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FULL BENCH—Appeals against decision of Commission—

2010 WAIRC 00849

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	:	2010 WAIRC 00849
CORAM	:	THE HONOURABLE JUSTICE RL LE MIERE, ACTING PRESIDENT CHIEF COMMISSIONER AR BEECH COMMISSIONER SJ KENNER
HEARD	:	THURSDAY, 1 JULY 2010
DELIVERED	:	FRIDAY, 27 AUGUST 2010
FILE NO.	:	FBA 7 OF 2009
BETWEEN	:	LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH Appellant AND THE DIRECTOR GENERAL, DEPARTMENT OF EDUCATION AND TRAINING Respondent

ON APPEAL FROM:

Jurisdiction	:	Western Australian Industrial Relations Commission
Coram	:	Commissioner J L Harrison
Citation	:	[2009] WAIRC 01232; (2009) 89 WAIG 2478
File No	:	C 35 of 2009

CatchWords	:	Industrial law (WA) - Appeal against finding of a single Commissioner - Public interest - Compulsory conference - Power of Commission to make Order - Need for order to issue urgently - Impending industrial action - Order to prevent industrial action - Order not binding on union members - Denial of natural justice and procedural fairness - Reliance on witness statements - Adjournments - Length of adjournment during proceedings - Opportunity to adequately present case
Legislation	:	*Industrial Relations Act 1979* (WA) – s6(c), s7, s26(1)(a), s26(1)(b), s42(1), s44, s44(1), (3), (5), (6), (6)(ba), (ba)(i), (ba)(ii), (bb), (bb)(i), (6a), (7)(b), s49(2a), s49(4)(a)

Result	:	Appeal refused on ground 1
		Appeal allowed on grounds 2 and 4

Representation:

Counsel:

Appellant	:	Mr RL Hooker (of counsel)
Respondent	:	Mr RL Bathurst (of counsel)

Case(s) referred to in reasons:

Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2005] HCA 72; (2005) 225 CLR 88

Baba v Parole Board of New South Wales (1986) 5 NSWLR 338

Hodgens v Gunn; Ex Parte Hodgens [1990] 1 Qd R 1

Kioa v West [1985] HCA 81; (1985) 159 CLR 550

Knauder v Moore [2002] FCAFC 404; (2002) 127 FCR 327

L v Human Rights and Equal Opportunities Commission [2006] FCAFC 114; (2006) 233 ALR 432

Marine Hull and Liability Insurance Co Ltd v Hurford (1985) 10 FCR 234

McGibbon v Linkenbagh (1996) 41 ALD 219

Nguyen v Minister for Immigration and Citizenship [2007] FCAFC 38

R v Secretary of State of Transport; Ex Parte Pegasus Holdings (London) Ltd [1988] 1 WLR 990

Re Refugee Review Tribunal; Ex Parte Aala [2000] HCA 57 (2000) 204 CLR 82

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

Scott v Handley [1999] FCA 404

Stead v State Government Insurance Commission [1986] HCA 54; (1986) 161 CLR 141

Sullivan v Department of Transport (1978) 20 ALR 323

SZBEL v Minister for Immigration and Multicultural and Indigenours Affairs [2006] HCA 63; (2006) 228 CLR 152

Touma v Saparas [2000] NSWCA 11

Reasons for Decision

LE MIERE AP, BEECH CC, KENNER C:

Introduction

1 The appellant union appeals from an order of the Commission that the union not undertake industrial action. The order was made at about 6.45 pm on 25 November 2009. The union had arranged strike action in the form of a stop work meeting to commence at 10.00 am the following day. The union presses three grounds of appeal. First, the union says the order was beyond power because of the absence of relevant jurisdictional facts authorising the Commission to make the order. Secondly, the union says that it was denied procedural fairness because it was not given an opportunity to adequately present its case in opposition to the order. Thirdly, the union says that the order was beyond power because it purports to bind the union members as well as the union itself.

A conference is convened

2 In August 2009 the union made claims for a new industrial agreement to replace the Education Assistants' (Government) General Agreement 2007. Following discussions between the union and the respondent Director General, the Director General initiated bargaining for a new industrial agreement by giving notice under s 42(1) of the *Industrial Relations Act 1979* (WA) (the Act). On 26 October education assistants employed by the Education Department commenced industrial action consisting of certain work bans or restrictions. On 5 November the Director General applied to the Commission for an order under s 44(6) of the Act that the union and its members cease industrial action.

3 On 6 November the Commission convened a conference with respect to the Director General's application. At the conference the union informed the Commission that it had no intention to escalate the bans in place at that time.

4 The Commission set down a further conference to be held on 9 November to hear further from the parties with respect to the impact of the bans at workplaces. Prior to 9 November the union informed the Commission that the bans which had been in place since 26 October had been lifted. The Director General did not then pursue the issue of orders and the conference did not proceed on 9 November.

5 On 10 November the Director General sought an urgent conference on the basis that the Education Department had been notified that cleaners, gardeners and education assistants who are members of the union would be attending stop work meetings on 11 November. A conference was convened in the Commission late on 10 November. The union confirmed that the stop work meetings would be taking place throughout Western Australia between 10.30 am and 12 noon on 11 November. At the conference the parties agreed to meet in the Commission the following day in an endeavour to reach agreement on a process for advancing negotiations for a replacement industrial agreement for education assistants. The union undertook to

cease all industrial action for 14 days commencing on 12 November. The Commission informed the parties that it would hear from the parties as to the progress of the negotiations on 18 and 25 November.

Respondent seeks orders to prevent strike

6 Report back conferences were held in the Commission on 18 and 25 November. At the conference on 25 November the Director General requested that the Commission issue orders on the basis that the union's members were to attend a half day stoppage the following day. The Director General sought the following orders:

(a) The union is to notify all its members employed in the Department of Education as education assistants by 5.00 pm on 25 November 2009 that they are not to engage in any further industrial action of any sort whether relating to negotiations for a new industrial agreement to replace the Education Assistants' (Government) General Agreement 2007 or otherwise; and

(b) The union, whether by its officers, employees, agents or otherwise, is not to direct or encourage, in any way, education assistants working in the Department of Education to engage in any further industrial action relating to negotiations for a new industrial agreement to replace the Education Assistants' (Government) General Agreement 2007.

7 The conference commenced at about 3.00 pm on 25 November. At the start of the conference Mr Bathurst, counsel for the Director General, said that he wanted to discuss the strike action that was to take place the following day. The Commissioner said she wanted feedback on bargaining first. Representatives of the union and Director General then reported on the bargaining. A representative of the Director General said that there was more room for discussion. Mr Whitehead, counsel for the union, said that the union was still prepared to negotiate and it was still worth pursuing an agreement. The Commissioner asked if the union would give another undertaking not to engage in industrial action. Mr Whitehead said that a half day stoppage was planned for the following morning. Counsel for the Director General said that the Director General had an application seeking orders to stop industrial action and produced an outline of submissions together with five witness statements in support of the Director General's application. Mr Whitehead said that the union had not seen the Director General's outline of submissions or supporting witness statements before they were produced at the conference and had not had an opportunity to examine them. There was then discussion between the Commissioner and representatives of the Director General and the union concerning the proposed industrial action and its impact upon schools, particularly special schools, and students.

Conference is adjourned

8 Mr Whitehead sought an adjournment to review the evidence presented to the Commission. The Commissioner adjourned the conference for 10 minutes. Mr Whitehead stated that the union representatives would not have sufficient time to review the evidence if the Commissioner was only going to adjourn for 10 minutes. The adjournment lasted nearly 15 minutes during which time the union representatives attempted to examine the outline of submissions and the supporting statements.

Conference is resumed and orders made

9 After the conference resumed the Commissioner asked Mr Whitehead to respond. Mr Whitehead stated that the union representatives had not had sufficient time to review the outline of submissions and attached witness statements and the union was being denied natural justice. Mr Whitehead said that further time would be required in order that the union be able to respond adequately. Mr Whitehead then made statements to the effect that the Director General's evidence was full of holes and there were things in the statements presented that supported the union's claims. Mr Whitehead gave some examples of statements that supported the union position and explained that the documents were full of similar statements that would require further time to examine.

10 The Commissioner read the outline of submissions and asked Mr Whitehead for the union's response to each point contained in the outline. Mr Whitehead responded. The Commissioner stated that she would not rely upon the witness statements attached to the outline of submissions. Mr Whitehead stated that that put the union at a disadvantage because the union representatives had spent the time during the adjournment attempting to examine the statements and the outline of submissions and had had no time to respond. There was further discussion between the Commissioner, the representatives of the Director General and the representatives of the union concerning the planned industrial action and its impact upon schools and students. The conference adjourned at about 5.15 pm for the Commissioner to consider the application.

11 At about 6.45 pm the Commissioner reconvened the conference and produced a minute of proposed orders. There was then a speaking to the minutes, that is, the parties spoke to matters contained in the minute of proposed orders. The Commissioner stated that she would vary the terms of the minute of proposed orders before it was delivered as the decision of the Commission. The Commissioner adjourned the conference. The Commissioner then issued the order of 25 November 2009. The order consists of a preamble and an operative part. The preamble consists of numerous recitals. The operative part of the order is:

NOW THEREFORE having heard Mr R L Bathurst of Counsel on behalf of the applicant and Mr N Whitehead of Counsel on behalf of the respondent, the Commission having regard for the interests of the parties directly involved, the public interest and to prevent the further deterioration of industrial relations, and pursuant to the powers vested in it by the Act, and in particular s44(6)(ba)(ii) and s 44(6)(bb)(i), hereby orders:

1. THAT the respondent by its officers, agents and employees and the respondent's members are not to undertake any further industrial action in any form in relation to negotiations for a new industrial agreement to replace the *Education Assistants' (Government) General Agreement 2007* including stop work meetings and bans and limitations on the normal duties undertaken by education assistants under their contracts of employment with the applicant.

2. THAT the respondent, by its officers, agents and employees are to take reasonable steps to immediately inform its members about the terms of this order and direct its members to comply with this order.

3. THAT this order is to remain in force until revoked or varied by the Commission.

4. THAT both parties have liberty to apply to vary this order.

Grounds of appeal

12 There are four grounds of appeal, one of which is not pressed. The first ground is that in making the order the Commissioner erred in law and acted beyond power in that the Commissioner made the order relying on the jurisdictional fact that it was appropriate in all of the circumstances to do so when that is not a jurisdictional fact that authorises the Commission to make the order. The second ground is that in making the order the Commission denied the union procedural fairness in that the union was not given an opportunity to adequately present its case. The third ground is not pressed. The fourth ground is that the order purported to bind the union's members when the Commission did not have power to do so.

The evidence

13 Section 49(4)(a) of the Act provides that an appeal shall be heard and determined on the evidence and matters raised in the proceedings before the Commission. There is no transcript of the proceedings before the Commissioner. The appellant adduced evidence by affidavits of Jessica Foster and Brett Owen of the evidence and matters raised in the proceedings before the Commissioner. Ms Foster and Mr Owen were present at the conference on 25 November 2009 and swore as to what occurred at the conference and what materials were presented to the Commissioner at the conference. The respondent did not object to the evidence of Ms Foster or Mr Owen. The respondent was right not to object to that evidence. It is evidence of 'the evidence and matters raised in the proceedings before the Commission'.

14 During the hearing of the appeal it emerged that there was an issue as to whether or not the Commissioner had read the witness statements. The respondent's case is that the Commissioner did not read the witness statements. In her affidavit Ms Foster said:

> Harrison C then stated that she would not rely on the witness statements attached to the outline of submissions.

In his affidavit Mr Owen said:

> Harrison C said that the statements attached to the Outline of Submissions were not going to be taken into account.

15 There was no evidence that the Commissioner had not read the witness statements. Counsel for the respondent sought, and was granted, leave to file and rely upon further affidavits from Ms Kristen Berger and Mr Keith Dodd, both of whom were present at the conference, concerning what the Commissioner said about having read the witness statements. We granted the appellant leave to file and serve any affidavits in reply together with any further written submissions.

16 After the hearing of the appeal the respondent filed affidavits of Ms Berger and Mr Dodd each sworn 6 July 2010. In their affidavits Ms Berger and Mr Dodd each swore that after the conference had reconvened, the Commissioner said that she had not read the witness statements and would not be relying upon them.

17 Subsequently, the appellant filed an affidavit of David Kelly, the Union Secretary, sworn 16 July 2010. In his affidavit Mr Kelly said, amongst other things, that when Mr Bathurst handed the written submissions and the witness statements to the Commissioner and to Mr Whitehead, Mr Bathurst said words to the effect that the government were seeking orders to stop the union taking industrial action and that the submissions and statements were in support of the application. Mr Kelly said:

> I instructed Mr Whitehead to ask the Commissioner for an adjournment of approximately 1 hour for us to be given an opportunity to consider the statements and submissions and consider our response. Commissioner Harrison refused that request and instead adjourned the conference for 10 minutes. She said that the adjournment was for us to consider the material that had just been provided by Mr Bathurst.
>
> The adjournment began about 45 minutes after Mr Bathurst had provided the written submissions and witness statements and lasted approximately 10-15 minutes. I spent virtually all of that time reading the witness statements. Because those statements contained over 120 pages of material I was not able to complete this task in the time the adjournment lasted.
>
> I did however note that there were some statements in the witness statements which appeared to support our contentions that the proposed industrial action would not adversely impact on the well being of students. I did not have time to test some of the views contained in the statements with the LHMU delegates who were also in attendance at the conference to assist us in presenting our case.
>
> When the conference resumed, Mr Whitehead advised the Commissioner that we had had insufficient time to consider the material. Commissioner Harrison then advised the parties that she would not be having regard to the statements in making her decision on whether or not to issue orders. I do not remember her saying that she had not read the statements.

The appellant also filed written submissions dated 16 July 2010 and entitled 'Appellant's Written Submissions in Reply'.

18 The respondent then wrote to the associate to the Chief Commissioner objecting to parts of the affidavit of Mr Kelly and responding to some of the submissions made by the appellant in its written submissions in reply. The respondent objected to [4] - [10] and [12] - [14] of Mr Kelly's affidavit on the ground that the evidence in those paragraphs was not evidence in reply to the affidavits of Ms Berger and Mr Dodd and they sought to introduce new evidence for which no leave had been given. The respondent stated that he was content for the Full Bench to determine the matter without the need for additional oral submissions. The appellant then requested, and was granted, leave to file further written submissions in response to the

respondent's objections to the affidavit of Mr Kelly. The appellant filed submissions dated 26 July 2010 and entitled 'Appellant's final written submissions in reply'.

19 An appeal to the Full Bench 'shall be heard and determined on the evidence and matters raised in the proceedings before the Commission': s 49(4)(a). In the exercise of its jurisdiction the Full Bench must 'act according to equity, good conscience, and the substantial merits of the case without regard to technicalities or legal forms': s 26(1)(a). The evidence of Mr Kelly, apart from [14] of his affidavit, is evidence of 'the evidence and matters raised in the proceedings before the Commission' and should be admitted as evidence in the appeal unless admitting the evidence will cause injustice or unfairness to the respondent.

20 The respondent specifically objects to Mr Kelly's evidence that he instructed Mr Whitehead to ask the Commissioner for an adjournment of approximately one hour and that the Commissioner 'refused that request and instead adjourned the conference for 10 minutes' and that the Commissioner 'said that the adjournment was for us to consider the material that had just been provided by Mr Bathurst'. The respondent does not submit that admitting the evidence of Mr Kelly would cause any injustice or unfairness to the respondent. The respondent objects to the evidence on two grounds. The first ground is that the evidence is not in reply to the evidence of Ms Berger and Mr Dodd. The appellant submits that the respondent 'takes an unrealistically narrow view of any potential significance of the evidence led by the affidavits of Mr Dodd and Ms Berger'. Leave was given to the respondent to adduce evidence concerning whether or not the Commissioner read the witness statements. The evidence of Ms Berger and Mr Dodd was confined to that issue. The evidence of Mr Kelly, in effect, seeks to reply to the evidence of Ms Berger and Mr Dodd by leading evidence from which it might be inferred that the appellant was prejudiced by the inadequate adjournment even if the Commissioner did not read the witness statements. The second ground of objection is that Mr Kelly's statement that, in effect, the union requested an adjournment for about an hour contradicts a concession made by Mr Hooker, counsel for the union, at the hearing of the appeal. Mr Hooker said:

> … When one asks the … practical question for the hearing rule, 'what should the decision-maker have done which he didn't do?' It's my submission that she should have given hours rather than minutes. I'm … not suggesting Mr Whitehead did say that (ts 60).

In the appellant's final written submissions in reply the appellant says that the acknowledgement made by counsel was one in respect of the evidence then before the Full Bench.

21 The admission of the evidence of Mr Kelly will not cause any injustice or unfairness to the respondent. It is relevant evidence and should be admitted.

22 We find that the Union did ask the Commissioner for an adjournment of approximately one hour and that the Commissioner refused that request and instead adjourned the conference for 10 minutes. We find that the adjournment lasted approximately 10 to 15 minutes and that the union representatives spent that time trying to read the outline of submissions and the witness statements. We find that after the conference resumed the Commissioner stated that she had not read the witness statements and would not rely upon them. Mr Whitehead then requested a further adjournment and the Commissioner refused that request.

Ground 1 - conditions for exercise of power under s 44(6)

23 The union submits that the Commissioner made the order on the basis that her power to do so was enlivened by her finding that the issue of the order was appropriate in all of the circumstances. The union submits that s 44 does not empower the Commission to make orders of the sort made merely because the Commission considers the order to be appropriate in all of the circumstances. The union submits that s 44(6) confers on the Commission the power to give such directions as it considers appropriate but not to make orders of the sort made by the Commissioner on the basis only that the Commission considers it appropriate. The union submits that the power of the Commission to make orders of the sort made is circumscribed by the provisions of s 44(6)(ba) and (bb). Those provisions do not empower the Commission to make orders merely because it considers them appropriate.

24 This ground of appeal misconceives the decision of the Commissioner. The reasons for the Commissioner's decision are to be found in the order. As we have said the order takes the form of a preamble or recitals followed by a formal order. The union's argument is based on the final recital which says:

> Whereas after hearing from the parties the Commission is of the view that the issuance of order 1 as proposed is appropriate in all of the circumstances

That recital was not in the minute of proposed order issued by the Commissioner. The Commissioner added that recital after hearing from the parties at the speaking to the minutes. The basis on which the Commissioner exercised her power to make the order is to be found in the introductory words of the operative order in which the Commissioner stated:

> … the Commission having regard for the interests of the parties directly involved, the public interest and to prevent the further deterioration of industrial relations, and pursuant to the powers vested in it by the Act, and in particular s44(6)(ba)(ii) and s44(6)(bb)(i), hereby orders …

Those words were contained in the minute of proposed orders and in the final order issued. It is sufficiently clear from those words and the terms of the order taken as a whole that the jurisdictional fact on which the Commissioner made the order was her opinion that the order would prevent the further deterioration of industrial relations between the union and the Director General.

25 Section 44(6)(ba)(i) empowers the Commission, with respect to industrial matters, to give such directions and make such orders as will in the opinion of the Commission prevent the deterioration of industrial relations in respect of the matter in question until conciliation or arbitration has resolved that matter. The Commission was enquiring into and dealing with an industrial matter, that is, the differences between the parties in relation to a new industrial agreement. The Commissioner commenced the conference on 25 November by enquiring as to the state of the negotiations between the parties. Both parties informed the Commissioner, in effect, that they were continuing to negotiate. It was open to the Commissioner to form the

opinion that the orders that she made would prevent the deterioration of industrial relations in respect of the matter in question until conciliation or arbitration resolved the matter. On a fair reading the order discloses that the Commissioner formed that opinion.

26 The order refers to s 44(6)(ba)(ii) and s 44(6)(bb)(i). The Commissioner prepared the order, and the reasons contained within that order, urgently. The reference in the order to s 44(6)(bb)(i) is obscure and the reference to s 44(6)(ba)(ii) appears to be a mistaken reference to s 44(6)(ba)(i). Notwithstanding the apparent error in the drafting of the order it is sufficiently clear that the Commissioner formed the opinion referred to in s 44(6)(ba)(i) and thereby enlivened the exercise of power under s 44(6)(ba)(i). Ground 1 of the appeal fails.

Ground 2 - procedural fairness

27 Certain decisions must be made in accordance with the rules of natural justice or procedural fairness. The threshold question is whether the requirements of procedural fairness apply to the decision of the Commission. It is common ground that they do. The argument on the appeal concerns the extent and content of the rules.

28 In the fourth edition of 'Judicial Review of Administrative Action' Aronson, Dyer & Groves say at [8.10] that there is one general principle concerning the content of the hearing rule which has been repeatedly endorsed. It is that the requirements of the rule are flexible and will be determined by what is fair in all the circumstances of a particular case. In some circumstances the content of the principles of procedural fairness may be diminished (even to nothingness) to avoid frustrating the purpose for which the power was conferred: ***Kioa v West*** [1985] HCA 81; (1985) 159 CLR 550, 615 (Brennan J).

29 The statutory framework within which a decision-maker exercises statutory power is of critical importance when considering what procedural fairness requires: ***SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs*** [2006] HCA 63, (2006) 228 CLR 152, [26] (Gleeson J, Kirby, Hayne, Callinan & Heydon JJ).

30 There are a number of provisions of the Act that are relevant to this issue. A principal object of the Act is to provide means for preventing and settling industrial disputes not resolved by amicable agreement, including threatened, impending and probable industrial disputes, with the maximum of expedition and the minimum of legal form and technicality: s 6(c). In exercising its jurisdiction the Commission shall not be bound by any rules of evidence but may inform itself on any matter in such a way as it thinks just: s 26(1)(b). Section 44(1) empowers a Commissioner to summon any person to attend, at a time and place specified in the summons, at a conference before the Commission. Any person so summoned shall, except for good cause, attend the conference at the time and place specified and continue his attendance as directed by the Commission: s 44(3). A conference under s 44 is held in private unless the Commission determines otherwise: s 44(5). The Commission may exercise the power conferred on it by s 44(1) on the motion of the Commission itself whenever industrial action has occurred or, in the opinion of the Commission, is likely to occur: s 44(7)(b).

31 In ***Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union of Western Australia*** (1989) 69 WAIG 990 Nicholson J, with whom Kennedy and Pidgeon JJ agreed, said:

> As has been seen, the s 44 conference procedure is one characterised by great informality. The reasons are formulated in a setting in which in my opinion, there is no obligation to maintain a record and in which the taking of evidence is either inappropriate or unlikely (999).

32 The nature of a conference convened under s 44 and the circumstances under which it may be convened are such that the power to make orders under s 44(6) is likely to be exercised in circumstances where industrial action is occurring or about to occur. Counsel for the Director-General, Mr Bathurst submitted that s 44 is a lynchpin of the State industrial relations system and is a way of controlling industrial action.

33 The primary purpose of s 44 is not to stop or prevent industrial action. The primary purpose is to endeavour to resolve industrial disputes or differences by conciliation. The powers conferred on the Commission by s 44(6) include the power to make orders as will in the opinion of the Commission prevent the deterioration of industrial relations until conciliation or arbitration has resolved the matter. That will include, in appropriate cases, an order to stop or prevent industrial action.

34 The Act contemplates that a s 44 conference may be held in circumstances which require the matters before the Commission to be dealt with urgently. The need for the urgent exercise of a statutory power can reduce the content of the duty to hear: ***Marine Hull and Liability Insurance Co Ltd v Hurford*** (1985) 10 FCR 234, 241 - 242 (Wilcox J); ***Baba v Parole Board of New South Wales*** (1986) 5 NSWLR 338, 345 (Hope JA), 347 (Mahoney JA), 349 (McHugh JA); ***R v Secretary of State of Transport; Ex Parte Pegasus Holdings (London) Ltd*** [1988] 1 WLR 990, 1000 (Schieman J); ***Hodgens v Gunn; Ex Parte Hodgens*** [1990] 1 Qd R 1, 4 - 5 (Thomas, Shepherdson & Williams JJ agreeing); ***Wasfi v Commonwealth*** (1998) 83 FCR 16, 28 - 30 (Merkel J); ***Pacific Century Productions Pty Ltd v Watson*** [2001] FCA 1424; (2001) 113 FCR 466, [41] (Stone J).

35 The content of the principles of procedural fairness may be diminished to avoid frustrating the purpose for which the power is conferred. But nevertheless the observance of the principles of procedural fairness condition the exercise of the power. Procedural fairness is not to be limited because a power may need to be exercised urgently. It must be established that there was a need for urgent action in the circumstances of the particular case.

36 The circumstances of a s 44 conference may give rise to the need for the urgent exercise of the power to make orders under s 44(6)(ba) or (bb). That may be so where the Commission is asked to make an order to stop or prevent industrial action to prevent the deterioration of industrial relations until conciliation or arbitration has resolved the matter. Where delay occurs in issuing an order to stop or prevent industrial action the order may be rendered ineffective and delay in determining the application may detract from the object of s 44(6)(ba)(i) of preventing the deterioration of industrial relations. The Commission must ensure an appropriate balance is struck between procedural fairness and the timely issue of an order to stop or prevent industrial action.

37 Before the opportunity of a party to present its case is limited it must be established that there is a need for urgent action in the circumstances of the particular case and that the urgency necessitates the limitation of the party's opportunity to present its

case. In the present context, whether to grant an adjournment, and if so, its duration, will involve a discretionary judgment by a Commissioner, depending on the particular circumstances of the case. In reviewing the decision of the Commissioner the Full Bench should give weight to the Commissioner's assessment of urgency and recognise that that assessment itself was made under pressure of time. However, the Full Bench must consider for itself whether in all the circumstances the union was given such opportunity to present its case that was reasonable in all the circumstances.

38 The Director General submits that the particular facts and circumstances of the case required that the Director General's application for orders be resolved urgently. The respondent says that on 25 November 2009 the Department learned that a half day strike was planned for the following morning. The conference commenced at 3.00 pm. The respondent's position was that if the proposed strike went ahead it would have serious consequences. Given that the strike was to occur on the morning of 26 November the question of whether orders were to issue had to be decided on 25 November.

39 The respondent points out that the Commissioner decided not to read the signed statements presented by the respondent. Each proposition in the respondent's outline of submissions was put by the Commissioner to the union's counsel for his response and the union's counsel had the opportunity to make submissions against the making of the order. Thus, the respondent submits the union was given an opportunity to present its case that was sufficient in all the circumstances.

40 The essence of the union's complaint is that it was refused an adjournment, or an adequate adjournment, to enable it to consider the materials presented to the Commission in support of the Director General's application for orders and as a result was denied an opportunity to adequately present its case.

