CUMULATIVE DIGEST HEADINGS

* Denotes New Heading

Absence Without Leave
Act—Interpretation of
Allowances—See also specific heading, e.g. Isolation Allowance, Industry Allowance, Meal Money—(lncludes Special Rates and Provisions)
Annual Leave—(Includes Annual Leave Loading)
Appeal
Apprentices and Juniors
Awards—(Includes specified sub-headings, First Awards, New Awards, Area, Scope, Coverage, Cancellations, Award-Free, Respondency)
Board of Reference
Board and Lodging—(Includes Accommodation)
Bonus—(Includes Incentive Payments)
Breach of Award
Capacity to Pay—Includes Inability to Pay
Casual Work—(Includes loadings applicable to such work and nature of casual employment)
Classification—(Includes Reclassification)
Clothing—(Used when clothing is/is not provided and for clothing allowances)
Common Rule—(Used in relation to Awards being or becoming Common Rule awards)
Comparative Wage Justice—See also Nexus—(lncludes Relativities)
Compassionate Leave—(Includes Bereavement Leave)
Compensation—See also specific heading, e.g. Redundancy, Long Service Leave—(Includes compensation for unfair dismissals)
Conference—(Includes such matters as jurisdiction arising out of)
Confined Space
Consumer Price Index
Contract of Service—(Used in relation to Section 29 (2) applications)
Contract out of Award
Custom and Practice
Dangerous Work
Date of Operation—(Includes Retrospectivity, Prospectivity)
Demarcation
Dirt Money
Disabilities
Discrimination
Employee—(Used in such cases as whether person is an employee or independent contractor or agent)
Enforcement of Awards/Orders
Entry: Right of
Hours of Work
Industrial Action—(lncludes Work-to-Rule, Picketing, Stop Work Meeting, Strike, Bans, Lockouts)
Industrial Matter
Industry—(Used re questions of extent and meaning of specified industry)
Industry Allowance
Interpretation—Words and Phrases
Intervention
Isolation Allowance
Jurisdiction
Jury Service
Leave Without Pay
Living Away From Home Allowance
Long Service Leave
Managerial Prerogative
Manning
Maternity Leave
Meal Breaks
Meal Money
Misconduct
Mixed Functions—(Includes Higher Duties)
Natural Justice
Nexus
Night and Weekend Work
On Call—(Includes Stand by)
Order—(Includes Cancellation of Order)
Over Award Payment
Overtime—(Includes Call Back, Recall)
Part-Time
Penalty Rates
Piecework
Preference—(lncludes Compulsory Unionism)
Principles (Wage Fixing)
Procedural Matters (e.g. Standards of evidence)
Promotion Appeals
Public Holidays
Public Interest
Redundancy/Retrenchment—(Includes Severance Pay)
Reinstatement
Registration—See Unions
Rest Periods—(Includes Smokos)
Safety
Shift Work
Sick Leave
Standdown
Stay of Proceedings
Superannuation
Supplementary and Service Payments
Tallies
Technological Change
Termination—(Includes Dismissal, Wrongful/Unfair Dismissal)
Training
Transfer
Travelling—(Includes Travelling Allowance and Travelling Time)
Unfair Discrepancy
Unions—(Includes Direction for Observance of Rules, Registration, Rules, Enforcement of Rules, Coverage/Constitutional Coverage, Dues, Membership, Cancellations, Exemptions)
Utilisation of Contractors
Victimisation
Wages—(lncludes Catch-up Margins, Payment by Results, Piece Work, Minimum Wage)
Work Value
Worker Participation
Workers Compensation

CUMULATIVE DIGEST

MATTERS REFERRED TO IN DECISIONS OF INDUSTRIAL APPEAL COURT, INDUSTRIAL COMMISSION AND INDUSTRIAL MAGISTRATES CONTAINED IN VOL. 76 PART 1, SUB PART 7.

NOTE: [1] Denotes Industrial Appeal Court Decision [3] Denotes Commission in Court Session Decision
[2] Denotes Full Bench Decision [4] Denotes Decision of President

Page

ACT - INTERPRETATION OF

[1]Appeal against decision of Full Bench (75 WAIG 1820) re dismissed appeal against decision of Industrial Magistrate (unreported) re breaches of award - Appellant initially claimed that Full Bench decision was erroneous in law or in excess of jurisdiction but latter sought leave to discontinue appeal - Respondent argued that although there was no objection to discontinuance, under s.86(2) of the I.R. Act it sought for payment costs of appeal, including services of legal practitioner - IAC reviewed authorities and found that within s.86(2) only on very rare occasions would cost of legal practitioner be granted and that as the appeal was untenable and could not have succeeded, Respondent's claim was seen as one of the rare cases which fell into exceptions of s.86(2) - Ordered Accordingly - The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers -v- Clark T/A Mike Clark Contracting - IAC 10 of 1995 - Industrial Appeal Court - Kennedy J./Franklyn J./Rowland J. - 23/11/95 - General Construction 4

[2]Appeals against decision of Commission (75 WAIG 1975 & 2251) re orders re cancellation of work bans and commencement of negotiations - Appellant claimed Commission erred in finding it had jurisdiction to make orders in relation to duties not contained in contract of employment and not within definition of 'industrial matter' - Appellant further claimed that Commission had erred in denying procedural fairness by making orders which were before AIRC and also made in a final rather than an interim form - Respondent argued that as AEU was not party to proceedings, it would not be affected by orders made by Commission - Majority Full Bench reviewed authorities and found that Commission erred in law under s.34(1) of the I.R. Act by not hearing evidence or submissions relating to jurisdiction prior to making orders, in not determining if matters were 'industrial matters' which action was deemed ultra vires and/or without statutory authorities - Majority Full Bench further found that Commission had determined jurisdiction by recording parties concerns as to jurisdiction on transcript and that it was for the Commission to decide extent of submissions and evidence necessary to determine questions before it - Minority Full Bench found that as matters before Commission affected or related to the work, privileges, rights or duties of employers or employees in industry, they constituted 'industrial matters' and as orders were not final they could be varied, set aside or cancelled and remained in force when conciliation/arbitration had finally resolved all industrial matters in dispute - Upheld and Quashed - State School Teachers Union of W.A. (Inc) -v- Hon Min for Education - APPL 587,723 of 1995 - Full Bench - SHARKEY P/GEORGE C/SCOTT C. - 13/12/95 - Education..... 27

[2]Appeal against decision of Commission (75 WAIG 2871) re dismissed application for stay of inquiry on the grounds of denied natural justice - Appellant claimed that Commission was outside its jurisdiction as the matter was not seen as industrial when the tribunal carried out a statutory function in accordance to the Education Act - Respondent argued that it was an industrial matter as defined by s.7 of the Education Act as it dealt with behaviour and/or performance and had the potential to result in the punishment of and termination of employment - Full Bench reviewed authorities and found on evidence that the Commission was not deprived of jurisdiction to hear and determine the matter under s.23B of the Act and had not erred in dismissing the application under s.27 of the Act as it merely made arbitration orders - Dismissed - Hon Minister for Education -v- State School Teachers Union of W.A. (Inc) - APPL 937 of 1995 - Full Bench - SHARKEY P/GEORGE C/SCOTT C. - 18/12/95 - Education 35

[2]Appeal against decision of Commission (75 WAIG 2871) re dismissed application for stay of enquiry - Appellant claimed Commission erred in dismissing application when opportunity to present denied natural justice evidence was not given and in failing to refer application for hearing and determination pursuant to s44(9) of the I.R. Act - Appellant further claimed that Commission erred in failing to intervene the section 7c enquiry when sufficient material to justify intervention existed, had erred in law and fact in finding that section 7c enquiry was conducted in a just manner and that the Commission lacked jurisdiction to enquire into and deal with claim - Respondent argued that the investigations conducted by headmaster were part of the normal running of the school and that the Chief Executive, pursuant to section 7c of the Education Act had set in train and enquiry - Full Bench reviewed authorities and found on evidence that no grounds of appeal had been made out nor had Commission erred and there did not exist any denial of natural justice, in particular, in any event - Dismissed - State School Teachers Union of W.A. (Inc) -v- Hon Min for Education - APPL 1127 of 1995 - Full Bench - SHARKEY P/HALLIWELL SC/PARKS C - 21/12/95 - Education..... 40

[2]Appeal against decision of Industrial Magistrate (unreported) re breach of award - Appellant claimed that Industrial Magistrate had erred in law as no finding, set out by the Minimum Conditions Act 1993, was made in relation to the terms implied in award, where a provision or condition of award was less favourable to the employee than a minimum condition of employment - Respondent argued that it had a right to know the nature of the illness or injury over and above the medical certificate and that in the absence of that, it was not liable for payment of the sick leave as stipulated in the award - Full Bench found on evidence that the Minimum Conditions Act applied in lieu of the award and that the medical certificate supplied by the Appellant's medical practitioner sufficed in notification of inability to attend work - Upheld and Remitted - Ms L Nicol -v- Milena Filomena and Giuseppe Iacusso T/A La Plaza Decor - APPL 784 of 1995 - Full Bench - SHARKEY P/HALLIWELL SC/GIFFORD C. - 06/12/95 - Personal & Household Good Rtlg 44

[4]Application for a stay of "finding" for Application No. PSA AG2 of 1995 of Public Service Arbitrator (75 WAIG 3052) pending appeal to Full Bench re registration of an industrial agreement - Applicant claimed that Commission erred as the provisions stipulated by s.80C(4) of the Act in conjunction with s.41 were not considered, that the interpretation of s.41 was questionable and challenged limited right to intervene - Applicant further claimed that HSOA lacked constitutional coverage to be party to the s.41 agreement and that Commission had not considered the circumstances in which the HSOA had sought to amend its constitution - Respondents argued that the balance of convenience lay with them and if the decision was stayed it would be against public interest as the Pathcentre would be award free and would cause irremediable harm - Respondent further argued that in the event of successful appeal with the agreement registered, an application to revoke the agreement or vary the award would occur - President reviewed authorities and found on evidence that the balance of convenience favoured the Applicant as the question of constitutional coverage was being addressed by the Full Bench and thereby constituted a serious issue to be tried - Granted - The Civil Service Association of Western Australia Incorporated -v- Western Australian Centre for Pathology and Medical Research - APPL 1311 of 1995 - President - SHARKEY P - 04/12/95 - Health Services..... 60

Application to re-open hearing re registration of industrial agreement - 2nd Union sought intervention as it claimed employees in new positions would, in part, perform duties covered by an award which they were party to, that under s.26(1) of the I.R. Act a requirement to take account of employees' interest existed and re-opening would enable an opportunity to be heard - Parties argued that by virtue of s.41(2) of the I.R. Act an obligation existed to register agreement and as it was inappropriate and unnecessary to re-open hearing it urged finalisation of registration - Commission found on evidence that as agreement did not cover salaried officers eligible of 2nd Union, objections by 2nd Union were rejected and agreement registered - Ordered Accordingly - W.A. Government Railways Commission -v- Australian Railways Union of Workers, West Australian Branch - AG 275 of 1995 - SCOTT C. - 27/11/95 - Road Transport 147

CUMULATIVE DIGEST—*continued*

Page

ACT - INTERPRETATION OF—*continued*

Application pursuant to Public Sector Management Act re unfair recruitment, selection and appointment process - Applicant claimed they had been a denied "like to like" transfer entitlement and due to unfair and improper invitations made to other ineligible persons, was placed in a disadvantageous predicament - Applicant further claimed that appointments were contrary to Redeployment & Redundancy Regulations and sought an order to restrict the appointments from only former Senior Counsellors - Respondent argued that Applicant's interpretation of the Regulations was incorrect and that the appointment of the positions was a discretionary matter for the employer and not subject to the Regulations - Commission reviewed authorities and found on evidence that it was not open to determine whether the Transfer Regulation had been applied fairly and applicant's claim for unfair and improper application of Regulations had been applied fairly and Applicant's claim for unfair and improper application of Regulations had not been made out - Dismissed - Mr DA Sheahan -v- Hon Min for Education, Employment and Training - APPL 1123 of 1995 - GIFFORD C. - 22/12/95 - Government Administration 215

Application to stay order re conduct of section 7c enquiry - Applicant claimed preliminary point that there would be costs incurred in proceeding before the Tribunal which may be thrown away if IAC ruled tribunal lacked jurisdiction to have issued order - Tribunal found on evidence that there was a serious matter to be tried before the Tribunal and as there was insufficient facts of the matter to cause any further delay, hearing be set down - Ordered Accordingly - State School Teachers Union of W.A. (Inc) -v- Hon Min for Education - T 15 of 1994 - Government School Teachers Tribunal - Beaman M./BEECH C - 02/01/96 - Education 272

[1]Appeal against decision of Full Bench (75 WAIG 856) re dismissed appeals against Industrial Magistrate (74 WAIG 2766) re breaches of award - Appellants claimed that Full Bench had erred in law in holding that provisions of I.R. Act created vicarious liability and in failing to hold both vicarious liability in common law doctrine and determining that s.96G(2) had no application to facts - IAC in first appeals, reviewed authorities and found that as threats made by employee organisation were in a nature prohibited by s.96E of I.R. Act an error in law had occurred and that appeals be upheld and remitted to Full Bench - IAC in later appeals, further found on evidence that said person had been established as agent for Union and that as defendant had adduced no evidence to discharge onus, appeal ground was immaterial to conviction - Granted in Part - P Aitken -v- Ms E Ducasse - IAC. 4, 5, 6 & 7 of 1995 - Industrial Appeal Court - Kennedy J./Franklyn J./Rowland J. - 14/12/95 - Services to Transport 330

[4]Application for interpretation of union rules - President examined rule and found that as provisions in rule 6 terminated membership effective 3 months from receival of written notice, it was inconsistent with and contrary to s.64(B) of the I.R. Act and determined that rule 6 be disallowed on and from date of hearing - Ordered and Declared Accordingly - REGISTRAR -v- CONSTRUCTION, MINING, ENERGY - APPL 1325 of 1995 - President - SHARKEY P - 02/02/96 - Unions 338

[4]Application for interpretation of union rules - President examined rule and found that as provisions in rule terminated membership effective 3 months from receival of written notice, it was inconsistent with and contrary to s.64(A) & (B) of the I.R. Act and determined that rule 6.12 be disallowed on and from date of hearing - Ordered and Declared Accordingly - REGISTRAR -v- The Master Plumbers' and Mechanical Services Association of Western Australia (Union of Employers) - APPL 1326,1332 of 1995 - President - SHARKEY P - 02/02/96 - Unions 339

Application for extension of time to amend prior application - Applicant claimed that due to poor legal counsel in previous case extension of time be granted to amend application - Applicant further claimed that as termination date was earlier the required 30 day limit was denied - Respondent argued that termination occurred later and payment was made through to this date - Commission reviewed authorities and found on evidence that employment contract had been observed and lawfully acted - Commission further found that as termination was at later date, under s.29(2) of I.R. Act, previous application was null as it was lodged out of 28 day limit - Dismissed - J Burton -v- Tiwest Pty Ltd - APPL 70 of 1994 - PARKS C - 15/01/96 - Petroleum Coal Chemical Assoc 435

[1]Appeal against decision of President (75 WAIG 2950) re orders for breach of union rules - Appellant claimed that in first order President was without power under s.66 of the Act to make direction as no rule existed which required re-imbursement or repayment of monies - Appellant further claimed that granting President's second and third orders would compel union to institute proceedings if General Trustees refused and that rules cast obligation only on General Trustees - IAC reviewed union rules and authorities and found that as rule 22 imposed an obligation of General Committee to direct General Trustees to instigate legal proceeding against misappropriation, President's order was within powers of s.66 of the Act - IAC further found that Appellant's submissions against second and third orders were valid and would be granted, but could not accept challenge of orders on natural justice - Granted in Part - The West Australian Locomotive Engine Drivers', Firemen's and Cleaners' Union of Workers -v- Mr E Schmid & Others - IAC 12 of 1995 - Industrial Appeal Court - Kennedy J./Franklyn J./Anderson J. - 20/02/96 - Unions 639

Application re reassignment to original location on the grounds of unfair transfer - Applicant claimed that due to unfair transfer he was the victim of unfair treatment and injustice and appeal against decision of the Respondent - Respondent argued that contrary to written warnings and instructions the Applicant had failed to comply with provisions of s.7C of the Education Act 1928 - Respondent further argued that after several communications the Applicant had disregarded instructions and as a result was suspended on the grounds of misconduct under s.7C(2)(a) of the Education Act 1928 - Commission reviewed authorities, Education Act 1928 and found on evidence that Applicant had not made out any grounds of appeal and accordingly the appeal be dismissed - Dismissed - Mr WG Antoniak -v- Ministry of Education - APPL 764 of 1995 - BEECH C - 11/03/96 - Education 721

Application for contractual entitlements on the grounds of unfair dismissal and subsequent application to strike out previous application for want of jurisdiction - Applicant claimed that unfair dismissal was within the Commission's jurisdiction due to enactment of the Industrial Legislation Amendment Act 1995 (s.42(3)), in that 28 day limit no longer applied - Respondent argued that Commission lacked jurisdiction and was functus officio as matter was previously determined by the Commission - Commission reviewed authorities and found on evidence that it lacked jurisdiction to determine matter as claim was lodged out of time limit - Commission further found that matter did not come under section 42(3) of the Industrial Legislation Reform Act and that the Act was not intended to apply retrospectively - Dismissed for want of jurisdiction - Mr GHT Flaherty -v- Siemens Aust Ltd - APPL 559 & 835 of 1995 - BEECH C - 26/02/96 - Construction Trade Services 731

Application for reinstatement on the grounds of unfair dismissal - Applicant sought reinstatement as termination occurred when on sick leave and was unfair - Respondent argued that under section 152 of the I.R. Act (Cth) Commission lacked jurisdiction in determining claim as Applicant was covered by a federal award - Commission reviewed authorities and found on evidence that federal award did apply and that order for reinstatement would negate provision of federal award, resulting in an inconsistency - Dismissed for want of jurisdiction - Mr MW McKeagg -v- Dyno Wesfarmers Limited - APPL 811 of 1995 - GEORGE C - 01/03/96 - Services to Mining 740

CUMULATIVE DIGEST—*continued*

Page

ACT - INTERPRETATION OF—*continued*

[1]Appeal against decision of Full Bench (75 WAIG 2934) re dismissed appeal re granted award variation - Appellant claimed that as awards could not be amended or varied by custom or usage, the Full Bench erred in determining that the right to the public holiday arose in that way, and, that a paid leave day was part of existing award wage conditions - Appellant further claimed Full Bench erred in law in failing to hold that Commission had acted in excess of jurisdiction in varying award without referral for consideration as special case - IAC reviewed the I.R. Act and authorities and found that as the Minister had failed to establish that the amendment could only be made pursuant to s.40(3) of the Act, the application to vary was under s.40(1) and did not have restrictions imposed under s.40(3) - IAC further found that no error in the manner of exercise of discretion nor error in law or excessive jurisdiction had been established - Dismissed - Hon Min for Health -v- LIQUOR, HOSPITALITY & MISC - IAC 14 of 1995 - Industrial Appeal Court - Kennedy J./Rowland J./Anderson J.- 27/03/96 - Health Services 930

[2]Appeal against decision of Industrial Magistrate (74 WAIG 2766) re dismissed complaints for breaches of awards - Application remitted back from Industrial Appeal Court - Respondent argued that there would be substantial arguments in relation to questions of findings to be made and that under s.90 of I.R. Act the Industrial Appeal Court could not remit matter directly back to Industrial Magistrate, only to Full Bench - Full Bench found on evidence that orders sought by Appellant should be made and outstanding matters of fact be determined by Industrial Magistrate - Ordered Accordingly - Ms E Ducasse -v- P Aitken - APPL 1032 of 1994 - Full Bench - SHARKEY P/COLEMAN CC/GEORGE C - Services to Transport 944

[3]Appeal against decision of Board of Reference (75 WAIG 2846) re pro-rata long service leave entitlements - Appellant claimed that appeal was made under correct section of the I.R. Act, which allowed legal representation of individuals - CICS reviewed I.R. Act and found that as the right to institute appeal was limited to 'organisation', 'association' or 'employer' the appeal had been instituted by persons not empowered by legislation to do so and was commenced contrary to act and was a nullity - Dismissed - Ms DA Evans -v- Meccan Pty Ltd T/A Thomas Massam Real Estate - APPL 1083 of 1995 - Commission in Court Session - PARKS C/SCOTT C./GIFFORD C. - Property Services 945

Applications for registration of industrial agreements - Applicant union claimed that as agreements applied to single enterprise they were pursuant to s.41 and no requirement to comply with terms of s.41(a) existed as no term was contrary to the Act, General Order or Principle - Respondent argued that agreements constituted one agreement applying to multitude of enterprises and could not be registered, as s.41(a) requirements were not being met - Commission reviewed authorities and found that as each agreement applied to a single enterprise, the restrictions of s.41(a) did not apply and subject to parties giving true intentions, agreements be registered - Granted - The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers -v- Formgrow Pty Ltd T/A Plasterwise Plastering Contractors - AG 178, 187,210, 213,214,217, 218, 220, 221, 222, 223, 224, 225, 226, 227, 228, 230, 231, 232, 233, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246 of 1995 - SCOTT C. - 13/11/95 - Various 1005

Complaint re breaches of award - Complainant union claimed breaches resulted from Defendant's failure to provide severance pay and notice of termination and in introducing 'major change' without discussion or notification - Defendant argued that employee was not covered by nominated award - Industrial Magistrate reviewed authorities and found on evidence that Defendant was bound by the nominated award as the classification of work covered employee's position - Upheld - AUST MUNICIPAL, CLERICAL & SER -v- City of South Perth - CP 69 of 1995 - Industrial Magistrate - Brown I.G. IM - 24/08/95 - Community Services 1155

Complaints re breaches of award - Complainant claimed breaches resulted from Defendant's failure to keep time and salaries record, allocate salary range and pay overtime and leave - Defendant argued that due to a prior ruling, the Complainant was not able to establish each and all of the elements of the four complaints and that they should be dismissed - Industrial Magistrate reviewed authorities and found on evidence that although Complainant could not establish the amount underpaid in absolute terms, Defendant's failure to comply with award was proven - Complainant invited to be heard and Defendant's application dismissed - Reason Issued - E Fisher -v- Totalisator Agency Board - CP 11, 142, 143 of 1995 & 37, 38 of 1996 - Industrial Magistrate - Reynolds IM- 28/04/96 - Sport and Recreation..... 1163

Complaints re breaches of Workplace Agreements Act 1993 - Complainant claimed that under s.72 a different penalty range for individuals and 'any other case' existed and to allow corporate defendants not be prosecuted would be contrary to objectives of the legislation - Defendant argued that terms of s.68 & s.69 of Act only individual person could be convicted of offences and corporate defendant be discharged and complaints dismissed - Industrial Magistrate reviewed Workplace Agreements Act and found that under s.68 & s.69 provisions were aimed at both individuals, corporations and registered organisations - Industrial Magistrate further found on evidence that statements said were intended to cause detriment and was satisfied that some charges had been proven beyond reasonable doubts - Proven in Part - Mr ME Game -v- Air Attention W.A. Pty Ltd and Others - CP 191 - 197, 199, 200, 201 of 1995 - Industrial Magistrate - Brown I.G. IM - 15/03/96 - Construction Trade Services 1164

Complaints re breach of award - First complainant claimed breach of award occurred when Defendant failed to pay full term of sick leave - Second complainant claimed that sick leave paid to Defendant should be reimbursed as the nature of the illness was not revealed - Industrial Magistrate found on evidence that neither matter fulfilled the criteria provided for in Clause 83(3) of the Industrial Relations Act - Dismissed - Ms L Nicol -v- Milena Filomena and Giuseppe Iacusso T/A La Plaza Decor - CP 37, 40 of 1995 - Industrial Magistrate - Malley IM - Personal & Household Good Rtlg..... 1174

Complaint re discriminatory and injurious acts against persons due to non-membership of employee organisation - Complainant claimed that the threatening of free and lawful trade of employee was contrary to s.96E of the I.R. Act - Defendant argued that employee was stopped for safety reasons, that in casual conversation told employee of union's location and denied stating that employee couldn't come and work on site - Industrial Magistrate found on evidence that safety aspect was never raised and was constructed by Defendant after event - Industrial Magistrate reviewed authorities and further found that in circumstance or context the words used had constituted a threat and as intention to threaten existed, breach of s.96 had occurred - Proven - Mr AG Shuttleton - DOPLAR -v- J Wilson - CP 79 of 1995 - Industrial Magistrate - Whitely IM - 27/02/96 - Property Services 1175

Application for denied contractual entitlements on the grounds of unfair dismissal - Applicant claimed payment of 5 weeks wages, 14 days holiday pay, superannuation contribution and the reimbursement of expenses owed under contract of employment - Respondent argued that Applicant entered into an arrangement whereby the value of entitlements owed would be met by financial return upon "taking over" another building contract - Commission found on evidence that no such arrangement occurred and had such an arrangement been entered into, the entitlements would not have been paid by the Respondent - Commission further reviewed the Truck Act 1899-1904 and found such arrangement illegal and void and ordered that Respondent pay entitlements no later than 21 days from the date of the order - Granted - Mr RJ Hall -v- Design 2000 Homes Pty Ltd - APPL 1424 of 1995 - PARKS C - 28/02/96 - General Construction 1190

CUMULATIVE DIGEST—*continued*

Page

ACT - INTERPRETATION OF—*continued*

Conference referred re granting pro-rata Long Service Leave - Applicant union claimed that notwithstanding employee's resignation from Respondent, pro-rata long service leave should be awarded - Respondent argued that Commission lacked jurisdiction to deal with matter as Applicant was not an 'employee' and claim did not constitute industrial matter - Commission reviewed I.R. Act and authorities and found that the as Long Service Leave Appeal Committee had authority to deal with claim, claim should have been first dealt with in that forum, Commission leaves applications in abeyance and are dismissed - Dismissed - LIQUOR, HOSPITALITY & MISC -v- Zoological Gardens Board - CR 257,261 of 1995 - GIFFORD C. - 22/03/96 - Libraries Museums and the Arts 1202

Complaints re breaches of Workplace Agreements Act 1993 - Parties were invited to prepare written submissions and pursuant to s.72 of the Workplace Agreement Act 1993, whether penalty should be imposed on Corporate Defendant - Industrial Magistrate reviewed the submissions and found on evidence that it was inappropriate to impose daily penalty in addition to the separate penalties as defendant did not initiate contact with complainant - Industrial Magistrate further reviewed authorities and found that "daily penalties" under the definition of the Legislation did not apply to the case and that to impose a daily penalty would be unfair - Decision Issued - Mr ME Game -v- Air Attention W.A. Pty Ltd - CP 191- 197 of 1995 and 199 - 201 of 1995 - Industrial Magistrate - Brown I.G. IM - Construction Trade Services..... 1424

Complaint re breach of Industrial Relations Act - Complainant claimed that as Defendant failed to comply with GSTT order by denying permanent appointments to AMES lecturers whom satisfied criteria for permanency, enforcement of previous order should occur - Defendant argued that criteria specified that "management" was to determine on-going need for appointed positions and that breach had not occurred - Industrial Magistrate reviewed authorities and found on evidence that although Defendant was not bound by issue of estoppel, it failed to comply with order and that the complaint was proven - Complainant invited to be heard on final orders - Decision Issued - State School Teachers Union of W.A. (Inc) -v- Hon Minister for Education & Training - CP 2607 of 1994 - Industrial Magistrate - Reynolds IM - 01/05/96 - Education 1425

Application for denied contractual entitlements on the grounds of unfair dismissal - Applicant failed to attend the conference - Respondent argued Commission should proceed with matter and dismiss application - Commission reviewed I.R. Act 1979 and found that under s.27(1)(d) it could proceed to hear and determine matter in the absence of any party and that as no response was evident nor any attempt to prosecute application on the Applicant's behalf, it was appropriate to dismiss application - Dismissed - Mr GP Shea -v- Communiquardo Pty Ltd - APPL 1275 of 1995 - PARKS C - 19/03/96 - Communication Services 1434

[2]Appeal against decision of Commission (unpublished) re granted payment of contractual benefits - Appellant claimed Commission erred in fact and law in failing to apply proper law relating to contractual benefits claim under IR Act, lacked jurisdiction to hear matter - Full Bench reviewed authorities and found that as s7 of IR Act had nothing but prospective operation from its own terms and terms of the Act, Commission lacked jurisdiction to hear and determine matter - Upheld - Lawrence Peter Ferris and Maureen Carroll T/A Carroll Realty -v- Mr JWC Chambers - APPL 539 of 1996 - Full Bench - SHARKEY P/COLEMAN CC/GEORGE C - 30/05/96 - Property Services 1656

[2]Applications pursuant to s.72A of I.R. Act 1979, seeking orders to represent the industrial interest of "PACTS" employees - Applicant Union (HSOA) submitted orders sought, would further the objects of the Act, were consistent with objectives of wage fixing principles, will reduce number of awards allowing for better industrial representation and management of employees and through Union rationalisation aid ongoing reform in the health industry - Application by Respondent Union (CSA) seeking orders to represent industrial interests of salaried employees, employed by the Commissioner of Health in business and activities as set out in application - Respondent Union submitted it had, historic coverage and continues to have significant actual membership coverage, provided impetus in relation to public health sector employees in matters of award entitlement and argued failure to grant orders would result in demarcation in the public health sector - Full Bench granted a number of "parties" leave to be heard pursuant to s.72A of Act, however dismissed all applications for leave to intervene pursuant to s.27(1)(k) of the Act - Full Bench reviewed authorities and noted arguments of both the Unions with regard to historical industrial coverage, change in status of employee, current work practices of employees and overall benefits sought by the employer, employees and Union. Full Bench found both parties had merits to their application, however issued decision and order defining the respective coverage of the unions and referred to the President, matters requiring alteration of rules of the Unions - Ordered Accordingly - Hospital Salaried Officers Association of Western Australia (Union of Workers) -v- (Not applicable) - APPL 169, 170, 171,172, 173,174,175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230,231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 496 of 1995 - Full Bench - SHARKEY P/BEECH C/GIFFORD C. - 02/04/96 - Unions 1671

[2]Application for alteration of union rules - Applicant sought a declaration that Branch rules relating to qualification of membership were same as applicant, and vice versa - Full Bench reviewed union rules and found that as the eligibility of membership for both Branch and applicant were substantially the same, the Branch rules were in accordance with s71 of the IR Act and the same as the State organisation - Declared Accordingly - LIQUOR, HOSPITALITY & MISC -v- Not Applicable - APPL 594 of 1996 - Full Bench - SHARKEY P/COLEMAN CC/GIFFORD C. - 28/05/96 - Unions 1699

Complaints re breach of Workplace Agreement Act 1993 - Complainants argued that Defendant had, by threats and intimidation, persuaded them to enter into an agreement contrary to section 68 of the Workplace Agreement - Defendant argued that proposed employment was an entirely new contract and did not consist of continuing employment and the requirement to sign the agreement was a condition precedent to employment with company - Industrial Magistrate reviewed authorities, I.R. Act, Workplace Agreement Act and found on evidence that threats to enter into workplace agreements had existed - Proven - Ms A.M. Clarke -v- Novek Pty Ltd (ACN 070 744 946) t/a Shell Combined - CP 242 of 1995 - Industrial Magistrate - Gething IM - 09/05/96 - Motor Vehicle Rtlg & Services 2010

Conference referred regarding orders concerning conduct of investigation and interpretation of Education Act - Applicant claimed that investigation into conduct be permanently stayed and those conducting the investigation be disqualified - Respondent argued that it opposed the claims sought - Commission reviewed Education Act and found that the facts did not lead to the conclusion that alleged flaw was so fundamental that the enquiry could not be permitted - Dismissed - State School Teachers Union of W.A. (Inc) -v- Hon Min for Education, Employment and Training - CR 173 of 1995 - BEECH C - Education..... 2039

Application re interpretation of Act and stay of proceedings - Applicant union sought interpretation of Education Act 1929, declaration of an enquiry carried out in rules of natural justice not due to null and void appointment, a permanent stay of proceedings, and orders that certain particulars and parties authorised by CEO be disqualified - Defendant argued that the GSTT was without jurisdiction to restrain or influence the enquiry under the act - The Tribunal reviewed authorities and found on evidence that there was jurisdiction to issue an order in Applicant's terms, but that no grounds for delaying the satisfactory conduct of the enquiry had existed - Dismissed - State School Teachers Union of W.A. (Inc) -v- Hon Min for Education - T 15 of 1994 - Government School Teachers Tribunal - Beaman M./BEECH C/Pollard R. - 23/05/96 - Education 2059

CUMULATIVE DIGEST—*continued*

Page

ALLOWANCES

Application for denied contractual entitlements - Applicant claimed in preliminary point that Commission did have jurisdiction as the Federal Commission lacked jurisdiction to deal with enforcement of contractual entitlements - Applicant claimed that non award benefit had been denied in regards to the use of motor vehicle for commuting purposes - Respondent argued in preliminary point that Commission lacked jurisdiction as employment was covered by paid rates award of the Australian Commission and matter was before the Australian Commission - Respondent argued that use of motor vehicle formed part of contract of employment and as use was granted at its discretion it was entitled to withdraw use at its discretion - Commission found on evidence that employer did not enter into a contractual arrangement, but rather an arrangement at employer's convenience which terminated due to review of vehicle usage - Dismissed - Mr G Roy -v- Western Power - APPL 447 of 1995 - SCOTT C. - 12/09/95 - Electricity and Gas Supply 209

Conference re site allowance at the clubhouse construction site, Burswood Golf Complex - Parties agreed to payment of the allowance as site contained various disabilities which made work unpleasant and difficult - Commission undertook inspections and found on evidence that the disabilities claimed were in fact experienced and that the site warranted the payment of an allowance as agreed by the parties - Granted - The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers -v- C H Day & Co Pty Ltd T/A Geo A Esslemont & Son - C 316 of 1995 - SCOTT C. - 16/11/95 - General Construction 222

Conference referred re claim for compensation allowance - Applicant union claimed that construction related disabilities experienced were greater than those previously considered and level of disability reflected changed in conditions - Respondent argued that construction related site disabilities addressed were overstated and were essentially no different to those usually present in construction industry - Commission found on evidence and via inspection that overall degree of disabilities which existed were in excess of those compensated by existing allowance and operative date of allowance be earliest date - Ordered Accordingly - Transfield Construction WA -v- AUTO, FOOD, METAL, ENGIN UNION & Other - CR 271 of 1995 - PARKS C - 27/11/95 - General Construction 231

Conference referred re cancellation of order - Applicant claimed that although the analysis report correctly classified the two positions it maintained that the composite allowance be kept due to not all tasks and multiskills being covered by reclassification guidelines - Respondent argued that order should be cancelled as award restructuring had been implemented into the Engineering Trades (Government) Award - Respondent further argued that as reclassification and proper recognition had been given after job skill analysis, continuance of order would reward employees twice for the same skills and responsibilities - Commission reviewed "Genders report" and found that report did take into account the positions in question and allotted the skills in respective ranking - Commission further found that whilst payment of individual allowances may be an "administrative nightmare" it could be overcome via agreement between parties and order had served its purpose - Granted - Australian Electrical, Electronics, Foundry and Engineering Union (Western Australian Branch) -v- Fisheries Department - CR 226 of 1995 - HALLIWELL SC - 09/01/96 - Rail Transport 234

[2]Appeal against decision of Commission (75 WAIG 3364) re discontinued tool allowance - Appellant claimed that Commission erred in fact and law in giving undue and unwarranted emphasis on Respondent's perception of security risks and in not giving sufficient consideration to weight of custom and practice - Respondent argued that supplying tools would give no legitimate occasion to take tools home, nor occasion for tools to be used as vehicles to convey precious metals - Full Bench reviewed I.R. Act and authorities and found that no error of law or facts were raised and according to principles set in House case, no establishment was made that Commission's exercise of discretion had miscarried - Dismissed - AUTO, FOOD, METAL, ENGIN UNION -v- Western Australian Mint - APPL 1293 of 1995 - Full Bench - SHARKEY P/COLEMAN CC/BEECH C - 04/04/96 - Metal Product Manufacturing 932

ANNUAL LEAVE

Application for denied contractual entitlements on the grounds of unfair dismissal - Applicant claimed payment of 5 weeks wages, 14 days holiday pay, superannuation contribution and the reimbursement of expenses owed under contract of employment - Respondent argued that Applicant entered into an arrangement whereby the value of entitlements owed would be met by financial return upon "taking over" another building contract - Commission found on evidence that no such arrangement occurred and had such an arrangement been entered into, the entitlements would not have been paid by the Respondent - Commission further reviewed the Truck Act 1899-1904 and found such arrangement illegal and void and ordered that Respondent pay entitlements no later than 21 days from the date of the order - Granted - Mr RJ Hall -v- Design 2000 Homes Pty Ltd - APPL 1424 of 1995 - PARKS C - 28/02/96 - General Construction 1190

Application for denied contractual entitlements re annual leave payments - Applicant claimed payment for four weeks annual leave notwithstanding change in position and move from award entitlement to contract of service - Respondent argued that there was no express provision in contract for payment in lieu of annual leave on resignation, and that no evidence existed before the Commission for term to be implied - Respondent however acknowledged Minimum Condition Act but argued it was outside Commission's jurisdiction - Commission found on past course of dealing between parties that it was open to imply a term into "leave" provision and having reviewed authorities granted entitlement for period calculated on completed weeks of service - Granted - Mr G Nealings -v- Crommelins Handyman Hire & Sales - APPL 975 of 1995 - GIFFORD C. - 07/03/96 - Personal Services 1194

Conference referred re amendment of conditions of employment of the re-employment order (3) (73 WAIG 1898) - Applicant union claimed that aforestated order did not provide opportunity to buy back accrued annual leave, sick leave and long service leave, that entitlements accrued up to termination were not paid out and omitted from new contracts of employment - Leave to intervene was sought by AEEFEU and granted to represent two of its other members - Respondent argued that Commission lacked jurisdiction to hear and determine the matter - Commission reviewed I.R. Act, Workplace Agreements, authorities and found on evidence that it lacked jurisdiction and power to arbitrate some claims as affected persons and employment relationships were parties to Workplace Agreement Act 1993 - Declared and Ordered Accordingly - The Australian Workers' Union and Another -v- Robe River Iron Associates and Another - CR 446 of 1993;CR 71 of 1994 - PARKS C - 12/03/96 - Coal Mining 1443

APPEAL

[1]Appeal against decision of Full Bench (75 WAIG 1820) re dismissed appeal against decision of Industrial Magistrate (unreported) re breaches of award - Appellant initially claimed that Full Bench decision was erroneous in law or in excess of jurisdiction but latter sought leave to discontinue appeal - Respondent argued that although there was no objection to discontinuance, under s.86(2) of the I.R. Act it sought for payment costs of appeal, including services of legal practitioner - IAC reviewed authorities and found that within s.86(2) only on very rare occasions would cost of legal practitioner be granted and that as the appeal was untenable and could not have succeeded, Respondent's claim was seen as one of the rare cases which fell into exceptions of s.86(2) - Ordered Accordingly - The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers -v- Clark T/A Mike Clark Contracting - IAC 10 of 1995 - Industrial Appeal Court - Kennedy J./Franklyn J./Rowland J. - 23/11/95 - General Construction 4

CUMULATIVE DIGEST—*continued*

Page

APPEAL—*continued*

[1]Application for stay of proceedings against decision of President (75 WAIG 2950) pending appeal to Industrial Appeal Court - Appellant claimed that if appeal was successful and the stay unsuccessful, the commencement of proceedings would cause prejudice to appellant and granting of stay would merely delay commencement of action against specified individuals - IAC reviewed authorities and found that the appeal did raise serious questions and found it undesirable to institute proceedings against individuals not formally parties to the original application - IAC further found that given the date the appeal was to be listed, only a minimal amount of time would elapse prior to its determination and no prejudice on the respondents was pointed to in submissions - Granted - The West Australian Locomotive Engine Drivers', Firemen's and Cleaners' Union of Workers -v- Mr E Schmid & Others - IAC 12 of 1995 - Industrial Appeal Court - Kennedy J. - 10/12/95 - Unions 6

[2]Appeal against decision of Commission (75 WAIG 1938) re dismissed application for award variation re award restructuring - Appellant claimed that Commission erred by failing to apply wage fixing principles to BMA employees and by giving insufficient weight to evidence regarding length of negotiations concerning classification structure for BMA - Appellant further claimed that Commission erred in placing too much weight to classification structure in Engineering Trades (Government) Award when award was not the subject of proceedings and also by holding that timeframe for implementing classification structure as lengthy and involved few gains - Respondent argued application of Structural Efficiency principle was not mandatory and that removal of exemption would not result in application of Principles - Majority Full Bench reviewed authorities and found that although Commission was open to facilitate Structural Efficiency process, it would have been incorrect to have imposed the process and that Commission erred in finding the timeframe for implementing classification structure as lengthy and involving few gains - Minority Full Bench reviewed authorities and found that it favoured Appellant's claim and that Respondent had impeded Structural Efficiency process and as the basis on which the exemption was agreed to was not achieved, no basis on agreed variation existed - Upheld and Remitted - The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers & Others -v- Hon Min for Works & Services - APPL 717 of 1995 - Full Bench - SHARKEY P/GEORGE C/GIFFORD C. - 28/11/95 - Construction Trade Services 8

[2]Appeal against dismissed decision of Commission (75 WAIG 2841) re variation of award re $8.00 arbitrated safety net wage adjustment - Appellant claimed that Commission had erred as it failed to correctly apply the wage fixing principles, to give weight to the evidence submitted and by incorrectly holding the award to be a "paid rates" award and not a "benchmark award" - Respondent argued that the two awards sought for comparison were inappropriate as one was a "paid rates award" and the other a "minimum rates award" and to do so would have been contrary to the Structural Efficiency Principle - Full Bench reviewed authorities and found on evidence that the history of the two awards indicated that comparison would have been inappropriate - Dismissed - The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers & Others -v- Hon Min for Works & Others - APPL 1128 of 1995 - Full Bench - SHARKEY P/COLEMAN CC/HALLIWELL SC - 20/12/95 - General Construction 16

[2]Appeals against decision of the Commission (75 WAIG 155 & 966) re dismissed applications for denied contractual entitlements - Appellants claimed that the Commission erred at first instance in strictly applying the Hastings case, and in incorrectly applying the test of the Western Port case regarding implied redundancy terms - Appellant further claimed Commission erred by failing to grant sufficient weight to evidence with respect to the custom and practice and in determining that the alternative employment was suitable - Respondent argued that the part of the Commission's decision relating to the payment of pro-rata long service leave entitlement be appealed as it exceeded its jurisdiction and the claims were made in respect of redundancy payments and not long service leave - Respondent further argued Commission had adopted an "arbitral" approach rather than the required "judicial" approach and sought the decision to be dismissed - Full Bench reviewed authorities and found on evidence that the Commission had not implied a term ralating to redundancy or severance payments as a matter of necessity into a contract, that the alternative employment found was only partially suitable as it did not preserve any existing service or accrued entitlements and under the circumstances there was a term allowing redundancy or severance payments - Full Bench further found that the Commission erred in the proper exercise of its discretion in ordering the payment of pro -rata long service leave to one of the Appellants - Upheld, Quashed and Ordered Accordingly - Joyce Australia Pty Ltd -v- R Lawson & Others - APPL 420,448 of 1995 - Full Bench - SHARKEY P/COLEMAN CC/GIFFORD C. - 18/12/95 - Personal & Household Good Rtlg 20

