he wishes more time within which to amass further information, which, arguably he had the opportunity to put to the Commissioner of Police when preparing his response to the notice of intention to remove". The Commissioner of Police submitted that he is entitled to have the appeal against him heard within a reasonable timeframe and within the statutory framework outlined in the *Police Act 1892*.

5 On 13 May 2009 at the direction of the WAIRC, the Chief Commissioner's Associate wrote to the parties advising that Mr Laurent's application and the Commissioner of Police's reply had been received and that the WAIRC intends to issue a formal decision "next week" as to whether the request for an adjournment is granted.

6 On Monday 18 May 2009 Mr Laurent sent an email to the Chief Commissioner's Associate stating that he wished to inform the WAIRC that he has completed "about 50% of my grounds I intend to rely upon whilst managing my injuries without legal support. I have attached documentation submitted to the S.A.T. not to strike out my applications during the same time my response to the Respondent's allegations were due. I am requesting the Commissioners to consider my situation of suffering hardship and injuries. I am seeking some empathy from the WAIRC to better manage my injuries and current situation so that I can forward my grounds to better address the Respondent's allegations. I wish to use this document in support of my application for an adjournment."

7 Attached to the email is a large document prepared by Mr Laurent to the State Administrative Tribunal of Western Australia. We are unsure how this document is able to assist Mr Laurent in the application before us for an adjournment. It is a document which refers to proceedings before another tribunal. We do not see the document as helpful to his application to us for an adjournment.

8 On 19 May 2009 Mr Laurent sent an email to the Chief Commissioner's Associate, with a copy to the Commissioner of Police, as follows:

> "When are Commissioners convene to give an affirmation of the adjournment requested? I intend to forward supplement medical information to demonstrate that I intend to seek medical treatment. However, I feel due to the Respondent history of interfering with the Respondent medical treatment leading to criminality I am not in a position to advise the WAIRC presently." (*sic*)

Consideration

9 Our consideration of Mr Laurent's application for adjournment includes the following matters. Mr Laurent's appeal was lodged on 23 December 2008. A programming conference was held on 4 February 2009 and the appeal was firstly listed for a conciliation conference in Geraldton, which was not successful in having the matter resolved. A further programming conference was held on 30 March 2009 and it was agreed that all documents to be relied upon in the case were to be filed and exchanged by 24 April 2009 and the appeal would be heard on 11 May 2009. That date was vacated following the need for the WAIRC to formally hear from the parties regarding Mr Laurent's application for an order that the Commissioner of Police produce documents to him prior to the appeal. The hearing of the appeal has not been relisted pending the decision of the WAIRC on that matter. Mr Laurent's request for an adjournment has now been received.

10 The decision to grant or refuse an adjournment is a matter for the discretion of the WAIRC. Where the refusal of an adjournment would result in a serious injustice to one party, an adjournment should be granted unless in turn this would mean serious injustice to the other party (see *Myers v. Myers* [1969] WAR 19).

11 On the information before the WAIRC we are far from convinced that to refuse the adjournment would result in a serious injustice to Mr Laurent. He has not supplied any medical information in support of an adjournment whether for a 2 month period or for any other period. Mr Laurent has readily participated in the appeal process thus far even taking into account that Mr Laurent is representing himself and may be unfamiliar with some processes. We hasten to add that this is not unusual in proceedings before the Commission which is a jurisdiction where parties regularly represent themselves.

12 This appeal is at Mr Laurent's own instigation: he lodged the appeal and he is expected to present his appeal. The Commissioner of Police as the other party to the appeal is entitled to the view that he wishes the proceedings against him to be dealt within a reasonable timeframe.

13 Taking into account all of the above, Mr Laurent has not demonstrated grounds for the granting of an adjournment. His appeal will be listed for hearing after our decision has issued in Mr Laurent's application for an order for the production of documents.

2009 WAIRC 00302

APPEAL AGAINST A DECISION OF THE COMMISSIONER OF POLICE TO TAKE REMOVAL ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GERALD JEAN-NOEL LAURENT
	APPELLANT
	-v-
	COMMISSIONER OF POLICE
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
	SENIOR COMMISSIONER J H SMITH
	COMMISSIONER P E SCOTT
DATE	MONDAY, 25 MAY 2009
FILE NO/S	APPL 135 OF 2008
CITATION NO.	2009 WAIRC 00302

Result Application dismissed

Order

The WAIRC, pursuant to the powers conferred on it under s 33S of the *Police Act, 1892*, hereby orders–

THAT the application for an adjournment of the hearing of the appeal is dismissed.

(Sgd.) A R BEECH,
Chief Commissioner,
[L.S.] On Behalf of the Western Australian Industrial Relations Commission.

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2009 WAIRC 00295

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PATRICIA ERICA BELL
	APPLICANT
	-v-
	STEPHEN LEGGETT
	MOUNT BARKER VALLEY VIEW MOTEL
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	FRIDAY, 22 MAY 2009
FILE NO.	U 160 OF 2008
CITATION NO.	2009 WAIRC 00295

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 29 January 2009 at the conclusion of which the matter was adjourned; and

WHEREAS the applicant advised the Commission on 13 May 2009 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,
Commissioner.

[L.S.]

2009 WAIRC 00289

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SAREL BREET
	APPLICANT
	-v-
	MRX TECHNOLOGIES, A DIVISION OF JRB ENGINEERING PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 19 MAY 2009
FILE NO/S	U 46 OF 2009
CITATION NO.	2009 WAIRC 00289

Result	Application discontinued by leave
Representation	
Applicant	In person
Respondent	Mr S Bibby as agent

Order

WHEARAS the applicant sought and was granted leave to discontinue the application, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued by leave.

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

2009 WAIRC 00262

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KLAUDIA CHAHIN
	APPLICANT
	-v-
	SPOIL YOURSELF - CATHY LEWIS "BUSINESS OWNER"
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	MONDAY, 11 MAY 2009
FILE NO	U 48 OF 2009
CITATION NO.	2009 WAIRC 00262

Result	Application discontinued
Representation	
Applicant	Ms K Chahin
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 22 April 2009 at the conclusion of which the matter was resolved; and

WHEREAS the applicant advised the Commission on 28 April 2009 that she wanted to discontinue the application;

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.

2009 WAIRC 00294

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	OWEN GEORGE
	APPLICANT
	-v-
	FORCE EQUIPMENT SERVICE & HIRE
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	THURSDAY, 21 MAY 2009
FILE NO.	U 68 OF 2009
CITATION NO.	2009 WAIRC 00294

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 12 May 2009 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.

2009 WAIRC 00322

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES JANELL HANSSON

APPLICANT

-v-

EMZMIK PTY LTD

RESPONDENT

CORAM CHIEF COMMISSIONER A R BEECH
DATE WEDNESDAY, 27 MAY 2009
FILE NO/S U 51 OF 2009
CITATION NO. 2009 WAIRC 00322

Result Application dismissed

Representation

Applicant No appearance

Respondent Mr K Trainer, as agent

Order

WHEREAS there was no appearance by the applicant at the conciliation proceedings held on 15 April 2009 and this matter was set down for hearing in order for the applicant to show cause why her application should not be dismissed for want of prosecution;

AND WHEREAS at the hearing on 27 May 2009 there was no appearance on behalf of or by the applicant;

NOW THEREFORE, I the undersigned, having given reasons for decision extemporaneously and pursuant to the powers conferred on me under section 27(1)(a) of the *Industrial Relations Act 1979*, hereby order -

THAT this application be, and is hereby dismissed for want of prosecution.

(Sgd.) A R BEECH,
[L.S.] Chief Commissioner.

2009 WAIRC 00310

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES ERIN LOUISE HOLMWOOD

APPLICANT

-v-

STATIONERY PLUS OFFICE CHOICE

RESPONDENT

CORAM COMMISSIONER J L HARRISON
WRITTEN SUBMISSIONS TUESDAY, 17 MARCH 2009, THURSDAY 26 MARCH 2009, 8 APRIL 2009
DELIVERED MONDAY, 25 MAY 2009
FILE NO. U 179 OF 2008
CITATION NO. 2009 WAIRC 00310

Catchwords	Industrial Law (WA) - Termination of employment - Claim of harsh, oppressive and unfair dismissal - Whether Commission has Jurisdiction - Principals applied - Commission satisfied respondent is a constitutional corporation - Claim beyond Commission's jursidiction - Application dismissed - *Industrial Relations Act 1979* (WA) s 29(1)(b)(i); *Workplace Relations Act 1996* (Cth) s 4, s 6 and s 16; *Commonwealth of Australia Constitution Act 1900* s 51(xx) and s 109
Result	Dismissed
Representation	
Applicant	Mr G Holmwood (as agent) by way of written submissions
Respondent	Ms C Cudini by way of written submissions

Reasons for Decision

1 On 11 December 2008 Erin Louise Holmwood ("the applicant") lodged an application in the Commission pursuant to s 29(1)(b)(i) of the *Industrial Relations Act 1979* ("the Act") claiming that she had been unfairly dismissed by Stationery Plus Office Choice ("the respondent"). The respondent denies the applicant's claim and maintains that it is a constitutional corporation for the purposes of the *Workplace Relations Act 1996* ("the WR Act") and therefore the applicant's claim is beyond the jurisdiction of the Commission.

Proper name of the respondent

2 The applicant named the respondent in her application as Stationery Plus Office Choice however during conciliation proceedings, held with the consent of the respondent on 22 January 2009, it became clear that the proper name of the respondent was Stationery Plus (WA) Pty Ltd trading as Stationery Plus Office Choice. Additionally, the Business Name Extract attached to the respondent's statutory declaration lodged with respect to the Commission's jurisdiction to deal with this application, confirms that the corporation carrying on the business of Stationery Plus Office Choice is Stationery Plus (WA) Pty Ltd. In the circumstances the applicant requested that the name of the respondent be changed to reflect the true name of the employer. I am satisfied and I find that the proper identity of the applicant's employer was Stationery Plus (WA) Pty Ltd trading as Stationery Plus Office Choice and I am also satisfied that the applicant misdescribed the respondent's name in her application and intended to bring these proceedings against her employer even though she did not accurately describe the respondent's proper name. Pursuant to the Commission's powers under s 27(1)(m) of the Act, which allows the Commission to correct, amend or waive any error, defect or irregularity whether in substance or in form, I will amend the name of the respondent in the Notice of Application to reflect the proper identity of the applicant's employer. I propose to issue an order that Stationery Plus Office Choice be deleted as the named respondent in this application and that it be substituted with Stationery Plus (WA) Pty Ltd trading as Stationery Plus Office Choice (see *Rai v Dogrin Pty Ltd* [2000] 80 WAIG 1375 and *Bridge Shipping Pty Limited v Grand Shipping SA and Anor* [1991] 173 CLR 231).

Submissions

3 Both parties were required to file written submissions with respect to the issue of the Commission's jurisdiction to deal with this application.

Respondent

4 The respondent filed a statutory declaration claiming that it is a constitutional corporation as it is registered as an Australian Proprietary Company and is an employer for the purposes of ss 4 and 6 of the WR Act. Attached to the statutory declaration, which was declared and certified on 17 March 2009, was a business names extract created on 22 December 2008 confirming that Stationery Plus (WA) Pty Ltd trades as Stationery Plus Office Choice. This declaration also confirms that the nature of the business of Stationery Plus Office Choice is to sell stationery and office furniture. The respondent stated that it has been a constitutional corporation since 15 December 1999 and attached a Certificate of Registration of a Company dated 15 December 1999 in support of this claim.

Applicant

5 Even though the applicant filed submissions in relation to the issue of jurisdiction these submissions did not address the issue of whether or not the respondent was a constitutional corporation for the purposes of the WR Act nor did the applicant present any information or evidence in response to the respondent's submissions.

6 Neither party sought to cross-examine the information contained in the other party's submissions.

Findings and conclusions

7 Section 6 of the WR Act defines "employer" as "a constitutional corporation, so far as it employs, or usually employs, an individual". Section 4 of the WR Act defines a "constitutional corporation" as a corporation to which s 51(xx) of the Commonwealth Constitution applies and s 51(xx) of the Commonwealth Constitution defines a corporation among others as "trading or financial corporations formed within the limits of the Commonwealth". If the respondent is a trading corporation, by virtue of ss 4, 6 and 16 of the WR Act the jurisdiction of the Commission to deal with the applicant's claim is excluded by s 16(1) of the WR Act and s 109 of the Commonwealth Constitution (see *Crown Scientific Pty Ltd v Leslie Bruce Clarke* [2007] 87 WAIG 598).

8 Section 16 of the WR Act reads as follows:

"**16 Act excludes some State and Territory laws**

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

(a) a State or Territory industrial law;

(b) a law that applies to employment generally and deals with leave other than long service leave;

(c) a law providing for a court or tribunal constituted by a law of the State or Territory to make an order in relation to equal remuneration for work of equal value (as defined in section 623);

(d) a law providing for the variation or setting aside of rights and obligations arising under a contract of employment, or another arrangement for employment, that a court or tribunal finds is unfair;

(e) a law that entitles a representative of a trade union to enter premises.

Note: Subsection 4(1) defines ***applies to employment generally***.

State and Territory laws that are not excluded

(2) However, subsection (1) does not apply to a law of a State or Territory so far as:

(a) the law deals with the prevention of discrimination, the promotion of EEO or both, and is neither a State or Territory industrial law nor contained in such a law; or

(b) the law is prescribed by the regulations as a law to which subsection (1) does not apply; or

(c) the law deals with any of the matters (the ***non-excluded matters***) described in subsection (3).

(3) The non-excluded matters are as follows:

(a) superannuation;

(b) workers compensation;

(c) occupational health and safety (including entry of a representative of a trade union to premises for a purpose connected with occupational health and safety);

(d) matters relating to outworkers (including entry of a representative of a trade union to premises for a purpose connected with outworkers);

(e) child labour;

(f) long service leave;

(g) the observance of a public holiday, except the rate of payment of an employee for the public holiday;

(h) the method of payment of wages or salaries;

(i) the frequency of payment of wages or salaries;

(j) deductions from wages or salaries;

(k) industrial action (within the ordinary meaning of the expression) affecting essential services;

(l) attendance for service on a jury;

(m) regulation of any of the following:

(i) associations of employees;

(ii) associations of employers;

(iii) members of associations of employees or of associations of employers.

Note: Part 15 (Right of entry) sets prerequisites for a trade union representative to enter certain premises under a right given by a prescribed law of a State or Territory. The prerequisites apply even though the law deals with such entry for a purpose connected with occupational health and safety and paragraph (2)(c) says this Act is not to apply to the exclusion of a law dealing with that.

This Act excludes prescribed State and Territory laws

(4) This Act is intended to apply to the exclusion of a law of a State or Territory that is prescribed by the regulations for the purposes of this subsection.

(5) To avoid doubt, subsection (4) has effect even if the law is covered by subsection (2) (so that subsection (1) does not apply to the law). This subsection does not limit subsection (4).

Definition

(6) In this section:

this Act includes the Registration and Accountability of Organisations Schedule and regulations made under it."

9 Whether a corporation is a trading corporation is ultimately a question of fact and degree (see *R v Judges of the Federal Court of Australia and Another*; *ex parte The Western Australian National Football League (Inc) and Another* (1979) 143 CLR 190 per Mason J at 234 applied by the Full Bench in *Crown Scientific Pty Ltd v Leslie Bruce Clarke* [op cit] and *Aboriginal Legal Service of Western Australia Incorporated v Mark James Lawrence* (2007) 87 WAIG 856 at 878, 884 and 893).

10 The authorities confirm that the issue to be determined when deciding if the respondent is a trading corporation is the character of the activities carried out by the respondent at the relevant time and whether or not the respondent engaged in significant and substantial trading activities of a commercial nature at this time such that it can be described as a trading corporation.

11 I am satisfied from the evidence tendered by the respondent, and I find, that the respondent is an incorporated entity which operates as a commercial enterprise selling stationery and office furniture and I accept that these trading activities form a substantial or significant part of its activities. In the circumstances I find that the respondent is a corporation which trades and as the respondent's main activities are trading activities this makes it a constitutional corporation for the purposes of the WR Act.

12 It was not in dispute and I find that the applicant was employed by the respondent as a sales assistant and she commenced employment with the respondent on 9 March 2008 and was terminated by the respondent on 21 November 2008. I am therefore satisfied from the information contained in the application that the respondent was the applicant's employer at the time the applicant was terminated and it was an employer at all relevant times for the purposes of the WR Act.

13 Given the combined effect of Division 4 of Part 12 of the WR Act which deals with termination of employment, and s 16(1) of the WR Act, and as the WR Act covers the field in relation to claims of unfair dismissal of employees employed by a constitutional corporation after 27 March 2006 I therefore find that the applicant's claim is beyond the jurisdiction of the Commission and will be dismissed.

14 An order will now issue dismissing this application.

2009 WAIRC 00311

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ERIN LOUISE HOLMWOOD
	APPLICANT
	-v-
	STATIONERY PLUS (WA) PTY LTD TRADING AS STATIONERY PLUS OFFICE CHOICE
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	MONDAY, 25 MAY 2009
FILE NO/S	U 179 OF 2008
CITATION NO.	2009 WAIRC 00311

Result	Dismissed
Representation	
Applicant	Mr G Holmwood (as agent) by way of written submission
Respondent	Ms C Cudini by way of written submissions

Order

HAVING HEARD Mr G Holmwood as agent on behalf of the applicant and Ms C Cudini on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders –

1. THAT the name of the respondent be deleted and that Stationery Plus (WA) Pty Ltd trading as Stationery Plus Office Choice be substituted in lieu thereof.

2. THAT the application otherwise be and is hereby dismissed.

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

2009 WAIRC 00239

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JAIMIE F ILES
	APPLICANT
	-v-
	MR GREG DOYLE
	RESPONDENT
CORAM	COMMISSIONER S WOOD
HEARD	WEDNESDAY, 18 MARCH 2009
DELIVERED	FRIDAY, 1 MAY 2009
FILE NO.	B 154 OF 2008
CITATION NO.	2009 WAIRC 00239

CatchWords	Denied contractual benefits - Overtime - Notice - Leave Loading - Annual leave - Compensation - Industrial Relations Act 1979 ss26, 29(1)(b)(ii)
Result	Claim awarded partially
Representation	
Applicant	Mr J F Iles
Respondent	Mr G Doyle

Reasons for Decision

1 The applicant, Mr Jaimie Iles, made a claim pursuant to s.29(1)(b)(ii) of the Industrial Relations Act 1979 ("the Act") as follows:

> "2 weeks pay in lieu of dismissal (Instant)
>
> 4 weeks holiday pay, all overtime pay for 7 day week's work during seeding, harvest and grain carting, also fertilizer carting.

$	
1600	2 weeks in lieu
3,200	4 weeks holiday pay
2,400 approx	7 day weeks during seeding + harvest
1600	extra time truck driving"

2 On 16 February 2009, attached to an application to adjourn the hearing, Mr Iles included a sheet of calculations as follows:

> "This is the itinery calculations of the overtime I have worked.

Two months transporting grain 2007 128 hours overtime	= $2664.98
Two months seeding 2007	= $4996.14
Two and a half months harvest 2007-2008	= $6245.17
2007-2008 Grain carting and fertilizer	= $2664.98
2008-2009 one and a half months seeding (bigger bar)	= $3747.10
Compensation for work related injuries and sickness	= $5000.00
4 weeks holiday pay	= $3200.00 + leave loading
2 weeks in lieu of unfair dismissal	= $1700.00
The total amount of unpaid overtime is	= $20,318.37
Compensation, holiday pay and unfair dismissal	= $9900.00 + leave loading
TOTAL AMOUNT OUTSTANDING calculated on 4 weeks holiday of $3200.00	= $30,218.37 before leave loading

> No tax on compensation"

This at hearing was said to be his amended claim.

3 The respondent in his Notice of Answer and Counter-proposal stated as follows:

> "Jamie was employed with us for a total of 83 weeks commencing on the 29th January 2007. In that time he took 43.5 days off work, (Just under 9 weeks).