Adjournments

41 The refusal of an adjournment may amount to a denial of procedural fairness if it deprives a party of the opportunity to adequately present his or her case: ***Sullivan v Department of Transport*** (1978) 20 ALR 323, 343; ***Touma v Saparas*** [2000] NSWCA 11, [27] (Stein JA, Powell JA and Hodgson CJ in Eq agreeing). Refusal of an adjournment may be a breach of procedural fairness if insufficient time is allowed to read the materials: ***McGibbon v Linkenbagh*** (1996) 41 ALD 219 (Kiefel J); ***Scott v Handley*** [1999] FCA 404; 58 ALD 373, [39] - [41]; (Spender Finn and Weinberg JJ); or to prepare for the hearing: ***Knauder v Moore*** [2002] FCAFC 404; (2002) 127 FCR 327.

42 The length of the adjournment can depend on the time required to deal with the issue for which the adjournment was granted: ***Nguyen v Minister for Immigration and Citizenship*** [2007] FCAFC 38, [30] - [31] (Moore, Bennett and Buchanan JJ); ***L v Human Rights and Equal Opportunity Commission*** [2006] FCAFC 114; (2006) 233 ALR 432, [21] (Black CJ, Moore and Finkelstein JJ).

Union was denied procedural fairness

43 The Commissioner adjourned the conference for 10 minutes. On resumption the Commissioner said that she would not rely upon the witness statements attached to the outline of submissions and that she had not read them. Counsel for the union sought a further adjournment to enable the union to examine the outline of submissions and prepare a response to the Director General's arguments. The Commissioner refused that adjournment. We find that in doing so the union was deprived of an opportunity to adequately present its case. That was a breach of procedural fairness.

44 There are a number of features of this case which lead to that finding. First, the order made by the Commission had serious consequences for the union. The union and the respondent were in dispute concerning a new industrial agreement for education assistants. Counsel for the union alleged to the Commissioner that 'the union was bargaining in good faith but the government was not'. An important part of the union's bargaining power is the willingness and ability of its members to strike and thereby impede the Education Department's delivery of services to cause the Department to make a better offer. An order stopping or preventing strike action weakens the bargaining position of the union.

45 Secondly, the case presented by the Director General was such that the union reasonably required further time for its counsel to consider the outline of submissions, take instructions and prepare its case in response. The respondent says that the union had known since 5 November that the Director General sought an order that the union cease industrial action and had had a fair opportunity to prepare its case in opposition. However, on 25 November the Director General presented a detailed written case in support of the application. The case included the allegation that the industrial action taken on 11 November had seriously affected schools and students. That allegation was supported by specific allegations including:

- Education assistants not being present [at schools caring for students with severe disabilities] can place a child's health at serious risk.
- A change in routine, such as that caused by a strike, will cause many students with special needs, particularly students with autism, to behave violently to other students and staff.
- The violent behaviour caused by strike action puts other students and staff at risk of injury.
- Not having education assistants at school due to strike action means that some children with disabilities are unable to eat.
- For some deaf and visibly impaired children that rely on education assistants, not having an education assistant, at school due to strike action means they cannot participate at all in classes.
- For some students with disabilities, not having an education assistant at school due to strike action means they cannot go to the toilet and have to sit in their own faeces and urine, which is both humiliating and a serious health risk.
- At special education schools and centres, strike action causes the education programme for students with special needs to stop.

- Strike action can force schools to close. Assuming parents are available to pick students up at all, the students may behave violently towards their parents.

46 Fairness required that the union be given a reasonable opportunity to consider those allegations and arguments and to prepare a case in response. The nature of the powers conferred by s 44(6) and the circumstances of the application for orders will inform the procedure to be followed by the Commission in each case.

47 Thirdly, the union received no prior notice of the grounds of the application and the factual assertions made in support of it. At the conference counsel for the union denied many of the allegations made in the outline of submissions but was effectively deprived of an opportunity to present an adequate case in response. An opportunity to present an adequate case does not mean an opportunity to present the best possible case. However, counsel for the union was allowed only 10 minutes to read all of the material presented by the Director General, take instructions and formulate a response. That was inadequate.

48 Fourthly, the outline of submissions was supported by detailed witness statements. Each factual assertion in the outline of submissions cited paragraphs from one or more witness statements in support of the assertion. Counsel for the union said to the Commissioner that 'the documents provided evidence of the impact that the last work stoppage on 11 November had on schools and potential risk created by another stoppage'.

49 In ***Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*** [2005] HCA 72; (2005) 225 CLR 88 Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ said:

> It follows that what is 'credible, relevant and significant' information must be determined by a decision-maker before the final decision is reached. That determination will affect whether the decision-maker must give an opportunity to the person affected to deal with the information. And that is why Brennan J prefaced his statement about a person being given an opportunity to deal with adverse information that is credible, relevant and significant, by pointing out that there may be information, apparently adverse to the interests of a person, which can and should be put aside from consideration by the decision-maker as not credible, not relevant, or of little or no significance to the decision to be made. 'Credible, relevant and significant' must therefore be understood as referring to information that cannot be dismissed from further consideration by the decision-maker before making the decision. And the decision-maker cannot dismiss information from further consideration unless the information is evidently not credible, not relevant, or of little or no significance to the decision that is to be made. References to information that is 'credible, relevant and significant' are not to be understood as depending upon whatever characterisation of the information the decision-maker may later have chosen to apply to the information when expressing reasons for the decision that has been reached.
>
> It follows that the Tribunal's statement, that it gave no weight in reaching its decision to the letter or its contents, does not demonstrate that there was no obligation to reveal the information to the appellant and to give him an opportunity to respond to it before the Tribunal concluded its review. Deciding that it could reach its conclusion on other bases did not discharge the Tribunal's obligation to give the appellant procedural fairness [17] - [18].

50 The outline of submissions and witness statements were inextricably interwoven. That was made clear to the Commissioner by counsel for the Director General. The information in the witness statements, or the conclusions drawn from that information, were summarised in the outline of submissions. The information in the witness statements and in those paragraphs of the outline of submissions which summarised or drew conclusions from the witness statements, was information that is credible, relevant and significant. The allegations in the witness statements, and outline of submissions, concerning the effect of strike action on schools and students with disabilities could not be dismissed as a matter of no relevance or of little or no significance to the decision to be made. Further, the allegations contained in the statements could not be dismissed from consideration as material to which the Commissioner could not give credence.

51 The outline of submissions and witness statements, together with annexures, occupy 132 pages of the appeal book. The Commissioner allowed an adjournment of about 10 minutes. That is an inadequate time for counsel to read the documents, let alone take instructions on them and formulate a response. The witness statements formed a part of the case presented by the Director General. The outline of submissions expressly referred to the witness statements. The unfairness to the union of having no opportunity to consider and respond to the factual assertions and arguments in the outline of submissions that summarised or were derived from the witness statements was not overcome by the Commissioner not reading the witness statements and stating that she would not rely upon them. In any event, the adjournment granted to the union was insufficient to consider the outline of submissions, take instructions on the allegations and arguments contained within it and prepare a case in response.

52 In the particular circumstances procedural fairness required that the Commissioner should have given the union an opportunity to deal with the information and arguments contained in the outline of submissions and witness statements. The union was not given an adequate opportunity to consider and give instructions in relation to the allegations contained in the witness statements and the arguments put in the outline of submissions that were derived from the witness statements and to prepare its case in answer to those arguments.

53 Fifthly, the evidence does not establish that the need for the Commission to issue the order urgently precluded an adjournment to enable the union to consider the outline of submissions and witness statements and present a case in response.

54 Counsel for the Director General submitted that an adjournment, or an adjournment for more than the 10 minutes granted, would frustrate the purpose for which the power of making orders under s 44(6)(ba) was conferred. Counsel for the Director General submitted that the order would have to be made in sufficient time for the union to inform its members that evening that the strike was not to go ahead. However, there is no evidence that the union could inform its members of the order made by the Commission or notify its members that evening that they were not to engage in industrial action the following day. The Director General sought an order that the union notify its members employed as education assistants by 5.00 pm that day not to engage in any further industrial action. The 5.00 pm deadline had passed when the Commissioner adjourned at 5.15 pm to

consider the application. In any event, there is no evidence that the union could have notified its members that evening or night. During the conference counsel for the union, Mr Whitehead, stated that the earliest opportunity that the union could advise its members of the Commission's order would be 10.00 am the following morning because members were going straight from home to the stop work meeting. The respondent accepts that Mr Whitehead made that statement but does not accept its truth. There is no evidence that the union had the means to inform its members of the Commission's order before they attended the stop work meeting at 10.00 am the following day. In the particular circumstances of this case it made no difference whether the order was made at 6.45 pm, later that evening or even early the following morning.

55 The Commissioner could, and should, have adjourned the conference for longer than she did to enable counsel for the union to consider the arguments put against the union, take instructions and prepare its case in opposition. The union was denied procedural fairness by being deprived of the opportunity to adequately present its case. The union was not given an adequate opportunity to present to the Commission in an organised way facts and arguments contrary to the facts and arguments in the Director General's outline of submissions.

Effect of breach of procedural fairness

56 Counsel for the Director General submitted that there is no evidence that an adjournment for an hour or so would have made any difference. Counsel submitted that there is no evidence of what the union might have said that would have made any difference.

57 Once a breach of procedural fairness is proved, the victim of the breach is ordinarily entitled to relief: ***Re Refugee Review Tribunal; Ex Parte Aala*** [2000] HCA 57; (2000) 204 CLR 82, [131] (Kirby J). There will be rare cases where a court can properly say, without judging the merits, that observance of procedural fairness could not possibly have made a difference. One example is that where a decision-maker denies a party the opportunity to make submissions on a question of law that must be answered unfavourably to that party: ***Stead v State Government Insurance Commission*** [1986] HCA 54l; (1986) 161 CLR 141, 145 (Mason, Wilson, Brennan, Deane & Dawson JJ). However, the court will not determine whether observance of procedural fairness would have made a difference if that requires the court to assess the merits of the decision.

58 In this case it cannot be said that the decision would not have been affected if the union had been granted an adjournment for the purpose of considering the Director General's case, and the materials in support of it, and formulating a case in response. The reasons for the Commissioner's decision are found in the preamble, or recitals, to the order. Those recitals include the following findings. First, some of the bans previously put in place by the union's members had had a detrimental impact on the health and safety of some students especially profoundly disabled students and the teaching programmes run by some schools. Secondly, the strike action would create difficulties in ensuring that the Department's responsibilities towards students, in particular students with profound disabilities, would not be compromised. Thirdly, the interests of those persons directly involved in the dispute, particularly profoundly disabled students, would be compromised if education assistants recommence industrial action. Before the Commissioner, counsel for the union, Mr Whitehead, challenged the fact or extent of those impacts and difficulties alleged by the Director General. Mr Whitehead stated that the Director General's evidence 'was full of holes and there are things in those statements that support our claims'. Mr Whitehead said in answer to one question from the Commissioner that he was 'not sure'. In answer to a question whether the applicant's education programmes were at risk Mr Whitehead replied 'some, may be'. In answer to other matters put to him by the Commissioner Mr Whitehead in effect denied the proposition advanced by the Director General but did not advance any detailed argument in support of the union's position. The refusal of an adjournment denied the union the opportunity to give Mr Whitehead instructions in relation to those matters and to present an adequate case to the Commission, that is, to present to the Commission in an organised way facts and arguments in opposition to what was stated in the Director General's outline of submissions. It cannot be concluded that the result would have been the same if the union had been given an adjournment to consider the arguments and material presented against it and to prepare a case in response.

59 Ground 2 is made out.

60 Counsel for the Director General, Mr Bathurst, urged the Full Bench to give careful consideration to the practical consequences of a finding that there was a denial of procedural fairness. Mr Bathurst said:

> The effect of the appellant's argument in this case really is, 'if we give late enough notice of a strike, we show up unprepared and we say, we need more time, its all unfair, there's no way that strike can be stopped' (ts 51).

61 Our conclusion that ground 2 is made out does not mean that in all urgent s 44 conferences relating to impending industrial action the Commissioner will be obliged to grant a request for a lengthy adjournment, or any adjournment at all, on the basis that otherwise there will be a denial of natural justice.

62 In the context of an urgent s 44 conference, what will be required to give a party the opportunity to adequately present his or her case is, in the first instance, a matter for the Commissioner's judgment in each case so that whether an adjournment should be granted will depend upon the circumstances. The exercise of the discretion by a Commissioner as to the period of any adjournment granted will be conditioned by the objects of the Act, in particular s 6(c) requiring the prevention and settlement of industrial disputes with the maximum of expedition and s 44(6)(ba)(i) in relation to the prevention of a deterioration in industrial relations.

63 The length of an adjournment, if granted, will depend upon the issue to be considered and all the circumstances. In some cases only a very short period may be appropriate, measured in minutes, to enable a party a fair opportunity to put its case. The adjournment of 10 or 15 minutes given in this case may be appropriate in some circumstances where the issue to which a response is to be given can be adequately dealt with in that time.

64 In this case the request for an adjournment was prompted by the Director General attending the conference with an outline of submissions and five witness statements to which the Union needed to be given a fair opportunity to respond. From the evidence of Mr Kelly that an adjournment of 'approximately 1 hour' was requested, and from the submission of Mr Hooker

(ts 27) that the issue was 'something in the realm of hours rather than minutes' the Union itself believed that an adjournment of approximately one hour would have given it a fair opportunity to reply to the material presented by the Director General. That is not to say that the fair length of time of an adjournment is to be the time that is requested. The point is that the time requested in this case would not have caused the kind of delay mentioned in [36] of these reasons, that is the delay which would detract from the object of s 44(6)(ba)(i) of preventing the deterioration of industrial relations, or, in the context of the discussion at ts 51, it would not have frustrated the purpose of the conference.

Ground 4 - persons bound by the order

65 The respondent concedes that the Commissioner did not have the power to make an order that bound the appellant's members. Section 44(6a) of the Act provides that an order made under s 44(6)(ba) or (bb) binds only the parties to the relevant conference under s 44. The parties to the conference were the Director General and the union.

66 The order is beyond power to the extent that it purports to bind the union's members. To that extent, ground 4 is made out. If ground 4 was the only ground of appeal made out then the appropriate order on appeal would be to vary the terms of the order so that the order required things to be done or not done by the union but did not compel the union's members to do or refrain from doing anything. As we have found that ground 2 of the appeal succeeds it is not necessary to consider the variation that should be made to the order if ground 4 alone succeeded.

Public interest

67 The decision of the Commission was a finding as defined in s 7 of the Act. The decision was made in the course of proceedings that did not finally decide, determine or dispose of the matter to which the proceedings related. Accordingly, an appeal does not lie from the decision of the Commission unless, in the opinion of the Full Bench, the matter is of such importance that, in the public interest, an appeal should lie: s 49(2a).

68 In our opinion the matter, that is, the subject matter of the appeal, is of such importance that, in the public interest, an appeal should lie. The appeal raises questions concerning the content of the rules of procedural fairness in a conference convened under s 44 of the Act. It is in the public interest that an appeal should lie when the appeal raises substantial questions concerning the content of the rules of procedural fairness to be observed by the Commission before making orders under s 44(6)(ba)(i) of the Act requiring a union to cease industrial action. We find that the appeal not only raises substantial questions but should succeed if the Full Bench determines that an appeal should lie.

69 The importance of the matter is added to by the fact that enforcement proceedings against the union are pending for breach of the order from which the union seeks to appeal.

Conclusion

70 We find that the matter raised by ground 2 of the appeal is of such importance that, in the public interest, the appeal should lie. We find that grounds 2 and 4 of the appeal are made out. The decision of the Commission appealed from should be quashed.

2010 WAIRC 00865

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH
	APPELLANT
	-and-
	THE DIRECTOR GENERAL, DEPARTMENT OF EDUCATION AND TRAINING
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE JUSTICE RL LE MIERE, ACTING PRESIDENT
	CHIEF COMMISSIONER AR BEECH
	COMMISSIONER SJ KENNER
DATE	TUESDAY, 31 AUGUST 2010
FILE NO/S	FBA 7 OF 2009
CITATION NO.	2010 WAIRC 00865

Result	Appeal upheld
Appearances	
Appellant	Mr RL Hooker, of counsel
Respondent	Mr RL Bathurst, of counsel

Order

This matter having come on for hearing before the Full Bench on 1 July 2010, and having heard Mr RL Hooker (of counsel) on behalf of the appellant, and Mr RL Bathurst (of counsel) on behalf of the respondent, and reasons for decision having been delivered on 27 August 2010, it is this day ordered that:

1 The appeal is upheld.

2. The order of the Commission in C 35 of 2009 dated 25 November 2010 ((2009) 89 WAIG 2478; [2009] WAIRC 01232)) is hereby quashed.

By the Full Bench

(Sgd.) THE HONOURABLE JUSTICE R L LE MIERE,
[L.S.] Acting President.

Paragraph of Order No. FBA 7 of 2010 amended to reflect the correct signature of the Acting President—Erratum dated 19/10/2010

PRESIDENT—Matters dealt with—

2010 WAIRC 00790

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PRESIDENT

CITATION	**:**	2010 WAIRC 00790
CORAM	**:**	THE HONOURABLE J H SMITH, ACTING PRESIDENT
HEARD	**:**	TUESDAY, 10 AUGUST 2010
DELIVERED	**:**	FRIDAY, 13 AUGUST 2010
FILE NO.	**:**	PRES 4 OF 2010
BETWEEN	**:**	JOHN PALERMO Applicant AND CHARLES ROSENTHAL Respondent

CatchWords	**:**	Industrial Law (WA) - Application to stay operation of an order made by Commission - Stay of order principles considered - Order stayed in part - *Industrial Relations Act 1979* (WA) s 49, s 49(11).
Result	**:**	Order made
Representation:		
Applicant	**:**	Mr A Palermo, as agent
Respondent	**:**	In person

Reasons for Decision

1 The Commission has before it an application seeking an order that the operation of an order made by a single Commissioner on 13 July 2010 ([2010] WAIRC 00445; (2010) 90 WAIG 719), be stayed pending the hearing and determination of an appeal which has been filed against the order made. The application is brought pursuant to s 49(11) of the *Industrial Relations Act 1979* (WA) (the Act). This section provides that at any time after an appeal to the Full Bench has been instituted, a person who has a sufficient interest may apply to the Commission for an order that the operation of the decision appealed against be stayed, wholly or in part, pending the hearing and determination of the appeal.

2 The decision of the Commission was made on 13 July 2010. The terms of the order are that the Commission:

1. Declares that the applicant was harshly and unfairly dismissed from his employment by the respondent;

2. Declares that reinstatement is not practicable;

3. Orders that the respondent shall pay to the applicant the amount of:

(a) $28,362.50 gross less any taxation payable to the Commissioner of Taxation as compensation for the loss arising from the dismissal; and

(b) $3,534.37 gross less any taxation payable to the Commissioner of Taxation being salary for the period 1 December 2008 to 23 December 2008.

4. Orders that the amounts set out in Order 3 hereof are to be paid within seven days of the date hereof.

3 In support of the application to stay the order, the applicant filed written submissions on 26 July 2010. The respondent did not file written submissions. The respondent's solicitors filed a notice of answer and counter-proposal on 23 July 2010 stating the respondent opposed the granting of a stay.

4 After the application was filed, I made programming orders which were served on the respondent to the application. One of the directions given was that any evidence in support of or in opposition to the application was to be by way of affidavit filed and served by the relevant party by 11:00am on Tuesday, 27 July 2010. An order was also made for notice of any intention to seek leave to cross-examine the deponent of any affidavit was to be provided by 11:00am on Wednesday, 28 July 2010. However, neither party sought to provide any evidence on affidavit in support of, or in opposition to, the application for the stay.

5 The principles that should apply in deciding whether or not to order a stay are well established. The discretionary grounds upon which a stay will be granted pending the determination of an appeal require the demonstration of special circumstances as there must be justification for departure from the ordinary rule that a successful litigant is entitled to the fruits of the judgment. Therefore, something special or unusual is required before a stay will be granted. The relevant principles were summarised by Acting President Ritter in *John Holland Group Pty Ltd v The Construction, Forestry, Mining and Energy Union of Workers* (2005) 85 WAIG 3918 as follows:

> 34 In *Federal Commissioner of Taxation v Myer Emporium Limited (No 1)* [1986] 160 CLR 220, Dawson J at 222 said that the discretion to "*order a stay of proceedings is only to be exercised where special circumstances exist which justify departure from the ordinary rule that a successful litigant is entitled to the fruits of his litigation pending the determination of any appeal…. Special circumstances justifying a stay will exist where it is necessary to prevent the appeal, if successful, from being nugatory…. Generally that will occur when, because of the respondent's financial state, there is no reasonable prospect of recovering monies paid pursuant to the judgment at first instance. However, special circumstances are not limited to that situation and will, I think, exist where for whatever reason, there is a real risk that it would not be possible for a successful appellant to be restored substantially to his former position if the judgment against him is executed*".
>
> 35 These observations were cited with approval by Pullin J in *Commonwealth Bank v Bouwman* [2003] WASC 205 and by Anderson J, with whom Pidgeon J agreed, in *Hamersley Iron Pty Ltd v Lovell (No 2)* (1998) 20 WAR 79 at pages 89-90. In the latter case, Anderson J said:-
>
> > "*… unless a stay is necessary to preserve the subject matter or integrity of the litigation in the broader sense described above the circumstances will not be regarded as sufficiently exceptional to enliven the discretionary jurisdiction to provide a stay. Only if the applicant can show that a stay is necessary to that end will the High Court go on to consider matters such as whether the application for special leave has a prospect of success, whether a stay will occasion hardship to the respondent, where the balance of convenience lies and so on. I think such matters are always treated as secondary to the question whether a stay is necessary to preserve the subject matter or integrity of the litigation. They come into play only if it appears that the refusal of a stay will substantially deprive the applicant of the benefit to be derived from the appeal. Thus, an applicant may fail to obtain a stay even if the applicant can show that unless there is a stay the appeal would be futile.*"
>
> 36 The reasons of Anderson J were cited with approval by Sharkey P in *G & M Partacini t/as Bayswater Powder Coaters v SDAE* (2005) 85 WAIG 51. In that decision, Sharkey P emphasised that the jurisdiction to grant a stay should also be exercised having regard to the requirements of s26 of *the Act* and the "*need to prevent there being any more uncertainty than is necessary, in industrial matters*".
>
> 37 In *Eastland Technology Australia Pty Ltd and Others v Whisson and Others* (2003) 28 WAR 308, the court (Murray and Parker JJ) at 311 distilled generally applicable principles in relation to applications for stays of orders. These principles were set out as follows:-
>
> > "*• The successful litigant at first instance will ordinarily be entitled to enforce the judgment pending the determination of any appeal.*
> >
> > *• It is for the applicant for a stay to move the court to a favourable exercise of its discretion.*
> >
> > *• It will not do so unless special circumstances are shown justifying the departure from the ordinary rule.*
> >
> > *• The central issue will be whether the grant of a stay is perceived to be necessary to preserve the subject matter or the integrity of the litigation, or where refusal of a stay could create practical difficulties in respect of the relief which may be granted on appeal. It is often put shortly that it will first and foremost be necessary to establish that without the grant of a stay, the right of appeal, whether upon the grant of leave or special leave or not, will be rendered nugatory.*
> >
> > *• If that can be demonstrated, the stay will generally still be refused unless it can be established that the appeal process, whether upon the grant of leave or special leave or not, has ultimately reasonable prospects of success so as to result in the grant of relief to the appellant.*
> >
> > *• If that hurdle can be overcome, the stay may still be refused where it appears that the balance of convenience does not lie in favour of the applicant; where, for example, the grant of a stay will occasion hardship to the respondent which may not be alleviated by the terms upon which the stay may be granted*."

6 The applicant's outline of grounds of appeal in FBA 15 of 2010 are as follows:

1. The history of this case and the way Commissioner Scott has conducted the hearing is appalling. I request that she be dismissed, and the matter be re-heard. She has shown continuous bias and lost total control of proceedings to the extent that at one stage during the hearing she saw fit to scream at the Applicant and advised him to 'shut up'. I have today ordered the rest of the transcript and I will elaborate on this and other matters once the transcript is in my possession.
2. The order does not make provision for superannuation which is a deduction on the gross amount agreed to.
3. The Commissioner has failed to strike out from the reasons any references to me carrying out a mixed business of chartered accounting and farming.
4. The Commissioner has seen fit not to clarify ownership of the cattle farm. I do not own the cattle farm.
5. Despite many requests and a previous appeal to the Full Bench, the Commissioner saw fit not to allow me to call Mr and Mrs Rosenthal Senior to give evidence, despite them having been properly served and summonsed. Mr Rosenthal Senior had full control of my farming operations without my authority on occasions when the Applicant went on leave. There was no formal handover and takeover. Mr Rosenthal Senior is the only person who could verify the Applicant's statements that he was not ill despite the Applicant having previously advised me that Mr Rosenthal Senior was ill. This would have an extreme bearing on the outcome of the case, not only on the credibility of the Applicant but also on cattle marking and missing cattle numbers. Mr Rosenthal Senior would also be able to verify and confirm dates, events and what transpired in the period when the Applicant had resigned from his position.
6. As a result of the above Mr Macri, who was to be my chief witness, having passed away during the course of the hearing, it was even more imperative, that Mr and Mrs Rosenthal Senior be called to give evidence as Mr Macri was the only other witness present when the Applicant resigned.
7. Due to the way the Commissioner conducted the case, it left no time for further witnesses and for my agent and/or myself to give further evidence. The comments by my agent about the fact that nothing further could be added was based on time management issues only. The Commissioner saw fit as a result of losing control of the matter to implement strict time guidelines in order to conclude the case early as there were other cases pending to be heard. Natural justice is not about timing or other cases. Whilst timing and costs are relevant, in the interests of natural justice, it is not up to the Commissioner to advise any respondent on how to conduct a case. For example, I stated that my agent's testimony could range from a period of 1 to 8 days. The reason why there was such a range in time was based on the documentation that the Applicant stole as a servant and the way that the Applicant refused to answer questions, despite having been requested to do so on many occasions by the Commissioner. If for instance the diaries and other records which were my property, had been produced much of the hearing time would not have been necessary. By way of further example, the question of theft of cattle did not come into contention as until further evidence was provided I could not see how I could make an allegation of theft against anyone. However, it was hoped that during the course of the hearing, the Applicant would in some way attempt (or be directed by the Commissioner) to produce records to reconcile stock numbers. Mere diary entries which were inadequate and inconclusive are not adequate when dealing with stock values in excess of half a million dollars. His continuous refusal during his evidence to produce records on stock numbers could only lead me to conclude that the missing stock was stolen by him.
8. The fact is that the Applicant had resigned, changed his mind, and attempted to rectify the position. As his departure time drew closer, the damage, destruction and theft were put in process.
9. The reason for the delay in the hearing could not in any way be attributed to me, as I am not responsible for setting hearing dates. Unlike the Applicant, I have a busy work schedule, and I have attempted on all situations to adhere to reasonable times and hearing dates.
10. In my view, the Commissioner has not seen fit to hear and rule in accordance with the spirit of the Industrial Relations Act, and has taken opportunity to side with the Applicant on every possible occasion. The fact that the Applicant was represented by a legal practitioner and incurring costs is not for my concern or care, as if the Applicant had answered the questions put to him, the whole hearing in my view should have concluded in 3 to 5 days maximum.
11. The Commissioner has erred in her calculations of the 6 months by not deducting from her calculations the receipt of some funds by the Applicant and the valuing of time the Applicant spent working on his farm during my paid time. Moonlighting was never requested for or approved. The Applicant has carelessly and unwillingly made poor attempts to mitigate his losses by stating that he would not travel to work if it involved more than a certain time or kilometre. Given low unemployment rates of under 4%, I find it extremely difficult that the Applicant could not find other work. I now know the reason. Working on his own farm.
12. The Commissioner has seen fit to punish me, the employer, with total lack of care and regard, not only to proceedings, but events and employer rights.
13. The Commissioner has seen fit to calculate the Applicant's loss by ending it on the last day of the hearing. This is completely contrary to the spirit of the Act, and again proves the Commissioner's bias in favour of the Applicant and against the employer.
14. The Commissioner has erred on many occasions, some of which were highlighted at the previous appeal before the Full Bench. By way of another example, in the order, her first paragraph states 'Having heard Ms R Cosentino on behalf of the applicant …'. This is completely incorrect. Ms Cosentino was not at the

speaking of the minutes hearing. It was her associate, Ms Billich [sic] was at the hearing. If the Commissioner does not even know who appeared before her, what hope is there for a fair outcome.