[2]Appeals against decision of Commission (75 WAIG 1975 & 2251) re orders re cancellation of work bans and commencement of negotiations - Appellant claimed Commission erred in finding it had jurisdiction to make orders in relation to duties not contained in contract of employment and not within definition of 'industrial matter' - Appellant further claimed that Commission had erred in denying procedural fairness by making orders which were before AIRC and also made in a final rather than an interim form - Respondent argued that as AEU was not party to proceedings, it would not be affected by orders made by Commission - Majority Full Bench reviewed authorities and found that Commission erred in law under s.34(1) of the I.R. Act by not hearing evidence or submissions relating to jurisdiction prior to making orders, in not determining if matters were 'industrial matters' which action was deemed ultra vires and/or without statutory authorities - Majority Full Bench further found that Commission had determined jurisdiction by recording parties concerns as to jurisdiction on transcript and that it was for the Commission to decide extent of submissions and evidence necessary to determine questions before it - Minority Full Bench found that as matters before Commission affected or related to the work, privileges, rights or duties of employers or employees in industry, they constituted 'industrial matters' and as orders were not final they could be varied, set aside or cancelled and remained in force when conciliation/arbitration had finally resolved all industrial matters in dispute - Upheld and Quashed - State School Teachers Union of W.A. (Inc) -v- Hon Min for Education - APPL 587,723 of 1995 - Full Bench - SHARKEY P/GEORGE C/SCOTT C. - 13/12/95 - Education 27

[2]Appeal against decision of Commission (75 WAIG 2871) re dismissed application for stay of inquiry on the grounds of denied natural justice - Appellant claimed that Commission was outside its jurisdiction as the matter was not seen as industrial when the tribunal carried out a statutory function in accordance to the Education Act - Respondent argued that it was an industrial matter as defined by s.7 of the Education Act as it dealt with behaviour and/or performance and had the potential to result in the punishment of and termination of employment - Full Bench reviewed authorities and found on evidence that the Commission was not deprived of jurisdiction to hear and determine the matter under s.23B of the Act and had not erred in dismissing the application under s.27 of the Act as it merely made arbitration orders - Dismissed - Hon Minister for Education -v- State School Teachers Union of W.A. (Inc) - APPL 937 of 1995 - Full Bench - SHARKEY P/GEORGE C/SCOTT C. - 18/12/95 - Education 35

[2]Appeal against decision of Commission (75 WAIG 2871) re dismissed application for stay of enquiry - Appellant claimed Commission erred in dismissing application when opportunity to present denied natural justice evidence was not given and in failing to refer application for hearing and determination pursuant to s44(9) of the I.R. Act - Appellant further claimed that Commission erred in failing to intervene the section 7c enquiry when sufficient material to justify intervention existed, had erred in law and fact in finding that section 7c enquiry was conducted in a just manner and that the Commission lacked jurisdiction to enquire into and deal with claim - Respondent argued that the investigations conducted by headmaster were part of the normal running of the school and that the Chief Executive, pursuant to section 7c of the Education Act had set in train and enquiry - Full Bench reviewed authorities and found on evidence that no grounds of appeal had been made out nor had Commission erred and there did not exist any denial of natural justice, in particular, in any event - Dismissed - State School Teachers Union of W.A. (Inc) -v- Hon Min for Education - APPL 1127 of 1995 - Full Bench - SHARKEY P/HALLIWELL SC/PARKS C - 21/12/95 - Education 40

CUMULATIVE DIGEST—*continued*

Page

APPEAL—*continued*

[2]Appeal against decision of Industrial Magistrate (unreported) re breach of award - Appellant claimed that Industrial Magistrate had erred in law as no finding, set out by the Minimum Conditions Act 1993, was made in relation to the terms implied in award, where a provision or condition of award was less favourable to the employee than a minimum condition of employment - Respondent argued that it had a right to know the nature of the illness or injury over and above the medical certificate and that in the absence of that, it was not liable for payment of the sick leave as stipulated in the award - Full Bench found on evidence that the Minimum Conditions Act applied in lieu of the award and that the medical certificate supplied by the Appellant's medical practitioner sufficed in notification of inability to attend work - Upheld and Remitted - Ms L Nicol -v- Milena Filomena and Giuseppe Iacusso T/A La Plaza Decor - APPL 784 of 1995 - Full Bench - SHARKEY P/HALLIWELL SC/GIFFORD C. - 06/12/95 - Personal & Household Good Rtlg 44

[1]Appeal against decision of Full Bench (75 WAIG 856) re dismissed appeals against Industrial Magistrate (74 WAIG 2766) re breaches of award - Appellants claimed that Full Bench had erred in law in holding that provisions of I.R. Act created vicarious liability and in failing to hold both vicarious liability in common law doctrine and determining that s.96G(2) had no application to facts - IAC in first appeals, reviewed authorities and found that as threats made by employee organisation were in a nature prohibited by s.96E of I.R. Act an error in law had occurred and that appeals be upheld and remitted to Full Bench - IAC in later appeals, further found on evidence that said person had been established as agent for Union and that as defendant had adduced no evidence to discharge onus, appeal ground was immaterial to conviction - Granted in Part - P Aitken -v- Ms E Ducasse - IAC Nos. 4, 5, 6 & 7 of 1995 - Industrial Appeal Court - Kennedy J./Franklyn J./Rowland J. - 14/12/95 - Services to Transport 330

[1]Appeal against decision of Full Bench (75 WAIG 2485) re dismissed appeal against Government School Teachers Tribunal (75 WAIG 1026) re granted stay of inquiry - IAC found, on application of test case, that as nothing had been put forward to indicated "extension of time" argument could succeed, no substance in application existed and determined in draft judgement that Respondent was entitled to costs - Ordered Accordingly - Hon Minister for Education -v- State School Teachers Union of W.A. (Inc) - IAC 13 of 1995 - Industrial Appeal Court - Kennedy J./Franklyn J./Anderson J. - 01/02/96 - Education 336

[1]Appeal against decision of President (75 WAIG 2950) re orders for breach of union rules - Appellant claimed that in first order President was without power under s.66 of the Act to make direction as no rule existed which required re-imbursement or repayment of monies - Appellant further claimed that granting President's second and third orders would compel union to institute proceedings if General Trustees refused and that rules cast obligation only on General Trustees - IAC reviewed union rules and authorities and found that as rule 22 imposed an obligation of General Committee to direct General Trustees to instigate legal proceeding against misappropriation, President's order was within powers of s.66 of the Act - IAC further found that Appellant's submissions against second and third orders were valid and would be granted, but could not accept challenge of orders on natural justice - Granted in Part - The West Australian Locomotive Engine Drivers', Firemen's and Cleaners' Union of Workers -v- Mr E Schmid & Others - IAC 12 of 1995 - Industrial Appeal Court - Kennedy J./Franklyn J./Anderson J. - 20/02/96 - Unions 639

Application re reassignment to original location on the grounds of unfair transfer - Applicant claimed that due to unfair transfer he was the victim of unfair treatment and injustice and appeal against decision of the Respondent - Respondent argued that contrary to written warnings and instructions the Applicant had failed to comply with provisions of s.7C of the Education Act 1928 - Respondent further argued that after several communications the Applicant had disregarded instructions and as a result was suspended on the grounds of misconduct under s.7C(2)(a) of the Education Act 1928 - Commission reviewed authorities, Education Act 1928 and found on evidence that Applicant had not made out any grounds of appeal and accordingly the appeal be dismissed - Dismissed - Mr WG Antoniak -v- Ministry of Education - APPL 764 of 1995 - BEECH C - 11/03/96 - Education 721

[1]Appeal against decision of Full Bench (75 WAIG 2934) re dismissed appeal re granted award variation - Appellant claimed that as awards could not be amended or varied by custom or usage, the Full Bench erred in determining that the right to the public holiday arose in that way, and, that a paid leave day was part of existing award wage conditions - Appellant further claimed Full Bench erred in law in failing to hold that Commission had acted in excess of jurisdiction in varying award without referral for consideration as special case - IAC reviewed the I.R. Act and authorities and found that as the Minister had failed to establish that the amendment could only be made pursuant to s.40(3) of the Act, the application to vary was under s.40(1) and did not have restrictions imposed under s.40(3) - IAC further found that no error in the manner of exercise of discretion nor error in law or excessive jurisdiction had been established - Dismissed - Hon Min for Health -v- LIQUOR, HOSPITALITY & MISC - IAC 14 of 1995 - Industrial Appeal Court - Kennedy J./Rowland J./Anderson J. - 27/03/96 - Health Services 930

[2]Appeal against decision of Commission (75 WAIG 3364) re discontinued tool allowance - Appellant claimed that Commission erred in fact and law in giving undue and unwarranted emphasis on Respondent's perception of security risks and in not giving sufficient consideration to weight of custom and practice - Respondent argued that supplying tools would give no legitimate occasion to take tools home, nor occasion for tools to be used as vehicles to convey precious metals - Full Bench reviewed I.R. Act and authorities and found that no error of law or facts were raised and according to principles set in House case, no establishment was made that Commission's exercise of discretion had miscarried - Dismissed - AUTO, FOOD, METAL, ENGIN UNION -v- Western Australian Mint - APPL 1293 of 1995 - Full Bench - SHARKEY P/COLEMAN CC/BEECH C - 04/04/96 - Metal Product Manufacturing 932

[2]Appeal against decision of Commission (75 WAIG 3068) re denied application for reinstatement of the grounds of unfair dismissal - Appellant claimed Commission erred in fact and law in finding that termination was effected by Appellant and that employee was engaged as casual employee on ongoing basis - Appellant further claimed that as no ongoing employment relationship existed, Commission lacked jurisdiction to deal with application - Full Bench reviewed authorities and found on evidence that as Respondent was not a casual worker in terms of the award definition, summary dismissal was unlawful and unfair and Commission had jurisdiction to make order for reinstatement - Dismissed - Serco (Australia) Pty Ltd -v- Mr JJ Moreno - APPL 1281 of 1995 - Full Bench - SHARKEY P/BEECH C/SCOTT C. - 19/03/96 - Food Retailing 937, 2023

[2]Appeal against decision of Industrial Magistrate (unreported) re dismissed complaint for breach of award - Appellant claimed that Magistrate misapplied the law and should have found the subject award applied to horticultural (nursery) industry as evidence was led to show - Full Bench reviewed authorities and found that no evidence existed upon which Industrial Magistrate could find that the purpose and function of Respondent was the nursery industry - Full Bench further found that as scope clause was intended to refer to all employees employed in the industries Respondent was engaged in, no grounds of appeal were made out - Dismissed - The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- Sumich Group Ltd - APPL 101 of 1996 - Full Bench - SHARKEY P/BEECH C/GIFFORD C. - Coal Mining 942

CUMULATIVE DIGEST—*continued*

Page

APPEAL—*continued*

[2]Appeal against decision of Industrial Magistrate (74 WAIG 2766) re dismissed complaints for breaches of awards - Application remitted back from Industrial Appeal Court - Respondent argued that there would be substantial arguments in relation to questions of findings to be made and that under s.90 of I.R. Act the Industrial Appeal Court could not remit matter directly back to Industrial Magistrate, only to Full Bench - Full Bench found on evidence that orders sought by Appellant should be made and outstanding matters of fact be determined by Industrial Magistrate - Ordered Accordingly - Ms E Ducasse -v- P Aitken - APPL 1032 of 1994 - Full Bench - SHARKEY P/COLEMAN CC/GEORGE C - Services to Transport 944

[3]Appeal against decision of Board of Reference (75 WAIG 2846) re pro-rata long service leave entitlements - Appellant claimed that appeal was made under correct section of the I.R. Act, which allowed legal representation of individuals - CICS reviewed I.R. Act and found that as the right to institute appeal was limited to 'organisation', 'association' or 'employer' the appeal had been instituted by persons not empowered by legislation to do so and was commenced contrary to act and was a nullity - Dismissed - Ms DA Evans -v- Meccan Pty Ltd T/A Thomas Massam Real Estate - APPL 1083 of 1995 - Commission in Court Session - PARKS C/SCOTT C./GIFFORD C. - Property Services 945

[2]Appeal against decision of Commission (75 WAIG 2522) re registration of industrial agreement - Appellant claimed that as Commission denied natural justice by revoking intervention status and erred in law in registering the agreement, full intervention status relating to agreement and current appeal be granted - Appellant further claimed that appeal raised sufficient matters of public interest to warrant further hearing and determination - Respondent argued that as appellant's officers had not been duly elected, Full Bench was without jurisdiction to hear matter - Full Bench reviewed I.R. Act and authorities and found that the Commission had power to permit intervention and did so generally and unconditionally, but erred at first instance in holding that mandatory requirement to register agreement existed without the agreement meeting all criteria - Full Bench further found that Appellant was denied natural justice - Upheld - LIQUOR, HOSPITALITY & MISC -v- Burswood Resort (Management) Ltd & Other - APPL 1075 of 1995 - Full Bench - SHARKEY P/HALLIWELL SC/BEECH C - 03/04/96 - Sport and Recreation 1281

[1]Appeal against decision of Full Bench (76 WAIG 20) re payment of denied contractual entitlements - Appellant claimed, in preliminary point, that Full Bench erred in determining that Commission had jurisdiction to hear matter - Respondent argued that Full Bench's decision regarding jurisdiction should be affirmed without reversing Pepler's case, as claims were made before termination and for contractual entitlements not compensation - IAC reviewed authorities and found that the rules in Pepler's case applied to the current application - Preliminary point granted - Joyce Corporation Ltd T/A Joyce Australia -v- R Lawson & Others - IAC 1 of 1996 - Industrial Appeal Court - Franklyn J./Rowland J./Anderson J. - 15/05/96 - Personal & Household Good Rtlg 1653

[1]Appeal against decision of Full Bench (76 WAIG 1281) re upheld appeal re registration of industrial agreement - Appellant claimed that as Full Bench erred in failing to hear that appeal was invalid or unauthorised, in granting first respondent leave to appeal and upholding appeal, order for stay of decision be given - IAC reviewed authorities and found that as no opposition for stay existed and grounds of appeal had prospects of success, it would be "just" to grant order - Granted - Burswood Resort (Management) Ltd -v- LIQUOR, HOSPITALITY & MISC - IAC 4 of 1996 - Industrial Appeal Court - Kennedy J. - 13/05/96 - Sport and Recreation 1655

[2]Appeal against decision of Commission (unpublished) re granted payment of contractual benefits - Appellant claimed Commission erred in fact and law in failing to apply proper law relating to contractual benefits claim under IR Act, lacked jurisdiction to hear matter - Full Bench reviewed authorities and found that as s7 of IR Act had nothing but prospective operation from its own terms and terms of the Act, Commission lacked jurisdiction to hear and determine matter - Upheld - Lawrence Peter Ferris and Maureen Carroll T/A Carroll Realty -v- Mr JWC Chambers - APPL 539 of 1996 - Full Bench - SHARKEY P/COLEMAN CC/GEORGE C - 30/05/96 - Property Services 1656

[2]Appeal against decision of Commission (75 WAIG 2815) re incorrect operative date for awards variation - Appellant claimed that Commission erred by failing to give reasons for chosen date, failing to properly consider employees low paid nature and in selecting date inconsistent with the intention of the State Wage Decision - Appellant further claimed that Commission erred in inserting "Enterprise Flexibility Provision" clause, as clause was contrary to intent of the State Wage Decision - Respondent argued that it opposed the applications at first instance - Full Bench reviewed the IR Act and authorities and found that as the Commission at first instance, erred and miscarried the exercise of its discretion in its failure to apply Principles the appeals would be upheld and awards varied - Ordered Accordingly - LIQUOR, HOSPITALITY & MISC -v- Crothall Hospital Services Pty Ltd - APPL 1172, 1173, 1174, 1175, 1176, 1177, 1183 of 1995 - Full Bench - SHARKEY P/COLEMAN CC/HALLIWELL SC - 16/05/96 - Community Services 1658

[2]Appeal against decision of Commission (76 WAIG 388) re granted variation of award - Appellant claimed Commission erred in holding that Safety Net Adjustment should only apply to tally workers where one tally was worked and in drawing conclusion without adduced evidence - Respondent argued that appellant had not established at first instance that it had complied with the conditions precedent - Full Bench reviewed authorities and found that Commission had erred and miscarried discretion as the variation should have been granted and substitution of Commission's decision with Full Bench would occur - Upheld - AUST MEAT INDUSTRY EMPL UNION -v- Action Food Barns (WA) Pty Ltd & Others - APPL 85 of 1996 - Full Bench - SHARKEY P/COLEMAN CC/CAWLEY C. - 28/05/96 - Personal & Household Good W/sg 1664

[2]Appeal against decision of Commission (76 WAIG 451) re dismissed claim for unfair dismissal, compensation and contractual entitlements - Appellant claimed Commission denied natural justice by failing to give opportunity to be heard and had erred in failing to find non payment of monies and deciding that it lacked jurisdiction to make orders with regards to wages - Full Bench reviewed authorities and found on evidence that cessation of employment was through resignation and in appearing before the Commission in person, appellants had given reasonable opportunity to present case and were not denied natural justice - Dismissed - T Stankovski -v- Quirk Corporate Cleaning Australia Pty Ltd - APPL 117 & 132 of 1996 - Full Bench - SHARKEY P/HALLIWELL SC/GEORGE C - 10/05/96 - Business Services 1667

AWARDS

[2]Appeal against decision of Commission (75 WAIG 1938) re dismissed application for award variation re award restructuring - Appellant claimed that Commission erred by failing to apply wage fixing principles to BMA employees and by giving insufficient weight to evidence regarding length of negotiations concerning classification structure for BMA - Appellant further claimed that Commission erred in placing too much weight to classification structure in Engineering Trades (Government) Award when award was not the subject of proceedings and also by holding that timeframe for implementing classification structure as lengthy and involved few gains - Respondent argued application of Structural Efficiency principle was not mandatory and that removal of exemption would not result in application of Principles - Majority Full Bench reviewed authorities and found that although Commission was open to facilitate Structural Efficiency process, it would have been incorrect to have imposed the process and that Commission erred in finding the timeframe for implementing classification structure as lengthy and involving few gains - Minority Full Bench reviewed authorities and found that it favoured Appellant's claim and that Respondent had impeded Structural Efficiency process and as the basis on which the exemption was agreed to was not achieved, no basis on agreed variation existed - Upheld and Remitted - The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers & Others -v- Hon Min for Works & Services - APPL 717 of 1995 - Full Bench - SHARKEY P/GEORGE C/GIFFORD C. - 28/11/95 - Construction Trade Services 8

CUMULATIVE DIGEST—*continued*

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AWARDS—*continued*

[2]Appeal against dismissed decision of Commission (75 WAIG 2841) re variation of award re $8.00 arbitrated safety net wage adjustment - Appellant claimed that Commission had erred as it failed to correctly apply the wage fixing principles, to give weight to the evidence submitted and by incorrectly holding the award to be a "paid rates" award and not a "benchmark award" - Respondent argued that the two awards sought for comparison were inappropriate as one was a "paid rates award" and the other a "minimum rates award" and to do so would have been contrary to the Structural Efficiency Principle - Full Bench reviewed authorities and found on evidence that the history of the two awards indicated that comparison would have been inappropriate - Dismissed - The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers & Others -v- Hon Min for Works & Others - APPL 1128 of 1995 - Full Bench - SHARKEY P/COLEMAN CC/HALLIWELL SC - 20/12/95 - General Construction 16

[2]Appeal against decision of Industrial Magistrate (unreported) re breach of award - Appellant claimed that Industrial Magistrate had erred in law as no finding, set out by the Minimum Conditions Act 1993, was made in relation to the terms implied in award, where a provision or condition of award was less favourable to the employee than a minimum condition of employment - Respondent argued that it had a right to know the nature of the illness or injury over and above the medical certificate and that in the absence of that, it was not liable for payment of the sick leave as stipulated in the award - Full Bench found on evidence that the Minimum Conditions Act applied in lieu of the award and that the medical certificate supplied by the Appellant's medical practitioner sufficed in notification of inability to attend work - Upheld and Remitted - Ms L Nicol -v- Milena Filomena and Giuseppe Iacusso T/A La Plaza Decor - APPL 784 of 1995 - Full Bench - SHARKEY P/HALLIWELL SC/GIFFORD C. - 06/12/95 - Personal & Household Good Rtlg 44

[3]Applications for variations to awards re non-work related medical expenses - Applicant claimed removal of conditions from Regulations was done unilaterally and without consultation, and that conditions were removed as a negative cost cutting exercise and not justified on merit - Applicant further claimed that high level of health and fitness for police officers was in public interest and as provision of entitlements had a long history of custom and practice, efficacy of enterprise bargaining would be undermined if unilateral determination of conditions was permitted - Respondent argued due process had been followed in removing entitlements and, as entitlements did not promote good health and fitness proposed provisions discriminated between police officers and other public officers - Respondent further argued that it was in the public interest to determine allocation of resources, that as entitlements were not an actual condition of employment re-establishment would interfere with flexibility and efficiency as funds had not been allocated and a flow-on effect would occur if entitlements were incorporated into the award - CICS reviewed authorities and found that application attracted consideration as a Special Case, and cost of providing entitlement did not outweigh aspects of public interest which recognised special nature of occupation - CICS further found that flow-on effect could also from conditions contained in Regulations, with entitlements part of a status quo which complemented services provided and that process of Structural Efficiency would be facilitated by re-establishment of entitlements - Granted - Western Australian Police Union of Workers -v- Hon Minister for Police - APPL 363 of 1994 - Commission in Court Session - COLEMAN CC/GEORGE C/PARKS C - 22/11/95 - Community Services..... 46

[4]Application for a stay of "finding" for Application No. PSA AG2 of 1995 of Public Service Arbitrator (75 WAIG 3052) pending appeal to Full Bench re registration of an industrial agreement - Applicant claimed that Commission erred as the provisions stipulated by s.80C(4) of the Act in conjunction with s.41 were not considered, that the interpretation of s.41 was questionable and challenged limited right to intervene - Applicant further claimed that HSOA lacked constitutional coverage to be party to the s.41 agreement and that Commission had not considered the circumstances in which the HSOA had sought to amend its constitution - Respondents argued that the balance of convenience lay with them and if the decision was stayed it would be against public interest as the Pathcentre would be award free and would cause irremediable harm - Respondent further argued that in the event of successful appeal with the agreement registered, an application to revoke the agreement or vary the award would occur - President reviewed authorities and found on evidence that the balance of convenience favoured the Applicant as the question of constitutional coverage was being addressed by the Full Bench and thereby constituted a serious issue to be tried - Granted - The Civil Service Association of Western Australia Incorporated -v- Western Australian Centre for Pathology and Medical Research - APPL 1311 of 1995 - President - SHARKEY P - 04/12/95 - Health Services..... 60

Application to vary award - Applicant sought to vary the award by the insertion of a separate schedule to give effect enterprise bargaining agreement reached between itself and the Respondent and that the date of operation should reflect retrospectivity - Respondent consented to the insertion but argued that the date of operation should be from the first pay period and on or after date of variation - Commission reviewed State Wage Principles and found on evidence that as there was an offer of retrospectivity made during the negotiations, the Respondent was bound to the offer and although claim constituted a "special condition" pursuant to the Principles, it was unable to award a retrospective date further than the date of application - Ordered Accordingly - AUST MUNICIPAL, CLERICAL & SER -v- Totalisator Agency Board of WA & Others - APPL 1369 of 1995 - BEECH C - 28/12/95 - Sport and Recreation..... 169

Application to re-open hearing re registration of industrial agreement - 2nd Union sought intervention as it claimed employees in new positions would, in part, perform duties covered by an award which they were party to, that under s.26(1) of the I.R. Act a requirement to take account of employees' interest existed and re-opening would enable an opportunity to be heard - Parties argued that by virtue of s.41(2) of the I.R. Act an obligation existed to register agreement and as it was inappropriate and unnecessary to re-open hearing it urged finalisation of registration - Commission found on evidence that as agreement did not cover salaried officers eligible of 2nd Union, objections by 2nd Union were rejected and agreement registered - Ordered Accordingly - W.A. Government Railways Commission -v- Australian Railways Union of Workers, West Australian Branch - AG 275 of 1995 - SCOTT C. - 27/11/95 - Road Transport 147

Application to vary award - Parties claimed Commission should disqualify itself from hearing matter as perception of bias had arisen - Applicant claimed that application for bias was misconceived and rejected proposition of Commission limitation on witness number but rather acknowledged that determination of question was for Commission to decide - Respondent union claimed that during hearing Commission conveyed impression of time wasting which placed onus to establish case for adjournment and also made a statement concerning unspecified limitation on witness number - Commission reviewed transcript and found that as no basis for reasonable apprehension of bias existed it would not disqualify itself from the matter - Ordered Accordingly - Newcrest Mining Ltd (Telfer) -v- Australian Electrical, Electronics, Foundry and Engineering Union (Western Australian Branch) & Others - APPL 766 of 1995 - GEORGE C - 05/01/96 - Metal Ore Mining..... 200

Conference re cancellation of interlocutory order - Applicant claimed that it would be less than equitable for the interlocutory order to be cancelled - Respondent Union argued that interlocutory order requiring the cessation of industrial action be cancelled as they were denied an opportunity to fully address the relevance of the situation as a "federal" matter prior to the order being issued and order was consequently wrongly made without practical effect and without being an industrial matter - Commission found on evidence that the order to end the industrial action was justified, however, on the premise that negotiations had resumed on amicable grounds the interlocutory order be cancelled - Ordered Accordingly - St John of God Hosp Murdoch -v- LIQUOR, HOSPITALITY & MISC - C 326 of 1995 - PARKS C - 22/12/95 - Health Services . 220

CUMULATIVE DIGEST—*continued*

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AWARDS—*continued*

Conference referred re order for redundancy payment - Applicant claimed that redundency clause in Metal Trades (General) Award applied to employees listed and sought order that any termination entitlement would not be offset by any superannuation amount received - Respondent argued that it was not bound by award and Commission should refrain from hearing as question of respondancy was before Industrial Magistrate and current matter be adjourned pending outcome - Respondent further argued that, Commission was without jurisdiction to determine matters - Commission reviewed authorities and found, on balance, that no establishment had been made in regards to departure of employers right from case and to do so would not be unfair in the circumstances - Dismissed - Amalgamated Metal Workers Union of Western Austral ia -v- Australian Agricultural Machinery - CR 432 of 1991 - GEORGE C - 03/01/96 - Machinery & Equipment Mfg 223

Conference referred re cancellation of order - Applicant claimed that although the analysis report correctly classified the two positions it maintained that the composite allowance be kept due to not all tasks and multiskills being covered by reclassification guidelines - Respondent argued that order should be cancelled as award restructuring had been implemented into the Engineering Trades (Government) Award - Respondent further argued that as reclassification and proper recognition had been given after job skill analysis, continuance of order would reward employees twice for the same skills and responsibilities - Commission reviewed "Genders report" and found that report did take into account the positions in question and allotted the skills in respective ranking - Commission further found that whilst payment of individual allowances may be an "administrative nightmare" it could be overcome via agreement between parties and order had served its purpose - Granted - Australian Electrical, Electronics, Foundry and Engineering Union (Western Australian Branch) -v- Fisheries Department - CR 226 of 1995 - HALLIWELL SC - 09/01/96 - Rail Transport 234

Conference referred re breakdown in enterprise bargaining negotiations re 'breadroom' employees - Applicant claimed that penalty payments should be viewed not in isolation but as part of overall agreement and that payment should be seen as the outcome of negotiation process - Respondent argued that payment of overaward payment to certain employees engaged in the breadroom should discontinue with a lump sum payment made and a phase out via deduction of monies over 12 month period - Commission found on evidence that circumstances had arisen since the first overaward payment to necessitate the discontinuance of the allowance and determined that to allow payment to continue would be counterproductive to the co-operation and teamwork - Commission further found that as parties had tried to resolve matter in the enterprise bargaining process a direction that parties enter into further discussions be made - Ordered Accordingly - Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch -v- Quality Bakers Australia Ltd T/A Buttercup Bakeries - CRA 122 of 1995 - GIFFORD C. - 23/11/95 - Food, Beverage and Tobacco Mfg 236

Application for variation re Resignation, Retirement and Severance and Continuity of Service - Applicant claimed that withholding of forfeited sum was illegal if without the consent of employee - Applicant further claimed that Continuity clause be altered to include words "shall be" before "treated as if the employment was continuous" to correct previous error - Respondent argued that the forfeited sum would be as a fine or a loss of a right, not an overpayment and Treasurer Instruction 515 allowed for deductions to be made - Respondent further argued that provision was justified on administrative convenience and to avoid expensive recovery action if refusal occurred - Commission found on evidence that Applicant's claim was misconceived and that as the proviso to placitum (i) of the paragraph within the clause was inconsistent with the general provisions of the new clause it should not form part - Commission further found that meaning of "employee" was to include Electorate Officer and clause should reflect meaning, in retaining the words "electorate officer" - Granted - The Civil Service Association of Western Australia Incorporated -v- Hon James Clarko, MLA & Other - P 46 of 1993 - GEORGE C - Sport and Recreation 378

Application to vary award re $8.00 Safety Net Adjustment - Applicant union claimed that Federal matter had previously determined the issue in principle and that principle should be followed by this Commission - Respondent argued that Federal Award was totally devoid from State award operations and should be considered when applying $8.00 Safety Net Adjustment - Commission reviewed authorities and found that the effect of two safety net adjustments, in Meat Award, would give tally workers a greater increase than prescribed in the Principles - Commission further found that over-tally was not an overtime payment but an incentive payment and for over-tally purposes refused application in relation to all-purpose rate - Granted in Part - AUST MEAT INDUSTRY EMPL UNION -v- Action Food Barns & Others - APPL 1086 of 1995 - HALLIWELL SC - 11/01/96 - Food, Beverage and Tobacco Mfg 388

Application to vary award re $8.00 Arbitrated Net Adjustment - Parties consented to variation subject to the determination of appropriate enterprise flexibility provisions - Commission reviewed both claims and found that the Enterprise Flexibility clause determined in the earlier hearing was the appropriate term to use and be included into current variations - Granted - LIQUOR, HOSPITALITY & MISC -v- Quadriplegic Centre - APPL 1147 & 1161 of 1994 - PARKS C - 22/01/95 - Health Services 399

Conference referred re implementation of part of EBA re career structure - Applicant claimed that as part of EBA it intended to train six mechanical tradespersons to obtain qualification and possession of Restricted Electrical Licence (REL) - 1st Respondent union argued that interpretation of word "may" in EBA was to mean "never" and opposed training of mechanical tradespersons - Commission found on evidence that some cross-skilling in electrical fundamentals had occurred before the EBA and could not accept 1st union's interpretation - Commission further found that to deal with the demarcation issue, an agreement regarding content of modules and hours be reached between Applicant and 2nd Respondent union, discussed with 1st Respondent union and re-convened before the Commission - Decision Issued - BHP Iron Ore Pty Ltd -v- Australian Electrical, Electronics, Foundry and Engineering Union (Western Australian Branch) & Other - CR 100 of 1995 - BEECH C - 12/01/96 - Metal Ore Mining 464

Applications to vary awards re second Arbitrated Safety Net Adjustment - Respondent agreed with adjustment but expressed reservations regarding tests to be applied - Commission found that 1st arbitrated safety net application had been granted, and as applications complied with the requirements of the Principles, variations be allowed - Granted - CONSTRUCTION, MINING, ENERGY -v- Adsigns Pty Ltd & Others - APPL 362,363,364 of 1995 - SCOTT C. - 24/05/95 - General Construction 706

Applications for variations to awards re $8.00 Arbitrated Safety Net Adjustment - Applicants claimed that awards contained enterprise flexibility provisions to satisfy requirements for second tier $8.00 adjustment and that first safety net adjustment be granted to employees whose first safety net adjustment was absorbed into overaward payment - Respondents argued that provisions contained within awards were not enterprise flexibility provisions but related to structural efficiency and other wage fixing principles - Commission found on evidence that existing award provisions were the basis for enterprise flexibility provisions and that the awards would be varied to include the first $8.00 adjustment for employees whom had it absorbed and the second $8.00 adjustment - Decision Issued - The Forest Products, Furnishing and Allied Industries Industrial Union of Workers, W.A. Branch -v- Bunnings Limited & Others - APPL 1313,1314,1317 of 1994;APPL 112 of 1995 - SCOTT C. - 24/05/95 - Various 713

CUMULATIVE DIGEST—*continued*

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AWARDS—*continued*

Application for denied contractual entitlements - Applicant claimed that employment contract was dependent on terms of two awards and that as "stand down clause" was incorrectly applied, four periods of unpaid wages resulted - Respondent argued that Applicant's stand down was fair as insufficient work and accommodation was available and option of annual leave was given - Commission reviewed authorities and found on evidence that the award "stand down clause" had applied and the Applicant was denied a benefit under his contract of employment - Granted in Part - Mr J Hay -v- Gardner & Perrott - APPL 727 of 1995 - BEECH C - 12/01/96 - Oil and Gas Extraction 735

Application for reinstatement on the grounds of unfair dismissal - Applicant sought reinstatement as termination occurred when on sick leave and was unfair - Respondent argued that under section 152 of the I.R. Act (Cth) Commission lacked jurisdiction in determining claim as Applicant was covered by a federal award - Commission reviewed authorities and found on evidence that federal award did apply and that order for reinstatement would negate provision of federal award, resulting in an inconsistency - Dismissed for want of jurisdiction - Mr MW McKeagg -v- Dyno Wesfarmers Limited - APPL 811 of 1995 - GEORGE C - 01/03/96 - Services to Mining..... 740

[3]Proceedings instituted on Commissions Own Motion pursuant to s.51(2) re consideration of AIRC's decision on "Third Safety Net Adjustment and Section 150A Review October 1995" (Print M5600) - All s.50's parties submitted above decision was a National Wage Decision (NWD) for the purpose of s.51(1) of I.R. Act 1979 and advocated Commission give effect to NWD, however different approaches were submitted for this task - The TLC sought to have separate application joined to these proceeding so that outcome could be achieved via General Order pursuant to s.50(2) of Act, arguing the absence of complimentary legislative provisions of s.150A of Commonwealth Act, impedes on Commission's ability to give effect to the substance of NWD and outcome could be "materially different" - CICS found in favour of other s.50 parties who opposed application for joinder - CICS noted concerns/issues raised by s.50 parties on issues such as, enterprise flexibility provisions, no disadvantage test, "Special Cases" and identification of "paid rates - minimum rates", which go to the operation of the Principle and the tests to be applied for the Third Arbitrated Safety Net adjustment - CICS addressed concerns by stating guidelines to be adopted and issued "Statement of Principles - March 1996" - Ordered Accordingly - (Commission's own motion) -v- Trades & Labor Council of WA & Others - APPL 1164 of 1995 - Commission in Court Session - COLEMAN CC/HALLIWELL SC/GEORGE C - 14/04/96 - Various..... 911

[1]Appeal against decision of Full Bench (75 WAIG 2934) re dismissed appeal re granted award variation - Appellant claimed that as awards could not be amended or varied by custom or usage, the Full Bench erred in determining that the right to the public holiday arose in that way, and, that a paid leave day was part of existing award wage conditions - Appellant further claimed Full Bench erred in law in failing to hold that Commission had acted in excess of jurisdiction in varying award without referral for consideration as special case - IAC reviewed the I.R. Act and authorities and found that as the Minister had failed to establish that the amendment could only be made pursuant to s.40(3) of the Act, the application to vary was under s.40(1) and did not have restrictions imposed under s.40(3) - IAC further found that no error in the manner of exercise of discretion nor error in law or excessive jurisdiction had been established - Dismissed - Hon Min for Health -v- LIQUOR, HOSPITALITY & MISC - IAC 14 of 1995 - Industrial Appeal Court - Kennedy J./Rowland J./Anderson J. - 27/03/96 - Health Services..... 930

[2]Appeal against decision of Commission (75 WAIG 3364) re discontinued tool allowance - Appellant claimed that Commission erred in fact and law in giving undue and unwarranted emphasis on Respondent's perception of security risks and in not giving sufficient consideration to weight of custom and practice - Respondent argued that supplying tools would give no legitimate occasion to take tools home, nor occasion for tools to be used as vehicles to convey precious metals - Full Bench reviewed I.R. Act and authorities and found that no error of law or facts were raised and according to principles set in House case, no establishment was made that Commission's exercise of discretion had miscarried - Dismissed - AUTO, FOOD, METAL, ENGIN UNION -v- Western Australian Mint - APPL 1293 of 1995 - Full Bench - SHARKEY P/COLEMAN CC/BEECH C - 04/04/96 - Metal Product Manufacturing..... 932

[2]Appeal against decision of Industrial Magistrate (unreported) re dismissed complaint for breach of award - Appellant claimed that Magistrate misapplied the law and should have found the subject award applied to horticultural (nursery) industry as evidence was led to show - Full Bench reviewed authorities and found that no evidence existed upon which Industrial Magistrate could find that the purpose and function of Respondent was the nursery industry - Full Bench further found that as scope clause was intended to refer to all employees employed in the industries Respondent was engaged in, no grounds of appeal were made out - Dismissed - The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- Sumich Group Ltd - APPL 101 of 1996 - Full Bench - SHARKEY P/BEECH C/GIFFORD C. - Coal Mining 942

Applications for registration of industrial agreements - Applicant union claimed that as agreements applied to single enterprise they were pursuant to s.41 and no requirement to comply with terms of s.41(a) existed as no term was contrary to the Act, General Order or Principle - Respondent argued that agreements constituted one agreement applying to multitude of enterprises and could not be registered, as s.41(a) requirements were not being met - Commission reviewed authorities and found that as each agreement applied to a single enterprise, the restrictions of s.41(a) did not apply and subject to parties giving true intentions, agreements be registered - Granted - The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers -v- Formgrow Pty Ltd T/A Plasterwise Plastering Contractors - AG 178, 187, 210, 213, 214, 217, 218, 220, 221, 222, 223, 224, 225, 226, 227, 228, 230, 231, 232, 233, 237, 238, 239, 240, 241,242,243, 244 , 245, 246 of 1995 - SCOTT C. - 13/11/95 - Various 1005

Application for variation to award - Application remitted from Full Bench for further hearing and determination of the application in accordance with Principles - Commission found on evidence that as joint benefit from implementing classification structure did not exist, the structure could not be reasonably or realistically applied to Applicant - Commission further found that in consideration of Full Bench remittance and Commission's initial finding it was not appropriate to amend award to remove exemption of Respondent from Appendix D - Dismissed - The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers -v- Minister for Works & Others - APPL 1279 of 1994 - SCOTT C. - Property Services..... 1149

Complaint re breaches of award - Complainant union claimed breaches resulted from Defendant's failure to provide severance pay and notice of termination and in introducing 'major change' without discussion or notification - Defendant argued that employee was not covered by nominated award - Industrial Magistrate reviewed authorities and found on evidence that Defendant was bound by the nominated award as the classification of work covered employee's position - Upheld - AUST MUNICIPAL, CLERICAL & SER -v- City of South Perth - CP 69 of 1995 - Industrial Magistrate - Brown I.G. IM - 24/08/95 - Community Services 1155

Complaint re breaches of award - Complainant claimed breaches resulted from Defendant's failure to pay arbitrated safety net adjustment of $8.00 per week - Defendant argued that Complainant was party to an enterprise agreement under which safety net adjustment was offset by increased wages - Industrial Magistrate reviewed authorities and found on evidence that Complainant had not received a wage increase under enterprise agreement thus resulting in breach of award through failure to pay $8.00 per week safety net adjustment - Upheld - The Civil Service Association of Western Australia Incorporated -v- Disability Services Commission - CP 102 of 1995 - Industrial Magistrate - Cicchini IM - 09/08/95 - Government Administration..... 1161

CUMULATIVE DIGEST—*continued*

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AWARDS—*continued*

Complaints re breaches of award - Complainant claimed breaches resulted from Defendant's failure to keep time and salaries record, allocate salary range and pay overtime and leave - Defendant argued that due to a prior ruling, the Complainant was not able to establish each and all of the elements of the four complaints and that they should be dismissed - Industrial Magistrate reviewed authorities and found on evidence that although Complainant could not establish the amount underpaid in absolute terms, Defendant's failure to comply with award was proven - Complainant invited to be heard and Defendant's application dismissed - Reason Issued - E Fisher -v- Totalisator Agency Board - CP 11, 142, 143 of 1995 & 37, 38 of 1996 - Industrial Magistrate - Reynolds IM - 28/04/96 - Sport and Recreation..... 1163

Complaints re breach of award - First complainant claimed breach of award occurred when Defendant failed to pay full term of sick leave - Second complainant claimed that sick leave paid to Defendant should be reimbursed as the nature of the illness was not revealed - Industrial Magistrate found on evidence that neither matter fulfilled the criteria provided for in Clause 83(3) of the Industrial Relations Act - Dismissed - Milena Filomena and Giuseppe Iacusso T/A La Plaza Decor -v- Ms L Nicol - CP 37, 40 of 1995 - Industrial Magistrate - Malley IM - Personal & Household Good Rtlg 1174

Complaint re breach of award - Complainant union claimed employee received incorrect payment for holidays, annual leave and notice of termination - Defendant argued that employee was employed and paid on a casual basis - Industrial Magistrate found on evidence that Complainant was engaged as casual employee on penalty rates and not entitled to payment for holidays, annual leave nor more than one hour's notice of termination - Dismissed - Metals and Engineering Workers' Union - Western Australian Branch -v- Centurion Industries Ltd - CP 101 of 1995 - Industrial Magistrate - Robins IM - 09/08/95 - Metal Product Manufacturing 1174

Application for registration of agreements - Preliminary discussion re Intervening Union claimed interpretation of state and federal eligibility rules caused confusion with rights and obligations of unions, and this resulted in lack of clarity of terms of Agreements - Commission found on evidence that as application of agreement was not ambiguous but reflected intention of parties and satisfied the requirements of the Act, intervention was dismissed - Dismissed - Western Australian Government Railways Commission -v- The West Australian Locomotive Engine Drivers', Firemen's and Cleaners' Union of Workers - AG 20,21 of 1996 - SCOTT C. - 26/02/96 - Rail Transport..... 1107

[2]Appeal against decision of Commission (75 WAIG 2522) re registration of industrial agreement - Appellant claimed that as Commission denied natural justice by revoking intervention status and erred in law in registering the agreement, full intervention status relating to agreement and current appeal be granted - Appellant further claimed that appeal raised sufficient matters of public interest to warrant further hearing and determination - Respondent argued that as appellant's officers had not been duly elected, Full Bench was without jurisdiction to hear matter - Full Bench reviewed I.R. Act and authorities and found that the Commission had power to permit intervention and did so generally and unconditionally, but erred at first instance in holding that mandatory requirement to register agreement existed without the agreement meeting all criteria - Full Bench further found that Appellant was denied natural justice - Upheld - LIQUOR, HOSPITALITY & MISC -v- Burswood Resort (Management) Ltd & Other - APPL 1075 of 1995 - Full Bench - SHARKEY P/HALLIWELL SC/BEECH C - 03/04/96 - Sport and Recreation 1281

[3]Applications for implementation of minimum wage adjustments - Parties requested that application No. 1523B of 1990 be deferred pending further examination of duties - Applicant union claimed that it was not in public interest to have one group of employees protected under the award Safety Net when public sector employees would have to wait until the Minimum Rates Adjustment process was completed - Respondents argued that employees covered by this award but not working in TAFE Colleges should not be treated any differently for the purpose of Minimum Rates Adjustment - Commission reviewed award and found that minimum rates process had been implemented and variations were consistent with Wage Fixing Principles - Granted - LIQUOR, HOSPITALITY & MISC -v- Hon Min for Community Services & Others - APPL 1349, 1350, 1351 and 1523B of 1995 - Commission in Court Session - COLEMAN CC/BEECH C/GIFFORD C. - 26/03/96 - Community Services..... 1290