Jamie's wage for that period, including an increase from the 10th March 2008, should have been $67850. He was paid $73500, this equates to about 6 weeks overtime.

In addition to the above Jamie was gifted many items from the farm to the value of approximately $3500 - 4000. These items being utes, a two way radio, gas conversion kit, metal and fuel.

With regard to Jamie's accusation of instant dismissal it was his decision to leave immediately. The circumstances surrounding this is that he had tendered his resignation six weeks prior, but after taking a couple of days off, he reconsidered his actions and said he would stay until the end of the year. I was concerned that Jamie would not be able to work the required long hours that were looming at harvest. I was also worried that Jamie could already be looking for employment and leave anytime. (This has happened to me in the past, leading up to a busy time where an employee has left us in an awkward position). I told Jamie I was bringing his dismissal forward, but I did not say it was immediate as I know the rules of notice. The conversation regarding him leaving got a little heated and he said he was going home to pack straight away. I said that it was up to him and that this was OK by me. So I believe I have no obligation to this matter.

I see Jamie has included a letter of reference I wrote. He requested this for a house he was buying so asked if I could word it to help him obtain finance as he has had trouble with such matters in the past. This copy is an edited version of my first attempt as Jamie asked me to change it as he didn't think some of the contents would help his cause. I reluctantly obliged.

In closing I am disappointed that Jamie has followed this path. I believe we have been generous both financially and in complying with Jamie's leave requests, especially as I have had to employ casuals at times to take his place at busy times."

4 At hearing Mr Iles was asked to explain the actual monies which he claims and he responded, "What I am actually seeking is two weeks' unfair dismissal, four weeks' holiday pay, my overtime accumulated over my employment period with Greg Doyle, and compensation for electrocution and being hospitalised with pneumonia".(T4). He went on to say that he thought he was making an application for unfair dismissal as well as a claim for denied contractual benefits. However, he clarified that the amount referred to as being "in lieu of unfair dismissal" was in fact for an unpaid notice payment.

5 The applicant's claim of $5,000 is for compensation related to illnesses he suffered at work. He says that he was treated by a doctor for an electric shock and then suffered pneumonia and was hospitalised. He says that he was diagnosed with a heart murmur two weeks after he was released from hospital.

6 In relation to the claim for overtime Mr Iles presented a photocopy of a calendar month. He says:

"I have a printout of a calendar month here. Unfortunately, it's the only one I have. The 2007 was destroyed, unfortunately, before I was aware this was an issue. It is one month's work. It is the lowest month of earnings and hours worked. In one month I had accumulated 288 hours with a total … well, this is how I had my figures. A total paid for was 160 hours for the … for the month and unpaid was 128 hours, which came to $2498.07. The way we come to that figure was based on the 40-hour working week, we'd gone … broken that down to find out the hourly rate and then moved that across to work out the unpaid hours. I am aware that even underneath … under a salary, if I am working a 40-hour five-day week, I am still entitled to be paid for my extra hours and I have a copy of the calendar month there if you wish to see it."

and

"it is a printout off the computer because the original calendar that I do have at home also has the wife's work hours from her job on it and it was very hard to understand. That's why it's been printed onto this."

and

"Well, basically what I do is just transferred the hours across from the … the calendar that was on the wall and reprinted it so it was much clearer and easier to understand."

and

"In the evening when I returned home, I would book down my hours, the … my start times were always the same, but finish times varied. During seeding and harvest, I actually worked the night shifts and Greg's daughter Tess would do day shifts." (T7)

7 He says that he has no other records. At the start of his employment Mr Doyle advised him that he would be paid $1600 gross per fortnight for a 40 hour, 5 day week. A farm vehicle and accommodation was included. There would be healthy cash bonuses for the peak periods during grain carting, harvest and seeding to cover the extra hours worked. Mr Iles says that he never saw any cash bonuses. He had four weeks annual leave a year but could not take leave during peak periods. He says that he thinks his employment was covered by an award. He never raised the issue of a cash bonus with Mr Doyle.

8 Mr Iles was asked about his claim for "Two months transporting grain, 2007, 128 hours' overtime". He replied:

"No, that is something else. I don't actually understand what we've done to these figures. They're not actually … the figures are correct, but they are not lining up with where they should be. The 2000 months … the two months transporting grain, 2007, was one of the first things I did for Greg when I started employment … was … I didn't … I wasn't there for the harvest, but I spent three to four days a week transporting grain to Perth and then backloading with fertiliser, which an average day was between 10 to 14-hour days." (T12)

9 He was asked to further explain his overtime claim and he stated:

"All right. Okay. Well, after the grain transporting, when we went seeding is two months for 2007. It's because we had a small machine at the time. It was only approximately 45 foot wide. It took a lot longer to cover the ground. And that's

why it is 4900. It's … it's based over the two-month period. Two-and-a-half months of harvest for 2007 and 2008. That was my first year and I probably was not very fast on the machine. Then, again, for 2007, and 2007 I carted the grain and backloaded with fertiliser from Perth to Corrigin. 2008 and 2009 season, it's only one-and-a-half month seeding, is because Greg bought a brand new air seeder … an air seeder bar and it was 65-foot wide, so we covered the ground quite quickly and that's … is there anything else you'd like to know?" (T13)

10 Mr Iles says that when he was dismissed he had to relocate from his house. He was paid his standard wage for the fortnight and was not paid any notice. His pay was in his bank account on Fridays every fortnight. He says that his claim for four weeks annual leave is for the second financial year of his employment and that for the whole time he worked for the respondent he took only five days annual leave to go fishing. He then says that he took a few days off to recover from dental surgery, two days off to see his nanna in hospital, a day off for her funeral and a week off to help his wife after her heart surgery. He says that he was paid when he took time off for illness.

11 Mr Doyle gave evidence that he runs his farming business in partnership with his father and wife. He says the transporting, seeding and harvesting in each of the years claimed by Mr Iles did not take nearly as much time as claimed by Mr Iles. He was concerned that Mr Iles could not operate under pressure and might choose to leave during harvest. This had happened to him with previous employees. He says therefore that he brought Mr Iles' termination date forward. Mr Iles chose to leave straightaway as he was ill at the time and could not work. He denies that he demanded that Mr Iles get out of the house quickly. He says he asked Mr Iles how long he would take to depart and Mr Iles said two weeks. Mr Doyle said that would be fine.

12 Mr Iles in his application ticked the box to indicate that his employment was not covered by an award. At hearing he says he thought his employment was covered by an award. Mr Doyle at hearing says that the employment is covered by the award for farm workers. The Farm Employees' Award 1985, Clause 3 - Area and Scope states (in part):

"3. - AREA AND SCOPE

This award shall apply throughout the State of Western Australia to employees employed:-

(a) On farms in connection with the sowing, raising, harvesting and/or treatment of grain, fodder or other farm produce.

(b) On farms or properties in connection with the breeding, rearing or grazing of horses, cattle, sheep, pigs or deer; or"

13 Clearly, Mr Iles' work and the nature of Mr Doyle's business brings this employment relationship under the Farm Employees' Award. Hence claims for benefits due under an award are claims which should be made before the Industrial Magistrate.

14 Notwithstanding that the employment is covered by an Award of this Commission, I would find as follows. Mr Iles' amended claim for overtime simply cannot be sustained. He gave little evidence upon which such a claim could be founded. He tendered only a calendar page to indicate his typical, or he says his least amount of overtime worked in a month. He could not explain his calculations and when questioned the limited calculations made appeared to be duplicated and were not credible. I would reject this claim in its entirety.

15 The *Minimum Conditions of Employment Act 1993* (MCE) states:

"Division 3 — Annual leave

23. Paid annual leave, entitlement to

(1) An employee, other than a casual employee, is entitled for each year of service, to paid annual leave for the number of hours the employee is required ordinarily to work in a 4 week period during that year, up to 152 hours.

(2) An entitlement under subsection (1) accrues *pro rata* on a weekly basis."

16 Mr Iles and Mr Doyle agree that Mr Iles is entitled to 4 weeks leave each year under his contract of employment as agreed at the commencement of his employment. Clearly the MCE Act provides for this. Mr Doyle conceded also that he had not paid leave loading for the whole of Mr Iles' employment and should have done so. I take this concession then to mean that leave loading formed a part of Mr Iles' contract of employment. Mr Iles in his application states that his employment was from 10 February 2007 to 25 August 2008. Mr Doyle in his Notice of Answer and Counterproposal stated that the employment commenced on 29 January 2007 and lasted for 83 weeks. I calculate the period of service to be 82 weeks, using the respondent's start date. If I calculate this period of leave in accordance with s.23(2) of the MCE Act, I derive a figure of 6.32 weeks annual leave (ie 1.58 years by 4 weeks being the annual rate of leave). The weekly salary was $800 gross. Therefore a 17.5% loading applied to this figure over 6.32 weeks gives a total of $884.80 gross. This is the amount of leave loading which should be paid.

17 The calculation of annual leave owed, if any, depends on the conflicting evidence as to the actual leave taken by Mr Iles during his entire period of employment. As stated above he would have accrued a total of 6.32 weeks of annual leave from his employment. The issue is then how much annual leave he took whilst employed. The evidence from both parties on this issue was unsatisfactory as it relied on their memories rather than any records and mixed up absences taken for what ever reason. There was also a contest as to whether days taken over the Christmas/New Year counted towards annual leave. Mr Doyle tendered Exhibit R2 which he complied from his memory, although some of the dates were backed up from shearing records as Mr Doyle employed people to take Mr Iles' place. It states:

"4 days Fishing

7 days Dentist

8-9 days	Grandmother
2 days	End seeding 07
3 days	Shearing 07
4 days	After harvest
5 days	Erica
8 days	Shearing 08
3-4 ½ days	House and finance"

18 Mr Doyle says Mr Iles took 4 days annual leave to go fishing. He says that the five days taken by Mr Iles to look after his wife was annual leave because Mr Iles had taken enough sick leave. The 8 days/shearing 08 was counted as sick leave. The 3 to 4 half days for house and finance was annual leave. The four days after harvest was annual leave. The 3 days/shearing 07 was sick leave. The 8 to 9 days/grandmother was bereavement leave. The 7 days/Dentist is half and half sick and annual leave. The 2 days/seeding is annual leave. So according to Mr Doyle's calculations, from his memory and evidence, Mr Iles took (at maximum) 20.5 days annual leave during his employment. However, the week Mr Iles took off to look after his sick wife should be treated as sick leave. The MCE Act states:

"Division 2 — Leave for illness or injury or family care

19. Entitlement to paid leave for illness, injury or family care

(1) An employee, other than a casual employee, is entitled for each year of service to paid leave under this subsection for the number of hours the employee is required ordinarily to work in a 2 week period during that year, up to 76 hours.

(2) An entitlement under subsection (1) accrues *pro rata* on a weekly basis.

(3) Entitlements under subsection (1) are cumulative.

(4) Entitlements under subsection (1) can only be used under sections 20 and 20A.

(5) In subsection (1) —

year does not include any period of unpaid leave.

20. Employee may use entitlement as paid sick leave

(1) Subject to subsection (2), an employee who is unable to work as a result of the employee's illness or injury, is entitled to use any part of the employee's entitlement under section 19(1) as paid leave for periods of absence from work resulting from the illness or injury.

(2) If an employee's illness or injury is attributable to —

(a) the employee's serious and wilful misconduct; or

(b) the employee's gross and wilful neglect,

in the course of the employee's employment, the employee is not entitled to be paid for any period of absence from work resulting from the illness or injury.

20A. Employee may use entitlement as paid carer's leave

(1) Subject to subsection (3), an employee is entitled to use any part of the employee's entitlement under section 19(1) as paid carer's leave.

(2) Subsection (3) applies to an employee if, at a particular time (***the time***), the employee —

(a) is employed by an employer; and

(b) for a continuous period of 12 months immediately before the time, has been in continuous service with the employer.

(3) The employee is not entitled to take paid carer's leave at the time if, during the period of 12 months ending at the time, the employee has already taken a total amount of paid carer's leave that is as much as the entitlement accrued by the employee under section 19(1) during that period.

19 On Mr Doyle's calculations alone then Mr Iles would be due another 14.82 days annual leave (i.e. 30.32 – 15.5 days). This equates to 2.482 weeks by $800 per week, equals $1,985.60.

20 Mr Iles would have the Commission believe that during the whole of his employment he took only 5 days annual leave to go fishing. Whilst both witnesses had resort to their memories to detail the leave taken, Mr Doyle had attempted to specify this prior to hearing and to resort, in part, to some records. I find his explanation more credible and I would accept his evidence.

21 Mr Iles is entitled to the payment of two weeks notice in accordance with s.661(2) of the Workplace Relations Act 1996. That is an amount of $1600 gross. It is clear from Mr Doyle's evidence that he brought the employment to an end. He was concerned that Mr Iles would leave during harvest and so in his words brought forward Mr Iles' departure. Mr Iles could not work at the time and was, on his evidence, covered by a doctor's certificate. Mr Doyle does not deny that Mr Iles could not work at the time. He therefore should have been paid his period of notice in lieu, i.e. $1,600 gross.

22 Mr Iles has claimed compensation in general terms for injuries he says he received at work. This is not within the jurisdiction of this Commission and would instead relate to a claim for either leave for illness or worker's compensation. Mr Iles says that he was paid for all time which he had off, be it on holiday, on sickness or for some other reason. It would seem that the claim could only be for worker's compensation and hence is not a matter for this Commission.

23 In summary then Mr Iles is due $884.80 gross for leave loading, $1,985.60 gross for annual leave and $1600 gross for notice; a total of $4,470.40 gross. His claims for general compensation and overtime are either beyond jurisdiction or not made out and are rejected. I would therefore order that the respondent pay Mr Iles, by way of denied contractual benefits, the sum of $4,470.40 gross, less any taxation payable to the Commissioner of Taxation, within 7 days of the date of this order.

2009 WAIRC 00261

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JAIMIE F ILES
	APPLICANT
	-v-
	MR GREG DOYLE
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	MONDAY, 11 MAY 2009
FILE NO	B 154 OF 2008
CITATION NO.	2009 WAIRC 00261

Result	Claim awarded partially
Representation	
Applicant	Mr J F Iles
Respondent	Mr G Doyle

Order

HAVING heard Mr J F Iles on his own behalf and Mr G Doyle 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 as and by way of denied contractual entitlement the amount of $4,470.40 gross to Jaimie Iles, less any taxation that may be payable to the Commissioner of Taxation, within 7 days of the date of this order.

(Sgd.) S WOOD,
[L.S.] Commissioner.

2009 WAIRC 00238

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GLEN KELLY
	APPLICANT
	-v-
	PUBLIC TRANSPORT AUTHORITY
	TRANSPERTH TRAIN OPERATIONS
	RESPONDENT
CORAM	SENIOR COMMISSIONER J H SMITH
HEARD	TUESDAY, 10 MARCH 2009
DELIVERED	FRIDAY, 1 MAY 2009
FILE NO.	U 180 OF 2008
CITATION NO.	2009 WAIRC 00238

CatchWords	Termination of employment - Harsh, oppressive and unfair dismissal - misconduct admitted - whether circumstances of misconduct justified dismissal - standard of conduct expected of Transit Officers considered - applicant harshly and unfairly dismissed - turns on own facts - *Industrial Relations Act 1979* (WA) s 29(1)(b)(i); *Public Transport Authority Railway Employees Enterprise Agreement 2006* clause 2.11.3.
Result	Applicant harshly and unfairly dismissed.
Representation	
Applicant	Mr A Dzieciol of counsel
Respondent	Mr D Matthews of counsel

Reasons for Decision

1 Glen Kelly (the applicant) filed an application in the Western Australian Industrial Relations Commission (the Commission) on 11 December 2008 under s 29(1)(b)(i) of the *Industrial Relations Act 1979* (the IR Act) claiming that on 17 November 2008 he was harshly, oppressively or unfairly dismissed by the Public Transport Authority (the respondent).

2 The applicant was employed by the respondent as a Transit Guard/Officer from 19 September 2002 until he was summarily dismissed by the respondent on 17 November 2008 following findings being made by the respondent that he (the applicant) had committed two breaches of discipline which amounted to misconduct on his behalf. The charges found to be proven by the respondent were as follows:

1. While in uniform and on duty on Public Transport Authority property the applicant conducted himself in an unprofessional and undignified manner during his use of a taser or similar device in the presence of his peers. (Transit Officer Operations Manual Section 6(15)(a) refers).
2. While in uniform and on duty on Public Transport Authority property he was in possession of a taser or similar device. The respondent found that this was a breach of Section 10. PTA Offences, Regulations and By-laws, which states that it is an offence to be in possession of things prohibited (firearm) and also, Section 8 – Employee Policies and Procedures (6) provides that, all PTA employees are subject to the provisions of the Public Transport Authority Act 2003 (includes the Public Transport Authority Regulations 2003) and any statutory applicable legislation.

3 In the applicant's application he states that he accepts that his conduct on the day in question fell below the standard required of a Transit Officer but says the penalty of dismissal is excessive and in all the circumstances harsh, oppressive and unfair. The grounds on which the applicant contends this to be so are as follows:

1. The device in question was not a *"taser"* within the usual meaning of that word. To the best (sic) my information, knowledge and belief, the device was not capable of discharging an electric shock that was able to injure or disable a person.
2. The PTA charge me with being *"…in possession of things prohibited (firearm)."* However, the item that I had in my possession was not a *"firearm"* as defined in section 4 of the *Firearms Act 1973.*
3. I did not bring the device into work or onto the PTA's premises.
4. I only used the device on myself, and only after being encouraged to do so by and urged on to do so by several Transit Officers.
5. No injury occurred to any of the persons present, and in all of the circumstances, it was extremely unlikely that any injury could have occurred to any person present.
6. This was a case of *"skylarking"* by a group (sic) Transit Officers, including myself, late in the evening at a time when there were no members of the public on the station.
7. By reason of the provisions of the Clause 2.11.3(f) of the *Public Transport Authority Railway Employees Enterprise Agreement 2006*, (*"the Enterprise Agreement"*) the Authority had no grounds on which to lay a *"charge"* against me in relation to the events in question, as a period of more than 30 days had passed since the occurrence of the events. In this regard, I was notified of the *"charge"* on 10 June 2008, nearly 7 months after the events occurred.
8. As at the date of my dismissal (17 November 2008) a period of well in excess of three (3) calendar months had passed from the time of the occurrence first came within the knowledge of the Authority. Accordingly, at that time the *"charge"* against me had lapsed by reason of the provisions of Clause 2.11.3(g) of the Enterprise Agreement. In this regard, it is clear that the Authority was aware of the events in question on 10 June 2008. The Authority then had a period of 3 months, to 9 September 2008, to make a final decision in relation to any charge against me that may have arisen from that occurrence. After that date, any such charge automatically lapsed by reason of clause 2.11.3(g) of the Enterprise Agreement.
9. Therefore, to the extent that I have been dismissed by the Authority on the basis of the charges referred to in paragraph 2 above, then such dismissal is not valid as it is in breach of Clause 2.11.3 the Enterprise Agreement as the charge(s) against me had lapsed for the reasons set out in paragraph 8 above.

10. I have been employed as a Transit Guard/Transit Officer for a period of (sic) excess of 6 years and I consider that I have an excellent record in that employment. Namely, this is the first occasion that I have been *"charged"* with a disciplinary *"offence"* in my 6 years of service with the Public Transport Authority.

4 At the hearing of this matter counsel for both parties informed the Commission that it is not in dispute that the applicant committed an act of misconduct on 29 November 2007 by twice applying to himself a device which emitted an electric spark. It is agreed by the parties that the Commission need not concern itself as to whether the device used by the applicant on the day in question was a firearm. The Commission was also informed that the applicant does not raise the issue whether the dismissal was invalid on the grounds that the procedure and time set for compliance of steps to be taken in the disciplinary process set out in clause 2.11.3 of the Public Transport Authority Railway Employees Enterprise Agreement 2006 (the Enterprise Agreement) had been complied with, but non-compliance is a matter going to the overall fairness of the decision to dismiss.