7 The respondent's answer and counter-proposal states that the stay should not be granted on the following grounds:

1 A stay of an Order of the Commission under s49(1l) ought only be made where 'special circumstances' justify doing so. The fact that an appeal from the Order has been lodged does not on its own amount to special circumstances justifying a stay.

2 The relevant ordinary principles applicable to an application for a stay of execution are:

2.1 The successful party is ordinary entitled to have the Order carried out pending the determination of any appeal.

2.2 It is for the applicant for a stay to satisfy the Commission that circumstances exist which favour the exercise of the discretion.

2.4 Special circumstances must be shown justifying a departure from the general rule.

2.5 The central issue will be whether a stay is necessary to preserve the subject matter or integrity of the litigation, in other words, that the absence of a stay will render the appeal nugatory.

2.6 If that is demonstrated a stay will generally still be refused unless it can be established that the appeal has reasonable prospects of success so as to result in the grant of relief to the appellant.

2.7 If that hurdle can be overcome then the stay may still be refused if the balance of convenience does not lie in favour of the applicant for the stay.

3 These principles are set out in *Eastland Technology Australia Pty Ltd and Others v Whisson and Others* (2003) 28 WAR 308, adopted by the President in *John Holland Group Pty Ltd v CFMEU 2005 WAIRC 02983.*

4 There is no reason for departure from the general rule. The Appellant has not cited or established any special circumstances which might justify a stay. The Appeal is manifestly unmeritorious.

8 The applicant in his written submissions says that the reasons a stay should be granted are as follows:

A. Reason for seeking the stay

I have filed an appeal in relation to Commissioner Scott's final orders. I will be materially prejudiced if I am required to comply with her final orders prior to having this matter heard on appeal.

B. Consequences of stay not being granted

If the stay is not granted, it would deny me procedural fairness, equity and natural justice. If the money is paid and I am successful in the appeal to the Full Bench, or failing that, successful in an appeal to the Industrial Court at the Supreme Court, there is little likelihood of regaining that money, given that the original Applicant has stated under oath that he has no assets, lives on the family farm, and appears to be supported by his parents. Given that the original Applicant is also in his mid-30's, and to date, has not been able to even afford to purchase a house, it is likely that if the money is paid, it will either be squandered or paid to his lawyers. I would then have to pursue recovery against him, with possible bankruptcy. This is not in his interest.

C. Anything else which affects the balance of convenience if the stay is not granted

A delay in the appeal is not going to inconvenience any party. The appeal should be a right, not a discretion. Given that the case has gone on for some time, and given that the original Applicant has seen fit to engage lawyers at great cost, I do not consider that he is inconvenienced in any way. He is obviously in a position where, if he does not have means, his solicitor's fees are either being paid by his parents, or is waiting for this payout to pay those fees. In my view, the delay in this matter has been solicitor-driven.

D. Whether the appeal has a reasonable prospect of success

Every appeal should be in the first instance looked at as having a reasonable prospect of success. This appeal is not lodged to inconvenience, frustrate or add cost to the process. I feel the Commissioner has simply got it wrong. As mentioned above, it is my right to take this matter to appeal.

E. Other special circumstances that support the grant of the stay

Commissioner Scott's finding is not only flawed, but also is incorrect in calculation of the quantum of the award. She has shown extreme bias throughout the hearing, and had lost total control of the proceedings. At one point, she screamed at the original Applicant when he refused to answer questions put to him, and told him: 'Shut up Mr Rosenthal' or words to that effect. Her bias was evident in this, as he constant [sic] refused to answer questions, and she constantly showed weakness in not requiring him to do so.

Her bias even extended to not allowing me to run my case in the way that it was planned. She refused to allow me to call Mr and Mrs Rosenthal Senior to give evidence, notwithstanding they had been properly summoned. This was critical because Mr Rosenthal Senior, without authority, was handed over total control of my farming operations by the original Applicant when he went on leave. Mr Rosenthal Senior therefore has access to all the means available to him to misappropriate stock.

Given that my principal witness Mr Macri passed away during the hearing, and given that Mr Macri was the only other person present when Mr Rosenthal resigned, it was imperative that Mr Rosenthal Senior be allowed to be examined. The original Applicant was not unfairly dismissed. He had resigned because his father was ill, and Mr Rosenthal Senior is the only person who could verify this.

Once the original Applicant had resigned, he took the opportunity between the resignation date and dismissal date to enter into a series of deceitful and fraudulent activities, worked on his own family farm and refused to attend to duties to please his own means. Mrs Rosenthal Senior should have been allowed to be examined, but only on the question of the computer, as the original Applicant simply refused to produce the computer that was used to generate some so-called documents which purported to be letters to me and stock records. Commissioner Scott failed to allow the production of the books and records of the original Applicant's company which trades in the same breed of stock as what I do.

9 The first requirement of s 49(11) of the Act is that an appeal must be instituted to the Full Bench under s 49. I am satisfied that this has occurred. Secondly, the stay application must be filed by a person who has a sufficient interest to make the application. Again, I am satisfied that the applicant as the party against whom the order to pay was made, has sufficient interest to make the application for the stay.

10 As to whether a stay ought to be granted or not, it would not be appropriate for me to reach any conclusion about the strength of the case as that is to be put forward by the appellant in the appeal. I am only required to be satisfied that there is some issue of substance to be raised. There is some difficulty involved in examining the substance and import of the grounds raised in an appeal because this application is an interlocutory matter and the appeal is to be heard by a Full Bench comprised of two other Commissioners and not just myself. Further, on a hearing for a stay it is not appropriate for the parties to address all of the grounds of appeal in any complete way. Having said that and having reviewed the grounds of appeal it is my view that although many of the grounds of appeal have real difficulties, grounds 5, 6, parts of grounds 7 and 11 appear reasonably arguable. Grounds 5, 6 and 7 raise the issue whether the applicant was denied procedural fairness and whether the principles of case management that apply in courts of pleadings should apply to industrial matters heard and determined by the Commission. Ground 11 raises an issue whether the respondent mitigated his loss after his employment was terminated. These grounds raise issues which arise in respect of the claim in U 10 of 2009 by the respondent that he was harshly, oppressively and unfairly dismissed and do not appear to relate to the respondent's claim in B 101 of 2009 for contractual benefits. Consequently I am not satisfied that the grounds of appeal disclose an arguable case that the Commission erred in finding that the respondent is owed by the applicant $3,534.37 gross in wages and I will not issue an order to stay order 3(b) of the order. Whether I should make an order to stay order 3(a) (which requires payment of compensation to the respondent for the loss caused by the unfair dismissal) requires an exercise of discretion. Before exercising that discretion the applicant must satisfy me that there are special circumstances that exist which justify my making an order to stay order 3(a) of the order and the balance of convenience favours the making of such an order.

11 In this matter the substantive ground of special circumstance is the applicant's contention that there is a real risk that it would not be possible to restore him substantially to his former position if a stay were not granted as the respondent's financial position is such that it is likely that if the order is complied with and the monetary amounts paid to the respondent the respondent would not be in a position to repay those amounts to the applicant if the appeal is successful.

12 The applicant's financial position at the time he gave evidence in May 2010 was set out in the Acting Senior Commissioner's reasons for decision ([2010] WAIRC 00401; (2010) 90 WAIG 709) as follows:

> 84 The applicant's remuneration at the time of dismissal was a salary of $52,000 per annum plus superannuation of $1,181.25 per quarter which equals $4,725 per annum (Exhibit A21). Therefore the total remuneration was $56,725 per annum giving a weekly rate of $1,087.50.
>
> 85 The period over which the applicant suffered the loss was from 23 December 2008 to the last day of hearing, being 14 May 2010 which is 72.3 weeks. 72.3 weeks at $1,087.50 per week equals $78,626.25.
>
> 86 The applicant was employed by Flexi Staff from 27 January 2009 to 15 August 2009, being 28 weeks and 4 days. He received wages of $17,710 plus superannuation of $1,510.65 totalling $19,220.65. This brings an average remuneration over that 28 and a half week period of $676.78 per week.
>
> 87 There is no evidence that this situation, on average, changed after 15 August 2009. Therefore the applicant's weekly loss has been $1,087.50 less $676.78 being $410.72.

13 The respondent gave evidence in the hearing before the Acting Senior Commissioner that the amount he received from his casual employment just covered food bills and that he received very little financial assistance from Centrelink during the periods set out above. The respondent conceded that he owns no real estate. His only asset is a motor vehicle that is 10 years old which he says would be valued at $8,000 to $10,000. At the hearing of this matter he stated he does have the capacity to repay the judgment sums in the event of successful appeal as his financial position has recently improved. The respondent stated without objection from the bar table that he has recently been employed as a truck driver for a period of three months and that it is anticipated that he will earn $1,200 each week. He also stated that he will be paid shift allowance for working shift work.

14 Although the respondent contends that he would be able to repay the money, the applicant has provided no information to the Commission as to whether the cost of litigating his claim in the Commission is outstanding and owing to his solicitors. Nor is it known whether the judgment sums are intended to be applied by him to any outstanding costs or if such costs are outstanding. Whilst the respondent appeared in person at the hearing of the application for a stay, his solicitors remain on the record.

15 The applicant contends there is a real risk that he will not be able to recover the money paid pursuant to the terms of the order if the appeal is successful. The applicant argues that the respondent will not suffer any prejudice if the order is stayed as the applicant is ready for the appeal to be heard expeditiously. The applicant undertook to file the appeal books and an application to extend time for filing the appeal books after the hearing of this application was concluded on 10 August 2010. However, where on an application for a stay an appeal is arguable, special circumstances do not arise where neither party might suffer prejudice and expeditious steps have been taken to have the appeal heard in the near future (*Hamersley Iron Pty Ltd v Lovell*

(No 2) (1998) 20 WAR 79, 80, 88). Whilst the undertaking given by the applicant by his agent is not sufficient to constitute special circumstances, the undertaking to prosecute the appeal expeditiously is noted.

16 Having considered the submissions made by the parties, I am persuaded that the balance of convenience favours that I make an order that order 3(a) of the order be stayed. In the circumstances:

(a) where it is not known how the monies payable pursuant to the terms of order 3(a) are to be applied;

(b) where the respondent is not the owner of real property and the one asset he owns would be insufficient to satisfy a judgment debt for the amount of $28,362.50; and

(c) the respondent has not secured permanent employment;

I am satisfied that there is a real risk that if the money required to be paid pursuant to order 3(a) of the order is paid, the monies may be irrecoverable if the appeal is successful.

17 I am also of the opinion that the applicant should take steps to ensure that the appeal is heard expeditiously and in particular should take steps to ensure that the hearing of the appeal is heard without delay. This will include an obligation on the applicant to make himself or his agent available to attend any date set by the Full Bench for the hearing of the appeal. If in the event that the appeal is delayed, it will be open to the respondent to apply to discharge the order staying order 3(a) of the order made on 13 July 2010.

18 For these reasons the order which I will make is that:

1. Order 3(a) of the order made by the Commission on 13 July 2010 in matters U 10 of 2009 and B 101 of 2009 ([2010] WAIRC 00445) is stayed pending the hearing and determination of appeal FBA 15 of 2010 until further order.

2. The parties have liberty to apply on 48 hours' notice for the purpose of seeking any variation of or revocation of order 1 of this order.

2010 WAIRC 00797

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOHN PALERMO
	APPLICANT
	-and-
	CHARLES ROSENTHAL
	RESPONDENT
CORAM	THE HONOURABLE J H SMITH, ACTING PRESIDENT
DATE	TUESDAY, 17 AUGUST 2010
FILE NO/S	PRES 4 OF 2010
CITATION NO.	2010 WAIRC 00797

Result	Order made
Appearances	
Applicant	Mr A Palermo (as agent)
Respondent	In person

Order

This matter having come on for hearing before me on Tuesday, 10 August 2010, and having heard Mr A Palermo as agent on behalf of the applicant, and Mr C Rosenthal, the respondent, in person, the Acting President, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders that —

1. Order 3(a) of the order made by the Commission on 13 July 2010 in matters U 10 of 2009 and B 101 of 2009 ([2010] WAIRC 00445) is stayed pending the hearing and determination of appeal FBA 15 of 2010 until further order.

2. The parties have liberty to apply on 48 hours' notice for the purpose of seeking any variation of or revocation of order 1 of this order.

(Sgd.) J H SMITH,
[L.S.] Acting President.

PRESIDENT—Unions—Matters dealt with under Section 66—

2010 WAIRC 00871

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ROBERT MCJANNETT
	APPLICANT
	-and-
	THE CONSTRUCTION FORESTRY MINING & ENERGY UNION OF WORKERS
	RESPONDENT
CORAM	THE HONOURABLE J H SMITH, ACTING PRESIDENT
DATE	MONDAY, 6 SEPTEMBER 2010
FILE NO/S	PRES 7 OF 2008
CITATION NO.	2010 WAIRC 00871

Result	Order discharging undertaking and application dismissed
Appearances	
Applicant	In person
Respondent	Mr J M Nicholas (of counsel)

Order

WHEREAS on 19 July 2010, the respondent made an application that Mr Kevin Reynolds, the Secretary of the respondent, be released from the undertaking made on 10 October 2008;

AND WHEREAS on 31 August 2010, the applicant filed a Notice of withdrawal or discontinuance and informed the Commission that he consented to an order being made discharging the Secretary of the respondent from the undertaking;

NOW THEREFORE, having heard the applicant in person and Mr J M Nicholas (of counsel) on behalf of the respondent, pursuant to the powers conferred by the provisions of the *Industrial Relations Act 1979*, it is ordered by consent that:—

1. The Secretary of the respondent is hereby released from the undertaking referred to in Order [2008] WAIRC 01490; (2008) 88 WAIG 2086;
2. The application be and is hereby dismissed.

(Sgd.) J H SMITH,
[L.S.] Acting President.

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

2010 WAIRC 00778

BREWING INDUSTRY AWARD 1993

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ON THE COMMISSION'S OWN MOTION
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	THURSDAY, 12 AUGUST 2010
FILE NO/S	APPL 1371 OF 2004
CITATION NO.	2010 WAIRC 00778

Result	Application discontinued

Order

WHEREAS this is an application made pursuant to s 40B on 20 October 2004 to vary the Brewing Industry Award 1993 ("the Award");

AND WHEREAS on 17 June 2010 the Commission cancelled the Award in order [2010] WAIRC 00355;

AND WHEREAS there is now no Award to which this application relates;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under s 27(1)(a)(iv) of the *Industrial Relations Act 1979*, hereby order -

THAT this application be, and is hereby discontinued.

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

2010 WAIRC 00788

CEMENT WORKERS' AWARD, 1975

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ON THE COMMISSION'S OWN MOTION
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	FRIDAY, 13 AUGUST 2010
FILE NO/S	APPL 6 OF 2009
CITATION NO.	2010 WAIRC 00788

Result Application discontinued

Order

WHEREAS this is an application made pursuant to s 40B on 10 February 2009 to vary the Cement Workers' Award, 1975 ("the Award");

AND WHEREAS on 18 May 2010 the Commission cancelled the Award in order [2010] WAIRC 00287;

AND WHEREAS there is now no award to which this application relates;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under s 27(1)(a)(iv) of the *Industrial Relations Act 1979*, hereby order -

THAT this application be, and is hereby discontinued.

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

2010 WAIRC 00808

CHILD CARE (OUT OF SCHOOL CARE - PLAYLEADERS) AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	SAVE THE CHILDREN FUND AND OTHERS
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 18 AUGUST 2010
FILE NO/S	APPL 5 OF 2006
CITATION NO.	2010 WAIRC 00808

Result Discontinued

Order

WHEREAS this is an application to vary the *Child Care (Out of School Care – Playleaders) Award* ("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 to hold discussions with 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 ("AIRC"); 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, the Commission listed the matter for a show cause hearing on 9 December 2008; and

WHEREAS at the hearing on 9 December 2008 the applicant requested that the matter be adjourned until September 2009 pending the outcome of a matter being dealt with by the AIRC; and

WHEREAS the Commission contacted the applicant on a number of occasions after 6 October 2009 about the status of the matter; and

WHEREAS on 3 December 2009 the applicant requested a directions hearing be set down; and

WHEREAS the matter was set down for a directions hearing on 22 January 2010; and

WHEREAS at the hearing the applicant requested further time to consider its position with respect the matter in relation to coverage of the Award and award modernisation that had occurred in the Federal system and the applicant was to advise the Commission of its intentions by 12 February 2010; and

WHEREAS on 11 February 2010 the applicant informed the Commission that it wished to proceed with the matter and that it would lodge amended schedules however, this did not occur; and

WHEREAS on 30 March 2010 the applicant advised the Commission that it was not proceeding with the matter; and

WHEREAS on 18 May 2010 the Commission wrote to the applicant about lodging a Notice of Withdrawal or Discontinuance; and

WHEREAS on 20 May 2010 the applicant filed a Notice of Withdrawal or 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.

2010 WAIRC 00809

CHILD CARE (SUBSIDISED CENTRES) AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	CITY OF BAYSWATER CHILD CARE CENTRE ASSOCIATION(INC) AND OTHERS
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 18 AUGUST 2010
FILE NO/S	APPL 9 OF 2006
CITATION NO.	2010 WAIRC 00809
Result	Discontinued

Order

WHEREAS this is an application to vary the *Child Care (Subsidised Centres) Award* ("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 to hold discussions with 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 ("AIRC"); 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, the Commission listed the matter for a show cause hearing on 9 December 2008; and

WHEREAS at the hearing on 9 December 2008 the applicant requested that the matter be adjourned until September 2009 pending the outcome of a matter being dealt with by the AIRC; and

WHEREAS the Commission contacted the applicant on a number of occasions after 6 October 2009 about the status of the matter; and

WHEREAS on 3 December 2009 the applicant requested a directions hearing be set down; and

WHEREAS the matter was set down for a directions hearing on 22 January 2010; and

WHEREAS at the hearing the applicant requested further time to consider its position with respect the matter in relation to coverage of the Award and award modernisation that had occurred in the Federal system and the applicant was to advise the Commission of its intentions by 12 February 2010; and

WHEREAS on 11 February 2010 the applicant informed the Commission that it wished to proceed with the matter and that it would lodge amended schedules however, this did not occur; and

WHEREAS on 30 March 2010 the applicant advised the Commission that it was not proceeding with the matter; and

WHEREAS on 18 May 2010 the Commission wrote to the applicant about lodging a Notice of Withdrawal or Discontinuance; and

WHEREAS on 20 May 2010 the applicant filed a Notice of Withdrawal or 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.

2010 WAIRC 00886

CLERKS (COMMERCIAL RADIO AND TELEVISION BROADCASTERS) AWARD 1970

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMISSION'S OWN MOTION
	APPLICANT
	-v-
	T.V.W. LIMITED, STW CHANNEL NINE, AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES, W.A. CLERICAL AND ADMINISTRATIVE BRANCH
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	THURSDAY, 9 SEPTEMBER 2010
FILE NO/S	APPL 1388 OF 2004
CITATION NO.	2010 WAIRC 00886

Result	Order issued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

WHEREAS this is an application made pursuant to s 40B to vary the *Clerks (Commercial Radio and Television Broadcasters) Award 1970*;

AND WHEREAS on 18 May 2010 the Commission cancelled the Award in order [2010] 2010 WAIRC 00287;

AND WHEREAS there is now no award to which this application relates;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under s 27(1)(a)(iv) of the *Industrial Relations Act 1979*, hereby order:

THAT this application be, and is hereby discontinued.

(Sgd.) S M MAYMAN,
[L.S.] Commissioner.

2010 WAIRC 00882

CLERKS (COMMERCIAL RADIO AND TELEVISION BROADCASTERS)AWARD OF 1970

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMISSION'S OWN MOTION
	APPLICANT
	-v-
	AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES, W.A. CLERICAL AND ADMINISTRATIVE BRANCH
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	THURSDAY, 9 SEPTEMBER 2010
FILE NO/S	APPL 1640 OF 2003
CITATION NO.	2010 WAIRC 00882

Result	Order issued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

WHEREAS this is an application made pursuant to s 40B to vary the *Clerks (Commercial Radio and Television Broadcasters)Award of 1970*;

AND WHEREAS on 18 May 2010 the Commission cancelled the Award in order [2010] 2010 WAIRC 00287;

AND WHEREAS there is now no award to which this application relates;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under s 27(1)(a)(iv) of the *Industrial Relations Act 1979*, hereby order:

THAT this application be, and is hereby discontinued.

(Sgd.) S M MAYMAN,
Commissioner.

[L.S.]

2010 WAIRC 00884

CLERKS' (R.A.C. CONTROL ROOM OFFICERS) AWARD OF 1988

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMISSION'S OWN MOTION
	APPLICANT
	-v-
	ROYAL AUTOMOBILE CLUB OF WA (INC), AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES, W.A. CLERICAL AND ADMINISTRATIVE BRANCH
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	THURSDAY, 9 SEPTEMBER 2010
FILE NO/S	APPL 1406 OF 2004
CITATION NO.	2010 WAIRC 00884

Result	Order issued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

WHEREAS this is an application made pursuant to s 40B to vary the *Clerks' (R.A.C. Control Room Officers) Award of 1988*;

AND WHEREAS on 18 May 2010 the Commission cancelled the Award in order [2010] 2010 WAIRC 00287;

AND WHEREAS there is now no award to which this application relates;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under s 27(1)(a)(iv) of the *Industrial Relations Act 1979*, hereby order:

THAT this application be, and is hereby discontinued.

(Sgd.) S M MAYMAN,
[L.S.] Commissioner.

2010 WAIRC 00883

CLERKS' (SWAN BREWERY CO. LTD.) AWARD 1986

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES COMMISSION'S OWN MOTION

APPLICANT

-v-

SWAN BREWERY COMPANY LIMITED, AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES, W.A. CLERICAL AND ADMINISTRATIVE BRANCH

RESPONDENT

CORAM COMMISSIONER S M MAYMAN

DATE THURSDAY, 9 SEPTEMBER 2010

FILE NO/S APPL 1408 OF 2004

CITATION NO. 2010 WAIRC 00883

Result Order issued

Representation

Applicant No appearance

Respondent No appearance

Order

WHEREAS this is an application made pursuant to s 40B to vary the *Clerks' (Swan Brewery Co. Ltd.) Award 1986*;

AND WHEREAS on 18 May 2010 the Commission cancelled the Award in order [2010] 2010 WAIRC 00287;

AND WHEREAS there is now no award to which this application relates;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under s 27(1)(a)(iv) of the *Industrial Relations Act 1979*, hereby order:

THAT this application be, and is hereby discontinued.

(Sgd.) S M MAYMAN,
[L.S.] Commissioner.

2010 WAIRC 00789

COCKBURN CEMENT LIMITED AWARD 1991

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES ON THE COMMISSION'S OWN MOTION

CORAM CHIEF COMMISSIONER A R BEECH

DATE FRIDAY, 13 AUGUST 2010

FILE NO/S APPL 113 OF 2007

CITATION NO. 2010 WAIRC 00789

Result Application discontinued

Order

WHEREAS this is an application made pursuant to s 40B on 17 September 2007 to vary the Cockburn Cement Limited Award 1991 ("the Award");

AND WHEREAS on 28 June 2010 the Commission cancelled the Award in order [2010] WAIRC 00387;

AND WHEREAS there is now no award to which this application relates;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under s 27(1)(a)(iv) of the *Industrial Relations Act 1979*, hereby order -

THAT this application be, and is hereby discontinued.

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

2010 WAIRC 00810

FAMILY DAY CARE CO-ORDINATORS' AND ASSISTANTS' AWARD 1985

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH

APPLICANT

-v-

SALVATION ARMY - BALGA AND OTHERS

RESPONDENT

CORAM COMMISSIONER J L HARRISON

DATE WEDNESDAY, 18 AUGUST 2010

FILE NO/S APPL 10 OF 2006

CITATION NO. 2010 WAIRC 00810

Result Discontinued

Order

WHEREAS this is an application to vary the *Family Day Care Co-Ordinators' and Assistants' Award, 1985* ("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 to hold discussions with 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 ("AIRC"); 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, the Commission listed the matter for a show cause hearing on 9 December 2008; and

WHEREAS at the hearing on 9 December 2008 the applicant requested that the matter be adjourned until September 2009 pending the outcome of a matter being dealt with by the AIRC; and

WHEREAS the Commission contacted the applicant on a number of occasions after 6 October 2009 about the status of the matter; and

WHEREAS on 3 December 2009 the applicant requested a directions hearing be set down; and

WHEREAS the matter was set down for a directions hearing on 22 January 2010; and

WHEREAS at the hearing the applicant requested further time to consider its position with respect the matter in relation to coverage of the Award and award modernisation that had occurred in the Federal system and the applicant was to advise the Commission of its intentions by 12 February 2010; and

WHEREAS on 11 February 2010 the applicant informed the Commission that it wished to proceed with the matter and that it would lodge amended schedules however, this did not occur; and

WHEREAS on 30 March 2010 the applicant advised the Commission that it was not proceeding with the matter; and

WHEREAS on 18 May 2010 the Commission wrote to the applicant about lodging a Notice of Withdrawal or Discontinuance; and

WHEREAS on 20 May 2010 the applicant filed a Notice of Withdrawal or 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.