Application to vary award - applicant claimed that variation was justified on its merits and in accordance with Statement of Principle in State wage Decision - respondent argued there was no case to answer, that right to put submission and call evidence would be reserved and applicant had not discharged onus of proof - Commission found on evidence parties attempt to resolve claim was consistent with statement of Principles, respondents claim was not sustained and matter be divided to further examine promotional procedures - Granted in Part - Western Australian Fire Brigades Board -v- United Firefighters Union of Western Australia - APPL 619 of 1995 - SCOTT C. - 18/04/96 - Various 1409

Application for interpretation of Supermarkets and Chain Stores Warehouse Award 1982 No. A26 of 1982 - Applicant claimed interpretation of Clause 35(7) to determine whether it applied to shift workers engaged to work overtime on an afternoon shift on Sunday - respondent argued that as shift work could only occur within limits of ordinary hours, work performed on Sunday was not shift work, but overtime - Commission found on evidence that Clause 35(7) of the Award did not apply to employees on Sunday overtime, only to overtime during the week Monday to Friday - Decision Issued - The Shop, Distributive and Allied Employees' Association of Western Australia -v- Woolworths (WA) Limited & Other - APPL 83 of 1996 - GIFFORD C. - 18/04/96 - Food Retailing 1418

[1]Appeal against decision of Full Bench (76 WAIG 1281) re upheld appeal re registration of industrial agreement - Appellant claimed that as Full Bench erred in failing to hear that appeal was invalid or unauthorised, in granting first respondent leave to appeal and upholding appeal, order for stay of decision be given - IAC reviewed authorities and found that as no opposition for stay existed and grounds of appeal had prospects of success, it would be "just" to grant order - Granted - Burswood Resort (Management) Ltd -v- LIQUOR, HOSPITALITY & MISC - IAC 4 of 1996 - Industrial Appeal Court - Kennedy J. - 13/05/96 - Sport and Recreation 1655

[2]Appeal against decision of Commission (75 WAIG 2815) re incorrect operative date for awards variation - Appellant claimed that Commission erred by failing to give reasons for chosen date, failing to properly consider employees low paid nature and in selecting date inconsistent with the intention of the State Wage Decision - Appellant further claimed that Commission erred in inserting "Enterprise Flexibility Provision" clause, as clause was contrary to intent of the State Wage Decision - Respondent argued that it opposed the applications at first instance - Full Bench reviewed the IR Act and authorities and found that as the Commission at first instance, erred and miscarried the exercise of its discretion in its failure to apply Principles the appeals would be upheld and awards varied - Ordered Accordingly - LIQUOR, HOSPITALITY & MISC -v- St John of God Hospital & Others - APPL 1172, 1173, 1174, 1175, 1176, 1177, 1183 of 1995 - Full Bench - SHARKEY P/COLEMAN CC/HALLIWELL SC - 16/05/96 - Community Services 1658

[2]Appeal against decision of Commission (76 WAIG 388) re granted variation of award - Appellant claimed Commission erred in holding that Safety Net Adjustment should only apply to tally workers where one tally was worked and in drawing conclusion without adduced evidence - Respondent argued that appellant had not established at first instance that it had complied with the conditions precedent - Full Bench reviewed authorities and found that Commission had erred and miscarried discretion as the variation should have been granted and substitution of Commission's decision with Full Bench would occur - Upheld - AUST MEAT INDUSTRY EMPL UNION -v- Action Food Barns (WA) Pty Ltd & Others - APPL 85 of 1996 - Full Bench - SHARKEY P/COLEMAN CC/CAWLEY C. - 28/05/96 - Personal & Household Good W/sg 1664

CUMULATIVE DIGEST—*continued*

Page

AWARDS—*continued*

Application for deletion of respondents to an award - Applicant Union accepted that the companies seeking to be deleted did not employ, and were not likely to employ in the future, persons covered by the Award, but objected to the deletions - Respondent Companies argued that as they no longer employ persons in the classifications, or engage in the industry described in the Award, they were no longer governed by the Award and should be deleted from list of respondents to the Award - Commission reviewed the claim and found that as neither of the companies were presently governed by the Award, no good purpose was served for them to remain named therein - Granted - The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- Ampol Petroleum Ltd & Others - APPLB 1005 of 1995 - PARKS C - 13/05/96 - Motor Vehicle Rtlg & Services 1992

BOARD OF REFERENCE

Application for pro-rata long service leave entitlements - Long Service Leave entitlement was based on ten and a half years of continuous service and continuity of employment resulting from transmission of business on two occasions - Respondent argued that the Applicant was not entitled to pro-rata long service leave as no transmission of business had occurred and the Applicant failed to have ten and a half years of continuous service - Board of Reference found on evidence that the Applicant's claim of transmission of business was without proof - Dismissed - Mr R Comley -v- Adelia Nominees Pty Ltd T/A Custom Rubber Company, Geraldton Branch - BOR 8 of 1995 - Board of Reference - LOVEGROVE DR - 19/01/96 - Machinery & Equipment Mfg 432

[3]Appeal against decision of Board of Reference (75 WAIG 2846) re pro-rata long service leave entitlements - Appellant claimed that appeal was made under correct section of the I.R. Act, which allowed legal representation of individuals - CICS reviewed I.R. Act and found that as the right to institute appeal was limited to 'organisation', 'association' or 'employer' the appeal had been instituted by persons not empowered by legislation to do so and was commenced contrary to act and was a nullity - Dismissed - Ms DA Evans -v- Meccan Pty Ltd T/A Thomas Massam Real Estate - APPL 1083 of 1995 - Commission in Court Session - PARKS C/SCOTT C./GIFFORD C. - Property Services 945

BONUS

Application for denied contractual entitlements re commission payments - Applicant claimed 1 month Commission should be paid as the general manager informed him that commission would be paid - Respondent argued that Applicant was informed that he would be paid according to the employment contract - Commission found on evidence that under the contract of employment the Applicant has not been denied any entitlements - Dismissed - Mr G Chisholm -v- Ausmic Environmental Industries - APPL 1431 of 1995 - BEECH C - 15/03/96 - Business Services..... 1182

Application for denied contractual entitlements re commission payments - Applicant claimed 1 month commission should be paid as he was told by the Respondent that commission would be paid - Respondent argued that no such undertaking was given to the Applicant - Commission found on evidence that Applicant was unable to show that benefit had been denied - Dismissed - Mr D Mason -v- Ausmic Environmental Industries - APPL 1433 of 1995 - BEECH C - 15/03/96 - Business Services 1191

Conference referred re bonus payment for award covered employees - Applicant Union claimed award covered employees should be entitled to bonus given to all other employees - Respondent argued that bonus was a reward for flexibility under workplace agreements and common law contracts and that award covered employees had to be paid award rates - CICS found on evidence that as bonus payment did not directly relate to individual work performance no reason to discriminate against award covered employees existed, and that employment contract was not a valid measure of productivity - CICS further bound that a failure to recognise informal agreements for greater flexibility under awards existed and that employees receiving award rates were eligible for exgratia bonuses - Granted - AUTO, FOOD, METAL, ENGIN UNION & Others -v- Perth Mint - CR 344 of 1995 - Commission in Court Session - HALLIWELL SC/GEORGE C/BEECH C - 18/04/96 - Metal Product Manufacturing 1700

BREACH OF AWARD

[1]Appeal against decision of Full Bench (75 WAIG 1820) re dismissed appeal against decision of Industrial Magistrate (unreported) re breaches of award - Appellant initially claimed that Full Bench decision was erroneous in law or in excess of jurisdiction but latter sought leave to discontinue appeal - Respondent argued that although there was no objection to discontinuance, under s.86(2) of the I.R. Act it sought for payment costs of appeal, including services of legal practitioner - IAC reviewed authorities and found that within s.86(2) only on very rare occasions would cost of legal practitioner be granted and that as the appeal was untenable and could not have succeeded, Respondent's claim was seen as one of the rare cases which fell into exceptions of s.86(2) - Ordered Accordingly - The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers -v- Clark T/A Mike Clark Contracting - IAC 10 of 1995 - Industrial Appeal Court - Kennedy J./Franklyn J./Rowland J. - 23/11/95 - General Construction 4

[2]Appeal against decision of Industrial Magistrate (unreported) re breach of award - Appellant claimed that Industrial Magistrate had erred in law as no finding, set out by the Minimum Conditions Act 1993, was made in relation to the terms implied in award, where a provision or condition of award was less favourable to the employee than a minimum condition of employment - Respondent argued that it had a right to know the nature of the illness or injury over and above the medical certificate and that in the absence of that, it was not liable for payment of the sick leave as stipulated in the award - Full Bench found on evidence that the Minimum Conditions Act applied in lieu of the award and that the medical certificate supplied by the Appellant's medical practitioner sufficed in notification of inability to attend work - Upheld and Remitted - Ms L Nicol -v- Milena Filomena and Giuseppe Iacusso T/A La Plaza Decor - APPL 784 of 1995 - Full Bench - SHARKEY P/HALLIWELL SC/GIFFORD C. - 06/12/95 - Personal & Household Good Rtlg 44

[1]Appeal against decision of Full Bench (75 WAIG 856) re dismissed appeals against Industrial Magistrate (74 WAIG 2766) re breaches of award - Appellants claimed that Full Bench had erred in law in holding that provisions of I.R. Act created vicarious liability and in failing to hold both vicarious liability in common law doctrine and determining that s.96G(2) had no application to facts - IAC in first appeals, reviewed authorities and found that as threats made by employee organisation were in a nature prohibited by s.96E of I.R. Act an error in law had occurred and that appeals be upheld and remitted to Full Bench - IAC in later appeals, further found on evidence that said person had been established as agent for Union and that as defendant had adduced no evidence to discharge onus, appeal ground was immaterial to conviction - Granted in Part - P Aitken -v- Ms E Ducasse - IAC 4, 5, 6 & 7 of 1995 - Industrial Appeal Court - Kennedy J./Franklyn J./Rowland J. - 14/12/95 - Services to Transport 330

Complaint re breaches of award - Complainant union claimed breaches resulted from Defendant's failure to provide severance pay and notice of termination and in introducing 'major change' without discussion or notification - Defendant argued that employee was not covered by nominated award - Industrial Magistrate reviewed authorities and found on evidence that Defendant was bound by the nominated award as the classification of work covered employee's position - Upheld - AUST MUNICIPAL, CLERICAL & SER -v- City of South Perth - CP 69 of 1995 - Industrial Magistrate - Brown I.G. IM - 24/08/95 - Community Services 1155

CUMULATIVE DIGEST—*continued*

Page

BREACH OF AWARD—*continued*

Complaint re breach of award - Complainant Union claimed that Defendant breached Clause 28(2) of the Building Trades (Construction) Award 1987 - Defendant argued that Union was not competent to make complaint as it was not party to award at the time complaint was made - Industrial Magistrate reviewed authorities and found pursuant to Section 72(5) of the I.R. Act 1979, that as Complainant Union was a registered member, it was competent to make complaint and had competence to pursue complaint - Decision Issued - The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers -v- Robco WA Pty Ltd T/A Robco - CP 53 of 1995 - Industrial Magistrate - Gething IM - 03/08/95 - Unions 1158

Complaints re breach of awards - Complainant union claimed Defendant breached two awards by failing to provide copies of time records - Defendant argued that it was sufficient for time records to be perused within their offices, rather than yielding possession to Complainant union - Industrial Magistrate reviewed authorities and found on evidence that the awards did not create an obligation on Defendant to send or deliver copy of records to the union premises - Parties invited to be heard on final orders - Decision Issued - The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers -v- Building Managing Authority - CP 139 of 1995 - Industrial Magistrate - Reynolds IM - 29/09/95 - General Construction 1159

Complaint re breaches of award - Complainant claimed breaches resulted from Defendant's failure to pay arbitrated safety net adjustment of $8.00 per week - Defendant argued that Complainant was party to an enterprise agreement under which safety net adjustment was offset by increased wages - Industrial Magistrate reviewed authorities and found on evidence that Complainant had not received a wage increase under enterprise agreement thus resulting in breach of award through failure to pay $8.00 per week safety net adjustment - Upheld - The Civil Service Association of Western Australia Incorporated -v- Disability Services Commission - CP 102 of 1995 - Industrial Magistrate - Cicchini IM - 09/08/95 - Government Administration..... 1161

Complaints re breaches of award - Complainant claimed breaches resulted from Defendant's failure to keep time and salaries record, allocate salary range and pay overtime and leave - Defendant argued that due to a prior ruling, the Complainant was not able to establish each and all of the elements of the four complaints and that they should be dismissed - Industrial Magistrate reviewed authorities and found on evidence that although Complainant could not establish the amount underpaid in absolute terms, Defendant's failure to comply with award was proven - Complainant invited to be heard and Defendant's application dismissed - Reason Issued - E Fisher -v- Totalisator Agency Board - CP 11, 142, 143 of 1995 & 37, 38 of 1996 - Industrial Magistrate - Reynolds IM - 28/04/96 - Sport and Recreation..... 1163

Complaint re breach of award - Complainant claimed Defendant failed to comply with clause 15 of award by refusing duly accredited union official opportunity to examine time and wages records of employees - Defendant argued that in 1969 employees were covered by term 'all others' in the predecessor of present Meat Industry (State) Award not the award stated by Complainant - Industrial Magistrate reviewed authorities and found that Cleaners award was one of those awards which the related industries could not be established without evidence of work performed and that Complainant failed to establish that Cleaners award applied to the Defendant - Dismissed - LIQUOR, HOSPITALITY & MISC -v- Metro Meat International Ltd - CP 228 of 1995 - Industrial Magistrate - Brown IM - 29/03/96 - Food, Beverage and Tobacco Mfg 1170

Complaint re breach of award - Complainant union claimed employee received incorrect payment for holidays, annual leave and notice of termination - Defendant argued that employee was employed and paid on a casual basis - Industrial Magistrate found on evidence that Complainant was engaged as casual employee on penalty rates and not entitled to payment for holidays, annual leave nor more than one hour's notice of termination - Dismissed - Metals and Engineering Workers' Union - Western Australian Branch -v- Centurion Industries Ltd - CP 101 of 1995 - Industrial Magistrate - Robins IM - 09/08/95 - Metal Product Manufacturing 1174

Complaints re breach of award - First complainant claimed breach of award occurred when Defendant failed to pay full term of sick leave - Second complainant claimed that sick leave paid to Defendant should be reimbursed as the nature of the illness was not revealed - Industrial Magistrate found on evidence that neither matter fulfilled the criteria provided for in Clause 83(3) of the Industrial Relations Act - Dismissed - Mr SA Lloyd -v- Albany Senior High School P & C Association Incorporated - CP 37, 40 of 1995 - Industrial Magistrate - Malley IM - 12/06/95 - Personal & Household Good Rtlg 1174

[2]Appeal against decision of Industrial Magistrate (76 WAIG 1174) re dismissed complaints re breaches of award - Appellant claimed that Industrial Magistrate erred in fact and law in finding that employment was casual and paid accordingly, and in failing to apply correct principles of award interpretation - Respondent argued that employment was of a casual basis as payment was on an hourly rate - Full Bench reviewed authorities and found on evidence that as Industrial Magistrate had failed to find that permanent employment contract existed, an error in fact and law had occurred and matter be remitted back for further determination - Ordered Accordingly - Metals and Engineering Workers' Union - Western Australian Branch -v- Centurion Industries Ltd - APPL 1006 of 1995 - Full Bench - SHARKEY P/COLEMAN CC/HALLIWELL SC - 24/04/96 - Metal Product Manufacturing..... 1287

CASUAL WORK

[4]Application for stay of decision pending appeal to Full Bench - Appellant claimed that the order for reinstatement could not be enforced as its policy with respect to the employment of casuals had changed significantly and did not allow for Respondent's re-employment - Appellant further claimed that there were serious issues to be tried before Full Bench - Respondent conceded that serious issues in regards to award interpretation and jurisdiction were to be tried but that decision should continue - President reviewed authorities and found on evidence that the Applicant had not successfully established that there was a serious issue to be tried and the equity, good conscience and substantial merits of the case lay with Respondent - Dismissed - Serco (Australia) Pty Ltd -v- Mr JJ Moreno - APPL 1304 of 1995 - President - SHARKEY P - 13/12/95 - Personal & Household Good Rtlg 63

Application for unfair dismissal - Applicant claimed termination was unfair as no procedural fairness was exercised upon termination of casual employment - Respondent argued that termination was result of insufficient work and also from several reprimands for employee's poor work standards - Commission found on evidence that the Respondent had acted legitimately to determine which employees were most appropriate for continued employment, and that the termination was procedurally fair as the employment was of a casual nature - Dismissed - Ms AF Gillan -v- Tarcoola Beach Resort - APPL 166 of 1995 - SCOTT C. - 26/07/95 - Accommodatn, Cafes&Restaurants 443

Application for unfair dismissal - Applicant claimed that termination was unfair as permanent employment was offered - Respondent argued that work was on an ad hoc basis to undertake seasonal work - Commission found on evidence that as Applicant was required to perform specific work for a limited period and as payment was of an hourly rate, the work was casual - Commission further found on that basis that there was no unfair dismissal but a frustration of the contract which led to termination - Dismissed - Mr GS Hardie -v- PT & BD Slade & Co - APPL 1265 of 1995 - SCOTT C. - 01/03/96 - Property Services..... 735

CUMULATIVE DIGEST—*continued*

Page

CASUAL WORK—*continued*

[2]Appeal against decision of Commission (75 WAIG 3068) re denied application for reinstatement of the grounds of unfair dismissal - Appellant claimed Commission erred in fact and law in finding that termination was effected by Appellant and that employee was engaged as casual employee on ongoing basis - Appellant further claimed that as no ongoing employment relationship existed, Commission lacked jurisdiction to deal with application - Full Bench reviewed authorities and found on evidence that as Respondent was not a casual worker in terms of the award definition, summary dismissal was unlawful and unfair and Commission had jurisdiction to make order for reinstatement - Dismissed - Serco (Australia) Pty Ltd -v- Mr JJ Moreno - APPL 1281 of 1995 - Full Bench - SHARKEY P/BEECH C/SCOTT C. - 19/03/96 - Food Retailing 937, 2023

Complaint re breach of award - Complainant union claimed employee received incorrect payment for holidays, annual leave and notice of termination - Defendant argued that employee was employed and paid on a casual basis - Industrial Magistrate found on evidence that Complainant was engaged as casual employee on penalty rates and not entitled to payment for holidays, annual leave nor more than one hour's notice of termination - Dismissed - Metals and Engineering Workers' Union - Western Australian Branch -v- Centurion Industries Ltd - CP 101 of 1995 - Industrial Magistrate - Robins IM - 09/08/95 - Metal Product Manufacturing 1174

[2]Appeal against decision of Industrial Magistrate (76 WAIG 1174) re dismissed complaints re breaches of award - Appellant claimed that Industrial Magistrate erred in fact and law in finding that employment was casual and paid accordingly, and in failing to apply correct principles of award interpretation - Respondent argued that employment was of a casual basis as payment was on an hourly rate - Full Bench reviewed authorities and found on evidence that as Industrial Magistrate had failed to find that permanent employment contract existed, an error in fact and law had occurred and matter be remitted back for further determination - Ordered Accordingly - Metals and Engineering Workers' Union - Western Australian Branch -v- Centurion Industries Ltd - APPL 1006 of 1995 - Full Bench - SHARKEY P/COLEMAN CC/HALLIWELL SC - 24/04/96 - Metal Product Manufacturing..... 1287

Application for contractual entitlements on the grounds of a contract of employment - Applicant claimed that a contract of employment existed and that wages for time when potential to work existed was owed - Respondent argued that no employment relationship existed and no wages were owed as applicant was not obligated to work when asked and on occasions declined the offer to work - Commission found on evidence that as Applicant was a casual employee, employee contracts were weekly contracts and as no new contract of employment was entered into during a period of claims, no subsequent entitlement to work existed - Dismissed - Mr MJ Walton -v- The Circuit Cabaret and Function Centre - APPL 427 of 1996 - PARKS C - 20/05/96 - Other Services..... 2032

CLASSIFICATION

[2]Appeal against decision of Commission (75 WAIG 1938) re dismissed application for award variation re award restructuring - Appellant claimed that Commission erred by failing to apply wage fixing principles to BMA employees and by giving insufficient weight to evidence regarding length of negotiations concerning classification structure for BMA - Appellant further claimed that Commission erred in placing too much weight to classification structure in Engineering Trades (Government) Award when award was not the subject of proceedings and also by holding that timeframe for implementing classification structure as lengthy and involved few gains - Respondent argued application of Structural Efficiency principle was not mandatory and that removal of exemption would not result in application of Principles - Majority Full Bench reviewed authorities and found that although Commission was open to facilitate Structural Efficiency process, it would have been incorrect to have imposed the process and that Commission erred in finding the timeframe for implementing classification structure as lengthy and involving few gains - Minority Full Bench reviewed authorities and found that it favoured Appellant's claim and that Respondent had impeded Structural Efficiency process and as the basis on which the exemption was agreed to was not achieved, no basis on agreed variation existed - Upheld and Remitted - The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers & Others -v- Hon Min for Works & Services - APPL 717 of 1995 - Full Bench - SHARKEY P/GEORGE C/GIFFORD C. - 28/11/95 - Construction Trade Services 8

Conference referred re cancellation of order - Applicant claimed that although the analysis report correctly classified the two positions it maintained that the composite allowance be kept due to not all tasks and multiskills being covered by reclassification guidelines - Respondent argued that order should be cancelled as award restructuring had been implemented into the Engineering Trades (Government) Award - Respondent further argued that as reclassification and proper recognition had been given after job skill analysis, continuance of order would reward employees twice for the same skills and responsibilities - Commission reviewed "Genders report" and found that report did take into account the positions in question and allotted the skills in respective ranking - Commission further found that whilst payment of individual allowances may be an "administrative nightmare" it could be overcome via agreement between parties and order had served its purpose - Granted - Australian Electrical, Electronics, Foundry and Engineering Union (Western Australian Branch) -v- Fisheries Department - CR 226 of 1995 - HALLIWELL SC - 09/01/96 - Rail Transport..... 234

Application for variation to award - Application remitted from Full Bench for further hearing and determination of the application in accordance with Principles - Commission found on evidence that as joint benefit from implementing classification structure did not exist, the structure could not be reasonably or realistically applied to Applicant - Commission further found that in consideration of Full Bench remittance and Commission's initial finding it was not appropriate to amend award to remove exemption of Respondent from Appendix D - Dismissed - The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers -v- Minister for Works & Others - APPL 1279 of 1994 - SCOTT C. - Property Services..... 1149

Complaint re breaches of award - Complainant union claimed breaches resulted from Defendant's failure to provide severance pay and notice of termination and in introducing 'major change' without discussion or notification - Defendant argued that employee was not covered by nominated award - Industrial Magistrate reviewed authorities and found on evidence that Defendant was bound by the nominated award as the classification of work covered employee's position - Upheld - AUST MUNICIPAL, CLERICAL & SER -v- City of South Perth - CP 69 of 1995 - Industrial Magistrate - Brown I.G. IM - 24/08/95 - Community Services 1155

COMPARATIVE WAGE JUSTICE

[2]Appeal against dismissed decision of Commission (75 WAIG 2841) re variation of award re $8.00 arbitrated safety net wage adjustment - Appellant claimed that Commission had erred as it failed to correctly apply the wage fixing principles, to give weight to the evidence submitted and by incorrectly holding the award to be a "paid rates" award and not a "benchmark award" - Respondent argued that the two awards sought for comparison were inappropriate as one was a "paid rates award" and the other a "minimum rates award" and to do so would have been contrary to the Structural Efficiency Principle - Full Bench reviewed authorities and found on evidence that the history of the two awards indicated that comparison would have been inappropriate - Dismissed - The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers & Others -v- Hon Min for Works & Others - APPL 1128 of 1995 - Full Bench - SHARKEY P/COLEMAN CC/HALLIWELL SC - 20/12/95 - General Construction 16

CUMULATIVE DIGEST—*continued*

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COMPENSATION

[1]Appeal against decision of Full Bench (75 WAIG 1820) re dismissed appeal against decision of Industrial Magistrate (unreported) re breaches of award - Appellant initially claimed that Full Bench decision was erroneous in law or in excess of jurisdiction but latter sought leave to discontinue appeal - Respondent argued that although there was no objection to discontinuance, under s.86(2) of the I.R. Act it sought for payment costs of appeal, including services of legal practitioner - IAC reviewed authorities and found that within s.86(2) only on very rare occasions would cost of legal practitioner be granted and that as the appeal was untenable and could not have succeeded, Respondent's claim was seen as one of the rare cases which fell into exceptions of s.86(2) - Ordered Accordingly - The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers -v- Clark T/A Mike Clark Contracting - IAC 10 of 1995 - Industrial Appeal Court - Kennedy J./Franklyn J./Rowland J. - 23/11/95 - General Construction 4

Application for reinstatement without loss of entitlements on the grounds of unfair dismissal - Applicant claimed termination was unfair as there had "perhaps been one warning verbally but nothing in writing", and work was up to expected standard - Respondent argued that Applicant's work performance was of poor standard and that there were repeated occasions of poor time keeping and absenteeism without doctor's certificate - Commission found on evidence that as Applicant had no prior warnings, and situation had not been discussed with him nor was he given an opportunity to defend the claim, the dismissal was unfair - Commission further found that re-instatement would not be practicable and ordered that compensation be paid to Applicant for loss or injury caused by termination - Ordered Accordingly - Mr K Dragicevich -v- BGC Builders Supplies - APPL 879 of 1995 - BEECH C - 13/12/95 - Basic Material Wholesaling..... 204

Application for denied contractual entitlements - Applicant claimed in preliminary point that Commission did have jurisdiction as the Federal Commission lacked jurisdiction to deal with enforcement of contractual entitlements - Applicant claimed that non award benefit had been denied in regards to the use of motor vehicle for commuting purposes - Respondent argued in preliminary point that Commission lacked jurisdiction as employment was covered by paid rates award of the Australian Commission and matter was before the Australian Commission - Respondent argued that use of motor vehicle formed part of contract of employment and as use was granted at its discretion it was entitled to withdraw use at its discretion - Commission found on evidence that employer did not enter into a contractual arrangement, but rather an arrangement at employer's convenience which terminated due to review of vehicle usage - Dismissed - Mr G Roy -v- Western Power - APPL 447 of 1995 - SCOTT C. - 12/09/95 - Electricity and Gas Supply 209

Conference referred re claim for compensation allowance - Applicant union claimed that construction related disabilities experienced were greater than those previously considered and level of disability reflected changed in conditions - Respondent argued that construction related site disabilities addressed were overstated and were essentially no different to those usually present in construction industry - Commission found on evidence and via inspection that overall degree of disabilities which existed were in excess of those compensated by existing allowance and operative date of allowance be earliest date - Ordered Accordingly - Transfield Construction WA -v- AUTO, FOOD, METAL, ENGIN UNION & Other - CR 271 of 1995 - PARKS C - 27/11/95 - General Construction 231

Application for denied contractual entitlements - Applicant claimed that payment of moneys due under contract of employment was not given - Respondent argued that the Applicant was not employed as an employee but as a contractor and was paid a set amount for completion of work which was subsequently left incomplete - Commission found on evidence that as Applicant had cited inadequate evidence in establishing employer/employee relationship it failed to clearly demonstrate existence of an industrial matter - Dismissed - Mr B Beaumaster -v- Capriplan Pty Ltd - APPL 1148 of 1995 - SCOTT C. - 30/01/96 - Construction Trade Services 433

Application for contractual entitlement on the grounds of unfair dismissal - Commission reviewed authorities and found that as three questions of law needed to be answered before determination of unfair dismissal, matter would be adjourned to await relisting - Adjourned - Mr C Di Risio -v- Caffe Piazza - APPL 1218 of 1995 - BEECH C - 15/01/96 - Accommodatn, Cafes&Restaurants..... 439

Application for compensation re unfair dismissal - Applicant claimed that although employment was casual, an expected continuity existed and that as requirements of s29(1)(b) were satisfied claim was within Commission jurisdiction - Respondent argued that termination was justified as the Applicant was a casual employee employed on separate individual contracts and Commission lacked jurisdiction - Commission reviewed authorities and found that the nature of the contract did not offer ongoing employment to the Applicant - Commission further found that Applicant was a true casual and that employment on that day merely came to an end at the conclusion of work performed - Dismissed - Mr CR Dorant -v- JLV Industries Pty Ltd - APPL 638 of 1995 - GIFFORD C. - 12/01/96 - Business Services..... 440

Application for contractual entitlements on the grounds of unfair dismissal - Applicant claimed dismissal was unfair as termination notice period was inconsistent with others given - Respondent argued that Applicant was told of the termination possibility and that although only one hours notice was required, one weeks' payment in lieu had been given - Commission found on evidence that although case lacked evidence of industry custom or practice regarding reasonable notice, it found that 2 weeks would be a reasonable notice period and be paid accordingly - Ordered Accordingly - Ms J Leslie -v- Fremantle Plan Printing & Microfilming Centre - APPL 948 of 1995 - GEORGE C - 25/01/96 - Printg, Publishg & Rcdd Media..... 445

Application for contractual entitlements on grounds of unfair dismissal - Applicant claimed that termination was unfair as no reason was given and that contractual benefit of higher salary and bonus was denied - Respondent failed to attend hearing - Commission found on evidence that no reason for termination was given and although no salary benefits were denied, compensation for denied bonus be granted - Granted in Part - Mr M Miles -v- Graystone WA Pty Ltd/ Turnball/ Weir Pty Ltd T/A Carnegies - APPL 592 of 1995 - GIFFORD C. - 06/02/96 - Accommodatn, Cafes&Restaurants..... 447

Applications for contractual entitlements on grounds of unfair dismissal - Applicants claimed they were dismissed unfairly and denied payment of entitlements and wages based upon additional duties performed - Respondent argued that Applicants were not dismissed but resigned - Commission reviewed authorities and found on evidence that Applicants resigned from their employment of their own will and no unfair dismissal existed - Dismissed - S Stankovska -v- Quirk Corporate Cleaning Australia Pty Ltd - APPL 645,646 of 1995 - GIFFORD C. - 15/01/96 - Business Services 451

Application for contractual benefits on the grounds of unfair dismissal - Applicant claimed termination was unfair as involvement in another company offered no competition or threat to the Respondent nor influence over employee role - Respondent argued that conflict of interest existed through to Applicant's position as employee and involvement in company to which Respondent was a client - Commission found on evidence that as the Applicant did not act contrary to duty of fidelity to the Respondent, a conflict of interest did not exist and compensation be paid - Granted in Part - Mrs LL Barton -v- Western Telecom Pty Ltd - APPL 729 of 1995 - BEECH C - 23/02/96 - Personal & Household Good Rtlg. 722

Application for compensation on the grounds of unfair dismissal - Applicant claimed that refusal to accept unilateral change to employment contract resulted in denial of further employment - Respondent argued that Applicant was not employed in limited capacity or area and that refusal to undertake duties as directed evinced an intention to repudiate employment contract - Commission found on evidence that as termination was in response to Applicant's intention to repudiate employment contract, dismissal was not unfair - Dismissed - Ms F Emery -v- Eucla Motor Hotel - APPL 1150 of 1995 - SCOTT C. - 28/02/96 - Accommodatn, Cafes&Restaurants..... 728

CUMULATIVE DIGEST—*continued*

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COMPENSATION—*continued*

Application for contractual entitlements on the grounds of unfair dismissal - Applicant claimed that termination was unfair and payment of seven weeks wages were owed - Respondent argued that employment was not terminated but employee resigned of own will - Commission found on evidence that as termination was from resignation, unfair dismissal did not exist and compensation could not be granted - Dismissed - Ms SJ Hammond -v- Annette Healy Pickwell T/A Oldham Boas Ednie Brown - APPL 1318 of 1995 - HALLIWELL SC - 15/02/96 - Property Services 734

Application for denied contractual entitlements - Applicant claimed that employment contract was dependent on terms of two awards and that as "stand down clause" was incorrectly applied, four periods of unpaid wages resulted - Respondent argued that Applicant's stand down was fair as insufficient work and accommodation was available and option of annual leave was given - Commission reviewed authorities and found on evidence that the award "stand down clause" had applied and the Applicant was denied a benefit under his contract of employment - Granted in Part - Mr J Hay -v- Gardner & Perrott - APPL 727 of 1995 - BEECH C - 12/01/96 - Oil and Gas Extraction 735

Application for denied contractual entitlements - Applicant claimed that outstanding wages were not award benefits and contractual relationship was employee/employer as directions were via employer and income tax was deducted on wages - Respondent failed to attend the conference - Commission found on evidence that Applicant was an employee and as nothing existed to suggest entitlement was award benefit, claim should succeed and compensation be paid within 7 days of the date of the order - Ordered Accordingly - Mr AN Ross -v- Burravilla Contractors - APPL 1197 of 1995 - COLEMAN CC - 19/02/96 - Services to Agriculture 742

Application for reinstatement without loss of benefits or compensation on the grounds of unfair dismissal - Applicant union claimed three members were unfairly selected for redundancy in preference to other employees, contrary to specified redundancy selection criteria - Respondent argued redundancy process was fair and unbiased, and involved open discussion and debate between supervisors and those knowledgeable of the operation - Commission found on evidence that a full comparison of Applicant employees with fellow employees had been undertaken by a qualified group, and that neither process or outcome was unfair - Dismissed - BRICK, TILE & POTTERY UNION -v- Bristile Clay Tiles - CR 276 of 1995 - SCOTT C. - 12/03/96 - Non-Metallic Min Product Mfg 747

Complaint re breaches of award - Complainant union claimed breaches resulted from Defendant's failure to provide severance pay and notice of termination and in introducing 'major change' without discussion or notification - Defendant argued that employee was not covered by nominated award - Industrial Magistrate reviewed authorities and found on evidence that Defendant was bound by the nominated award as the classification of work covered employee's position - Upheld - AUST MUNICIPAL, CLERICAL & SER -v- City of South Perth - CP 69 of 1995 - Industrial Magistrate - Brown I.G. IM - 24/08/95 - Community Services 1155

Application for reinstatement on the grounds of unfair dismissal - Applicant claimed termination was unfair as Respondent's financial situation did not justify dismissal, and that redundancy was a sham - Respondent argued that redundancy was result of cost savings, restructure and the lack of alternative position - Commission reviewed authorities and found on evidence that although Respondent needed to initiate significant cost savings, dismissal was unfair due to its summary nature, and the lack of warning and consultation about redundancy - Commission further found that compensation should be granted as reinstatement was impracticable - Granted in Part - Mr J Gilmore -v- Cecil Bros Pty Ltd - APPL 667 of 1995 - BEECH C - 30/01/96 - Personal & Household Good Rtlg 1184

Application for denied contractual entitlements on the grounds of unfair dismissal - Applicant claimed payment of 5 weeks wages, 14 days holiday pay, superannuation contribution and the reimbursement of expenses owed under contract of employment - Respondent argued that Applicant entered into an arrangement whereby the value of entitlements owed would be met by financial return upon "taking over" another building contract - Commission found on evidence that no such arrangement occurred and had such an arrangement been entered into, the entitlements would not have been paid by the Respondent - Commission further reviewed the Truck Act 1899-1904 and found such arrangement illegal and void and ordered that Respondent pay entitlements no later than 21 days from the date of the order - Granted - Mr RJ Hall -v- Design 2000 Homes Pty Ltd - APPL 1424 of 1995 - PARKS C - 28/02/96 - General Construction 1190

Application for compensation on the grounds of unfair dismissal - Applicant claimed that instant dismissal was unfair as every measure had been taken to ensure that services would be monitored and provided for during R and R Leave - Respondent argued that Applicant's absence from site and lack of management of impending industrial action was valid reason for termination - Commission reviewed authorities and found on evidence that the Applicant's actions did not give rise to valid criticism, nor justify summary dismissal - Granted - Mr RW More -v- Spotless Services Aust Ltd - APPL 1339 of 1995 - HALLIWELL SC - 21/04/96 - Accommodatn, Cafes&Restaurants 1192

Application for denied contractual entitlements - Applicant claimed that as employer/employee relationship existed, outstanding wages should be paid - Respondent failed to attend the conference - Commission found on evidence that Applicant was an employee and as nothing existed to suggest entitlement was award, industrial agreement or other form of regulation benefit, compensation be paid within 14 days of the date of the order - Ordered Accordingly - Ms R Rendalls -v- Mr K Evans - APPL 1194 of 1995 - COLEMAN CC - 25/03/96 - Education 1196

Application for compensation on the grounds of unfair dismissal - Applicant claimed termination was unfair and was owed unpaid benefits of a non-award nature - Respondent argued that claim had been settled through 'Deed of Settlement and Release' - Commission found on evidence that Applicant was to conclude settlement through filing of Notice of Discontinuance, but failed to do so and that in the absence of the Applicant, Respondent's submission of Deed of Settlement was sufficient to resolve dispute - Dismissed - Mr Z Stojkovic -v- Timpack Industries - APPL 1077 of 1995 - PARKS C - 11/04/96 - Wood and Paper Product Mfg 1198

Complaint re overtime payments - Complainant claimed that as relief was given only during normal day shift, work performed during meal breaks of other shifts was overtime and should be paid accordingly - Defendant argued that Complainant was never instructed to work during meal breaks - Industrial Magistrate found on evidence that as CEO had no power to direct the Complainant to work during meal breaks and payment for overtime could only be approved for work directed by CEO, claim for payment of overtime could not be made - Dismissed - Mr AA Dixon -v- Ministry of Justice - CP 198 of 1995 - Industrial Magistrate - - 11/04/96 - Other Services 1421

Complaint re payment for penalty, interest and costs - Defendant argued that although it accepted outline of facts, the complainant's current application should not be allowed - Industrial Magistrate found that as penalties were not claimed in original complaint, current claim was not justified - Dismissed - Mr AA Dixon -v- Ministry of Justice - CP 167 of 1995 - Industrial Magistrate - - 11/04/96 - Government Administration 1421

[2]Appeal against decision of Commission (76 WAIG 451) re dismissed claim for unfair dismissal, compensation and contractual entitlements - Appellant claimed Commission denied natural justice by failing to give opportunity to be heard and had erred in failing to find non payment of monies and deciding that it lacked jurisdiction to make orders with regards to wages - Full Bench reviewed authorities and found on evidence that cessation of employment was through resignation and in appearing before the Commission in person, appellants had given reasonable opportunity to present case and were not denied natural justice - Dismissed - T Stankovski -v- Quirk Corporate Cleaning Australia Pty Ltd - APPL 117 & 132 of 1996 - Full Bench - SHARKEY P/HALLIWELL SC/GEORGE C - 10/05/96 - Business Services 1667

CUMULATIVE DIGEST—*continued*

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COMPENSATION—*continued*

Application for reinstatement without loss of benefits or compensation on the grounds of unfair dismissal - Applicant claimed termination was unfair as the former position should have been offered to her - Respondent argued that the perceived friction caused by Applicant's parents would not have created a suitable working environment - Commission found on evidence that as termination was from business operating loss and re-advertised position was not Applicant's position, dismissal was not unfair - Dismissed - Ms CM Korda -v- Murray Heslin Hamilton and Melissa Ann Hamilton T/A Sweet Paradise - APPL 102 of 1996 - GIFFORD C. - 17/05/96 - Food Retailing 2021

Application for contractual entitlements on the grounds of unfair dismissal - Applicant claimed that termination was due to unpaid monies from Respondent - Respondent argued that termination was result of gross misconduct, in misappropriation of company funds and poor workmanship - Commission found on evidence that a discretion between Jobstart scheme and CES had occurred and directed Registrar to forward transcript onto Department of Employment, Education and Training - Dismissed - Mr EJ Poat -v- Eagle Communications Pty Ltd - APPL 899 of 1995 - BEECH C - Communication Services 2028

CONFERENCE

Conference referred re cancellation of order - Applicant claimed that although the analysis report correctly classified the two positions it maintained that the composite allowance be kept due to not all tasks and multiskills being covered by reclassification guidelines - Respondent argued that order should be cancelled as award restructuring had been implemented into the Engineering Trades (Government) Award - Respondent further argued that as reclassification and proper recognition had been given after job skill analysis, continuance of order would reward employees twice for the same skills and responsibilities - Commission reviewed "Genders report" and found that report did take into account the positions in question and allotted the skills in respective ranking - Commission further found that whilst payment of individual allowances may be an "administrative nightmare" it could be overcome via agreement between parties and order had served its purpose - Granted - Australian Electrical, Electronics, Foundry and Engineering Union (Western Australian Branch) -v- Fisheries Department - CR 226 of 1995 - HALLIWELL SC - 09/01/96 - Rail Transport 234

Conference referred re breakdown in enterprise bargaining negotiations re 'breadroom' employees - Applicant claimed that penalty payments should be viewed not in isolation but as part of overall agreement and that payment should be seen as the outcome of negotiation process - Respondent argued that payment of overaward payment to certain employees engaged in the breadroom should discontinue with a lump sum payment made and a phase out via deduction of monies over 12 month period - Commission found on evidence that circumstances had arisen since the first overaward payment to necessitate the discontinuance of the allowance and determined that to allow payment to continue would be counterproductive to the co-operation and teamwork - Commission further found that as parties had tried to resolve matter in the enterprise bargaining process a direction that parties enter into further discussions be made - Ordered Accordingly - Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch -v- Quality Bakers Australia Ltd T/A Buttercup Bakeries - CRA 122 of 1995 - GIFFORD C. - 23/11/95 - Food, Beverage and Tobacco Mfg 236

Conference referred re implementation of part of EBA re career structure - Applicant claimed that as part of EBA it intended to train six mechanical tradespersons to obtain qualification and possession of Restricted Electrical Licence (REL) - 1st Respondent union argued that interpretation of word "may" in EBA was to mean "never" and opposed training of mechanical tradespersons - Commission found on evidence that some cross-skilling in electrical fundamentals had occurred before the EBA and could not accept 1st union's interpretation - Commission further found that to deal with the demarcation issue, an agreement regarding content of modules and hours be reached between Applicant and 2nd Respondent union, discussed with 1st Respondent union and re-convened before the Commission - Decision Issued - BHP Iron Ore Pty Ltd -v- Australian Electrical, Electronics, Foundry and Engineering Union (Western Australian Branch) & Other - CR 100 of 1995 - BEECH C - 12/01/96 - Metal Ore Mining 464

Conference referred re reinstatement to former positions - Applicant claimed that the Commissioner for Main Roads (CMR) was the employer of the cafeteria staff or had represented that he was their employer - Respondent argued that no employment nor representation as employer existed, rather the Social Club was the employer and CMR involvement was limited to subsidising operational costs - The Commission found on evidence that the Social Club was a separate body not acting for the CMR and that the Social Club was in fact the employer - Dismissed - LIQUOR, HOSPITALITY & MISC -v- Commissioner for Main Roads - CR 83 of 1994 - PARKS C - 31/01/96 - Accommodatn, Cafes&Restaurants.... 466

Conference referred re bonus payment for award covered employees - Applicant Union claimed award covered employees should be entitled to bonus given to all other employees - Respondent argued that bonus was a reward for flexibility under workplace agreements and common law contracts and that award covered employees had to be paid award rates - CICS found on evidence that as bonus payment did not directly relate to individual work performance no reason to discriminate against award covered employees existed, and that employment contract was not a valid measure of productivity - CICS further bound that a failure to recognise informal agreements for greater flexibility under awards existed and that employees receiving award rates were eligible for exgratia bonuses - Granted - AUTO, FOOD, METAL, ENGIN UNION & Others -v- Perth Mint - CR 344 of 1995 - Commission in Court Session - HALLIWELL SC/GEORGE C/BEECH C - 18/04/96 - Metal Product Manufacturing 1700