5 In light of the concessions made on behalf of the applicant and the respondent, the issue for determination in these proceedings is whether the circumstances of the misconduct complained of on 29 November 2007 and the circumstances of mitigation warranted the penalty of dismissal or some other penalty provided for in clause 2.11.2 of the Enterprise Agreement.

The Enterprise Agreement

6 The relevant provisions of the Enterprise Agreement are as follows. Clause 2.11.2 provides:

Discipline

(a) The Employer shall have the ability to reprimand, fine, transfer, suspend without pay from duty, reduce in grade, retire or dismiss any employee. Provided always that there is prior written notice to an employee of such intended action, stating the reason for the action being taken.

(b) Notwithstanding any other provision in this Agreement, disciplinary action taken by the employer will be consistent with PTA disciplinary policies and guidelines and the relevant public sector regulations, legislation and codes which are applicable to this agency, including procedures relevant to internal investigations where the issue is deemed to warrant such a process.

Clause 2.11.3 of the Enterprise Agreement provides:

Charges Against Employees

(a) The employer shall notify the employee of the disciplinary charge and shall state the reasons for this, and request the employee provide a written explanation in relation to the matter.

(b) An employee shall provide if called upon, with the least possible delay, any report or statement, which may be required by the employer.

(c) When an employee against whom a charge is pending has made a statement to the employer and that statement has been taken down in writing, the employee shall be provided with a copy of the statement.

(d) If in the opinion of the employer, the action of any employee could lead to a charge of discipline, the following process shall be commenced within seven days of the employer's first knowledge of the actions occurrence.

(e) The employee shall be notified, at the time the employer commences the disciplinary process, that the disciplinary process has been commenced against him or her.

(f) When a charge has been made against an employee the employee shall be supplied with a copy of the charge and any reports upon which it is based. No charge shall in any case be laid after the expiration of 30 days from the date of the occurrence.

(g) If a final decision in any case in which a charge has been made against a employee is not given within three (3) calendar months of the occurrence first coming to the knowledge of the employer or within fourteen (14) days of the final determination of any charge relating to the occurrence brought against the employee by a party other than the employer (whichever is the later) the charge in question shall lapse.

(h) An employee who is suspended from duty for any reason shall not be kept under suspension in excess of six (6) rostered days following the date on which the employee was suspended. Except in cases where dismissal follows suspension. An employee shall be back-paid for any time under suspension in excess of six days, provided the employee has not delayed the submission of the employee's explanation of the offence for which the employee was suspended.

(i) Where an employee exercises the right to challenge the employer's decision by invoking the Dispute Resolution Procedure clause of this Award, no deduction shall be made from the employee's wages in respect of any fine until a final decision has been made.

(j) Where an employee has been fined an amount exceeding one day's pay, the amount to be deducted from any fortnight's pay shall not be greater than one day's pay, except with the consent of the employee concerned.

(k) Where, owing to absence from duty of an employee through sickness or other authorised absence, it is not possible to notify the employee within the period prescribed that the employee has been reported, the provision shall be regarded as having been complied with if the employee is so notified within seven (7) days of resuming duty following such absence. In such cases, the period in which the final decision may be made shall be extended by the period of the absence.

(l) Where the employer is unable to contact the employee as the employee's whereabouts are unknown and the employee's absence has not been approved beforehand, the circumstances may be construed as abandonment of employment, in which case the employee's contract of employment may be terminated with one week's notice sent by registered post to the employee's last known address.

Background

7 The applicant whilst on duty somewhere between 10.00 pm and 11.00 pm on 29 November 2007 when in company with other Transit Officers twice applied a device to his right thigh which emitted an electrical spark which produced not only a spark but at least a sting which gave the appearance of a strong shock to his leg. A video was taken of this event whilst it occurred by another Transit Officer using a mobile phone owned by the Public Transport Authority. The video was later distributed to other Transit Officers and after some months the video was downloaded by an unknown person onto a disc and sent to the respondent's Manager of Security and Customer Service, Mr Steve Furmedge. On 3 June 2008, Mr Furmedge located two packages in his in-tray. One was addressed to him and the other was addressed to Investigator Trivanovic. Mr Furmedge viewed the video. A running sheet was placed on the investigation file (Exhibit 1). Exhibit 1 records that:

> A review of the footage shows Transit Officers in an unidentified PTA office. The only Transit Officer that can be identified is Transit Officer Glen Kelly who appears to be holding a device, which he later places against his leg and a visible electrical discharge is relayed into his own leg, which he repeats again. Transit Officer Kelly appears to threaten to discharge it on another identified Transit Officer, all of whom are laughing in the process.

8 The respondent initially made a decision to refer the matter to the Police prior to commencing disciplinary action. Police executed a search warrant on the applicant's residence on Saturday, 7 June 2008, but no device was located.

9 On 10 June 2008, John Kitis, the Acting Manager of Security Services, prepared and caused to be served a notice of investigation into alleged breach of discipline - request for written explanation. The notice stated as follows:

> It is alleged that on or before 1 May, 2008, whilst in uniform and on duty on Public Transport Authority (PTA) Property, you had in your possession a taser or similar device as shown in the attached recorded footage, being a device listed as a controlled weapon pursuant to section 7 of the Weapons Act 1999.
>
> It is alleged that on or before 1 May, 2008 you discharged a taser or similar device into your own leg on two occasions while on duty, in uniform and on Public Transport Authority (PTA) Property.
>
> It is alleged that on or before 1 May, 2008, you waved the weapon (taser or similar device) in the direction of one or more unidentified Transit Officers who were also present and who were forced to take evasive action.
>
> In accordance with cl 2.11.3 of the Railway employees (sic) Enterprise Agreement 2006 – Charges Against Workers you are requested to provide a written statement explaining these alleged actions and specifically responding to the following questions:
>
> 1. Who else was involved in this incident?
> 2. Who owned the item that can be viewed on the recorded footage?
> 3. Where is the item in question?
> 4. Any other information that explains the circumstances of the incident.
>
> In accordance with cl 2.11.3 of the Railway employees (sic) Enterprise Agreement 2006 – Charges Against Workers you are advised that a disciplinary process has commenced against you regarding this matter. The allegations have also been referred to the PTA Internal Investigations, The Western Australia Police and the Corruption and Crime Commission. Enquiries have commenced into the facts of this matter.
>
> In accordance with cl 2.11.3 of the Railway employees (sic) Enterprise Agreement 2006 – Charges Against Workers you have until 5pm 17 June 2008 to respond to the undersigned on these matters.
>
> (Exhibit 2)

10 The applicant provided a written explanation on 22 June 2008. His response stated as follows:

> This report is made in reference to a letter dated 10th June 2008, from Acting Manager Security Services, Mr. John Kitis. The letter has requested a written explanation explaining video footage on a compact disc that was attached.
>
> In the letter, it reads, "… had in your possession a taser or similar device as shown in the attached footage, being a device listed as a controlled weapon pursuant to section 7 of the Weapons Act 1999."
>
> This object was NOT a "taser or similar device." I understand that a "taser or similar device" is something that can injure or disable. This object does not have the capacity to injure or disable and has very low voltage.
>
> In the letter, it reads, "… you discharged a taser or similar device into your own leg on two occasions…"
>
> I did not discharge a "taser or similar device" into my leg. The object was held near my right leg and it emitted a small spark. I deliberately pretended that the object caused me discomfort for the camera and was exaggerating the effects to make people laugh.
>
> In the letter, it reads, "… you waved the weapon in the direction of one or more unidentified Transit Officers who were also present and who were forced to take evasive action."
>
> I was joking around and the person who I waved the object in the direction of can be heard on the video footage laughing. Other parties present were also laughing loudly and this is clearly heard in the footage. I never intended to use the object on anyone but myself and video footage clearly substantiates this.

In the letter, it reads, "… and specifically responding to the following questions:

1. Who else was involved in the incident?
2. Who owned the item that can be viewed on the recorded footage?
3. Where is the item in question?
4. Any other information that explains the circumstances of the incident."

In regard to Question 1; I was the only person that handled the item in the video footage.

In regard to Question 2; I do not know who owns the item. The only occasion that I have ever had the item in my possession was for a very brief period of time on the day in question.

In regard to Question 3; I do not know where the item is.

In regard to Question 4; I can not (sic) provide any other information in regards to this incident as it occurred over six (6) months ago, apart than the information set out above.

(Exhibit 3)

11 In a letter dated 1 July 2008, Pat Italiano, the General Manager Transperth Train Operations, wrote to the applicant and informed the applicant that he was disappointed with his response which he (Mr Italiano) considered to be unacceptable from a fully trained and experienced Transit Officer. Mr Italiano also stated in the letter that it was expected that the applicant would have been able to provide comprehensive responses to the questions posed in the memorandum of 22 June 2008 as follows:

1. In regard to Question 1 you might have named the persons who were present in order that they could be asked to corroborate your version of the incident and the type of item you were playing with.
2. In regard to Question 2 you might have stated from where or from whom you obtained the item that you were playing with, which also may assist in corroborating your advice that the item was not a "taser or similar device".
3. In regard to Question 3 you might have stated where or with whom you left the device you were playing with which also may assist in corroborating your advice that the item was not a "taser or similar device.

(Exhibit 4)

12 Mr Italiano, in that letter, also informed the applicant that:

It appears to me that while in uniform and on duty on Public Transport Authority property you were in possession of a taser or similar device as was alleged in the memorandum of 10 June 2008 from the Acting Manager Security Services. Your responses do not provide any clarification to the contrary.

Therefore, you are hereby charged with the following breaches of the requirements of the Transit Officer Operations Manual:

1. While in uniform and on duty on Public Transport Authority property you conducted yourself in an unprofessional and undignified manner during your use of a taser or similar device in the presence of your peers. (Transit Officer Operations Manual Section 6 (15)(a) refers.(sic)
2. While in uniform and on duty on Public Transport Authority property you were in possession of a taser or similar device.

   This was a breach of Section 10. PTA Offences, Regulations and By-laws, which states that it is an offence to be in possession of things prohibited (firearm) and also, Section 8 – Employee Policies and Procedures (6) provides that, all PTA employees are subject to the provisions of the Public Transport Authority Act 2003 (includes the Public Transport Authority Regulations 2003) and any statutory applicable legislation.

An investigation will be conducted into the matter and you will be contacted by a PTA Investigator shortly to provide input into the investigation.

13 Prior to the completion of the investigation the applicant went on an extended holiday overseas in mid August 2008. He was due to return to Western Australia on 19 October 2008. His leave had been planned for some time and had been approved in early 2008. On 3 September 2008, a letter addressed to the applicant was signed by Mr Italiano in relation to the investigation. However, because the applicant was on leave the letter was not sent to the applicant until some time in October 2008. In the letter Mr Italiano informed the applicant that:

The investigation has been completed but your absence on approved leave has prevented our Investigator from providing input into the investigation. I understand that your last rostered shift was 14 August 2008.

The provisions contained in section 2.11.3 (k) (Charges Against Employees) of the Railway Employees Enterprise Agreement 2006 state the following.

> *(k) Where, owing to absence from duty of an employee through sickness or other authorised absence, it is not possible to notify the employee within the period prescribed that the employee has been reported, the provision shall be regarded as having been complied with if the employee is so notified within seven (7) days of resuming duty following such absence. In such cases, the period in which the final decision may be made shall be extended by the period of the absence".*

A final decision will not be made until you are provided the opportunity to participate in a formal interview about the matter. Hence, the conclusion of the investigation will be extended by the time of your absence on leave.

I understand that you are due to return from leave on 19 October 2008.

You are required to attend an interview to advise the outcome of the investigation and to provide your input into the matter. The interview will be recorded on digital audio and visually recorded. A copy of audio disk will be provided to you at the conclusion of the interview. You are required to attend the interview at 10.00 AM on 21 October 2008 at the Public Transport Centre, West Parade Perth 6000. Please attend at the security desk on your arrival and advise the security personnel that you have an appointment with the Investigation Section.

(Exhibit 5)

14 The applicant's return to work was delayed as he was unable to return from overseas until 21 October 2008. He contacted the respondent by email a few days prior to 21 October 2008 and was informed of the contents of this letter. He sought to have the interview delayed. The respondent agreed to his request and the interview was rescheduled for 28 October 2008. The applicant then requested a further deferral of the interview to allow him time to arrange for a legal representative to be present at the interview. This request was refused by the respondent. The applicant later received a letter from Mr Italiano dated 5 November 2008 informing him that the charges had been proven. In that letter Mr Italiano stated:

In relation to the conduct of PTA Transit Officers, The Transit Officer Operations Manual states in part:

'15) ATTITUDE

While on duty, you must act with courtesy, honesty and integrity, and conduct yourself in a professional and dignified manner'.

Your conduct, which was in an area that could be seen by the public, was unprofessional and entirely unacceptable. As a Transit Officer, a very high standard of behaviour is expected of you. By acting in the way you did, you fell far below the required standard.

In accordance with Clause 2.11.2 (a) of the Public Transport Authority Railway Employees Enterprise Agreement 2006, you are advised that the Public Transport Authority intends to impose a penalty of dismissal. In my view, a finding that you had committed either charge justifies a penalty of dismissal.

However, before taking action against you, I will provide you with an opportunity to make a submission to me as to why your employment should not be terminated. If you wish to make such a submission, please do so in writing by the close of business on 12 November 2008.

From today you are not to attend your operational rostered shifts. You are required to report to John Kitis Transit Manager Transit Office Perth at 0830 hours on Thursday 6 November 2008 to undertake alternative duties. I will notify you of my final decision in this matter after the 12 November 2008.

(Exhibit 6)

15 The applicant provided his submission to Mr Italiano on 14 November 2008. In a memorandum to Mr Italiano dated 6 November 2008 the applicant stated:

Second Breach

I will deal firstly with the second breach, namely that I was *"in possession of a taser or similar device"*, which *"was a breach of Section 10 PTA Offences, Regulations and By-laws"*, in that I was in possession of a prohibited thing, namely a firearm.

Section 10 of the Transit Officer Operations Manual 2006 reads, *"Possession of things prohibited (Firearm), Regulation 21(c)."* The item that I had in my possession was not a *"firearm"* as defined under the Firearms Act 1973 Section 4, as it was not capable of discharging a *"shot, bullet, or other missile."* A W.A. Police issued taser would be defined as a firearm as when fired the Taser propels two barbed darts with trailing wires that attach to the skin or clothing. In those circumstances I cannot see how it could be *"proven"* that I was *"in possession of [a] firearm…"*. I accept that if I did in fact handle a firearm on PTA property, then it would have been a very serious matter.

It is my understanding that a taser, or similar device, as defined under Schedule 1 – Prohibited weapons of the Weapons Regulations 1999, Item 8, Electric Shock Weapon is, *"an article made…to discharge an electric current so as to injure or disable a person."* I had never seen this device before and what I saw of the device in question, it did not appear to have the capacity to injure or disable, as it had a very low voltage.

The device in question does not emit an electric current that is capable of disrupting the person's nervous system in such a manner as to render him incapable of normal functioning. Rather, I considered, and still consider, that the device was merely a *"toy"* device, which was not capable of causing harm nor has the ability to disable.

Further, having used the device presented to me by Transit Officer Coppin on myself, I did not consider that it was a *'(sic)taser or similar device*" and therefore, a prohibited or controlled weapon (as stated by me in my initial statement concerning this matter dated, 22nd June 2008).

First Breach

In your Memorandum dated 5th November 2008, you state that *"Section 5.4.1 of the PTA Code of Conduct states in part: 5.4.1. Personal Behaviour 5.4.1.1 Employees should respect the rights of the individual and should treat each other and customers with courtesy, dignity and respect. It is expected that employees will at times act professionally. Teamwork and working collaboratively and cooperatively is a highly valued behaviour at the PTA."*

You then go on to state that:

"Your conduct, which was in an area that could be seen by the public, was unprofessional and entirely unacceptable."

Memorandum

I accept that my conduct, in using the device at work, fell below what would be considered acceptable behaviour for a Transit Officer. However, when all of the circumstances surrounding the incident are taken into consideration, I do not agree that my conduct *"fell **far** below the required standard."* as stated in your Memorandum dated 5th November 2008.

The incident was very much a *"one of"(sic),* and an isolated event that came about as a result of an unusual set of circumstances, where a group of Transit Officers were skylarking, or engaging in *"horseplay"* whilst on duty. All of us, including me, should have been more professional in our conduct on the night in question. I therefore accept that what I did that evening was wrong.

However, I wish to point out that:

1. I did not bring the device onto PTA premises;
2. I was only a reluctant participant, and I did not initiate the skylarking, or *"horseplay"*;
3. I only used the device on myself.
4. No injury occurred to any of the persons present;
5. I believed that there was very little, if any, potential for injury to any of the participants from the device; and
6. It was late evening, and there were no members of the public on the platform at the time.

Therefore, when the events of the evening in question are viewed as a whole, it would appear that, if anything, it was the other Transit Officers present who did not treat me with *"courtesy and respect"* by encouraging me to use the device on myself.

Concluding Comments

I have been a Transit Officer for 6 years and during that time I have always strived to act with courtesy, honesty and integrity, in the performance of my duties.

I started with the Authority in September 2002, as an inaugural Transit Guard. In the 6 years as a Transit Guard/Transit Officer I have always strived to behave in a professional and dignified manner, and I consider that my record as Transit Officer speaks for itself. I enjoy my work as a Transit Officer, and I consider that I have more to contribute in this role.

Having regard for all of the circumstances surrounding the incident in question, the matters set out above, my 6 years of service as a Transit Officer, and my prior exemplary record, the proposed punishment of dismissal far exceeds the seriousness of my conduct on the day in question. Therefore, any dismissal would be harsh, unjust and unfair.

(Exhibit 7)

16 After receipt of the applicant's response the respondent reached a decision that the applicant should be summarily dismissed. On 17 November 2008, the applicant was informed that his services with the respondent would be terminated from the close of business on that day.

The Applicant's Evidence

17 The applicant was employed by the respondent as an inaugural Transit Guard and commenced duty on 19 September 2002. Initially all Transit Guards were based in Perth. Later he was posted to Currambine where he remained until he was dismissed.

18 In relation to the events on the night in question the applicant testified that he commenced his shift at 2.45 pm and finished at 12.45 am the following morning. His partner for the evening was Andrew Arch. During the afternoon he was visited at the Whitfords station by members of the Delta 5 Vehicle Support Crew (Delta 5). Members of Delta 5 drive from station to station in a vehicle to assist Transit Officers in trouble. They also provide transport to the Police lockup and other services. On that afternoon the officers who formed Delta 5 were Troy Casey and Nigel Coppin. Transit Officers Casey and Coppin arrived at the Whitfords station sometime between 4.00 pm and 4.30 pm. The purpose of their visit was to unlock the pepper sprays to be used by the Transit Officers at that station. Delta 5 officers visit each station near the beginning of each shift to unlock the pepper sprays and then return to the station at a time close to the end of the shift to relock them. When Transit Officers Casey and Coppin arrived in the afternoon the applicant was sitting at a computer desk doing some work. While the applicant was seated Transit Officer Coppin came up to the applicant from behind and discharged the device in question reasonably close to the back of his neck. The applicant said that when this occurred he was a "bit startled". He turned around and asked Transit Officer Coppin, "What's that?" Transit Officer Coppin was reluctant to hand the device over and said he had to go and that he would return later and show the applicant the device.

19 The applicant gave evidence that the device in question looked like a small torch or a large pen. It was about 12 to 15 cm in length and 1½ cm in diameter. The applicant says the device emitted a low voltage electric shock and was probably powered by AA batteries. He also said it was not a device that could be listed as a prohibited weapon under Schedule 1 of the *Weapons Regulations 1999*.