2010 WAIRC 00777

MATILDA BAY BREWING COMPANY LIMITED ENTERPRISE AWARD 1994

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ON THE COMMISSION'S OWN MOTION
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	THURSDAY, 12 AUGUST 2010
FILE NO/S	APPL 1374 OF 2004
CITATION NO.	2010 WAIRC 00777

Result Application discontinued

Order

WHEREAS this is an application made pursuant to s 40B on 20 October 2004 to vary the Matilda Bay Brewing Company Limited Enterprise Award 1994 ("the Award");

AND WHEREAS on 17 June 2010 the Commission cancelled the Award in order [2010] WAIRC 00355;

AND WHEREAS there is now no Award to which this application relates;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under s 27(1)(a)(iv) of the *Industrial Relations Act 1979*, hereby order -

THAT this application be, and is hereby discontinued.

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

2010 WAIRC 00885

PERMANENT BUILDING SOCIETIES (ADMINISTRATIVE AND CLERICAL OFFICERS) AWARD, 1975 NO. 26 OF 1975

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMISSION'S OWN MOTION
	APPLICANT
	-v-
	HOME BUILDING SOCIETY, AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES, W.A. CLERICAL AND ADMINISTRATIVE BRANCH
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	THURSDAY, 9 SEPTEMBER 2010
FILE NO/S	APPL 1637 OF 2004
CITATION NO.	2010 WAIRC 00885

Result	Order issued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

WHEREAS this is an application made pursuant to s 40B to vary the *Permanent Building Societies (Administrative and Clerical Officers) Award, 1975 No. 26 of 1975*;

AND WHEREAS on 18 May 2010 the Commission cancelled the Award in order [2010] 2010 WAIRC 00287;

AND WHEREAS there is now no award to which this application relates;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under s 27(1)(a)(iv) of the *Industrial Relations Act 1979*, hereby order:

THAT this application be, and is hereby discontinued.

(Sgd.) S M MAYMAN,
[L.S.] Commissioner.

2010 WAIRC 00887

PERMANENT BUILDING SOCIETIES (ADMINISTRATIVE ANDCLERICAL OFFICERS) AWARD, 1975

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMISSION'S OWN MOTION
	APPLICANT
	-v-
	HOME BUILDING SOCIETY, AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES, W.A. CLERICAL AND ADMINISTRATIVE BRANCH
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	THURSDAY, 9 SEPTEMBER 2010
FILE NO/S	APPL 1657 OF 2003
CITATION NO.	2010 WAIRC 00887

Result	Order issued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

WHEREAS this is an application made pursuant to s 40B to vary the *Permanent Building Societies (Administrative and Clerical Officers') Award 1975*;

AND WHEREAS on 18 May 2010 the Commission cancelled the Award in order [2010] 2010 WAIRC 00287;

AND WHEREAS there is now no award to which this application relates;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under s 27(1)(a)(iv) of the *Industrial Relations Act 1979*, hereby order:

THAT this application be, and is hereby discontinued.

(Sgd.) S M MAYMAN,
[L.S.] Commissioner.

2010 WAIRC 00776

TITANIUM OXIDE MANUFACTURING AWARD 1975

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ON THE COMMISSION'S OWN MOTION
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	THURSDAY, 12 AUGUST 2010
FILE NO/S	APPL 1355 OF 2004
CITATION NO.	2010 WAIRC 00776

Result Application discontinued

Order

WHEREAS this is an application made pursuant to s 40B on 18 October 2004 to vary the Titanium Oxide Manufacturing Award 1975 ("the Award");

AND WHEREAS on 18 May 2010 the Commission cancelled the Award in order [2010] WAIRC 00287;

AND WHEREAS there is now no Award to which this application relates;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under s 27(1)(a)(iv) of the *Industrial Relations Act 1979*, hereby order -

THAT this application be, and is hereby discontinued.

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

INDUSTRIAL MAGISTRATE—Claims before—

2010 WAIRC 00305

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

PARTIES	LIQUOR HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH
	CLAIMANT
	-v-
	MINISTER FOR EDUCATION
	RESPONDENT
CORAM	INDUSTRIAL MAGISTRATE G. CICCHINI
HEARD	THURSDAY, 27 MAY 2010, WEDNESDAY, 28 APRIL 2010, THURSDAY, 28 JANUARY 2010
DELIVERED	THURSDAY, 27 MAY 2010
CLAIM NO.	M 32 OF 2009
CITATION NO.	2010 WAIRC 00305

CatchWords	Alleged breach of the Cleaners and Caretakers (Government) Award 1975; whether employee was directed to work outside usual hours of work; whether overtime is payable for hours worked outside of usual hours; turns on its own facts.
Legislation	*Industrial Relations Act 1979*
Industrial Instruments	*Cleaners and Caretakers (Government) Award 1975*
Cases Referred to in Decision	Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation (Commonwealth) (1981) 147 CLR 297
	Project Blue Sky v Australian Broadcasting Authority (1998) 194 CLR 355
	City of Wanneroo v Holmes (1987) 30 IR 362
	BHP Billiton Iron Ore Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Union of Workers (Western Australian Branch) [2006] WASCA 124

Cases also Cited:	Metropolitan Health Services Board v Australian Nursing Federation 98 IR 390
	Iannella v French **(**1968**)** 119 CLR 84
	Minister for Health v Hospitals Salaried Officers' Associate of WA (1983) 63 WAIG 1153
	Perth Electric Tramways "Employees" Industrial Union v Commissioner of Railways (1927) 7 WAIG 155
	Norwest Beef Industries Ltd v WA Branch, Australasian Meat Industry Employees' Union (1984) 64 WAIG 2124.
	Ostrowski v Palmer **(**2004**)** 218 CLR 493
	AWU v Mt Newman Mining Co Pty Ltd 54 WAIT 1943
	The United Furniture Industrial Union of Workers, WA v The Construction, Mining and Energy Workers' Union of Australia, Western Australian Branch 70 WAIG 2108
	Australian Electrical Electronics, Foundry and Engineering Union (WA Branch) v Minister for Health 71 WAIG 2253
	Proudman v Dayman **(**1941**)** 67 CLR 536
Result	Claim proved
Representation	
Claimant	Mr M Aulfrey In House Counsel Employed By The Claimant Appeared For The Claimant
Respondent	Mr A Shuy instructed by the Mr T Sharp, State Solicitor for Western Australia appeared for the Respondent

REASONS FOR DECISION

Background

1 Mount Lawley Senior High School (the school) formerly directly employed its own cleaning staff. In April 1996 it began to outsource its cleaning requirements to contract cleaners. That continued until 18 April 2005 when it reverted to employing its own day labour cleaning staff.

2 When the decision was made to return to the use of day labour cleaning, Mr Terry Boland the then school Principal delegated the role of recruiting day labour cleaning staff to Mr Shane Mr Longman who was then the school's Business Manager responsible for its finances, buildings and non-teaching staff. Mr Longman consequently recruited a full time Cleaner in Charge, a part-time Assistant Cleaner in Charge and eleven part time Cleaners. With the exception of the appointment of the Assistant Cleaner in Charge, the compliment day labour cleaning staff employed was the same as that previously existing.

3 Following a merit selection interview process Mr Brett Clements was appointed as the school's full time Cleaner in Charge. Prior to his appointment Mr Clements had worked at a hotel. The remainder of the cleaning staff with the odd exception were former staff members of Quantum Cleaning, which had held the school's cleaning contract prior to the change. Each cleaner was in effect invited to reapply for his or her job on the basis that they would be employed directly by the Respondent. Most of them were successful in their application.

4 Prior to the commencement of their duties, all cleaning staff including Mr Clements participated in an induction process conducted by the school. That took place on 14 and 15 April 2005. During that process all inductees received an Induction Booklet (exhibit 5) containing, inter alia, details about their conditions of service. Insofar as it is relevant to this matter, the spread of work hours for cleaners stipulated therein was between 5.30 am and 6.00 pm with a starting time of 5.30 am for those working the morning shift. The *Cleaners and Caretakers (Government) Award 1975* (the Award) governed the conditions of their employment however the information contained in the handbook concerning the spread of hours and starting times was inconsistent with it. Relevantly subclause 3.1.1(b) of the Award provided:

> "Ordinary hours shall be worked between the hours of 6.00 am and 7.00 pm, Monday to Friday inclusive."

5 It is common ground that until 1 April 2009 Mr Clements started work at 5.30 am and continued to work through to 9.30 am at which time he had a break. He thereafter recommenced at 2.00 pm and finished at 6.00 pm.

6 Despite the fact that Mr Clements had been the Claimant's union delegate at the school since 2005 it had not come to his attention that there might have been a problem with his start times until his chance observation of the Award during a union training session in 2007. At that time he discovered that there was an inconsistency relating to starting times between the Award provisions and that stated in the induction manual. He consequently soon thereafter asked the Claimant to investigate the matter. There was some considerable delay in the Claimant responding. Consequently it was not until early 2009 that Mr Clements formed the view that his and the other cleaners starting times were not in accordance with the Award.

7 In about March 2009, Mr Clements in an attempt to rectify the anomaly held a number of discussions with Yvonne Scott who was by then the school's Business Manager. In the end result because most of the school's cleaners were happy to continue to start work at 5.30 am, Mr Clements in accordance with the procedure set out in the Award on 2 April 2009 wrote to the school's Principal and Business Manager requesting written approval for cleaners to commence work at 5.30 am in lieu of 6.00 am. Subclause 3.1.1(e)(i) of the Award facilitated an earlier start time than that provided by the Award but only with the written permission of the Principal. That same day the school's Principal Mr Johnson granted approval of what was sought and notified Mr Clements in writing.

8 On 24 June 2009, the Claimant lodged its claim alleging that during the material period the Respondent failed to comply with the Award in that it required Mr Clements to start work at 5.30 am instead of 6.00 am. It asserts that resulted in Mr Clements working outside his usual hours 30 minutes each day. It asserts that Mr Clements should have been remunerated at overtime rates for those 30 minutes but was not and that he was therefore underpaid. The Claimant accordingly seeks to recover that allegedly owed together with interest thereon. It also seeks the imposition of a penalty for the Respondent's contravention of the Award.

Factual Issue in Dispute – Was There Agreement About Starting Times?

Mr Clements' Version

9 Mr Clements testified that prior to the commencement of his duties at the school he and his wife, also a cleaner, met with Mr Longman in Mr Longman's office. Natasha Harland who worked for Mr Longman was also present. At that time Mr Longman told him that he was to start work at 5.30 am and continue working until 9.30 am at which time he was to have a break and thereafter recommence at 2.00 pm and finish at 6.00 pm. Mr Longman told him that those hours of work had been accepted by his District Office Support Officer Jeff Kinane. There was no other discussion about the starting time. During the meeting they also discussed the job and what was expected. Immediately after that meeting they attended another meeting which had been organised to meet the rest of the cleaning staff.

10 At that subsequent meeting Mr Longman introduced Mr Clements and his wife, who had previously worked as a cleaner at another school, to the rest of the cleaning staff. Mr Longman then went on to advise staff about their start and finish times. He told them that they were to start at 5.30 am and that the recommencement time for those working on the afternoon would be 2.00 pm in Mr Clements' case and 3.00 pm for the others. At that time one of the prospective cleaning staff members named Mileva approached Mr Longman to advise she could not recommence at 3.00 pm and asked whether she could recommence at 3.30 pm instead. She was told that she could not and that in the circumstances her services would not be required. From that Mr Clements took the view that the hours of work indicated by Mr Longman were not negotiable.

Mr Longman's Version

11 Mr Longman testified that prior to the cleaning staff's commencement he met with Mr Clements in order to determine which cleaners were to work morning or afternoon shifts, or both. After ascertaining that the majority of the cleaners were to work a three hour morning shift he determined that by commencing at 6.00 am and concluding at 9.00 am at least 20 minutes of their shift would be non productive, given that classes started at 8.45 am. He told Mr Clements that he would prefer it if cleaning staff cleared the school by 8.45 am and accordingly raised the possibility of an earlier start. Mr Clements did not object to the proposal. Consequently he asked Mr Clements to put the proposal to the rest of the cleaning staff to ascertain whether it was acceptable to them. Mr Clements later returned to advise that the cleaning staff were happy to start at 5.30 am. Mr Terry Boland who was then the schools' principal was kept informed regarding the starting times issue.

12 Mr Boland in his statement to the Court said that he recalled Mr Longman going to him seeking approval to negotiate an earlier start time so that clashes between cleaners and students could be avoided. He recalled telling Mr Longman to ensure that what was proposed was permissible under the relevant award and to check with the Department of Education about it. Mr Boland recalls Mr Longman reporting back to him that an earlier start time had been negotiated.

13 Mr Longman testified that prior to entering into the arrangement he had spoken with his District Office Support Officer to ensure that an earlier start time was permissible. In that regard he was advised that it was permissible provided that the cleaning staff agreed and the school Principal approved it. As a consequence of the agreement reached his District Office Support Officer emailed him a copy of the Cleaning Induction Manual 2005 version 4 which was subsequently issued to all cleaners including Mr Clements.

Determination of the Starting Time Issue

14 In resolving the issue in dispute I must say that I was impressed by Mr Clements. He appeared to be a careful and truthful witness. He was able to give specific details relating to his meeting with Mr Longman prior to meeting the rest of the cleaning staff. He recalled who was present, where it took place and the specific circumstances in which the meeting took place. I accept his evidence that there was no discussion about starting times and that a 5.30 am starting time was presented to him as a fait accompli.

15 His specific recollection of the incident involving Mileva is also of significance. I am satisfied that such an incident occurred and that he has not fabricated that event. In my view the fact that Mileva did not participate in the induction, as is clear from the induction records supports what Mr Clements has told the Court. It is apparent that Mileva was unable to take up a position as cleaner at the school because Mr Longman was inflexible with respect to start times. It is obvious that as the Business Manager Mr Longman looked after the best interest of the school. He was of the view that any cross over between classes in session and cleaners on duty was undesirable because it affected the productivity of cleaners.

16 There can be no doubt that Mr Longman discussed the issue of a 5.30 am start with Mr Boland and that he also sought advice about it from his District Office Support Officer. I find however that was all done prior to the engagement of cleaners. Given the advice received that an earlier start time was permissible, Mr Longman set about achieving his goal in the best interests of the school but without reference to the cleaners. The best that can be said about Mr Longman's evidence is that he is mistaken in his recollection. His evidence relating to his alleged meeting with Mr Clements concerning the early state times is vague as to place, time and circumstance. He may now believe that he met with Mr Clements to discuss the issue however I am satisfied that he never did. I conclude therefore that there was never any agreement concerning the earlier starting time. I am satisfied that work times were presented as an inflexible condition of employment as is evidence as to what happened to Mileva. I far prefer the evidence of Mr Clements to that of Mr Longman and find Mr Clements's version of events to be accurate.

17 In closing submissions counsel for the Respondent suggested that Mr Boland's statement supports Mr Longman's evidence. I disagree. The fact that Mr Longman told Mr Boland certain things does not mean that they were true or correct.

Did the Respondent Contravene the Award?

18 Relevantly the Award provides

> 3. - HOURS OF WORK
>
> 3.1. - HOURS
>
> 3.1.1 (a) Except as otherwise provided for in 3.1 – Hours, the ordinary hours of work shall be 38 per week with the hours actually worked being 40 hours per week or 80 hours per fortnight.
>
> (b) Ordinary hours shall be worked between the hours of 6.00 am and 7.00 pm, Monday to Friday inclusive.
>
> (c) The actual hours of work for attendants and court ushers shall be worked between 8.00 am and 5.00 pm unless otherwise ordered by the WAIRC or by agreement with the union.
>
> (d) Ordinary hours shall be worked within a 20-day cycle of eight hours on the first 19 days in each cycle with 0.4 of one hour of each such day worked accruing as an entitlement to take the 20th day in each cycle as a paid day off as though worked.
>
> (e) (i) Notwithstanding the provisions of 3.1.1(a), where the majority of school cleaners, including the Cleaner in Charge, request, the start time may be varied to allow cleaners to start earlier than 6.00 am with the written permission of the Principal. Under no circumstances are cleaners allowed to start work more than 4.5 hours before the official opening time of the school at which they are employed.
>
> (ii) In considering a request made in accordance with 3.1.1(e)(i), the Principal will take into account, but is not limited to, such factors as:
>
> (aa) operational needs of the schools;
>
> (bb) natural and artificial lighting;
>
> (cc) safety and security of the cleaning staff; and
>
> (dd) security of school premises and property.
>
> (iii) Where the request of cleaners to start earlier than 6.00 am is granted, the loadings prescribed in 5.1 – Special Rates and Provisions of this award will not apply.
>
> (iv) In the event that the Cleaner in Charge does not agree to an earlier start time, but the majority of cleaners do, another cleaner may volunteer to take responsibility for opening the school and switching off the security alarm system. Under such circumstances, no additional allowances are payable to the cleaner who elects to undertake this duty.
>
> (v) The starting times for cleaners will be reviewed at the end of Term 1 and Term 3 each year.

19 Subclause 3.1.1(b) provides that ordinary hours are to be worked between 6.00 am and 7.00 pm Monday to Friday inclusive. The corollary of that is that work done outside those times on those days and any hours worked on a Saturday and/or Sunday are not ordinary hours. It is important to note also that subclause 3.1.1(e)(i) facilitates a start earlier than 6.00 am subject to the cleaners at the school requesting it and the school Principal giving permission in writing for it to occur. The effect of subclause 3.1.1(e)(i) is that the spread of hours can be changed to run between the agreed earlier starting time and the finishing time stipulated in the Award.

20 The Respondent contends that subclause 3.1.1(e) of the Award is aimed at prohibiting an earlier start without permission and says that proposition is supported by the fact that the school Principal in determining whether an earlier start time should be permitted is obliged to consider the factors set out in subclause 3.1.1(e)(ii). Those factors are not so much concerned with the concept of ordinary hours for the purpose of the overtime provision in subclause 3.2 but rather with logistical issues such as need, lighting, safety and security of staff and premises. Those factors relate solely to operational considerations. Consequently, by starting earlier than otherwise permitted in writing employees committed breaches of the Award, albeit unwittingly. In that regard the Respondent acknowledges that the cleaners were led into that situation because of the representations about starting times made by the school's administrative officers. It is argued therefore that the Respondent cannot be in breach of the Award provision which is aimed at prohibiting employees from starting earlier than that permitted in writing.

21 With respect I do not agree with the Respondent's submission. In my view it is apparent that subclause 3.1.1(e) of the Award is not concerned with prohibition but rather with, subject to limitation, the facilitation of an earlier start time. If the cleaners' proposal suits the school then an earlier start time will be permitted without penalty to the school. If the Respondent's contention were correct it would lead to an absurd outcome in which cleaners would be subject to penalty for doing what their employer had instructed them to do or alternatively had agreed to.

22 Another argument put forward by the Respondent is that a spread of hours set out in subclause 3.1.1(b) did not have application to Mr Clements and other cleaners because their start times were regulated outside the Award. In support of that contention the Respondent argues that based on a historical overview of the provision, the words *"except as otherwise provided for in 3.1 hours"* found in subclause 3.1.1(a) also limits the operation of subclause 3.1.1(b). The Respondent points

out that subclauses 3.1.1(a) and 3.1.1(b) were once a composite provision but were split as part of the process of Award modernisation. Accordingly given its history and context and in light of other errors made in the modernisation process it should be construed as suggested.

23 To support its argument the Respondent points out that subclause 3.1.1 contains apparent errors. By way of example subclause 3.1.1(e)(i) contains a reference to subclause 3.1.1(a) when it clearly should be a reference to clause 3.1.1(b). Further it is suggested that an error has also been made in clause 3.1.1(e)(iii) where it refers to clause 5.1. Given those errors which it is reasonable to infer has resulted from the Award modernisation process subclause 3.1.1(a) should be construed having regard to its history so as to ascertain its true intention.

24 In my view subclause 3.1.1(b) should be given its ordinary and natural meaning (see ***Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation Commonwealth*** (1981) 147 CLR 297). Having said that, I acknowledge that the contemporary approach to construction which stems from ***Project Blue Sky v Australian Broadcasting Authority*** (1998) 1994 CLR 355 is that factors such as purpose, general policy and context have to be taken into account rather than just a literal meaning of a provision so as to create consistency and fairness. The interpretation of the relevant industrial instrument in this matter begins with a consideration of the words used and their natural meaning, but they cannot be interpreted in a vacuum divorced form industrial realities. (See ***City of Wanneroo v Holmes*** (1987) 30 IR 362 per French J at 378 and ***BHP Billiton Iron Ore Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers (Western Australian Branch)*** [2006] WASCA 124 per Pullin J at [19] – [23]).

25 The words of subclause 3.1.1(b) are plain. They do not draw confusion or ambiguity. The subclause makes it clear that all hours worked between 6.00 am and 7.00 am Monday to Friday inclusive are to be classified as ordinary hours. Given that its terms are clear there is no need to look elsewhere in order to construe it. Indeed the language used is not only plain but also explicit. In those circumstances it is inappropriate for it to be construed so as to import the exception in subclause 3.1.1(a). Although I accept that errors have occurred in the Award modernisation process, it does not follow that there was an error made in subclause 3.1.1(b) and that the parties to it had intended that it be subject to the same exception as in subclause 3.1.1(a). In my view, such an approach invites speculation.

26 I am satisfied that Mr Clements' start and finish times together with the spread of hours over which he was to work was not subject to extraneous regulation. The Award regulated those matters. I have no doubt that the spread of hours as provided for in subclause 3.1.1(b) at all material times applied to Mr Clements.

27 It is not in dispute that during the material period Mr Clements commenced work at 5.30 am. I find that the Respondent's officer instructed him to do so. As a consequence he started work outside of ordinary hours. The Claimant asserts that for those days that Mr Clements worked periods of time outside the usual hours of work as provided by the Award that he was entitled to be paid at overtime rates in accordance with subclause 3.2.2 of the Award. Relevantly subclause 3.2.2(a) of the Award provides:

> 3.2.2 Overtime rates
>
> (a) Except as otherwise provided for in 3.2 – Overtime, and subject to 3.1.2 – Rostered and shift employees, all time worked in excess of or outside of the usual hours or outside the daily spread shall be paid for at the rate of time and one-half for the first two hours and double time thereafter.

28 Clause 3.2.2(a) is clear and unambiguous. It provides for the payment of overtime rates for hours worked "in excess of or outside" of the usual hours. The words "outside of" refers to work carried out before or after usual hours. In the current context usual hours can only mean the ordinary hours as permitted by the Award. What is meant by ordinary hours may be different dependant upon the nature of employment. For example the ordinary hours of rostered and shift employees are between 6.00 am and 7.00 pm seven days a week (see subclause 3.1.2(a)).

29 The language of subclause 3.2.2 makes it clear those employees who works outside of their ordinary hours or outside the duly spread of hours are to be paid at overtime rates.

Conclusion

30 The Respondent obliged Mr Clements to start work at a time earlier than that provided by subclause 3.1.1(b) of the Award. The earlier start time resulted from a directive given by the school to Mr Clements rather than by agreement as referred to subclause 3.1.1(e)(i) of the Award. Mr Clements worked outside of ordinary hours. He should have been paid at overtime rates for his first half hour worked each day but was not. It follows that the claim is proved.

Quantum

31 At the commencement of the hearing the parties advised that they had agreed that the issue of quantum is to be deferred pending the outcome on liability.

G.Cicchini

Industrial Magistrate

POLICE ACT 1892—APPEAL—Matters Pertaining To—

2010 WAIRC 00840

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PETER WALL
	APPELLANT
	-v-
	THE COMMISSIONER OF POLICE
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
	COMMISSIONER S J KENNER
	COMMISSIONER J L HARRISON
HEARD	MONDAY 22 MARCH 2010, FRIDAY 18 JUNE 2010
DELIVERED	MONDAY 23 AUGUST 2010
FILE NO.	APPL 40 OF 2009
CITATION NO.	2010 WAIRC 00840

CatchWords	Removal of Police Officer – Loss of confidence by Commissioner of Police – Application for leave to tender new evidence – *Police Force Regulations 1979 – Police Act 1892* s 8, s 33R, s 33R(3), (4), (7), (8), (11)
Result	Application dismissed
Representation	
Appellant	Mr Wall in person
Respondent	Ms D Scaddan, of counsel

Reasons for Decision

1 Peter Wall, the appellant, appeals to the WAIRC against his removal by the Commissioner of Police pursuant to s 8 of the *Police Act 1892* (the Police Act).

2 These Reasons for Decision relate to Mr Wall's application made on 1 June 2010 for leave to tender new evidence under s 33R – New evidence on appeal of the Police Act.

3 Some of the background to this appeal is set out in the Reasons for Decision of 3 August 2009 (2009 WAIRC 00514) dealing with the appeal being filed out of time.

4 In October 2009 Mr Wall was represented in his appeal by a solicitor from the WA Police Union of Workers, Mr Judd, and also by Mr Momber. On 22 October 2009 Mr Wall, through Mr Judd, filed an application for leave to tender new evidence, together with an unsigned affidavit of Mr Wall and a copy of an affidavit of Alexander Craig David Harding (Mr Harding) sworn on 22 October 2009.

5 The Commissioner of Police did not consent to the tendering of new evidence set out in the application save for one item.

6 On 9 November 2009 Mr Wall filed a further application for leave to tender new evidence.

7 On 17 December 2009, Mr Judd advised the Commission that he and Mr Momber no longer represented Mr Wall.

8 The appeal was referred for conciliation on 26 October 2009. Conciliation did not resolve the matter and on 22 March 2010, the WAIRC convened a hearing for programming purposes.

9 At the programming hearing, Mr Wall foreshadowed that within seven days he would file a fresh application seeking leave to tender new evidence. For various reasons he did not file that application within that time. However, on 1 June 2010 Mr Wall filed an affidavit of 170 paragraphs sworn on 1 June 2010. It also attached a statement of Mr Harding of 18 October 2009; which contained the same information as his affidavit of 22 October 2009; a letter of 14 April 2010 from Dr L C Risbey, Consulting Psychiatrist addressed To Whom It May Concern and a copy of a Notice to Resume Duty provided to Senior Constable Peter James Wall by the Commissioner of Police dated 20 March 2006. Mr Wall's affidavit was treated as an application for leave to tender new evidence.