Conference referred re reinstatement without loss of earnings or award entitlements - Applicant union claimed that as drug conviction occurred outside work and on personal property, Respondent failed to exercise procedural fairness upon discovery of employee's conviction - Respondent argued that as drug was found on company property a right to exercise duty of care towards employees existed, and that employee did not deny drug possession until employment was terminated - Commission reviewed authorities and found on evidence that the claims of employee being a cannabis user, attending work under the influence of the drug, or endangering lives of employees were not sustainable, and dismissal was unfair - Granted - The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- Western Mining Corporation - Kambalda Nickel Operations - CR 117 of 1996 - HALLIWELL SC - 06/05/96 - Metal Ore Mining. 2035

Conference referred regarding orders concerning conduct of investigation and interpretation of Education Act - Applicant claimed that investigation into conduct be permanently stayed and those conducting the investigation be disqualified - Respondent argued that it opposed the claims sought - Commission reviewed Education Act and found that the facts did not lead to the conclusion that alleged flaw was so fundamental that the enquiry could not be permitted - Dismissed - State School Teachers Union of W.A. (Inc) -v- Hon Min for Education, Employment and Training - CR 173 of 1995 - BEECH C - Education..... 2039

CUMULATIVE DIGEST—*continued*

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CONTRACT OF SERVICE

Application for denied contractual entitlements - Applicant claimed in preliminary point that Commission did have jurisdiction as the Federal Commission lacked jurisdiction to deal with enforcement of contractual entitlements - Applicant claimed that non award benefit had been denied in regards to the use of motor vehicle for commuting purposes - Respondent argued in preliminary point that Commission lacked jurisdiction as employment was covered by paid rates award of the Australian Commission and matter was before the Australian Commission - Respondent argued that use of motor vehicle formed part of contract of employment and as use was granted at its discretion it was entitled to withdraw use at its discretion - Commission found on evidence that employer did not enter into a contractual arrangement, but rather an arrangement at employer's convenience which terminated due to review of vehicle usage - Dismissed - Mr G Roy -v- Western Power - APPL 447 of 1995 - SCOTT C. - 12/09/95 - Electricity and Gas Supply 209

Application for denied contractual entitlements - Applicant claimed that payment of moneys due under contract of employment was not given - Respondent argued that the Applicant was not employed as an employee but as a contractor and was paid a set amount for completion of work which was subsequently left incomplete - Commission found on evidence that as Applicant had cited inadequate evidence in establishing employer/employee relationship it failed to clearly demonstrate existence of an industrial matter - Dismissed - Mr B Beaumaster -v- Capriplan Pty Ltd - APPL 1148 of 1995 - SCOTT C. - 30/01/96 - Construction Trade Services 433

Application for extension of time to amend prior application - Applicant claimed that due to poor legal counsel in previous case extension of time be granted to amend application - Applicant further claimed that as termination date was earlier the required 30 day limit was denied - Respondent argued that termination occurred later and payment was made through to this date - Commission reviewed authorities and found on evidence that employment contract had been observed and lawfully acted - Commission further found that as termination was at later date, under s.29(2) of I.R. Act, previous application was null as it was lodged out of 28 day limit - Dismissed - J Burton -v- Tiwest Pty Ltd - APPL 70 of 1994 - PARKS C - 15/01/96 - Petroleum Coal Chemical Assoc 435

Application for compensation re unfair dismissal - Applicant claimed that although employment was casual, an expected continuity existed and that as requirements of s29(1)(b) were satisfied claim was within Commission jurisdiction - Respondent argued that termination was justified as the Applicant was a casual employee employed on separate individual contracts and Commission lacked jurisdiction - Commission reviewed authorities and found that the nature of the contract did not offer ongoing employment to the Applicant - Commission further found that Applicant was a true casual and that employment on that day merely came to an end at the conclusion of work performed - Dismissed - Mr CR Dorant -v- JLV Industries Pty Ltd - APPL 638 of 1995 - GIFFORD C. - 12/01/96 - Business Services 440

Application for unfair dismissal - Applicant claimed termination was unfair as no procedural fairness was exercised upon termination of casual employment - Respondent argued that termination was result of insufficient work and also from several reprimands for employee's poor work standards - Commission found on evidence that the Respondent had acted legitimately to determine which employees were most appropriate for continued employment, and that the termination was procedurally fair as the employment was of a casual nature - Dismissed - Ms AF Gillan -v- Tarcoola Beach Resort - APPL 166 of 1995 - SCOTT C. - 26/07/95 - Accommodatn, Cafes&Restaurants 443

Application for contractual entitlements on grounds of unfair dismissal - Applicant claimed that termination was unfair as no reason was given and that contractual benefit of higher salary and bonus was denied - Respondent failed to attend hearing - Commission found on evidence that no reason for termination was given and although no salary benefits were denied, compensation for denied bonus be granted - Granted in Part - Mr M Miles -v- Graystone WA Pty Ltd/ Turnball/ Weir Pty Ltd T/A Carnegies - APPL 592 of 1995 - GIFFORD C. - 06/02/96 - Accommodatn, Cafes&Restaurants 447

Conference referred re reinstatement to former positions - Applicant claimed that the Commissioner for Main Roads (CMR) was the employer of the cafeteria staff or had represented that he was their employer - Respondent argued that no employment nor representation as employer existed, rather the Social Club was the employer and CMR involvement was limited to subsidising operational costs - The Commission found on evidence that the Social Club was a separate body not acting for the CMR and that the Social Club was in fact the employer - Dismissed - LIQUOR, HOSPITALITY & MISC -v- Commissioner for Main Roads - CR 83 of 1994 - PARKS C - 31/01/96 - Accommodatn, Cafes&Restaurants 466

Application for contractual benefits on the grounds of unfair dismissal - Applicant claimed termination was unfair as involvement in another company offered no competition or threat to the Respondent nor influence over employee role - Respondent argued that conflict of interest existed through to Applicant's position as employee and involvement in company to which Respondent was a client - Commission found on evidence that as the Applicant did not act contrary to duty of fidelity to the Respondent, a conflict of interest did not exist and compensation be paid - Granted in Part - Mrs LL Barton -v- Western Telecom Pty Ltd - APPL 729 of 1995 - BEECH C - 23/02/96 - Personal & Household Good Rtlg. 722

Application for compensation on the grounds of unfair dismissal - Applicant claimed that refusal to accept unilateral change to employment contract resulted in denial of further employment - Respondent argued that Applicant was not employed in limited capacity or area and that refusal to undertake duties as directed evinced an intention to repudiate employment contract - Commission found on evidence that as termination was in response to Applicant's intention to repudiate employment contract, dismissal was not unfair - Dismissed - Ms F Emery -v- Eucla Motor Hotel - APPL 1150 of 1995 - SCOTT C. - 28/02/96 - Accommodatn, Cafes&Restaurants 728

Application for contractual entitlements on the grounds of unfair dismissal and subsequent application to strike out previous application for want of jurisdiction - Applicant claimed that unfair dismissal was within the Commission's jurisdiction due to enactment of the Industrial Legislation Amendment Act 1995 (s.42(3)), in that 28 day limit no longer applied - Respondent argued that Commission lacked jurisdiction and was functus officio as matter was previously determined by the Commission - Commission reviewed authorities and found on evidence that it lacked jurisdiction to determine matter as claim was lodged out of time limit - Commission further found that matter did not come under section 42(3) of the Industrial Legislation Reform Act and that the Act was not intended to apply retrospectively - Dismissed for want of jurisdiction - Mr GHT Flaherty -v- Siemens Aust Ltd - APPL 559 & 835 of 1995 - BEECH C - 26/02/96 - Construction Trade Services 731

Application for contractual entitlements on the grounds of unfair dismissal - Applicant claimed that termination was unfair and payment of seven weeks wages were owed - Respondent argued that employment was not terminated but employee resigned of own will - Commission found on evidence that as termination was from resignation, unfair dismissal did not exist and compensation could not be granted - Dismissed - Ms SJ Hammond -v- Annette Healy Pickwell T/A Oldham Boas Ednie Brown - APPL 1318 of 1995 - HALLIWELL SC - 15/02/96 - Property Services 734

Application for denied contractual entitlements - Applicant claimed that employment contract was dependent on terms of two awards and that as "stand down clause" was incorrectly applied, four periods of unpaid wages resulted - Respondent argued that Applicant's stand down was fair as insufficient work and accommodation was available and option of annual leave was given - Commission reviewed authorities and found on evidence that the award "stand down clause" had applied and the Applicant was denied a benefit under his contract of employment - Granted in Part - Mr J Hay -v- Gardner & Perrott - APPL 727 of 1995 - BEECH C - 12/01/96 - Oil and Gas Extraction 735

CUMULATIVE DIGEST—*continued*

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CONTRACT OF SERVICE—*continued*

Application for unfair dismissal - Applicant claimed that termination was unfair as permanent employment was offered - Respondent argued that work was on an ad hoc basis to undertake seasonal work - Commission found on evidence that as Applicant was required to perform specific work for a limited period and as payment was of an hourly rate, the work was casual - Commission further found on that basis that there was no unfair dismissal but a frustration of the contract which led to termination - Dismissed - Mr GS Hardie -v- PT & BD Slade & Co - APPL 1265 of 1995 - SCOTT C. - 01/03/96 - Property Services 735

Application for denied contractual entitlements - Applicant claimed that outstanding wages were not award benefits and contractual relationship was employee/employer as directions were via employer and income tax was deducted on wages - Respondent failed to attend the conference - Commission found on evidence that Applicant was an employee and as nothing existed to suggest entitlement was award benefit, claim should succeed and compensation be paid within 7 days of the date of the order - Ordered Accordingly - Mr AN Ross -v- Burravilla Contractors - APPL 1197 of 1995 - COLEMAN CC - 19/02/96 - Services to Agriculture 742

Application for denied contractual entitlements re commission payments - Applicant claimed 1 month Commission should be paid as the general manager informed him that commission would be paid - Respondent argued that Applicant was informed that he would be paid according to the employment contract - Commission found on evidence that under the contract of employment the Applicant has not been denied any entitlements - Dismissed - Mr G Chisholm -v- Ausmic Environmental Industries - APPL 1431 of 1995 - BEECH C - 15/03/96 - Business Services 1182

Application for denied contractual entitlements on the grounds of unfair dismissal - Applicant claimed payment of 5 weeks wages, 14 days holiday pay, superannuation contribution and the reimbursement of expenses owed under contract of employment - Respondent argued that Applicant entered into an arrangement whereby the value of entitlements owed would be met by financial return upon "taking over" another building contract - Commission found on evidence that no such arrangement occurred and had such an arrangement been entered into, the entitlements would not have been paid by the Respondent - Commission further reviewed the Truck Act 1899-1904 and found such arrangement illegal and void and ordered that Respondent pay entitlements no later than 21 days from the date of the order - Granted - Mr RJ Hall -v- Design 2000 Homes Pty Ltd - APPL 1424 of 1995 - PARKS C - 28/02/96 - General Construction 1190

Application for denied contractual entitlements re commission payments - Applicant claimed 1 month commission should be paid as he was told by the Respondent that commission would be paid - Respondent argued that no such undertaking was given to the Applicant - Commission found on evidence that Applicant was unable to show that benefit had been denied - Dismissed - Mr D Mason -v- Ausmic Environmental Industries - APPL 1433 of 1995 - BEECH C - 15/03/96 - Business Services 1191

Application for denied contractual entitlements re annual leave payments - Applicant claimed payment for four weeks annual leave notwithstanding change in position and move from award entitlement to contract of service - Respondent argued that there was no express provision in contract for payment in lieu of annual leave on resignation, and that no evidence existed before the Commission for term to be implied - Respondent however acknowledged Minimum Condition Act but argued it was outside Commission's jurisdiction - Commission found on past course of dealing between parties that it was open to imply a term into "leave" provision and having reviewed authorities granted entitlement for period calculated on completed weeks of service - Granted - Mr G Nealings -v- Crommelins Handyman Hire & Sales - APPL 975 of 1995 - GIFFORD C. - 07/03/96 - Personal Services 1194

Application for denied contractual entitlements - Applicant claimed that as employer/employee relationship existed, outstanding wages should be paid - Respondent failed to attend the conference - Commission found on evidence that Applicant was an employee and as nothing existed to suggest entitlement was award, industrial agreement or other form of regulation benefit, compensation be paid within 14 days of the date of the order - Ordered Accordingly - Ms R Rendalls -v- Mr K Evans - APPL 1194 of 1995 - COLEMAN CC - 25/03/96 - Education 1196

Application for denied contractual entitlements on the grounds of unfair dismissal - Applicant failed to attend the conference - Respondent argued Commission should proceed with matter and dismiss application - Commission reviewed I.R. Act 1979 and found that under s.27(1)(d) it could proceed to hear and determine matter in the absence of any party and that as no response was evident nor any attempt to prosecute application on the Applicant's behalf, it was appropriate to dismiss application - Dismissed - Mr GP Shea -v- Communiquardo Pty Ltd - APPL 1275 of 1995 - PARKS C - 19/03/96 - Communication Services 1434

[1]Appeal against decision of Full Bench (76 WAIG 20) re payment of denied contractual entitlements - Appellant claimed, in preliminary point, that Full Bench erred in determining that Commission had jurisdiction to hear matter - Respondent argued that Full Bench's decision regarding jurisdiction should be affirmed without reversing Pepler's case, as claims were made before termination and for contractual entitlements not compensation - IAC reviewed authorities and found that the rules in Pepler's case applied to the current application - Preliminary point granted - Joyce Corporation Ltd T/A Joyce Australia -v- R Lawson & Others - IAC 1 of 1996 - Industrial Appeal Court - Franklyn J./Rowland J./Anderson J. - 15/05/96 - Personal & Household Good Rtlg 1653

[2]Appeal against decision of Commission (unpublished) re granted payment of contractual benefits - Appellant claimed Commission erred in fact and law in failing to apply proper law relating to contractual benefits claim under IR Act, lacked jurisdiction to hear matter - Full Bench reviewed authorities and found that as s7 of IR Act had nothing but prospective operation from its own terms and terms of the Act, Commission lacked jurisdiction to hear and determine matter - Upheld - Lawrence Peter Ferris and Maureen Carroll T/A Carroll Realty -v- Mr JWC Chambers - APPL 539 of 1996 - Full Bench - SHARKEY P/COLEMAN CC/GEORGE C - 30/05/96 - Property Services 1656

Complaints re breach of Workplace Agreement Act 1993 - Complainants argued that Defendant had, by threats and intimidation, persuaded them to enter into an agreement contrary to section 68 of the Workplace Agreement - Defendant argued that proposed employment was an entirely new contract and did not consist of continuing employment and the requirement to sign the agreement was a condition precedent to employment with company - Industrial Magistrate reviewed authorities, I.R. Act, Workplace Agreement Act and found on evidence that threats to enter into workplace agreements had existed - Proven - Ms A.M. Clarke -v- Novek Pty Ltd (ACN 070 744 946) t/a Shell Combined - CP 242 of 1995 - Industrial Magistrate - Gething IM - 09/05/96 - Motor Vehicle Rtlg & Services 2010

Application for monetary benefits under the contract of service - Applicant claimed that he was an employee of the respondent and owed monetary benefits - Respondent argued that no employer/employee relationship existed and the commission lacked jurisdiction to deal with it - Commission found that the applicant failed to prove that employer/employee relationship existed and the Commission did not have jurisdiction to deal with it - Dismissed - Mr D Crowe -v- Agrosoke Aust Pty Ltd T/A Yes Environmental Products & Earth Technology Brokers Pty Ltd - APPL 1224 of 1995 - PARKS C - 29/05/96 - Other Services 2016

CUMULATIVE DIGEST—*continued*

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CONTRACT OF SERVICE—*continued*

Application for outstanding wages on the grounds of a contract of service - Applicant claimed that as there was an employer/employee relationship, compensation for unpaid weekly remuneration should be paid - Respondent argued that an employment relationship had not existed and the Commission lacked jurisdiction to deal with the matter - Commission found on evidence that as the applicant had not shown an employer/employee relationship existed, the Commission lacked jurisdiction - Dismissed - Mr O Girvan -v - Communiquardo Pty Ltd - APPL 1226 of 1995 - PARKS C - 24/04/96 - Other Services..... 2017

Application for contractual entitlements - Applicant failed to attend hearing - Respondent claimed that dispute was settled previously and that it complied with terms of the settlement, whereas the Applicant had not sought for application be dismissed - Commission found that Applicant's lack of physical representation demonstrated satisfaction with the resolution of matters and that they had honoured the terms of the previous settlement - Dismissed - Mr R Rozario -v- Allwest Print Pty Ltd - APPL 1204 of 1995 - PARKS C - 30/04/96 - Printg, Publishg & Rcdd Media..... 2031

Application for contractual entitlements on the grounds of a contract of employment - Applicant claimed that a contract of employment existed and that wages for time when potential to work existed was owed - Respondent argued that no employment relationship existed and no wages were owed as applicant was not obligated to work when asked and on occasions declined the offer to work - Commission found on evidence that as Applicant was a casual employee, employee contracts were weekly contracts and as no new contract of employment was entered into during a period of claims, no subsequent entitlement to work existed - Dismissed - Mr MJ Walton -v- The Circuit Cabaret and Function Centre - APPL 427 of 1996 - PARKS C - 20/05/96 - Other Services..... 2032

CONTRACT OUT OF AWARD

Application for denied contractual entitlements - Applicant claimed that employment contract was dependent on terms of two awards and that as "stand down clause" was incorrectly applied, four periods of unpaid wages resulted - Respondent argued that Applicant's stand down was fair as insufficient work and accommodation was available and option of annual leave was given - Commission reviewed authorities and found on evidence that the award "stand down clause" had applied and the Applicant was denied a benefit under his contract of employment - Granted in Part - Mr J Hay -v- Gardner & Perrott - APPL 727 of 1995 - BEECH C - 12/01/96 - Oil and Gas Extraction 735

[2]Appeal against decision of Industrial Magistrate (76WAIG1174) re dismissed complaints re breaches of award - Appellant claimed that Industrial Magistrate erred in fact and law in finding that employment was casual and paid accordingly, and in failing to apply correct principles of award interpretation - Respondent argued that employment was of a casual basis as payment was on an hourly rate - Full Bench reviewed authorities and found on evidence that as Industrial Magistrate had failed to find that permanent employment contract existed, an error in fact and law had occurred and matter be remitted back for further determination - Ordered Accordingly - Metals and Engineering Workers' Union - Western Australian Branch -v- Centurion Industries Ltd - APPL 1006 of 1995 - Full Bench - SHARKEY P/COLEMAN CC/HALLIWELL SC - 24/04/96 - Metal Product Manufacturing..... 1287

CUSTOM AND PRACTICE

[2]Appeals against decision of the Commission (75 WAIG 155 & 966) re dismissed applications for denied contractual entitlements - Appellants claimed that the Commission erred at first instance in strictly applying the Hastings case, and in incorrectly applying the test of the Western Port case regarding implied redundancy terms - Appellant further claimed Commission erred by failing to grant sufficient weight to evidence with respect to the custom and practice and in determining that the alternative employment was suitable - Respondent argued that the part of the Commission's decision relating to the payment of pro-rata long service leave entitlement be appealed as it exceeded its jurisdiction and the claims were made in respect of redundancy payments and not long service leave - Respondent further argued Commission had adopted an "arbitral" approach rather than the required "judicial" approach and sought the decision to be dismissed - Full Bench reviewed authorities and found on evidence that the Commission had not implied a term relating to redundancy or severance payments as a matter of necessity into a contract, that the alternative employment found was only partially suitable as it did not preserve any existing service or accrued entitlements and under the circumstances there was a term allowing redundancy or severance payments - Full Bench further found that the Commission erred in the proper exercise of its discretion in ordering the payment of pro -rata long service leave to one of the Appellants - Upheld, Quashed and Ordered Accordingly - R Lawson & Others -v- Joyce Australia Pty Ltd - APPL 420,448 of 1995 - Full Bench - SHARKEY P/COLEMAN CC/GIFFORD C. - 18/12/95 - Personal & Household Good Rtlg..... 20

[3]Applications for variations to awards re non-work related medical expenses - Applicant claimed removal of conditions from Regulations was done unilaterally and without consultation, and that conditions were removed as a negative cost cutting exercise and not justified on merit - Applicant further claimed that high level of health and fitness for police officers was in public interest and as provision of entitlements had a long history of custom and practice, efficacy of enterprise bargaining would be undermined if unilateral determination of conditions was permitted - Respondent argued due process had been followed in removing entitlements and, as entitlements did not promote good health and fitness proposed provisions discriminated between police officers and other public officers - Respondent further argued that it was in the public interest to determine allocation of resources, that as entitlements were not an actual condition of employment re-establishment would interfere with flexibility and efficiency as funds had not been allocated and a flow-on effect would occur if entitlements were incorporated into the award - CICS reviewed authorities and found that application attracted consideration as a Special Case, and cost of providing entitlement did not outweigh aspects of public interest which recognised special nature of occupation - CICS further found that flow-on effect could also from conditions contained in Regulations, with entitlements part of a status quo which complemented services provided and that process of Structural Efficiency would be facilitated by re-establishment of entitlements - Granted - Western Australian Police Union of Workers -v- Hon Minister for Police - APPL 363 of 1994 - Commission in Court Session - COLEMAN CC/GEORGE C/PARKS C - 22/11/95 - Community Services..... 46

[1]Appeal against decision of Full Bench (75 WAIG 2934) re dismissed appeal re granted award variation - Appellant claimed that as awards could not be amended or varied by custom or usage, the Full Bench erred in determining that the right to the public holiday arose in that way, and, that a paid leave day was part of existing award wage conditions - Appellant further claimed Full Bench erred in law in failing to hold that Commission had acted in excess of jurisdiction in varying award without referral for consideration as special case - IAC reviewed the I.R. Act and authorities and found that as the Minister had failed to establish that the amendment could only be made pursuant to s.40(3) of the Act, the application to vary was under s.40(1) and did not have restrictions imposed under s.40(3) - IAC further found that no error in the manner of exercise of discretion nor error in law or excessive jurisdiction had been established - Dismissed - Hon Min for Health -v- LIQUOR, HOSPITALITY & MISC - IAC 14 of 1995 - Industrial Appeal Court - Kennedy J./Rowland J./Anderson J. - 27/03/96 - Health Services..... 930

CUMULATIVE DIGEST—*continued*

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CUSTOM AND PRACTICE—*continued*

[2]Appeal against decision of Commission (75 WAIG 3364) re discontinued tool allowance - Appellant claimed that Commission erred in fact and law in giving undue and unwarranted emphasis on Respondent's perception of security risks and in not giving sufficient consideration to weight of custom and practice - Respondent argued that supplying tools would give no legitimate occasion to take tools home, nor occasion for tools to be used as vehicles to convey precious metals - Full Bench reviewed I.R. Act and authorities and found that no error of law or facts were raised and according to principles set in House case, no establishment was made that Commission's exercise of discretion had miscarried - Dismissed - AUTO, FOOD, METAL, ENGIN UNION -v- Western Australian Mint - APPL 1293 of 1995 - Full Bench - SHARKEY P/COLEMAN CC/BEECH C - 04/04/96 - Metal Product Manufacturing 932

Application for transfer of hours of work for Easter period - Applicant claimed that as 6 hours were worked on normal Friday, it was custom and practice that the roster be transferred to Thursday before Good Friday - Respondent argued that in previous arrangements, bonuses had been paid, but it could no longer be afforded - Commission found that on the merits of cases presented, the most equitable arrangement was for 7 ordinary hours for both Thursday before/and Good Friday - Ordered Accordingly - BRICK, TILE & POTTERY UNION -v- Australian Fine China - CR 104 of 1996 - SCOTT C. - 18/04/96 - Other Manufacturing 1442

DANGEROUS WORK

Conference re site allowance at the clubhouse construction site, Burswood Golf Complex - Parties agreed to payment of the allowance as site contained various disabilities which made work unpleasant and difficult - Commission undertook inspections and found on evidence that the disabilities claimed were in fact experienced and that the site warranted the payment of an allowance as agreed by the parties - Granted - The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers -v- C H Day & Co Pty Ltd T/A Geo A Esslemont & Son - C 316 of 1995 - SCOTT C. - 16/11/95 - General Construction 222

DATE OF OPERATION

Application to vary award - Applicant sought to vary the award by the insertion of a separate schedule to give effect enterprise bargaining agreement reached between itself and the Respondent and that the date of operation should reflect retrospectivity - Respondent consented to the insertion but argued that the date of operation should be from the first pay period and on or after date of variation - Commission reviewed State Wage Principles and found on evidence that as there was an offer of retrospectivity made during the negotiations, the Respondent was bound to the offer and although claim constituted a "special condition" pursuant to the Principles, it was unable to award a retrospective date further than the date of application - Ordered Accordingly - AUST MUNICIPAL, CLERICAL & SER -v- Totalisator Agency Board of WA & Others - APPL 1369 of 1995 - BEECH C - 28/12/95 - Sport and Recreation 169

Applications for variations to awards re $8.00 Arbitrated Safety Net Adjustment - Applicants claimed that awards contained enterprise flexibility provisions to satisfy requirements for second tier $8.00 adjustment and that first safety net adjustment be granted to employees whose first safety net adjustment was absorbed into overaward payment - Respondents argued that provisions contained within awards were not enterprise flexibility provisions but related to structural efficiency and other wage fixing principles - Commission found on evidence that existing award provisions were the basis for enterprise flexibility provisions and that the awards would be varied to include the first $8.00 adjustment for employees whom had it absorbed and the second $8.00 adjustment - Decision Issued - The Forest Products, Furnishing and Allied Industries Industrial Union of Workers, W.A. Branch -v- Wesfi Pty Ltd - APPL 1313,1314,1317 of 1994;APPL 112 of 1995 - SCOTT C. - 24/05/95 - Various 713

[3]Proceedings instituted on Commissions Own Motion pursuant to s.51(2) re consideration of AIRC's decision on "Third Safety Net Adjustment and Section 150A Review October 1995" (Print M5600) - All s.50's parties submitted above decision was a National Wage Decision (NWD) for the purpose of s.51(1) of I.R. Act 1979 and advocated Commission give effect to NWD, however different approaches were submitted for this task - The TLC sought to have separate application joined to these proceeding so that outcome could be achieved via General Order pursuant to s.50(2) of Act, arguing the absence of complimentary legislative provisions of s.150A of Commonwealth Act, impedes on Commission's ability to give effect to the substance of NWD and outcome could be "materially different" - CICS found in favour of other s.50 parties who opposed application for joinder - CICS noted concerns/issues raised by s.50 parties on issues such as, enterprise flexibility provisions, no disadvantage test, "Special Cases" and identification of "paid rates - minimum rates", which go to the operation of the Principle and the tests to be applied for the Third Arbitrated Safety Net adjustment - CICS addressed concerns by stating guidelines to be adopted and issued "Statement of Principles - March 1996" - Ordered Accordingly - (Commission's own motion) -v- Trades & Labor Council of WA & Others - APPL 1164 of 1995 - Commission in Court Session - COLEMAN CC/HALLIWELL SC/GEORGE C - 14/04/96 - Various 911

Complaint re breach of order - Complainant union claimed that Defendant failed to comply with GSTT Order re permanent appointment for teachers responding to Minister's offer of permanency - Respondent argued that complainant union was without standing to initiate complaint as no time limit for compliance existed and that it had not failed to comply with order - Industrial Magistrate reviewed authorities and found on evidence that Complainant union had standing to enforce order but that order was not defective as it did not expressly specify time or date within which appointments were to be made - Dismissed - State School Teachers Union of W.A. (Inc) -v- Hon Minister for Education & Training - CP 2607 of 1994 - Industrial Magistrate - Reynolds IM - 15/09/95 - Education 1180

[2]Appeal against decision of Commission (75 WAIG 2815) re incorrect operative date for awards variation - Appellant claimed that Commission erred by failing to give reasons for chosen date, failing to properly consider employees low paid nature and in selecting date inconsistent with the intention of the State Wage Decision - Appellant further claimed that Commission erred in inserting "Enterprise Flexibility Provision" clause, as clause was contrary to intent of the State Wage Decision - Respondent argued that it opposed the applications at first instance - Full Bench reviewed the IR Act and authorities and found that as the Commission at first instance, erred and miscarried the exercise of its discretion in its failure to apply Principles the appeals would be upheld and awards varied - Ordered Accordingly - LIQUOR, HOSPITALITY & MISC -v- Anglican Homes for the Aged (Inc) & Others - APPL 1172, 1173, 1174, 1175, 1176, 1177, 1183 of 1995 - Full Bench - SHARKEY P/COLEMAN CC/HALLIWELL SC - 16/05/96 - Community Services 1658

Application to vary award re third $8 arbitrated safety net adjustment - subject to an operative date being issued - Applicant claimed a retrospective date of operation - Respondent argued for a current date of operation - Commission reviewed claims and found that an operative date should be date of hearing - Ordered Accordingly - The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers -v- Adsigns Pty Ltd & Others - APPL 486 of 1996 - BEECH C - 09/05/96 - Construction Trade Services 1971

CUMULATIVE DIGEST—*continued*

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DEMARCATION

Conference referred re implementation of part of EBA re career structure - Applicant claimed that as part of EBA it intended to train six mechanical tradespersons to obtain qualification and possession of Restricted Electrical Licence (REL) - 1st Respondent union argued that interpretation of word "may" in EBA was to mean "never" and opposed training of mechanical tradespersons - Commission found on evidence that some cross-skilling in electrical fundamentals had occurred before the EBA and could not accept 1st union's interpretation - Commission further found that to deal with the demarcation issue, an agreement regarding content of modules and hours be reached between Applicant and 2nd Respondent union, discussed with 1st Respondent union and re-convened before the Commission - Decision Issued - BHP Iron Ore Pty Ltd -v- Australian Electrical, Electronics, Foundry and Engineering Union (Western Australian Branch) & Other - CR 100 of 1995 - BEECH C - 12/01/96 - Metal Ore Mining 464

DISABILITIES

Conference re site allowance at the clubhouse construction site, Burswood Golf Complex - Parties agreed to payment of the allowance as site contained various disabilities which made work unpleasant and difficult - Commission undertook inspections and found on evidence that the disabilities claimed were in fact experienced and that the site warranted the payment of an allowance as agreed by the parties - Granted - The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers -v- C H Day & Co Pty Ltd T/A Geo A Esslemont & Son - C 316 of 1995 - SCOTT C. - 16/11/95 - General Construction 222

Conference referred re claim for compensation allowance - Applicant union claimed that construction related disabilities experienced were greater than those previously considered and level of disability reflected changed in conditions - Respondent argued that construction related site disabilities addressed were overstated and were essentially no different to those usually present in construction industry - Commission found on evidence and via inspection that overall degree of disabilities which existed were in excess of those compensated by existing allowance and operative date of allowance be earliest date - Ordered Accordingly - Transfield Construction WA -v- AUTO, FOOD, METAL, ENGIN UNION & Other - CR 271 of 1995 - PARKS C - 27/11/95 - General Construction 231

DISCRIMINATION

Conference referred re bonus payment for award covered employees - Applicant Union claimed award covered employees should be entitled to bonus given to all other employees - Respondent argued that bonus was a reward for flexibility under workplace agreements and common law contracts and that award covered employees had to be paid award rates - CICS found on evidence that as bonus payment did not directly relate to individual work performance no reason to discriminate against award covered employees existed, and that employment contract was not a valid measure of productivity - CICS further bound that a failure to recognise informal agreements for greater flexibility under awards existed and that employees receiving award rates were eligible for exgratia bonuses - Granted - AUTO, FOOD, METAL, ENGIN UNION & Others -v- Perth Mint - CR 344 of 1995 - Commission in Court Session - HALLIWELL SC/GEORGE C/BEECH C - 18/04/96 - Metal Product Manufacturing 1700

EMPLOYEE

Application for contractual benefits on the grounds of unfair dismissal - Applicant claimed termination was unfair as involvement in another company offered no competition or threat to the Respondent nor influence over employee role - Respondent argued that conflict of interest existed through to Applicant's position as employee and involvement in company to which Respondent was a client - Commission found on evidence that as the Applicant did not act contrary to duty of fidelity to the Respondent, a conflict of interest did not exist and compensation be paid - Granted in Part - Mrs LL Barton -v- Western Telecom Pty Ltd - APPL 729 of 1995 - BEECH C - 23/02/96 - Personal & Household Good Rtlg. 722

Application for denied contractual entitlements - Applicant claimed that outstanding wages were not award benefits and contractual relationship was employee/employer as directions were via employer and income tax was deducted on wages - Respondent failed to attend the conference - Commission found on evidence that Applicant was an employee and as nothing existed to suggest entitlement was award benefit, claim should succeed and compensation be paid within 7 days of the date of the order - Ordered Accordingly - Mr AN Ross -v- Burravilla Contractors - APPL 1197 of 1995 - COLEMAN CC - 19/02/96 - Services to Agriculture 742

[2]Appeal against decision of Commission (75 WAIG 3068) re denied application for reinstatement of the grounds of unfair dismissal - Appellant claimed Commission erred in fact and law in finding that termination was effected by Appellant and that employee was engaged as casual employee on ongoing basis - Appellant further claimed that as no ongoing employment relationship existed, Commission lacked jurisdiction to deal with application - Full Bench reviewed authorities and found on evidence that as Respondent was not a casual worker in terms of the award definition, summary dismissal was unlawful and unfair and Commission had jurisdiction to make order for reinstatement - Dismissed - Serco (Australia) Pty Ltd -v- Mr JJ Moreno - APPL 1281 of 1995 - Full Bench - SHARKEY P/BEECH C/SCOTT C. - 19/03/96 - Food Retailing 937, 2023

Complaint re breach of General Order - Complainant claimed that payments due were pursuant to clause 6 of the W.A. Government Employees Redeployment, Retraining & Redundancy General Order and interest was also due from Defendant - No evidence was adduced by or on behalf of the Defendant - Magistrate reviewed General Order and found on evidence that as employee was employed in Public Sector, Respondent was bound to comply with provisions of General Order - Proven - Mr GN Hocking (for CLARK) -v- Board of Management, Port Hedland Regional Hospital - CP 32 of 1995 - Industrial Magistrate - Robins IM - Health Services 1168

Application for denied contractual entitlements - Applicant claimed that as employer/employee relationship existed, outstanding wages should be paid - Respondent failed to attend the conference - Commission found on evidence that Applicant was an employee and as nothing existed to suggest entitlement was award, industrial agreement or other form of regulation benefit, compensation be paid within 14 days of the date of the order - Ordered Accordingly - Ms R Rendalls -v- Mr K Evans - APPL 1194 of 1995 - COLEMAN CC - 25/03/96 - Education 1196

Conference referred re granting pro-rata Long Service Leave - Applicant union claimed that notwithstanding employee's resignation from Respondent, pro-rata long service leave should be awarded - Respondent argued that Commission lacked jurisdiction to deal with matter as Applicant was not an 'employee' and claim did not constitute industrial matter - Commission reviewed I.R. Act and authorities and found that the as Long Service Leave Appeal Committee had authority to deal with claim, claim should have been first dealt with in that forum, Commission leaves applications in abeyance and are dismissed - Dismissed - LIQUOR, HOSPITALITY & MISC -v- Zoological Gardens Board - CR 257,261 of 1995 - GIFFORD C. - 22/03/96 - Libraries Museums and the Arts 1202

CUMULATIVE DIGEST—*continued*

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EMPLOYEE—*continued*

[2]Appeal against decision of Industrial Magistrate (76WAIG1174) re dismissed complaints re breaches of award - Appellant claimed that Industrial Magistrate erred in fact and law in finding that employment was casual and paid accordingly, and in failing to apply correct principles of award interpretation - Respondent argued that employment was of a casual basis as payment was on an hourly rate - Full Bench reviewed authorities and found on evidence that as Industrial Magistrate had failed to find that permanent employment contract existed, an error in fact and law had occurred and matter be remitted back for further determination - Ordered Accordingly - Metals and Engineering Workers' Union - Western Australian Branch -v- Centurion Industries Ltd - APPL 1006 of 1995 - Full Bench - SHARKEY P/COLEMAN CC/HALLIWELL SC - 24/04/96 - Metal Product Manufacturing 1287

Application for monetary benefits under the contract of service - Applicant claimed that he was an employee of the respondent and owed monetary benefits - Respondent argued that no employer/employee relationship existed and the commission lacked jurisdiction to deal with it - Commission found that the applicant failed to prove that employer/employee relationship existed and the Commission did not have jurisdiction to deal with it - Dismissed - Mr D Crowe -v- Agrosoke Aust Pty Ltd T/A Yes Environmental Products & Earth Technology Brokers Pty Ltd - APPL 1224 of 1995 - PARKS C - 29/05/96 - Other Services 2016

Application for outstanding wages on the grounds of a contract of service - Applicant claimed that as there was an employer/employee relationship, compensation for unpaid weekly remuneration should be paid - Respondent argued that an employment relationship had not existed and the Commission lacked jurisdiction to deal with the matter - Commission found on evidence that as the applicant had not shown an employer/employee relationship existed, the Commission lacked jurisdiction - Dismissed - Mr O Girvan -v - Communiquardo Pty Ltd - APPL 1226 of 1995 - PARKS C - 24/04/96 - Other Services 2017

Application for contractual entitlements on the grounds of a contract of employment - Applicant claimed that a contract of employment existed and that wages for time when potential to work existed was owed - Respondent argued that no employment relationship existed and no wages were owed as applicant was not obligated to work when asked and on occasions declined the offer to work - Commission found on evidence that as Applicant was a casual employee, employee contracts were weekly contracts and as no new contract of employment was entered into during a period of claims, no subsequent entitlement to work existed - Dismissed - Mr MJ Walton -v- The Circuit Cabaret and Function Centre - APPL 427 of 1996 - PARKS C - 20/05/96 - Other Services 2032

ENFORCEMENT OF AWARDS/ORDERS

Complaint re breach of award - Complainant Union claimed that Defendant breached Clause 28(2) of the Building Trades (Construction) Award 1987 - Defendant argued that Union was not competent to make complaint as it was not party to award at the time complaint was made - Industrial Magistrate reviewed authorities and found pursuant to Section 72(5) of the I.R. Act 1979, that as Complainant Union was a registered member, it was competent to make complaint and had competence to pursue complaint - Decision Issued - The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers -v- Robco WA Pty Ltd T/A Robco - CP 53 of 1995 - Industrial Magistrate - Gething IM - 03/08/95 - Unions 1158

Complaint re breach of General Order - Complainant claimed that payments due were pursuant to clause 6 of the W.A. Government Employees Redeployment, Retraining & Redundancy General Order and interest was also due from Defendant - No evidence was adduced by or on behalf of the Defendant - Magistrate reviewed General Order and found on evidence that as employee was employed in Public Sector, Respondent was bound to comply with provisions of General Order - Proven - Mr GN Hocking (for CLARK) -v- Board of Management, Port Hedland Regional Hospital - CP 32 of 1995 - Industrial Magistrate - Robins IM - Health Services 1168

Complaint re breach of order - Complainant union claimed that Defendant failed to comply with GSTT Order re permanent appointment for teachers responding to Minister's offer of permanency - Respondent argued that complainant union was without standing to initiate complaint as no time limit for compliance existed and that it had not failed to comply with order - Industrial Magistrate reviewed authorities and found on evidence that Complainant union had standing to enforce order but that order was not defective as it did not expressly specify time or date within which appointments were to be made - Dismissed - State School Teachers Union of W.A. (Inc) -v- Hon Minister for Education & Training - CP 2607 of 1994 - Industrial Magistrate - Reynolds IM - 15/09/95 - Education 1180

Complaint re breach of Industrial Relations Act - Complainant claimed that as Defendant failed to comply with GSTT order by denying permanent appointments to AMES lecturers whom satisfied criteria for permanency, enforcement of previous order should occur - Defendant argued that criteria specified that "management" was to determine on-going need for appointed positions and that breach had not occurred - Industrial Magistrate reviewed authorities and found on evidence that although Defendant was not bound by issue of estoppel, it failed to comply with order and that the complaint was proven - Complainant invited to be heard on final orders - Decision Issued - State School Teachers Union of W.A. (Inc) -v- Hon Minister for Education & Training - CP 2607 of 1994 - Industrial Magistrate - Reynolds IM - 01/05/96 - Education 1425

ENTRY: RIGHT OF

Complaint re breach of award - Complainant claimed Defendant failed to comply with clause 15 of award by refusing duly accredited union official opportunity to examine time and wages records of employees - Defendant argued that in 1969 employees were covered by term 'all others' in the predecessor of present Meat Industry (State) Award not the award stated by Complainant - Industrial Magistrate reviewed authorities and found that Cleaners award was one of those awards which the related industries could not be established without evidence of work performed and that Complainant failed to establish that Cleaners award applied to the Defendant - Dismissed - LIQUOR, HOSPITALITY & MISC -v- Metro Meat International Ltd - CP 228 of 1995 - Industrial Magistrate - Brown IM - 29/03/96 - Food, Beverage and Tobacco Mfg 1170

HOURS OF WORK

Application to vary award - applicant claimed that variation was justified on its merits and in accordance with Statement of Principle in State wage Decision - respondent argued there was no case to answer, that right to put submission and call evidence would be reserved and applicant had not discharged onus of proof - Commission found on evidence parties attempt to resolve claim was consistent with statement of Principles, respondents claim was not sustained and matter be divided to further examine promotional procedures - Granted in Part - Western Australian Fire Brigades Board -v- United Firefighters Union of Western Australia - APPL 619 of 1995 - SCOTT C. - 18/04/96 - Various 1409

Application for interpretation of Supermarkets and Chain Stores Warehouse Award 1982 No. A26 of 1982 - Applicant claimed interpretation of Clause 35(7) to determine whether it applied to shift workers engaged to work overtime on an afternoon shift on Sunday - respondent argued that as shift work could only occur within limits of ordinary hours, work performed on Sunday was not shift work, but overtime - Commission found on evidence that Clause 35(7) of the Award did not apply to employees on Sunday overtime, only to overtime during the week Monday to Friday - Decision Issued - The Shop, Distributive and Allied Employees' Association of Western Australia -v- Woolworths (WA) Limited & Other - APPL 83 of 1996 - GIFFORD C. - 18/04/96 - Food Retailing 1418

CUMULATIVE DIGEST—*continued*

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HOURS OF WORK—*continued*

Application for transfer of hours of work for Easter period - Applicant claimed that as 6 hours were worked on normal Friday, it was custom and practice that the roster be transferred to Thursday before Good Friday - Respondent argued that in previous arrangements, bonuses had been paid, but it could no longer be afforded - Commission found that on the merits of cases presented, the most equitable arrangement was for 7 ordinary hours for both Thursday before/and Good Friday - Ordered Accordingly - BRICK, TILE & POTTERY UNION -v- Australian Fine China - CR 104 of 1996 - SCOTT C. - 18/04/96 - Other Manufacturing 1442

INDUSTRIAL ACTION

Conference re cancellation of interlocutory order - Applicant claimed that it would be less than equitable for the interlocutory order to be cancelled - Respondent Union argued that interlocutory order requiring the cessation of industrial action be cancelled as they were denied an opportunity to fully address the relevance of the situation as a "federal" matter prior to the order being issued and order was consequently wrongly made without practical effect and without being an industrial matter - Commission found on evidence that the order to end the industrial action was justified, however, on the premise that negotiations had resumed on amicable grounds the interlocutory order be cancelled - Ordered Accordingly - St John of God Hosp Murdoch -v- LIQUOR, HOSPITALITY & MISC - C 326 of 1995 - PARKS C - 22/12/95 - Health Services . 220