20 Sometime after 10.00 pm or perhaps closer to 11.00 pm Transit Officers Casey and Coppin returned to the Whitfords station. The applicant said it would have been closer to 11.00 pm when they returned because shortly after the incident in question Transit Officers Coppin and Casey locked up the pepper sprays. Shortly after their arrival at Whitfords station all the Transit Officers were in the Transit Officers' booth which is on the platform at the Whitfords station. The booth contains glass walls on at least three sides. Transit Officer Coppin produced the device and gave it to Transit Officer Arch who looked at it and

passed the device to the applicant. Whilst looking at the device the applicant was encouraged by the other Transit Officers to use it on himself. Transit Officer Casey said to him (whilst the applicant was holding the device), "Go on. Do it. Do it. Are you going to do yourself?" Transit Officer Arch said, "Go! Go! Go!" Transit Officer Coppin said, "Don't be a chicken shit. He is a chicken shit." The applicant then applied the device to his leg and was then told to do it again which he did.

21 A copy of a video of the incident was tendered in evidence in these proceedings (Exhibit 12). The video shows the applicant sitting on an office chair with the device in his right hand. Whilst encouragement is given to him by other officers yelling words such as, "Go on. Do it. Do it.", the applicant points the device at his leg and then takes it away and then swings with his right hand out of view of the camera. All the officers laugh and continue to do so throughout the incident. The applicant appears to point the device at each officer. Whilst still seated and laughing loudly the applicant points the device at an officer who the applicant says is Transit Officer Arch. Transit Officer Arch tries to kick him away. The applicant then rolls his chair back, looks down at his right leg and then using his right hand uses the device on his right leg. His right leg jumps and he laughs again. Then using his right arm again he uses the device again on his right leg whilst seated. As the device emits the spark his right leg appears to jump. He then jumps up from the chair shaking his leg and yells "Yowee", but then stands normally without any sign of pain and laughs very loudly and continues to laugh very loudly. The video tape ends whilst all officers continue to laugh.

22 The applicant said that he was reluctant to use the device but gave way to "peer pressure" and applied the device to his leg. When cross-examined the applicant conceded he did not know what the effect would be of using the device but he said looking at the spark that it emitted he could see that it would not harm but he did not know that for certain. He testified that he used it on himself because he thought the risk would be minimal as the device was a toy. The applicant waved the device around the other officers. He pretended that he had an intention to use it on Transit Officer Arch and that action is reflected in the video, when Transit Officer Arch puts his boot up in jest as if to kick the applicant away. He says it was clear to him that Transit Officer Arch did not intend to make contact or do any damage to him. The applicant also testified that he pretended that he suffered pain but in fact he suffered no physical pain but only a mild sting. He conceded, however, that someone watching the video could have thought that he was in pain. The applicant also said that the device was not like a true taser which would put someone on the ground if it was used against them.

23 The applicant said he was reluctant to be filmed during this event but because of peer pressure he relented to the camera being used. He said he exaggerated the effect of the device on his leg, especially the second time and he did so for the amusement of the other Transit Officers. After he had used the device the second time he tried to grab the phone out of Transit Officer Coppin's hand so that he could erase the film. However, Transit Officer Coppin refused to give him the phone saying that the video was so funny and he wanted to keep it.

24 The applicant maintained when he was cross-examined that there were no members of the public present on the platform. He said that when Transit Officer Coppin produced the device Transit Officer Casey asked Transit Officer Coppin to put the device away. Transit Officer Coppin then said that there were no members of the public on the platform and there was only one person in the area and that was someone waiting for a bus upstairs in a bus shelter. He conceded, however, that if there had been members of the public present they could have seen into the Transit Officers' booth.

25 When cross-examined the applicant also conceded that during this incident if a member of the public came down the escalator or walked towards the Transit Officers' booth from the stairs or from the left they could have seen the incident unfolding before any of the officers in the booth were aware of it. The applicant, however, said that most people use the escalators and they congregate at the base of the escalators from which the booth cannot be seen.

26 The applicant said it was a spur of the moment event that he engaged in horseplay. He also said that he was given an assurance by Transit Officer Coppin that there were no members of the public around. He also pointed out that the incident occurred in a very short period of time.

27 The applicant agreed when cross-examined that if he saw someone on the platform using such a device he would intervene and stop them.

28 The applicant agrees that his conduct fell below the standard expected of a Transit Officer and that horseplay or skylarking should not be condoned by the respondent. The applicant also agrees that his use of the device could impact negatively on the reputation of the PTA. He testified that in hindsight that he would not do it again but he gave in to peer pressure to use the device. He does not, however, agree that he abused his position because he says that there were no members of the public present when the incident occurred. Also he says that there was only a miniscule risk of harm as the device was a toy and that he was in an environment in the office where other officers were enticing him to use the device. He argues that if someone was using such a device on the platform such conduct would be far more serious as the platform is a dangerous place to be as someone using the device could fall from the platform.

29 The applicant was also asked in cross-examination why, when he was asked to explain the events on the night in question, he did not report Transit Officer Coppin for having possession of the device and name the other Transit Officers who were present. In response, he said he did not do so because he was under pressure not to "dob in" other Transit Officers and he was less than frank in his response to the respondent when he provided his written explanation (Exhibit 3) because of peer pressure from other Transit Officers. He agreed, however, he could have said more about what had happened.

30 After the applicant's employment with the respondent was terminated he applied for more than a hundred jobs in various industries including work as a customer service representative with a bank, diamond offsider and drilling work with mining companies. On 3 March 2009, he secured employment as a parking officer with the City of Joondalup. The applicant seeks to be reinstated to his previous position as a Transit Officer as his current position pays significantly less than the position he held as a Transit Officer.

31 Stuart Philbey is a Transit Supervisor. He was the applicant's supervisor at the time the applicant's employment was terminated. The applicant worked with Mr Philbey or under his supervision for just under six years. Mr Philbey has held the position of Transit Supervisor on the Currambine line for the past two years. Mr Philbey gave evidence that the applicant, in his opinion, always acted in a professional manner, did not cut corners and that he (Mr Philbey) had no major issues with the applicant that he would not have had with any other Transit Officer. He said that the only issue that did arise with the applicant was that he could be a little overzealous and had exercised poor judgment on one occasion with the use of a pepper spray. Mr Philbey, however, said that the applicant was very good with paperwork and assisted and supported junior officers with their paperwork. Mr Philbey was not consulted about the respondent's decision to terminate the applicant's employment.

The Respondent's Evidence

32 The respondent did not call any witnesses who witnessed the events on the night in question but called George Svirac to give evidence about the location of the Transit Officers' booth at Whitfords station. Mr Svirac is the Transit Manager of Security. The respondent also called Mr Brian Appleby who is the Executive Director of People and Organisational Development (POD). Mr Appleby gave evidence about the process of investigation into the charges.

33 Mr Svirac has been the Transit Manager of Security for the past four years. Prior to holding that position he was a Transit Guard Supervisor. As Transit Manager of Security Mr Svirac oversees the entire security operations and makes sure the rail public transport system is safe and secure and that Transit Officers duties are what the public and the respondent expect.

34 Mr Svirac first saw the video footage of the incident when he was shown the video by Mr Furmedge after internal investigators commenced the investigation.

35 Mr Svirac produced to the court a bundle of nine photographs of the Whitfords train station which show where the incident took place. The photographs show the Transit Officers' booth at the Whitfords station and show that the lower part of the booth walls are composed in part of brick and surrounded on top of the brickwork by tinted glass windows. He said that the booths at the train stations are referred to as fish bowls because members of the public can see the interior of the booths.

36 Mr Svirac gave evidence that in his opinion the events depicted in the video were unprofessional and demeaning to other Transit Officers. He explained that the respondent receives a lot of criticism from the public about the actions of Transit Officers and is constantly trying to improve the public image of Transit Officers and what is depicted in the video could cause damage to the public image as the video depicts a "bunch of cowboys". He also explained that Transit Officers are presently seeking through their union to have tasers made available for their use. In his view this incident raises the issue whether the public could have confidence in the ability of Transit Officers to act professionally and use tasers appropriately. Mr Svirac also said that this incident would reflect upon cases in the courts in regard to the use of force a Transit Officer may use.

37 When cross-examined Mr Svirac agreed that the conduct of all of the Transit Officers involved in the incident was unprofessional. When asked whether the other three officers are still working for the PTA Mr Svirac said that two had left and that one still works for the respondent and that is Transit Officer Coppin. When it was put to Mr Svirac that Transit Officer Coppin brought the device into work Mr Svirac said he had heard that but he was unaware whether that had been proved. Mr Svirac also conceded in cross-examination that no member of the public had made a complaint about the incident.

38 Brian Appleby has held the position of Executive Director of POD since February 2008. As part of his role he oversees disciplinary processes. Mr Appleby testified that the disciplinary process in this matter commenced when a disc of the video footage was received by Mr Furmedge. Mr Appleby said that the response by the applicant to the notice sent by Mr Kitis (Exhibit 3) did not provide a lot of information. The focus of the investigation was to locate witnesses to the event and to verify what had occurred. This process was unable to be concluded until after the applicant left to go overseas on 14 August 2008. Attempts were made by investigators to interview Transit Officers Coppin and Arch as witnesses. However, both officers declined to attend an interview. The investigators also sought to interview two other Transit Officers. Both were interviewed after they left the employment of the respondent. One was Transit Officer Casey.

39 Mr Appleby testified that the general practice of the respondent when investigating charges is to speak to all the witnesses first before speaking to the person who is charged and that when the person who has been charged is on leave, they do not interrupt that leave. Mr Appleby expressed the opinion in these proceedings that clause 2.11.3(k) of the Enterprise Agreement enables the respondent to extend the time for concluding an investigation against an employee where a person is on approved leave. Consequently time was extended whilst the applicant was on leave but the respondent wished to conclude the investigation prior to time running out. The respondent did not grant the second extension of time for the interview as the applicant already had two opportunities to attend an interview and the respondent was concerned to conclude the investigation within the timeframes prescribed in clause 2.11.3 of the Enterprise Agreement.

40 Mr Appleby said it was his advice to the Executive Officer of the respondent to dismiss the applicant. In Mr Appleby's view, the conduct of the applicant was unprofessional and justified summary dismissal. Mr Appleby pointed out that the incident occurred in an area visible to the public and that the conduct complained of was the type of behaviour that if engaged in by a member of the public in a train station the respondent would expect a Transit Officer to intervene to stop that behaviour from occurring. Mr Appleby gave evidence that he did have regard to the fact that the applicant had six years of service with an unblemished record but he was of the view that the behaviour depicted in the video was so serious that it alone warranted dismissal. Mr Appleby did not agree that the applicant did not instigate the conduct. He agreed, however, that he was urged on by other officers but Mr Appleby said he took into account the high standards of professional conduct and integrity expected of Transit Officers.

41 Disciplinary action was initiated against Transit Officer Coppin. He was provided with a notice of disciplinary charges in respect of three matters. Firstly, whether he had a taser or similar device in his possession. Secondly, whether he brought that device onto the property of the Public Transport Authority and, thirdly, whether he was involved in the incident in question.

Mr Appleby said that Transit Officer Coppin's response did not elicit much information other than to say that he did not have the taser in his possession. At that point in time the respondent did not have any other evidence in their possession. Transit Officer Coppin was reprimanded and told no further action would be taken. When, however, the investigation revealed further information Transit Officer Coppin was charged with two offences. One of being in possession of a taser and another charge of general misconduct. The union objected to the charges on behalf of Transit Officer Coppin. After receipt of legal advice that the respondent could not proceed with the charges as they had been addressed, responded to and withdrawn, the fresh charges did not proceed. Transit Officer Arch, he was also given notice of a disciplinary charge that he participated in the incident. His response was also not detailed and he was subsequently reprimanded as the respondent did not have sufficient evidence. Whilst Mr Appleby expressed an opinion that he did not regard the conduct of all the Transit Officers involved in the incident to be equally culpable he regarded their conduct as unprofessional. He, however, said that he regarded the conduct of Transit Officer Coppin very seriously and would have recommended that Transit Officer Coppin be dismissed if the disciplinary action had been able to be concluded.

The Applicant's Submissions

42 Counsel for the applicant points out that the respondent bears the evidential onus of proving that the dismissal of the applicant was justified and contends that the respondent has not met that onus.

43 The applicant says that his act of misconduct did not amount to a deliberate flouting of the essential obligations of his contract of employment. The event on 29 November 2007 was simply a one-off incident of four Transit Officers letting off steam that "got a bit out of hand" which was mitigated by the fact that it occurred out of view of the presence of any members of the public. The elements of unfairness of the dismissal are said to be:

(a) The conduct of the applicant cannot be distinguished from the conduct of Transit Officers Coppin, Arch and Casey. Fairness demands that employees who engage in misconduct that cannot be differentiated are not to be treated inconsistently *(Gonzalo Portilla v BHP Billiton Iron Ore Pty Ltd* (2005) 85 WAIG 3441 at [166]). It is clear from the video footage of the event (Exhibit 12) that there were four Transit Officers present and all could be identified. Although the applicant was the most visible on the video, it was a joint enterprise or group exercise. The other three Transit Officers were not innocent bystanders. They actively encouraged the applicant to use the device and to repeat that conduct. It is conceded by the respondent's witnesses that all four officers engaged in misconduct. If a member of the public had seen the event they would not have distinguished the conduct of the applicant from the conduct of the other Transit Officers. All four Transit Officers should have received the same punishment for their misconduct. The appropriate punishment for the incident is a reprimand. Alternatively, if the conduct is regarded as more serious than warranting a reprimand, the penalty should have been suspension without pay from duty for a period of time.

(b) When the relevant questions in *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union, on behalf of Mark Harrison and Keith Donaldson v Australian Co-operative Foods Limited* [2000] NSWIRComm 199 (*Harrison and Donaldson*) are asked for assessing the conduct in question particularly at [63] and [64] the answer to each question is no.

(c) The process leading to the termination of the applicant's employment was unfair in that pursuant to clause 2.11.3 of the Enterprise Agreement the disciplinary charges lapsed on 3 September 2008.

(d) In making a determination whether a dismissal is unfair, all relevant circumstances in relation to unfairness must be considered by the Commission including matters specifically related to the employee's work record and the financial consequences of the dismissal (*BHP Iron Ore Limited v Transport Workers' Union of Australia, Industrial Union of Workers, WA Branch* (1993) 73 WAIG 529). The penalty of dismissal was particularly harsh in light of the circumstances that:

(i) The applicant had provided six years service without prior breaches of discipline. The only complaint about his conduct was that he can be a bit overzealous which was not a serious complaint.

(ii) The applicant has been unable to obtain comparable employment and has suffered a loss of income of approximately $35,000 per annum.

(e) The incident in question occurred on the spur of the moment, it did not re-occur and no members of the public were present.

The Respondent's Submissions

44 The respondent says that the failure to comply with the timelines set out in clause 2.11.3 did not raise any unfairness, as it would have been unfair to the applicant to deal with the charges whilst he was on leave. The purpose of clause 2.11.3 is to achieve a fair and expeditious process of discipline. The respondent concedes that the timelines set out in clause 2.11.3 were not met but says that the objectives of expedition and fairness were met. The history of the investigation shows the investigation was hampered by the applicant as he was not co-operative in providing information about witnesses when he provided a response on 22 June 2008 (Exhibit 2) to the notice that a disciplinary inquiry had commenced. He could have provided a more comprehensive reply. Transit Officers Arch and Coppin refused to answer questions, so the investigation did not run smoothly. Consequently the investigator was not in a position to speak to the applicant until the middle of August 2009 which is six weeks after the investigation commenced. The applicant, however, by that time had gone on leave. The respondent properly achieved a balance between completing the process fairly and doing it quickly.

45 After his return to work from leave the applicant had two weeks to respond to the charges. The respondent cannot be criticised for not addressing this matter with the applicant whilst he was on leave. However, it is conceded that in refusing to adjourn the

date of the second interview the respondent did put expedition over fairness. Notwithstanding this there is no evidence before the Commission that the applicant suffered any prejudice as a result of the delay.

46 The respondent contends that the Commission should not interfere with the decision to dismiss unless the penalty falls clearly outside the range of penalties that could be imposed for the misconduct.

47 The penalty of dismissal was an appropriate penalty to be imposed on the applicant for the following reasons:

(a) The applicant lacks insight into the seriousness of the matter. He was a public law enforcement officer. As a Transit Officer he held a position of power and authority to deprive persons of their liberty, powers to seize and he does not display the maturity and trustworthiness required to perform the duties of the position. The respondent says in particular the applicant by his actions demonstrated recklessness, weakness, immaturity, no understanding of the authority held as a Transit Officer and no real understanding of his position in the community. He thinks that one set of rules should apply to him and another to members of the public. The applicant gave in to peer pressure not only when he used the device but when he provided his response to Mr Kitis in writing on 22 June 2008. The duties of a Transit Officer require a person who occupies such a position to act maturely in relation to events that occur on the spur of the moment and under pressure. The applicant did not do so and shows himself to be a person who cannot resist peer pressure.

(b) The conduct in question was not just horseplay. The applicant did not know if the device could have caused him harm. The applicant was in uniform and could have been viewed by a member or members of the public. The device presented to any observer as a weapon capable of causing harm. In addition he was engaging in conduct that he would stop if a member of the public was engaging in such conduct.

(c) The conduct of the applicant could have harmed the reputation of the Public Transport Authority.

(d) The actions of the applicant were different to the actions of Transit Officers Coppin, Arch and Casey. The applicant was the only officer who used the device and he allowed himself to be filmed.

48 The respondent says that in the event that the Commission is of the opinion that the dismissal of the applicant was unfair, the Commission should conclude that the applicant should have been transferred to a position such as a car park attendant or something similar. The applicant should not be reinstated to the position of Transit Officer because he cannot be trusted to perform the duties of that position.

Conclusion

49 The question to be determined by the Commission is whether the legal right of the respondent to dismiss the applicant has been exercised harshly or oppressively against the employee, so as to amount to an abuse of that right (*Ronald David Miles, Norma Shirley Miles and Lee Gavin Miles and Rose & Crown Hiring Service trading as The Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385 at 386).

50 The applicant was summarily dismissed by the respondent. As counsel for the respondent points out, where an employee is summarily dismissed, the onus is on the employee to demonstrate that the dismissal was unfair on the balance of probabilities. However, there is an evidential onus upon the employer to prove that summary dismissal is justified. The lawfulness or otherwise of the dismissal is but a relevant factor to be taken into account. (*Newmont Australia Ltd v The Australian Workers' Union, West Australian Branch, Industrial Union of Workers* (1988) 68 WAIG 677 at 679).

51 The onus of proof rests upon the respondent to establish that it had the right to terminate the applicant's employment without proper notice (see *Blyth Chemicals Limited v Bushnell* (1933) 49 CLR 66 at 83 and *Concut Pty Ltd v Worrell* (2000) 176 ALR 693 at [51]). There is no rule of law that defines the degree of misconduct which would justify dismissal without notice. In *Clouston & Co Ltd v Corry* [1906] AC 122, the Privy Council at 129 stated:

> … the sufficiency of the justification depended upon the extent of misconduct. There is no fixed rule of law defining the degree of misconduct which will justify dismissal. Of course there may be misconduct in a servant which will not justify the determination of the contract of service by one of the parties to it against the will of the other. On the other hand, misconduct inconsistent with the fulfilment of the express or implied conditions of service will justify dismissal.

52 A single act of disobedience will rarely justify summary dismissal except where the conduct has the quality that is wilful; in other words, the conduct connotes a deliberate flouting of the essential contractual conditions (see *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 1 WLR 698 per Lord Evershed MR at 701).

53 The observations of Sams DP of the New South Wales Industrial Commission in *Harrison and Donaldson* may be of assistance in considering misconduct which occurs in the course of skylarking in a workplace of employees who do not form part of a disciplined law enforcement force. However, it is my respectful opinion that the observations and the factual circumstances considered and the cases referred to in that matter are different to the considerations that apply to conduct in the nature of skylarking engaged in by law enforcement officers.