10 On Tuesday, 15 June 2010, Mr Wall sent to the WAIRC a copy of an unsigned deed of release (the deed) however the Commission indicated to him that it was inappropriate for that document to be received and it was returned to him.

11 Also on 15 June 2010 Mr Wall forwarded to the WAIRC a submission regarding his application for leave to tender new evidence.

12 On 18 June 2010 the WAIRC convened a hearing to deal with the application seeking leave to tender new evidence. Mr Wall clarified that he seeks leave to tender the following as new evidence:

(1) A copy of the deed;

(2) Provisions of the *Police Act* and the *Police Force Regulations 1979* (the Regulations);

(3) The witness statement of Mr Harding;

(4) The Notice to Resume Duty form of 20 March 2006;

(5) Dr Risbey's report of 14 April 2010.

13 Mr Wall also referred to statements which he believes have been filed by the respondent being; a report by Dr Assumption dated 20 August 2008, reports by Dr McCarthy dated 16 January and 29 March 2008 and a statement by Superintendent Brown in relation to their meeting on 31 January 2008.

14 Part of the difficulty in dealing with this matter is that Mr Wall did not have a copy of the applications which had previously been filed on his behalf by Mr Judd dated 22 October 2009 and 9 November 2009, the file of *Documents that May be Relied Upon by the Appellant* filed by Mr Judd on 7 October 2009, or the *Respondent's Bundle of Documents* also filed on 7 October 2009.

15 Mr Wall suggested that Dr McCarthy, Dr Assumption, Superintendent Brown, Dr Risbey and Mr Harding should give oral testimony, and Inspector Ball should be available for cross-examination. He said that the Commissioner of Police should be summonsed by the WAIRC to give evidence because of the contradictions between his actions and the Police Act and Regulations. He says that the Police Act and Regulations have not been considered by the Commissioner of Police in his decision making.

The Deed

16 Mr Wall says that during the failed conciliation process, the respondent and Mr Judd had agreed to a deed of release, which he, Mr Wall, refused to sign. He says that the WAIRC should receive this as new evidence because it is relevant to the credibility of the whole removal action. The Commissioner of Police is required to act according to the Police Act and cannot step aside from his oath of office for conciliation or any other purposes. If he does so it constitutes corruption. The deed demonstrates that the Commissioner of Police had proposed to reinstate Mr Wall pursuant to the Police Act and this, according to Mr Wall, undermines the credibility of the decision to dismiss him in the first instance.

17 Mr Wall says that the inference that could be drawn from the deed is that the Commissioner of Police recognised that he had made an error in his decision to dismiss and therefore it is relevant to be tendered as new evidence.

18 The Commissioner of Police says that the WAIRC should not receive the deed because to do so would preclude parties from genuinely attempting to settle matters if there is a prospect that confidential discussions and settlement proposals may be used against them if the matter is not settled and it is contrary to the interests of justice for such documents to be used in this way. The Commissioner also says that the deed does not demonstrate that the Commissioner of Police has acted on wrong or mistaken information with respect to his reasons for removing Mr Wall, nor is the deed new evidence which might materially have affected the Commissioner's decision to take removal action. Further, the deed is not a document which could have played any part in the process the subject of the appeal on the basis that it came about as part of the appeal process.

Police Act and Regulations

19 Mr Wall says that the Police Act and the Regulations are appropriate to be received as new evidence on the basis that the Commissioner of Police is bound by them and they play a significant role in the decision making process.

20 The Commissioner of Police says that Mr Wall does not need to seek leave to tender the Police Act and the Regulations but can refer to them without the need for them to become evidence.

Mr Harding's Statement

21 The Commissioner of Police says that Mr Harding's statement relates to an incident said to have occurred on 26 July 2008, when it was alleged that Mr Wall had struck Sergeant Raas in the chest. This incident formed part of the issues set out by the Commissioner of Police in his Notice of Intention to Remove Mr Wall dated 4 December 2008, at dot point number 7. In his letter to Mr Wall dated 13 March 2009, he informed Mr Wall that following his consideration of Mr Wall's response to his Notice of Intention to Remove, he had decided to abandon the grounds set out in dot points 3 to 9 of that Notice of Intention to Remove because he was not satisfied that those grounds provided a sufficient basis upon which he might lose confidence in Mr Wall's suitability to be a police officer, and he reformulated his reasons. Therefore Mr Harding's statement had no part to play in the Commissioner's reasons for removal and the statement has no relevance in this appeal.

Notice to Resume Duty dated 20 March 2006

22 Mr Wall deals with this notice from paragraph 40 in his Affidavit in Support of Application to tender new evidence. It advised him that further to Mr Wall's stand down from operational duties on 5 September 2005 and to the Commissioner of Police's letter to him of 1 March 2006, his stand down from duty had been rescinded and he was directed to report for duty to Cannington Police Station on 20 March 2006.

23 The respondent says that this notice has no relevance to this appeal as it does not relate to any of the grounds of appeal. It was served on the appellant following the first loss of confidence proceedings that had taken place in 2005. As part of those proceedings Mr Wall was stood down from duty and the Notice to Resume Duty was merely the document which formally notified Mr Wall he was returned to operational duties. If it were relevant, it would have been referred to in Mr Wall's response to the Notice of Intention to Remove, however it was not. In any event, it does not meet the test of being new evidence.

Dr Risbey's Report

24 Mr Wall says that Dr Risbey has stated in his letter of 14 April 2010 that he had never been contacted by the Commissioner of Police or any representative over the entire period that Mr Wall was on duty, notwithstanding that Mr Wall had given authority for the respondent to consult Dr Risbey about his condition.

25 The respondent noted that at tabs 4 and 5 of the Respondent's Bundle of Documents are letters written by Mr Wall's former legal representative, one dated 3 April 2009, which is Mr Wall's response to the reformulated grounds of removal by the Commissioner of Police. The Commissioner says that it flags to the Commissioner of Police that Mr Wall was obtaining a letter from Dr Risbey for the Commissioner's consideration. A further letter dated 21 April 2009 from Mr Wall's former legal representative advised the Commissioner that Mr Wall had obtained a report from Dr Risbey. Although he did not provide a copy of that report to the Commissioner of Police, he described it or summarised it. In his Reasons for Removal dated 23 April 2009 (tab 3, page 6) the Commissioner of Police demonstrates that he has taken into consideration the points raised by Mr Wall's legal representative's summary of Dr Risbey's report. The information contained in the summary of Dr Risbey's report did not affect the respondent's decision to take removal action, particularly because it did not address the grounds upon which the respondent lost confidence in Mr Wall. Dr Risbey's report adds nothing to that which was already before the respondent, particularly on 21 April 2009.

26 The Commissioner of Police says that Dr Risbey's report dated 14 April 2010 does not constitute new evidence under s 33R(11) because, save for some updating of the information already provided, Dr Risbey's report is not new in that the information contained within it had already been provided to the Commissioner of Police by Mr Judd in his letter dated 21 April 2009.

27 The report itself may constitute new evidence because it is a letter which post dates the removal but the substance of the letter is not new. There is nothing to demonstrate that the respondent has acted on wrong or mistaken information or that the report of 14 April 2010 might materially affect or have affected the Commissioner's decision to take removal action or that it is in the interests of justice to otherwise grant leave to tender this new evidence.

Statements by Dr McCarthy and Dr Assumption

28 The Commissioner of Police says that if Mr Wall is referring to medical reports of Dr McCarthy of 26 March 2008 and Dr Assumption of 8 September 2008 then these are already included in his documents at tabs 13 O and P/Q.

Superintendent Brown's Statement

29 The Commissioner of Police says that it is likely that this is the document at tab 6.2 of the Respondent's Bundle, being a contemporaneous journal entry made by Superintendent Brown at a meeting with Mr Wall in January 2008. There is no other statement by Superintendent Brown, nor any statements submitted by any party. If it is the statement referred to, then it is already available and does not need to be the subject of a new evidence application.

Oral Evidence

30 Mr Wall refers to reasons stated in his affidavit for each of these people to give oral testimony. Mr Wall says that the evidence of Dr Peter McCarthy, Dr Ian Assumption and Dr Risbey relates to his suffering major depressive and post traumatic stress disorders from approximately 2002 onwards.

31 The Commissioner of Police says that if Mr Wall seeks to have a number of people including Dr Risbey, Dr McCarthy, Superintendent Brown, Inspector Ball, Mr Harding and the Commissioner of Police give oral evidence then the principles relating to how new evidence which is in the form of oral evidence is to be dealt with are set out in *Carlyon v Commissioner of Police* (2004 WAIRC 11435).

32 The Commissioner of Police points out that the appeal process under the Police Act is not a hearing de novo, a rehearing of the issues, rather it is for the WAIRC to consider whether the decision of the Commissioner of Police to take removal action was harsh, oppressive or unfair. The process set out in the legislation involves a review of the materials that were taken into account by the Commissioner of Police, including submissions made by Mr Wall, the grounds of removal and the respondent's reasons for removal. The provisions for tendering of new evidence are very limited on the basis that the Commissioner of Police ought to have taken into account what was before him including the written response of the appellant.

33 The Commissioner of Police says that according to paragraph 98 of Mr Wall's affidavit what Mr Wall wishes to do is examine the witnesses about their intentions in the hope of demonstrating some ulterior motive. Nothing put to the WAIRC by Mr Wall suggests that he would be successful in this. If that was the appellant's belief or concern then he ought to have put that to the Commissioner of Police when he had an opportunity to do so, not as part of the appeal process.

Consideration

34 The WAIRC has previously set out the basis on which new evidence can be tendered by an appellant in *Gerald Jean-Noel Laurent v Commissioner of Police* [2009 WAIRC 00839; (2009) 89 WAIG 2177 (*Laurent*)]. It noted:

> 10 The *Police Act, 1892* (the Police Act) places considerable restrictions on the ability of either Mr Laurent or the Commissioner of Police to tender new evidence. Section 33R(1) states:
>
> > (1) New evidence shall not be tendered to the WAIRC during a hearing of an appeal instituted under this Part unless the Commission grants leave under subsection (2) or (3).
>
> 11 These opening words of section 33R as set out above are prohibitory in that the emphasis is that new evidence shall not be tendered to the WAIRC during the hearing of an appeal. It seems quite clear the Police Act intends that an appeal is heard and determined only on:

- Any document or other material that was examined and taken into account by the Commissioner of Police in making a decision to take removal action;
- The notice of intention to remove;
- A written submission to the Commissioner of Police made by the appellant in response to the notice of intention to remove;
- The written notice of a decision to take removal action; and
- The notification of the removal from office.

12 Evidence other than of the above is 'new evidence' (see section 33R(11)). The WAIRC is given the power to grant leave, however it is subject to the restrictions set out in s 33R(3) and (4). It is section 33R(3) that is of relevance to this application as it governs the circumstances by which the WAIRC may grant leave to Mr Laurent to tender new evidence. In the absence of consent from the Commissioner of Police, the WAIRC will need to be satisfied in relation to each document submitted by Mr Laurent, and in relation to the evidence to be given by any witness summonsed by Mr Laurent, that:

- Mr Laurent is likely to be able to show that the Commissioner of Police has acted upon wrong or mistaken information; or
- The new evidence might materially have affected the Commissioner of Police's decision to take removal action; or
- It is in the interests of justice to do so.

It is not necessary that all three of the above need apply to any particular piece of new evidence; it is sufficient if any one of the three applies.

13 There is a further test. Even if the new evidence Mr Laurent seeks to submit meets one of the three tests above, section 33R(4) states that in the exercise of the WAIRC's discretion under subsection 33R(3), the WAIRC shall have regard to:

- Whether or not Mr Laurent was aware of the substance of the new evidence; and
- Whether or not the substance of the new evidence was contained in a document to which Mr Laurent had reasonable access,

before his removal from office.

14 It is apparent from the wording of section 33R(3) and (4) that the WAIRC is only able to assess whether leave should be granted if it is aware of the nature of the new evidence to assess its substance. If it is unable to see the new evidence and assess its substance, it is not able to grant leave to tender new evidence.

15 Where the new evidence which is sought to be tendered is contained in a document, the WAIRC will be able to assess its substance. Where the evidence sought to be tendered is the oral evidence of a witness, the WAIRC will need to be made aware of the substance of the witness's evidence in order to determine whether or not to admit it. This can be done by the witness preparing a statement or affidavit (see *Allan Raymond Carlyon v Commissioner of Police* (2004) 84 WAIG 1397).

35 Therefore each of the documents and evidence which Mr Wall seeks to have leave to tender needs to comply with the requirements set out in the Police Act and in *Laurent*.

The Deed

36 It is in the public interest that disputes should be resolved without recourse to litigation and parties often engage in discussions and exchange communications for the purpose of trying to reach a compromise agreement. These communications are generally treated as being without prejudice.

37 If such communications were liable to be disclosed in the course of litigation it would act as a serious impediment to parties to enter into frank and open discussions to try to resolve their differences.

38 It is clear that in this case the deed was prepared for the purpose of the parties attempting to resolve this appeal by agreement during the conciliation process. It would be contrary to the interests of justice for the deed to be received into evidence, so this part of the application should be dismissed.

The Police Act and Regulations

39 The Police Act and the Regulations form part of the record and may be referred to by either party in these proceedings without the necessity for them to be received as new evidence.

Mr Harding's Statement

40 Mr Harding's statement deals with an incident which ceased to form part of the Commissioner of Police's grounds for removal as notified to Mr Wall in the Commissioner's letter of 13 March 2009. Therefore it is not relevant to the appeal and should not be received as new evidence.

The Notice to Resume Duty dated 20 March 2006

41 The history of the Loss of Confidence process, from the Commissioner of Police's perspective, is set out in Inspector Eric Smith's Summary of Investigation dated 5 November 2008, contained within the Respondent's Bundle of Documents at tab 13. At page 2, under the heading of Summary of Investigation, commencing at paragraph 1 is a recitation of the events from 1 November 2005, and paragraphs 3 and 4 refer to the Notice to Resume Duty dated 20 March 2006.

42 The notice itself is not already in evidence. It seems that the use Mr Wall seeks to make of it is to demonstrate that he was returned to operational duties, and to enable him to address issues surrounding that return. The return to duty is referred to in the Respondent's Bundle of Documents and forms part of the history of the matters. However, the notice itself is not critical to that history. Also, it does not meet the definition of new evidence and Mr Wall was aware of the substance of the notice, and he had reasonable access to it before his removal from office. Therefore we conclude that it should not be received as new evidence.

Dr Risbey's Report

43 In the Respondent's Bundle of Documents filed on 7 October 2009, at tabs 4 and 5, are letters from Mr Judd to the Commissioner of Police. The first at tab 5 is dated 3 April 2009, and responds to the reformulated grounds with respect to the Commissioner of Police's Notice of Intention to Remove Mr Wall dated 4 December 2008. It notes that Dr Lance Risbey was then "in the process of providing a report (to Mr Judd) with respect to Peter. It is envisaged that his report will be completed by Wednesday 8 April 2009, and, that much of the report will be highly relevant to your considerations. Upon receipt, I will promptly forward it to you."

44 The letter at tab 4 is dated 21 April 2009. Although there is no suggestion in this letter that Dr Risbey's report was forwarded to the Commissioner of Police, Mr Judd's letter provides "information [which] has been extracted from Dr Risbey's report to assist you in your further consideration of the matter".

45 The information contained in that letter is not significantly different to that contained in the information extracted by Mr Judd from Dr Risbey's earlier report, which information was provided to the Commissioner of Police. It does however comment that he, Dr Risbey, has not been contacted by the Police Service at all up to the time Mr Wall was stood down in October 2008.

46 The letter of 10 April 2010 may technically constitute "new evidence" as the letter itself was not in existence when the Commissioner of Police made the decision to take removal action, however, its contents, save for the comment about not being contacted, are not new.

47 However, and more importantly, the grounds for removal action do not directly relate to Mr Wall's operational fitness. Rather, in his letter to Mr Wall of 23 April 2009 setting out the grounds for Mr Wall's removal, the Commissioner of Police says in respect of that second ground, that he has lost confidence in Mr Wall in that:

> you continue to be difficult to manage in the workplace and frequently act in an aggressive manner when challenged by your supervisors, notwithstanding management action undertaken by the WA Police.
>
> …
>
> I arranged for you to be independently medically assessed on 8 September 2008 to determine what was contributing to your continuing absences on sick leave. The medical report suggested a number of 'models' and strategies that WA Police ought to employ in order to keep you in the workplace as a functional, productive police officer. It has been submitted in your responses that I should engage these strategies because of the *"likely benefits for [you] arising from [your] return to work with WA Police"*.
>
> These strategies include you having to be supervised by a senior officer outside of your present workplace, together with an elaborate and resource-intensive regime whereby your supervisors should report your every absence from the workplace or instance of workplace conflict to a rehabilitation officer who, in turn, reports it to a psychologist so that you can, at this agency's expense, 'work through' your personality issues with the psychologist to develop an understanding of the "development of [your] personality style".
>
> However, the psychiatrist was still <u>unable</u> to reassure me that, even with this level of treatment, it would reduce the amount of sick leave you take [emphasis added]:
>
> > *"Without the above [recommended treatment] being instituted on a regular basis, including good liaison between a rehabilitation provider, himself, his supervisors and his treating psychiatrist, it is too early to say whether his current pattern of behaviour is entrenched. At this stage it is possible that a rehabilitation or injury management program will result in him returning to his employment and remaining in full time employment. <u>However it is not possible to guarantee significant periods of sick leave will not occur. A wait and see approach of over a specific time of approximately 6-12 months is required".</u>*
>
> I consider the suggested support that would be required to retain you as a productive employee to be manifestly excessive and beyond what the community would expect of me in managing my workforce, particularly in an officer who has had as much sick leave as you have had in your career. Part of your undertaking to me in 2006 was that you had the issues under control that led you to be absent so frequently from the workplace. Yet, in 2009, I am again being asked to accept that "with treatment" your issues, which are, notably, 'personality issues' rather than medical issues, will be brought under control and you will become a productive employee who attends work. I am not prepared to extend you this further opportunity when nothing else about your conduct and performance recommends you as a police officer in whom my continued support is warranted.

48 We find that Dr Risbey's report adds nothing new to the issues for consideration in light of both Mr Judd's letter of 23 April 2009 and that it does not relate in any meaningful way to the Commissioner of Police's grounds or considerations in losing confidence in Mr Wall.

Superintendent Brown's report and Statements by Dr McCarthy and Dr Assumption

49 These documents are already part of the evidence and they are included in the Respondent's Bundle of Documents at tabs 6.2 and 13 O and P/Q respectively.

Oral Evidence Generally

50 The scheme of the Police Act and the manner in which appeals are dealt with is set out in *Laurent.* At para 15 of Laurent it is noted that "(w)here the evidence sought to be tendered is the oral evidence of a witness, the WAIRC will need to be made aware of the substance of the witness's evidence in order to determine whether or not to admit it. This can be done by the witness preparing a statement or affidavit".

51 There is no provision for the examination of witnesses in the absence of the evidence of those witnesses first being submitted to the WAIRC to enable it to consider whether it is new evidence which ought to be allowed in accordance with the requirements of s 33R(3) and (4). In accordance with s 33R(7) and (8), the Commissioner of Police has a statutory right to review that evidence and then either revoke the removal action or alternatively reformulate his reasons. The Commissioner of Police would not have the opportunity to do that where oral evidence was given in the absence of any statement or affidavit, and a hearing would need to be stood down after that evidence to enable that process to take place.

52 Further, in the absence of such a statement or affidavit outlining what the evidence of those witnesses would be, Mr Wall would be speculating about what information he may be able to elicit from that evidence which might be helpful to him. There was an opportunity for Mr Wall to put that to the Commissioner of Police when he had the opportunity to respond to the Notice of the Intention to Remove.

53 The persons Mr Wall wishes to have called to give oral evidence are Dr McCarthy, Dr Assumption, Dr Risbey, Mr Harding, Inspector Ball, Superintendent Brown and the Commissioner of Police.

54 In respect of the first three of those persons, there is no suggestion that their evidence would be other than the reports already referred to. It may be that now that Mr Wall is aware that the substance of Dr Risbey's report and the actual reports of Dr McCarthy and Dr Assumption are already in evidence he would not wish to proceed with seeking to call them. It is not clear otherwise what evidence he would seek to elicit or how it is relevant to his appeal or the Commissioner of Police's grounds for removal.

55 As to Mr Harding's statement, there is no indication that he would give any evidence other than that contained in his statement, and if that is so, it deals with an incident which did not form any part of the Commissioner of Police's grounds for removal.

56 In respect of Inspector Ball and the Commissioner of Police, there is nothing before the WAIRC which would indicate the substance of their evidence to enable the WAIRC to determine whether or not to admit it (see *Laurent* para 15).

57 In those circumstances, we would not grant leave to tender new evidence, for the purpose of having any of these persons summonsed to give evidence.

Summary

58 Leave ought not be granted for Mr Wall to tender as new evidence the deed, the witness statement of Mr Harding, the Notice to Resume Duty form of 20 March 2006 or Dr Risbey's report of 14 April 2010.

59 Dr McCarthy's and Dr Assumption's reports, along with Mr Judd's summary of 21 April 2009 of Dr Risbey's report are already in the documents before the WAIRC. Likewise, Superintendent Brown's journal entries are before us.

60 Mr Wall may utilise and make reference to the Police Act and Regulations in arguing his case.

61 Leave ought not be granted for the calling of any oral evidence sought by Mr Wall.

2010 WAIRC 00839

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PETER WALL
	APPELLANT
	-v-
	THE COMMISSIONER OF POLICE
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
	COMMISSIONER S J KENNER
	COMMISSIONER J L HARRISON
DATE	MONDAY, 23 AUGUST 2010
FILE NO/S	APPL 40 OF 2009
CITATION NO.	2010 WAIRC 00839

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 leave to tender new evidence is dismissed.

(Sgd.) P E SCOTT,
Acting Senior Commissioner,
[L.S.] On Behalf of the Western Australian Industrial Relations Commission.

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2010 WAIRC 00838

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NATALIE BROAD
	APPLICANT
	-v-
	FORRESTFIELD TAVERN
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	FRIDAY, 20 AUGUST 2010
FILE NO/S	U 62 OF 2010
CITATION NO.	2010 WAIRC 00838

Result	Order issue dismissing application
Representation	
Applicant	Ms N Broad
Respondent	No appearance

Order

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

AND WHEREAS this matter was listed for hearing on 12 August 2010 for the applicant to show cause why her application should not be dismissed;

AND WHEREAS having heard from Ms Broad the Commission formed the view the application should be dismissed;

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.) S M MAYMAN,
[L.S.] Commissioner.

2010 WAIRC 00841

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GILLIAN BROOKS
	APPLICANT
	-v-
	THE GOWRIE (WA) INC
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	TUESDAY, 24 AUGUST 2010
FILE NO/S	B 50 OF 2010
CITATION NO.	2010 WAIRC 00841

Result	Discontinued
Representation	
Applicant	Mr P Mullally as agent
Respondent	Mr S Bibby as agent

Order

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

WHEREAS on 3 June 2010 the Commission convened a conference for the purpose of dealing with issues raised in the respondent's Notice of Answer and Counter-proposal lodged in the Commission on 15 April 2010; and

WHEREAS on 8 July 2010 the Commission convened a further conference for the parties to report back about how the matter was to be progressed; and

WHEREAS at the conference on 8 July 2010, and with the consent of the parties, the Commission conducted a conciliation conference; and

WHEREAS at the conclusion of the conference the parties sought time for further discussions; and

WHEREAS on 11 August 2010 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the application; and

WHEREAS on 13 August 2010 the respondent consented to the matter being discontinued;

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

THAT this application be, and is hereby discontinued.

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

2010 WAIRC 00796

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ROBERT BUSH
	APPLICANT
	-v-
	ENERGY POWER SYSTEMS AUSTRALIA
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 16 AUGUST 2010
FILE NO/S	U 37 OF 2010
CITATION NO.	2010 WAIRC 00796

Result	Application dismissed
Representation	
Applicant	Mr R Bush
Respondent	Ms P Brooke, of counsel

Order

WHEREAS the application was adjourned on 20 May 2010 for 14 days to allow the applicant to obtain advice on the basis that if no advice was received from the applicant by that date the application may be dismissed;

AND WHEREAS on 22 June 2010 the applicant was granted a further period of time to 25 June 2010 to advise of whether he intended to proceed with his application;

AND WHEREAS by 16 August 2010 no advice had been received from the applicant;

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 J KENNER,
[L.S.] Commissioner.

2010 WAIRC 00848

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MEGAN CASSIDY
	APPLICANT
	-v-
	MR S FRASER CHIEF EXECUTIVE OFFICER SHIRE OF GINGIN
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	FRIDAY, 27 AUGUST 2010
FILE NO/S	U 6 OF 2009
CITATION NO.	2010 WAIRC 00848

Result	Discontinued
Representation	
Applicant	Mr K Trainer (as Agent)
Respondent	Mr S Kemp (of Counsel)

Order

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

WHEREAS this matter is one of six applications lodged by a number of applicants against the respondent which were dealt with at the same time; and

WHEREAS the application was set down for hearing and determination on 9, 10 and 11 March 2010; and

WHEREAS on 22 February 2010 the hearing dates were vacated at the request of the respondent due to the unavailability of the person instructing the respondent's representative; and

WHEREAS the matter was set down for hearing and determination on 14, 15, 16 and 21 July 2010 along with five related applications; and

WHEREAS at the start of the hearing on 14 July 2010 the applicant's representative advised the Commission that the applicant was unavailable to give evidence due to the imminent birth of a child; and

WHEREAS given the consent of the respondent, the Commission advised the parties that the matter would to be listed at a later date for the applicant to give her evidence; and

WHEREAS the matter was set down for further hearing on 23 August 2010; and

WHEREAS on 20 August 2010 the applicant's representative advised the Commission that the applicant did not wish to continue with her application; and

WHEREAS on 20 August 2010 the applicant filed a Notice of Discontinuance in respect of the application and the hearing was vacated; and

WHEREAS on 20 August 2010 the respondent consented to the matter being discontinued;

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

THAT this application be, and is hereby discontinued.

(Sgd.) J L HARRISON,
Commissioner.

[L.S.]