Application for compensation on the grounds of unfair dismissal - Applicant claimed that instant dismissal was unfair as every measure had been taken to ensure that services would be monitored and provided for during R and R Leave - Respondent argued that Applicant's absence from site and lack of management of impending industrial action was valid reason for termination - Commission reviewed authorities and found on evidence that the Applicant's actions did not give rise to valid criticism, nor justify summary dismissal - Granted - Mr RW More -v- Spotless Services Aust Ltd - APPL 1339 of 1995 - HALLIWELL SC - 21/04/96 - Accommodatn, Cafes&Restaurants 1192

INDUSTRIAL MATTER

[2]Appeals against decision of Commission (75 WAIG 1975 & 2251) re orders re cancellation of work bans and commencement of negotiations - Appellant claimed Commission erred in finding it had jurisdiction to make orders in relation to duties not contained in contract of employment and not within definition of 'industrial matter' - Appellant further claimed that Commission had erred in denying procedural fairness by making orders which were before AIRC and also made in a final rather than an interim form - Respondent argued that as AEU was not party to proceedings, it would not be affected by orders made by Commission - Majority Full Bench reviewed authorities and found that Commission erred in law under s.34(1) of the I.R. Act by not hearing evidence or submissions relating to jurisdiction prior to making orders, in not determining if matters were 'industrial matters' which action was deemed ultra vires and/or without statutory authorities - Majority Full Bench further found that Commission had determined jurisdiction by recording parties concerns as to jurisdiction on transcript and that it was for the Commission to decide extent of submissions and evidence necessary to determine questions before it - Minority Full Bench found that as matters before Commission affected or related to the work, privileges, rights or duties of employers or employees in industry, they constituted 'industrial matters' and as orders were not final they could be varied, set aside or cancelled and remained in force when conciliation/arbitration had finally resolved all industrial matters in dispute - Upheld and Quashed - State School Teachers Union of W.A. (Inc) -v- Hon Min for Education - APPL 587,723 of 1995 - Full Bench - SHARKEY P/GEORGE C/SCOTT C. - 13/12/95 - Education..... 27

[2]Appeal against decision of Commission (75 WAIG 2871) re dismissed application for stay of inquiry on the grounds of denied natural justice - Appellant claimed that Commission was outside its jurisdiction as the matter was not seen as industrial when the tribunal carried out a statutory function in accordance to the Education Act - Respondent argued that it was an industrial matter as defined by s.7 of the Education Act as it dealt with behaviour and/or performance and had the potential to result in the punishment of and termination of employment - Full Bench reviewed authorities and found on evidence that the Commission was not deprived of jurisdiction to hear and determine the matter under s.23B of the Act and had not erred in dismissing the application under s.27 of the Act as it merely made arbitration orders - Dismissed - Hon Minister for Education -v- State School Teachers Union of W.A. (Inc) - APPL 937 of 1995 - Full Bench - SHARKEY P/GEORGE C/SCOTT C. - 18/12/95 - Education 35

Conference re cancellation of interlocutory order - Applicant claimed that it would be less than equitable for the interlocutory order to be cancelled - Respondent Union argued that interlocutory order requiring the cessation of industrial action be cancelled as they were denied an opportunity to fully address the relevance of the situation as a "federal" matter prior to the order being issued and order was consequently wrongly made without practical effect and without being an industrial matter - Commission found on evidence that the order to end the industrial action was justified, however, on the premise that negotiations had resumed on amicable grounds the interlocutory order be cancelled - Ordered Accordingly - St John of God Hosp Murdoch -v- LIQUOR, HOSPITALITY & MISC - C 326 of 1995 - PARKS C - 22/12/95 - Health Services . 220

Conference referred re granting pro-rata Long Service Leave - Applicant union claimed that notwithstanding employee's resignation from Respondent, pro-rata long service leave should be awarded - Respondent argued that Commission lacked jurisdiction to deal with matter as Applicant was not an 'employee' and claim did not constitute industrial matter - Commission reviewed I.R. Act and authorities and found that the as Long Service Leave Appeal Committee had authority to deal with claim, claim should have been first dealt with in that forum, Commission leaves applications in abeyance and are dismissed - Dismissed - LIQUOR, HOSPITALITY & MISC -v- Zoological Gardens Board - CR 257,261 of 1995 - GIFFORD C. - 22/03/96 - Libraries Museums and the Arts 1202

[2]Applications pursuant to s.72A of I.R. Act 1979, seeking orders to represent the industrial interest of "PACTS" employees - Applicant Union (HSOA) submitted orders sought, would further the objects of the Act, were consistent with objectives of wage fixing principles, will reduce number of awards allowing for better industrial representation and management of employees and through Union rationalisation aid ongoing reform in the health industry - Application by Respondent Union (CSA) seeking orders to represent industrial interests of salaried employees, employed by the Commissioner of Health in business and activities as set out in application - Respondent Union submitted it had, historic coverage and continues to have significant actual membership coverage, provided impetus in relation to public health sector employees in matters of award entitlement and argued failure to grant orders would result in demarcation in the public health sector - Full Bench granted a number of "parties" leave to be heard pursuant to s.72A of Act, however dismissed all applications for leave to intervene pursuant to s.27(1)(k) of the Act - Full Bench reviewed authorities and noted arguments of both the Unions with regard to historical industrial coverage, change in status of employee, current work practices of employees and overall benefits sought by the employer, employees and Union. Full Bench found both parties had merits to their application, however issued decision and order defining the respective coverage of the unions and referred to the President, matters requiring alteration of rules of the Unions - Ordered Accordingly - Hospital Salaried Officers Association of Western Australia (Union of Workers) -v- (Not applicable) - APPL 169, 170, 171,172, 173,174,175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230,231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 496 of 1995 - Full Bench - SHARKEY P/BEECH C/GIFFORD C. - 02/04/96 - Unions 1671

CUMULATIVE DIGEST—*continued*

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INDUSTRY

Conference referred re claim for compensation allowance - Applicant union claimed that construction related disabilities experienced were greater than those previously considered and level of disability reflected changed in conditions - Respondent argued that construction related site disabilities addressed were overstated and were essentially no different to those usually present in construction industry - Commission found on evidence and via inspection that overall degree of disabilities which existed were in excess of those compensated by existing allowance and operative date of allowance be earliest date - Ordered Accordingly - Transfield Construction WA -v- AUTO, FOOD, METAL, ENGIN UNION & Other - CR 271 of 1995 - PARKS C - 27/11/95 - General Construction 231

Conference referred re implementation of part of EBA re career structure - Applicant claimed that as part of EBA it intended to train six mechanical tradespersons to obtain qualification and possession of Restricted Electrical Licence (REL) - 1st Respondent union argued that interpretation of word "may" in EBA was to mean "never" and opposed training of mechanical tradespersons - Commission found on evidence that some cross-skilling in electrical fundamentals had occurred before the EBA and could not accept 1st union's interpretation - Commission further found that to deal with the demarcation issue, an agreement regarding content of modules and hours be reached between Applicant and 2nd Respondent union, discussed with 1st Respondent union and re-convened before the Commission - Decision Issued - BHP Iron Ore Pty Ltd -v- Australian Electrical, Electronics, Foundry and Engineering Union (Western Australian Branch) & Other - CR 100 of 1995 - BEECH C - 12/01/96 - Metal Ore Mining 464

[2]Appeal against decision of Industrial Magistrate (unreported) re dismissed complaint for breach of award - Appellant claimed that Magistrate misapplied the law and should have found the subject award applied to horticultural (nursery) industry as evidence was led to show - Full Bench reviewed authorities and found that no evidence existed upon which Industrial Magistrate could find that the purpose and function of Respondent was the nursery industry - Full Bench further found that as scope clause was intended to refer to all employees employed in the industries Respondent was engaged in, no grounds of appeal were made out - Dismissed - The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- Sumich Group Ltd - APPL 101 of 1996 - Full Bench - SHARKEY P/BEECH C/GIFFORD C. - Coal Mining 942

Applications for registration of industrial agreements - Applicant union claimed that as agreements applied to single enterprise they were pursuant to s.41 and no requirement to comply with terms of s.41(a) existed as no term was contrary to the Act, General Order or Principle - Respondent argued that agreements constituted one agreement applying to multitude of enterprises and could not be registered, as s.41(a) requirements were not being met - Commission reviewed authorities and found that as each agreement applied to a single enterprise, the restrictions of s.41(a) did not apply and subject to parties giving true intentions, agreements be registered - Granted - The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers -v- Formgrow Pty Ltd T/A Plasterwise Plastering Contractors - AG 178, 187, 210, 213, 214, 217, 218, 220, 221, 222, 223, 224, 225, 226, 227, 228, 230, 231, 232, 233, 237, 238, 239, 240, 241, 242, 243, 244 , 245, 246 of 1995 - SCOTT C. - 13/11/95 - Various 1005

[2]Applications pursuant to s.72A of I.R. Act 1979, seeking orders to represent the industrial interest of "PACTS" employees - Applicant Union (HSOA) submitted orders sought, would further the objects of the Act, were consistent with objectives of wage fixing principles, will reduce number of awards allowing for better industrial representation and management of employees and through Union rationalisation aid ongoing reform in the health industry - Application by Respondent Union (CSA) seeking orders to represent industrial interests of salaried employees, employed by the Commissioner of Health in business and activities as set out in application - Respondent Union submitted it had, historic coverage and continues to have significant actual membership coverage, provided impetus in relation to public health sector employees in matters of award entitlement and argued failure to grant orders would result in demarcation in the public health sector - Full Bench granted a number of "parties" leave to be heard pursuant to s.72A of Act, however dismissed all applications for leave to intervene pursuant to s.27(1)(k) of the Act - Full Bench reviewed authorities and noted arguments of both the Unions with regard to historical industrial coverage, change in status of employee, current work practices of employees and overall benefits sought by the employer, employees and Union. Full Bench found both parties had merits to their application, however issued decision and order defining the respective coverage of the unions and referred to the President, matters requiring alteration of rules of the Unions - Ordered Accordingly - Hospital Salaried Officers Association of Western Australia (Union of Workers) -v- (Not applicable) - APPL 169, 170, 171,172, 173,174,175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230,231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 496 of 1995 - Full Bench - SHARKEY P/BEECH C/GIFFORD C. - 02/04/96 - Unions 1671

Application for deletion of respondents to an award - Applicant Union accepted that the companies seeking to be deleted did not employ, and were not likely to employ in the future, persons covered by the Award, but objected to the deletions - Respondent Companies argued that as they no longer employ persons in the classifications, or engage in the industry described in the Award, they were no longer governed by the Award and should be deleted from list of respondents to the Award - Commission reviewed the claim and found that as neither of the companies were presently governed by the Award, no good purpose was served for them to remain named therein - Granted - The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- Ampol Petroleum Ltd & Others - APPLB 1005 of 1995 - PARKS C - 13/05/96 - Motor Vehicle Rtlg & Services 1992

INDUSTRY ALLOWANCE

Conference referred re amendment of conditions of employment of the re-employment order (3) (73 WAIG 1898) - Applicant union claimed that aforestated order did not provide opportunity to buy back accrued annual leave, sick leave and long service leave, that entitlements accrued up to termination were not paid out and omitted from new contracts of employment - Leave to intervene was sought by AEEFEU and granted to represent two of its other members - Respondent argued that Commission lacked jurisdiction to hear and determine the matter - Commission reviewed I.R. Act, Workplace Agreements, authorities and found on evidence that it lacked jurisdiction and power to arbitrate some claims as affected persons and employment relationships were parties to Workplace Agreement Act 1993 - Declared and Ordered Accordingly - The Australian Workers' Union and Another -v- Robe River Iron Associates and Another - CR 446 of 1993;CR 71 of 1994 - PARKS C - 12/03/96 - Coal Mining 1443

INTERPRETATION-WORDS & PHRASES

[2]Appeal against decision of Commission (75 WAIG 2871) re dismissed application for stay of inquiry on the grounds of denied natural justice - Appellant claimed that Commission was outside its jurisdiction as the matter was not seen as industrial when the tribunal carried out a statutory function in accordance to the Education Act - Respondent argued that it was an industrial matter as defined by s.7 of the Education Act as it dealt with behaviour and/or performance and had the potential to result in the punishment of and termination of employment - Full Bench reviewed authorities and found on evidence that the Commission was not deprived of jurisdiction to hear and determine the matter under s.23B of the Act and had not erred in dismissing the application under s.27 of the Act as it merely made arbitration orders - Dismissed - Hon Minister for Education -v- State School Teachers Union of W.A. (Inc) - APPL 937 of 1995 - Full Bench - SHARKEY P/GEORGE C/SCOTT C. - 18/12/95 - Education 35

CUMULATIVE DIGEST—*continued*

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INTERPRETATION-WORDS & PHRASES—*continued*

Application pursuant to Public Sector Management Act re unfair recruitment, selection and appointment process - Applicant claimed they had been a denied "like to like" transfer entitlement and due to unfair and improper invitations made to other ineligible persons, was placed in a disadvantageous predicament - Applicant further claimed that appointments were contrary to Redeployment & Redundancy Regulations and sought an order to restrict the appointments from only former Senior Counsellors - Respondent argued that Applicant's interpretation of the Regulations was incorrect and that the appointment of the positions was a discretionary matter for the employer and not subject to the Regulations - Commission reviewed authorities and found on evidence that it was not open to determine whether the Transfer Regulation had been applied fairly and applicant's claim for unfair and improper application of Regulations had been applied fairly and Applicant's claim for unfair and improper application of Regulations had not been made out - Dismissed - Mr DA Sheahan -v- Hon Min for Education, Employment and Training - APPL 1123 of 1995 - GIFFORD C. - 22/12/95 - Government Administration 215

Application for variation re Resignation, Retirement and Severance and Continuity of Service - Applicant claimed that withholding of forfeited sum was illegal if without the consent of employee - Applicant further claimed that Continuity clause be altered to include words "shall be" before "treated as if the employment was continuous" to correct previous error - Respondent argued that the forfeited sum would be as a fine or a loss of a right, not an overpayment and Treasurer Instruction 515 allowed for deductions to be made - Respondent further argued that provision was justified on administrative convenience and to avoid expensive recovery action if refusal occurred - Commission found on evidence that Applicant's claim was misconceived and that as the proviso to placitum (i) of the paragraph within the clause was inconsistent with the general provisions of the new clause it should not form part - Commission further found that meaning of "employee" was to include Electorate Officer and clause should reflect meaning, in retaining the words "electorate officer" - Granted - The Civil Service Association of Western Australia Incorporated -v- Hon James Clarko, MLA & Other - P 46 of 1993 - GEORGE C - Sport and Recreation 378

Conference referred re implementation of part of EBA re career structure - Applicant claimed that as part of EBA it intended to train six mechanical tradespersons to obtain qualification and possession of Restricted Electrical Licence (REL) - 1st Respondent union argued that interpretation of word "may" in EBA was to mean "never" and opposed training of mechanical tradespersons - Commission found on evidence that some cross-skilling in electrical fundamentals had occurred before the EBA and could not accept 1st union's interpretation - Commission further found that to deal with the demarcation issue, an agreement regarding content of modules and hours be reached between Applicant and 2nd Respondent union, discussed with 1st Respondent union and re-convened before the Commission - Decision Issued - BHP Iron Ore Pty Ltd -v- Australian Electrical, Electronics, Foundry and Engineering Union (Western Australian Branch) & Other - CR 100 of 1995 - BEECH C - 12/01/96 - Metal Ore Mining 464

[1]Appeal against decision of President (75 WAIG 2950) re orders for breach of union rules - Appellant claimed that in first order President was without power under s.66 of the Act to make direction as no rule existed which required re-imbursement or repayment of monies - Appellant further claimed that granting President's second and third orders would compel union to institute proceedings if General Trustees refused and that rules cast obligation only on General Trustees - IAC reviewed union rules and authorities and found that as rule 22 imposed an obligation of General Committee to direct General Trustees to instigate legal proceeding against misappropriation, President's order was within powers of s.66 of the Act - IAC further found that Appellant's submissions against second and third orders were valid and would be granted, but could not accept challenge of orders on natural justice - Granted in Part - The West Australian Locomotive Engine Drivers', Firemen's and Cleaners' Union of Workers -v- Mr E Schmid & Others - IAC 12 of 1995 - Industrial Appeal Court - Kennedy J./Franklyn J./Anderson J. - 20/02/96 - Unions 639

[4]Application for orders re breach of union rules - Applicant claimed Respondents' had failed to adhere to union rules through failing to conduct referendum, failing to meet legal expenses exceeding $8.00 provision and sought order accordingly - Respondent initially did not oppose order but later argued that as incurring of expenses could result in possible breach of contract it was not practicable to hold referendum and that issuance of declaration would affect rights of innocent payees - President reviewed union rules and found that under rule 45, the authorisation of incurring and payment of legal expenses was specifically approved by General Committee and that General Committee's interpretation of rules 45 and 46 and "practicable" was incorrect - President further found that as Respondent had breached rule 46 the decision and action were ultra vires the rules and void, and as no demonstration of affected rights had been made out, declaration to issue - Declared and Ordered Accordingly - Mr E Schmid -v- The West Australian Locomotive Engine Drivers', Firemen's and Cleaners' Union of Workers - APPL 1272 of 1995 - President - SHARKEY P - 23/11/95 - Unions 641

Applications for registration of industrial agreements - Applicant union claimed that as agreements applied to single enterprise they were pursuant to s.41 and no requirement to comply with terms of s.41(a) existed as no term was contrary to the Act, General Order or Principle - Respondent argued that agreements constituted one agreement applying to multitude of enterprises and could not be registered, as s.41(a) requirements were not being met - Commission reviewed authorities and found that as each agreement applied to a single enterprise, the restrictions of s.41(a) did not apply and subject to parties giving true intentions, agreements be registered - Granted - The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers -v- Formgrow Pty Ltd T/A Plasterwise Plastering Contractors - AG 178, 187, 210, 213, 214, 217, 218, 220, 221, 222, 223, 224, 225, 226, 227, 228, 230, 231, 232, 233, 237, 238, 239, 240, 241, 242, 243, 244 , 245, 246 of 1995 - SCOTT C. - 13/11/95 - Various 1005

Application for denied contractual entitlements re annual leave payments - Applicant claimed payment for four weeks annual leave notwithstanding change in position and move from award entitlement to contract of service - Respondent argued that there was no express provision in contract for payment in lieu of annual leave on resignation, and that no evidence existed before the Commission for term to be implied - Respondent however acknowledged Minimum Condition Act but argued it was outside Commission's jurisdiction - Commission found on past course of dealing between parties that it was open to imply a term into "leave" provision and having reviewed authorities granted entitlement for period calculated on completed weeks of service - Granted - Mr G Nealings -v- Crommelins Handyman Hire & Sales - APPL 975 of 1995 - GIFFORD C. - 07/03/96 - Personal Services 1194

Application for interpretation of Supermarkets and Chain Stores Warehouse Award 1982 No. A26 of 1982 - Applicant claimed interpretation of Clause 35(7) to determine whether it applied to shift workers engaged to work overtime on an afternoon shift on Sunday - respondent argued that as shift work could only occur within limits of ordinary hours, work performed on Sunday was not shift work, but overtime - Commission found on evidence that Clause 35(7) of the Award did not apply to employees on Sunday overtime, only to overtime during the week Monday to Friday - Decision Issued - The Shop, Distributive and Allied Employees' Association of Western Australia -v- Woolworths (WA) Limited & Other - APPL 83 of 1996 - GIFFORD C. - 18/04/96 - Food Retailing 1418

CUMULATIVE DIGEST—*continued*

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INTERVENTION

[2]Appeal against decision of Commission (75 WAIG 2871) re dismissed application for stay of enquiry - Appellant claimed Commission erred in dismissing application when opportunity to present denied natural justice evidence was not given and in failing to refer application for hearing and determination pursuant to s44(9) of the I.R. Act - Appellant further claimed that Commission erred in failing to intervene the section 7c enquiry when sufficient material to justify intervention existed, had erred in law and fact in finding that section 7c enquiry was conducted in a just manner and that the Commission lacked jurisdiction to enquire into and deal with claim - Respondent argued that the investigations conducted by headmaster were part of the normal running of the school and that the Chief Executive, pursuant to section 7c of the Education Act had set in train and enquiry - Full Bench reviewed authorities and found on evidence that no grounds of appeal had been made out nor had Commission erred and there did not exist any denial of natural justice, in particular, in any event - Dismissed - State School Teachers Union of W.A. (Inc) -v- Hon Min for Education - APPL 1127 of 1995 - Full Bench - SHARKEY P/HALLIWELL SC/PARKS C - 21/12/95 - Education..... 40

[4]Application for a stay of "finding" for Application No. PSA AG2 of 1995 of Public Service Arbitrator (75 WAIG 3052) pending appeal to Full Bench re registration of an industrial agreement - Applicant claimed that Commission erred as the provisions stipulated by s.80C(4) of the Act in conjunction with s.41 were not considered, that the interpretation of s.41 was questionable and challenged limited right to intervene - Applicant further claimed that HSOA lacked constitutional coverage to be party to the s.41 agreement and that Commission had not considered the circumstances in which the HSOA had sought to amend its constitution - Respondents argued that the balance of convenience lay with them and if the decision was stayed it would be against public interest as the Pathcentre would be award free and would cause irremediable harm - Respondent further argued that in the event of successful appeal with the agreement registered, an application to revoke the agreement or vary the award would occur - President reviewed authorities and found on evidence that the balance of convenience favoured the Applicant as the question of constitutional coverage was being addressed by the Full Bench and thereby constituted a serious issue to be tried - Granted - The Civil Service Association of Western Australia Incorporated -v- Western Australian Centre for Pathology and Medical Research - APPL 1311 of 1995 - President - SHARKEY P - 04/12/95 - Health Services..... 60

Application to re-open hearing re registration of industrial agreement - 2nd Union sought intervention as it claimed employees in new positions would, in part, perform duties covered by an award which they were party to, that under s.26(1) of the I.R. Act a requirement to take account of employees' interest existed and re-opening would enable an opportunity to be heard - Parties argued that by virtue of s.41(2) of the I.R. Act an obligation existed to register agreement and as it was inappropriate and unnecessary to re-open hearing it urged finalisation of registration - Commission found on evidence that as agreement did not cover salaried officers eligible of 2nd Union, objections by 2nd Union were rejected and agreement registered - Ordered Accordingly - W.A. Government Railways Commission -v- Australian Railways Union of Workers, West Australian Branch - AG 275 of 1995 - SCOTT C. - 27/11/95 - Road Transport..... 147

Application for registration of agreements - Preliminary discussion re Intervening Union claimed interpretation of state and federal eligibility rules caused confusion with rights and obligations of unions, and this resulted in lack of clarity of terms of Agreements - Commission found on evidence that as application of agreement was not ambiguous but reflected intention of parties and satisfied the requirements of the Act, intervention was dismissed - Dismissed - Western Australian Government Railways Commission -v- The West Australian Locomotive Engine Drivers', Firemen's and Cleaners' Union of Workers - AG 20,21 of 1996 - SCOTT C. - 26/02/96 - Rail Transport..... 1107

[2]Appeal against decision of Commission (75WAIG2522) re registration of industrial agreement - Appellant claimed that as Commission denied natural justice by revoking intervention status and erred in law in registering the agreement, full intervention status relating to agreement and current appeal be granted - Appellant further claimed that appeal raised sufficient matters of public interest to warrant further hearing and determination - Respondent argued that as appellant's officers had not been duly elected, Full Bench was without jurisdiction to hear matter - Full Bench reviewed I.R. Act and authorities and found that the Commission had power to permit intervention and did so generally and unconditionally, but erred at first instance in holding that mandatory requirement to register agreement existed without the agreement meeting all criteria - Full Bench further found that Appellant was denied natural justice - Upheld - LIQUOR, HOSPITALITY & MISC -v- Burswood Resort (Management) Ltd & Other - APPL 1075 of 1995 - Full Bench - SHARKEY P/HALLIWELL SC/BEECH C - 03/04/96 - Sport and Recreation 1281

Conference referred re amendment of conditions of employment of the re-employment order (3) (73 WAIG 1898) - Applicant union claimed that aforestated order did not provide opportunity to buy back accrued annual leave, sick leave and long service leave, that entitlements accrued up to termination were not paid out and omitted from new contracts of employment - Leave to intervene was sought by AEEFEU and granted to represent two of its other members - Respondent argued that Commission lacked jurisdiction to hear and determine the matter - Commission reviewed I.R. Act, Workplace Agreements, authorities and found on evidence that it lacked jurisdiction and power to arbitrate some claims as affected persons and employment relationships were parties to Workplace Agreement Act 1993 - Declared and Ordered Accordingly - The Australian Workers' Union and Another -v- Robe River Iron Associates and Another - CR 446 of 1993;CR 71 of 1994 - PARKS C - 12/03/96 - Coal Mining..... 1443

[2]Applications pursuant to s.72A of I.R. Act 1979, seeking orders to represent the industrial interest of "PACTS" employees - Applicant Union (HSOA) submitted orders sought, would further the objects of the Act, were consistent with objectives of wage fixing principles, will reduce number of awards allowing for better industrial representation and management of employees and through Union rationalisation aid ongoing reform in the health industry - Application by Respondent Union (CSA) seeking orders to represent industrial interests of salaried employees, employed by the Commissioner of Health in business and activities as set out in application - Respondent Union submitted it had, historic coverage and continues to have significant actual membership coverage, provided impetus in relation to public health sector employees in matters of award entitlement and argued failure to grant orders would result in demarcation in the public health sector - Full Bench granted a number of "parties" leave to be heard pursuant to s.72A of Act, however dismissed all applications for leave to intervene pursuant to s.27(1)(k) of the Act - Full Bench reviewed authorities and noted arguments of both the Unions with regard to historical industrial coverage, change in status of employee, current work practices of employees and overall benefits sought by the employer, employees and Union. Full Bench found both parties had merits to their application, however issued decision and order defining the respective coverage of the unions and referred to the President, matters requiring alteration of rules of the Unions - Ordered Accordingly - Hospital Salaried Officers Association of Western Australia (Union of Workers) -v- (Not applicable) - APPL 169, 170, 171,172, 173,174,175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 496 of 1995 - Full Bench - SHARKEY P/BEECH C/GIFFORD C. - 02/04/96 - Unions..... 1671

CUMULATIVE DIGEST—*continued*

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JURISDICTION

[2]Appeals against decision of the Commission (75 WAIG 155 & 966) re dismissed applications for denied contractual entitlements - Appellants claimed that the Commission erred at first instance in strictly applying the Hastings case, and in incorrectly applying the test of the Western Port case regarding implied redundancy terms - Appellant further claimed Commission erred by failing to grant sufficient weight to evidence with respect to the custom and practice and in determining that the alternative employment was suitable - Respondent argued that the part of the Commission's decision relating to the payment of pro-rata long service leave entitlement be appealed as it exceeded its jurisdiction and the claims were made in respect of redundancy payments and not long service leave - Respondent further argued Commission had adopted an "arbitral" approach rather than the required "judicial" approach and sought the decision to be dismissed - Full Bench reviewed authorities and found on evidence that the Commission had not implied a term relating to redundancy or severance payments as a matter of necessity into a contract, that the alternative employment found was only partially suitable as it did not preserve any existing service or accrued entitlements and under the circumstances there was a term allowing redundancy or severance payments - Full Bench further found that the Commission erred in the proper exercise of its discretion in ordering the payment of pro -rata long service leave to one of the Appellants - Upheld, Quashed and Ordered Accordingly - R Lawson & Others -v- Joyce Australia Pty Ltd - APPL 420,448 of 1995 - Full Bench - SHARKEY P/COLEMAN CC/GIFFORD C. - 18/12/95 - Personal & Household Good Rtlg..... 20

[2]Appeals against decision of Commission (75 WAIG 1975 & 2251) re orders re cancellation of work bans and commencement of negotiations - Appellant claimed Commission erred in finding it had jurisdiction to make orders in relation to duties not contained in contract of employment and not within definition of 'industrial matter' - Appellant further claimed that Commission had erred in denying procedural fairness by making orders which were before AIRC and also made in a final rather than an interim form - Respondent argued that as AEU was not party to proceedings, it would not be affected by orders made by Commission - Majority Full Bench reviewed authorities and found that Commission erred in law under s.34(1) of the I.R. Act by not hearing evidence or submissions relating to jurisdiction prior to making orders, in not determining if matters were 'industrial matters' which action was deemed ultra vires and/or without statutory authorities - Majority Full Bench further found that Commission had determined jurisdiction by recording parties concerns as to jurisdiction on transcript and that it was for the Commission to decide extent of submissions and evidence necessary to determine questions before it - Minority Full Bench found that as matters before Commission affected or related to the work, privileges, rights or duties of employers or employees in industry, they constituted 'industrial matters' and as orders were not final they could be varied, set aside or cancelled and remained in force when conciliation/arbitration had finally resolved all industrial matters in dispute - Upheld and Quashed - State School Teachers Union of W.A. (Inc) -v- Hon Min for Education - APPL 587,723 of 1995 - Full Bench - SHARKEY P/GEORGE C/SCOTT C. - 13/12/95 - Education..... 27

[2]Appeal against decision of Commission (75 WAIG 2871) re dismissed application for stay of inquiry on the grounds of denied natural justice - Appellant claimed that Commission was outside its jurisdiction as the matter was not seen as industrial when the tribunal carried out a statutory function in accordance to the Education Act - Respondent argued that it was an industrial matter as defined by s.7 of the Education Act as it dealt with behaviour and/or performance and had the potential to result in the punishment of and termination of employment - Full Bench reviewed authorities and found on evidence that the Commission was not deprived of jurisdiction to hear and determine the matter under s.23B of the Act and had not erred in dismissing the application under s.27 of the Act as it merely made arbitration orders - Dismissed - Hon Minister for Education -v- State School Teachers Union of W.A. (Inc) - APPL 937 of 1995 - Full Bench - SHARKEY P/GEORGE C/SCOTT C. - 18/12/95 - Education 35

[2]Appeal against decision of Commission (75 WAIG 2871) re dismissed application for stay of enquiry - Appellant claimed Commission erred in dismissing application when opportunity to present denied natural justice evidence was not given and in failing to refer application for hearing and determination pursuant to s44(9) of the I.R. Act - Appellant further claimed that Commission erred in failing to intervene the section 7c enquiry when sufficient material to justify intervention existed, had erred in law and fact in finding that section 7c enquiry was conducted in a just manner and that the Commission lacked jurisdiction to enquire into and deal with claim - Respondent argued that the investigations conducted by headmaster were part of the normal running of the school and that the Chief Executive, pursuant to section 7c of the Education Act had set in train and enquiry - Full Bench reviewed authorities and found on evidence that no grounds of appeal had been made out nor had Commission erred and there did not exist any denial of natural justice, in particular, in any event - Dismissed - State School Teachers Union of W.A. (Inc) -v- Hon Min for Education - APPL 1127 of 1995 - Full Bench - SHARKEY P/HALLIWELL SC/PARKS C - 21/12/95 - Education..... 40

Application for denied contractual entitlements - Applicant claimed in preliminary point that Commission did have jurisdiction as the Federal Commission lacked jurisdiction to deal with enforcement of contractual entitlements - Applicant claimed that non award benefit had been denied in regards to the use of motor vehicle for commuting purposes - Respondent argued in preliminary point that Commission lacked jurisdiction as employment was covered by paid rates award of the Australian Commission and matter was before the Australian Commission - Respondent argued that use of motor vehicle formed part of contract of employment and as use was granted at its discretion it was entitled to withdraw use at its discretion - Commission found on evidence that employer did not enter into a contractual arrangement, but rather an arrangement at employer's convenience which terminated due to review of vehicle usage - Dismissed - Mr G Roy -v- Western Power - APPL 447 of 1995 - SCOTT C. - 12/09/95 - Electricity and Gas Supply 209

Application pursuant to Public Sector Management Act re unfair recruitment, selection and appointment process - Applicant claimed they had been a denied "like to like" transfer entitlement and due to unfair and improper invitations made to other ineligible persons, was placed in a disadvantageous predicament - Applicant further claimed that appointments were contrary to Redeployment & Redundancy Regulations and sought an order to restrict the appointments from only former Senior Counsellors - Respondent argued that Applicant's interpretation of the Regulations was incorrect and that the appointment of the positions was a discretionary matter for the employer and not subject to the Regulations - Commission reviewed authorities and found on evidence that it was not open to determine whether the Transfer Regulation had been applied fairly and applicant's claim for unfair and improper application of Regulations had been applied fairly and Applicant's claim for unfair and improper application of Regulations had not been made out - Dismissed - Mr DA Sheahan -v- Hon Min for Education, Employment and Training - APPL 1123 of 1995 - GIFFORD C. - 22/12/95 - Government Administration..... 215

Conference re cancellation of interlocutory order - Applicant claimed that it would be less than equitable for the interlocutory order to be cancelled - Respondent Union argued that interlocutory order requiring the cessation of industrial action be cancelled as they were denied an opportunity to fully address the relevance of the situation as a "federal" matter prior to the order being issued and order was consequently wrongly made without practical effect and without being an industrial matter - Commission found on evidence that the order to end the industrial action was justified, however, on the premise that negotiations had resumed on amicable grounds the interlocutory order be cancelled - Ordered Accordingly - St John of God Hosp Murdoch -v- LIQUOR, HOSPITALITY & MISC - C 326 of 1995 - PARKS C - 22/12/95 - Health Services . 220

CUMULATIVE DIGEST—*continued*

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JURISDICTION—*continued*

Conference referred re order for redundancy payment - Applicant claimed that redundency clause in Metal Trades (General) Award applied to employees listed and sought order that any termination entitlement would not be offset by any superannuation amount received - Respondent argued that it was not bound by award and Commission should refrain from hearing as question of respondancy was before Industrial Magistrate and current matter be adjourned pending outcome - Respondent further argued that, Commission was without jurisdiction to determine matters - Commission reviewed authorities and found, on balance, that no establishment had been made in regards to departure of employers right from case and to do so would not be unfair in the circumstances - Dismissed - Amalgamated Metal Workers Union of Western Austral ia -v- Australian Agricultural Machinery - CR 432 of 1991 - GEORGE C - 03/01/96 - Machinery & Equipment Mfg 223

Application to stay order re conduct of section 7c enquiry - Applicant claimed preliminary point that there would be costs incurred in proceeding before the Tribunal which may be thrown away if IAC ruled tribunal lacked jurisdiction to have issued order - Tribunal found on evidence that there was a serious matter to be tried before the Tribunal and as there was insufficient facts of the matter to cause any further delay, hearing be set down - Ordered Accordingly - State School Teachers Union of W.A. (Inc) -v- Hon Min for Education - T 15 of 1994 - Government School Teachers Tribunal - Beaman M./BEECH C - 02/01/96 - Education 272

Application for compensation re unfair dismissal - Applicant claimed that although employment was casual, an expected continuity existed and that as requirements of s29(1)(b) were satisfied claim was within Commission jurisdiction - Respondent argued that termination was justified as the Applicant was a casual employee employed on separate individual contracts and Commission lacked jurisdiction - Commission reviewed authorities and found that the nature of the contract did not offer ongoing employment to the Applicant - Commission further found that Applicant was a true casual and that employment on that day merely came to an end at the conclusion of work performed - Dismissed - Mr CR Dorant -v- JLV Industries Pty Ltd - APPL 638 of 1995 - GIFFORD C. - 12/01/96 - Business Services..... 440

Application for contractual entitlements on the grounds of unfair dismissal and subsequent application to strike out previous application for want of jurisdiction - Applicant claimed that unfair dismissal was within the Commission's jurisdiction due to enactment of the Industrial Legislation Amendment Act 1995 (s.42(3)), in that 28 day limit no longer applied - Respondent argued that Commission lacked jurisdiction and was functus officio as matter was previously determined by the Commission - Commission reviewed authorities and found on evidence that it lacked jurisdiction to determine matter as claim was lodged out of time limit - Commission further found that matter did not come under section 42(3) of the Industrial Legislation Reform Act and that the Act was not intended to apply retrospectively - Dismissed for want of jurisdiction - Mr GHT Flaherty -v- Siemens Aust Ltd - APPL 559 & 835 of 1995 - BEECH C - 26/02/96 - Construction Trade Services..... 731

Application for reinstatement on the grounds of unfair dismissal - Applicant sought reinstatement as termination occurred when on sick leave and was unfair - Respondent argued that under section 152 of the I.R. Act (Cth) Commission lacked jurisdiction in determining claim as Applicant was covered by a federal award - Commission reviewed authorities and found on evidence that federal award did apply and that order for reinstatement would negate provision of federal award, resulting in an inconsistency - Dismissed for want of jurisdiction - Mr MW McKeagg -v- Dyno Wesfarmers Limited - APPL 811 of 1995 - GEORGE C - 01/03/96 - Services to Mining..... 740

[1]Appeal against decision of Full Bench (75 WAIG 2934) re dismissed appeal re granted award variation - Appellant claimed that as awards could not be amended or varied by custom or usage, the Full Bench erred in determining that the right to the public holiday arose in that way, and, that a paid leave day was part of existing award wage conditions - Appellant further claimed Full Bench erred in law in failing to hold that Commission had acted in excess of jurisdiction in varying award without referral for consideration as special case - IAC reviewed the I.R. Act and authorities and found that as the Minister had failed to establish that the amendment could only be made pursuant to s.40(3) of the Act, the application to vary was under s.40(1) and did not have restrictions imposed under s.40(3) - IAC further found that no error in the manner of exercise of discretion nor error in law or excessive jurisdiction had been established - Dismissed - Hon Min for Health -v- LIQUOR, HOSPITALITY & MISC - IAC 14 of 1995 - Industrial Appeal Court - Kennedy J./Rowland J./Anderson J. - 27/03/96 - Health Services..... 930

[2]Appeal against decision of Commission (75 WAIG 3068) re denied application for reinstatement of the grounds of unfair dismissal - Appellant claimed Commission erred in fact and law in finding that termination was effected by Appellant and that employee was engaged as casual employee on ongoing basis - Appellant further claimed that as no ongoing employment relationship existed, Commission lacked jurisdiction to deal with application - Full Bench reviewed authorities and found on evidence that as Respondent was not a casual worker in terms of the award definition, summary dismissal was unlawful and unfair and Commission had jurisdiction to make order for reinstatement - Dismissed - Serco (Australia) Pty Ltd -v- Mr JJ Moreno - APPL 1281 of 1995 - Full Bench - SHARKEY P/BEECH C/SCOTT C. - 19/03/96 - Food Retailing 937, 2023

[2]Appeal against decision of Industrial Magistrate (74 WAIG 2766) re dismissed complaints for breaches of awards - Application remitted back from Industrial Appeal Court - Respondent argued that there would be substantial arguments in relation to questions of findings to be made and that under s.90 of I.R. Act the Industrial Appeal Court could not remit matter directly back to Industrial Magistrate, only to Full Bench - Full Bench found on evidence that orders sought by Appellant should be made and outstanding matters of fact be determined by Industrial Magistrate - Ordered Accordingly - Ms E Ducasse -v- P Aitken - APPL 1032 of 1994 - Full Bench - SHARKEY P/COLEMAN CC/GEORGE C - Services to Transport 944

Conference referred re granting pro-rata Long Service Leave - Applicant union claimed that notwithstanding employee's resignation from Respondent, pro-rata long service leave should be awarded - Respondent argued that Commission lacked jurisdiction to deal with matter as Applicant was not an 'employee' and claim did not constitute industrial matter - Commission reviewed I.R. Act and authorities and found that the as Long Service Leave Appeal Committee had authority to deal with claim, claim should have been first dealt with in that forum, Commission leaves applications in abeyance and are dismissed - Dismissed - LIQUOR, HOSPITALITY & MISC -v- Zoological Gardens Board - CR 257,261 of 1995 - GIFFORD C. - 22/03/96 - Libraries Museums and the Arts 1202

[2]Appeal against decision of Commission (75WAIG2522) re registration of industrial agreement - Appellant claimed that as Commission denied natural justice by revoking intervention status and erred in law in registering the agreement, full intervention status relating to agreement and current appeal be granted - Appellant further claimed that appeal raised sufficient matters of public interest to warrant further hearing and determination - Respondent argued that as appellant's officers had not been duly elected, Full Bench was without jurisdiction to hear matter - Full Bench reviewed I.R. Act and authorities and found that the Commission had power to permit intervention and did so generally and unconditionally, but erred at first instance in holding that mandatory requirement to register agreement existed without the agreement meeting all criteria - Full Bench further found that Appellant was denied natural justice - Upheld - LIQUOR, HOSPITALITY & MISC -v- Burswood Resort (Management) Ltd & Other - APPL 1075 of 1995 - Full Bench - SHARKEY P/HALLIWELL SC/BEECH C - 03/04/96 - Sport and Recreation 1281

CUMULATIVE DIGEST—*continued*

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JURISDICTION—*continued*

Complaint re breach of Industrial Relations Act - Complainant claimed that as Defendant failed to comply with GSTT order by denying permanent appointments to AMES lecturers whom satisfied criteria for permanency, enforcement of previous order should occur - Defendant argued that criteria specified that "management" was to determine on-going need for appointed positions and that breach had not occurred - Industrial Magistrate reviewed authorities and found on evidence that although Defendant was not bound by issue of estoppel, it failed to comply with order and that the complaint was proven - Complainant invited to be heard on final orders - Decision Issued - State School Teachers Union of W.A. (Inc) -v- Hon Minister for Education & Training - CP 2607 of 1994 - Industrial Magistrate - Reynolds IM - 01/05/96 - Education 1425

Conference referred re amendment of conditions of employment of the re-employment order (3) (73 WAIG 1898) - Applicant union claimed that aforestated order did not provide opportunity to buy back accrued annual leave, sick leave and long service leave, that entitlements accrued up to termination were not paid out and omitted from new contracts of employment - Leave to intervene was sought by AEEFEU and granted to represent two of its other members - Respondent argued that Commission lacked jurisdiction to hear and determine the matter - Commission reviewed I.R. Act, Workplace Agreements, authorities and found on evidence that it lacked jurisdiction and power to arbitrate some claims as affected persons and employment relationships were parties to Workplace Agreement Act 1993 - Declared and Ordered Accordingly - Metals and Engineering Workers' Union and Another -v- Robe River Iron Associates and Another - CR 446 of 1993;CR 71 of 1994 - PARKS C - 12/03/96 - Coal Mining 1443

[1]Appeal against decision of Full Bench (76 WAIG 20) re payment of denied contractual entitlements - Appellant claimed, in preliminary point, that Full Bench erred in determining that Commission had jurisdiction to hear matter - Respondent argued that Full Bench's decision regarding jurisdiction should be affirmed without reversing Pepler's case, as claims were made before termination and for contractual entitlements not compensation - IAC reviewed authorities and found that the rules in Pepler's case applied to the current application - Preliminary point granted - Joyce Corporation Ltd T/A Joyce Australia -v- R Lawson & Others - IAC 1 of 1996 - Industrial Appeal Court - Franklyn J./Rowland J./Anderson J. - 15/05/96 - Personal & Household Good Rtlg 1653

[2]Appeal against decision of Commission (unpublished) re granted payment of contractual benefits - Appellant claimed Commission erred in fact and law in failing to apply proper law relating to contractual benefits claim under IR Act, lacked jurisdiction to hear matter - Full Bench reviewed authorities and found that as s7 of IR Act had nothing but prospective operation from its own terms and terms of the Act, Commission lacked jurisdiction to hear and determine matter - Upheld - Lawrence Peter Ferris and Maureen Carroll T/A Carroll Realty -v- Mr JWC Chambers - APPL 539 of 1996 - Full Bench - SHARKEY P/COLEMAN CC/GEORGE C - 30/05/96 - Property Services 1656