54 High standards of integrity in the performance of the statutory duties of the office of Transit Officers are required of all Transit Officers. The Public Transport Authority and the public expect that only officers that are trustworthy to carry out their duties properly at all times should remain engaged as Transit Officers. The effectiveness of the service provided by Transit Officers rests heavily upon the public's confidence in the integrity, honesty, conduct and standard of performance by individual Transit Officers. Whilst on duty they should always act and be seen to act appropriately and beyond reproach.

55 Whilst I am not satisfied that the charge found to be proven against the applicant has been made out in that I am not satisfied that the applicant was in possession of a taser or similar device, I am satisfied that the device that emitted an electric spark used by him on two occasions in all the circumstances was an act of misconduct for which a disciplinary penalty should have been imposed.

56 Prima facie the misconduct by the applicant was serious for the following reasons:

(a) The incident took place whilst the applicant was on duty, in uniform and at a location which could be viewed by members of the public;

(b) The conduct of the applicant was conduct which he would have been expected to intervene in as a Transit Officer;

(c) The conduct of the applicant was unbecoming of the office of Transit Officer and could have caused damage to the reputation of the Public Transport Authority if the incident had been viewed by a member or members of the public by causing a loss of confidence in the ability of the Public Transport Authority and its officers to appropriately deliver services and exercise powers of law enforcement.

57 The Commission must consider whether the respondent exercised its legal right to dismiss the applicant for the misconduct harshly, oppressively or unfairly. Whilst the misconduct could on one view be regarded as so serious to warrant dismissal, there are other factors that weigh against this conclusion, that when considered, render the dismissal of the applicant harsh and unfair. The reason why I have reached this conclusion is as follows:

(a) I am satisfied the device in question can be described as a "toy". It is plain from the video footage that it is not a taser. Whilst emitting an electrical spark the device did not cause injury to the applicant.

(b) It is apparent from the video footage that after immediately using the device that despite feigning the effect of a jolt to his leg, he suffered no pain or discomfort other than a mild sting.

(c) The incident was very short.

(d) The time prescribed in clause 2.11.3 of the Enterprise Agreement for concluding process in respect of the disciplinary charges against the applicant was not complied with. Although a breach of clause 2.11.3 has the effect that the termination is unlawful it does not follow the dismissal is unfair, harsh or oppressive. However when this circumstance is considered together with the fact that Transit Officers Coppin and Arch were treated differently to the applicant this is one factor that mitigates in the applicant's favour and against the penalty of dismissal.

(e) The respondent gave insufficient weight to the fact that the applicant had provided to the respondent six years of unblemished service as a Transit Officer.

(f) Most importantly, the applicant did not act alone or without encouragement. The actions of the Transit Officers Coppin, Arch and Casey also constituted misconduct. Whilst the conduct of Arch and Casey may not be regarded as serious as the conduct of the applicant, I am of the opinion the conduct of Transit Officer Coppin was comparable. Transit Officer Coppin was the person who brought the device onto the premises of the Public Transport Authority. Early in the shift he discharged the device close to the applicant's neck in the Transit Officers' booth. Further, it was Transit Officer Coppin who produced the device on the occasion that it was used by the applicant. In my view, on the facts before the Commission in this matter the seriousness of the Transit Officer Coppin's misconduct cannot be differentiated from the applicant. For reasons that may perhaps be referred to as "procedural estoppel", formal charges against Transit Officer Coppin did not proceed. Formal charges did not proceed against Transit Officer Arch but he, like Transit Officer Coppin, was reprimanded. It seems Transit Officer Casey left the employment of the Public Transport Authority so no disciplinary action was taken against him. However, fairness demands that the applicant be treated consistently with Transit Officer Coppin and the penalty of dismissal set aside.

58 Whilst I have concluded that the applicant should not have been dismissed, I am not satisfied that the penalty of a reprimand only is an appropriate penalty. Clearly the applicant's conduct can be distinguished from the conduct of Transit Officers Arch and Casey. Although Transit Officer Coppin was only reprimanded for participating in the incident, if the disciplinary charges referred to in this decision had proceeded against him, his conduct, if found to be proven, would likely have warranted the imposition of a more serious penalty.

59 Whilst I accept the respondent is concerned that the applicant lacks insight in relation to the proper discharge of duties as a Transit Officer, I am of the opinion that this is a matter that can be addressed by a direction by the respondent to the applicant that the applicant undergoes retraining in respect of his duties.

60 For these reasons I am of the opinion that the applicant was harshly and unfairly dismissed and the penalty that should have been imposed on the applicant for the misconduct is a reprimand and a suspension without pay from duty for a period of four weeks. I have taken into account the fact that Transit Officers Coppin and Arch retained their employment with the respondent. However, I have reached the view that a reprimand alone would not reflect the gravity of the misconduct and that a more punitive penalty was warranted. A suspension without pay for four weeks is a penalty that would reflect the gravity of the misconduct and the fact that the conduct engaged in by the applicant was plainly unbecoming of a Transit Officer which should not be tolerated or condoned. Prior to making any orders to give effect to these findings I will hear further from the parties.

2009 WAIRC 00359

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GLEN KELLY
	APPLICANT
	-v-
	PUBLIC TRANSPORT AUTHORITY
	TRANSPERTH TRAIN OPERATIONS
	RESPONDENT
CORAM	SENIOR COMMISSIONER J H SMITH
DATE	FRIDAY, 5 JUNE 2009
FILE NO/S	U 180 OF 2008
CITATION NO.	2009 WAIRC 00359

Result	Declaration and Orders issued.
Representation	
Applicant	Mr A Dzieciol (of counsel)
Respondent	Mr D Matthews (of counsel)

Order

HAVING heard Mr A Dzieciol (of counsel) on behalf of the applicant and Mr D Matthews (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby —

(1) DECLARES that the applicant was harshly and unfairly dismissed by the respondent;

(2) ORDERS the respondent do reinstate the applicant in his former position as a Transit Officer at the same level that he was employed at immediately before the termination of that employment, and at the same level of remuneration as and from 22 June 2009;

(3) ORDERS that the period between 17 November 2008 and the date on which the applicant recommences employment with the respondent shall count as service for the purposes of accrual of all entitlements; and

(4) ORDERS that the respondent do pay to the applicant the sum of $27,723.00 gross by way of remuneration lost by the applicant by reason of his dismissal within fourteen (14) days of the date of this order.

[L.S.]

(Sgd.) J H SMITH,
Senior Commissioner.

2009 WAIRC 00263

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ALLAN RONALD OAKES
	APPLICANT
	-v-
	AUSTRALIAN SUPREME IMPORT
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	MONDAY, 11 MAY 2009
FILE NO	B 57 OF 2009
CITATION NO.	2009 WAIRC 00263

Result	Application discontinued
Representation	
Applicant	Mr A R Oakes
Respondent	Mr G Chang

Order

WHEREAS this is an application pursuant to section 29(1)(b)(ii) of the Industrial Relations Act 1979; and

WHEREAS a conciliation conference was convened on 16 April 2009 at the conclusion of which the matter was resolved; and

WHEREAS the applicant advised the Commission on 24 April 2009 that he wanted to discontinue the application;

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.

2009 WAIRC 00312

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LINDSAY RALPH
	APPLICANT
	-v-
	BRIAN ERCEG. MOTEMA PTY LTD
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
HEARD	THURSDAY, 2 APRIL 2009
DELIVERED	MONDAY, 25 MAY 2009
FILE NO.	B 23 OF 2009
CITATION NO.	2009 WAIRC 00312

Catchwords	Contractual benefits claim -- Claim for pro rata Long Service Leave - Whether Commission has Jurisdiction - Principals applied - Commission satisfied respondent is a constitutional corporation - Claim beyond Commission's jurisdiction - Application dismissed - *Industrial Relations Act 1979* (WA) s 29(1)(b)(ii); *Workplace Relations Act 1996* (Cth) s 4, s 6 and s 16; *Commonwealth of Australia Constitution Act 1900* s 51(xx) and s 109; *Long Service Leave Act 1958* s 8(3) and s 11
Result	Dismissed
Representation	
Applicant	Mr L Ralph on his own behalf
Respondent	Mr D Paton (of Counsel)

Reasons for Decision

1 On 10 February 2009 Lindsay Ralph ("the applicant") lodged an application in the Commission pursuant to s 29(1)(b)(ii) of the *Industrial Relations Act 1979* ("the Act") claiming that he had been denied a benefit under his contract of employment by Brian Erceg Motema Pty Ltd ("the respondent"). The respondent denies the applicant's claim and maintains that it is a constitutional corporation for the purposes of the *Workplace Relations Act 1996* ("the WR Act") and therefore the applicant's claim is beyond the jurisdiction of this Commission.

Proper name of the respondent

2 The applicant named the respondent in his application as Brian Erceg Motema Pty Ltd. In its Notice of Answer and Counter Proposal the respondent stated that the correct name of the respondent was Motema Pty Ltd and at the outset of the proceedings the applicant confirmed that Motema Pty Ltd was identified on his payslip as his employer. The respondent also tendered a Business Name Extract during the hearing confirming that Motema Pty Ltd trades as Myaree Supa IGA which is where the applicant was working when he was terminated (Exhibit R1). From all of this information I am satisfied and I find that the proper identity of the applicant's employer was Motema Pty Ltd. I am also satisfied that the applicant misdescribed the name of the respondent in his application and intended to bring these proceedings against his employer even though he did not accurately describe the respondent's proper name in his application. Pursuant to the Commission's powers under s 27(1)(m) of the Act, which allows the Commission to correct, amend or waive any error, defect or irregularity whether in substance or in form, I will amend the name of the respondent in the Notice of Application to reflect the proper identity of the applicant's employer. I propose to issue an order that Brian Erceg Motema Pty Ltd be deleted as the named respondent in this application and be substituted with Motema Pty Ltd (see *Rai v Dogrin Pty Ltd* [2000] 80 WAIG 1375 and *Bridge Shipping Pty Limited v Grand Shipping SA and Anor* [1991] 173 CLR 231).

Respondent's evidence

3 Mr Brian Erceg gave evidence that he is one of the respondent's directors and he confirmed that the respondent trades as Myaree Super IGA which was previously known as Dewsons Myaree until its registration was cancelled on 29 May 2006 (see Exhibits R1 and R2). The respondent also tendered an Historical Company Extract for Motema Pty Ltd as at 26 February 2009 confirming that Mr Erceg was a director of the respondent (Exhibit R3).

4 Mr Erceg gave evidence that Myaree Supa IGA, which is operated by the respondent, is a supermarket that sells goods and in return makes a profit by way of income from the supermarket's activities. The respondent also owns a medical centre which it rents out and in return receives rent as income. Mr Erceg's evidence was not challenged under cross-examination and there was no evidence that the respondent engaged in any other activities. The respondent also tendered an Individual Workplace Agreement which applied to the applicant and the respondent when the respondent was trading as Dewsons Myaree. This agreement was signed and dated 25 March 2002.

Submissions

5 The respondent argues that as its activities were of a commercial and trading nature it is therefore a constitutional corporation as defined in the WR Act and the Commission has no jurisdiction to deal with this application.

6 The applicant, who was unrepresented, was given the opportunity to present evidence and make submissions with respect to the issue of jurisdiction but he declined to do so.

Findings and conclusions

Credibility

7 I have no reason to doubt the evidence given by Mr Erceg as I found his evidence to be given honestly and to the best of his recollection.

8 Section 6 of the WR Act defines "employer" as "a constitutional corporation, so far as it employs, or usually employs, an individual". Section 4 of the WR Act defines a "constitutional corporation" as a corporation to which s 51(xx) of the Commonwealth Constitution applies and s 51(xx) of the Commonwealth Constitution defines a corporation among others as "trading or financial corporations formed within the limits of the Commonwealth". If the respondent is a trading corporation, by virtue of ss 4, 6 and 16 of the WR Act, the jurisdiction of the Commission to deal with the applicant's claim is excluded by s 16(1) of the WR Act and s 109 of the Commonwealth Constitution (see *Crown Scientific Pty Ltd v Leslie Bruce Clarke* [2007] 87 WAIG 598).

9 Section 16 of the WR Act reads as follows:

> "**16 Act excludes some State and Territory laws**
>
> (1) This Act is intended to apply to the exclusion of all the following laws of a State or Territory so far as they would otherwise apply in relation to an employee or employer:
>
> (a) a State or Territory industrial law;
>
> (b) a law that applies to employment generally and deals with leave other than long service leave;
>
> (c) a law providing for a court or tribunal constituted by a law of the State or Territory to make an order in relation to equal remuneration for work of equal value (as defined in section 623);
>
> (d) a law providing for the variation or setting aside of rights and obligations arising under a contract of employment, or another arrangement for employment, that a court or tribunal finds is unfair;
>
> (e) a law that entitles a representative of a trade union to enter premises.
>
> Note: Subsection 4(1) defines ***applies to employment generally***.
>
> *State and Territory laws that are not excluded*
>
> (2) However, subsection (1) does not apply to a law of a State or Territory so far as:
>
> (a) the law deals with the prevention of discrimination, the promotion of EEO or both, and is neither a State or Territory industrial law nor contained in such a law; or
>
> (b) the law is prescribed by the regulations as a law to which subsection (1) does not apply; or
>
> (c) the law deals with any of the matters (the ***non-excluded matters***) described in subsection (3).
>
> (3) The non-excluded matters are as follows:
>
> (a) superannuation;
>
> (b) workers compensation;
>
> (c) occupational health and safety (including entry of a representative of a trade union to premises for a purpose connected with occupational health and safety);

(d) matters relating to outworkers (including entry of a representative of a trade union to premises for a purpose connected with outworkers);

(e) child labour;

(f) long service leave;

(g) the observance of a public holiday, except the rate of payment of an employee for the public holiday;

(h) the method of payment of wages or salaries;

(i) the frequency of payment of wages or salaries;

(j) deductions from wages or salaries;

(k) industrial action (within the ordinary meaning of the expression) affecting essential services;

(l) attendance for service on a jury;

(m) regulation of any of the following:

(i) associations of employees;

(ii) associations of employers;

(iii) members of associations of employees or of associations of employers.

Note: Part 15 (Right of entry) sets prerequisites for a trade union representative to enter certain premises under a right given by a prescribed law of a State or Territory. The prerequisites apply even though the law deals with such entry for a purpose connected with occupational health and safety and paragraph (2)(c) says this Act is not to apply to the exclusion of a law dealing with that.

This Act excludes prescribed State and Territory laws

(4) This Act is intended to apply to the exclusion of a law of a State or Territory that is prescribed by the regulations for the purposes of this subsection.

(5) To avoid doubt, subsection (4) has effect even if the law is covered by subsection (2) (so that subsection (1) does not apply to the law). This subsection does not limit subsection (4).

Definition

(6) In this section:

this Act includes the Registration and Accountability of Organisations Schedule and regulations made under it."

10 Whether a corporation is a trading corporation is ultimately a question of fact and degree (see *R v Judges of the Federal Court of Australia and Another*; *ex parte The Western Australian National Football League (Inc) and Another* (1979) 143 CLR 190 per Mason J at 234 applied by the Full Bench in *Crown Scientific Pty Ltd v Leslie Bruce Clarke* [op cit] and *Aboriginal Legal Service of Western Australia Incorporated v Mark James Lawrence* (2007) 87 WAIG 856 at 878, 884 and 893).

11 The authorities confirm that the issue to be determined when deciding if the respondent is a trading corporation is the character of the activities carried out by the respondent at the relevant time and whether or not the respondent engaged in significant and substantial trading activities of a commercial nature at this time such that it can be described as a trading corporation.

12 I find from the documentation tendered by the respondent and the evidence of Mr Erceg that the respondent is an incorporated entity which carries on a business known as Myaree Supa IGA, which is a supermarket that sells goods for a profit. I also find that the respondent owns a medical centre that it rents in return for a profit. On the basis of these findings I conclude that the financial activities of the respondent constitute the main purpose of the respondent and I am satisfied that being a commercial enterprise the respondent's trading activities form a substantial or significant part of its activities. In the circumstances I find that the respondent is a corporation which trades and as the respondent's main activities are trading activities this makes it a constitutional corporation for the purposes of the WR Act.

13 I find that the respondent was the applicant's employer at the time the applicant was terminated and I am therefore satisfied that the respondent was an employer at all relevant times for the purposes of the WR Act.

14 This application is a claim for a denied contractual benefit and the applicant was employed by the respondent both prior to and subsequent to the WR Act being amended by the *Workplace Relations Amendment (Work Choices) Act 2005* ("Work Choices"), which took effect from 27 March 2006. The decision of the Full Bench in *Marina Saldanha v Fujitsu Australia Pty Ltd* (2008) 89 WAIG 76 confirms that s 16 of the WR Act excludes the Commission's jurisdiction to deal with claims for a denied contractual benefit under s 29(1)(b)(ii) of the Act when an employee is employed by a constitutional corporation and in circumstances when that employee was employed prior to and post the date of the commencement of the Work Choices amendments.

15 In the circumstances I therefore conclude that the applicant's claim is beyond the jurisdiction of the Commission and must be dismissed.

16 Even though I have found that the Commission does not have jurisdiction to deal with this application, for completeness, it is appropriate to comment on the merit of the applicant's claim for pro rata long service leave. The applicant confirmed during the hearing that his application for a denied contractual benefit was a claim of an entitlement to pro rata long service leave pursuant to the *Long Service Leave Act 1958* ("the LSL Act").

17 I have no reason to doubt and I find that the LSL Act applied to the applicant during his employment with the respondent. Section 8(3) of the LSL Act reads as follows:

> "(3) Where an employee has completed at least 7 years of such continuous employment since the commencement thereof, but less than 10 years, and the employment is terminated —
>
> (a) by his death; or
>
> (b) for any reason other than serious misconduct,
>
> the amount of leave to which the employee is entitled shall be a proportionate amount on the basis of $8\ ^{2}/_{3}$ weeks for 10 years of such continuous employment."

18 The applicant maintained that he had received advice that he had an entitlement to pro rata long service leave pursuant to s 8(3) of the LSL Act and the applicant claimed that he was not precluded from making such an application to the Commission for the benefit of this entitlement on the basis that he had not committed any misconduct, which the respondent maintained was the reason for his termination. In his application the applicant stated that he commenced employment with the respondent on 13 March 2002 and ceased employment on 22 January 2009 and he conceded during the hearing that he had therefore not completed seven years of continuous employment with the respondent as at the date of his termination, which is a requirement under s 8(3) of the LSL Act to be paid pro rata long service leave. Even if the applicant was not terminated for serious misconduct, as the applicant did not complete seven years of continuous employment with the respondent he therefore does not have an entitlement to any pro rata long service leave payment pursuant to s 8(3) of the LSL Act. Furthermore, the exclusive jurisdiction for the enforcement of any entitlements accruing to an employee under the terms of the LSL Act lies with the Industrial Magistrate's Court and the applicant would therefore not be able to progress his claim in the Commission in any event (see Clause 11 of the LSL Act).

19 An order will now issue dismissing this application.

2009 WAIRC 00313

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LINDSAY RALPH
	APPLICANT
	-v-
	MOTEMA PTY LTD
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	MONDAY, 25 MAY 2009
FILE NO/S	B 23 OF 2009
CITATION NO.	2009 WAIRC 00313

Result	Dismissed
Representation	
Applicant	Mr L Ralph on his own behalf
Respondent	Mr D Paton (of Counsel)

Order

HAVING HEARD Mr L Ralph on his own behalf and Mr D Paton (of Counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby orders –

1. THAT the name of the respondent be deleted and that Motema Pty Ltd be substituted in lieu thereof.
2. THAT the application be and is hereby dismissed.