2010 WAIRC 00852

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DIANE DALY
	APPLICANT
	-v-
	ALBANY YOUTH SUPPORT ASSOCIATION INC
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	FRIDAY, 27 AUGUST 2010
FILE NO/S	U 67 OF 2010
CITATION NO.	2010 WAIRC 00852

Result	Order issued
Representation	
Applicant	Ms D Daly
Respondent	Mr S Heathcote (of counsel)

Order

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

AND WHEREAS on 30 June 2010 the Commission convened a conference for the purpose of conciliating between the parties;

AND WHEREAS subsequently an agreement was reached between the parties;

AND WHEREAS on 19 August 2010 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.

2010 WAIRC 00792

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SAMANTHA FERNANDES
	APPLICANT
	-v-
	TAMBREY OPS PTY LTD T/A TAMBREY TAVERN
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 16 AUGUST 2010
FILE NO/S	U 5 OF 2010
CITATION NO.	2010 WAIRC 00792

Result	Order issued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

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

AND WHEREAS on 4 August 2010 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.

2010 WAIRC 00851

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JAMIE KETTERINGHAM
	APPLICANT
	-v-
	CHIEF EXECUTIVE OFFICER SHIRE OF CUE
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	FRIDAY, 27 AUGUST 2010
FILE NO/S	U 34 OF 2010
CITATION NO.	2010 WAIRC 00851

Result	Discontinued
Representation	
Applicant	Mr K Trainer (as Agent)
Respondent	Mr S White (as Agent)

Order

WHEREAS this is an application pursuant to s29(1)(b)(i) of the *Industrial Relations Act 1979*; and

WHEREAS on 30 April 2010 the Commission convened a conference for the purpose of conciliating between the parties and at the conclusion of the conference the applicant was given further time to consider a settlement offer made by the respondent at the conference; and

WHEREAS the Commission contacted the applicant's representative on a number of occasions about the status of the matter; and

WHEREAS on 24 August 2010 the applicant filed a Notice of Discontinuance in respect of the application; and

WHEREAS on 26 August 2010 the respondent consented to the matter being discontinued;

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

THAT this application be, and is hereby discontinued.

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

2010 WAIRC 00847

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR SAMUEL SCHMIDT
	APPLICANT
	-v-
	MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER SECTION 7 OF THE HOSPITALS AND HEALTH. HEALTH SERVICES ACT (WA) AS THE HOSPITALS FORMERLY COMPRISED IN THE METROPOLITAN HEALTH SERVICES BOARD
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	THURSDAY, 26 AUGUST 2010
FILE NO/S	U 81 OF 2010
CITATION NO.	2010 WAIRC 00847

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 21st day of June 2010 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of the conference the parties were to exchange documents and the applicant sought time to consider his position; and

WHEREAS on the 9th day of August 2010 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 dismissed.

(Sgd.) P E SCOTT,
[L.S.] Acting Senior Commissioner.

2010 WAIRC 00850

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CERI O'NEILL
	APPLICANT
	-v-
	RON REGAN
	MOSAIC COMMUNITY CARE
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	FRIDAY, 27 AUGUST 2010
FILE NO/S	U 91 OF 2010
CITATION NO.	2010 WAIRC 00850

Result	Discontinued
Representation	
Applicant	Mr K Trainer (as Agent)
Respondent	Ms M Ivanovski (of Counsel)

Order

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

WHEREAS the application was lodged out of time; and

WHEREAS on 7 July 2010, and with the consent of the parties, the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of that conference the parties reached an agreement in principle in respect of the application; and

WHEREAS on 3 August 2010 the Commission wrote to the applicant's representative by way of electronic mail requesting advice as to the status of the matter and was informed that the settlement had not yet been finalised; and

WHEREAS on 23 August 2010 the applicant filed a Notice of Discontinuance in respect of the application; and

WHEREAS on 25 August 2010 the respondent consented to the matter being discontinued;

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

THAT this application be, and is hereby discontinued.

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

2010 WAIRC 00794

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ANNETTE ONUOHA
	APPLICANT
	-v-
	PEP COMMUNITY SERVICES INC.
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	MONDAY, 16 AUGUST 2010
FILE NO/S	U 32 OF 2010
CITATION NO.	2010 WAIRC 00794

Result	Discontinued
Representation	
Applicant	Mr P King as Agent
Respondent	Mr P Kieran and Mr P Brunner of Counsel

Order

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

WHEREAS on 3 May 2010 the Commission convened a conference for the purpose of dealing with programming matters with respect to the issue of jurisdiction raised in the respondent's Notice of Answer and Counter-proposal lodged in the Commission on 15 March 2010; and

WHEREAS on 3 May 2010, and with the consent of the parties, the Commission conducted a conciliation conference; and

WHEREAS at the conclusion of that conference the respondent was given time to consider its position and the parties were to have further discussions; and

WHEREAS on 12 July 2010 the Commission convened a further conference; and

WHEREAS at the conclusion of that conference the applicant was to advise the Commission within seven days of her intentions with respect to the matter; and

WHEREAS on 28 July 2010 the Commission contacted the applicant to clarify her intentions with respect to this matter and was advised that the application was to be discontinued; and

WHEREAS on 30 July 2010 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the application; and

WHEREAS on 4 August 2010 the respondent consented to the matter being discontinued;

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

THAT this application be, and is hereby discontinued.

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

2010 WAIRC 00795

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HAYLEY REDMOND
	APPLICANT
	-v-
	TANYA, (THE ELEGANT TOUCH)
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	MONDAY, 16 AUGUST 2010
FILE NO/S	U 64 OF 2010
CITATION NO.	2010 WAIRC 00795

Result Discontinued

Order

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

WHEREAS the matter was set down for hearing on 9 June 2010 as to whether the application should be accepted out of time; and

WHEREAS on 8 June 2010 the applicant advised the Commission that she did not wish to proceed with the matter and the hearing was vacated; and

WHEREAS on 7 July 2010 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the application; and

WHEREAS the respondent consented to the matter being discontinued;

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

THAT this application be, and is hereby discontinued.

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

2010 WAIRC 00842

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CRAIG SOMERVILLE
	APPLICANT
	-v-
	ABORIGINAL HEALTH COUNCIL OF WESTERN AUSTRALIA ACN 114 220 478
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	TUESDAY, 24 AUGUST 2010
FILE NO/S	U 97 OF 2010
CITATION NO.	2010 WAIRC 00842

Result Discontinued

Order

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

WHEREAS the Commission set down a conference on 3 August 2010, which date was later changed to 17 August 2010, for the purpose of conciliating between the parties; and

WHEREAS on 13 August 2010 the applicant lodged a Notice of Withdrawal or Discontinuance in respect of the application; and

WHEREAS on 16 August 2010 the respondent consented to the matter being discontinued and the conference 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.

2010 WAIRC 00364

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SUSAN TAYLOR
	APPLICANT
	-v-
	IEUAN LAKAY OF LAKAY AND ASSOCIATES TRUST TA SWAN VALLEY PHYSIOTHERAPY
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
HEARD	FRIDAY, 18 JUNE 2010
DELIVERED	MONDAY, 21 JUNE 2010
FILE NO.	B 49 OF 2010
CITATION NO.	2010 WAIRC 00364

CatchWords	Section 29(1)(b)(ii) – Claim amended
Result	Preliminary reasons issued.
Representation	
Applicant	Ms S Taylor
Respondent	No appearance

Preliminary Reasons for Decision

1 When the s 29(1)(b)(ii) application was received from Mrs Susan Taylor (the applicant) she asserted the contractual entitlement denied her by Mr Ieuan Lakay of Lakay and Associates Trust trading as Swan Valley Physiotherapy (the respondent) was limited to an annual leave entitlement of 68.12 hours, a gross amount of $2,292.24.

2 During the hearing on 18 June 2010 the applicant sought to amend her claim to include, in addition to the annual leave entitlement, a claim for two weeks' wages in lieu of notice. The Commission accepted the application to amend the claim.

3 The claim for payment in lieu of notice is now a relevant consideration, and is capable of being addressed. The question is whether, in accordance with the applicant's contract of employment, the respondent's termination and subsequent payment to the applicant included payment in lieu of notice.

4 The Commission will invite further submissions in writing from the parties confined to the following question. The parties are asked to address:

(a) Whether payment in lieu of notice ought apply;

(b) If the answer to (a) is 'yes' what amount of payment in lieu of notice applies;

(c) Was proper notice to terminate the employment contract given by the respondent to the applicant; and

(d) What period, in terms of assessing an amount of pay in lieu of notice, would have been reasonable in the circumstances.

5 A further decision will issue, following receipt of the submissions referred to herein. Please submit your views in writing by close of business Monday, 28 June 2010 to the Commission. The Commission requests the respondent to provide a copy of their submission to the applicant and similarly the applicant to the respondent.

6 The present proceedings stand adjourned.

2010 WAIRC 00782

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SUSAN TAYLOR
	APPLICANT
	-v-
	IEUAN LAKAY OF LAKAY AND ASSOCIATES TRUST TRADING AS SWAN VALLEY PHYSIOTHERAPY
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
HEARD	FRIDAY, 18 JUNE 2010
DELIVERED	FRIDAY, 13 AUGUST 2010
FILE NO.	B 49 OF 2010
CITATION NO.	2010 WAIRC 00782

CatchWords	Contractual benefits claim – contract of employment - application upheld – *Industrial Relations Act 1979* (WA) s 29(1)(b)(ii)
Result	Minute issued.
Representation	
Applicant	Ms S Taylor
Respondent	No appearance

Reasons for Decision

1 This is an application by Ms Susan Taylor (the applicant) filed pursuant to s 29(1)(b)(ii) of the *Industrial Relations Act 1979* (the Act). The applicant seeks benefits she considers have been denied by Ieuan Lakay of Lakay and Associates Trust trading as Swan Valley Physiotherapy (the respondent).

2 At no stage was a Form 5, notice of answer and counter proposal, filed by the respondent despite a number of requests made by the registry of the Western Australian Industrial Relations Commission (the Commission). The respondent also failed to attend the first conference on 17 May 2010 at the Midland Courthouse although following the conference informal correspondence was left at the Midland Courthouse.

3 The matter was listed for hearing on 18 June 2010. A notice of hearing was sent to the respondent's address and telephone contact was made confirming the hearing date and time. At no stage did the respondent inform the Commission he would not be attending. The Commission is satisfied a notice of hearing was sent to the respondent and that no mail was returned. The Commission is further satisfied that the respondent was aware this matter was on but chose not to attend. At no point did the respondent seek an adjournment of the proceedings. It is therefore appropriate the Commission proceed to deal with this matter in the absence of the respondent having regard to the powers granted under s 27(1)(d) of the Act. I so determine. Following the conclusion of the hearing on 18 June 2010 an email was received from the respondent advising that Mr Lakay was overseas.

The Claim

4 The applicant claims outstanding contractual entitlements have been denied by the respondent namely:

68.12 hours' annual leave; and

two weeks' payment in lieu of notice.

Following the hearing the applicant formally sought leave to withdraw her claim for two weeks' payment in lieu of notice. The Commission granted the applicant's request.

Applicant's Evidence

5 The applicant gave evidence that she was first employed by the respondent as a business development manager, following an initial approach made by Mr Lakay of the respondent. The applicant gave evidence that there was a further discussion between herself and Mr Lakay the following day regarding the prospect of the applicant working for the respondent.

6 Terms of the contract of employment as discussed at the second meeting encompassed:

payment of $33.65 per hour for all hours worked;

four weeks' annual leave based on 38 hours per week;

10 sick leave days per year; and

a five day week.

The applicant gave evidence that from time to time, she was required to work additional hours on a Saturday.

7 The applicant gave evidence she initially expressed some reluctance to enter into a contract of employment with the respondent due to the wage she had been receiving from her previous employer. During the second discussion with the respondent Mr

Lakay made a verbal offer to match the rates of pay and, on the evidence, the applicant agreed to enter into a contract of employment with the respondent. The terms of employment were verbally agreed between the applicant and Mr Lakay at the conclusion of the second interview.

8 The applicant commenced employment with the respondent on 17 November 2008.

9 The applicant gave evidence she was paid fortnightly by electronic funds transfer to a Westpac account in her own name. Copies of the relevant bank account statements were submitted as evidence and showed regular payments as credited by the respondent. The applicant gave evidence that each regular payment made by the respondent into the applicant's bank account generated a payslip reflecting the applicant's ongoing entitlements.

10 The applicant provided verbal and documentary evidence that the final payment by the respondent excluded the applicant's outstanding annual leave entitlement as at that date, some 68.12 hours. The applicant gave evidence her hourly rate at the time of her resignation was $33.65. The hourly rate and the outstanding annual leave entitlement was reflected on the applicant's final payslip attached to the notice of application.

11 The applicant gave evidence that following her resignation from the company, on several occasions, she phoned the respondent to determine when the outstanding annual leave entitlement would be paid.

The Respondent's email

12 Following the hearing the Commission received an email from the respondent (an unsigned, document) advising he was overseas. In that email, a copy of which had not been forwarded to the applicant, a number of assertions were made regarding the applicant's employment. The email, received by my associate Ms Allison, cannot be considered in the face of sworn evidence by the applicant. Unless the respondent is willing to attend proceedings and give evidence, the contents of any informal document received cannot be relied upon by the Commission.

Conclusions

13 The Commission has listened carefully to the verbal submissions and considered the documentary evidence of the applicant. It is the Commission's view that the applicant's evidence was given clearly and to the best of her recollection.

14 The Commission accepts that the applicant was employed as business development manager by the respondent between 17 November 2008 and 24 March 2010. I accept also that the applicant was employed under a contract of employment reached verbally, following:

an initial conversation between Mr Lakay on behalf of the respondent and the applicant; and

an interview held the following day with the applicant, and Mr and Mrs Lakay at the respondent's premises.

The Commission finds that the applicant was offered the job at the time of the second discussion and the offer was accepted. The Commission finds that following the commencement of the applicant's employment the verbal contract of employment reached between the applicant and the respondent was committed to writing on or about 6 January 2009 (exhibit T1).

15 It is for the Commission to determine the terms of the contract of employment and to ascertain whether the claim constitutes a benefit denied under such a contract, having regard to the previous decisions of the Commission as per *Belo Fisheries v Froggett* (1983) 63 WAIG 2394; *Perth Finishing College Pty Ltd v Watts* (1989) 69 WAIG 2307; *Waroona Contracting v Usher* (1984) 64 WAIG 1500.

16 The Commission finds annual leave to be a term of the applicant's contract. It is the Commission's view the applicant has made out her claim that she has been denied a benefit due under her contract of employment with the respondent for annual leave. The Commission accepts that at the time of the applicant's resignation her hourly rate of pay was $33.65. The Commission finds that the respondent has denied the applicant $2,292.24 (gross) in annual leave some 68.12 hours.

17 A minute of order will now issue requiring the respondent pay the applicant $2,292.24 (gross) within seven days of the issuance of the order.

2010 WAIRC 00837

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SUSAN TAYLOR
	APPLICANT
	-v-
	IEUAN LAKAY OF LAKAY AND ASSOCIATES TRUST TRADING AS SWAN VALLEY PHYSIOTHERAPY
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	FRIDAY, 20 AUGUST 2010
FILE NO	B 49 OF 2010
CITATION NO.	2010 WAIRC 00837

Result	Denied contractual benefits awarded as claimed
Representation	
Applicant	Ms Susan Taylor
Respondent	No appearance

Order

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

WHEREAS a hearing was convened on 18 June 2010; and

WHEREAS there was no appearance by the respondent at the hearing; and

WHEREAS the Commission, for reasons expressed at hearing and referred to in written reasons for decision proceeded to hear the matter;

NOW THEREFORE having heard Ms Susan Taylor on her own behalf and there being no appearance by the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the respondent pay to Ms Susan Taylor, by way of a denied contractual benefit, an amount of $2,294.24 gross, being 68.12 hours' unpaid annual leave entitlement; and

THAT the payment be made within 7 days of the date of the issuance of this order.

(Sgd.) S M MAYMAN,
[L.S.] Commissioner.

2010 WAIRC 00791

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LYNNETTE VIVAIN WALTON
	APPLICANT
	-v-
	EZIWAY FOODSTORES GOOMALLING
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 16 AUGUST 2010
FILE NO/S	U 71 OF 2010
CITATION NO.	2010 WAIRC 00791

Result	Order issued
Representation	
Applicant	Ms G Clarke (of counsel)
Respondent	Mr B Jackson (of counsel)

Order

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

AND WHEREAS on 24 June 2010 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 23 July 2010 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.

2010 WAIRC 00870

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOHN SPENCER WARD
	APPLICANT
	-v-
	EASTERN DISTRICTS ENTERPRISE CENTRE TRADING AS:- SMALL BUSINESS CENTRE - EASTERN WHEATBELT
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 6 SEPTEMBER 2010
FILE NO/S	U 15 OF 2010
CITATION NO.	2010 WAIRC 00870

Result	Order issued
Representation	
Applicant	Mr T Hutchison
Respondent	Mr M McDonald

Order

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

AND WHEREAS on 25 March 2010 a conference was held in Perth and on 23 April 2010 a conference was held in Bruce Rock;

AND WHEREAS at the conference on 23 April 2010 an in-principle agreement was reached between the parties;

AND WHEREAS on 13 August 2010 the application was listed to show cause why the application ought not be dismissed;

AND WHEREAS on 26 August 2010 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby discontinued.

(Sgd.) S M MAYMAN,
Commissioner.

[L.S.]

2010 WAIRC 00866

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOHN JAMES WHELAN
	APPLICANT
	-v-
	MPA SKILLS
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	WEDNESDAY, 1 SEPTEMBER 2010
FILE NO/S	U 42 OF 2010
CITATION NO.	2010 WAIRC 00866

Result	Order issued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

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

AND WHEREAS on 24 May 2010 the application was listed for a conference;

AND WHEREAS prior to the date of the conference the parties advised the Commission they were involved in private negotiations and the conference did not proceed;

AND WHEREAS the applicant subsequently advised the Commission that the parties had reached a settlement and the applicant would be discontinuing the application;

AND WHEREAS the applicant did not file a Notice of Discontinuance;

AND WHEREAS on 25 August 2010 the application was listed for hearing to show cause why the application ought not be dismissed;

AND WHEREAS on 24 August 2010 the applicant advised the Commission that he was overseas and that a Notice of Discontinuance had been sent to the Commission;

AND WHEREAS on 31 August 2010 the applicant filed a Notice of Discontinuance;

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.

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Adam Maguire	Darren Faulkes (Autoscene Pty Ltd)	U 269/2009	Chief Commissioner A R Beech	Dicontinued
Kevin Higgins	Gateway Printing	B 184/2009	Commissioner J L Harrison	Consent Order Issued

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
Liquor, Hospitality and Miscellaneous Union	Peter Spencer Acting Business Manager Water Corporation	Harrison C	C 22/2010	1/06/2010 29/06/2010	Dispute re alleged falsification of records by union member	Concluded
The Civil Service Association of Western Australia Incorporated	The Managing Director Central Institute of Technology Formerly Central Tafe	Scott A/SC	PSAC 11/2010	29/04/2010	Dispute re employment status of union member	Discontinued
The Civil Service Association of Western Australia Incorporated	Director General Department of the Attorney General Government of Western Australia	Scott A/SC	PSAC 13/2010	10/05/2010	Dispute re status of disciplinary action taken against union member	Discontinued
Western Australian Police Union of Workers	Commissioner of Police	Scott A/SC	PSAC 7/2010	10/03/2010	Dispute re transfer of union member	Concluded

PROCEDURAL DIRECTIONS AND ORDERS—

2010 WAIRC 00779

S.47 CANCELLATION OF THE WUNDOWIE FOUNDRY AWARD 1986 NO A 8 OF 1986

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ON THE COMMISSION'S OWN MOTION
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	THURSDAY, 12 AUGUST 2010
FILE NO/S	APPL 120 OF 2007
CITATION NO.	2010 WAIRC 00779

Result Application discontinued

Order

WHEREAS this is an application made pursuant to s 47 on 15 November 2007 to cancel the Wundowie Foundry Award 1986 No A 8 of 1986 ("the Award");

AND WHEREAS on 18 May 2010 the Commission cancelled the Award in order [2010] WAIRC 00287;

AND WHEREAS there is now no Award to which this application relates;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under s 27(1)(a)(iv) of the *Industrial Relations Act 1979*, hereby order -

THAT this application be, and is hereby discontinued.

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

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Beehive Montessori School (Enterprise Bargaining) Agreement AG 5/2010	18/08/2010	The Independent Education Union of Western Australia, Union of Employees, Beehive Montessori School	(Not applicable)	Commissioner S J Kenner	Agreement registered
Bunbury Cathedral Grammar School Inc (Enterprise Bargaining Agreement) 2010 AG 12/2010	12/08/2010	The Independent Education Union of Western Australia, Union of Employees, Bunbury Cathedral Grammer School	(Not applicable)	Commissioner S J Kenner	Agreement registered
District Allowance (Government Officers) General Agreement 2010 PSAAG 7/2010	1/09/2010	The Civil Service Association of Western Australia Incorporated and Others	(Not applicable)	Acting Senior Commissioner P E Scott	Agreement registered
Western Australia Police Agency Specific Agreement 2009 PSAAG 6/2010	3/09/2010	Commissioner of Police	The Civil Service Association of Western Australia Incorporated	Acting Senior Commissioner P E Scott	Agreement registered

PUBLIC SERVICE APPEAL BOARD—

2010 WAIRC 00843

APPEAL AGAINST THE DECISION MADE ON 18 JANUARY 2010 RELATING TO TERMINATION OF CONTRACT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SHARMAINE SCOTT
	APPELLANT
	-v-
	WESTERN AUSTRALIA COUNTRY HEALTH SERVICES (WACHS)
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	ACTING SENIOR COMMISSIONER P E SCOTT - CHAIRMAN
	MR K TRENT - BOARD MEMBER
	MR N FERGUS - BOARD MEMBER
DATE	WEDNESDAY, 25 AUGUST 2010
FILE NO	PSAB 4 OF 2010
CITATION NO.	2010 WAIRC 00843

Result Appeal dismissed

Order

WHEREAS this is an appeal to the Public Service Appeal Board pursuant to Section 80I of the *Industrial Relations Act 1979*; and

WHEREAS on the 11th day of June 2010 the appellant advised she did not wish to proceed with the appeal at that time; and

WHEREAS on the 18th day of June 2010 the appellant sought time to consider her position; and

WHEREAS by a letter dated the 26th day of July 2010 the Board directed the appellant to advise of her intentions regarding the appeal by 4.00 pm on the 9th day of August 2010 and that if she had not contacted the Board by that time it would be assumed that she did not wish to proceed with the appeal and an order of dismissal may issue; and

WHEREAS by 4.00 pm on the 9th day of August 2010 the appellant had not contacted the Board;

NOW THEREFORE, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Commission 1979*, hereby orders:

THAT this appeal be, and is hereby dismissed.

(Sgd.) P E SCOTT,
Acting Senior Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2010 WAIRC 00806

APPEAL AGAINST THE DECISION MADE ON 27 NOVEMBER 2009 RELATING TO TERMINATION OF EMPLOYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JAMES SYDNEY WILLIS
	APPELLANT
	-v-
	WA COUNTRY HEALTH - GOLDFIELDS
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	ACTING SENIOR COMMISSIONER P E SCOTT - CHAIRMAN
	MR S SEEDS - BOARD MEMBER
	MR N HASTINGS-JAMES - BOARD MEMBER
HEARD	THURSDAY, 29 JULY 2010
DELIVERED	WEDNESDAY, 18 AUGUST 2010
FILE NO.	PSAB 27 OF 2009
CITATION NO.	2010 WAIRC 00806

CatchWords	Public Service Appeal Board – Termination of employment - Application to receive appeal out of time – Failure to lodge appeal within prescribed time frames – Merits of the appeal – *Industrial Relations Act 1979* (WA) s 80I(1)(c), s 80J – *Industrial Relations Commission Regulations 2005* Reg 102(2)
Result	Application dismissed
Representation	
Appellant	Mr J Willis on his own behalf
Respondent	Mr P Heslewood as agent for the respondent

Reasons for Decision

ACTING SENIOR COMMISSIONER P E SCOTT AND MR N HASTINGS-JAMES:

Background

1 The appellant, James Sydney Willis, was employed by the respondent as a Medical Imaging Technologist from 25 July 2009 at Kalgoorlie. By letter dated 26 October 2009, the Regional Director, WA Country Health Service – Goldfields, Geraldine Ennis, advised Mr Willis that:

> "Your contract of employment is being terminated in accordance with clause 9.5 of the *Health Services Union – WA Health State Industrial Agreement 2008*. Specifically you have been found to have breached discipline by committing acts of misconduct while employed as a Medical Imaging Technologist at the Kalgoorlie Hospital. …
>
> The date of the termination of your contract of employment shall be Friday 27th November 2009. You will remain suspended, on pay, until this date and you are not required to serve this period of notice."

2 On 27 November 2009, Mr Willis lodged with the Commission a Form 11 – Notice of appeal to Public Service Appeal Board which noted that he had instituted an appeal against the decision "Termination of Employment … given on the 27 day of November 2009".

3 Mr Willis says that the letter of 26 October 2009 in which he was advised of the respondent's decision to terminate his employment was not received by him until 29 October 2009. The respondent does not challenge this date.

4 Section 80I(1)(c) of the *Industrial Relations Act 1979* allows a government officer to appeal to the Public Service Appeal Board against a decision, determination or recommendation that the government officer be dismissed. The appeals to the Public Service Appeal Board are to be instituted within the prescribed time (s 80J). The prescribed time referred to there is prescribed by Regulation 107(2) of the *Industrial Relations Commission Regulations 2005*. This provides that an appeal is to be commenced within 21 days of the date of the decision, determination or recommendation in respect of which the appeal is made.

5 Twenty one days from the date when Mr Willis was notified of the respondent's decision, being 29 October 2009, is 19 November 2009. As the Notice of appeal was lodged with the Registrar on 27 November 2009, it is seven days out of time.

6 In filing his Notice of appeal, Mr Willis included numerous documents which set out the correspondence between himself and officers of the respondent and others dealing with questions, complaints and incidents said to have occurred during the course of his employment. The Board was also referred to a letter sent to the Board by Mr Willis dated 7 December 2009 and received on 9 December 2009, attached to which was a series of emails between Mr Willis and Geraldine Ennis throughout October 2009. The respondent has filed a Notice of answer and counter proposal on 24 December 2009 and attached to it a letter of 8 October 2009 addressed to Mr Willis signed by David Bowdidge, Operations Manager, WA Country Health Service – Goldfields.