[2]Appeal against decision of Commission (76 WAIG 451) re dismissed claim for unfair dismissal, compensation and contractual entitlements - Appellant claimed Commission denied natural justice by failing to give opportunity to be heard and had erred in failing to find non payment of monies and deciding that it lacked jurisdiction to make orders with regards to wages - Full Bench reviewed authorities and found on evidence that cessation of employment was through resignation and in appearing before the Commission in person, appellants had given reasonable opportunity to present case and were not denied natural justice - Dismissed - S Stankovska -v- Quirk Corporate Cleaning Australia Pty Ltd - APPL 117 & 132 of 1996 - Full Bench - SHARKEY P/HALLIWELL SC/GEORGE C - 10/05/96 - Business Services 1667

Application for monetary benefits under the contract of service - Applicant claimed that he was an employee of the respondent and owed monetary benefits - Respondent argued that no employer/employee relationship existed and the commission lacked jurisdiction to deal with it - Commission found that the applicant failed to prove that employer/employee relationship existed and the Commission did not have jurisdiction to deal with it - Dismissed - Mr D Crowe -v- Agrosoke Aust Pty Ltd T/A Yes Environmental Products & Earth Technology Brokers Pty Ltd - APPL 1224 of 1995 - PARKS C - 29/05/96 - Other Services 2016

Application for outstanding wages on the grounds of a contract of service - Applicant claimed that as there was an employer/employee relationship, compensation for unpaid weekly remuneration should be paid - Respondent argued that an employment relationship had not existed and the Commission lacked jurisdiction to deal with the matter - Commission found on evidence that as the applicant had not shown an employer/employee relationship existed, the Commission lacked jurisdiction - Dismissed - Mr O Girvan -v - Communiquardo Pty Ltd - APPL 1226 of 1995 - PARKS C - 24/04/96 - Other Services 2017

Application re interpretation of Act and stay of proceedings - Applicant union sought interpretation of Education Act 1929, declaration of an enquiry carried out in rules of natural justice not due to null and void appointment, a permanent stay of proceedings, and orders that certain particulars and parties authorised by CEO be disqualified - Defendant argued that the GSTT was without jurisdiction to restrain or influence the enquiry under the act - The Tribunal reviewed authorities and found on evidence that there was jurisdiction to issue an order in Applicant's terms, but that no grounds for delaying the satisfactory conduct of the enquiry had existed - Dismissed - State School Teachers Union of W.A. (Inc) -v- Hon Min for Education - T 15 of 1994 - Government School Teachers Tribunal - Beaman M./BEECH C/Pollard R. - 23/05/96 - Education 2059

LEAVE WITHOUT PAY

Application re reassignment to original location on the grounds of unfair transfer - Applicant claimed that due to unfair transfer he was the victim of unfair treatment and injustice and appeal against decision of the Respondent - Respondent argued that contrary to written warnings and instructions the Applicant had failed to comply with provisions of s.7C of the Education Act 1928 - Respondent further argued that after several communications the Applicant had disregarded instructions and as a result was suspended on the grounds of misconduct under s.7C(2)(a) of the Education Act 1928 - Commission reviewed authorities, Education Act 1928 and found on evidence that Applicant had not made out any grounds of appeal and accordingly the appeal be dismissed - Dismissed - Mr WG Antoniak -v- Ministry of Education - APPL 764 of 1995 - BEECH C - 11/03/96 - Education 721

LONG SERVICE LEAVE

[2]Appeals against decision of the Commission (75 WAIG 155 & 966) re dismissed applications for denied contractual entitlements - Appellants claimed that the Commission erred at first instance in strictly applying the Hastings case, and in incorrectly applying the test of the Western Port case regarding implied redundancy terms - Appellant further claimed Commission erred by failing to grant sufficient weight to evidence with respect to the custom and practice and in determining that the alternative employment was suitable - Respondent argued that the part of the Commission's decision relating to the payment of pro-rata long service leave entitlement be appealed as it exceeded its jurisdiction and the claims were made in respect of redundancy payments and not long service leave - Respondent further argued Commission had adopted an "arbitral" approach rather than the required "judicial" approach and sought the decision to be dismissed - Full Bench reviewed authorities and found on evidence that the Commission had not implied a term relating to redundancy or severance payments as a matter of necessity into a contract, that the alternative employment found was only partially suitable as it did not preserve any existing service or accrued entitlements and under the circumstances there was a term allowing redundancy or severance payments - Full Bench further found that the Commission erred in the proper exercise of its discretion in ordering the payment of pro -rata long service leave to one of the Appellants - Upheld, Quashed and Ordered Accordingly - R Lawson & Others -v- Joyce Australia Pty Ltd - APPL 420,448 of 1995 - Full Bench - SHARKEY P/COLEMAN CC/GIFFORD C. - 18/12/95 - Personal & Household Good Rtlg 20

CUMULATIVE DIGEST—*continued*

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LONG SERVICE LEAVE—*continued*

Application for pro-rata long service leave entitlements - Long Service Leave entitlement was based on ten and a half years of continuous service and continuity of employment resulting from transmission of business on two occasions - Respondent argued that the Applicant was not entitled to pro-rata long service leave as no transmission of business had occurred and the Applicant failed to have ten and a half years of continuous service - Board of Reference found on evidence that the Applicant's claim of transmission of business was without proof - Dismissed - Mr R Comley -v- Adelia Nominees Pty Ltd T/A Custom Rubber Company, Geraldton Branch - BOR 8 of 1995 - Board of Reference - LOVEGROVE DR - 19/01/96 - Machinery & Equipment Mfg 432

[3]Appeal against decision of Board of Reference (75 WAIG 2846) re pro-rata long service leave entitlements - Appellant claimed that appeal was made under correct section of the I.R. Act, which allowed legal representation of individuals - CICS reviewed I.R. Act and found that as the right to institute appeal was limited to 'organisation', 'association' or 'employer' the appeal had been instituted by persons not empowered by legislation to do so and was commenced contrary to act and was a nullity - Dismissed - Ms DA Evans -v- Meccan Pty Ltd T/A Thomas Massam Real Estate - APPL 1083 of 1995 - Commission in Court Session - PARKS C/SCOTT C./GIFFORD C. - Property Services..... 945

Conference referred re granting pro-rata Long Service Leave - Applicant union claimed that notwithstanding employee's resignation from Respondent, pro-rata long service leave should be awarded - Respondent argued that Commission lacked jurisdiction to deal with matter as Applicant was not an 'employee' and claim did not constitute industrial matter - Commission reviewed I.R. Act and authorities and found that the as Long Service Leave Appeal Committee had authority to deal with claim, claim should have been first dealt with in that forum, Commission leaves applications in abeyance and are dismissed - Dismissed - LIQUOR, HOSPITALITY & MISC -v- Zoological Gardens Board - CR 257,261 of 1995 - GIFFORD C. - 22/03/96 - Libraries Museums and the Arts 1202

Conference referred re amendment of conditions of employment of the re-employment order (3) (73 WAIG 1898) - Applicant union claimed that aforestated order did not provide opportunity to buy back accrued annual leave, sick leave and long service leave, that entitlements accrued up to termination were not paid out and omitted from new contracts of employment - Leave to intervene was sought by AEEFEU and granted to represent two of its other members - Respondent argued that Commission lacked jurisdiction to hear and determine the matter - Commission reviewed I.R. Act, Workplace Agreements, authorities and found on evidence that it lacked jurisdiction and power to arbitrate some claims as affected persons and employment relationships were parties to Workplace Agreement Act 1993 - Declared and Ordered Accordingly - The Australian Workers' Union and Another -v- Robe River Iron Associates and Another - CR 446 of 1993;CR 71 of 1994 - PARKS C - 12/03/96 - Coal Mining..... 1443

MANAGERIAL PREROGATIVE

Application pursuant to Public Sector Management Act re unfair recruitment, selection and appointment process - Applicant claimed they had been a denied "like to like" transfer entitlement and due to unfair and improper invitations made to other ineligible persons, was placed in a disadvantageous predicament - Applicant further claimed that appointments were contrary to Redeployment & Redundancy Regulations and sought an order to restrict the appointments from only former Senior Counsellors - Respondent argued that Applicant's interpretation of the Regulations was incorrect and that the appointment of the positions was a discretionary matter for the employer and not subject to the Regulations - Commission reviewed authorities and found on evidence that it was not open to determine whether the Transfer Regulation had been applied fairly and applicant's claim for unfair and improper application of Regulations had been applied fairly and Applicant's claim for unfair and improper application of Regulations had not been made out - Dismissed - Mr DA Sheahan -v- Hon Min for Education, Employment and Training - APPL 1123 of 1995 - GIFFORD C. - 22/12/95 - Government Administration..... 215

Application for variation re Resignation, Retirement and Severance and Continuity of Service - Applicant claimed that withholding of forfeited sum was illegal if without the consent of employee - Applicant further claimed that Continuity clause be altered to include words "shall be" before "treated as if the employment was continuous" to correct previous error - Respondent argued that the forfeited sum would be as a fine or a loss of a right, not an overpayment and Treasurer Instruction 515 allowed for deductions to be made - Respondent further argued that provision was justified on administrative convenience and to avoid expensive recovery action if refusal occurred - Commission found on evidence that Applicant's claim was misconceived and that as the proviso to placitum (i) of the paragraph within the clause was inconsistent with the general provisions of the new clause it should not form part - Commission further found that meaning of "employee" was to include Electorate Officer and clause should reflect meaning, in retaining the words "electorate officer" - Granted - The Civil Service Association of Western Australia Incorporated -v- Hon James Clarko, MLA & Other - P 46 of 1993 - GEORGE C - Sport and Recreation 378

MEAL BREAKS

Complaint re overtime payments - Complainant claimed that as relief was given only during normal day shift, work performed during meal breaks of other shifts was overtime and should be paid accordingly - Defendant argued that Complainant was never instructed to work during meal breaks - Industrial Magistrate found on evidence that as CEO had no power to direct the Complainant to work during meal breaks and payment for overtime could only be approved for work directed by CEO, claim for payment of overtime could not be made - Dismissed - Mr AA Dixon -v- Ministry of Justice - CP 198 of 1995 - Industrial Magistrate - - 11/04/96 - Other Services..... 1421

MISCONDUCT

[2]Appeal against decision of Commission (75 WAIG 2871) re dismissed application for stay of inquiry on the grounds of denied natural justice - Appellant claimed that Commission was outside its jurisdiction as the matter was not seen as industrial when the tribunal carried out a statutory function in accordance to the Education Act - Respondent argued that it was an industrial matter as defined by s.7 of the Education Act as it dealt with behaviour and/or performance and had the potential to result in the punishment of and termination of employment - Full Bench reviewed authorities and found on evidence that the Commission was not deprived of jurisdiction to hear and determine the matter under s.23B of the Act and had not erred in dismissing the application under s.27 of the Act as it merely made arbitration orders - Dismissed - Hon Minister for Education -v- State School Teachers Union of W.A. (Inc) - APPL 937 of 1995 - Full Bench - SHARKEY P/GEORGE C/SCOTT C. - 18/12/95 - Education 35

Application for unfair dismissal - Applicant claimed termination was unfair as no procedural fairness was exercised upon termination of casual employment - Respondent argued that termination was result of insufficient work and also from several reprimands for employee's poor work standards - Commission found on evidence that the Respondent had acted legitimately to determine which employees were most appropriate for continued employment, and that the termination was procedurally fair as the employment was of a casual nature - Dismissed - Ms AF Gillan -v- Tarcoola Beach Resort - APPL 166 of 1995 - SCOTT C. - 26/07/95 - Accommodatn, Cafes&Restaurants 443

CUMULATIVE DIGEST—*continued*

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MISCONDUCT—*continued*

Application re reassignment to original location on the grounds of unfair transfer - Applicant claimed that due to unfair transfer he was the victim of unfair treatment and injustice and appeal against decision of the Respondent - Respondent argued that contrary to written warnings and instructions the Applicant had failed to comply with provisions of s.7C of the Education Act 1928 - Respondent further argued that after several communications the Applicant had disregarded instructions and as a result was suspended on the grounds of misconduct under s.7C(2)(a) of the Education Act 1928 - Commission reviewed authorities, Education Act 1928 and found on evidence that Applicant had not made out any grounds of appeal and accordingly the appeal be dismissed - Dismissed - Mr WG Antoniak -v- Ministry of Education - APPL 764 of 1995 - BEECH C - 11/03/96 - Education 721

Application for contractual entitlements on the grounds of unfair dismissal - Applicant claimed that termination was due to unpaid monies from Respondent - Respondent argued that termination was result of gross misconduct, in misappropriation of company funds and poor workmanship - Commission found on evidence that a discretion between Jobstart scheme and CES had occurred and directed Registrar to forward transcript onto Department of Employment, Education and Training - Dismissed - Mr EJ Poat -v- Eagle Communications Pty Ltd - APPL 899 of 1995 - BEECH C - Communication Services 2028

Conference referred re reinstatement without loss of earnings or award entitlements - Applicant union claimed that as drug conviction occurred outside work and on personal property, Respondent failed to exercise procedural fairness upon discovery of employee's conviction - Respondent argued that as drug was found on company property a right to exercise duty of care towards employees existed, and that employee did not deny drug possession until employment was terminated - Commission reviewed authorities and found on evidence that the claims of employee being a cannabis user, attending work under the influence of the drug, or endangering lives of employees were not sustainable, and dismissal was unfair - Granted - The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- Western Mining Corporation - Kambalda Nickel Operations - CR 117 of 1996 - HALLIWELL SC - 06/05/96 - Metal Ore Mining. 2035

NATURAL JUSTICE

[2]Appeal against decision of Commission (75 WAIG 2871) re dismissed application for stay of inquiry on the grounds of denied natural justice - Appellant claimed that Commission was outside its jurisdiction as the matter was not seen as industrial when the tribunal carried out a statutory function in accordance to the Education Act - Respondent argued that it was an industrial matter as defined by s.7 of the Education Act as it dealt with behaviour and/or performance and had the potential to result in the punishment of and termination of employment - Full Bench reviewed authorities and found on evidence that the Commission was not deprived of jurisdiction to hear and determine the matter under s.23B of the Act and had not erred in dismissing the application under s.27 of the Act as it merely made arbitration orders - Dismissed - Hon Minister for Education -v- State School Teachers Union of W.A. (Inc) - APPL 937 of 1995 - Full Bench - SHARKEY P/GEORGE C/SCOTT C. - 18/12/95 - Education 35

[2]Appeal against decision of Commission (75 WAIG 2871) re dismissed application for stay of enquiry - Appellant claimed Commission erred in dismissing application when opportunity to present denied natural justice evidence was not given and in failing to refer application for hearing and determination pursuant to s44(9) of the I.R. Act - Appellant further claimed that Commission erred in failing to intervene the section 7c enquiry when sufficient material to justify intervention existed, had erred in law and fact in finding that section 7c enquiry was conducted in a just manner and that the Commission lacked jurisdiction to enquire into and deal with claim - Respondent argued that the investigations conducted by headmaster were part of the normal running of the school and that the Chief Executive, pursuant to section 7c of the Education Act had set in train and enquiry - Full Bench reviewed authorities and found on evidence that no grounds of appeal had been made out nor had Commission erred and there did not exist any denial of natural justice, in particular, in any event - Dismissed - State School Teachers Union of W.A. (Inc) -v- Hon Min for Education - APPL 1127 of 1995 - Full Bench - SHARKEY P/HALLIWELL SC/PARKS C - 21/12/95 - Education..... 40

[4]Application for stay of decision in PSA AG2 of 1995 pending hearing of Appeal 1347 of 1995 - President determined that order be made in terms of order in Application No. 1311 of 1995 and reasons for making order to also be adopted and applied from Application No. 1311 of 1995 - President further determined to adopt argument that issue of estoppel had arisen, not to bind application as a matter of law, but as part of the equity, good conscience and merits of the case - Ordered and Declared Accordingly - The Civil Service Association of Western Australia Incorporated -v- Western Australian Centre for Pathology and Medical Research & Other - APPL 1348 of 1995 - President - SHARKEY P - 17/12/95 - Health Services 337

Application for contractual entitlement on the grounds of unfair dismissal - Commission reviewed authorities and found that as three questions of law needed to be answered before determination of unfair dismissal, matter would be adjourned to await relisting - Adjourned - Mr C Di Risio -v - Caffe Piazza - APPL 1218 of 1995 - BEECH C - 15/01/96 - Accommodatn, Cafes&Restaurants..... 439

[1]Appeal against decision of President (75 WAIG 2950) re orders for breach of union rules - Appellant claimed that in first order President was without power under s.66 of the Act to make direction as no rule existed which required re-imbursement or repayment of monies - Appellant further claimed that granting President's second and third orders would compel union to institute proceedings if General Trustees refused and that rules cast obligation only on General Trustees - IAC reviewed union rules and authorities and found that as rule 22 imposed an obligation of General Committee to direct General Trustees to instigate legal proceeding against misappropriation, President's order was within powers of s.66 of the Act - IAC further found that Appellant's submissions against second and third orders were valid and would be granted, but could not accept challenge of orders on natural justice - Granted in Part - The West Australian Locomotive Engine Drivers', Firemen's and Cleaners' Union of Workers -v- Mr E Schmid & Others - IAC 12 of 1995 - Industrial Appeal Court - Kennedy J./Franklyn J./Anderson J. - 20/02/96 - Unions 639

[2]Appeal against decision of Commission (75WAIG2522) re registration of industrial agreement - Appellant claimed that as Commission denied natural justice by revoking intervention status and erred in law in registering the agreement, full intervention status relating to agreement and current appeal be granted - Appellant further claimed that appeal raised sufficient matters of public interest to warrant further hearing and determination - Respondent argued that as appellant's officers had not been duly elected, Full Bench was without jurisdiction to hear matter - Full Bench reviewed I.R. Act and authorities and found that the Commission had power to permit intervention and did so generally and unconditionally, but erred at first instance in holding that mandatory requirement to register agreement existed without the agreement meeting all criteria - Full Bench further found that Appellant was denied natural justice - Upheld - LIQUOR, HOSPITALITY & MISC -v- Burswood Resort (Management) Ltd & Other - APPL 1075 of 1995 - Full Bench - SHARKEY P/HALLIWELL SC/BEECH C - 03/04/96 - Sport and Recreation 1281

[2]Appeal against decision of Commission (76 WAIG 451) re dismissed claim for unfair dismissal, compensation and contractual entitlements - Appellant claimed Commission denied natural justice by failing to give opportunity to be heard and had erred in failing to find non payment of monies and deciding that it lacked jurisdiction to make orders with regards to wages - Full Bench reviewed authorities and found on evidence that cessation of employment was through resignation and in appearing before the Commission in person, appellants had given reasonable opportunity to present case and were not denied natural justice - Dismissed - T Stankovski -v- Quirk Corporate Cleaning Australia Pty Ltd - APPL 117 & 132 of 1996 - Full Bench - SHARKEY P/HALLIWELL SC/GEORGE C - 10/05/96 - Business Services..... 1667

CUMULATIVE DIGEST—*continued*

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NATURAL JUSTICE—*continued*

Application re interpretation of Act and stay of proceedings - Applicant union sought interpretation of Education Act 1929, declaration of an enquiry carried out in rules of natural justice not due to null and void appointment, a permanent stay of proceedings, and orders that certain particulars and parties authorised by CEO be disqualified - Defendant argued that the GSTT was without jurisdiction to restrain or influence the enquiry under the act - The Tribunal reviewed authorities and found on evidence that there was jurisdiction to issue an order in Applicant's terms, but that no grounds for delaying the satisfactory conduct of the enquiry had existed - Dismissed - State School Teachers Union of W.A. (Inc) -v- Hon Min for Education - T 15 of 1994 - Government School Teachers Tribunal - Beaman M./BEECH C/Pollard R. - 23/05/96 - Education 2059

ORDER

[2]Appeals against decision of Commission (75 WAIG 1975 & 2251) re orders re cancellation of work bans and commencement of negotiations - Appellant claimed Commission erred in finding it had jurisdiction to make orders in relation to duties not contained in contract of employment and not within definition of 'industrial matter' - Appellant further claimed that Commission had erred in denying procedural fairness by making orders which were before AIRC and also made in a final rather than an interim form - Respondent argued that as AEU was not party to proceedings, it would not be affected by orders made by Commission - Majority Full Bench reviewed authorities and found that Commission erred in law under s.34(1) of the I.R. Act by not hearing evidence or submissions relating to jurisdiction prior to making orders, in not determining if matters were 'industrial matters' which action was deemed ultra vires and/or without statutory authorities - Majority Full Bench further found that Commission had determined jurisdiction by recording parties concerns as to jurisdiction on transcript and that it was for the Commission to decide extent of submissions and evidence necessary to determine questions before it - Minority Full Bench found that as matters before Commission affected or related to the work, privileges, rights or duties of employers or employees in industry, they constituted 'industrial matters' and as orders were not final they could be varied, set aside or cancelled and remained in force when conciliation/arbitration had finally resolved all industrial matters in dispute - Upheld and Quashed - State School Teachers Union of W.A. (Inc) -v- Hon Min for Education - APPL 587,723 of 1995 - Full Bench - SHARKEY P/GEORGE C/SCOTT C. - 13/12/95 - Education..... 27

Conference re cancellation of interlocutory order - Applicant claimed that it would be less than equitable for the interlocutory order to be cancelled - Respondent Union argued that interlocutory order requiring the cessation of industrial action be cancelled as they were denied an opportunity to fully address the relevance of the situation as a "federal" matter prior to the order being issued and order was consequently wrongly made without practical effect and without being an industrial matter - Commission found on evidence that the order to end the industrial action was justified, however, on the premise that negotiations had resumed on amicable grounds the interlocutory order be cancelled - Ordered Accordingly - St John of God Hosp Murdoch -v- LIQUOR, HOSPITALITY & MISC - C 326 of 1995 - PARKS C - 22/12/95 - Health Services . 220

Conference referred re order for redundancy payment - Applicant claimed that redundency clause in Metal Trades (General) Award applied to employees listed and sought order that any termination entitlement would not be offset by any superannuation amount received - Respondent argued that it was not bound by award and Commission should refrain from hearing as question of respondancy was before Industrial Magistrate and current matter be adjourned pending outcome - Respondent further argued that, Commission was without jurisdiction to determine matters - Commission reviewed authorities and found, on balance, that no establishment had been made in regards to departure of employers right from case and to do so would not be unfair in the circumstances - Dismissed - Amalgamated Metal Workers Union of Western Austral ia -v- Australian Agricultural Machinery - CR 432 of 1991 - GEORGE C - 03/01/96 - Machinery & Equipment Mfg 223

Conference referred re cancellation of order - Applicant claimed that although the analysis report correctly classified the two positions it maintained that the composite allowance be kept due to not all tasks and multiskills being covered by reclassification guidelines - Respondent argued that order should be cancelled as award restructuring had been implemented into the Engineering Trades (Government) Award - Respondent further argued that as reclassification and proper recognition had been given after job skill analysis, continuance of order would reward employees twice for the same skills and responsibilities - Commission reviewed "Genders report" and found that report did take into account the positions in question and allotted the skills in respective ranking - Commission further found that whilst payment of individual allowances may be an "administrative nightmare" it could be overcome via agreement between parties and order had served its purpose - Granted - Australian Electrical, Electronics, Foundry and Engineering Union (Western Australian Branch) -v- Fisheries Department - CR 226 of 1995 - HALLIWELL SC - 09/01/96 - Rail Transport..... 234

[4]Application for orders re breach of union rules - Applicant claimed Respondents' had failed to adhere to union rules through failing to conduct referendum, failing to meet legal expenses exceeding $8.00 provision and sought order accordingly - Respondent initially did not oppose order but later argued that as incurring of expenses could result in possible breach of contract it was not practicable to hold referendum and that issuance of declaration would affect rights of innocent payees - President reviewed union rules and found that under rule 45, the authorisation of incurring and payment of legal expenses was specifically approved by General Committee and that General Committee's interpretation of rules 45 and 46 and "practicable" was incorrect - President further found that as Respondent had breached rule 46 the decision and action were ultra vires the rules and void, and as no demonstration of affected rights had been made out, declaration to issue - Declared and Ordered Accordingly - Mr E Schmid -v- The West Australian Locomotive Engine Drivers', Firemen's and Cleaners' Union of Workers - APPL 1272 of 1995 - President - SHARKEY P - 23/11/95 - Unions 641

Complaint re breach of General Order - Complainant claimed that payments due were pursuant to clause 6 of the W.A. Government Employees Redeployment, Retraining & Redundancy General Order and interest was also due from Defendant - No evidence was adduced by or on behalf of the Defendant - Magistrate reviewed General Order and found on evidence that as employee was employed in Public Sector, Respondent was bound to comply with provisions of General Order - Proven - Mr GN Hocking (for CLARK) -v- Board of Management, Port Hedland Regional Hospital - CP 32 of 1995 - Industrial Magistrate - Robins IM - Health Services..... 1168

[4]Application for orders re referendum of membership - Applicants claimed that as provisions of union rule 56 had not been observed in a proper manner an order should issue stating that the referendum of the membership in Westrail's Right Track Program, Crew Reform Initiatives be declared null and void - Applicant further claimed that not appointing a Returning Officer constituted a breach of union rules - Respondent argued that application had no merit as the referendum was undertaken in accordance with the rules and as lack of compliance with rule was only technical, relief should not be granted - President reviewed authorities and found on evidence that the applicants had not established that a prima facie case for relief existed for interim orders - Dismissed - Mr GH Heaysman & Other -v- The West Australian Locomotive Engine Drivers', Firemen's and Cleaners' Union of Workers - APPL 1403 of 1995 - President - SHARKEY P - 26/03/96 - Rail Transport..... 1294

CUMULATIVE DIGEST—*continued*

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ORDER—*continued*

Conference referred re amendment of conditions of employment of the re-employment order (3) (73 WAIG 1898) - Applicant union claimed that aforestated order did not provide opportunity to buy back accrued annual leave, sick leave and long service leave, that entitlements accrued up to termination were not paid out and omitted from new contracts of employment - Leave to intervene was sought by AEEFEU and granted to represent two of its other members - Respondent argued that Commission lacked jurisdiction to hear and determine the matter - Commission reviewed I.R. Act, Workplace Agreements, authorities and found on evidence that it lacked jurisdiction and power to arbitrate some claims as affected persons and employment relationships were parties to Workplace Agreement Act 1993 - Declared and Ordered Accordingly - The Australian Workers' Union and Another -v- Robe River Iron Associates and Another - CR 446 of 1993;CR 71 of 1994 - PARKS C - 12/03/96 - Coal Mining 1443

[4]Application for orders re breach of union rules - Applicant claimed that as the provisions and requirements of the registered rules had not been "observed in a proper manner" an order be issued declaring that the Special Delegates Conference and all resolutions passed at the conference as null and void - Respondent argued that as none of the stated registered rules had been breached, no basis existed to grant orders -President reviewed rules and found on evidence that the rules had been sufficiently complied with and that no breach had been established - Dismissed - Mr S Nedeljkovic -v- The West Australian Locomotive Engine Drivers', Firemen's and Cleaners' Union of Workers - APPL 573 of 1996 - President - SHARKEY P - 23/05/96 - Unions 1702

OVER AWARD PAYMENT

Conference referred re breakdown in enterprise bargaining negotiations re 'breadroom' employees - Applicant claimed that penalty payments should be viewed not in isolation but as part of overall agreement and that payment should be seen as the outcome of negotiation process - Respondent argued that payment of overaward payment to certain employees engaged in the breadroom should discontinue with a lump sum payment made and a phase out via deduction of monies over 12 month period - Commission found on evidence that circumstances had arisen since the first overaward payment to necessitate the discontinuance of the allowance and determined that to allow payment to continue would be counterproductive to the co-operation and teamwork - Commission further found that as parties had tried to resolve matter in the enterprise bargaining process a direction that parties enter into further discussions be made - Ordered Accordingly - Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch -v- Quality Bakers Australia Ltd T/A Buttercup Bakeries - CRA 122 of 1995 - GIFFORD C. - 23/11/95 - Food, Beverage and Tobacco Mfg 236

Application to vary award re $8.00 Safety Net Adjustment - Applicant union claimed that Federal matter had previously determined the issue in principle and that principle should be followed by this Commission - Respondent argued that Federal Award was totally devoid from State award operations and should be considered when applying $8.00 Safety Net Adjustment - Commission reviewed authorities and found that the effect of two safety net adjustments, in Meat Award, would give tally workers a greater increase than prescribed in the Principles - Commission further found that over-tally was not an overtime payment but an incentive payment and for over-tally purposes refused application in relation to all-purpose rate - Granted in Part - AUST MEAT INDUSTRY EMPL UNION -v- Action Food Barns & Others - APPL 1086 of 1995 - HALLIWELL SC - 11/01/96 - Food, Beverage and Tobacco Mfg 388

Applications for variations to awards re $8.00 Arbitrated Safety Net Adjustment - Applicants claimed that awards contained enterprise flexibility provisions to satisfy requirements for second tier $8.00 adjustment and that first safety net adjustment be granted to employees whose first safety net adjustment was absorbed into overaward payment - Respondents argued that provisions contained within awards were not enterprise flexibility provisions but related to structural efficiency and other wage fixing principles - Commission found on evidence that existing award provisions were the basis for enterprise flexibility provisions and that the awards would be varied to include the first $8.00 adjustment for employees whom had it absorbed and the second $8.00 adjustment - Decision Issued - The Forest Products, Furnishing and Allied Industries Industrial Union of Workers, W.A. Branch -v- Wesfi Pty Ltd - APPL 1313,1314,1317 of 1994;APPL 112 of 1995 - SCOTT C. - 24/05/95 - Various 713

Complaint re breaches of award - Complainant claimed breaches resulted from Defendant's failure to pay arbitrated safety net adjustment of $8.00 per week - Defendant argued that Complainant was party to an enterprise agreement under which safety net adjustment was offset by increased wages - Industrial Magistrate reviewed authorities and found on evidence that Complainant had not received a wage increase under enterprise agreement thus resulting in breach of award through failure to pay $8.00 per week safety net adjustment - Upheld - The Civil Service Association of Western Australia Incorporated -v- Disability Services Commission - CP 102 of 1995 - Industrial Magistrate - Cicchini IM - 09/08/95 - Government Administration 1161

OVERTIME

Application for interpretation of Supermarkets and Chain Stores Warehouse Award 1982 No. A26 of 1982 - Applicant claimed interpretation of Clause 35(7) to determine whether it applied to shift workers engaged to work overtime on an afternoon shift on Sunday - respondent argued that as shift work could only occur within limits of ordinary hours, work performed on Sunday was not shift work, but overtime - Commission found on evidence that Clause 35(7) of the Award did not apply to employees on Sunday overtime, only to overtime during the week Monday to Friday - Decision Issued - The Shop, Distributive and Allied Employees' Association of Western Australia -v- Woolworths (WA) Limited & Other - APPL 83 of 1996 - GIFFORD C. - 18/04/96 - Food Retailing 1418

Complaint re overtime payments - Complainant claimed that as relief was given only during normal day shift, work performed during meal breaks of other shifts was overtime and should be paid accordingly - Defendant argued that Complainant was never instructed to work during meal breaks - Industrial Magistrate found on evidence that as CEO had no power to direct the Complainant to work during meal breaks and payment for overtime could only be approved for work directed by CEO, claim for payment of overtime could not be made - Dismissed - Mr AA Dixon -v- Ministry of Justice - CP 198 of 1995 - Industrial Magistrate - - 11/04/96 - Other Services 1421

Complaint re payment for penalty, interest and costs - Defendant argued that although it accepted outline of facts, the complainant's current application should not be allowed - Industrial Magistrate found that as penalties were not claimed in original complaint, current claim was not justified - Dismissed - Mr AA Dixon -v- Ministry of Justice - CP 167 of 1995 - Industrial Magistrate - - 11/04/96 - Government Administration 1421

PENALTY RATES

Complaint re breach of award - Complainant union claimed employee received incorrect payment for holidays, annual leave and notice of termination - Defendant argued that employee was employed and paid on a casual basis - Industrial Magistrate found on evidence that Complainant was engaged as casual employee on penalty rates and not entitled to payment for holidays, annual leave nor more than one hour's notice of termination - Dismissed - Metals and Engineering Workers' Union - Western Australian Branch -v- Centurion Industries Ltd - CP 101 of 1995 - Industrial Magistrate - Robins IM - 09/08/95 - Metal Product Manufacturing 1174

CUMULATIVE DIGEST—*continued*

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PENALTY RATES—*continued*

Complaint re payment for penalty, interest and costs - Defendant argued that although it accepted outline of facts, the complainant's current application should not be allowed - Industrial Magistrate found that as penalties were not claimed in original complaint, current claim was not justified - Dismissed - Mr AA Dixon -v- Ministry of Justice - CP 167 of 1995 - Industrial Magistrate - - 11/04/96 - Government Administration 1421

PREFERENCE

Complaint re discriminatory and injurious acts against persons due to non-membership of employee organisation - Complainant claimed that the threatening of free and lawful trade of employee was contrary to s.96E of the I.R. Act - Defendant argued that employee was stopped for safety reasons, that in casual conversation told employee of union's location and denied stating that employee couldn't come and work on site - Industrial Magistrate found on evidence that safety aspect was never raised and was constructed by Defendant after event - Industrial Magistrate reviewed authorities and further found that in circumstance or context the words used had constituted a threat and as intention to threaten existed, breach of s.96 had occurred - Proven - Mr AG Shuttleton - DOPLAR -v- J Wilson - CP 79 of 1995 - Industrial Magistrate - Whitely IM - 27/02/96 - Property Services 1175

[2]Applications pursuant to s.72A of I.R. Act 1979, seeking orders to represent the industrial interest of "PACTS" employees - Applicant Union (HSOA) submitted orders sought, would further the objects of the Act, were consistent with objectives of wage fixing principles, will reduce number of awards allowing for better industrial representation and management of employees and through Union rationalisation aid ongoing reform in the health industry - Application by Respondent Union (CSA) seeking orders to represent industrial interests of salaried employees, employed by the Commissioner of Health in business and activities as set out in application - Respondent Union submitted it had, historic coverage and continues to have significant actual membership coverage, provided impetus in relation to public health sector employees in matters of award entitlement and argued failure to grant orders would result in demarcation in the public health sector - Full Bench granted a number of "parties" leave to be heard pursuant to s.72A of Act, however dismissed all applications for leave to intervene pursuant to s.27(1)(k) of the Act - Full Bench reviewed authorities and noted arguments of both the Unions with regard to historical industrial coverage, change in status of employee, current work practices of employees and overall benefits sought by the employer, employees and Union. Full Bench found both parties had merits to their application, however issued decision and order defining the respective coverage of the unions and referred to the President, matters requiring alteration of rules of the Unions - Ordered Accordingly - Hospital Salaried Officers Association of Western Australia (Union of Workers) -v- (Not applicable) - APPL 169, 170, 171,172, 173,174,175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230,231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 496 of 1995 - Full Bench - SHARKEY P/BEECH C/GIFFORD C. - 02/04/96 - Unions 1671

PRINCIPLES

[2]Appeal against dismissed decision of Commission (75 WAIG 2841) re variation of award re $8.00 arbitrated safety net wage adjustment - Appellant claimed that Commission had erred as it failed to correctly apply the wage fixing principles, to give weight to the evidence submitted and by incorrectly holding the award to be a "paid rates" award and not a "benchmark award" - Respondent argued that the two awards sought for comparison were inappropriate as one was a "paid rates award" and the other a "minimum rates award" and to do so would have been contrary to the Structural Efficiency Principle - Full Bench reviewed authorities and found on evidence that the history of the two awards indicated that comparison would have been inappropriate - Dismissed - The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers & Others -v- Hon Min for Works & Others - APPL 1128 of 1995 - Full Bench - SHARKEY P/COLEMAN CC/HALLIWELL SC - 20/12/95 - General Construction 16

[3]Applications for variations to awards re non-work related medical expenses - Applicant claimed removal of conditions from Regulations was done unilaterally and without consultation, and that conditions were removed as a negative cost cutting exercise and not justified on merit - Applicant further claimed that high level of health and fitness for police officers was in public interest and as provision of entitlements had a long history of custom and practice, efficacy of enterprise bargaining would be undermined if unilateral determination of conditions was permitted - Respondent argued due process had been followed in removing entitlements and, as entitlements did not promote good health and fitness proposed provisions discriminated between police officers and other public officers - Respondent further argued that it was in the public interest to determine allocation of resources, that as entitlements were not an actual condition of employment re-establishment would interfere with flexibility and efficiency as funds had not been allocated and a flow-on effect would occur if entitlements were incorporated into the award - CICS reviewed authorities and found that application attracted consideration as a Special Case, and cost of providing entitlement did not outweigh aspects of public interest which recognised special nature of occupation - CICS further found that flow-on effect could also from conditions contained in Regulations, with entitlements part of a status quo which complemented services provided and that process of Structural Efficiency would be facilitated by re-establishment of entitlements - Granted - Western Australian Police Union of Workers -v- Hon Minister for Police - APPL 363 of 1994 - Commission in Court Session - COLEMAN CC/GEORGE C/PARKS C - 22/11/95 - Community Services 46

Application to vary award - Applicant sought to vary the award by the insertion of a separate schedule to give effect enterprise bargaining agreement reached between itself and the Respondent and that the date of operation should reflect retrospectivity - Respondent consented to the insertion but argued that the date of operation should be from the first pay period and on or after date of variation - Commission reviewed State Wage Principles and found on evidence that as there was an offer of retrospectivity made during the negotiations, the Respondent was bound to the offer and although claim constituted a "special condition" pursuant to the Principles, it was unable to award a retrospective date further than the date of application - Ordered Accordingly - AUST MUNICIPAL, CLERICAL & SER -v- Totalisator Agency Board of WA & Others - APPL 1369 of 1995 - BEECH C - 28/12/95 - Sport and Recreation 169

Application to vary award re $8.00 Safety Net Adjustment - Applicant union claimed that Federal matter had previously determined the issue in principle and that principle should be followed by this Commission - Respondent argued that Federal Award was totally devoid from State award operations and should be considered when applying $8.00 Safety Net Adjustment - Commission reviewed authorities and found that the effect of two safety net adjustments, in Meat Award, would give tally workers a greater increase than prescribed in the Principles - Commission further found that over-tally was not an overtime payment but an incentive payment and for over-tally purposes refused application in relation to all-purpose rate - Granted in Part - AUST MEAT INDUSTRY EMPL UNION -v- Action Food Barns & Others - APPL 1086 of 1995 - HALLIWELL SC - 11/01/96 - Food, Beverage and Tobacco Mfg 388

CUMULATIVE DIGEST—*continued*

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PRINCIPLES—*continued*

Applications to vary awards re second Arbitrated Safety Net Adjustment - Respondent agreed with adjustment but expressed reservations regarding tests to be applied - Commission found that 1st arbitrated safety net application had been granted, and as applications complied with the requirements of the Principles, variations be allowed - Granted - CONSTRUCTION, MINING, ENERGY -v- Transfield WA Pty Ltd & Others - APPL 362,363,364 of 1995 - SCOTT C. - 24/05/95 - General Construction 706

Applications for variations to awards re $8.00 Arbitrated Safety Net Adjustment - Applicants claimed that awards contained enterprise flexibility provisions to satisfy requirements for second tier $8.00 adjustment and that first safety net adjustment be granted to employees whose first safety net adjustment was absorbed into overaward payment - Respondents argued that provisions contained within awards were not enterprise flexibility provisions but related to structural efficiency and other wage fixing principles - Commission found on evidence that existing award provisions were the basis for enterprise flexibility provisions and that the awards would be varied to include the first $8.00 adjustment for employees whom had it absorbed and the second $8.00 adjustment - Decision Issued - The Forest Products, Furnishing and Allied Industries Industrial Union of Workers, W.A. Branch -v- Bunnings Limited & Others - APPL 1313,1314,1317 of 1994;APPL 112 of 1995 - SCOTT C. - 24/05/95 - Various 713

[3]Proceedings instituted on Commissions Own Motion pursuant to s.51(2) re consideration of AIRC's decision on "Third Safety Net Adjustment and Section 150A Review October 1995" (Print M5600) - All s.50's parties submitted above decision was a National Wage Decision (NWD) for the purpose of s.51(1) of I.R. Act 1979 and advocated Commission give effect to NWD, however different approaches were submitted for this task - The TLC sought to have separate application joined to these proceeding so that outcome could be achieved via General Order pursuant to s.50(2) of Act, arguing the absence of complimentary legislative provisions of s.150A of Commonwealth Act, impedes on Commission's ability to give effect to the substance of NWD and outcome could be "materially different" - CICS found in favour of other s.50 parties who opposed application for joinder - CICS noted concerns/issues raised by s.50 parties on issues such as, enterprise flexibility provisions, no disadvantage test, "Special Cases" and identification of "paid rates - minimum rates", which go to the operation of the Principle and the tests to be applied for the Third Arbitrated Safety Net adjustment - CICS addressed concerns by stating guidelines to be adopted and issued "Statement of Principles - March 1996" - Ordered Accordingly - (Commission's own motion) -v- Trades & Labor Council of WA & Others - APPL 1164 of 1995 - Commission in Court Session - COLEMAN CC/HALLIWELL SC/GEORGE C - 14/04/96 - Various 911

Applications for registration of industrial agreements - Applicant union claimed that as agreements applied to single enterprise they were pursuant to s.41 and no requirement to comply with terms of s.41(a) existed as no term was contrary to the Act, General Order or Principle - Respondent argued that agreements constituted one agreement applying to multitude of enterprises and could not be registered, as s.41(a) requirements were not being met - Commission reviewed authorities and found that as each agreement applied to a single enterprise, the restrictions of s.41(a) did not apply and subject to parties giving true intentions, agreements be registered - Granted - The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers -v- Formgrow Pty Ltd T/A Plasterwise Plastering Contractors - AG 178,187,210,213,214,217,218,220,221,222,223,224,225,226,227,228,230,231,232,233,237,238,239,240,241,242,243, 244 , 245, 246 of 1995 - SCOTT C. - 13/11/95 - Various 1005

[3]Applications for implementation of minimum wage adjustments - Parties requested that application No. 1523B of 1990 be deferred pending further examination of duties - Applicant union claimed that it was not in public interest to have one group of employees protected under the award Safety Net when public sector employees would have to wait until the Minimum Rates Adjustment process was completed - Respondents argued that employees covered by this award but not working in TAFE Colleges should not be treated any differently for the purpose of Minimum Rates Adjustment - Commission reviewed award and found that minimum rates process had been implemented and variations were consistent with Wage Fixing Principles - Granted - LIQUOR, HOSPITALITY & MISC -v- Hon Min for Community Services & Others - APPL 1349, 1350, 1351 and 1523B of 1995 - Commission in Court Session - COLEMAN CC/BEECH C/GIFFORD C. - 26/03/96 - Community Services 1290

Application to vary award - applicant claimed that variation was justified on its merits and in accordance with Statement of Principle in State wage Decision - respondent argued there was no case to answer, that right to put submission and call evidence would be reserved and applicant had not discharged onus of proof - Commission found on evidence parties attempt to resolve claim was consistent with statement of Principles, respondents claim was not sustained and matter be divided to further examine promotional procedures - Granted in Part - Western Australian Fire Brigades Board -v- United Firefighters Union of Western Australia - APPL 619 of 1995 - SCOTT C. - 18/04/96 - Various 1409

