

CUMULATIVE DIGEST HEADINGS

Denotes New Heading

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

CUMULATIVE DIGEST

MATTERS REFERRED TO IN DECISIONS OF THE INDUSTRIAL APPEAL COURT, INDUSTRIAL RELATIONS COMMISSION AND INDUSTRIAL MAGISTRATES COURT CONTAINED IN VOL. 80 PART 1, SUB PARTS 1 - 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

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ABSENCE WITHOUT LEAVE	
Application re Unfair Dismissal - Applicant argued that dismissal was unfair and that respondent failed to give notice of termination or one week's wages in lieu, to which he is entitled under clause 10 of the award relating to contract of service - Respondent argued that applicant's services were terminated because he refused to satisfactorily explain absence on 13 December 1996 - Respondent further argued that applicant had previously misled him and offered to resign if not granted a week's leave, and then almost immediately commenced work with a competitor - Commission found that though applicant was not obliged to submit detailed information on personal matters that required absence from work, it was not convinced that respondent's right to terminate applicant was unfair - Dismissed - Mr M McGrath -v- Temkara Pty Ltd T/A Economic Pest Control - APPL 1873 of 1996 - PARKS C - 24/02/97 - PESTICIDES	1641
ACT - INTERPRETATION OF	
Application for contractual benefits - Applicants claimed pro-rata long service leave arising out of their contract of service - Respondent argued that the Applicants had not accrued the right to pro-rata long service leave by reason of their length of service - Commission having heard claims CR176/97 and CR 211/97 found the common words used in the contract documents "but will not include any qualifying period" and "with no qualifying period" excluded the Applicants from any requirement to serve a qualifying period before becoming entitled to pro-rata payment of long service leave - Granted in part - Hospital Salaried Officers Association of Western Australia (Union of Workers) -v- Diabetes Australia - Western Australia - CR 176,211 of 1997 - PARKS C - 27/10/97 - Health Services	1663
Application re interpretation of Government Officers (Social Trainers) Award 1988 - Applicant Union claimed that any alteration to the start and finishing times with less than 24 hours' notice attracted penalty rates as prescribed by the Award - Respondent argued such change of hours did not constitute a changed shift thus not directed at any alteration to the roster - Commission having to resolve "what constituted the rostered shift" in reference to "a changed shift" to refer to shift which has changed from one shift to another noted that a shift may be changed and can be extended without becoming a new 'changed shift' but a "change in hours" - Dismissed - The Civil Service Association of Western Australia Incorporated -v- Chief Executive Officer Disability Services Commission - P 1 of 2000 - FIELDING C - 12/04/00 - Community	1940
Application re contractual entitlements - Applicant sought orders pursuant to clause 48(3)(a) of the Metropolitan Health Service Board AMA Medical Practitioners Agreement 1999, or alternatively to resolve the dispute pursuant to clause 48(3)(a) or sections 23(1) and s29(1)(b)(ii) of the I.R. Act - Applicant further argued that to undertake work was a benefit to which she was entitled under her contract of employment - Respondent argued that clause 48(3) of the Agreement only enables "parties" identified as the MHSB and the W.A. Branch of the AMA Inc to bring matter to the Commission and that Applicant is not a party to the Agreement - Respondent argued s.29 of the Act sets out those matters which the Act enables employees to bring to the Commission, that this matter is not such a matter and there was no benefit under Applicant's contract of employment to enable her to bring a matter of the provision of work to the Commission - Commission reviewed Agreement, I.R. Act, Authorities and was not satisfied that to undertake work was a benefit to which Applicant was entitled under her contract of service - Commission concluded that what the Applicant sought does not constitute a benefit to which she was entitled under her contract of employment, nor was the Applicant able to bring the matter to the Commission pursuant to clause 48 of the Agreement - Dismissed - Prof LA Cala -v- Metropolitan Health Service Board & Other - APPL 300 of 2000 - SCOTT C. - 17/04/00 - Health	1946