7 On 29 July 2010 the Board convened for the purpose of hearing from the parties in respect of the application that the appeal be received out of time. It is noted that in letters dated 27 January 2010 and 21 May 2010 sent to the parties by Helen Evans, Associate to the Chairman of the Public Service Appeal Board, the parties were referred to a decision of the Industrial Appeal Court which sets out criteria to be applied in the consideration of an application to receive an application out of time, being *Prem Singh Malik v The Director General Department of Education and Training* [2004] WASCA 51 (*Malik*).

8 At the commencement of the hearing on 29 July 2010 the Chairman of the Public Service Appeal Board indicated to the parties the documents that had been received and referred to above and asked if these were the documents which the parties wished to rely upon and the parties agreed that they were.

Respondent's Outline of Submissions

9 On the day prior to the hearing the respondent had provided to the Board and to Mr Willis, a written submission. Mr Willis initially objected to the Board receiving the submission, believing that it constituted evidence, and he said that this was unfair on him as he had not had an opportunity to examine it and receive advice regarding it. The Chairman of the Board noted to him that such outlines of submission are often provided by parties to the other side and the Board as a courtesy, otherwise the parties could simply make their submission orally during the course of the hearing with the other party not otherwise receiving prior notice of the submissions.

The Appellant's Case

10 The essence of Mr Willis' grounds for his application that the appeal be received out of time is that he was advised by the Health Services Union, Slater & Gordon Solicitors and the Employment Law Centre that he had to lodge a Form 2 with the Commission claiming unfair dismissal within 21 days of the dismissal. He says that he was wrongly advised by staff of the Registry of the Commission after the expiration of the time, that he had been referred to the wrong jurisdiction and that his

claim ought to have been made to the Public Service Appeal Board, not to the Western Australian Industrial Relations Commission in its general jurisdiction. He says by this time he was outside of the time limit. He referred to the time limit that he says he was advised of by the staff of the Commission as being 15 days and he says he did not know about it until those 15 days had expired.

11 It is noted that although reference was made to the criteria contained in the decision in *Malik* in two letters to the parties that Mr Willis did not seek to address the criteria other than to rely upon what he says was wrong advice provided to him.

The Respondent's Case

12 The respondent's submission is that the criteria set out in *Malik* do not support the granting of the extension of time for the filing of the appeal. There are no special circumstances or acceptable explanations which would make it equitable for the Public Service Appeal Board to "alter the prima facie position that failure to lodge within the prescribed time frames is fatal to the application".

13 The respondent says that Mr Willis knew of the decision to terminate his employment well before 29 October 2009 as his correspondence with the respondent demonstrates. In an email to Ms Geraldine Ennis of 9 October 2009 Mr Willis said that he had received by registered post a letter which informed him of an intention to terminate his employment. On 26 October 2009 he wrote to Mr Kim Snowball, the Chief Executive Officer of the WA Country Health Service, indicating that he had been summoned to attend a meeting on 29 October 2009 "where they intend to terminate my Contract of Employment".

14 On 28 October 2009 Mr Willis had written to Mr David Bowdidge advising that he would not be attending that meeting on 29 October 2009 noting "(t)he meeting is to terminate my Employment Contract, and if you are going to do so, you can do it by post". Therefore the letter was posted to him.

15 Mr Willis had also sent an email to Ms Ennis dated 23 October 2009 in which he again noted that it was the respondent's intention to dismiss him on 29 October 2009.

16 The respondent also notes that Mr Willis has provided an email trail showing that he was advised by the Commission's Registry as early as 27 October 2009 to seek advice from the Department of Commerce as to how he should proceed with his appeal and that he would seek advice from others.

17 As to the second criterion, the respondent says prior to the lodgment of the unfair dismissal claim in the Commission, Mr Willis had taken no other steps to contest the termination of his employment. He was aware of the respondent's intention to terminate him as early as 9 October 2009.

18 The respondent says that in respect of the prejudice to the respondent caused by the delay that the respondent has a right to rely upon the expiration of the required time frames as being the point at which the process of termination and appeal is finalised, and that decisions made subsequent to the expiration of that time frame lead to some prejudice to the respondent. The respondent does not rely on any other specific prejudice.

19 As to the criterion that the merits of the appeal may be taken into account, the respondent says that it is clear from the correspondence between 3 August and 14 October 2009 that Mr Willis was not denied the opportunity to address the allegations and he was not denied natural justice. He was provided with every opportunity to address the allegations made against him and did so.

20 As to consideration of fairness between the appellant in this case and other persons in a like position the respondent says that all other employees are subject to the same processes and that there is no particular unfairness to Mr Willis.

Consideration and Conclusions

21 We note the decision of the Industrial Appeal Court in *Malik*. There is a requirement for a party to comply with the legislative requirements and meet the time frames set out in those requirements, being to lodge the appeal or refer the matter to the Public Service Appeal Board within 21 days of the date of the decision appealed against.

22 The Board must be positively satisfied that the time period should be extended and the prima facie position is that the time limit is to be complied with unless there is an acceptable explanation for the delay.

23 Mr Willis says that he was wrongly advised by the Health Services Union, Slater & Gordon, the Employment Law Centre and the Commission's Registry as to the time frame applicable to the filing of an appeal including as to the type of claim which he should lodge. It seems somewhat strange that the applicant should say that he received wrong advice from the Health Services Union, a party which regularly appears or represents employees in matters before the Public Service Appeal Board.

24 An applicant is responsible for ensuring that he or she refers a claim to the proper jurisdiction and does so within the time frames required. It is noted that during the course of the hearing on 29 July 2010, Mr Willis incorrectly identified the lodgment time as being 15 days from the date of the decision whereas it is 21 days. The fact of him having received wrong advice is not a matter which the Board can take into account. In any event if that advice is wrong that is a matter for him to take up elsewhere. On its own it is not a reasonable explanation which justifies an extension of time being granted.

25 As to the action taken by Mr Willis to contest the termination, it was quite clear that he intended to contest the termination and he protested on many occasions. This favours the granting of the extension of time.

26 There is no particular prejudice to the respondent caused by the delay, particularly as the delay is only a relatively short period of time.

27 As to the merits of the appeal, the applicant did not address these at all. The onus is on him to at least satisfy the Board in what has been described as a "rough and ready way" that there is some merit in his claim if the respondent challenges the merits. He has not done so.

28 The final consideration is the fairness between the applicant and other persons in a like position. Nothing in particular was put to us in this regard, however others are able to refer matters within the required time frame.

29 In balancing all of the considerations and criteria, when the essence of Mr Willis' argument is that he was wrongly advised, we are not satisfied that this is either the case or that this is an acceptable explanation. The merits of the appeal are not shown to

be in favour of granting an extension of time. In these circumstances we would refuse the application for an extension of time and dismiss the application.

MR S SEEDS:

30 I agree with these Reasons and have nothing to add.

2010 WAIRC 00805

APPEAL AGAINST THE DECISION MADE ON 27 NOVEMBER 2009 RELATING TO TERMINATION OF EMPLOYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JAMES SYDNEY WILLIS
	APPLICANT
	-v-
	WA COUNTRY HEALTH- GOLDFIELDS
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	ACTING SENIOR COMMISSIONER P E SCOTT - CHAIRMAN
	MR S SEEDS - BOARD MEMBER
	MR N HASTINGS-JAMES - BOARD MEMBER
DATE	WEDNESDAY, 18 AUGUST 2010
FILE NO	PSAB 27 OF 2009
CITATION NO.	2010 WAIRC 00805

Result	Application to receive the appeal out of time dismissed
Representation	
Applicant	Mr J Willis on his own behalf
Respondent	Mr P Heslewood on behalf of the respondent

Order

HAVING heard Mr J Willis on his own behalf and Mr P Heslewood on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the application to receive the appeal out of time be, and is hereby dismissed.

(Sgd.) P E SCOTT,
Acting Senior Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

RECLASSIFICATION APPEALS—

2010 WAIRC 00824

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ROBERT BRIGGS
	APPLICANT
	-v-
	DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE METROPOLITAN HEALTH SERVICE
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 18 AUGUST 2010
FILE NO	PSA 14 OF 2008
CITATION NO.	2010 WAIRC 00824

Result	Appeal dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS on the 28th day of July 2010 the applicant filed a Notice of Discontinuance in respect of the appeal;

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 dismissed.

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

2010 WAIRC 00831

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES RAYMOND JOHN BROCKENSHIRE

APPLICANT

-v-

DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE METROPOLITAN HEALTH SERVICE

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
ACTING SENIOR COMMISSIONER P E SCOTT

DATE WEDNESDAY, 18 AUGUST 2010

FILE NO PSA 31 OF 2008

CITATION NO. 2010 WAIRC 00831

Result Appeal dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS on the 28th day of July 2010 the applicant filed a Notice of Discontinuance in respect of the appeal;

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 dismissed.

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

2010 WAIRC 00832

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES ANDREW ALICK BURGESS

APPLICANT

-v-

DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE METROPOLITAN HEALTH SERVICE

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
ACTING SENIOR COMMISSIONER P E SCOTT

DATE WEDNESDAY, 18 AUGUST 2010

FILE NO PSA 35 OF 2008

CITATION NO. 2010 WAIRC 00832

Result Appeal dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS on the 28th day of July 2010 the applicant filed a Notice of Discontinuance in respect of the appeal;

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 dismissed.

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

2010 WAIRC 00846

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES MELISSA BUTCHER

APPLICANT

-v-

DISABILITY SERVICES COMMISSION

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
ACTING SENIOR COMMISSIONER P E SCOTT

DATE THURSDAY, 26 AUGUST 2010

FILE NO PSA 3 OF 2010

CITATION NO. 2010 WAIRC 00846

Result Appeal dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS on the 23rd day of August 2010 the applicant filed a Notice of Discontinuance in respect of the appeal;

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 dismissed.

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

2010 WAIRC 00833

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES LEXIE CARAMIA

APPLICANT

-v-

DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE METROPOLITAN HEALTH SERVICE

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
ACTING SENIOR COMMISSIONER P E SCOTT

DATE WEDNESDAY, 18 AUGUST 2010

FILE NO PSA 6 OF 2009

CITATION NO. 2010 WAIRC 00833

Result Appeal dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS on the 29th day of July 2010 the applicant filed a Notice of Discontinuance in respect of the appeal;

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 dismissed.

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

2010 WAIRC 00823

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES KEVIN FRANK DAVEY

APPLICANT

-v-

DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE METROPOLITAN HEALTH SERVICE

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
ACTING SENIOR COMMISSIONER P E SCOTT

DATE WEDNESDAY, 18 AUGUST 2010

FILE NO PSA 12 OF 2008

CITATION NO. 2010 WAIRC 00823

Result Appeal dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS on the 28th day of July 2010 the applicant filed a Notice of Discontinuance in respect of the appeal;

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 dismissed.

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

2010 WAIRC 00826

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES LEON DUSCI

APPLICANT

-v-

DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE METROPOLITAN HEALTH SERVICE

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
ACTING SENIOR COMMISSIONER P E SCOTT

DATE WEDNESDAY, 18 AUGUST 2010

FILE NO PSA 17 OF 2008

CITATION NO. 2010 WAIRC 00826

Result Appeal dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS on the 28th day of July 2010 the applicant filed a Notice of Discontinuance in respect of the appeal;

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 dismissed.

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

2010 WAIRC 00819

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES STEPHEN JAMES FLETCHER

APPLICANT

-v-

DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE METROPOLITAN HEALTH SERVICE

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
ACTING SENIOR COMMISSIONER P E SCOTT

DATE WEDNESDAY, 18 AUGUST 2010

FILE NO PSA 7 OF 2008

CITATION NO. 2010 WAIRC 00819

Result Appeal dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS on the 28th day of July 2010 the applicant filed a Notice of Discontinuance in respect of the appeal;

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 dismissed.

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

2010 WAIRC 00821

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES LAURENCE PETER HACKETT

APPLICANT

-v-

DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE METROPOLITAN HEALTH SERVICE

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
ACTING SENIOR COMMISSIONER P E SCOTT

DATE WEDNESDAY, 18 AUGUST 2010

FILE NO PSA 10 OF 2008

CITATION NO. 2010 WAIRC 00821

Result Appeal dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS on the 28th day of July 2010 the applicant filed a Notice of Discontinuance in respect of the appeal;

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 dismissed.

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

2010 WAIRC 00811

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES FRANK HAVERKORT

APPLICANT

-v-

DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE METROPOLITAN HEALTH SERVICE

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
ACTING SENIOR COMMISSIONER P E SCOTT

DATE WEDNESDAY, 18 AUGUST 2010

FILE NO PSA 123 OF 2007

CITATION NO. 2010 WAIRC 00811

Result Appeal dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS on the 28th day of July 2010 the applicant filed a Notice of Discontinuance in respect of the appeal;

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 dismissed.

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

2010 WAIRC 00816

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES BARBARA ANNETTE HENDERSON

APPLICANT

-v-

DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE METROPOLITAN HEALTH SERVICE

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
ACTING SENIOR COMMISSIONER P E SCOTT

DATE WEDNESDAY, 18 AUGUST 2010

FILE NO PSA 2 OF 2008

CITATION NO. 2010 WAIRC 00816

Result Appeal dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS on the 28th day of July 2010 the applicant filed a Notice of Discontinuance in respect of the appeal;

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 dismissed.

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

2010 WAIRC 00820

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES GILLIAN INGRAM

APPLICANT

-v-

DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE METROPOLITAN HEALTH SERVICE

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
ACTING SENIOR COMMISSIONER P E SCOTT

DATE WEDNESDAY, 18 AUGUST 2010

FILE NO PSA 8 OF 2008

CITATION NO. 2010 WAIRC 00820

Result Appeal dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS on the 28th day of July 2010 the applicant filed a Notice of Discontinuance in respect of the appeal;

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 dismissed.

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

2010 WAIRC 00812

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES JOHN JOSEPH

APPLICANT

-v-

DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE METROPOLITAN HEALTH SERVICE

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
ACTING SENIOR COMMISSIONER P E SCOTT

DATE WEDNESDAY, 18 AUGUST 2010

FILE NO PSA 125 OF 2007

CITATION NO. 2010 WAIRC 00812

Result Appeal dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS on the 28th day of July 2010 the applicant filed a Notice of Discontinuance in respect of the appeal;

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 dismissed.

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

2010 WAIRC 00845

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES KEVIN KING

APPLICANT

-v-

DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE METROPOLITAN HEALTH SERVICE

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
ACTING SENIOR COMMISSIONER P E SCOTT

DATE THURSDAY, 26 AUGUST 2010

FILE NO PSA 56 OF 2008

CITATION NO. 2010 WAIRC 00845

Result Appeal dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS on the 16th day of August 2010 the applicant filed a Notice of Discontinuance in respect of the appeal;

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 dismissed.

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

2010 WAIRC 00815

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES BRIAN FRANCIS MACKENZIE

APPLICANT

-v-

DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE METROPOLITAN HEALTH SERVICE

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
ACTING SENIOR COMMISSIONER P E SCOTT

DATE WEDNESDAY, 18 AUGUST 2010

FILE NO PSA 1 OF 2008

CITATION NO. 2010 WAIRC 00815

Result Appeal dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS on the 28th day of July 2010 the applicant filed a Notice of Discontinuance in respect of the appeal;

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 dismissed.

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

2010 WAIRC 00827

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES FRANK MANCINI

APPLICANT

-v-

DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE METROPOLITAN HEALTH SERVICE

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
ACTING SENIOR COMMISSIONER P E SCOTT

DATE WEDNESDAY, 18 AUGUST 2010

FILE NO PSA 18 OF 2008

CITATION NO. 2010 WAIRC 00827

Result Appeal dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS on the 28th day of July 2010 the applicant filed a Notice of Discontinuance in respect of the appeal;

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 dismissed.

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

2010 WAIRC 00825

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES JEAN-GERARD MICHAEL MCINTYRE

APPLICANT

-v-

DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE METROPOLITAN HEALTH SERVICE

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
ACTING SENIOR COMMISSIONER P E SCOTT

DATE WEDNESDAY, 18 AUGUST 2010

FILE NO PSA 16 OF 2008

CITATION NO. 2010 WAIRC 00825

Result Appeal dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS on the 28th day of July 2010 the applicant filed a Notice of Discontinuance in respect of the appeal;

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 dismissed.

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

2010 WAIRC 00828

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES RENAE SHAREE MOLLOY

APPLICANT

-v-

DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE METROPOLITAN HEALTH SERVICE

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
ACTING SENIOR COMMISSIONER P E SCOTT

DATE WEDNESDAY, 18 AUGUST 2010

FILE NO PSA 19 OF 2008

CITATION NO. 2010 WAIRC 00828

Result Appeal dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS on the 28th day of July 2010 the applicant filed a Notice of Discontinuance in respect of the appeal;

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 dismissed.

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

2010 WAIRC 00822

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES JOANNE MONTGOMERY

APPLICANT

-v-

DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE METROPOLITAN HEALTH SERVICE

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
ACTING SENIOR COMMISSIONER P E SCOTT

DATE WEDNESDAY, 18 AUGUST 2010

FILE NO PSA 11 OF 2008

CITATION NO. 2010 WAIRC 00822

Result Appeal dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS on the 28th day of July 2010 the applicant filed a Notice of Discontinuance in respect of the appeal;

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 dismissed.

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

2010 WAIRC 00813

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES BRETT MOON

APPLICANT

-v-

DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE METROPOLITAN HEALTH SERVICE

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
ACTING SENIOR COMMISSIONER P E SCOTT

DATE WEDNESDAY, 18 AUGUST 2010

FILE NO PSA 126 OF 2007

CITATION NO. 2010 WAIRC 00813

Result Appeal dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS on the 28th day of July 2010 the applicant filed a Notice of Discontinuance in respect of the appeal;

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 dismissed.

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

2010 WAIRC 00829

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES MR D. R. CHAPMAN

APPLICANT

-v-

DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE METROPOLITAN HEALTH SERVICE

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
ACTING SENIOR COMMISSIONER P E SCOTT

DATE WEDNESDAY, 18 AUGUST 2010

FILE NO PSA 20 OF 2008

CITATION NO. 2010 WAIRC 00829

Result Appeal dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS on the 28th day of July 2010 the applicant filed a Notice of Discontinuance in respect of the appeal;

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 dismissed.

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

2010 WAIRC 00807

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES JAYA LUTCHMEE NAIDU

APPLICANT

-v-

DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER SECTION 7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE METROPOLITAN HEALTH SERVICE

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
ACTING SENIOR COMMISSIONER P E SCOTT

DATE WEDNESDAY, 18 AUGUST 2010

FILE NO PSA 64 OF 2007

CITATION NO. 2010 WAIRC 00807

Result Appeal dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS on the 5th day of August 2010 the applicant filed a Notice of Discontinuance in respect of the appeal;

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 dismissed.

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

2010 WAIRC 00814

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES PETER ALEXANDER PHILLIPS

APPLICANT

-v-

DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE METROPOLITAN HEALTH SERVICE

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
ACTING SENIOR COMMISSIONER P E SCOTT

DATE WEDNESDAY, 18 AUGUST 2010

FILE NO PSA 127 OF 2007

CITATION NO. 2010 WAIRC 00814

Result Appeal dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS on the 28th day of July 2010 the applicant filed a Notice of Discontinuance in respect of the appeal;

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 dismissed.

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

2010 WAIRC 00818

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES IAN SAMPSON

APPLICANT

-v-

DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE METROPOLITAN HEALTH SERVICE

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
ACTING SENIOR COMMISSIONER P E SCOTT

DATE WEDNESDAY, 18 AUGUST 2010

FILE NO PSA 4 OF 2008

CITATION NO. 2010 WAIRC 00818

Result Appeal dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS on the 28th day of July 2010 the applicant filed a Notice of Discontinuance in respect of the appeal;

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 dismissed.

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

2010 WAIRC 00817

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES GERHARD CHRISTOPH SAUERACKER

APPLICANT

-v-

DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE METROPOLITAN HEALTH SERVICE

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
ACTING SENIOR COMMISSIONER P E SCOTT

DATE WEDNESDAY, 18 AUGUST 2010

FILE NO PSA 3 OF 2008

CITATION NO. 2010 WAIRC 00817

Result Appeal dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS on the 28th day of July 2010 the applicant filed a Notice of Discontinuance in respect of the appeal;

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 dismissed.

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

2010 WAIRC 00830

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES VIVIENNE SUE THOMAS

APPLICANT

-v-

DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE METROPOLITAN HEALTH SERVICE

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
ACTING SENIOR COMMISSIONER P E SCOTT

DATE WEDNESDAY, 18 AUGUST 2010

FILE NO PSA 30 OF 2008

CITATION NO. 2010 WAIRC 00830

Result Appeal dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS on the 28th day of July 2010 the applicant filed a Notice of Discontinuance in respect of the appeal;

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 dismissed.

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

2010 WAIRC 00799

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES CHERYL WORSLEY

APPLICANT

-v-

DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE METROPOLITAN HEALTH SERVICE

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
ACTING SENIOR COMMISSIONER P E SCOTT

DATE TUESDAY, 17 AUGUST 2010

FILE NO PSA 5 OF 2008

CITATION NO. 2010 WAIRC 00799

Result	Appeal granted
Representation	
Applicant	Mr D Ellis and with him Ms T Dellaca
Respondent	Mr K Trainer as agent and with him Mr J Ross

Order

HAVING heard Mr D Ellis and with him Ms T Dellaca on behalf of the applicant and Mr K Trainer as agent and with him Mr J Ross on behalf of the respondent, and by consent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

1. THAT position PC 001417 occupied by Ms Cheryl Worsley will remain classified at P3.
2. THAT Ms Worsley will be paid a Temporary Special Allowance at P4 from 15 July 2005 until 30 June 2009.

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

NOTICES—Union Matters—

2010 WAIRC 00876

NOTICE

FBM 6 of 2010, FBM 7 of 2010, FBM 8 of 2010 & FBM 9 of 2010

Notice is given of four applications by the Western Australian Municipal, Administrative, Clerical and Services Union of Employees to the Full Bench of the Western Australian Industrial Relations Commission for the alteration to Rule 5 – Eligibility For Membership.

Existing Rule 5

5. - ELIGIBILITY FOR MEMBERSHIP

The following persons and classes of persons shall be eligible for membership of the Union, namely:

a. persons engaged in the services of the Western Australian Government Railways in receipt of an annual salary or, in the case of temporary clerks, paid on wages sheets, also Union Head Office staff.

b. persons employed at an annual salary rate in the rail transport industry by:

(i) any statutory body representing W.A.G.R. in any such right as aforesaid; or

(ii) any instrumentality or authority whether corporate or unincorporated acting under the control of or for or on behalf of or in the interest of W.A.G.R. in any such right as aforesaid; or,

(iii) any Company or Corporation in which at least fifty per centum of the issued shares are held by or for or on behalf of or in the interest of W.A.G.R. in any such right as aforesaid.

(iv) persons employed at an annual salary rate in the Western Australian Railways Institute.

The Union shall also consist of:

a. persons, male or female, engaged in any clerical capacity, including telephonists, or in the occupation of shorthand writing or typing or calculating, billing or other machines designed to perform, or assist in performing any clerical work whatsoever within the State of Western Australia, but excepting that portion of the State within the 20th and 26th parallels of latitude and the 125th and the 129th meridians of longitude.

b. provided that no person shall be a member who is not an employee within the meaning of the "Industrial Relations Act, 1979".

FBM 6 of 2010

Proposed amended Rule 5

(Alterations sought by FBM 6 of 2010 are underlined)

5. - ELIGIBILITY FOR MEMBERSHIP

The following persons and classes of persons shall be eligible for membership of the Union, namely:

a. persons engaged in the services of the Western Australian Government Railways in receipt of an annual salary or, in the case of temporary clerks, paid on wages sheets, also Union Head Office staff.

b. persons employed at an annual salary rate in the rail transport industry by:

(i) any statutory body representing W.A.G.R. in any such right as aforesaid; or

(ii) any instrumentality or authority whether corporate or unincorporated acting under the control of or for or on behalf of or in the interest of W.A.G.R. in any such right as aforesaid; or,

(iii) any Company or Corporation in which at least fifty per centum of the issued shares are held by or for or on behalf of or in the interest of W.A.G.R. in any such right as aforesaid.

(iv) persons employed at an annual salary rate in the Western Australian Railways Institute.

The Union shall also consist of:

a. persons, male or female, engaged in any clerical capacity, including telephonists, or in the occupation of shorthand writing or typing or calculating, billing or other machines designed to perform, or assist in performing any clerical work whatsoever within the State of Western Australia, but excepting that portion of the State within the 20th and 26th parallels of latitude and the 125th and the 129th meridians of longitude.

b. provided that no person shall be a member who is not an employee within the meaning of the "Industrial Relations Act, 1979".

The Union shall consist of an unlimited number of bona fide employees of Municipal County and Shire Councils or other Local Government Authorities or Trusts, Municipal Trusts Water Supply and/or Sewerage Boards or Trusts, Road Boards and other Boards, Corporations, Commissions or Trusts, carrying out or entrusted with the carrying out of works operations or functions similar to those usually or generally performed by Municipal or Shire Councils or other Local Government Authorities before the appointment of such Boards, Corporations, Commissions or Trusts and of health boards, the board or governing body of any park, reserve or racecourse, cemetery board or any person acting for, under or on behalf of any of such boards or bodies and of employees to contractors to any of such Councils, Authorities, Boards, Corporations, Commissions or Trusts

Provided that the Union shall not admit as members employees engaged on new construction work in connection with services which have not passed to the authority which on the completion of such construction work is responsible for the provision and maintenance of those services.

FBM 7 of 2010

Proposed amended Rule 5

(Alterations sought by FBM 7 of 2010 are underlined)

5. - ELIGIBILITY FOR MEMBERSHIP

The following persons and classes of persons shall be eligible for membership of the Union, namely:

a. persons engaged in the services of the Western Australian Government Railways in receipt of an annual salary or, in the case of temporary clerks, paid on wages sheets, also Union Head Office staff.

b. persons employed at an annual salary rate in the rail transport industry by:

(i) any statutory body representing W.A.G.R. in any such right as aforesaid; or

(ii) any instrumentality or authority whether corporate or unincorporated acting under the control of or for or on behalf of or in the interest of W.A.G.R. in any such right as aforesaid; or,

(iii) any Company or Corporation in which at least fifty per centum of the issued shares are held by or for or on behalf of or in the interest of W.A.G.R. in any such right as aforesaid.

(iv) persons employed at an annual salary rate in the Western Australian Railways Institute.