[2]Appeal against decision of Commission (75 WAIG 2815) re incorrect operative date for awards variation - Appellant claimed that Commission erred by failing to give reasons for chosen date, failing to properly consider employees low paid nature and in selecting date inconsistent with the intention of the State Wage Decision - Appellant further claimed that Commission erred in inserting "Enterprise Flexibility Provision" clause, as clause was contrary to intent of the State Wage Decision - Respondent argued that it opposed the applications at first instance - Full Bench reviewed the IR Act and authorities and found that as the Commission at first instance, erred and miscarried the exercise of its discretion in its failure to apply Principles the appeals would be upheld and awards varied - Ordered Accordingly - LIQUOR, HOSPITALITY & MISC -v- Anglican Homes for the Aged (Inc) & Others - APPL 1172,1173,1174,1175,1176,1177,1183 of 1995 - Full Bench - SHARKEY P/COLEMAN CC/HALLIWELL SC - 16/05/96 - Community Services 1658

[2]Appeal against decision of Commission (76 WAIG 388) re granted variation of award - Appellant claimed Commission erred in holding that Safety Net Adjustment should only apply to tally workers where one tally was worked and in drawing conclusion without adduced evidence - Respondent argued that appellant had not established at first instance that it had complied with the conditions precedent - Full Bench reviewed authorities and found that Commission had erred and miscarried discretion as the variation should have been granted and substitution of Commission's decision with Full Bench would occur - Upheld - AUST MEAT INDUSTRY EMPL UNION -v- Action Food Barns (WA) Pty Ltd & Others - APPL 85 of 1996 - Full Bench - SHARKEY P/COLEMAN CC/CAWLEY C. - 28/05/96 - Personal & Household Good W/sg 1664

Application to vary award re third $8 arbitrated safety net adjustment - subject to an operative date being issued - Applicant claimed a retrospective date of operation - Respondent argued for a current date of operation - Commission reviewed claims and found that an operative date should be date of hearing - Ordered Accordingly - The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers -v- Adsigns Pty Ltd & Others - APPL 486 of 1996 - BEECH C - 09/05/96 - Construction Trade Services 1971

CUMULATIVE DIGEST—*continued*

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PROCEDURAL MATTERS

[2]Application for orders for substituted service and extension of time in lodging appeal books in Appeal Nos. 753, 754, 755 and 756 of 1995 - Applicant claimed orders should be made given number of respondents, cost and time involved in production of large number of appeal books - Respondents did not oppose application but argued that notice of appeal had been filed out of time - Full Bench reviewed authorities and found that appeals should be heard together and that notice of appeal had been filed within time - Full Bench further found that no injustice would occur by granting orders and substituted service was the just way of bringing appeal books to Respondents attention - Ordered Accordingly - The Forest Products, Furnishing and Allied Industries Industrial Union of Workers, W.A. Branch -v- Dubrov Pty Ltd T/A Innovation & Others - APPL 753,754,755,756 of 1995 - Full Bench - SHARKEY P/GEORGE C/PARKS C - 12/12/95 - Wood and Paper Product Mfg 18

Application for denied contractual entitlements - Applicant claimed in preliminary point that Commission did have jurisdiction as the Federal Commission lacked jurisdiction to deal with enforcement of contractual entitlements - Applicant claimed that non award benefit had been denied in regards to the use of motor vehicle for commuting purposes - Respondent argued in preliminary point that Commission lacked jurisdiction as employment was covered by paid rates award of the Australian Commission and matter was before the Australian Commission - Respondent argued that use of motor vehicle formed part of contract of employment and as use was granted at its discretion it was entitled to withdraw use at its discretion - Commission found on evidence that employer did not enter into a contractual arrangement, but rather an arrangement at employer's convenience which terminated due to review of vehicle usage - Dismissed - Mr G Roy -v- Western Power - APPL 447 of 1995 - SCOTT C. - 12/09/95 - Electricity and Gas Supply 209

[1]Appeal against decision of Full Bench (75 WAIG 2485) re dismissed appeal against Government School Teachers Tribunal (75 WAIG 1026) re granted stay of inquiry - IAC found, on application of test case, that as nothing had been put forward to indicated "extension of time" argument could succeed, no substance in application existed and determined in draft judgement that Respondent was entitled to costs - Ordered Accordingly - Hon Minister for Education -v- State School Teachers Union of W.A. (Inc) - IAC 13 of 1995 - Industrial Appeal Court - Kennedy J./Franklyn J./Anderson J. - 01/02/96 - Education 336

[4]Application for stay of decision in PSA AG2 of 1995 pending hearing of Appeal 1347 of 1995 - President determined that order be made in terms of order in Application No. 1311 of 1995 and reasons for making order to also be adopted and applied from Application No. 1311 of 1995 - President further determined to adopt argument that issue of estoppel had arisen, not to bind application as a matter of law, but as part of the equity, good conscience and merits of the case - Ordered and Declared Accordingly - The Civil Service Association of Western Australia Incorporated -v- Western Australian Centre for Pathology and Medical Research & Other - APPL 1348 of 1995 - President - SHARKEY P - 17/12/95 - Health Services 337

Application for extension of time to amend prior application - Applicant claimed that due to poor legal counsel in previous case extension of time be granted to amend application - Applicant further claimed that as termination date was earlier the required 30 day limit was denied - Respondent argued that termination occurred later and payment was made through to this date - Commission reviewed authorities and found on evidence that employment contract had been observed and lawfully acted - Commission further found that as termination was at later date, under s.29(2) of I.R. Act, previous application was null as it was lodged out of 28 day limit - Dismissed - J Burton -v- Tiwest Pty Ltd - APPL 70 of 1994 - PARKS C - 15/01/96 - Petroleum Coal Chemical Assoc 435

Application for contractual entitlement on the grounds of unfair dismissal - Commission reviewed authorities and found that as three questions of law needed to be answered before determination of unfair dismissal, matter would be adjourned to await relisting - Adjourned - Mr C Di Risio -v - Caffe Piazza - APPL 1218 of 1995 - BEECH C - 15/01/96 - Accommodatn, Cafes&Restaurants 439

PROMOTION APPEALS

Appeal against recommendation for promotion to the position of Information Officer, ROA Level 1, Perth Station - Appellant claimed a better claim to promotion to position than the Applicants but that an interview was not granted - Promotion Appeal Board found on evidence that when all factors were taken into account, the recommended Applicants were better equipped to fulfil the requirements of the position - Dismissed - Ms S.J. Jarvis -v- Ms C.M. Leeson - PAB 9 of 1995 - Promotion Appeal Board - SCOTT C. - 18/01/96 - Rail Transport 606

Appeal against recommendation for promotion to the position of Information Officer, ROA Level 1, Perth Station - Appellant claimed a better claim to promotion to position than the Applicants but that an interview was not granted - Promotion Appeal Board found on evidence that when all factors were taken into account, the recommended Applicants were better equipped to fulfil the requirements of the position - Dismissed - Mr C M G Phillips -v- Mr B Treby - PAB 10 of 1995 - Promotion Appeal Board - SCOTT C. - 18/01/96 - Rail Transport 606

PUBLIC HOLIDAY

[1]Appeal against decision of Full Bench (75 WAIG 2934) re dismissed appeal re granted award variation - Appellant claimed that as awards could not be amended or varied by custom or usage, the Full Bench erred in determining that the right to the public holiday arose in that way, and, that a paid leave day was part of existing award wage conditions - Appellant further claimed Full Bench erred in law in failing to hold that Commission had acted in excess of jurisdiction in varying award without referral for consideration as special case - IAC reviewed the I.R. Act and authorities and found that as the Minister had failed to establish that the amendment could only be made pursuant to s.40(3) of the Act, the application to vary was under s.40(1) and did not have restrictions imposed under s.40(3) - IAC further found that no error in the manner of exercise of discretion nor error in law or excessive jurisdiction had been established - Dismissed - Hon Min for Health -v- LIQUOR, HOSPITALITY & MISC - IAC 14 of 1995 - Industrial Appeal Court - Kennedy J./Rowland J./Anderson J. - 27/03/96 - Health Services 930

PUBLIC INTEREST

[1]Appeal against decision of Full Bench (75 WAIG 1820) re dismissed appeal against decision of Industrial Magistrate (unreported) re breaches of award - Appellant initially claimed that Full Bench decision was erroneous in law or in excess of jurisdiction but latter sought leave to discontinue appeal - Respondent argued that although there was no objection to discontinuance, under s.86(2) of the I.R. Act it sought for payment costs of appeal, including services of legal practitioner - IAC reviewed authorities and found that within s.86(2) only on very rare occasions would cost of legal practitioner be granted and that as the appeal was untenable and could not have succeeded, Respondent's claim was seen as one of the rare cases which fell into exceptions of s.86(2) - Ordered Accordingly - The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers -v- Clark T/A Mike Clark Contracting - IAC 10 of 1995 - Industrial Appeal Court - Kennedy J./Franklyn J./Rowland J. - 23/11/95 - General Construction 4

CUMULATIVE DIGEST—*continued*

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PUBLIC INTEREST—*continued*

[3]Applications for variations to awards re non-work related medical expenses - Applicant claimed removal of conditions from Regulations was done unilaterally and without consultation, and that conditions were removed as a negative cost cutting exercise and not justified on merit - Applicant further claimed that high level of health and fitness for police officers was in public interest and as provision of entitlements had a long history of custom and practice, efficacy of enterprise bargaining would be undermined if unilateral determination of conditions was permitted - Respondent argued due process had been followed in removing entitlements and, as entitlements did not promote good health and fitness proposed provisions discriminated between police officers and other public officers - Respondent further argued that it was in the public interest to determine allocation of resources, that as entitlements were not an actual condition of employment re-establishment would interfere with flexibility and efficiency as funds had not been allocated and a flow-on effect would occur if entitlements were incorporated into the award - CICS reviewed authorities and found that application attracted consideration as a Special Case, and cost of providing entitlement did not outweigh aspects of public interest which recognised special nature of occupation - CICS further found that flow-on effect could also from conditions contained in Regulations, with entitlements part of a status quo which complemented services provided and that process of Structural Efficiency would be facilitated by re-establishment of entitlements - Granted - Western Australian Police Union of Workers -v- Hon Minister for Police - APPL 363 of 1994 - Commission in Court Session - COLEMAN CC/GEORGE C/PARKS C - 22/11/95 - Community Services..... 46

[4]Application for a stay of "finding" for Application No. PSA AG2 of 1995 of Public Service Arbitrator (75 WAIG 3052) pending appeal to Full Bench re registration of an industrial agreement - Applicant claimed that Commission erred as the provisions stipulated by s.80C(4) of the Act in conjunction with s.41 were not considered, that the interpretation of s.41 was questionable and challenged limited right to intervene - Applicant further claimed that HSOA lacked constitutional coverage to be party to the s.41 agreement and that Commission had not considered the circumstances in which the HSOA had sought to amend its constitution - Respondents argued that the balance of convenience lay with them and if the decision was stayed it would be against public interest as the Pathcentre would be award free and would cause irremediable harm - Respondent further argued that in the event of successful appeal with the agreement registered, an application to revoke the agreement or vary the award would occur - President reviewed authorities and found on evidence that the balance of convenience favoured the Applicant as the question of constitutional coverage was being addressed by the Full Bench and thereby constituted a serious issue to be tried - Granted - The Civil Service Association of Western Australia Incorporated -v- Western Australian Centre for Pathology and Medical Research - APPL 1311 of 1995 - President - SHARKEY P - 04/12/95 - Health Services..... 60

Conference re cancellation of interlocutory order - Applicant claimed that it would be less than equitable for the interlocutory order to be cancelled - Respondent Union argued that interlocutory order requiring the cessation of industrial action be cancelled as they were denied an opportunity to fully address the relevance of the situation as a "federal" matter prior to the order being issued and order was consequently wrongly made without practical effect and without being an industrial matter - Commission found on evidence that the order to end the industrial action was justified, however, on the premise that negotiations had resumed on amicable grounds the interlocutory order be cancelled - Ordered Accordingly - St John of God Hosp Murdoch -v- LIQUOR, HOSPITALITY & MISC - C 326 of 1995 - PARKS C - 22/12/95 - Health Services . 220

[3]Proceedings instituted on Commissions Own Motion pursuant to s.51(2) re consideration of AIRC's decision on "Third Safety Net Adjustment and Section 150A Review October 1995" (Print M5600) - All s.50's parties submitted above decision was a National Wage Decision (NWD) for the purpose of s.51(1) of I.R. Act 1979 and advocated Commission give effect to NWD, however different approaches were submitted for this task - The TLC sought to have separate application joined to these proceeding so that outcome could be achieved via General Order pursuant to s.50(2) of Act, arguing the absence of complimentary legislative provisions of s.150A of Commonwealth Act, impedes on Commission's ability to give effect to the substance of NWD and outcome could be "materially different" - CICS found in favour of other s.50 parties who opposed application for joinder - CICS noted concerns/issues raised by s.50 parties on issues such as, enterprise flexibility provisions, no disadvantage test, "Special Cases" and identification of "paid rates - minimum rates", which go to the operation of the Principle and the tests to be applied for the Third Arbitrated Safety Net adjustment - CICS addressed concerns by stating guidelines to be adopted and issued "Statement of Principles - March 1996" - Ordered Accordingly - (Commission's own motion) -v- Trades & Labor Council of WA & Others - APPL 1164 of 1995 - Commission in Court Session - COLEMAN CC/HALLIWELL SC/GEORGE C - 14/04/96 - Various..... 911

[2]Appeal against decision of Commission (75WAIG2522) re registration of industrial agreement - Appellant claimed that as Commission denied natural justice by revoking intervention status and erred in law in registering the agreement, full intervention status relating to agreement and current appeal be granted - Appellant further claimed that appeal raised sufficient matters of public interest to warrant further hearing and determination - Respondent argued that as appellant's officers had not been duly elected, Full Bench was without jurisdiction to hear matter - Full Bench reviewed I.R. Act and authorities and found that the Commission had power to permit intervention and did so generally and unconditionally, but erred at first instance in holding that mandatory requirement to register agreement existed without the agreement meeting all criteria - Full Bench further found that Appellant was denied natural justice - Upheld - LIQUOR, HOSPITALITY & MISC -v- Burswood Resort (Management) Ltd & Other - APPL 1075 of 1995 - Full Bench - SHARKEY P/HALLIWELL SC/BEECH C - 03/04/96 - Sport and Recreation 1281

[3]Applications for implementation of minimum wage adjustments - Parties requested that application No. 1523B of 1990 be deferred pending further examination of duties - Applicant union claimed that it was not in public interest to have one group of employees protected under the award Safety Net when public sector employees would have to wait until the Minimum Rates Adjustment process was completed - Respondents argued that employees covered by this award but not working in TAFE Colleges should not be treated any differently for the purpose of Minimum Rates Adjustment - Commission reviewed award and found that minimum rates process had been implemented and variations were consistent with Wage Fixing Principles - Granted - LIQUOR, HOSPITALITY & MISC -v- Hon Min for Community Services & Others - APPL 1349, 1350, 1351 and 1523B of 1995 - Commission in Court Session - COLEMAN CC/BEECH C/GIFFORD C. - 26/03/96 - Community Services..... 1290

REDUNDANCY/RETRENCHMENT

[2]Appeals against decision of the Commission (75 WAIG 155 & 966) re dismissed applications for denied contractual entitlements - Appellants claimed that the Commission erred at first instance in strictly applying the Hastings case, and in incorrectly applying the test of the Western Port case regarding implied redundancy terms - Appellant further claimed Commission erred by failing to grant sufficient weight to evidence with respect to the custom and practice and in determining that the alternative employment was suitable - Respondent argued that the part of the Commission's decision relating to the payment of pro-rata long service leave entitlement be appealed as it exceeded its jurisdiction and the claims were made in respect of redundancy payments and not long service leave - Respondent further argued Commission had adopted an "arbitral" approach rather than the required "judicial" approach and sought the decision to be dismissed - Full Bench reviewed authorities and found on evidence that the Commission had not implied a term ralating to redundancy or severance payments as a matter of necessity into a contract, that the alternative employment found was only partially suitable as it did not preserve any existing service or accrued entitlements and under the circumstances there was a term allowing redundancy or severance payments - Full Bench further found that the Commission erred in the proper exercise of its discretion in ordering the payment of pro -rata long service leave to one of the Appellants - Upheld, Quashed and Ordered Accordingly - Joyce Australia Pty Ltd -v- R Lawson & Others - APPL 420,448 of 1995 - Full Bench - SHARKEY P/COLEMAN CC/GIFFORD C. - 18/12/95 - Personal & Household Good Rtlg..... 20

CUMULATIVE DIGEST—*continued*

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REDUNDANCY/RETRENCHMENT—*continued*

Application pursuant to Public Sector Management Act re unfair recruitment, selection and appointment process - Applicant claimed they had been a denied "like to like" transfer entitlement and due to unfair and improper invitations made to other ineligible persons, was placed in a disadvantageous predicament - Applicant further claimed that appointments were contrary to Redeployment & Redundancy Regulations and sought an order to restrict the appointments from only former Senior Counsellors - Respondent argued that Applicant's interpretation of the Regulations was incorrect and that the appointment of the positions was a discretionary matter for the employer and not subject to the Regulations - Commission reviewed authorities and found on evidence that it was not open to determine whether the Transfer Regulation had been applied fairly and applicant's claim for unfair and improper application of Regulations had been applied fairly and Applicant's claim for unfair and improper application of Regulations had not been made out - Dismissed - Mr DA Sheahan -v- Hon Min for Education, Employment and Training - APPL 1123 of 1995 - GIFFORD C. - 22/12/95 - Government Administration 215

Conference referred re order for redundancy payment - Applicant claimed that redundency clause in Metal Trades (General) Award applied to employees listed and sought order that any termination entitlement would not be offset by any superannuation amount received - Respondent argued that it was not bound by award and Commission should refrain from hearing as question of respondancy was before Industrial Magistrate and current matter be adjourned pending outcome - Respondent further argued that, Commission was without jurisdiction to determine matters - Commission reviewed authorities and found, on balance, that no establishment had been made in regards to departure of employers right from case and to do so would not be unfair in the circumstances - Dismissed - Amalgamated Metal Workers Union of Western Austral ia -v- Australian Agricultural Machinery - CR 432 of 1991 - GEORGE C - 03/01/96 - Machinery & Equipment Mfg 223

Application for reinstatement without loss of benefits or compensation on the grounds of unfair dismissal - Applicant union claimed three members were unfairly selected for redundancy in preference to other employees, contrary to specified redundancy selection criteria - Respondent argued redundancy process was fair and unbiased, and involved open discussion and debate between supervisors and those knowledgeable of the operation - Commission found on evidence that a full comparison of Applicant employees with fellow employees had been undertaken by a qualified group, and that neither process or outcome was unfair - Dismissed - BRICK, TILE & POTTERY UNION -v- Bristile Clay Tiles - CR 276 of 1995 - SCOTT C. - 12/03/96 - Non-Metallic Min Product Mfg 747

Application for reinstatement on the grounds of unfair dismissal - Applicant claimed termination was unfair as Respondent's financial situation did not justify dismissal, and that redundancy was a sham - Respondent argued that redundancy was result of cost savings, restructure and the lack of alternative position - Commission reviewed authorities and found on evidence that although Respondent needed to initiate significant cost savings, dismissal was unfair due to its summary nature, and the lack of warning and consultation about redundancy - Commission further found that compensation should be granted as reinstatement was impracticable - Granted in Part - Mr J Gilmore -v- Cecil Bros Pty Ltd - APPL 667 of 1995 - BEECH C - 30/01/96 - Personal & Household Good Rtlg 1184

REINSTATEMENT

[2]Appeals against decision of the Commission (75 WAIG 155 & 966) re dismissed applications for denied contractual entitlements - Appellants claimed that the Commission erred at first instance in strictly applying the Hastings case, and in incorrectly applying the test of the Western Port case regarding implied redundancy terms - Appellant further claimed Commission erred by failing to grant sufficient weight to evidence with respect to the custom and practice and in determining that the alternative employment was suitable - Respondent argued that the part of the Commission's decision relating to the payment of pro-rata long service leave entitlement be appealed as it exceeded its jurisdiction and the claims were made in respect of redundancy payments and not long service leave - Respondent further argued Commission had adopted an "arbitral" approach rather than the required "judicial" approach and sought the decision to be dismissed - Full Bench reviewed authorities and found on evidence that the Commission had not implied a term ralating to redundancy or severance payments as a matter of necessity into a contract, that the alternative employment found was only partially suitable as it did not preserve any existing service or accrued entitlements and under the circumstances there was a term allowing redundancy or severance payments - Full Bench further found that the Commission erred in the proper exercise of its discretion in ordering the payment of pro -rata long service leave to one of the Appellants - Upheld, Quashed and Ordered Accordingly - Joyce Australia Pty Ltd -v- R Lawson & Others - APPL 420,448 of 1995 - Full Bench - SHARKEY P/COLEMAN CC/GIFFORD C. - 18/12/95 - Personal & Household Good Rtlg 20

[4]Application for stay of decision pending appeal to Full Bench - Appellant claimed that the order for reinstatement could not be enforced as its policy with respect to the employment of casuals had changed significantly and did not allow for Respondent's re-employment - Appellant further claimed that there were serious issues to be tried before Full Bench - Respondent conceded that serious issues in regards to award interpretation and jurisdiction were to be tried but that decision should continue - President reviewed authorities and found on evidence that the Applicant had not successfully established that there was a serious issue to be tried and the equity, good conscience and substantial merits of the case lay with Respondent - Dismissed - Serco (Australia) Pty Ltd -v- Mr JJ Moreno - APPL 1304 of 1995 - President - SHARKEY P - 13/12/95 - Personal & Household Good Rtlg 63

Application for reinstatement without loss of entitlements on the grounds of unfair dismissal - Applicant claimed termination was unfair as there had "perhaps been one warning verbally but nothing in writing", and work was up to expected standard - Respondent argued that Applicant's work performance was of poor standard and that there were repeated occasions of poor time keeping and absenteeism without doctor's certificate - Commission found on evidence that as Applicant had no prior warnings, and situation had not been discussed with him nor was he given an opportunity to defend the claim, the dismissal was unfair - Commission further found that re-instatement would not be practicable and ordered that compensation be paid to Applicant for loss or injury caused by termination - Ordered Accordingly - Mr K Dragicevich -v- BGC Builders Supplies - APPL 879 of 1995 - BEECH C - 13/12/95 - Basic Material Wholesaling 204

Conference referred re reinstatement to former positions - Applicant claimed that the Commissioner for Main Roads (CMR) was the employer of the cafeteria staff or had represented that he was their employer - Respondent argued that no employment nor representation as employer existed, rather the Social Club was the employer and CMR involvement was limited to subsidising operational costs - The Commission found on evidence that the Social Club was a separate body not acting for the CMR and that the Social Club was in fact the employer - Dismissed - LIQUOR, HOSPITALITY & MISC -v- Commissioner for Main Roads - CR 83 of 1994 - PARKS C - 31/01/96 - Accommodatn, Cafes&Restaurants 466

Application for reinstatement on the grounds of unfair dismissal - Applicant sought reinstatement as termination occurred when on sick leave and was unfair - Respondent argued that under section 152 of the I.R. Act (Cth) Commission lacked jurisdiction in determining claim as Applicant was covered by a federal award - Commission reviewed authorities and found on evidence that federal award did apply and that order for reinstatement would negate provision of federal award, resulting in an inconsistency - Dismissed for want of jurisdiction - Mr MW McKeagg -v- Dyno Wesfarmers Limited - APPL 811 of 1995 - GEORGE C - 01/03/96 - Services to Mining 740

CUMULATIVE DIGEST—*continued*

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REINSTATEMENT—*continued*

Application for reinstatement without loss of benefits or compensation on the grounds of unfair dismissal - Applicant union claimed three members were unfairly selected for redundancy in preference to other employees, contrary to specified redundancy selection criteria - Respondent argued redundancy process was fair and unbiased, and involved open discussion and debate between supervisors and those knowledgeable of the operation - Commission found on evidence that a full comparison of Applicant employees with fellow employees had been undertaken by a qualified group, and that neither process or outcome was unfair - Dismissed - BRICK, TILE & POTTERY UNION -v- Bristile Clay Tiles - CR 276 of 1995 - SCOTT C. - 12/03/96 - Non-Metallic Min Product Mfg 747

Application for reinstatement on the grounds of unfair dismissal - Applicant claimed termination was unfair as Respondent's financial situation did not justify dismissal, and that redundancy was a sham - Respondent argued that redundancy was result of cost savings, restructure and the lack of alternative position - Commission reviewed authorities and found on evidence that although Respondent needed to initiate significant cost savings, dismissal was unfair due to its summary nature, and the lack of warning and consultation about redundancy - Commission further found that compensation should be granted as reinstatement was impracticable - Granted in Part - Mr J Gilmore -v- Cecil Bros Pty Ltd - APPL 667 of 1995 - BEECH C - 30/01/96 - Personal & Household Good Rtlg 1184

Application for reinstatement without loss of benefits or compensation on the grounds of unfair dismissal - Applicant claimed termination was unfair as the former position should have been offered to her - Respondent argued that the perceived friction caused by Applicant's parents would not have created a suitable working environment - Commission found on evidence that as termination was from business operating loss and re-advertised position was not Applicant's position, dismissal was not unfair - Dismissed - Ms CM Korda -v- Murray Heslin Hamilton and Melissa Ann Hamilton T/A Sweet Paradise - APPL 102 of 1996 - GIFFORD C. - 17/05/96 - Food Retailing 2021

Conference referred re reinstatement without loss of earnings or award entitlements - Applicant union claimed that as drug conviction occurred outside work and on personal property, Respondent failed to exercise procedural fairness upon discovery of employee's conviction - Respondent argued that as drug was found on company property a right to exercise duty of care towards employees existed, and that employee did not deny drug possession until employment was terminated - Commission reviewed authorities and found on evidence that the claims of employee being a cannabis user, attending work under the influence of the drug, or endangering lives of employees were not sustainable, and dismissal was unfair - Granted - The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- Western Mining Corporation - Kambalda Nickel Operations - CR 117 of 1996 - HALLIWELL SC - 06/05/96 - Metal Ore Mining. 2035

SAFETY

Complaint re discriminatory and injurious acts against persons due to non-membership of employee organisation - Complainant claimed that the threatening of free and lawful trade of employee was contrary to s.96E of the I.R. Act - Defendant argued that employee was stopped for safety reasons, that in casual conversation told employee of union's location and denied stating that employee couldn't come and work on site - Industrial Magistrate found on evidence that safety aspect was never raised and was constructed by Defendant after event - Industrial Magistrate reviewed authorities and further found that in circumstance or context the words used had constituted a threat and as intention to threaten existed, breach of s.96 had occurred - Proven - Mr AG Shuttleton - DOPLAR -v- J Wilson - CP 79 of 1995 - Industrial Magistrate - Whitely IM - 27/02/96 - Property Services 1175

SHIFT WORK

Application for interpretation of Supermarkets and Chain Stores Warehouse Award 1982 No. A26 of 1982 - Applicant claimed interpretation of Clause 35(7) to determine whether it applied to shift workers engaged to work overtime on an afternoon shift on Sunday - respondent argued that as shift work could only occur within limits of ordinary hours, work performed on Sunday was not shift work, but overtime - Commission found on evidence that Clause 35(7) of the Award did not apply to employees on Sunday overtime, only to overtime during the week Monday to Friday - Decision Issued - The Shop, Distributive and Allied Employees' Association of Western Australia -v- Woolworths (WA) Limited & Other - APPL 83 of 1996 - GIFFORD C. - 18/04/96 - Food Retailing 1418

SICK LEAVE

[2]Appeal against decision of Industrial Magistrate (unreported) re breach of award - Appellant claimed that Industrial Magistrate had erred in law as no finding, set out by the Minimum Conditions Act 1993, was made in relation to the terms implied in award, where a provision or condition of award was less favourable to the employee than a minimum condition of employment - Respondent argued that it had a right to know the nature of the illness or injury over and above the medical certificate and that in the absence of that, it was not liable for payment of the sick leave as stipulated in the award - Full Bench found on evidence that the Minimum Conditions Act applied in lieu of the award and that the medical certificate supplied by the Appellant's medical practitioner sufficed in notification of inability to attend work - Upheld and Remitted - Ms L Nicol -v- Milena Filomena and Giuseppe Iacusso T/A La Plaza Decor - APPL 784 of 1995 - Full Bench - SHARKEY P/HALLIWELL SC/GIFFORD C. - 06/12/95 - Personal & Household Good Rtlg 44

Complaints re breach of award - First complainant claimed breach of award occurred when Defendant failed to pay full term of sick leave - Second complainant claimed that sick leave paid to Defendant should be reimbursed as the nature of the illness was not revealed - Industrial Magistrate found on evidence that neither matter fulfilled the criteria provided for in Clause 83(3) of the Industrial Relations Act - Dismissed - Milena Filomena and Giuseppe Iacusso T/A La Plaza Decor - v- Ms L Nicol - CP 37, 40 of 1995 - Industrial Magistrate - Malley IM - Personal & Household Good Rtlg 1174

Conference referred re amendment of conditions of employment of the re-employment order (3) (73 WAIG 1898) - Applicant union claimed that aforestated order did not provide opportunity to buy back accrued annual leave, sick leave and long service leave, that entitlements accrued up to termination were not paid out and omitted from new contracts of employment - Leave to intervene was sought by AEEFEU and granted to represent two of its other members - Respondent argued that Commission lacked jurisdiction to hear and determine the matter - Commission reviewed I.R. Act, Workplace Agreements, authorities and found on evidence that it lacked jurisdiction and power to arbitrate some claims as affected persons and employment relationships were parties to Workplace Agreement Act 1993 - Declared and Ordered Accordingly - Metals and Engineering Workers' Union and Another -v- Robe River Iron Associates and Another - CR 446 of 1993;CR 71 of 1994 - PARKS C - 12/03/96 - Coal Mining 1443

STANDDOWN

Application for denied contractual entitlements - Applicant claimed that employment contract was dependent on terms of two awards and that as "stand down clause" was incorrectly applied, four periods of unpaid wages resulted - Respondent argued that Applicant's stand down was fair as insufficient work and accommodation was available and option of annual leave was given - Commission reviewed authorities and found on evidence that the award "stand down clause" had applied and the Applicant was denied a benefit under his contract of employment - Granted in Part - Mr J Hay -v- Gardner & Perrott - APPL 727 of 1995 - BEECH C - 12/01/96 - Oil and Gas Extraction 735

CUMULATIVE DIGEST—*continued*

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STAY OF PROCEEDINGS

[1]Application for stay of proceedings against decision of President (75 WAIG 2950) pending appeal to Industrial Appeal Court - Appellant claimed that if appeal was successful and the stay unsuccessful, the commencement of proceedings would cause prejudice to appellant and granting of stay would merely delay commencement of action against specified individuals - IAC reviewed authorities and found that the appeal did raise serious questions and found it undesirable to institute proceedings against individuals not formally parties to the original application - IAC further found that given the date the appeal was to be listed, only a minimal amount of time would elapse prior to its determination and no prejudice on the respondents was pointed to in submissions - Granted - The West Australian Locomotive Engine Drivers', Firemen's and Cleaners' Union of Workers -v- Mr E Schmid & Others - IAC 12 of 1995 - Industrial Appeal Court - Kennedy J. - 10/12/95 - Unions 6

[2]Appeal against decision of Commission (75 WAIG 2871) *re* dismissed application for stay of inquiry on the grounds of denied natural justice - Appellant claimed that Commission was outside its jurisdiction as the matter was not seen as industrial when the tribunal carried out a statutory function in accordance to the Education Act - Respondent argued that it was an industrial matter as defined by s.7 of the Education Act as it dealt with behaviour and/or performance and had the potential to result in the punishment of and termination of employment - Full Bench reviewed authorities and found on evidence that the Commission was not deprived of jurisdiction to hear and determine the matter under s.23B of the Act and had not erred in dismissing the application under s.27 of the Act as it merely made arbitration orders - Dismissed - Hon Minister for Education -v- State School Teachers Union of W.A. (Inc) - APPL 937 of 1995 - Full Bench - SHARKEY P/GEORGE C/SCOTT C. - 18/12/95 - Education 35

[4]Application for a stay of "finding" for Application No. PSA AG2 of 1995 of Public Service Arbitrator (75 WAIG 3052) pending appeal to Full Bench re registration of an industrial agreement - Applicant claimed that Commission erred as the provisions stipulated by s.80C(4) of the Act in conjunction with s.41 were not considered, that the interpretation of s.41 was questionable and challenged limited right to intervene - Applicant further claimed that HSOA lacked constitutional coverage to be party to the s.41 agreement and that Commission had not considered the circumstances in which the HSOA had sought to amend its constitution - Respondents argued that the balance of convenience lay with them and if the decision was stayed it would be against public interest as the Pathcentre would be award free and would cause irremediable harm - Respondent further argued that in the event of successful appeal with the agreement registered, an application to revoke the agreement or vary the award would occur - President reviewed authorities and found on evidence that the balance of convenience favoured the Applicant as the question of constitutional coverage was being addressed by the Full Bench and thereby constituted a serious issue to be tried - Granted - The Civil Service Association of Western Australia Incorporated -v- Western Australian Centre for Pathology and Medical Research - APPL 1311 of 1995 - President - SHARKEY P - 04/12/95 - Health Services 60

[4]Application for stay of decision pending appeal to Full Bench - Appellant claimed that the order for reinstatement could not be enforced as its policy with respect to the employment of casuals had changed significantly and did not allow for Respondent's re-employment - Appellant further claimed that there were serious issues to be tried before Full Bench - Respondent conceded that serious issues in regards to award interpretation and jurisdiction were to be tried but that decision should continue - President reviewed authorities and found on evidence that the Applicant had not successfully established that there was a serious issue to be tried and the equity, good conscience and substantial merits of the case lay with Respondent - Dismissed - Serco (Australia) Pty Ltd -v- Mr JJ Moreno - APPL 1304 of 1995 - President - SHARKEY P - 13/12/95 - Personal & Household Good Rtlg 63

Application to stay order re conduct of section 7c enquiry - Applicant claimed preliminary point that there would be costs incurred in proceeding before the Tribunal which may be thrown away if IAC ruled tribunal lacked jurisdiction to have issued order - Tribunal found on evidence that there was a serious matter to be tried before the Tribunal and as there was insufficient facts of the matter to cause any further delay, hearing be set down - Ordered Accordingly - State School Teachers Union of W.A. (Inc) -v- Hon Min for Education - T 15 of 1994 - Government School Teachers Tribunal - Beaman M./BEECH C - 02/01/96 - Education 272

[1]Appeal against decision of Full Bench (75 WAIG 2485) re dismissed appeal against Government School Teachers Tribunal (75 WAIG 1026) re granted stay of inquiry - IAC found, on application of test case, that as nothing had been put forward to indicated "extension of time" argument could succeed, no substance in application existed and determined in draft judgement that Respondent was entitled to costs - Ordered Accordingly - Hon Minister for Education -v- State School Teachers Union of W.A. (Inc) - IAC 13 of 1995 - Industrial Appeal Court - Kennedy J./Franklyn J./Anderson J. - 01/02/96 - Education 336

[4]Application for stay of decision in PSA AG2 of 1995 pending hearing of Appeal 1347 of 1995 - President determined that order be made in terms of order in Application No. 1311 of 1995 and reasons for making order to also be adopted and applied from Application No. 1311 of 1995 - President further determined to adopt argument that issue of estoppel had arisen, not to bind application as a matter of law, but as part of the equity, good conscience and merits of the case - Ordered and Declared Accordingly - The Civil Service Association of Western Australia Incorporated -v- Western Australian Centre for Pathology and Medical Research & Other - APPL 1348 of 1995 - President - SHARKEY P - 17/12/95 - Health Services 337

[1]Appeal against decision of Full Bench (76 WAIG 1281) re upheld appeal re registration of industrial agreement - Appellant claimed that as Full Bench erred in failing to hear that appeal was invalid or unauthorised, in granting first respondent leave to appeal and upholding appeal, order for stay of decision be given - IAC reviewed authorities and found that as no opposition for stay existed and grounds of appeal had prospects of success, it would be "just" to grant order - Granted - Burswood Resort (Management) Ltd -v- LIQUOR, HOSPITALITY & MISC - IAC 4 of 1996 - Industrial Appeal Court - Kennedy J. - 13/05/96 - Sport and Recreation 1655

Conference referred regarding orders concerning conduct of investigation and interpretation of Education Act - Applicant claimed that investigation into conduct be permanently stayed and those conducting the investigation be disqualified - Respondent argued that it opposed the claims sought - Commission reviewed Education Act and found that the facts did not lead to the conclusion that alleged flaw was so fundamental that the enquiry could not be permitted - Dismissed - State School Teachers Union of W.A. (Inc) -v- Hon Min for Education, Employment and Training - CR 173 of 1995 - BEECH C - Education 2039

Application re interpretation of Act and stay of proceedings - Applicant union sought interpretation of Education Act 1929, declaration of an enquiry carried out in rules of natural justice not due to null and void appointment, a permanent stay of proceedings, and orders that certain particulars and parties authorised by CEO be disqualified - Defendant argued that the GSTT was without jurisdiction to restrain or influence the enquiry under the act - The Tribunal reviewed authorities and found on evidence that there was jurisdiction to issue an order in Applicant's terms, but that no grounds for delaying the satisfactory conduct of the enquiry had existed - Dismissed - State School Teachers Union of W.A. (Inc) -v- Hon Min for Education - T 15 of 1994 - Government School Teachers Tribunal - Beaman M./BEECH C/Pollard R. - 23/05/96 - Education 2059

CUMULATIVE DIGEST—*continued*

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SUPERANNUATION

Application for denied contractual entitlements on the grounds of unfair dismissal - Applicant claimed payment of 5 weeks wages, 14 days holiday pay, superannuation contribution and the reimbursement of expenses owed under contract of employment - Respondent argued that Applicant entered into an arrangement whereby the value of entitlements owed would be met by financial return upon "taking over" another building contract - Commission found on evidence that no such arrangement occurred and had such an arrangement been entered into, the entitlements would not have been paid by the Respondent - Commission further reviewed the Truck Act 1899-1904 and found such arrangement illegal and void and ordered that Respondent pay entitlements no later than 21 days from the date of the order - Granted - Mr RJ Hall -v- Design 2000 Homes Pty Ltd - APPL 1424 of 1995 - PARKS C - 28/02/96 - General Construction 1190

SUPPLEMENTARY AND SERVICE PAYMENTS

Conference referred re bonus payment for award covered employees - Applicant Union claimed award covered employees should be entitled to bonus given to all other employees - Respondent argued that bonus was a reward for flexibility under workplace agreements and common law contracts and that award covered employees had to be paid award rates - CICS found on evidence that as bonus payment did not directly relate to individual work performance no reason to discriminate against award covered employees existed, and that employment contract was not a valid measure of productivity - CICS further bound that a failure to recognise informal agreements for greater flexibility under awards existed and that employees receiving award rates were eligible for exgratia bonuses - Granted - AUTO, FOOD, METAL, ENGIN UNION & Others -v- Perth Mint - CR 344 of 1995 - Commission in Court Session - HALLIWELL SC/GEORGE C/BEECH C - 18/04/96 - Metal Product Manufacturing 1700

TALLIES

Application to vary award re $8.00 Safety Net Adjustment - Applicant union claimed that Federal matter had previously determined the issue in principle and that principle should be followed by this Commission - Respondent argued that Federal Award was totally devoid from State award operations and should be considered when applying $8.00 Safety Net Adjustment - Commission reviewed authorities and found that the effect of two safety net adjustments, in Meat Award, would give tally workers a greater increase than prescribed in the Principles - Commission further found that over-tally was not an overtime payment but an incentive payment and for over-tally purposes refused application in relation to all-purpose rate - Granted in Part - AUST MEAT INDUSTRY EMPL UNION -v- Action Food Barns & Others - APPL 1086 of 1995 - HALLIWELL SC - 11/01/96 - Food, Beverage and Tobacco Mfg 388

TERMINATION

[4]Application for stay of decision pending appeal to Full Bench - Appellant claimed that the order for reinstatement could not be enforced as its policy with respect to the employment of casuals had changed significantly and did not allow for Respondent's re-employment - Appellant further claimed that there were serious issues to be tried before Full Bench - Respondent conceded that serious issues in regards to award interpretation and jurisdiction were to be tried but that decision should continue - President reviewed authorities and found on evidence that the Applicant had not successfully established that there was a serious issue to be tried and the equity, good conscience and substantial merits of the case lay with Respondent - Dismissed - Serco (Australia) Pty Ltd -v- Mr JJ Moreno - APPL 1304 of 1995 - President - SHARKEY P - 13/12/95 - Personal & Household Good Rtlg 63

Application for reinstatement without loss of entitlements on the grounds of unfair dismissal - Applicant claimed termination was unfair as there had "perhaps been one warning verbally but nothing in writing", and work was up to expected standard - Respondent argued that Applicant's work performance was of poor standard and that there were repeated occasions of poor time keeping and absenteeism without doctor's certificate - Commission found on evidence that as Applicant had no prior warnings, and situation had not been discussed with him nor was he given an opportunity to defend the claim, the dismissal was unfair - Commission further found that re-instatement would not be practicable and ordered that compensation be paid to Applicant for loss or injury caused by termination - Ordered Accordingly - Mr K Dragicevich -v- BGC Builders Supplies - APPL 879 of 1995 - BEECH C - 13/12/95 - Basic Material Wholesaling 204

Application for denied contractual entitlements - Applicant claimed that payment of moneys due under contract of employment was not given - Respondent argued that the Applicant was not employed as an employee but as a contractor and was paid a set amount for completion of work which was subsequently left incomplete - Commission found on evidence that as Applicant had cited inadequate evidence in establishing employer/employee relationship it failed to clearly demonstrate existence of an industrial matter - Dismissed - Mr B Beaumaster -v- Capriplan Pty Ltd - APPL 1148 of 1995 - SCOTT C. - 30/01/96 - Construction Trade Services 433

Application for extension of time to amend prior application - Applicant claimed that due to poor legal counsel in previous case extension of time be granted to amend application - Applicant further claimed that as termination date was earlier the required 30 day limit was denied - Respondent argued that termination occurred later and payment was made through to this date - Commission reviewed authorities and found on evidence that employment contract had been observed and lawfully acted - Commission further found that as termination was at later date, under s.29(2) of I.R. Act, previous application was null as it was lodged out of 28 day limit - Dismissed - J Burton -v- Tiwest Pty Ltd - APPL 70 of 1994 - PARKS C - 15/01/96 - Petroleum Coal Chemical Assoc 435

Application for contractual entitlement on the grounds of unfair dismissal - Commission reviewed authorities and found that as three questions of law needed to be answered before determination of unfair dismissal, matter would be adjourned to await relisting - Adjourned - Mr C Di Risio -v - Caffe Piazza - APPL 1218 of 1995 - BEECH C - 15/01/96 - Accommodatn, Cafes&Restaurants 439

Application for compensation re unfair dismissal - Applicant claimed that although employment was casual, an expected continuity existed and that as requirements of s29(1)(b) were satisfied claim was within Commission jurisdiction - Respondent argued that termination was justified as the Applicant was a casual employee employed on separate individual contracts and Commission lacked jurisdiction - Commission reviewed authorities and found that the nature of the contract did not offer ongoing employment to the Applicant - Commission further found that Applicant was a true casual and that employment on that day merely came to an end at the conclusion of work performed - Dismissed - Mr CR Dorant -v- JLV Industries Pty Ltd - APPL 638 of 1995 - GIFFORD C. - 12/01/96 - Business Services 440

Application for unfair dismissal - Applicant claimed termination was unfair as no procedural fairness was exercised upon termination of casual employment - Respondent argued that termination was result of insufficient work and also from several reprimands for employee's poor work standards - Commission found on evidence that the Respondent had acted legitimately to determine which employees were most appropriate for continued employment, and that the termination was procedurally fair as the employment was of a casual nature - Dismissed - Ms AF Gillan -v- Tarcoola Beach Resort - APPL 166 of 1995 - SCOTT C. - 26/07/95 - Accommodatn, Cafes&Restaurants 443