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

2009 WAIRC 00324

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ELAINE SENIOR
	APPLICANT
	-v-
	SONYA BEVAN
	RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE	THURSDAY, 28 MAY 2009
FILE NO/S	U 44 OF 2009
CITATION NO.	2009 WAIRC 00324

Result	Application dismissed

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(i) of the Industrial Relations Act 1979; and

WHEREAS on the 28th day of April 2009 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of that conference the applicant sought time to consider her position; and

WHEREAS on the 20th day of May 2009 the applicant advised the Commission that the matter had been resolved;

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

THAT this application be, and is hereby dismissed.

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

2009 WAIRC 00346

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	OLGA STOJANOVIC
	APPLICANT
	-v-
	ST. MICHAEL'S RESIDENTAL CARE
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	WEDNESDAY, 3 JUNE 2009
FILE NO	U 74 OF 2009
CITATION NO.	2009 WAIRC 00346

Result	Application discontinued
Representation	
Applicant	Ms O Stojanovic
Respondent	Mr L Pilgrim (as agent)

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(i) of the *Industrial Relations Act 1979*;

AND WHEREAS on 15 May 2009 the Commission 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 on 22 May 2009 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby discontinued.

(Sgd.) S M MAYMAN,
[L.S.] Commissioner.

2009 WAIRC 00338

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JULIA WILKINS
	APPLICANT
	-v-
	THE TRUSTEE FOR PIPERLINK TRUST AND TRUSTING T/AS CAKE BOX
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	WEDNESDAY, 3 JUNE 2009
FILE NO	U 34 OF 2009
CITATION NO.	2009 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 2009 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.

2009 WAIRC 00373

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DAVID WOOD
	APPLICANT
	-v-
	FURNITURE SPOT, FURNITURE FIRST
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	WEDNESDAY, 10 JUNE 2009
FILE NO	U 30 OF 2009
CITATION NO.	2009 WAIRC 00373

Result	Application dismissed for want of prosecution
Representation	
Applicant	No appearance
Respondent	Mr D Jones as agent

Order

WHEREAS this is an application pursuant to section 29(1)(b)(ii) of the Industrial Relations Act 1979; and

WHEREAS the matter was listed for a show cause hearing on 10 June 2009 and the applicant was advised that failure to attend would lead to the application being dismissed; and

WHEREAS the applicant did not attend the hearing;

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 dismissed for want of prosecution.

(Sgd.) S WOOD,
[L.S.] Commissioner.

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Atchara Holper	Brad & Siriporn Mason, Thai on the Terrace	U 35/2009	Commissioner J L Harrison	Consent
Catharina Rudman	WorkPower Inc t/as WorkPower Incorporated	U 27/2009	Senior Commissioner J H Smith	Withdrawn
Dianne Bennett	Gosnells Armadale Business Development Organisation Inc	U 145/2008		Discontinued
Julie Stewart	Roman Catholic Archbishop of Perth, Trading as Centacare Employment and Training	U 173/2008	Senior Commissioner J H Smith	Discontinued
Ken Jennings	Roman Catholic Archbishop of Perth Trading as Centacare Employment and Training	U 174/2008	Senior Commissioner J H Smith	Discontinued
Ms Sarah De Longis	Jaqulyn Gill Luxe Day Spa	B 97/2007	Chief Commissioner A R Beech	Discontinued
Natasha King	Jayne Rayner (Skate International)	U 98/2008	Chief Commissioner A R Beech	Discontinued
Nicholas John McKenzie	Dueon Pty Ltd	U 67/2009	Senior Commissioner J H Smith	Withdrawn
Sue Robinson-Grone	Kalamunda Community Care Inc	U 139/2008	Chief Commissioner A R Beech	Discontinued
Thomas Alexander Eckford	Roman Catholic Archbishop of Perth, Trading as Centacare Employment and Training	U 172/2008	Senior Commissioner J H Smith	Discontinued

CONFERENCES—Matters referred—

2009 WAIRC 00314

DISPUTE IN RELATION TO THE WORKLOAD OF COMMUNITY CORRECTIONS OFFICERS AND JUVENILE JUSTICE OFFICERS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMISSIONER, DEPARTMENT OF CORRECTIVE SERVICES
	APPLICANT
	-v-
	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER J L HARRISON
DATE	MONDAY, 25 MAY 2009
FILE NO/S	PSACR 25 OF 2007
CITATION NO.	2009 WAIRC 00314

Result	Order issued
Representation	
Applicant	Mr N Cinquina
Respondent	Mr W Claydon

Order

WHEREAS this is a matter referred for hearing and determination pursuant to s 44 of the *Industrial Relations Act 1979* ("the Act") in relation to a dispute about the workloads of Community Corrections Officers, Senior Community Corrections Officers, Juvenile Justice Officers, Senior Juvenile Justice Officers, Case Support Officers and Senior Case Support Officers; and

WHEREAS the Public Service Arbitrator ("the Arbitrator") listed the matter for hearing and determination on 14 to 18 and 21 to 24 April 2008 to deal with the issues in dispute between the parties; and

WHEREAS following informal discussions between the parties and mediation before the Arbitrator on 14, 15 and 16 April 2008 the parties reached an agreement in settlement of the dispute; and

WHEREAS on 18 April 2008 the Arbitrator issued a consent order in the following terms ("the Consent Order"):

> "THAT this dispute is settled by the respondent and its members accepting and implementing the Workload Management Strategy document contained in the schedule attached to this order."; and

WHEREAS on 21 October 2008 and 20 April 2009 the Arbitrator convened conferences for the parties to report back to the Arbitrator in relation to the implementation of the Workload Management Strategy as provided for in the Workload Management Strategy contained in the schedule attached to the Consent Order; and

WHEREAS at the conference held on 20 April 2009 the parties agreed that a revised Workload Management Strategy document incorporating amendments agreed to by the parties would be filed in the Commission; and

FURTHER at the conference held on 20 April 2009 the applicant advised the Arbitrator that it wanted the file with respect to this application closed; and

FURTHER the respondent objected to the file with respect to this application being closed and asked that the Arbitrator replace the existing schedule attached to the Consent Order with a new schedule containing the agreed amended Workload Management Strategy document; and

WHEREAS on 21 April 2009 the Arbitrator wrote to the parties detailing a timeframe for filing and serving submissions in relation to the file with respect to this application being closed; and

WHEREAS on 5 May 2009 the applicant filed a copy of the agreed amended Workload Management Strategy document in the Commission and this document has been placed on this file; and

FURTHER on 5 May 2009 the applicant filed the following submissions in support of its application that the file should be closed and that the revised Workload Management Strategy forwarded to the Arbitrator on 5 May 2009 should not replace the existing schedule attached to the Consent Order:

- the dispute with respect to this application was settled by the respondent and its members accepting and implementing the Workload Management Strategy document attached as a schedule to the Consent Order;
- the Consent Order constitutes a final, not an interim order;

- the Workload Management Strategy attached as a schedule to the Consent Order cannot form part of this order as Clause 13 of the Workload Management Strategy document allows for amendments to be made to the document by consent and the parties cannot alter an order of the Commission;
- the Commission has no power to alter the original order by incorporating the revised Workload Management Strategy document into the Consent Order as the only way this order can be altered is via an appeal to the Full Bench;
- if the parties have a dispute about the Workload Management Strategy in the future either party could seek to have this issue dealt with by the Arbitrator; and

WHEREAS on 19 May 2009 the respondent filed the following submissions opposing the closing of this file and in support of its proposal to vary the Consent Order by incorporating the agreed changes to the Workload Management Strategy document, that is the revised Workload Management Strategy document filed in the Commission on 5 May 2009:

- the Workload Management Strategy document forms part of the Consent Order and the Arbitrator has the power to amend the Workload Management Strategy document as Clause 12 of the Workload Management Strategy attached to the Consent Order allows for amendments to the Workload Management Strategy to be considered up to 12 months after the commencement of the Workload Management Strategy;
- the Arbitrator is not *functus officio* with respect to dealing any further with this application and this doctrine does not apply to s 44 and s 80E of the Act;
- the respondent maintains that the Workload Management Strategy can be changed by the Arbitrator and still form part of the Consent Order and no application need be made to the Full Bench to alter the Consent Order in the manner sought by the respondent;
- this application and therefore the file should remain open given ongoing disputation about the scope and nature of the Consent Order and when taking into account the necessity to prevent the deterioration of industrial relations between the parties; and

WHEREAS the Arbitrator is satisfied that the dispute between the parties relevant to this application with respect to the workloads of Juvenile Justice Officers, Community Corrections Officers and Case Support Officers was resolved by agreement between the parties and this agreement was reflected in the Consent Order that issued with respect to this application; and

WHEREAS the Workload Management Strategy document, which forms part of the Consent Order as it is a schedule attached to the order, contained a provision for two report back conferences to be held before the Arbitrator in October 2008 and April 2009 and these report back conferences have taken place; and

WHEREAS as a result of discussions taking place between the parties and after reporting back to the Arbitrator with respect to the implementation of the Workload Management Strategy document the parties agreed to amend the Workload Management Strategy document and these amendments are contained in the Workload Management Strategy document sent to the Commission on 5 May 2009; and

WHEREAS it is the Arbitrator's view that it is not necessary nor appropriate to replace the Workload Management Strategy document attached as a schedule to the Consent Order as this order does not provide for the Workload Management Strategy document which formed part of the Consent Order to be replaced notwithstanding that the Workload Management Strategy document allows the parties, by agreement, to alter the Workload Management Strategy document; and

WHEREAS the agreed revised Workload Management Strategy document forwarded to the Commission on 5 May 2009 does not contain any further report back timeframes to the Arbitrator with respect to the Workload Management Strategy document; and

WHEREAS in the circumstances the Arbitrator is of the view that the dispute between the parties with respect to this application has been settled given the terms of the Consent Order and the file should be closed; and

WHEREAS in making this decision the Arbitrator notes that any future questions, difficulties or disputes about the implementation of the Workload Management Strategy document, and any changes to this strategy as contained in the revised Workload Management Strategy document forwarded to the Commission on 5 May 2009 may be referred to the Commission for conciliation and/or arbitration;

NOW THEREFORE having heard Mr N Cinquina on behalf of the applicant and Mr W Claydon on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT the respondent's application that the file remain open and that the Public Service Arbitrator's order that issued on 18 April 2008 be varied be, and is hereby dismissed.

(Sgd.) J L HARRISON,
Commissioner,
[L.S.] Public Service Arbitrator.

2009 WAIRC 00296

DISPUTE RE TO THE USE OF FIXED TERM CONTRACT EMPLOYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS)
	APPLICANT
	-v-
	THE DIRECTOR GENERAL OF HEALTH IN RIGHT OF THE MINISTER FOR HEALTH AS THE SOUTH METROPOLITAN AREA HEALTH SERVICE (ROCKINGHAM KWINANA DISTRICT HOSPITAL)
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER S WOOD
DATE	FRIDAY, 22 MAY 2009
FILE NO	PSACR 2 OF 2008
CITATION NO.	2009 WAIRC 00296

Result Application discontinued

Order

WHEREAS this is an application pursuant to section 44 of the Industrial Relations Act 1979; and

WHEREAS the applicant union advised the Public Service Arbitrator on 8 May 2009 that they 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 Public Service Arbitrator, 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,
Commissioner,
[L.S.] Public Service Arbitrator.

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
Public Transport Authority of WA	The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch	Smith SC	C 18/2009	N/A	Distpute re proposed stop work meeting	Discontinued
The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch	Public Transport Authority	Smith SC	C 4/2009	27/01/2009	Dispute re attendance of a union member at an interview	Referred
The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch	Public Transport Authority	Smith SC	CR 4/2009	6/05/2009	Dispute re attendance of a union member at an interview	Withdrawn
The Civil Service Association of Western Australia Incorporated	Director General, Department of Education and Training	Harrison C	PSAC 30/2008	7/11/2008 19/12/2008 10/02/2009 24/03/2009	Dispute re directive of respondent issued to union member	Consent
The Civil Service Association of Western Australia Incorporated	The Chief Executive Officer, Western Australian Museum	Smith SC	PSAC 10/2009	17/04/2009	Dispute re reclassification of union members	Discontinued

CORRECTIONS—

2009 WAIRC 00315

CLUB WORKERS' AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ON THE COMMISSION'S OWN MOTION
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	WEDNESDAY, 27 MAY 2009
FILE NO.	APPLA 7 OF 2009
CITATION NO.	2009 WAIRC 00315

Result Correction Order issued

Correction Order

WHEREAS the Commission has before it an application on the Commission's own motion under s 40B of the *Industrial Relations Act, 1979* (the Act) to vary the Club Workers Award;

AND WHEREAS the Order which issued on 30 April 2009 amending the Award ((2009) 89 WAIG 488) contained an error;

NOW THEREFORE the Commission pursuant to the powers conferred on it under s 27(1) of the Act, hereby orders:

THAT clause 11 in the Schedule to the Order issued by the Commission in Application A7 of 2009 on 30 April 2009 be replaced by clause 11 in the attached Schedule.

(Sgd.) A R BEECH,
[L.S.] Chief Commissioner.

SCHEDULE

11. Schedule A - Named Union Party: Delete this Schedule and insert the following in lieu thereof:

SCHEDULE A - NAMED PARTIES TO THE AWARD

Liquor, Hospitality and Miscellaneous Union, Western Australian Branch

Kalamunda Club (Inc)

Bellevue Returned Serviceman's Club (Inc)

Gosnells Bowling and Recreation Club (Inc)

Air Force Association Country Club (Inc)

Royal Perth Golf Club (Inc)

Royal Perth Yacht Club of W.A. (Inc)

Fremantle Club (Inc)

East Fremantle Football Club (Inc)

Commercial Club

Collie Club (Inc)

Pemberton Country Club (Inc)

Emu Point Progress Association Sporting Club (Inc)

Northam Workers Club

Moora Club (Inc)

Geraldton Yacht Club (Inc)

Merredin Bowling and Tennis Club (Inc)

Kalgoorlie Ex-Serviceman's Memorial Club (Inc)

Ord River Sports Club (Inc)

2009 WAIRC 00355

STATE WAGE CASE 2008 (CORRECTING SCHEDULES)

GOVERNMENT OFFICERS (SOCIAL TRAINERS) AWARD 1988

Whereas an error occurred in the Publication of the 2008 State Wage Case "Variation Schedule" for the Government Officers (Social Trainers) Award 1988 at 88 WAIG 1150, the "Variation Schedule" is hereby republished. Specifically the "19 years" total rate incorrectly appeared as 25290, however it should have read as 26290.

Dated at Perth this 2nd day of June 2009.

(Sgd.) J SPURLING,
[L.S.] Registrar.

Government Officers (Social Trainers) Award 1988

1B. - MINIMUM ADULT AWARD WAGE

(1) No employee aged 21 or more shall be paid less than the minimum adult award wage unless otherwise provided by this clause.

(2) The minimum adult award wage for full-time employees aged 21 or more is $557.40 per week payable on and from the first pay period on or after 1 July 2008.

(3) The minimum adult award wage is deemed to include all State Wage order adjustments from State Wage Case Decisions.

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

(5) Employees under the age of 21 shall be paid no less than the wage determined by applying the percentage prescribed in the junior rates provision in this award to the minimum adult award wage.

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

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

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

(a) Apply to all work in ordinary hours.

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

(9) Minimum Adult Award Wage

The rates of pay in this award include the minimum weekly wage for employees aged 21 or more payable under the 2008 State Wage order decision. Any increase arising from the insertion of the minimum wage will be offset against any equivalent amount in rates of pay received by employees whose wages and conditions of employment are regulated by this award which are above the wage rates prescribed in the award. Such above award payments include wages payable pursuant to enterprise agreements, consent awards or award variations to give effect to enterprise agreements and over award arrangements. Absorption which is contrary to the terms of an agreement is not required.

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

(10) Adult Apprentices

(a) Notwithstanding the provisions of this clause, an apprentice, 21 years of age or more, shall not be paid less than $488.40 per week on and from the commencement of the first pay period on or after 1 July 2008.

(b) The rate paid in the paragraph above to an apprentice 21 years of age or more is payable on superannuation and during any period of paid leave prescribed by this award.

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

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

SCHEDULE A. – SALARIES

(1) The annual salaries applicable to employees covered by this Award.

Level	Salary Per Annum$	Arbitrated Safety Net Adjustments$	Total Salary Per Annum$
Level 1			
Under 17 years	11355	5306	16661
17 years	13270	6201	19471

Level	Salary Per Annum$	Arbitrated Safety Net Adjustments$	Total Salary Per Annum$
Level 1—*continued*			
18 years	15480	7234	22714
19 years	17918	8372	26290
20 years	20122	9402	29524
1.1	22104	10329	32433
1.2	22756	10329	33085
1.3	23407	10329	33736
1.4	24054	10434	34488
1.5	24705	10434	35139
1.6	25356	10434	35790
1.7	26105	10330	36435
1.8	26623	10330	36953
1.9	27389	10330	37719
Level 2			
2.1	28306	10330	38636
2.2	29009	10330	39339
2.3	29748	10330	40078
2.4	30529	10330	40859
2.5	31346	10330	41676
Level 3			
3.1	32469	10330	42799
3.2	33344	10330	43674
3.3	34246	10330	44576
3.4	35172	10225	45397
Level 4			
4.1	36442	10225	46667
4.2	37437	10121	47558
4.3	38461	10121	48582

(2) Salary increases resulting from State Wage Case Decisions are calculated for those employees under the age of 21 years employed at Level 1 by dividing the current junior annual salary by the current Level 1.1 annual salary and multiplying the result by the new Level 1.1 annual salary which includes the State Wage Case increase. The following formula is to be applied:

Current Junior Rate Current Level 1.1 Rate x New Level 1.1 Rate = New Junior Rate

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GOVERNMENT OFFICER (STATE GOVERNMENT INSURANCE COMMISSION) AWARD, 1987

Whereas an error occurred in the Publication of the 2008 State Wage Case "Variation Schedule" for the Government Officer (State Government Insurance Commission) Award, 1987 at 88 WAIG 1151, the "Variation Schedule" is hereby republished. Specifically the "19 years" total rate incorrectly appeared as 25290, however it should have read as 26290.

Dated at Perth this 2nd day of June 2009.

(Sgd.) J SPURLING,
[L.S.] Registrar.

Government Officer (State Government Insurance Commission) Award, 1987

1B. - MINIMUM ADULT AWARD WAGE

(1) No employee aged 21 or more shall be paid less than the minimum adult award wage unless otherwise provided by this clause.

(2) The minimum adult award wage for full-time employees aged 21 or more is $557.40 per week payable on and from the first pay period on or after 1 July 2008.

(3) The minimum adult award wage is deemed to include all State Wage order adjustments from State Wage Case Decisions.

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

(5) Employees under the age of 21 shall be paid no less than the wage determined by applying the percentage prescribed in the junior rates provision in this award to the minimum adult award wage.

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

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

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

(a) Apply to all work in ordinary hours.

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

(9) Minimum Adult Award Wage

The rates of pay in this award include the minimum weekly wage for employees aged 21 or more payable under the 2008 State Wage order decision. Any increase arising from the insertion of the minimum wage will be offset against any equivalent amount in rates of pay received by employees whose wages and conditions of employment are regulated by this award which are above the wage rates prescribed in the award. Such above award payments include wages payable pursuant to enterprise agreements, consent awards or award variations to give effect to enterprise agreements and over award arrangements. Absorption which is contrary to the terms of an agreement is not required.

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

(10) Adult Apprentices

(a) Notwithstanding the provisions of this clause, an apprentice, 21 years of age or more, shall not be paid less than $488.40 per week on and from the commencement of the first pay period on or after 1 July 2008.

(b) The rate paid in the paragraph above to an apprentice 21 years of age or more is payable on superannuation and during any period of paid leave prescribed by this award.