Conference re dispute in relation to enterprise bargaining negotiations - Applicants discontinued application by letter and by subsequent notices of discontinuance of application - Matter arose for determination as Respondent argued that it was not competent for Applicants to discontinue application without leave of the Commission in accordance with reg.75 of the Industrial Relations Commission Regulations 1985 - Furthermore, Respondent's Counsel submitted that in the circumstances, leave should not be granted by the Commission - Commission found it was unnecessary to determine leave issue as application had been discontinued by Applicants and leave to do so pursuant to the Regulations, was not required - Commission reviewed relevant sections of the I.R.C. Regulations 1985, authorities and found that as the terms of reg.75(1) prescribe the clear and unambiguous method of bringing proceedings to an end, which method should be complied with to be effective, therefore, this procedure was ultimately complied with in this case - Discontinued - AUTO, FOOD, METAL, ENGIN UNION -v- Midland Brick Co Pty Ltd - C 337 of 1999 - KENNER C - 20/04/00 - Brick	1978
² Questions of Law referred to Full Bench re whether Industrial Agreement No. AG21 of 1995 continued to bind the Western Australian Government Railways Commission (WAGRC) and its employees notwithstanding the notice of retirement given by the Australian Rail, Tram and Bus Industry Union (ARTBIU), on 12th November 1999 and whether the Agreement continued in force in respect of the WAGRC after the retirement of ARTBIU from the agreement on December 13, 1999, until a new agreement or an award in substitution for the Industrial Agreement has been made - Leave to intervene by the Minister for Labour Relations was granted - Submissions on behalf of Applicant and intervener were both directed to persuading the Full Bench that the answer to both questions posed was "No" - Respondent made no submissions - Full Bench reviewed I.R. Act, authorities and found the answer to the said questions were "No" and ordered Respondent to pay costs to Applicant within 14 days of the date of the Determination - Determined Accordingly - The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch -v- Western Australian Government Railways Commission - APPL 1728 of 1999 - Full Bench - COLEMAN CC - 11/04/00 - Rail	1740
¹ Appeal against decision of Full Bench (79WAIG3529) re upheld appeal re variation of Mineral Sands Industrial Award 1991 - Question re jurisdiction - Appellant argued that Full Bench erred in law in finding that the subject of the application was an industrial matter, that Full Bench erred in law in holding that an offer by the employer appellants pursuant to the Workplace Agreement Act 1993 was an industrial matter and further, an offer to employ a person under a workplace agreement does not relate to any future or potential employee as defined in the Act and, therefore, is not an industrial matter - IAC allowed the appeal only to the extent of amending par 5 of Full Bench Orders and dismissed the appeal in all other respect - Dismissed - RGC Mineral Sands Ltd & Other -v- CONSTRUCTION, MINING, ENERGY & Others - IAC 10 of 1999 - Industrial Appeal Court - Kennedy J./Scott J./Parker J. - 09/06/00 - Mining	2437
² Appeal against decision of Commission (unreported) re employment of contractors - Appellant argued that the Commission erred in law in that it did not comply with the provisions of s.44 of the Act following an objection to the Commission of ostensible bias, therefore the decision of the Commission should be quashed in its entirety - Full Bench found that the matter had not proceeded to arbitration level, there was no agreement reached and was adjourned before the main issue of disagreement or dispute was dealt with - Full Bench found that the decision appealed against was a 'finding' and the Full Bench was required to be satisfied that the matter was of such importance that, in the public interest, an appeal should lie - Full Bench found that because the grounds of appeal were narrowly confined only to the issue of the Commission's jurisdiction and power and particularly the procedure adopted by the single Commissioner under s.44 of the Act, it was not persuaded that the finding related to a matter of such importance in the public interest - Dismissed - COMM, ELECTRIC, ELECT, ENERGY -v- BHP Iron Ore Pty Ltd - FBA 11 of 2000 - Full Bench - SHARKEY P/SCOTT C./KENNER C - 02/06/200 - Mining	2453