The Union shall also consist of:

a. persons, male or female, engaged in any clerical capacity, including telephonists, or in the occupation of shorthand writing or typing or calculating, billing or other machines designed to perform, or assist in performing any clerical work whatsoever within the State of Western Australia, but excepting that portion of the State within the 20th and 26th parallels of latitude and the 125th and the 129th meridians of longitude.

b. provided that no person shall be a member who is not an employee within the meaning of the "Industrial Relations Act, 1979".

The Union shall also consist of an unlimited number of persons employed or usually employed by Local Authorities, Cities, Municipalities, Towns, Boroughs or Shires, or by Statutory Authorities, Corporations, Trusts, Boards or Commissions in the following callings or avocations namely, City, Town, District, Borough or Shire Clerks, Secretaries, Treasurers, Engineers, Surveyors, Architects, Electricians or Electrical Engineers, Inspectors, Superintendents, Paymasters, Receivers, Accountants, Auditors, Valuers, Rate Collectors Registrars, Collectors, Clerks, Typists, Stenographers, Foremen, Overseers, Draughtsmen, Curators, or in similar callings or avocations, or as· assistants to employees so employed whether employed as aforesaid or not

FBM 8 of 2010

Proposed amended Rule 5

(Alterations sought by FBM 8 of 2010 are underlined)

5. - ELIGIBILITY FOR MEMBERSHIP

The following persons and classes of persons shall be eligible for membership of the Union, namely:

a. persons engaged in the services of the Western Australian Government Railways in receipt of an annual salary or, in the case of temporary clerks, paid on wages sheets, also Union Head Office staff.

b. persons employed at an annual salary rate in the rail transport industry by:

(i) any statutory body representing W.A.G.R. in any such right as aforesaid; or

(ii) any instrumentality or authority whether corporate or unincorporated acting under the control of or for or on behalf of or in the interest of W.A.G.R. in any such right as aforesaid; or,

(iii) any Company or Corporation in which at least fifty per centum of the issued shares are held by or for or on behalf of or in the interest of W.A.G.R. in any such right as aforesaid.

(iv) persons employed at an annual salary rate in the Western Australian Railways Institute.

The Union shall also consist of:

a. persons, male or female, engaged in any clerical capacity, including telephonists, or in the occupation of shorthand writing or typing or calculating, billing or other machines designed to perform, or assist in performing any clerical work whatsoever within the State of Western Australia, but excepting that portion of the State within the 20th and 26th parallels of latitude and the 125th and the 129th meridians of longitude.

b. provided that no person shall be a member who is not an employee within the meaning of the "Industrial Relations Act, 1979".

The Union shall also consist of any person employed or usually employed for hire or reward on a full or part-time basis in or in connection with the industry of professional social work other than by

i. the Crown in right of the State; or

ii. any Statutory body representing the Crown in right of the State, or

iii. any Instrumentality or Authority whether corporate or unincorporate acting under the control of or for or on behalf of or in the interest of the Crown in right of the, or

iv. any Company or Corporation in which at least 50 per centum of the issued shares are held by or for or on behalf of or in the interest of the Crown in right of the State or if there are no issued shares in which the governing body by whatever name called includes nominees appointed by and appointed for or on behalf of, or in the interest of the Crown in right of the State.

FBM 9 of 2010

Proposed amended Rule 5

(Alterations sought by FBM 9 of 2010 are underlined)

5. - ELIGIBILITY FOR MEMBERSHIP

The following persons and classes of persons shall be eligible for membership of the Union, namely:

a. persons engaged in the services of the Western Australian Government Railways in receipt of an annual salary or, in the case of temporary clerks, paid on wages sheets, also Union Head Office staff.

b. persons employed at an annual salary rate in the rail transport industry by:

(v) any statutory body representing W.A.G.R. in any such right as aforesaid; or

(vi) any instrumentality or authority whether corporate or unincorporated acting under the control of or for or on behalf of or in the interest of W.A.G.R. in any such right as aforesaid; or,

(vii) any Company or Corporation in which at least fifty per centum of the issued shares are held by or for or on behalf of or in the interest of W.A.G.R. in any such right as aforesaid.

(viii) persons employed at an annual salary rate in the Western Australian Railways Institute.

The Union shall also consist of:

a. persons, male or female, engaged in any clerical capacity, including telephonists, or in the occupation of shorthand writing or typing or calculating, billing or other machines designed to perform, or assist in performing any clerical work whatsoever within the State of Western Australia, but excepting that portion of the State within the 20th and 26th parallels of latitude and the 125th and the 129th meridians of longitude.

b. provided that no person shall be a member who is not an employee within the meaning of the "Industrial Relations Act, 1979".

The Union shall also consist of any person employed or usually employed for hire or reward on a fulltime or a part-time basis in or in connection with the industry of social and/or welfare work except

1. persons employed as an officer under and within the meaning of the Public Service Act 1978-80 or in any of the established branches of the Public Service, including State trading concerns, business undertakings and government institutions controlled by boards; provided the management of such bodies is appointed by, or under the control of, the Western Australian Government; and

2. persons employed under the Forests Act, the Main Roads Act, or any act now in force or hereafter enacted whereby any Board Commission or other body is constituted to administer any such Act; provided the management of such body is appointed by, or is under the control of the Western Australian Government; and

3. persons employed by any public or private hospital; and

4. persons employed by the Western Australian School of Nursing; and

5. persons employed by the Western Australian. division of the Red Cross Society, the Spastic Welfare Association of Western Australia (Incorporated), the Silver Chain Nursing Association (Incorporated), S.L.C.C. (Incorporated) (an Association for

developmental disability W.A.) the Paraplegic-Quadriplegic Association of Western Australia (Incorporated), Good Samaritan Industries, FCB Industries or Nulsen Haven Association (Inc); and

6. persons employed by any service ancillary to the practice of medicine but this exception does not apply to non-government community health organisations (including any which are funded by the Western Australian Drug and Alcohol Authority); and

7. persons eligible to join the Federated Miscellaneous Workers Union of Australia in accordance with its Rules as at 23.2:87 and employed ·in convalescent homes, nursing homes, rest homes or other institutions established to provide care for aged, sick or infirm persons, and engaged in the provision of accommodation and ancillary services within one of the above establishments, or as nurse assistants (including supervisory nurse assistants); provided this exception shall not apply to persons primarily engaged in social welfare counselling.

The matters have been listed before the Full Bench at 10.30 am on Monday, 13th, Tuesday 14th and Wednesday 15th of December 2010 in Court No. 3 (Floor 18). A copy of the Rules of the organisation and the proposed rule alterations may be inspected on the 16th Floor, 111 St Georges Terrace, Perth.

Any organisation/association registered under the *Industrial Relations Act 1979,* or any person who satisfies the Full Bench that he/she has a sufficient interest or desires to object to the application may do so by filing a notice of objection (Form 13) in accordance with the *Industrial Relations Commission Regulations 2005.*

S. HUTCHINSON

DEPUTY REGISTRAR **7** September 2010

2010 WAIRC 00875

NOTICE

FBM No. 10 of 2010

NOTICE is given of an application by the Western Australian Police Union of Workers to the Full Bench of the Western Australian Industrial Relations Commission for a new set of rules to be substituted for the existing rules.

The proposed substitute rules seek to alter the qualifications of persons for membership of the organisation. The proposed new Rule 5 – Membership will be substituted for the existing Rule 4 - Membership and both are detailed below.

EXISTING RULE 4 - MEMBERSHIP

4 - MEMBERSHIP

(1) The following classes of employees of the Western Australia Police Service shall be eligible to be members of the Union:

(a) Sworn Police Officers;

(b) Police Cadet (Recruits); and

(c) Aboriginal Police Liaison Officers.

(2) The Union shall be constituted of those classes of members specified in sub rule (1) of this Rule and persons upon whom Life Membership of the Union has been conferred in accordance with these Rules.

(3) Any sworn officer of the Police Service as defined by sub rule (1) of this Rule may apply to the Board for membership of the Union, and the Union shall have the power to accept or reject such applications; provided that any applicant whose application for membership is rejected by the Board shall have the right of appeal to the next Annual Conference of Delegates whose decision shall be final.

(4) A register of the names of the officers and members of the Union shall be kept by the General Manager at the Registered Office and will be open at all convenient times for inspection by any member or by the Registrar or any person appointed by him or her.

(5) Subscriptions for members of the Union shall be:

(a) For Sworn Police Officers an amount equivalent to 1% of the base salary applicable to the rank of a third year Constable rounded up to the next nearest 10 cents, with such amount to be paid fortnightly or at other greater intervals as may be determined by the Board.

(b) For Police Cadets (Recruit) an amount determined by the Board, with such amount to be paid fortnightly or at other greater intervals as may be determined by the Board.

(c) For Aboriginal Police Liaison Officers an amount equivalent to 1% of the base salary applicable to the rank of a First Class Aboriginal Police Liaison Officer rounded up to the next nearest 10 cents, with such amount to be paid fortnightly or at other greater intervals as may be determined by the Board.

(d) For a member who converts to part time employment an amount determined by the Board, with such amount to be paid fortnightly or at other greater intervals as may be determined by the Board.

(e) For a member (who must inform the Union in writing of their intention to do so) proceeding on maternity leave or, other absence from duty without pay, normal subscriptions shall not be required to be paid during such leave but the member shall contribute an amount determined by the Board and will be still entitled to the full

privileges of membership. Such amount is to be paid fortnightly or at other greater intervals as may be determined by the Board.

(f) For Life Members, subscriptions shall not be required to be paid, whether or not they are entitled to membership under another classification.

(6) A member may end membership of the Union by giving written notice of the intention to resign. The notice of resignation shall be delivered in person or by certified mail to the Registered Office. The resignation takes effect from the day on which it is received by the Union or on such later date specified in the notice but the member will remain responsible for any subscriptions, levies or fines owing up to and including the date of ceasing to be a member of the Union.

(7) Where a member's subscription has not been paid for a period of three months then that person shall cease to be a member of the Union, but shall be responsible for any subscriptions, fees, levies or fines owing up to and including the date of termination of membership.

(8) (a) The Union shall remove from the register the name of any person who ceases to be a member in accordance with sub rule (7).

(b) The Union shall ensure persons specified in sub rule (7) shall have their names removed by purging the register at least four times each year.

(c) The Board may remove from the register the name of any member whose levies or other monies owing, other than subscriptions, is in arrears for six months.

(d) Any member whose name is removed in accordance with sub rule (8) (a) or (c) shall not be free from arrears due, and the General Manager may, after 14 days notice, sue such member in any court of ordinary jurisdiction pursuant to Section 109 of the Act.

(9) Any sworn officer of the Western Australia Police Service eligible to be a member of the Union voluntarily resigning from the Union and wishing to rejoin may only be admitted on the approval of the Board.

(10) Any member of the Union who ceases to be a member of the Western Australia Police Service by reason of retirement because of age or because of total and permanent incapacity may remain a member of the Union insofar as those privileges and benefits determined solely by the Board are concerned and will be eligible to receive the benefits to be derived therefrom without any further payments to the Union.

(11) The Board may by resolution confer Life Membership on any person, in recognition of long or special services rendered to the Union. Any person on whom Life Membership has been conferred shall enjoy the full benefits of membership of the Union without payment of any subscriptions or levy as from the date of conferring of such Life Membership. For the purposes of these Rules such person shall be deemed to be a financial member of the Union.

(12) The Union shall not credit any moneys from a members subscription fees to a political fund.

PROPOSED RULE 5 – MEMBERSHIP - (to replace existing Rule 4 above)

5 - MEMBERSHIP

5.1 Ordinary Membership

To be eligible to be an Ordinary Member of the Union a person must be:

(a) appointed under the Police Act 1892 (WA) and employed by the Commissioner of Police; or
(b) a Police Recruit; or
(c) engaged by the Commissioner of Police in some other capacity undertaking work currently or traditionally performed by a member of the Police Force appointed under the Police Act 1892 (WA).

5.2 Retired Membership

(a) Any Member who ceases to be eligible for membership by reason of their retirement because of age or total permanent incapacity may apply for membership as a Retired Member.
(b) A Retired Member shall be entitled to those benefits of membership as determined by the Board from time to time without further payment of any subscription, fee, fine or levy.
(c) A Retired Member shall not be entitled to stand for election as an Officer of the Union or vote in any election held pursuant to these Rules.
(d) For the purposes of these Rules a Retired Member shall be deemed to be a financial member of the Union.

5.3 Life Membership

(a) The Board may by resolution confer life membership on any person, in recognition of long or special services rendered to the Union.

(b) A Life Member shall be entitled to the full benefits of membership of the Union without payment of any subscription, fee, fine or levy.

(c) A Life Member who has retired shall not be entitled to stand for election as an Officer of the Union or vote in any election held pursuant to these Rules.
(d) For the purposes of these Rules a Life Member shall be deemed to be a financial member of the Union.

5.4 Application for Membership

Any person eligible to be an Ordinary or Retired Member may apply to the Board for membership of the Union, and the Board shall have the power to accept or reject such applications; provided that any applicant whose application for membership is rejected by the Board shall have the right of appeal to the next Annual Conference whose decision shall be final.

5.5 Register of Members

(a) The Union shall consist of Ordinary Members, Retired Members and Life Members.

(b) A register of the names and residential addresses of the Officers and Members of the Union and such other information as required by section 63 of the Act shall be kept by the Secretary at the Registered Office and will be open at all convenient times for inspection by any Member or by the Registrar or any person appointed by the Registrar.

(c) The Register of Members shall be purged on not less than four (4) occasions in each year in accordance with section 64D of the Act.

5.6 Membership of the Police Federation of Australia

(a) In order to develop and maintain relations between the Police Federation of Australia and the Union, the President may make an application to the Police Federation of Australia on behalf of any Member who is eligible for, but is not already a member of, the Police Federation of Australia for that Member to become a member of the Police Federation of Australia.

(b) At least four weeks before making an application pursuant to this Rule, the President shall notify those Members of the Union on whose behalf it is proposed to make the application of the intention to make the application by placing a notice in a metropolitan daily newspaper in Western Australia and in the Journal.

(c) The notice published pursuant to this Rule must state that Members who do not wish to become members of the Police Federation of Australia must advise the President in writing within 4 weeks of the date of the publication of the notice that they do not wish to become a member of the Police Federation of Australia.

(d) The President shall not make an application for membership of the Police Federation of Australia on behalf of any person who notified the President in accordance with this Rule that they did not wish to become a member of the Police Federation of Australia.

5.7 Termination of Membership

(a) A Member's membership of the Union shall be terminated:
  (1) by resignation;
  (2) by expulsion in accordance with Rule 13 – Disciplinary Matters;
  (3) by death of the Member;
  (4) by the Member ceasing to be eligible to become a Member; or
  (5) by a Member becoming non financial.

(b) A Member who fails to pay the applicable subscription for a period of more than 3 months or a fee, fine or levy for a period of 6 months without making an alternative arrangement satisfactory to the Board shall be deemed a non financial member.

(c) A Member may resign by giving written notice of the intention to resign. The notice of resignation shall be delivered in person or by certified mail to the Registered Office. The resignation takes effect from the day on which it is received by the Union or on such later date specified in the notice.

(d) Where a Member's membership is terminated that person shall cease to be a Member but shall be responsible for any subscriptions, fees, levies or fines owing up to and including the date of termination of membership.

(e) Any subscriptions, fees, levies or fines payable but not paid by the former Member in relation to a period before the termination of the former Member's membership took effect may be sued for and recovered in the name of the Union in a court of competent jurisdiction as a debt due to the Union.

(f) The Secretary shall remove from the Register of Members the name of any person who ceases to be a Member in accordance with Rule 5.7 Termination of Membership

5.8 Rejoining After Termination of Membership

A person whose membership is terminated in accordance with Rule 5.7 Termination of Membership may only reapply for membership with the written approval of the Board.

The matter has been listed before the Full Bench at 10:30 am on Thursday, 28th October 2010 in Court No. 3 (Floor 18). A copy of the Rules of the organisation and the proposed rule alterations may be inspected on the 16th Floor, 111 St Georges Terrace, Perth.

Any organisation/association registered under the *Industrial Relations Act 1979*, or any person who satisfies the Full Bench that he/she has a sufficient interest or desires to object to the application may do so by filing a notice of objection (Form 13) in accordance with the *Industrial Relations Commission Regulations 2005.*

S. HUTCHINSON

DEPUTY REGISTRAR **7 September 2010**

ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL—Matters Dealt With—

2010 WAIRC 00863

REFERRAL OF DISPUTE RE PAYMENT OF A CLAIM

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	KAART ENTERPRISES P/L
	APPLICANT
	-v-
	MR BILL CASSELLS
	CASSELL LOGISTICS
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 27 JULY 2010
FILE NO/S	RFT 7 OF 2010
CITATION NO	2010 WAIRC 00863

Catchwords	Owner-driver contract – Failure to comply with summons to attend compulsory conference – Respondent duly notified of proceedings – Respondent did not demonstrate good cause for failure to appear, made no undertaking as to future conduct and failed to attend enforcement proceedings – Serious contravention of s 45(3) of the Owner-Drivers (Contract and Disputes) Act 2007 – Penalty of fine imposed – Owner-Drivers (Contract and Disputes) Act 2007 s45, s46(4) – Industrial Relations Act 1979 s 84A
Result	Penalty imposed
Representation	
Respondent	No appearance

Reasons for Decision

Ex tempore

1. The Tribunal has of its own motion commenced these proceedings for enforcement of the failure by Cassells Logistics to comply with a summons to attend a compulsory conference in accordance with section 45 of the Owner-Drivers (Contracts and Disputes) Act 2007 ("the Act"). The Tribunal has before it the evidence of Stephanie Louise Hanrahan, whose affidavit was affirmed on 20 July 2010, which the Tribunal now takes as read. The evidence of Ms Hanrahan in relation to these proceedings is as follows: by notice of referral to the Tribunal dated 31 March 2010, proceedings were commenced by Kaart Enterprises Pty Ltd against Mr Bill Cassells of Cassells Logistics. Ms Hanrahan further states that the Tribunal constituted by myself directed her to summons the parties to the proceedings to a conciliation conference under section 45 of the Act. That conference was to be held on Tuesday 25 May at 10.30 am by telephone link.

2. The notification and summons to the parties to attend that conciliation conference is annexed to Ms Hanrahan's affidavit. Furthermore, on Wednesday, 12 May 2010, Ms Hanrahan states that she telephoned Mr Cassells in order to ascertain his availability to attend the conference and she further states that Mr Cassells provided her with a mobile telephone number in order for him to be connected to the teleconference.

3. On the day of the conference, that being 25 May 2010, Ms Hanrahan testifies that at about 10.25 am that morning she telephoned Mr Cassells on the telephone number provided to her. The telephone call that she made was diverted to "MessageBank" after ringing initially. A message was left by Ms Hanrahan. She then telephoned again shortly thereafter however the telephone call was diverted directly to "MessageBank". Further messages were left with Mr Cassells for him to contact Ms Hanrahan urgently, but no contact with her was made.

4. Furthermore, later that morning at 10.45 am, a further call was made by Ms Hanrahan to Mr Cassells on the mobile telephone number he had provided to her for the telephone conference, but again that call was diverted to a message service. A file note was made by Ms Hanrahan of the events of the morning of 25 May 2010, a copy of which is annexed to her affidavit.

5. Ms Hanrahan also in her affidavit referred to an earlier contact with Mr Cassells on 17 May 2010, in which he informed her that he had received the summons to attend the conference listed for 25 May.

6. Furthermore, at the direction of the Tribunal, Ms Hanrahan by letter dated 14 June 2010, wrote to Mr Cassells in relation to his failure to attend the telephone conference on 25 May and invited him to show good cause why he could not or did not appear and no response has been received to Ms Hanrahan's letter and I find accordingly.

7. Therefore the Tribunal is satisfied and it finds that the business Cassell Logistics through Mr Bill Cassells was duly notified of conciliation proceedings before the Tribunal on 25 May 2010.

8. Mr Cassells was summonsed to attend those proceedings and the Tribunal is satisfied on the evidence of Ms Hanrahan that for the purposes of s 45(3) of the Act, Mr Cassells and Cassells Logistics has not demonstrated any good cause, proof of which is upon him, as to why he could not attend the conference to which he was summonsed to appear and I find accordingly.

9. By s 46(4) of the Act, in proceedings such as this, the Tribunal has all of the powers and duties of the Full Bench under ss 84A (4) to (8) of the Industrial Relations Act 1979 ("the IR Act"), for the purposes of enforcement. Section 84A(4) of the IR Act enables the Tribunal to have regard to the seriousness of any contravention or failure to comply, any undertakings that may be given as to future conduct and any mitigating circumstances.

10. In this case there are no undertakings and there are no mitigating circumstances before the Tribunal. Given the Tribunal's knowledge of Mr Cassells and Cassells Logistics' failure to appear before it in other proceedings and the complete failure to attend at this morning's enforcement proceedings, the contravention in the Tribunal's view is serious.

11. By s 84A of the IR Act, the Tribunal has a number of options open to it if the contravention or failure to comply is proved. In the circumstances of this case, the Tribunal is satisfied that the contravention of s 45(3) of the Act is proved. The options open to the Tribunal are, firstly, to accept any undertaking given. Obviously in this case, there are none. Secondly, or in the alternative, to issue a caution or impose such penalty as it considers just but not exceeding $2000 in the case of an employer, organisation or association and $500 in any other case. Thirdly, to direct the Registrar or a Deputy Registrar to issue a summons under s 73(1) of the IR Act, which is not relevant to these proceedings before the Tribunal. Or alternatively, to dismiss the application.

12. In the present circumstances, the Tribunal is of the view that the contravention of s 45(3) of the Act in all of the circumstances, as I have already indicated, is a serious one. In particular, the person concerned, Mr Bill Cassells of Cassells Logistics, has completely failed to appear before the Tribunal and answer to the enforcement proceedings. In my view, that demonstrates an attitude bordering on contempt of the proceedings of the Tribunal.

13. In all of the circumstances, in my opinion, having regard to the nature of the contravention of Cassells Logistics, a penalty towards the maximum should be imposed in the circumstances. The evidence before the Tribunal is that in this case the operation of Cassells Logistics appears to have been, and appears to be conducted by a sole proprietor, Mr Bill Cassells. Therefore it would seem that the maximum penalty of $500 prescribed as "in any other case" is the appropriate scale of penalty to use, given that there is nothing before the Tribunal to indicate that Cassells Logistics is an employer, organisation or association for present purposes.

14. Having regard to all of the matters before me in my view, a fine of $400 is an appropriate penalty to impose upon the defaulting party. Therefore there will be an order that Mr Bill Cassells of Cassells Logistics pay a penalty of $400 within 14 days to the consolidated revenue by way of penalty in accordance with s 84A(5) of the I R Act.

2010 WAIRC 00864

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	KAART ENTERPRISES P/L
	APPLICANT
	-v-
	MR BILL CASSELLS
	CASSELL LOGISTICS
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 30 AUGUST 2010
FILE NO/S	RFT 7 OF 2010
CITATION NO.	2010 WAIRC 00864

Result	Penalty imposed
Representation	
Respondent	No Appearance

Order

There being no appearance on behalf of the respondent, the Tribunal, pursuant to the powers conferred on it under the Owner-Drivers (Contracts and Disputes) Act 2007 and the Industrial Relations Act 1979, hereby orders:

THAT the respondent pay to the consolidated revenue $400.00 within 14 days.

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

2010 WAIRC 00786

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SITTING AS
THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	CONVENIENT CARTAGE
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 13 AUGUST 2010
FILE NO/S	RFT 14 OF 2010
CITATION NO.	2010 WAIRC 00786

Result	Application discontinued
Representation	
Applicant	Mr D Cain
Respondent	Ms N Raschilla

Order

WHEREAS the applicant sought and was granted leave to discontinue the application, the Commission, sitting as the Road Freight Transport Industry Tribunal, pursuant to the powers conferred on it under the Owner-Drivers (Contracts and Disputes) Act, 2007 hereby orders –

THAT the application be and is hereby discontinued by leave.

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

2010 WAIRC 00784

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SITTING AS
THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	TRANSPORT WORKERS' UNION, INDUSTRIAL UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	TOLL AUTO LOGISTICS
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 13 AUGUST 2010
FILE NO/S	RFT 19 OF 2009
CITATION NO.	2010 WAIRC 00784

Result	Application discontinued
Representation	
Applicant	Mr D Cain
Respondent	Mr N Griffiths

Order

WHEREAS the applicant sought and was granted leave to discontinue the application, the Commission, sitting as the Road Freight Transport Industry Tribunal, pursuant to the powers conferred on it under the Owner-Drivers (Contracts and Disputes) Act, 2007 hereby orders –

THAT the application be and is hereby discontinued by leave.

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

2010 WAIRC 00785

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SITTING AS
THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	TOLL TRANSPORT PTY. LIMITED T/A TOLL EXPRESS
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 13 AUGUST 2010
FILE NO/S	RFT 8 OF 2010
CITATION NO.	2010 WAIRC 00785

Result	Application discontinued
Representation	
Applicant	Mr D Cain
Respondent	Mr S Moore

Order

WHEREAS the applicant sought and was granted leave to discontinue the application, the Commission, sitting as the Road Freight Transport Industry Tribunal, pursuant to the powers conferred on it under the Owner-Drivers (Contracts and Disputes) Act 2007, hereby orders –

THAT the application be and is hereby discontinued by leave.

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

2010 WAIRC 00783

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SITTING AS
THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	TOLL AUTOLOGISTICS
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 13 AUGUST 2010
FILE NO/S	RFT 20 OF 2009
CITATION NO.	2010 WAIRC 00783

Result	Application discontinued
Representation	
Applicant	Mr D Cain
Respondent	Ms N Tatasciore, of counsel

Order

WHEREAS the applicant sought and was granted leave to discontinue the application, the Commission, sitting as the Road Freight Transport Industry Tribunal, pursuant to the powers conferred on it under the Owner-Drivers (Contracts and Disputes) Act, 2007 hereby orders –

THAT the application be and is hereby discontinued by leave.

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

2010 WAIRC 00787

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS', WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	WY WORRY TRANSPORT
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 13 AUGUST 2010
FILE NO/S	RFT 4 OF 2010
CITATION NO.	2010 WAIRC 00787

Result	Application discontinued
Representation	
Applicant	Ms M Papa
Respondent	Mr J Ashmore

Order

WHEREAS the applicant sought and was granted leave to discontinue the application, the Commission, sitting as the Road Freight Transport Industry Tribunal, pursuant to the powers conferred on it under the Owner-Drivers (Contracts and Disputes) Act, 2007 hereby orders –

THAT the application be and is hereby discontinued by leave.

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