CUMULATIVE DIGEST—*continued*

Page

TERMINATION—*continued*

Application for contractual entitlements on the grounds of unfair dismissal - Applicant claimed dismissal was unfair as termination notice period was inconsistent with others given - Respondent argued that Applicant was told of the termination possibility and that although only one hours notice was required, one weeks' payment in lieu had been given - Commission found on evidence that although case lacked evidence of industry custom or practice regarding reasonable notice, it found that 2 weeks would be a reasonable notice period and be paid accordingly - Ordered Accordingly - Ms J Leslie -v- Fremantle Plan Printing & Microfilming Centre - APPL 948 of 1995 - GEORGE C - 25/01/96 - Printg, Publishg & Rcdd Media 445

Application for contractual entitlements on grounds of unfair dismissal - Applicant claimed that termination was unfair as no reason was given and that contractual benefit of higher salary and bonus was denied - Respondent failed to attend hearing - Commission found on evidence that no reason for termination was given and although no salary benefits were denied, compensation for denied bonus be granted - Granted in Part - Mr M Miles -v- Graystone WA Pty Ltd/ Turnball/ Weir Pty Ltd T/A Carnegies - APPL 592 of 1995 - GIFFORD C. - 06/02/96 - Accommodatn, Cafes&Restaurants 447

Applications for contractual entitlements on grounds of unfair dismissal - Applicants claimed they were dismissed unfairly and denied payment of entitlements and wages based upon additional duties performed - Respondent argued that Applicants were not dismissed but resigned - Commission reviewed authorities and found on evidence that Applicants resigned from their employment of their own will and no unfair dismissal existed - Dismissed - S Stankovska -v- Quirk Corporate Cleaning Australia Pty Ltd - APPL 645,646 of 1995 - GIFFORD C. - 15/01/96 - Business Services 451

Conference referred re reinstatement to former positions - Applicant claimed that the Commissioner for Main Roads (CMR) was the employer of the cafeteria staff or had represented that he was their employer - Respondent argued that no employment nor representation as employer existed, rather the Social Club was the employer and CMR involvement was limited to subsidising operational costs - The Commission found on evidence that the Social Club was a separate body not acting for the CMR and that the Social Club was in fact the employer - Dismissed - LIQUOR, HOSPITALITY & MISC -v- Commissioner for Main Roads - CR 83 of 1994 - PARKS C - 31/01/96 - Accommodatn, Cafes&Restaurants 466

Application re reassignment to original location on the grounds of unfair transfer - Applicant claimed that due to unfair transfer he was the victim of unfair treatment and injustice and appeal against decision of the Respondent - Respondent argued that contrary to written warnings and instructions the Applicant had failed to comply with provisions of s.7C of the Education Act 1928 - Respondent further argued that after several communications the Applicant had disregarded instructions and as a result was suspended on the grounds of misconduct under s.7C(2)(a) of the Education Act 1928 - Commission reviewed authorities, Education Act 1928 and found on evidence that Applicant had not made out any grounds of appeal and accordingly the appeal be dismissed - Dismissed - Mr WG Antoniak -v- Ministry of Education - APPL 764 of 1995 - BEECH C - 11/03/96 - Education 721

Application for contractual benefits on the grounds of unfair dismissal - Applicant claimed termination was unfair as involvement in another company offered no competition or threat to the Respondent nor influence over employee role - Respondent argued that conflict of interest existed through to Applicant's position as employee and involvement in company to which Respondent was a client - Commission found on evidence that as the Applicant did not act contrary to duty of fidelity to the Respondent, a conflict of interest did not exist and compensation be paid - Granted in Part - Mrs LL Barton -v- Western Telecom Pty Ltd - APPL 729 of 1995 - BEECH C - 23/02/96 - Personal & Household Good Rtlg. 722

Application for compensation on the grounds of unfair dismissal - Applicant claimed that refusal to accept unilateral change to employment contract resulted in denial of further employment - Respondent argued that Applicant was not employed in limited capacity or area and that refusal to undertake duties as directed evinced an intention to repudiate employment contract - Commission found on evidence that as termination was in response to Applicant's intention to repudiate employment contract, dismissal was not unfair - Dismissed - Ms F Emery -v- Eucla Motor Hotel - APPL 1150 of 1995 - SCOTT C. - 28/02/96 - Accommodatn, Cafes&Restaurants 728

Application for contractual entitlements on the grounds of unfair dismissal and subsequent application to strike out previous application for want of jurisdiction - Applicant claimed that unfair dismissal was within the Commission's jurisdiction due to enactment of the Industrial Legislation Amendment Act 1995 (s.42(3)), in that 28 day limit no longer applied - Respondent argued that Commission lacked jurisdiction and was functus officio as matter was previously determined by the Commission - Commission reviewed authorities and found on evidence that it lacked jurisdiction to determine matter as claim was lodged out of time limit - Commission further found that matter did not come under section 42(3) of the Industrial Legislation Reform Act and that the Act was not intended to apply retrospectively - Dismissed for want of jurisdiction - Siemens Ltd -v- Mr GHT Flaherty - APPL 559 & 835 of 1995 - BEECH C - 26/02/96 - Construction Trade Services 731

Application for contractual entitlements on the grounds of unfair dismissal - Applicant claimed that termination was unfair and payment of seven weeks wages were owed - Respondent argued that employment was not terminated but employee resigned of own will - Commission found on evidence that as termination was from resignation, unfair dismissal did not exist and compensation could not be granted - Dismissed - Ms SJ Hammond -v- Annette Healy Pickwell T/A Oldham Boas Ednie Brown - APPL 1318 of 1995 - HALLIWELL SC - 15/02/96 - Property Services 734

Application for unfair dismissal - Applicant claimed that termination was unfair as permanent employment was offered - Respondent argued that work was on an ad hoc basis to undertake seasonal work - Commission found on evidence that as Applicant was required to perform specific work for a limited period and as payment was of an hourly rate, the work was casual - Commission further found on that basis that there was no unfair dismissal but a frustration of the contract which led to termination - Dismissed - Mr GS Hardie -v- PT & BD Slade & Co - APPL 1265 of 1995 - SCOTT C. - 01/03/96 - Property Services 735

Application for reinstatement on the grounds of unfair dismissal - Applicant sought reinstatement as termination occurred when on sick leave and was unfair - Respondent argued that under section 152 of the I.R. Act (Cth) Commission lacked jurisdiction in determining claim as Applicant was covered by a federal award - Commission reviewed authorities and found on evidence that federal award did apply and that order for reinstatement would negate provision of federal award, resulting in an inconsistency - Dismissed for want of jurisdiction - Mr MW McKeagg -v- Dyno Wesfarmers Limited - APPL 811 of 1995 - GEORGE C - 01/03/96 - Services to Mining 740

Application for reinstatement without loss of benefits or compensation on the grounds of unfair dismissal - Applicant union claimed three members were unfairly selected for redundancy in preference to other employees, contrary to specified redundancy selection criteria - Respondent argued redundancy process was fair and unbiased, and involved open discussion and debate between supervisors and those knowledgeable of the operation - Commission found on evidence that a full comparison of Applicant employees with fellow employees had been undertaken by a qualified group, and that neither process or outcome was unfair - Dismissed - BRICK, TILE & POTTERY UNION -v- Bristile Clay Tiles - CR 276 of 1995 - SCOTT C. - 12/03/96 - Non-Metallic Min Product Mfg 747

CUMULATIVE DIGEST—*continued*

Page

TERMINATION—*continued*

[2]Appeal against decision of Commission (75 WAIG 3068) re denied application for reinstatement of the grounds of unfair dismissal - Appellant claimed Commission erred in fact and law in finding that termination was effected by Appellant and that employee was engaged as casual employee on ongoing basis - Appellant further claimed that as no ongoing employment relationship existed, Commission lacked jurisdiction to deal with application - Full Bench reviewed authorities and found on evidence that as Respondent was not a casual worker in terms of the award definition, summary dismissal was unlawful and unfair and Commission had jurisdiction to make order for reinstatement - Dismissed - Serco (Australia) Pty Ltd -v- Mr JJ Moreno - APPL 1281 of 1995 - Full Bench - SHARKEY P/BEECH C/SCOTT C. - 19/03/96 - Food Retailing 937, 2023

Application for reinstatement on the grounds of unfair dismissal - Applicant claimed termination was unfair as Respondent's financial situation did not justify dismissal, and that redundancy was a sham - Respondent argued that redundancy was result of cost savings, restructure and the lack of alternative position - Commission reviewed authorities and found on evidence that although Respondent needed to initiate significant cost savings, dismissal was unfair due to its summary nature, and the lack of warning and consultation about redundancy - Commission further found that compensation should be granted as reinstatement was impracticable - Granted in Part - Mr J Gilmore -v- Cecil Bros Pty Ltd - APPL 667 of 1995 - BEECH C - 30/01/96 - Personal & Household Good Rtlg 1184

Application for denied contractual entitlements on the grounds of unfair dismissal - Applicant claimed payment of 5 weeks wages, 14 days holiday pay, superannuation contribution and the reimbursement of expenses owed under contract of employment - Respondent argued that Applicant entered into an arrangement whereby the value of entitlements owed would be met by financial return upon "taking over" another building contract - Commission found on evidence that no such arrangement occurred and had such an arrangement been entered into, the entitlements would not have been paid by the Respondent - Commission further reviewed the Truck Act 1899-1904 and found such arrangement illegal and void and ordered that Respondent pay entitlements no later than 21 days from the date of the order - Granted - Mr RJ Hall -v- Design 2000 Homes Pty Ltd - APPL 1424 of 1995 - PARKS C - 28/02/96 - General Construction 1190

Application for denied contractual entitlements re commission payments - Applicant claimed 1 month commission should be paid as he was told by the Respondent that commission would be paid - Respondent argued that no such undertaking was given to the Applicant - Commission found on evidence that Applicant was unable to show that benefit had been denied - Dismissed - Mr D Mason -v- Ausmic Environmental Industries - APPL 1433 of 1995 - BEECH C - 15/03/96 - Business Services 1191

Application for compensation on the grounds of unfair dismissal - Applicant claimed that instant dismissal was unfair as every measure had been taken to ensure that services would be monitored and provided for during R and R Leave - Respondent argued that Applicant's absence from site and lack of management of impending industrial action was valid reason for termination - Commission reviewed authorities and found on evidence that the Applicant's actions did not give rise to valid criticism, nor justify summary dismissal - Granted - Mr RW More -v- Spotless Services Aust Ltd - APPL 1339 of 1995 - HALLIWELL SC - 21/04/96 - Accommodatn, Cafes&Restaurants 1192

Application for denied contractual entitlements re annual leave payments - Applicant claimed payment for four weeks annual leave notwithstanding change in position and move from award entitlement to contract of service - Respondent argued that there was no express provision in contract for payment in lieu of annual leave on resignation, and that no evidence existed before the Commission for term to be implied - Respondent however acknowledged Minimum Condition Act but argued it was outside Commission's jurisdiction - Commission found on past course of dealing between parties that it was open to imply a term into "leave" provision and having reviewed authorities granted entitlement for period calculated on completed weeks of service - Granted - Mr G Nealings -v- Crommelins Handyman Hire & Sales - APPL 975 of 1995 - GIFFORD C. - 07/03/96 - Personal Services 1194

Application for denied contractual entitlements - Applicant claimed that as employer/employee relationship existed, outstanding wages should be paid - Respondent failed to attend the conference - Commission found on evidence that Applicant was an employee and as nothing existed to suggest entitlement was award, industrial agreement or other form of regulation benefit, compensation be paid within 14 days of the date of the order - Ordered Accordingly - Ms R Rendalls -v- Mr K Evans - APPL 1194 of 1995 - COLEMAN CC - 25/03/96 - Education 1196

Application for compensation on the grounds of unfair dismissal - Applicant claimed termination was unfair and was owed unpaid benefits of a non-award nature - Respondent argued that claim had been settled through 'Deed of Settlement and Release' - Commission found on evidence that Applicant was to conclude settlement through filing of Notice of Discontinuance, but failed to do so and that in the absence of the Applicant, Respondent's submission of Deed of Settlement was sufficient to resolve dispute - Dismissed - Mr Z Stojkovic -v- Timpack Industries - APPL 1077 of 1995 - PARKS C - 11/04/96 - Wood and Paper Product Mfg 1198

Application for denied contractual entitlements on the grounds of unfair dismissal - Applicant failed to attend the conference - Respondent argued Commission should proceed with matter and dismiss application - Commission reviewed I.R. Act 1979 and found that under s.27(1)(d) it could proceed to hear and determine matter in the absence of any party and that as no response was evident nor any attempt to prosecute application on the Applicant's behalf, it was appropriate to dismiss application - Dismissed - Mr GP Shea -v- Communiquardo Pty Ltd - APPL 1275 of 1995 - PARKS C - 19/03/96 - Communication Services 1434

[2]Appeal against decision of Commission (76 WAIG 451) re dismissed claim for unfair dismissal, compensation and contractual entitlements - Appellant claimed Commission denied natural justice by failing to give opportunity to be heard and had erred in failing to find non payment of monies and deciding that it lacked jurisdiction to make orders with regards to wages - Full Bench reviewed authorities and found on evidence that cessation of employment was through resignation and in appearing before the Commission in person, appellants had given reasonable opportunity to present case and were not denied natural justice - Dismissed - T Stankovski -v- Quirk Corporate Cleaning Australia Pty Ltd - APPL 117 & 132 of 1996 - Full Bench - SHARKEY P/HALLIWELL SC/GEORGE C - 10/05/96 - Business Services 1667

Complaints re breach of Workplace Agreement Act 1993 - Complainants argued that Defendant had, by threats and intimidation, persuaded them to enter into an agreement contrary to section 68 of the Workplace Agreement - Defendant argued that proposed employment was an entirely new contract and did not consist of continuing employment and the requirement to sign the agreement was a condition precedent to employment with company - Industrial Magistrate reviewed authorities, I.R. Act, Workplace Agreement Act and found on evidence that threats to enter into workplace agreements had existed - Proven - Ms A.M. Clarke -v- Novek Pty Ltd (ACN 070 744 946) t/a Shell Combined - CP 242 of 1995 - Industrial Magistrate - Gething IM - 09/05/96 - Motor Vehicle Rtlg & Services 2010

Application for contractual entitlements on the ground of unfair dismissal - Applicant claimed that advising the respondent that a pay rise under the award was due, led to dismissal - Respondent argued that continued poor performance led to the dismissal - Commission found on evidence that although applicant was unfairly dismissed, and reinstatement was not practical as other employment had been obtained, compensation and contractual entitlements be paid - Granted - Ms AF Bodell -v- L J Hooker Mirrabooka - APPL 1261 of 1995 - HALLIWELL SC - 16/04/96 - Property Services 2013

CUMULATIVE DIGEST—*continued*

Page

TERMINATION—*continued*

Application for unfair dismissal - Applicant claimed that the dismissal was procedurally unfair and [was not given] sufficient time to show any improvement prior to the date of termination - Respondent argued the applicant was dismissed for reasons of repeated errors, lack of productivity, lack of efficiency and a refusal to comply with instructions - Commission found on evidence that Applicant had failed to show that dismissal was unfair - Dismissed - Ms L Klemm -v- Dr M Oehlers & Dr N Miller - Balga Medical Centre - APPL 6 of 1996 - BEECH C - 23/05/96 - Health Services 2019

Application for reinstatement without loss of benefits or compensation on the grounds of unfair dismissal - Applicant claimed termination was unfair as the former position should have been offered to her - Respondent argued that the perceived friction caused by Applicant's parents would not have created a suitable working environment - Commission found on evidence that as termination was from business operating loss and re-advertised position was not Applicant's position, dismissal was not unfair - Dismissed - Ms CM Korda -v- Murray Heslin Hamilton and Melissa Ann Hamilton T/A Sweet Paradise - APPL 102 of 1996 - GIFFORD C. - 17/05/96 - Food Retailing 2021

Application for contractual entitlements on the grounds of unfair dismissal - Applicant claimed that termination was due to unpaid monies from Respondent - Respondent argued that termination was result of gross misconduct, in misappropriation of company funds and poor workmanship - Commission found on evidence that a discretion between Jobstart scheme and CES had occurred and directed Registrar to forward transcript onto Department of Employment, Education and Training - Dismissed - Mr EJ Poat -v- Eagle Communications Pty Ltd - APPL 899 of 1995 - BEECH C - Communication Services 2028

Conference referred re reinstatement without loss of earnings or award entitlements - Applicant union claimed that as drug conviction occurred outside work and on personal property, Respondent failed to exercise procedural fairness upon discovery of employee's conviction - Respondent argued that as drug was found on company property a right to exercise duty of care towards employees existed, and that employee did not deny drug possession until employment was terminated - Commission reviewed authorities and found on evidence that the claims of employee being a cannabis user, attending work under the influence of the drug, or endangering lives of employees were not sustainable, and dismissal was unfair - Granted - The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- Western Mining Corporation - Kambalda Nickel Operations - CR 117 of 1996 - HALLIWELL SC - 06/05/96 - Metal Ore Mining. 2035

TRANSFER

Application pursuant to Public Sector Management Act *re* unfair recruitment, selection and appointment process - Applicant claimed they had been a denied "like to like" transfer entitlement and due to unfair and improper invitations made to other ineligible persons, was placed in a disadvantageous predicament - Applicant further claimed that appointments were contrary to Redeployment & Redundancy Regulations and sought an order to restrict the appointments from only former Senior Counsellors - Respondent argued that Applicant's interpretation of the Regulations was incorrect and that the appointment of the positions was a discretionary matter for the employer and not subject to the Regulations - Commission reviewed authorities and found on evidence that it was not open to determine whether the Transfer Regulation had been applied fairly and applicant's claim for unfair and improper application of Regulations had been applied fairly and Applicant's claim for unfair and improper application of Regulations had not been made out - Dismissed - Mr DA Sheahan -v- Hon Min for Education, Employment and Training - APPL 1123 of 1995 - GIFFORD C. - 22/12/95 - Government Administration..... 215

Application re reassignment to original location on the grounds of unfair transfer - Applicant claimed that due to unfair transfer he was the victim of unfair treatment and injustice and appeal against decision of the Respondent - Respondent argued that contrary to written warnings and instructions the Applicant had failed to comply with provisions of s.7C of the Education Act 1928 - Respondent further argued that after several communications the Applicant had disregarded instructions and as a result was suspended on the grounds of misconduct under s.7C(2)(a) of the Education Act 1928 - Commission reviewed authorities, Education Act 1928 and found on evidence that Applicant had not made out any grounds of appeal and accordingly the appeal be dismissed - Dismissed - Mr WG Antoniak -v- Ministry of Education - APPL 764 of 1995 - BEECH C - 11/03/96 - Education..... 721

UNFAIR DISCREPANCY

Application to vary award - Parties claimed Commission should disqualify itself from hearing matter as perception of bias had arisen - Applicant claimed that application for bias was misconceived and rejected proposition of Commission limitation on witness number but rather acknowledged that determination of question was for Commission to decide - Respondent union claimed that during hearing Commission conveyed impression of time wasting which placed onus to establish case for adjournment and also made a statement concerning unspecified limitation on witness number - Commission reviewed transcript and found that as no basis for reasonable apprehension of bias existed it would not disqualify itself from the matter - Ordered Accordingly - Newcrest Mining Ltd (Telfer) -v- Australian Electrical, Electronics, Foundry and Engineering Union (Western Australian Branch) & Others - APPL 766 of 1995 - GEORGE C - 05/01/96 - Metal Ore Mining..... 200

UNIONS

[1]Application for stay of proceedings against decision of President (75 WAIG 2950) pending appeal to Industrial Appeal Court - Appellant claimed that if appeal was successful and the stay unsuccessful, the commencement of proceedings would cause prejudice to appellant and granting of stay would merely delay commencement of action against specified individuals - IAC reviewed authorities and found that the appeal did raise serious questions and found it undesirable to institute proceedings against individuals not formally parties to the original application - IAC further found that given the date the appeal was to be listed, only a minimal amount of time would elapse prior to its determination and no prejudice on the respondents was pointed to in submissions - Granted - The West Australian Locomotive Engine Drivers', Firemen's and Cleaners' Union of Workers -v- Mr E Schmid & Others - IAC 12 of 1995 - Industrial Appeal Court - Kennedy J. - 10/12/95 - Unions..... 6

CUMULATIVE DIGEST—*continued*

Page

UNIONS—*continued*

[1]Appeal against decision of Full Bench (75 WAIG 856) re dismissed appeals against Industrial Magistrate (74 WAIG 2766) re breaches of award - Appellants claimed that Full Bench had erred in law in holding that provisions of I.R. Act created vicarious liability and in failing to hold both vicarious liability in common law doctrine and determining that s.96G(2) had no application to facts - IAC in first appeals, reviewed authorities and found that as threats made by employee organisation were in a nature prohibited by s.96E of I.R. Act an error in law had occurred and that appeals be upheld and remitted to Full Bench - IAC in later appeals, further found on evidence that said person had been established as agent for Union and that as defendant had adduced no evidence to discharge onus, appeal ground was immaterial to conviction - Granted in Part - P Aitken -v- Ms E Ducasse - IAC 4, 5, 6 & 7 of 1995 - Industrial Appeal Court - Kennedy J./Franklyn J./Rowland J. - 14/12/95 - Services to Transport 330

[4]Application for interpretation of union rules - President examined rule and found that as provisions in rule 6 terminated membership effective 3 months from receival of written notice, it was inconsistent with and contrary to s.64(B) of the I.R. Act and determined that rule 6 be disallowed on and from date of hearing - Ordered and Declared Accordingly - REGISTRAR -v- CONSTRUCTION, MINING, ENERGY - APPL 1325 of 1995 - President - SHARKEY P - 02/02/96 - Unions 338

[4]Application for interpretation of union rules - President examined rule and found that as provisions in rule terminated membership effective 3 months from receival of written notice, it was inconsistent with and contrary to s.64(A) & (B) of the I.R. Act and determined that rule 6.12 be disallowed on and from date of hearing - Ordered and Declared Accordingly - REGISTRAR -v- The Master Plumbers' and Mechanical Services Association of Western Australia (Union of Employers) - APPL 1326,1332 of 1995 - President - SHARKEY P - 02/02/96 - Unions 339

[1]Appeal against decision of President (75 WAIG 2950) re orders for breach of union rules - Appellant claimed that in first order President was without power under s.66 of the Act to make direction as no rule existed which required re-imbursement or repayment of monies - Appellant further claimed that granting President's second and third orders would compel union to institute proceedings if General Trustees refused and that rules cast obligation only on General Trustees - IAC reviewed union rules and authorities and found that as rule 22 imposed an obligation of General Committee to direct General Trustees to instigate legal proceeding against misappropriation, President's order was within powers of s.66 of the Act - IAC further found that Appellant's submissions against second and third orders were valid and would be granted, but could not accept challenge of orders on natural justice - Granted in Part - The West Australian Locomotive Engine Drivers', Firemen's and Cleaners' Union of Workers -v- Mr E Schmid & Others - IAC 12 of 1995 - Industrial Appeal Court - Kennedy J./Franklyn J./Anderson J. - 20/02/96 - Unions 639

[4]Application for orders re breach of union rules - Applicant claimed Respondents' had failed to adhere to union rules through failing to conduct referendum, failing to meet legal expenses exceeding $8.00 provision and sought order accordingly - Respondent initially did not oppose order but later argued that as incurring of expenses could result in possible breach of contract it was not practicable to hold referendum and that issuance of declaration would affect rights of innocent payees - President reviewed union rules and found that under rule 45, the authorisation of incurring and payment of legal expenses was specifically approved by General Committee and that General Committee's interpretation of rules 45 and 46 and "practicable" was incorrect - President further found that as Respondent had breached rule 46 the decision and action were ultra vires the rules and void, and as no demonstration of affected rights had been made out, declaration to issue - Declared and Ordered Accordingly - Mr E Schmid -v- The West Australian Locomotive Engine Drivers', Firemen's and Cleaners' Union of Workers - APPL 1272 of 1995 - President - SHARKEY P - 23/11/95 - Unions 641

Complaint re breach of award - Complainant Union claimed that Defendant breached Clause 28(2) of the Building Trades (Construction) Award 1987 - Defendant argued that Union was not competent to make complaint as it was not party to award at the time complaint was made - Industrial Magistrate reviewed authorities and found pursuant to Section 72(5) of the I.R. Act 1979, that as Complainant Union was a registered member, it was competent to make complaint and had competence to pursue complaint - Decision Issued - The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers -v- Robco WA Pty Ltd T/A Robco - CP 53 of 1995 - Industrial Magistrate - Gething IM - 03/08/95 - Unions 1158

Complaints re breach of awards - Complainant union claimed Defendant breached two awards by failing to provide copies of time records - Defendant argued that it was sufficient for time records to be perused within their offices, rather than yielding possession to Complainant union - Industrial Magistrate reviewed authorities and found on evidence that the awards did not create an obligation on Defendant to send or deliver copy of records to the union premises - Parties invited to be heard on final orders - Decision Issued - The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers -v- Building Managing Authority - CP 139 of 1995 - Industrial Magistrate - Reynolds IM - 29/09/95 - General Construction 1159

Complaint re discriminatory and injurious acts against persons due to non-membership of employee organisation - Complainant claimed that the threatening of free and lawful trade of employee was contrary to s.96E of the I.R. Act - Defendant argued that employee was stopped for safety reasons, that in casual conversation told employee of union's location and denied stating that employee couldn't come and work on site - Industrial Magistrate found on evidence that safety aspect was never raised and was constructed by Defendant after event - Industrial Magistrate reviewed authorities and further found that in circumstance or context the words used had constituted a threat and as intention to threaten existed, breach of s.96 had occurred - Proven - Mr AG Shuttleton - DOPLAR -v- J Wilson - CP 79 of 1995 - Industrial Magistrate - Whitely IM - 27/02/96 - Property Services 1175

Application for registration of agreements - Preliminary discussion re Intervening Union claimed interpretation of state and federal eligibility rules caused confusion with rights and obligations of unions, and this resulted in lack of clarity of terms of Agreements - Commission found on evidence that as application of agreement was not ambiguous but reflected intention of parties and satisfied the requirements of the Act, intervention was dismissed - Dismissed - Western Australian Government Railways Commission -v- The West Australian Locomotive Engine Drivers', Firemen's and Cleaners' Union of Workers - AG 20,21 of 1996 - SCOTT C. - 26/02/96 - Rail Transport 1107

[4]Application for orders re referendum of membership - Applicants claimed that as provisions of union rule 56 had not been observed in a proper manner an order should issue stating that the referendum of the membership in Westrail's Right Track Program, Crew Reform Initiatives be declared null and void - Applicant further claimed that not appointing a Returning Officer constituted a breach of union rules - Respondent argued that application had no merit as the referendum was undertaken in accordance with the rules and as lack of compliance with rule was only technical, relief should not be granted - President reviewed authorities and found on evidence that the applicants had not established that a prima facie case for relief existed for interim orders - Dismissed - Mr GH Heaysman & Other -v- The West Australian Locomotive Engine Drivers', Firemen's and Cleaners' Union of Workers - APPL 1403 of 1995 - President - SHARKEY P - 26/03/96 - Rail Transport 1294

CUMULATIVE DIGEST—*continued*

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UNIONS—*continued*

[2]Applications pursuant to s.72A of I.R. Act 1979, seeking orders to represent the industrial interest of "PACTS" employees - Applicant Union (HSOA) submitted orders sought, would further the objects of the Act, were consistent with objectives of wage fixing principles, will reduce number of awards allowing for better industrial representation and management of employees and through Union rationalisation aid ongoing reform in the health industry - Application by Respondent Union (CSA) seeking orders to represent industrial interests of salaried employees, employed by the Commissioner of Health in business and activities as set out in application - Respondent Union submitted it had, historic coverage and continues to have significant actual membership coverage, provided impetus in relation to public health sector employees in matters of award entitlement and argued failure to grant orders would result in demarcation in the public health sector - Full Bench granted a number of "parties" leave to be heard pursuant to s.72A of Act, however dismissed all applications for leave to intervene pursuant to s.27(1)(k) of the Act - Full Bench reviewed authorities and noted arguments of both the Unions with regard to historical industrial coverage, change in status of employee, current work practices of employees and overall benefits sought by the employer, employees and Union. Full Bench found both parties had merits to their application, however issued decision and order defining the respective coverage of the unions and referred to the President, matters requiring alteration of rules of the Unions - Ordered Accordingly - Hospital Salaried Officers Association of Western Australia (Union of Workers) -v- (Not applicable) - APPL 169, 170, 171,172, 173,174,175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230,231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 496 of 1995 - Full Bench - SHARKEY P/BEECH C/GIFFORD C. - 02/04/96 - Unions 1671

[2]Application for alteration of union rules - Applicant sought a declaration that Branch rules relating to qualification of membership were same as applicant, and vice versa - Full Bench reviewed union rules and found that as the eligibility of membership for both Branch and applicant were substantially the same, the Branch rules were in accordance with s71 of the IR Act and the same as the State organisation - Declared Accordingly - LIQUOR, HOSPITALITY & MISC -v- Not Applicable - APPL 594 of 1996 - Full Bench - SHARKEY P/COLEMAN CC/GIFFORD C. - 28/05/96 - Unions 1699

[4]Application for orders re breach of union rules - Applicant claimed that as the provisions and requirements of the registered rules had not been "observed in a proper manner" an order be issued declaring that the Special Delegates Conference and all resolutions passed at the conference as null and void - Respondent argued that as none of the stated registered rules had been breached, no basis existed to grant orders -President reviewed rules and found on evidence that the rules had been sufficiently complied with and that no breach had been established - Dismissed - Mr S Nedeljkovic -v- The West Australian Locomotive Engine Drivers', Firemen's and Cleaners' Union of Workers - APPL 573 of 1996 - President - SHARKEY P - 23/05/96 - Unions 1702

[4]Application for orders re breach of union rules - Applicant claimed that rules of the respondent were contrary to and inconsistent with sections of the Act - President reviewed union rules and IR Act and found that as rule 30 was inconsistent with and contrary to section 64 of the Act, the rule would be disallowed on and from the date of decision - Ordered and Declared Accordingly - The Registrar -v- The Shop, Distributive and Allied Employees' Association of Western Australia - APPL 461 of 1996 - President - SHARKEY P - 23/05/96 - Unions 1703

VICTIMISATION

Application for reinstatement without loss of benefits or compensation on the grounds of unfair dismissal - Applicant union claimed three members were unfairly selected for redundancy in preference to other employees, contrary to specified redundancy selection criteria - Respondent argued redundancy process was fair and unbiased, and involved open discussion and debate between supervisors and those knowledgeable of the operation - Commission found on evidence that a full comparison of Applicant employees with fellow employees had been undertaken by a qualified group, and that neither process or outcome was unfair - Dismissed - BRICK, TILE & POTTERY UNION -v- Bristile Clay Tiles - CR 276 of 1995 - SCOTT C. - 12/03/96 - Non-Metallic Min Product Mfg 747

Complaints re breaches of Workplace Agreements Act 1993 - Complainant claimed that under s.72 a different penalty range for individuals and 'any other case' existed and to allow corporate defendants not be prosecuted would be contrary to objectives of the legislation - Defendant argued that terms of s.68 & s.69 of Act only individual person could be convicted of offences and corporate defendant be discharged and complaints dismissed - Industrial Magistrate reviewed Workplace Agreements Act and found that under s.68 & s.69 provisions were aimed at both individuals, corporations and registered organisations - Industrial Magistrate further found on evidence that statements said were intended to cause detriment and was satisfied that some charges had been proven beyond reasonable doubts - Proven in Part - Mr ME Game -v- Air Attention W.A. Pty Ltd - CP 191-197, 199, 200, 201 of 1995 - Industrial Magistrate - Brown I.G. IM - 15/03/96 - Construction Trade Services 1164

Complaint re discriminatory and injurious acts against persons due to non-membership of employee organisation - Complainant claimed that the threatening of free and lawful trade of employee was contrary to s.96E of the I.R. Act - Defendant argued that employee was stopped for safety reasons, that in casual conversation told employee of union's location and denied stating that employee couldn't come and work on site - Industrial Magistrate found on evidence that safety aspect was never raised and was constructed by Defendant after event - Industrial Magistrate reviewed authorities and further found that in circumstance or context the words used had constituted a threat and as intention to threaten existed, breach of s.96 had occurred - Proven - Mr AG Shuttleton - DOPLAR -v- J Wilson - CP 79 of 1995 - Industrial Magistrate - Whitely IM - 27/02/96 - Property Services 1175

Complaints re breach of Workplace Agreement Act 1993 - Complainants argued that Defendant had, by threats and intimidation, persuaded them to enter into an agreement contrary to section 68 of the Workplace Agreement - Defendant argued that proposed employment was an entirely new contract and did not consist of continuing employment and the requirement to sign the agreement was a condition precedent to employment with company - Industrial Magistrate reviewed authorities, I.R. Act, Workplace Agreement Act and found on evidence that threats to enter into workplace agreements had existed - Proven - Ms A.M. Clarke -v- Novek Pty Ltd (ACN 070 744 946) t/a Shell Combined - CP 242 of 1995 - Industrial Magistrate - Gething IM - 09/05/96 - Motor Vehicle Rtlg & Services 2010

Conference referred re reinstatement without loss of earnings or award entitlements - Applicant union claimed that as drug conviction occurred outside work and on personal property, Respondent failed to exercise procedural fairness upon discovery of employee's conviction - Respondent argued that as drug was found on company property a right to exercise duty of care towards employees existed, and that employee did not deny drug possession until employment was terminated - Commission reviewed authorities and found on evidence that the claims of employee being a cannabis user, attending work under the influence of the drug, or endangering lives of employees were not sustainable, and dismissal was unfair - Granted - The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- Western Mining Corporation - Kambalda Nickel Operations - CR 117 of 1996 - HALLIWELL SC - 06/05/96 - Metal Ore Mining. 2035

CUMULATIVE DIGEST—*continued*

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WAGES

[2]Appeal against dismissed decision of Commission (75 WAIG 2841) re variation of award re $8.00 arbitrated safety net wage adjustment - Appellant claimed that Commission had erred as it failed to correctly apply the wage fixing principles, to give weight to the evidence submitted and by incorrectly holding the award to be a "paid rates" award and not a "benchmark award" - Respondent argued that the two awards sought for comparison were inappropriate as one was a "paid rates award" and the other a "minimum rates award" and to do so would have been contrary to the Structural Efficiency Principle - Full Bench reviewed authorities and found on evidence that the history of the two awards indicated that comparison would have been inappropriate - Dismissed - The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers & Others -v- Hon Min for Works & Others - APPL 1128 of 1995 - Full Bench - SHARKEY P/COLEMAN CC/HALLIWELL SC - 20/12/95 - General Construction 16

[2]Appeal against decision of Industrial Magistrate (unreported) re breach of award - Appellant claimed that Industrial Magistrate had erred in law as no finding, set out by the Minimum Conditions Act 1993, was made in relation to the terms implied in award, where a provision or condition of award was less favourable to the employee than a minimum condition of employment - Respondent argued that it had a right to know the nature of the illness or injury over and above the medical certificate and that in the absence of that, it was not liable for payment of the sick leave as stipulated in the award - Full Bench found on evidence that the Minimum Conditions Act applied in lieu of the award and that the medical certificate supplied by the Appellant's medical practitioner sufficed in notification of inability to attend work - Upheld and Remitted - Ms L Nicol -v- Milena Filomena and Giuseppe Iacusso T/A La Plaza Decor - APPL 784 of 1995 - Full Bench - SHARKEY P/HALLIWELL SC/GIFFORD C. - 06/12/95 - Personal & Household Good Rtlg 44

Conference re site allowance at the clubhouse construction site, Burswood Golf Complex - Parties agreed to payment of the allowance as site contained various disabilities which made work unpleasant and difficult - Commission undertook inspections and found on evidence that the disabilities claimed were in fact experienced and that the site warranted the payment of an allowance as agreed by the parties - Granted - The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers -v- C H Day & Co Pty Ltd T/A Geo A Esslemont & Son - C 316 of 1995 - SCOTT C. - 16/11/95 - General Construction 222

Application to vary award re $8.00 Safety Net Adjustment - Applicant union claimed that Federal matter had previously determined the issue in principle and that principle should be followed by this Commission - Respondent argued that Federal Award was totally devoid from State award operations and should be considered when applying $8.00 Safety Net Adjustment - Commission reviewed authorities and found that the effect of two safety net adjustments, in Meat Award, would give tally workers a greater increase than prescribed in the Principles - Commission further found that over-tally was not an overtime payment but an incentive payment and for over-tally purposes refused application in relation to all-purpose rate - Granted in Part - AUST MEAT INDUSTRY EMPL UNION -v- Action Food Barns & Others - APPL 1086 of 1995 - HALLIWELL SC - 11/01/96 - Food, Beverage and Tobacco Mfg 388

Application to vary award re $8.00 Arbitrated Net Adjustment - Parties consented to variation subject to the determination of appropriate enterprise flexibility provisions - Commission reviewed both claims and found that the Enterprise Flexibility clause determined in the earlier hearing was the appropriate term to use and be included into current variations - Granted - LIQUOR, HOSPITALITY & MISC -v- Quadriplegic Centre - APPL 1147 & 1161 of 1994 - PARKS C - 22/01/95 - Health Services 399

Applications to vary awards re second Arbitrated Safety Net Adjustment - Respondent agreed with adjustment but expressed reservations regarding tests to be applied - Commission found that 1st arbitrated safety net application had been granted, and as applications complied with the requirements of the Principles, variations be allowed - Granted - CONSTRUCTION, MINING, ENERGY -v- Adsigns Pty Ltd & Others - APPL 362,363,364 of 1995 - SCOTT C. - 24/05/95 - General Construction 706

[3]Proceedings instituted on Commissions Own Motion pursuant to s.51(2) re consideration of AIRC's decision on "Third Safety Net Adjustment and Section 150A Review October 1995" (Print M5600) - All s.50's parties submitted above decision was a National Wage Decision (NWD) for the purpose of s.51(1) of I.R. Act 1979 and advocated Commission give effect to NWD, however different approaches were submitted for this task - The TLC sought to have separate application joined to these proceeding so that outcome could be achieved via General Order pursuant to s.50(2) of Act, arguing the absence of complimentary legislative provisions of s.150A of Commonwealth Act, impedes on Commission's ability to give effect to the substance of NWD and outcome could be "materially different" - CICS found in favour of other s.50 parties who opposed application for joinder - CICS noted concerns/issues raised by s.50 parties on issues such as, enterprise flexibility provisions, no disadvantage test, "Special Cases" and identification of "paid rates - minimum rates", which go to the operation of the Principle and the tests to be applied for the Third Arbitrated Safety Net adjustment - CICS addressed concerns by stating guidelines to be adopted and issued "Statement of Principles - March 1996" - Ordered Accordingly - (Commission's own motion) -v- Trades & Labor Council of WA & Others - APPL 1164 of 1995 - Commission in Court Session - COLEMAN CC/HALLIWELL SC/GEORGE C - 14/04/96 - Various 911

Complaint re breaches of award - Complainant claimed breaches resulted from Defendant's failure to pay arbitrated safety net adjustment of $8.00 per week - Defendant argued that Complainant was party to an enterprise agreement under which safety net adjustment was offset by increased wages - Industrial Magistrate reviewed authorities and found on evidence that Complainant had not received a wage increase under enterprise agreement thus resulting in breach of award through failure to pay $8.00 per week safety net adjustment - Upheld - The Civil Service Association of Western Australia Incorporated -v- Disability Services Commission - CP 102 of 1995 - Industrial Magistrate - Cicchini IM - 09/08/95 - Government Administration 1161

[3]Applications for implementation of minimum wage adjustments - Parties requested that application No. 1523B of 1990 be deferred pending further examination of duties - Applicant union claimed that it was not in public interest to have one group of employees protected under the award Safety Net when public sector employees would have to wait until the Minimum Rates Adjustment process was completed - Respondents argued that employees covered by this award but not working in TAFE Colleges should not be treated any differently for the purpose of Minimum Rates Adjustment - Commission reviewed award and found that minimum rates process had been implemented and variations were consistent with Wage Fixing Principles - Granted - LIQUOR, HOSPITALITY & MISC -v- Hon Min for Community Services & Others - APPL 1349, 1350, 1351 and 1523B of 1995 - Commission in Court Session - COLEMAN CC/BEECH C/GIFFORD C. - 26/03/96 - Community Services 1290

[2]Appeal against decision of Commission (75 WAIG 2815) re incorrect operative date for awards variation - Appellant claimed that Commission erred by failing to give reasons for chosen date, failing to properly consider employees low paid nature and in selecting date inconsistent with the intention of the State Wage Decision - Appellant further claimed that Commission erred in inserting "Enterprise Flexibility Provision" clause, as clause was contrary to intent of the State Wage Decision - Respondent argued that it opposed the applications at first instance - Full Bench reviewed the IR Act and authorities and found that as the Commission at first instance, erred and miscarried the exercise of its discretion in its failure to apply Principles the appeals would be upheld and awards varied - Ordered Accordingly - LIQUOR, HOSPITALITY & MISC -v- St John of God Hospital & Others - APPL 1172,1173,1174,1175,1176,1177,1183 of 1995 - Full Bench - SHARKEY P/COLEMAN CC/HALLIWELL SC - 16/05/96 - Community Services 1658

CUMULATIVE DIGEST—*continued*

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WAGES—*continued*

[2]Appeal against decision of Commission (76 WAIG 388) re granted variation of award - Appellant claimed Commission erred in holding that Safety Net Adjustment should only apply to tally workers where one tally was worked and in drawing conclusion without adduced evidence - Respondent argued that appellant had not established at first instance that it had complied with the conditions precedent - Full Bench reviewed authorities and found that Commission had erred and miscarried discretion as the variation should have been granted and substitution of Commission's decision with Full Bench would occur - Upheld - AUST MEAT INDUSTRY EMPL UNION -v- Action Food Barns (WA) Pty Ltd & Others - APPL 85 of 1996 - Full Bench - SHARKEY P/COLEMAN CC/CAWLEY C. - 28/05/96 - Personal & Household Good W/sg 1664

Application to vary award re third $8 arbitrated safety net adjustment - subject to an operative date being issued - Applicant claimed a retrospective date of operation - Respondent argued for a current date of operation - Commission reviewed claims and found that an operative date should be date of hearing - Ordered Accordingly - The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers -v- Adsigns Pty Ltd & Others - APPL 486 of 1996 - BEECH C - 09/05/96 - Construction Trade Services 1971

Application for contractual entitlements on the ground of unfair dismissal - Applicant claimed that advising the respondent that a pay rise under the award was due, led to dismissal - Respondent argued that continued poor performance led to the dismissal - Commission found on evidence that although applicant was unfairly dismissed, and reinstatement was not practical as other employment had been obtained, compensation and contractual entitlements be paid - Granted - Ms AF Bodell -v- L J Hooker Mirrabooka - APPL 1261 of 1995 - HALLIWELL SC - 16/04/96 - Property Services 2013

Application for contractual entitlements - Applicant failed to attend hearing - Respondent claimed that dispute was settled previously and that it complied with terms of the settlement, whereas the Applicant had not sought for application be dismissed - Commission found that Applicant's lack of physical representation demonstrated satisfaction with the resolution of matters and that they had honoured the terms of the previous settlement - Dismissed - Mr R Rozario -v- Allwest Print Pty Ltd - APPL 1204 of 1995 - PARKS C - 30/04/96 - Printg, Publishg & Rcdd Media 2031