CUMULATIVE DIGEST—continued

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ACT - INTERPRETATION OF—continued

Application re dispute in respect of termination and annual leave - Applicant made a referral to the Commission for determination of a question or dispute that has arisen between Applicant and Respondent about the meaning or effect of a workplace agreement, namely whether Respondent, being a party to a registered workplace agreement was entitled to require Applicant, to take annual leave during a period of one month's notice in writing of termination of his employment - Commission reviewed authorities, I.R. Act, Workplace Agreement and the Minimum Conditions of Employment Act 1993 and found that the meaning or effect of the workplace agreement executed by Applicant and Respondent, including the meaning or effect of the term implied into the workplace agreement under s.24(2)(b) of the Minimum Conditions of Employment Act 1993 was that "on the giving of one month's notice of termination of the contract of employment under the termination clause of the workplace agreement, the Applicant was entitled to be paid for accrued annual leave that he had not taken prior to the date of the termination notice", therefore, the Respondent could not require the Applicant to take annual leave during a period of notice of termination of the employment contract - Determination Issued Accordingly - Mr P Hunt -v- Swan Barrack Holdings - WAG 3 of 2000 - SMITH, C - 16/05/00 - Education

2699

ALLOWANCES

Application for variations of awards - Applicant sought to amend the Public Service Award 1992 and the Government Officers Salaries, Allowances and Conditions Award 1989 by varying respectively Schedule C- Camping Allowance and Schedule I - Travelling, Transfer and Relieving Allowance and Schedule F - Camping allowance and Schedule I - Travelling Transfer and Relieving Allowance - Commission ascertained that the previous method of establishing the allowance was no longer supported by DOPLAR - Respondents argued that as employers they had concerns regarding taxation implications if travel allowances prescribed in the awards exceeded those which are deemed reasonable for taxation purposes by the ATO - Respondent further argued that the allowance system utilised by the Australian Public Service should be utilised as this system has more merit - Arbitrator noted that the adoption of the APS rates would cause reductions in the current level of travelling allowance payments in high cost towns in WA - Applicant argued that reimbursement of actual expenses could cover the difference however there are obvious problems in operating a hybrid scheme - Arbitrator further noted that the respondents have not raised any substantive argument why the change should occur - Parties directed to have such negotiations as were necessary to produce agreed schedules of amendments to the Commission - Direction Accordingly - The Civil Service Association of Western Australia Incorporated -v- Commissioner, Aboriginal Affairs & Others - P 7,8 of 1999 - Public Service Arbitrator - GREGOR C - 01/02/00 - Welfare

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Application for interpretation of Clause 5.7 "Review of Remote Location Conditions & Allowances" of the Water Corporation Agreement 1997 - Parties disagreed as to the proper interpretation of the Clause, particularly as it governs the operative date for the implementation of any adjustments from the review referred to in the clause - Applicant argued the Clause should be interpreted as requiring any adjustments made as a consequence of the results of a review to be from the date in the clause - Applicant further argued that the Clause should be read literally so that the words "subject to agreement being reached between the parties" qualifies only the implementation or otherwise of the results of the review, and not the date of the implementation - Respondent argued that the Clause should read as providing that the operative date of the first pay period commencing on or after the 1 July 1998 was to apply only if agreement was reached regarding the changes before 1 July 1998 and the clause should not be read as authorising a retrospective adjustment - Commission referred to the law and established that the Clause is capable of being given a sensible meaning by applying the ordinary and natural meaning of the language used in the clause - Commission determined that the question posed by the Applicant should be answered in the affirmative but only in so far as it concerns changes resulting from the results of the review contemplated by Clause 5.7 - Order Accordingly - The Civil Service Association of Western Australia Incorporated -v- Managing Director, Water Corporation - P 24 of 1999 - Public Service Arbitrator - FIELDING C - 04/02/00 - Household

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Application re alleged incorrect application of Regulation 23 of the Public Sector Management (Redeployment and Redundancy) Regulations 1994 regarding rate of pay - Applicant argued that he was entitled to be paid at a higher rate upon redeployment - Respondent argued that the rate paid to the Applicant in his position at the Office of Energy constituted the rate of pay for the position which was Level 5.4, and that he received an allowance to maintain the rate he had previously been paid from SECWA - Respondent further argued the allowance did not constitute an allowance for the purposes of Reg 3 of the PSM Act and therefore the correct rate of pay is the applicant's current rate - Arbitrator examined the evidence and referred to the law and determined that the allowance the applicant had received was not an allowance as defined by Reg 3 of the PSM Act and as the substantive position of the applicant was level 5 the applicant's current rate of pay is correct - Dismissed - Mr PJ Glynn -v- Chief Executive Officer, Office of Energy - P 10 of 1999 - Public Service Arbitrator - SCOTT C. - 27/01/00 - Energy

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Conference Referred re site allowance - Applicant claimed that due to various conditions and factors on a number of sites a site allowance is warranted - Commission referred to the law and inspected the Wellington St site and determined that an allowance in relation to this matter is warranted - Order Issued - Commission inspected the South Perth site, referred to the law and the Building Trades (Construction) Award 14 of 1978 and determined that the conditions were not beyond the norm contemplated by the terms of the Award and was not satisfied that the site caused excessive difficulties for employees on that site - Dismissed - The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers -v- Hanssen Constructions & Others - CR 259,299 of 1999 - KENNER C - 17/12/99 - Building

426

Application to make a previously declared interpretation in the form of an Order - Applicant argued terms within s27(1) were superfluous and to retain them would only serve to confuse - Respondent union objected on the grounds deletion of the words may alter the practical effect of the subclause and also prejudice the ongoing dispute with employers in the industry re duty status of "on call" arrangements and appropriate level of payment for such - Commission is satisfied that given the interpretation it declared (79 WAIG 1174), clause 27(1) was less likely to be misapplied if varied to read as Applicant asks - Order issued - Brightwater Care Group (Inc) & Other -v- LIQUOR, HOSPITALITY & MISC - APPL 978,1673 of 1998 - PARKS C - 28/02/00 - Community Services