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

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

SCHEDULE A – SALARIES

(1) The annual salaries applicable to employees covered by this Award;

Level	Salary Per Annum **$**	Arbitrated Safety Net Adjustments **$**	Total Salary Per Annum **$**
Level 1			
Under 17 years	11355	5306	16661
17 years	13270	6201	19471
18 years	15480	7234	22714
19 years	17918	8372	26290
20 years	20122	9402	29524
1.1	22104	10329	32433
1.2	22756	10329	33085
1.3	23407	10329	33736
1.4	24054	10434	34488
1.5	24705	10434	35139
1.6	25356	10434	35790
1.7	26105	10330	36435
1.8	26623	10330	36953
1.9	27389	10330	37719
Level 2			
2.1	28306	10330	38636
2.2	29009	10330	39339
2.3	29748	10330	40078
2.4	30529	10330	40859
2.5	31346	10330	41676
Level 3			
3.1	32469	10330	42799
3.2	33344	10330	43674
3.3	34246	10225	44471
3.4	35172	10225	45397
Level 4			
4.1	36442	10225	46667
4.2	37437	10121	47558
4.3	38461	10121	48582
Level 5			
5.1	40433	10121	50554
5.2	41766	10121	51887
5.3	43151	10121	53272
5.4	44588	10121	54709

Level	Salary Per Annum **$**	Arbitrated Safety Net Adjustments **$**	Total Salary Per Annum **$**
Level 6			
6.1	46899	10121	57020
6.2	48470	10121	58591
6.3	50096	10121	60217
6.4	51832	10121	61953
Level 7			
7.1	54494	10121	64615
7.2	56336	10121	66457
7.3	58340	10121	68461
Level 8			
8.1	61597	10121	71718
8.2	63930	10121	74051
8.3	66823	10121	76944
Level 9			
9.1	70436	10121	80557
9.2	72877	10121	82998
9.3	75661	10121	85782
Class 1	79871	10121	89992
Class 2	84081	10121	94202
Class 3	88289	10121	98410
Class 4	92499	10121	102620

(2) Salary increases resulting from State Wage Case Decisions are calculated for those employees under the age of 21 years employed at Level 1 by dividing the current junior annual salary by the current Level 1.1 annual salary and multiplying the result by the new Level 1.1 annual salary which includes the State Wage Case increase. The following formula is to be applied:

Current junior rate

Current Level 1.1 rate x New Level 1.1 rate = New junior rate

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GOVERNMENT OFFICERS SALARIES, ALLOWANCES AND CONDITIONS AWARD 1989

Whereas an error occurred in the Publication of the 2008 State Wage Case "Variation Schedule" for the Government Officers Salaries, Allowances and Conditions Award 1989 at 88 WAIG 1153, the "Variation Schedule" is hereby republished. Specifically the "19 years" total rate incorrectly appeared as 25290, however it should have read as 26290.

Dated at Perth this 2nd day of June 2009.

(Sgd.) J SPURLING,
[L.S.] Registrar.

Government Officers Salaries, Allowances and Conditions Award 1989

1B. - MINIMUM ADULT AWARD WAGE

(1) No employee aged 21 or more shall be paid less than the minimum adult award wage unless otherwise provided by this clause.

(2) The minimum adult award wage for full-time employees aged 21 or more is $557.40 per week payable on and from the first pay period on or after 1 July 2008.

(3) The minimum adult award wage is deemed to include all State Wage order adjustments from State Wage Case Decisions.

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

(5) Employees under the age of 21 shall be paid no less than the wage determined by applying the percentage prescribed in the junior rates provision in this award to the minimum adult award wage.

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

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

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

(a) Apply to all work in ordinary hours.

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

(9) Minimum Adult Award Wage

The rates of pay in this award include the minimum weekly wage for employees aged 21 or more payable under the 2008 State Wage order decision. Any increase arising from the insertion of the minimum wage will be offset against any equivalent amount in rates of pay received by employees whose wages and conditions of employment are regulated by this award which are above the wage rates prescribed in the award. Such above award payments include wages payable pursuant to enterprise agreements, consent awards or award variations to give effect to enterprise agreements and over award arrangements. Absorption which is contrary to the terms of an agreement is not required.

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

(10) Adult Apprentices

(a) Notwithstanding the provisions of this clause, an apprentice, 21 years of age or more, shall not be paid less than $488.40 per week on and from the commencement of the first pay period on or after 1 July 2008.

(b) The rate paid in the paragraph above to an apprentice 21 years of age or more is payable on superannuation and during any period of paid leave prescribed by this award.

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

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

SCHEDULE D SALARIES

(1) The annual salaries applicable to officers covered by this Award.

Level	Salary Per Annum $	Arbitrated Safety Net Adjustments $	Total Salary Per Annum $
Level 1			
Under 17 years	11355	5306	16661
17 years	13270	6201	19471
18 years	15480	7234	22714
19 years	17918	8372	26290
20 years	20122	9402	29524
1.1	22104	10329	32433
1.2	22756	10329	33085
1.3	23407	10329	33736
1.4	24054	10434	34488
1.5	24705	10434	35139
1.6	25356	10434	35790
1.7	26105	10330	36435
1.8	26623	10330	36953
1.9	27389	10330	37719
Level 2			
2.1	28306	10330	38636
2.2	29009	10330	39339
2.3	29748	10330	40078
2.4	30529	10330	40859
2.5	31346	10330	41676
Level 3			
3.1	32469	10330	42799
3.2	33344	10330	43674
3.3	34246	10225	44471
3.4	35172	10225	45397
Level 4			
4.1	36442	10225	46667
4.2	37437	10121	47558
4.3	38461	10121	48582
Level 5			
5.1	40433	10121	50554
5.2	41766	10121	51887
5.3	43151	10121	53272
5.4	44588	10121	54709
Level 6			
6.1	46899	10121	57020
6.2	48470	10121	58591
6.3	50096	10121	60217
6.4	51832	10121	61953

Level	Salary Per Annum $	Arbitrated Safety Net Adjustments $	Total Salary Per Annum $
Level 7			
7.1	54494	10121	64615
7.2	56336	10121	66457
7.3	58340	10121	68461
Level 8			
8.1	61597	10121	71718
8.2	63930	10121	74051
8.3	66823	10121	76944
Level 9			
9.1	70436	10121	80557
9.2	72877	10121	82998
9.3	75661	10121	85782
Class 1	79871	10121	89992
Class 2	84081	10121	94202
Class 3	88289	10121	98410
Class 4	92499	10121	102620

(2) Salary increases resulting from State Wage Case Decisions are calculated for those officers under the age of 21 years employed at Level 1 by dividing the current junior annual salary by the current level 1.1 annual salary and multiplying the result by the new Level 1.1 annual salary which includes the State Wage Case increase. The following formula is to be applied:

$$\frac{\text{Current junior rate}}{\text{Current Level 1.1 rate}} \times \text{New Level 1.1 rate} = \text{New junior rate}$$

SCHEDULE E SALARIES - SPECIFIED CALLINGS

Officers, who possess a relevant tertiary level qualification, or equivalent determined by the Executive Director, Labour Relations, Department of Consumer and Employment Protection, and who are employed in the callings of Agricultural Scientist, Architect, Architectural Graduate, Community Corrections Officer, Dental Officer, Dietician, Educational Officer, Engineer, Geologist, Laboratory Technologist, Land Surveyor, Legal Officer, Librarian, Medical Officer, Pharmacist, Planning Officer, Podiatrist, Psychiatrist, Clinical Psychologist, Psychologist, Quantity Surveyor, Medical Imaging Technologist, Nuclear Medicine Technologist, Radiation Therapist, Scientific Officer, Social Worker, Therapist (Occupational, Physio or Speech), Veterinary Scientist, or any other professional calling determined by the Executive Director, Labour Relations, Department of Consumer and Employment Protection, shall be entitled to annual salaries as follows:

Level	Salary Per Annum$	Arbitrated Safety Net Adjustment$	Total Salary Per Annum$
Level 2/4			
1st year	28306	10330	38636
2nd year	29748	10330	40078
3rd year	31346	10330	41676
4th year	33344	10330	43674
5th year	36442	10225	46667
6th year	38461	10121	48582
Level 5			
1st year	40433	10121	50554
2nd year	41766	10121	51887
3rd year	43151	10121	53272
4th year	44588	10121	54709
Level 6			
1st year	46899	10121	57020
2nd year	48470	10121	58591
3rd year	50096	10121	60217
4th year	51832	10121	61953
Level 7			
1st year	54494	10121	64615
2nd year	56336	10121	66457
3rd year	58340	10121	68461

Level	Salary Per Annum$	Arbitrated Safety Net Adjustment$	Total Salary Per Annum$
Level 8			
1st year	61597	10121	71718
2nd year	63930	10121	74051
3rd year	66823	10121	76944
Level 9			
1st year	70436	10121	80557
2nd year	72877	10121	82998
3rd year	75661	10121	85782
Class 1	79871	10121	89992
Class 2	84081	10121	94202
Class 3	88289	10121	98410
Class 4	92499	10121	102620

PARTICLE BOARD EMPLOYEES' AWARD, 1964

Whereas an error occurred in the Publication of the 2008 State Wage Case "Variation Schedule" for the Particle Board Employees' Award, 1964 at 88 WAIG 1371, the "Variation Schedule" is hereby republished. Specifically the total junior rate "Between 20 and 21 years of age" incorrectly appeared as 529.53, however it should have read as 509.87.

Dated at Perth this 2nd day of June 2009.

(Sgd.) J SPURLING,
[L.S.] Registrar.

Particle Board Employees' Award, 1964

1B. - MINIMUM ADULT AWARD WAGE

(1) No employee aged 21 or more shall be paid less than the minimum adult award wage unless otherwise provided by this clause.

(2) The minimum adult award wage for full-time employees aged 21 or more is $557.40 per week payable on and from the first pay period on or after 1 July 2008.

(3) The minimum adult award wage is deemed to include all State Wage order adjustments from State Wage Case Decisions.

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

(5) Employees under the age of 21 shall be paid no less than the wage determined by applying the percentage prescribed in the junior rates provision in this award to the minimum adult award wage.

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

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

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

(a) Apply to all work in ordinary hours.

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

(9) Minimum Adult Award Wage

The rates of pay in this award include the minimum weekly wage for employees aged 21 or more payable under the 2008 State Wage order decision. Any increase arising from the insertion of the minimum wage will be offset against any equivalent amount in rates of pay received by employees whose wages and conditions of employment are regulated by this award which are above the wage rates prescribed in the award. Such above award payments include wages payable pursuant to enterprise agreements, consent awards or award variations to give effect to enterprise agreements and over award arrangements. Absorption which is contrary to the terms of an agreement is not required.

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

(10) Adult Apprentices

(a) Notwithstanding the provisions of this clause, an apprentice, 21 years of age or more, shall not be paid less than $488.40 per week on and from the commencement of the first pay period on or after 1 July 2008.

(b) The rate paid in the paragraph above to an apprentice 21 years of age or more is payable on superannuation and during any period of paid leave prescribed by this award.

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

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

5. - WAGES

It is a term of this award that the union undertakes for the duration of the Principles determined by the Commission in Court Session in Application No. 704 of 1991 not to pursue any extra claims, award or over award except when consistent with the State Wage Principles.

(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				557.40
Trainee Operator				
Yard Hand				
Packaging				
Machine Assistant				
Factory Hand				
Grade 2				557.40
Flaker/Knife Room Operator				
Overlay Operator				
Log Deck/Chipping Operator				
Glue Mixer				
Paper Impregnation Operator				
Log Tower Operator				
Gatekeeper				
Grade 3				557.40
Residue & Waste Operator				
Flooring & Grading Operator				
Log Deck Loader				
Knife Setter & Grinder & Changing Knives				
Grade 4	362.70	15.90	194.00	572.60
Laboratory Assistant				
Finishing Line				
Logyard Loader				
Panel Saw Operator				
Sanding & Grading Operator				
Grade 5	378.70	15.90	194.00	588.60
Drier Operator				
Despatch				
Forming Machine Operator				
Relief Operator				
Press Operator				
Resin Plant Operator				
Grade 6	396.30	15.90	194.00	606.20
Senior Melamine Operator				
Senior Finishing Operator				
Senior Shift Operator				

(2) Junior Employee: (percentage of sum of Grade 1 rate of wage $557.40 and supplementary payments prescribed):

	%	BASE RATE$	SUPPLE-MENTARY PAYMENT$	ASNA	AWARD RATE$
Between 15 and 16 years of age	40				223.00
Between 16 and 17 years of age	50				278.70
Between 17 and 18 years of age	60				334.50
Between 18 and 19 years of age	70				390.20
Between 19 and 20 years of age	80				446.00
Between 20 and 21 years of age	95	310.46	15.10	184.31	509.87

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.

(3) Leading Hands:

(a) A leading hand, if placed in charge of three to ten employees shall be paid $14.90 per week in addition to the appropriate wage prescribed.

(b) A leading hand, if placed in charge of eleven to twenty employees shall be paid $22.40 per week in addition to the appropriate wage prescribed.

(4) Supplementary Payments:

(a) As shown in the rates payable under the provisions of this clause -

(i) an employee, other than a junior employee, shall be paid a supplementary payment of $15.90 per week; and

(ii) a junior employee shall be paid per week a percentage of the $15.90 being the percentage which appears against his/her age in subclause (2) of this clause.

(b) (i) The supplementary payments as prescribed in paragraph (a) hereof are in substitution for any overaward payment as defined hereunder. Any such over award payment applicable at the time of the introduction of supplementary payments into the Award shall be reduced by the amount of the supplementary payment prescribed for the classification concerned.

(ii) "Over award payment" is defined as the amount (whether it be termed "over award payment", "attendance bonus", "service increment", or any term whatsoever) which an employee would receive in excess of the "base rate" for the classification in which such employee is engaged, provided that such payment shall exclude overtime, shift allowances, penalty rates, disability allowances, fares and travelling time allowances and any other ancillary payments of a like nature prescribed by this Award.

(iii) Subject to subclause (5) of this clause, the Award rate prescribed in subclauses (1) and (2) of this clause and which includes the supplementary payment also prescribed within this clause shall be paid for all purposes of the Award.

(c) The supplementary payments prescribed by this clause shall not be payable to employees during their first month of employment with the employer.

(5) Calculation of Wage Rates - State Wage Case Decisions:

In circumstances where award wages are to be increased as a result of State Wage Case Decisions, the amount of the increase shall be calculated and applied to the wages clause as follows:

(a) Where the State Wage Case Decision provides that Award wages be increased by a flat amount, that amount shall be applied to the award Base Rate only.

(b) Where the State Wage Case Decision provides that Award wages be increased by a percentage amount, that amount shall be applied to the award Base Rate and the Supplementary Payment.

Such a percentage increase shall also apply to the leading hand allowances, the special payment and the disability allowances.

(c) In the instances outlined in paragraphs (a) and (b) hereof the new award rate shall be calculated by adding the award Base Rate and the Supplementary Payment.

(d) Where the State Wage Case Decision provides for a plateau formula (that is, a combination of a percentage increase and a flat money amount), the plateau level shall be determined by reference to the award Base Rates, and the Award rate and the Supplementary Payment shall be calculated by subtracting the award Base Rate from the Award rate.

PROCEDURAL DIRECTIONS AND ORDERS—

2009 WAIRC 00330

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ALAN CHARLES CARSTAIRS
	APPLICANT
	-v-
	CITY OF WANNEROO
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	THURSDAY, 28 MAY 2009
FILE NO.	U 81 OF 2009
CITATION NO.	2009 WAIRC 00330

Result	Extension of time granted for respondent to file answering statement

Direction

WHEREAS an application was lodged in the Commission pursuant to section 29(1)(b)(i) of the *Industrial Relations Act, 1979* on 29 April 2009;

AND WHEREAS on 27 May 2009 the respondent requested an extension of 7 days in which to file its answering statement;

AND WHEREAS on 27 May 2009 the applicant advised he does not object to this request;

AND WHEREAS the Commission considers there is no disadvantage to either party to grant this request;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under Regulation 36 of the *Industrial Relations Commission Regulations 2005* hereby direct -

THAT the time for filing any answering statement in this application be extended to Monday, 8 June 2009.

(Sgd.) A R BEECH,
[L.S.] Chief Commissioner.

RECLASSIFICATION APPEALS—

2009 WAIRC 00334

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPELLANT
	-v-
	DIRECTOR GENERAL, DISABILITY SERVICES COMMISSION
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER S WOOD
DATE	WEDNESDAY, 3 JUNE 2009
FILE NO	PSA 32 OF 2008
CITATION NO.	2009 WAIRC 00334

Result	Application discontinued

Order

WHEREAS this is an appeal pursuant to Section 80E of the Industrial Relations Act 1979; and

WHEREAS on 21 May 2009 the appellant advised the Public Service Arbitrator that the appellant wished to withdraw the appeal; 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 Public Service Arbitrator, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders:

THAT this appeal be, and is hereby discontinued.

(Sgd.) S WOOD,
Commissioner,
[L.S.] Public Service Arbitrator.

2009 WAIRC 00335

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPELLANT
	-v-
	DIRECTOR GENERAL, DISABILITY SERVICES COMMISSION
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER S WOOD
DATE	WEDNESDAY, 3 JUNE 2009
FILE NO	PSA 33 OF 2008
CITATION NO.	2009 WAIRC 00335

Result Application discontinued

Order

WHEREAS this is an appeal pursuant to Section 80E of the Industrial Relations Act 1979; and

WHEREAS on 21 May 2009 the appellant advised the Public Service Arbitrator that the appellant wished to withdraw the appeal; 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 Public Service Arbitrator, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders:

THAT this appeal be, and is hereby discontinued.

(Sgd.) S WOOD,
Commissioner,
[L.S.] Public Service Arbitrator.

2009 WAIRC 00337

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPELLANT
	-v-
	DIRECTOR GENERAL, DISABILITY SERVICES COMMISSION
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER S WOOD
DATE	WEDNESDAY, 3 JUNE 2009
FILE NO	PSA 34 OF 2008
CITATION NO.	2009 WAIRC 00337

Result Application discontinued

Order

WHEREAS this is an appeal pursuant to Section 80E of the Industrial Relations Act 1979; and

WHEREAS on 21 May 2009 the appellant advised the Public Service Arbitrator that the appellant wished to withdraw the appeal; 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 Public Service Arbitrator, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders:

THAT this appeal be, and is hereby discontinued.

(Sgd.) S WOOD,
Commissioner,
[L.S.] Public Service Arbitrator.

2009 WAIRC 00336

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPELLANT
	-v-
	DIRECTOR GENERAL, DISABILITY SERVICES COMMISSION
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER S WOOD
DATE	WEDNESDAY, 3 JUNE 2009
FILE NO	PSA 39 OF 2008
CITATION NO.	2009 WAIRC 00336

Result Application discontinued

Order

WHEREAS this is an appeal pursuant to Section 80E of the Industrial Relations Act 1979; and

WHEREAS on 22 May 2009 the appellant advised the Public Service Arbitrator that the appellant wished to withdraw the appeal; 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 Public Service Arbitrator, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders:

THAT this appeal be, and is hereby discontinued.

(Sgd.) S WOOD,
Commissioner,
[L.S.] Public Service Arbitrator.

2009 WAIRC 00344

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARIE-HELENE MALLET
	APPLICANT
	-v-
	DEPT. OF CONSUMER & EMPLOYMENT PROTECTION
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER P E SCOTT
HEARD	BY WRITTEN SUBMISSIONS
DELIVERED	WEDNESDAY, 3 JUNE 2009
FILE NO.	PSA 7 OF 2007
CITATION NO.	2009 WAIRC 00344

CatchWords	Industrial Law (WA) - reclassification appeal - capacity of applicant to refer particular types of "industrial matters" to Arbitrator - jurisdiction of Arbitrator - Industrial Relations Act 1979 (WA) ss 80E, 80F.
Result	Application to be represented by legal practitioner dismissed
Representation	
Applicant	Mr J Hammond (of Counsel)
Respondent	Mr K Trainer (as agent)

Reasons for Decision

1 Reasons for Decision in respect of the applicant's application to be represented by a legal practitioner in her application regarding the level of classification of the position held by her issued on 12 March 2009. Those Reasons noted that ground (c) of the applicant's amended grounds of appeal raised an issue of the respondent's Classification Review Committee (the CRC) not giving sufficient weight to the applicant's position being abolished, a new position being created at a higher level, and that the applicant was encouraged to apply for the new position. At paragraph 11 of those Reasons, I indicated that those issues may go beyond those which a government officer may refer to the Public Service Arbitrator (the Arbitrator) pursuant to s 80E (2)(a) of the *Industrial Relations Act 1979* (the Act) by reference to s 80F. It was agreed that the parties should address this matter by way of written submissions and they have done so.