604

ANNUAL LEAVE

Application for breach of Minimum Conditions of Employment Act 1993 - Complainant sought an order for alleged failure to pay annual leave as prescribed by the Minimum Conditions of Employment Act - Industrial Magistrate examined the evidence and referred to the law and determined that the Minimum Conditions of Employment Act 1993 applied - IM referred in particular to Bombak and Didco Pty Ltd (75WAIG2314) and applied the dicta of this case and determined that the employee is entitled to payment for annual leave - Annual leave entitlement was determined by the IM to be based on the normal rate of pay not the bonus payment as requested by the agent for the complainant - Proved - Mr DJ Hignett -v- Joburne Pty Ltd - CP 62 of 1999 - Industrial Magistrate - Cicchini IM - 24/11/99 - Real Estate Agency

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Application re alleged denied contractual entitlements on the grounds of unfair dismissal - Applicants argued that at all material times, they were employees of the Respondent and sought relief in the form of reinstatement or alternatively compensation - Further, Applicants sought to recover pro rata annual leave and a payment equivalent to three months salary in lieu of reasonable notice due to them under their contract of service - Respondent argued that as Applicants were partners in the business, Commission lacked jurisdiction to hear and determine the matter therefore it should dismiss applications - Commission reviewed authorities and found on evidence that no employee/employer relationship existed and that claims for denied contractual entitlements should be dismissed - Commission further found that the Supreme Court has held that a contractual entitlement to annual leave cannot be converted to a cash entitlement in the absence of some express provision in that regard and that there was no such provision in the King Sound Bargaining Partnership Agreement, therefore Applicants may well have a claim pursuant to provisions of the MCE Act 1993, and if that was the case, it is a matter which is beyond Commission's jurisdiction - Ordered Accordingly and the question of costs adjourned sine die - Mr PI Pederson -v- Carpentaria Marine Pty Ltd ACN 010 996 273 - APPL 2201,2202,2204,2205 of 1998 - FIELDING C - 13/12/99 - Marine

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CUMULATIVE DIGEST—continued

ANNUAL LEAVE—continued

- Application re unfair dismissal - Commission to assess loss for which applicant to be compensated after finding applicant to have been unfairly dismissed - Applicant argued they had not been employed since time of dismissal and sought compensation - Respondent argued compensation should not be ordered for the shift allowance component as applicant had not worked and experienced the disability for which that allowance is paid and the commission should take into account the fact that the Respondent entered into an agreement in settlement of a negligence claim in the District Court - Respondent further argued the applicant's employment was covered by a Federal Award however this was not established as a matter of fact - Commission found applicants loss to be the amount she would have earned had she not been dismissed, however, the Commission was limited by legislation to issue a maximum six months compensation - Order issued - Ms JA Hoffmann -v- Western Australian Aboriginal Media Association (Aboriginal Corporation) - APPL 180 of 1999 - BEECH C - 02/02/00 400
- Application re unfair dismissal and alleged denied contractual entitlements -Applicant claimed that she was unfairly dismissed and as a result denied benefits under her contract of employment - Commission established in conference that the two claims for the benefits of wages in lieu of notice, and pro rata annual leave are based upon the provisions of the Shop and Warehouse (Wholesale and Retail Establishments) Award which applied to the applicant's employment - Applicant argued that she was dismissed for failing to sign a workplace agreement - Applicant further argued that the respondent advertised for new employees one week before her dismissal - Respondents argued that it had dismissed a number of employees in other stores which had ceased operation due to economic considerations - Commission examined the evidence and determined that the applicant did not discharge the onus of proof of Unfair dismissal - Dismissed - Mrs IM Lawson -v- Night Crest Pty Ltd As Trustee For The King Kong Sales Unit Trading As King Kong Sale - APPL 475 of 1999-PARKS C-21/09/99-Retail Trade..... 404
- Application re contractual entitlements - Applicant sought wages and pro rata annual leave due on resignation of employment - Respondent initially argued that Commission did not have jurisdiction to deal with this claim as applicant's employment was governed by Farm Employees Award 1985 and a claim to enforce the award for underpaid wages and annual leave must be made before an Industrial Magistrate - Commission found that it had jurisdiction to deal with applicant's claim because the wage rate agreed between the parties were above award rates and money owed was a non-award benefit - Respondent then argued that applicant's date of resignation was 11 April 1999 but applicant argued that she worked until 28 May 1999 - Respondent further argued that applicant resigned from employment because working full time with long hours was difficult as she cared for 3 children - Commission found that evidence from statutory declaration supported the claim that applicant worked until 28 May 1999 and was therefore entitled to wages of \$800 and pro rata annual leave of \$424 - Granted - Mrs C Boxall -v- Rodney Harry Wisbey (Orlanda Park) - APPL 956 of 1999 - BEECH C - 28/02/00 - Dairy..... 1618
- Conference referred re interpretation of agreement - Applicant seeks interpretation of the annual leave and long service leave clauses to include 20% shift penalty with wages - Respondent argued that no entitlement to shift penalties while on leave exists in the agreement - Commission found the provision for payment of shift loading is elsewhere in the agreement, but the agreement does not make shift loading as part of the rate of pay, as a result the claims sought cannot be granted after a proper interpretation of the clauses - Dismissed - The Media, Entertainment and Arts Alliance of Western Australia (Union of Employees) -v- Western Australian Sports Centre Trust & Others - PSACR 46 of 1999 - BEECH C - 20/04/00 - Sports 1674
- Application re contractual entitlements - Applicant sought to recover monies for outstanding annual leave loading and underpayment of salary - Respondent argued that contract had been altered removing benefit of leave loading and alleged Applicant had been overpaid - Commission found Applicant had made out, at least on balance, his claim and was entitled to recover contractual entitlements denied to him under his contract of employment - Granted - Mr DI Holden -v- Teravin Group Pty Ltd ACN 009 445 121 - APPL 436 of 2000 - FIELDING C - 09/05/00 2722