2 I have taken account of the parties' written submissions in reaching these conclusions. Ultimately though this is a question of statutory construction and jurisdiction.

3 The jurisdiction of the Arbitrator is set out in s 80E – Jurisdiction of Arbitrator of the Act as being:

> ***"80E. Jurisdiction of Arbitrator***
>
> *(1) Subject to Division 3 of Part II and subsections (6) and (7), an Arbitrator has exclusive jurisdiction to enquire into and deal with any industrial matter relating to a government officer, a group of government officers or government officers generally.*
>
> *(2) Without limiting the generality of subsection (1) the jurisdiction conferred by that subsection includes jurisdiction to deal with —*
>
> *(a) a claim in respect of the salary, range of salary or title allocated to the office occupied by a government officer and, where a range of salary was allocated to the office occupied by him, in respect of the particular salary within that range of salary allocated to him; and*
>
> *(b) a claim in respect of a decision of an employer to downgrade any office that is vacant.*
>
> …
>
> *(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."*

4 Division 3 of Part II and subsections (6) and (7) have no application to this matter. An "industrial matter" is defined in s 7 of the Act to mean "any matter affecting or relating or pertaining to the work, privileges, rights or duties of employers or employees in any industry or of any employer or employee therein and, without limiting the generality of that meaning, includes…", and a number of specific types of matters which are encompassed by the term "industrial matter" are set out.

5 **Section 80F- By whom matters may be referred to Arbitrator** provides that certain types of matters may be referred to the Arbitrator by particular persons or organisations. It is notable that the only type of industrial matter the legislation allows a government officer concerned to refer is a claim mentioned in s 80E(2)(a) being:

> *"a claim in respect of the salary, range of salary or title allocated to the office occupied by a government officer and, where a range of salary was allocated to the office occupied by him, in respect of the particular salary within that range of salary allocated to him:…"*

6 There is no other provision for the government officer concerned to refer any other matter to the Arbitrator.

7 It ought to be noted that the legislation does not refer to an "appeal", the reference to an appeal is of historical significance only. A matter referred to the Arbitrator under s 80E(2)(a), commonly referred to as a reclassification appeal, is usually against the employer's decision rejecting the government officer's claim of reclassification of the office occupied by the government officer or in some other way a claim in respect of the salary, range of salary or title allocated to the office. It is not a claim of unfair treatment which may be dealt with. It is limited to the salary, range of salary or title allocated to the office occupied by the government officer. That means that it is about the office not the officer; it is about the salary, range of salary or title allocated to the office, not about the abolition of the position, the creation of a new position or an appointment to a position.

8 I note that s 80E(2)(b) refers to a specific type of industrial matter being "a claim in respect of a decision of an employer to downgrade any office that is vacant". Such a claim is not within the type of matter which a government officer may refer to the Arbitrator (s 80F(2)). The only persons or parties who may refer such a claim are an organisation or an employer (s 80F(3)). There is no provision for an officer to refer to the Arbitrator any claim of unfair treatment in the process of abolition of and/or creation of and/or appointment to a position.

9 The claim set out in the Notice of Appeal to the Public Service Arbitrator is expressed in terms which challenge the work value assessment made by the employer and is typical of the type of claim referred to the Arbitrator in what is called a reclassification appeal. Such a claim is assessed by reference to the Work Value test *(Health Services Union of Western Australia (Union of Workers) v Director General of Health in Right of the Minister for Health as the Metropolitan Health Service at PathWest Laboratory Medicine WA (2008 WAIRC 00253).* That test deals with the requirement for a demonstration of a significant net addition to the work value of a position for the purpose of determining whether the position ought to be reclassified. Such a matter involves a consideration of the requirements of the position occupied by the government officer and the work value to be attached to that position. The work value is assessed according to the nature of the work, skills and responsibilities of the position and the circumstances under which it is performed.

10 In that context the amended grounds of appeal which deal with the considerations of the CRC about the position are in keeping with the requirements of s 80E(2)(a) being a claim of salary, range of salary or title allocated to the office occupied by the government officer. However, considerations of the weight which ought to be given by the CRC to the applicant's position being abolished and a new position being created at a higher level, and whether or not the applicant was encouraged by her director to apply for that new position do not relate to the salary, range of salary, or title allocated to the office occupied by the officer and therefore are not matters which a government officer may refer to the Arbitrator. Those matters go to questions of treatment and fairness in the respondent's abolition of one position, the creation of a new position, and the filling of that new position.

11 In those circumstances ground (c) of the application is not a matter which can be taken into account as justifying the applicant's claim and therefore cannot be a ground of that claim. Therefore it is not a matter about which the applicant can be heard or represented by a legal practitioner.

12 In her submission the applicant referred to the comment of the Public Service Arbitrator contained in *Stephen Wall v Department of Fisheries (2004 WAIRC 1294)* that:

> *"Those issues do not and should not override the principles on which reclassification appeals proceed- i.e. taking account of the circumstances as they existed at the date the reclassification was sought."*

13 The issue before the Arbitrator in that matter was that the respondent had announced an intention to restructure the organisation and argued that on that basis the reclassification appeal should not be heard at all. The Arbitrator referred to the decision of Fielding C in PSA 76 of 1998 which dealt with a similar situation of an employer raising the issue of future restructuring as an impediment to a reclassification. He said:

> *"Essentially the classification of an office simply involves the assessment of the work value of the office at the time of the lodgement of the appeal. The issues raised by the Committee are not relevant to that exercise… It will always be open to the Department at any time, irrespective of the reclassification to carry out a restructure."*

14 The context in which the comment referred to by the applicant in this matter was made was "the work value of the office at the time of lodgement of the appeal". That was what was referred to as the "circumstances as they existed at the date the reclassification was sought". Accordingly, the comment referred to by the applicant is not relevant to this matter.

15 In conclusion I find that the issue raised in ground (c) is not one which justifies the applicant being represented by a legal practitioner. An Order shall issue dismissing the applicant's application to be represented by a legal practitioner.

2009 WAIRC 00345

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARIE-HELENE MALLET
	APPLICANT
	-v-
	DEPT. OF CONSUMER & EMPLOYMENT PROTECTION
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 3 JUNE 2009
FILE NO	PSA 7 OF 2007
CITATION NO.	2009 WAIRC 00345

Result Application to be represented by legal practitioner dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS on the issue of the applicant's application to be represented by a legal practitioner the parties addressed the matter by way of written submissions;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the applicant's application to be represented by legal practitioner be and is hereby dismissed.

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

RECLASSIFICATION APPEALS—Notation of—

File Number	Appellant	Respondent	Commissioner	Decision	Finalisation Date
PSA 3/2009	The Civil Service Association of Western Australia Incorporated	The Chief Executive Officer, Western Australian Museum	Smith SC	Discontinued	20/05/2009
PSA 4/2009	The Civil Service Association of Western Australia Incorporated	The Chief Executive Officer, Western Australian Museum	Smith SC	Discontinued	20/05/2009

OCCUPATIONAL SAFETY AND HEALTH ACT—Matters Dealt With—

2009 WAIRC 00246

REFERRAL OF DISPUTE RE TERMINATION OF SAFETY REPRESENTATIVE

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING & KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	WEBFORGE
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 4 MAY 2009
FILE NO/S	OSHT 1 OF 2009
CITATION NO.	2009 WAIRC 00246

Result	Order issued

Order

A copy of the Tribunal's order regarding compliance with reg 98(3) of the *Industrial Relations Commission Regulations 2005* is to be served forthwith upon the respondent Webforge, 24 Tennant Street, Welshpool WA.

A copy of the notice of referral is to be served forthwith upon the respondent. For the purpose of service forthwith the Tribunal will accept service by prepaid post, or in electronic format or facsimile.

The applicant is to file in the Western Australian Industrial Relations Commission Registry, 16th Floor, 111 St Georges Terrace, Perth within 24 hours of service a statutory declaration of service (Form 4).

(Sgd.) S M MAYMAN,
[L.S.] Commissioner.

2009 WAIRC 00288

REFERRAL OF DISPUTE RE DISCRIMINATION AGAINST SAFETY AND HEALTH REPRESENTATIVE

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING & KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	WEBFORGE
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 18 MAY 2009
FILE NO	OSHT 1 OF 2009
CITATION NO.	2009 WAIRC 00288

Result	Application discontinued
Representation	
Applicant	Mr T. Kucera (of counsel)
Respondent	Ms M. Saraceni (of counsel

Order

WHEREAS an application was lodged in the Occupational Safety and Health Tribunal pursuant to s 35C of the *Occupational Safety and Health Act 1984*; and

WHEREAS the applicant sought to discontinue the application; and

WHEREAS the Tribunal has formed the view it is appropriate to discontinue the application;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me, hereby orders –

THAT this application be, and is hereby discontinued.

(Sgd.) S M MAYMAN,
[L.S.] Commissioner.

2009 WAIRC 00304

REFERRAL OF DISPUTE RE ENTITLEMENT TO PAY AND OTHER BENEFITS

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	ALEJANDRO BAYATO
	APPLICANT
	-v-
	PACIFIC INDUSTRIAL COMPANY
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 25 MAY 2009
FILE NO/S	OSHT 7 OF 2009
CITATION NO.	2009 WAIRC 00304

Result	Application discontinued
Representation	
Applicant	Mr J. Nicholas (of counsel)
Respondent	Mr J. Blackburn and Ms L. Gibbs (both of counsel)

Order

WHEREAS this is an application pursuant to s 28(2) of the *Occupational Safety and Health Act 1984*;

AND WHEREAS on 13 May 2009 the applicant filed a Notice of Discontinuance in respect of the application;

AND WHEREAS on 14 May 2009 the Tribunal convened a conference for the purpose of conciliation between the parties;

AND WHEREAS at that conference the parties agreed the application be discontinued;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby order –

THAT this application be, and is hereby discontinued

(Sgd.) S M MAYMAN,
[L.S.] Commissioner.

2009 WAIRC 00309

REFERRAL OF DISPUTE RE ENTITLEMENT TO PAY AND OTHER BENEFITS

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	MATTHEW DYE
	APPLICANT
	-v-
	KENDLE CONSTRUCTION
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 25 MAY 2009
FILE NO/S	OSHT 9 OF 2009
CITATION NO.	2009 WAIRC 00309

Result	Application discontinued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

WHEREAS this is an application pursuant to s 28(2) of the *Occupational Safety and Health Act 1984*;

AND WHEREAS on 11 May 2009 the applicant filed a Notice of Discontinuance in respect of the application;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby order –

THAT this application be, and is hereby discontinued

(Sgd.) S M MAYMAN,
[L.S.] Commissioner.

2009 WAIRC 00308

REFERRAL OF DISPUTE RE ENTITLEMENT TO PAY AND OTHER BENEFITS

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SITTING AS
THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	ADRIAN GRAHAM
	APPLICANT
	-v-
	RIGGING DOGGING SCAFFOLDING CONSTRUCTION PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 25 MAY 2009
FILE NO/S	OSHT 10 OF 2009
CITATION NO.	2009 WAIRC 00308

Result	Application discontinued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

WHEREAS this is an application pursuant to s 28(2) of the *Occupational Safety and Health Act 1984*;

AND WHEREAS on 11 May 2009 the applicant filed a Notice of Discontinuance in respect of the application;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby order –

THAT this application be, and is hereby discontinued

(Sgd.) S M MAYMAN,
[L.S.] Commissioner.

2009 WAIRC 00343

REFERRAL OF DISPUTE RE ENTITLEMENT TO PAY AND OTHER BENEFITS

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SITTING AS
THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	ANDREW HEMPSTEAD
	APPLICANT
	-v-
	L&T RIGGING & SCAFFOLDING PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 2 JUNE 2009
FILE NO/S	OSHT 11 OF 2009
CITATION NO.	2009 WAIRC 00343

Result	Application discontinued
Representation	
Applicant	Mr J Nicholas (of counsel)
Respondent	Mr J Blackburn and Ms L Gibbs (both of counsel)

Order

WHEREAS this is an application pursuant to s 28(2) of the *Occupational Safety and Health Act 1984*;

AND WHEREAS on 11 May 2009 the applicant filed a Notice of Discontinuance in respect of the application;

AND WHEREAS on 14 May 2009 the Tribunal convened a conference for the purpose of conciliation between the parties;

AND WHEREAS subsequent to that conference the parties agreed the application be discontinued;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby order –

THAT this application be, and is hereby discontinued

(Sgd.) S M MAYMAN,
[L.S.] Commissioner.

2009 WAIRC 00307

REFERRAL OF DISPUTE RE ENTITLEMENT TO PAY AND OTHER BENEFITS.

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	SHANE NULSEN
	APPLICANT
	-v-
	BOOM LOGISTICS LTD
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 25 MAY 2009
FILE NO/S	OSHT 14 OF 2009
CITATION NO.	2009 WAIRC 00307

Result	Application discontinued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

WHEREAS this is an application pursuant to s 28(2) of the *Occupational Safety and Health Act 1984*;

AND WHEREAS on 11 May 2009 the applicant filed a Notice of Discontinuance in respect of the application;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby order –

THAT this application be, and is hereby discontinued

(Sgd.) S M MAYMAN,
[L.S.] Commissioner.

2009 WAIRC 00339

REFERRAL OF DISPUTE RE ENTITLEMENT TO PAY AND OTHER BENEFITS

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	GERRY NEWMAN
	APPLICANT
	-v-
	JOHN HOLLAND PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 2 JUNE 2009
FILE NO	OSHT 13 OF 2009
CITATION NO.	2009 WAIRC 00339

Result	Application discontinued
Representation	
Applicant	Mr J Nicholas (of counsel)
Respondent	Mr J Blackburn and Ms L Gibbs (both of counsel)

Order

WHEREAS this is an application pursuant to s 28(2) of the *Occupational Safety and Health Act 1984*;

AND WHEREAS on 14 May 2009 the Tribunal convened a conference for the purpose of conciliation between the parties;

AND WHEREAS the matter was listed for hearing on 27 May 2009;

AND WHEREAS on 26 May 2009 the applicant filed a Notice of Discontinuance in respect of the application;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby order –

THAT this application be, and is hereby discontinued

(Sgd.) S M MAYMAN,
Commissioner.

[L.S.]

2009 WAIRC 00347

REFERRAL OF DISPUTE RE DISCRIMINATION AGAINST SAFETY AND HEALTH REPRESENTATIVE

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	MICHAEL SOREL
	APPLICANT
	-v-
	WEBFORGE
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	WEDNESDAY, 3 JUNE 2009
FILE NO/S	OSHT 20 OF 2009
CITATION NO.	2009 WAIRC 00347

Result	Application discontinued
Representation	
Applicant	Mr T Kucera (of counsel)
Respondent	Ms M Saraceni (of counsel)

Order

WHEREAS this is an application pursuant to s 35C of the *Occupational Safety and Health Act 1984*;

AND WHEREAS the Tribunal listed the matter for preliminary hearing on 13 May 2009;

AND WHEREAS the Tribunal further listed the matter for hearing and determination on 29 May 2009;

AND WHEREAS on 27 May 2009 the applicant filed a Notice of Discontinuance in respect of the application;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby order –

THAT this application be, and is hereby discontinued

(Sgd.) S M MAYMAN,
[L.S.] Commissioner.

2009 WAIRC 00280

REFERRAL OF DISPUTE RE REVIEW OF IMPROVEMENT NOTICE 70019572

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	THE OWNERS OF ARGOSY COURT STRATA PLAN 21513
	APPLICANT
	-v-
	WORKSAFE WESTERN AUSTRALIA COMMISSIONER
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 12 MAY 2009
FILE NO/S	OSHT 19 OF 2009
CITATION NO.	2009 WAIRC 00280

Result	Order issued

Order

WHEREAS the Occupational Safety and Health Tribunal has received a request for further review of Improvement Notice 70019572 pursuant to s 51A of the *Occupational Safety and Health Act 1984*;

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

1. A copy of the notice of referral is to be served forthwith upon the respondent Nina Lyhne, the WorkSafe Western Australia Commissioner, Westcentre, 1260 Hay Street, West Perth WA 6005. For the purpose of service forthwith the Tribunal will accept service by prepaid post, or in electronic format or facsimile.
2. A copy of the Tribunal's order is to be served forthwith upon the respondent
3. The applicant is to file in the Western Australian Industrial Relations Commission Registry, 16th Floor, 111 St Georges Terrace, Perth within 24 hours of service a statutory declaration of service (Form 4).

(Sgd.) S M MAYMAN,
[L.S.] Commissioner.

2009 WAIRC 00331

REFERRAL OF DISPUTE RE REVIEW OF IMPROVEMENT NOTICE 70019572

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	THE OWNERS OF ARGOSY COURT STRATA PLAN 21513
	APPLICANT
	-v-
	WORKSAFE WESTERN AUSTRALIA COMMISSIONER
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	FRIDAY, 29 MAY 2009
FILE NO/S	OSHT 19 OF 2009
CITATION NO.	2009 WAIRC 00331

Result	Revocation of WorkSafe Commissioner's decision
Representation	
Applicant	Mr D McCashney (of counsel)
Respondent	Mr K Burgoyne (of counsel)

Order

AND WHEREAS the applicant sought, pursuant to s 51A of the *Occupational Safety and Health Act 1984* ('the Act'), to have the WorkSafe Western Australia Commissioner's ('the Commissioner') decision of 5 May 2009 subject to further review by the Occupational Safety and Health Tribunal ('the Tribunal');

AND WHEREAS the Tribunal listed the matter for mention on 29 May 2009;

AND WHEREAS the Tribunal heard from the parties on the issue including the powers of the Tribunal pursuant to s 51A(5)(c) of the Act; and

AND WHEREAS the Tribunal understands the applicant and the respondent consent to orders issuing in these proceedings which revoke the Commissioner's decision and cancel the improvement notice.

NOW THEREFORE having regard to s 51A(5)(c) of the Act and s 26(1) of the *Industrial Relations Act 1979*, I the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979* hereby order –

1. THAT the WorkSafe Western Australia Commissioner's decision of 5 May 2009 be revoked in accordance with s 51A(5)(c) of the *Occupational Safety and Health Act 1984*;
2. THAT Improvement Notice number 70019572 be cancelled; and
3. THAT this order shall have effect on and from 29 May 2009.

(Sgd.) S M MAYMAN,
[L.S.] Commissioner.

2009 WAIRC 00306

REFERRAL OF DISPUTE RE ENTITLEMENT TO PAY AND OTHER BENEFITS

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	ANTHONY TUCK
	APPLICANT
	-v-
	COALCLIFF PLANT HIRE
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 25 MAY 2009
FILE NO/S	OSHT 16 OF 2009
CITATION NO.	2009 WAIRC 00306

Result	Application discontinued
Representation	
Applicant	Mr J Nicholas (of counsel)
Respondent	Mr J Blackburn and Ms L Gibbs (both of counsel)

Order

WHEREAS this is an application pursuant to s 28(2) of the *Occupational Safety and Health Act 1984*;

AND WHEREAS on 13 May 2009 the applicant filed a Notice of Discontinuance in respect of the application;

AND WHEREAS on 14 May 2009 the Tribunal convened a conference for the purpose of conciliation between the parties;

AND WHEREAS at that conference the parties agreed the application be discontinued;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby order –

THAT this application be, and is hereby discontinued

(Sgd.) S M MAYMAN,
[L.S.] Commissioner.