APPEAL

- Appeal against decision of the Full Bench (79WAIG2305) - Appellant argued that the Commission's discretion miscarried in that it failed to have regard to any relevant factor, apart from the alleged assault itself - Appellant further argued that the Commission should have taken into consideration, the immediate acknowledgement of fault by Mr Baron, minor nature of the alleged assault, the alleged assault was incidental to the physical nature of the assault, the unblemished service and exemplary character of the employee and whether there was any other appropriate way with which the misconduct should have been dealt - IAC examined the evidence and referred to the law and determined that the nature of the offence was not minor due to the matter of maintaining authority within the employment relationship and occurred as a result of anger and insubordination - Dismissed - AUTO, FOOD, METAL, ENGIN UNION -v- Dampier Salt Operations Ltd - IAC 7 of 1999 - Industrial Appeal Court - - 13/12/99 - Mining..... 4
- Appeals against decisions of the Commission (79 WAIG 2656) re Application harsh, oppressive and unfair dismissal and denied contractual benefits - Appellant's argued that the learned Commissioner erred when determining who the employer was and erred in finding and relying upon the content and parties at an interview - Full Bench found that the decisions appealed against were not discretionary decisions in that the decisions were the result of a finding that there was no employment contract between the applicants and the respondent or alternatively that none had been established - Full Bench determined that the Commission at first instance correctly determined the matter of employer responsibility - Dismissed - Mr A Richardson -v- Pipunya Pty Ltd (Administrator Appointed) & Other - FBA 17,18 of 1999 - Full Bench - SHARKEY P/COLEMAN CC/GREGOR C - 09/12/99 - Food Retailing..... 14
- Application for interpretation of Full Bench Order No. FBA 3 of 1999 (79 WAIG 3567) and clarification of Full Bench Order FBA 3 of 1999 issued on 10 November 1999 in regards to the exact number of breaches proven by the Full Bench - Full Bench found that the first question which arose was whether the Full Bench was "functus officio" - Respondent conceded that the Full Bench which heard and determined the appeal was functus officio - Applicant submitted that whilst the doctrine of functus officio, when applied to the proceedings prevented the Full Bench from hearing new evidence or going back a second time after it had performed its authorised function, the order was "alterable" if inconsistencies or anomalies were established to exist in it - Employer argued that it's application was made under s. 46 of the IR Act which was not defeated by the doctrine of functus officio and was a new matter - Full Bench found the application was a fresh application unrelated to the appeal - Full Bench referred to the law and determined that the matter is functus officio and further determined that there is a question as to whether s.46 of the Act is applicable to this type of matter - Dismissed - Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch -v- Pinnacle Services Pty Ltd - FBA 3 of 1999 - Full Bench - SHARKEY P/PARKS C/KENNER C - 31/01/00 - Road Transport..... 307
- Application re unfair dismissal - Matter remitted to the Commission as a result of appeal to the Full Bench to consider the question of relief after Full Bench found the Applicants dismissal to be harsh, oppressive and unfair - Applicant and respondent appeared before the Commission - Respondent elected after a short period of time to no longer maintain his presence - Commission noted that in general the respondent's behaviour was most offensive and further noted the Commission's inability to deal with the respondents behaviour due to the repeal of former s.101 of the IR Act 1979 in 1984, regarding contempt in the face of the Commission - Commission heard evidence and submissions from the applicant and noted that the applicant did not wish to seek reinstatement due to the work environment - Commission determined that the applicant did suffer loss for a brief period and awarded monies accordingly - Order given extemporaneous - Ms GL Tan -v- Gabriels' Cafe - APPL 1842 of 1998 - KENNER C - 15/12/99 - Food Retailing 418

CUMULATIVE DIGEST—continued

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APPEAL—continued

- ¹Appeal against decision of Full Bench (79 WAIG 2091) re effective date of salary increases due under Enterprise Agreement (Dismissed) - Appeal concerns the expression of an operative date for the purposes of calculating the first pay increases due employees contained in the decision of the Public Service Arbitrator (79 WAIG 245) - Appellant argued the same grounds that were argued before the Full Bench, the Order purported to vary an Industrial Agreement, the Order purported to give retrospective effect and the Order purported to give effect prior to the date upon which the Order was lodged in the Commission - IAC found the Arbitrator's Order had the effect of backdating the part of the Agreement providing for salary increases and the Commission/Arbitrator has no power to order that an Industrial Agreement which is being accepted for registration is to have effect from a date prior to its registration - Appeal Upheld - Ministry for Culture & the Arts -v- The Civil Service Association of Western Australia Incorporated & Others - IAC 6 of 1999 - Industrial Appeal Court - 04/02/00 - Government Administration 453
- Appeal against decision of Commission (79 WAIG 2632) re unfair dismissal and contractual entitlements - Appellant argued Commission erred on numerous points and sought the decision to be set aside and the matter re-listed for hearing or at the very least compensation to be recalculated - Full Bench found there was no error in the Commissions findings - Dismissed - Robert Blakeman ATF the Blakeman Family Trust T/A McBride's Collectables and Giftware -v- Ms J Gudgin - FBA 19 of 1999 - Full Bench - SHARKEY P/FIELDING C/KENNER C - 22/02/00 - Personal & Household Good Rtlg 457
- ²Appeal against decision of Commission (79 WAIG 3459) re wearing of badges by union members during hours of employment - Appellant appealed on a number of grounds including that the Commission erred in finding the respondents policy prohibiting the wear of union badges is not unreasonable - Appellant argued employees wore a number of badges apart from their identification badges and there was no evidence that the wearing of union badges had been complained about by the public or that they were detrimental to the operations - Respondent argued it had a blanket ban on all unauthorised badges and further argued that, if an exception were to be made in the case of membership badges issued by the appellant, exceptions would have to be made for others - Full Bench found the Commission had erred in grounds 3 and 4 of the appeal and that the order made at first instance in application No. CR 159 of 1999 be suspended and be remitted back to the commission to be heard and determined according to law - Appeal Upheld - LIQUOR, HOSPITALITY & MISC -v- Burswood Resort (Management) Ltd - FBA 30 of 1999 - Full Bench - SHARKEY P/BEECH C/SMITH, C - 15/03/00 1359
- ²Appeal against Decision of Public Service Arbitrator (80 WAIG 213) re effective date of salary increase as a result of an Enterprise Bargaining Agreement - Appellant argued Commissioner erred in law and acted in excess of jurisdiction in making an order that the appellant pay to its employees sums of money which amounted to giving retrospective effect to an industrial agreement - Respondent argued the appellant had agreed to an effective date of 1st January 1999, however, then reneged on the promise and that this was an order seeking the enforcement of that promise - Full Bench found the order requiring the appellant to pay its employees covered by the EBA salary increases from 1st January 1999 to be impermissible - Upheld - Chief Executive of the Western Australian Tourism Commission -v- The Civil Service Association of Western Australia Incorporated - FBA 32 of 1999 - Full Bench - SHARKEY P/COLEMAN CC/FIELDING C - 27/03/00 - Government Administration 1370
- ²Appeal against Decision of Commission (79 WAIG 3114) re unfair dismissal - Application in first instance dismissed on preliminary matter - Appellant argued the commissioner erred in a number of findings relating to the dismissal of the application on the grounds the incorrect respondent was named - Appellant further argued the commissioner erred in not permitting the applicant to amend the original application to reflect correctly the employer/s - Respondent referred to authorities and argued this was a case of a wrong party being named, not a misdescription of the party's name and should be dismissed - Full Bench reviewed authorities and found the commissioner had erred in not allowing an amendment to the name of the respondent and remitted the application back to the commission at first instance to be listed for hearing and determination according to law - Upheld in Part - Ms PK Rai -v- Dogrin Pty Ltd - FBA 27 of 1999 - Full Bench - SHARKEY P/FIELDING C/GREGOR C - 07/03/00 - Accommodatn, Cafes&Restaurants 1375
- ²Appeal against Decision of Commission (79 WAIG 3461) re unfair dismissal - Appellant argued Commissioner erred on a number of grounds one being that reinstatement of the former employees was impracticable - Full Bench found the commissioner was open to conclude the relationship between the former employees and the appellant had broken down and under the circumstances reinstatement was impracticable and that no other grounds of appeal were made out - Dismissed - Solid Concepts Pty Ltd ACN 009 301 553 -v- LIQUOR, HOSPITALITY & MISC - FBA 23 of 1999 - Full Bench - SHARKEY P/SCOTT C/WOOD, C - 31/03/00 1381
- ¹Appeal against decision of Full Bench (79 WAIG 1867, 2985 & 3183) re allegedly denied contractual entitlements - Industrial Appeal Court found that Full Bench was in error in concluding that the rate of salary to be paid was a different rate to that in the contract when the contract clearly and unambiguously expressed the rate of salary to be paid to Appellant - IAC was not persuaded otherwise that Full Bench has made any other error, has upheld the Appeal to this extent and remitted the matter back to the Single Commissioner for further hearing and determination regarding under-paid salary - Upheld - Ms AP Ahern -v- Aust Fed of TPI Ex-Serv Men - IAC 8 of 1999 - Industrial Appeal Court - Kennedy J./Anderson J./Scott J. - 31/03/00 1729
- Appeal against Decision of Commission (80 WAIG 252) re Unfair dismissal and contractual entitlements - Appellant argued Commission erred in calculating annual salary, redundancy and compensation after finding appellant to have proven his claim - Full bench reviewed authorities and found Commission to have erred in the calculation of appellants redundancy and compensation and varied the Order in the first instance to reflect findings - Upheld - Mr K Thompson -v- Gregmaun Farms Pty Ltd atf Chris & Evelyn Henderson Family Trust trading as C & E Henderson - FBA 1 of 2000 - Full Bench - SHARKEY P/SCOTT C/KENNER C - 11/04/00 - Agriculture 1733
- ⁴Application for stay of the operation of Orders 2 and 3 issued by the Commission - The appeal was against the decision issued on 8/7/99 (80 WAIG 1622) and was about the compensation ordered - The Applicant filed an affidavit and testified that it had a genuine concern that if the back-pay was paid to the respondent there would be considerable difficulty recovering that back-pay if the appeal was successful - President found that the balance of convenience favoured the respondent as it suffered financial hardship because of the dismissal - Further, there was no evidence that he would be unable to repay the back-pay money particularly since he had been reinstated in his employment - President further found that there was no need for a stay of the operation of the decision - The equity, good conscience and the substantial merits of the case favoured the respondent - Dismissed. - City of Geraldton -v- Mr DJ Cooling - PRES 4 of 2000 - President - SHARKEY P 1751
- ⁴Application for stay of operation of the whole of the Order (80 WAIG 671) - Appeal was against a declaration of unfair dismissal and an order for compensation - President found that balance of convenience favoured applicant because there was a lack of objection from respondent to the application and was satisfied that applicant faced financial difficulties and the probability that compensation would not be recovered with alacrity - Stay Granted - East Kimberley Aboriginal Medical Service -v- The Australian Nursing Federation, Industrial Union of Workers Perth - PRES 2 of 2000 - SHARKEY P - 03/04/00 - Medical 1753
- Appeal against a decision that Applicant be required to register as an employer under the Construction Industry Portable Paid Long Service Leave Act 1985("the Act") and make payments to the Construction Industry Long Service Leave Payments Board - The board reviewed the Act and authorities and concluded the applicant was in an industry related to, but not in, the construction industry and accordingly should not be required to register under the Act - Upheld - Kununurra Crane Hire -v- Construction Industry Long Service Leave Payments Board - BOR 7 of 1999 - Long Service Leave Board of Reference - 05/05/00 - Construction Trade Services 1943

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APPEAL—continued

- ¹Appeal against decision of Full Bench (79WAIG3529) re upheld appeal re variation of Mineral Sands Industrial Award 1991 - Question re jurisdiction - Appellant argued that Full Bench erred in law in finding that the subject of the application was an industrial matter, that Full Bench erred in law in holding that an offer by the employer appellants pursuant to the Workplace Agreement Act 1993 was an industrial matter and further, an offer to employ a person under a workplace agreement does not relate to any future or potential employee as defined in the Act and, therefore, is not an industrial matter - IAC allowed the appeal only to the extent of amending par 5 of Full Bench Orders and dismissed the appeal in all other respect - Dismissed - RGC Mineral Sands Ltd & Other -v- CONSTRUCTION, MINING, ENERGY & Others - IAC 10 of 1999 - Industrial Appeal Court - Kennedy J./Scott J./Parker J. - 09/06/00 - Mining 2437
- ²Appeals against decisions of Commission (79WAIG3120) re enterprise bargaining agreements - Appellants argued that the Public Service Arbitrator erred in law and acted in excess of jurisdiction in ordering that, on registration of the enterprise agreement, the date for the purposes of calculating the first pay increase due to employees should be deemed to be the first pay period on or after 12 May 1999 in respect of first Appellant and 10 June 1999 in respect of 2nd Appellant, and in making an order which gave retrospective effect to the industrial agreements, in that such order is not authorised or permitted under the provisions of the Act - Appellants further argued that the date should be the first pay period on or after the registration of the agreements by the Commission - Respondent Union argued that the dates to be used for the purposes of calculating the first pay increases should be 25 March 1999 for first Appellant and 20 April 1999 for second Appellant - Full Bench found that there was no power to make an order that purports to give an industrial agreement any operative effect before the agreement comes into existence - Full Bench acceded to the submissions made by the Appellant's Counsel that the order made was ultra vires and quashed the orders made at first instance - Ordered Accordingly - Chief Executive Officer, Western Australian Centre for Pathology and Medical Research (Pathcentre) -v- Civil Service Association of Western Australia Incorporated - FBA 21,22 of 1999 - Full Bench - SHARKEY P/COLEMAN CC/FIELDING C - 06/06/00 - Health..... 2449
- ²Appeal against decision of Commission (unreported) re employment of contractors - Appellant argued that the Commission erred in law in that it did not comply with the provisions of s.44 of the Act following an objection to the Commission of ostensible bias, therefore the decision of the Commission should be quashed in its entirety - Full Bench found that the matter had not proceeded to arbitration level, there was no agreement reached and was adjourned before the main issue of disagreement or dispute was dealt with - Full Bench found that the decision appealed against was a 'finding' and the Full Bench was required to be satisfied that the matter was of such importance that, in the public interest, an appeal should lie - Full Bench found that because the grounds of appeal were narrowly confined only to the issue of the Commission's jurisdiction and power and particularly the procedure adopted by the single Commissioner under s.44 of the Act, it was not persuaded that the finding related to a matter of such importance in the public interest - Dismissed - COMM, ELECTRIC, ELECT, ENERGY -v- BHP Iron Ore Pty Ltd - FBA 11 of 2000 - Full Bench - SHARKEY P/SCOTT C./KENNER C - 02/06/200 - Mining 2453

APPRENTICES AND JUNIORS

- Application re Interpretation of award - Applicant employer sought true interpretation of clause 21A of Hotel and Tavern Workers Award 1978 re minimum wage for adult males and females from 9/1/96 - 14/11/97 - Respondent sought interpretation to clarify how additional rates for Adult apprentices applied whom ordinary hours included work on a Saturday or Sunday - Commission found Adult apprentices were entitled to the minimum adult wage in the first instance and additional rates for those ordinary hours worked on a Saturday or Sunday as prescribed by the Award - Declared Accordingly - Chestone Holdings Pty Ltd T/A The Lord Forrest Hotel -v- LIQUOR & ALLIED INDUSTRY UNION & Others - APPL 2275 of 1997;APPL 933 of 1998 - PARKS C - 29/02/00 - Hospitality..... 605

AWARDS

- Application for interpretation of Animal Welfare Industry Award No.8 of 1968-Preliminary Point-Applicant seeks interpretation to ascertain whether the award would apply to cohuna koala park-Respondent denies consenting to the application nor agreeing to pay wages based upon the outcome of a determination by the commission-Further argued that all employees are parties to registered workplace agreements and it did not intend employing people other than on workplace agreements-Commission found respondent had agreed to an interpretation in settlement of a previous unfair dismissal claim and allowing there was a substantial delay found there was sufficient justification for the matter to proceed-Application allowed - LIQUOR, HOSPITALITY & MISC -v- Cohuna Koala Park - APPL 178 of 1999 - BEECH C - 25/11/99 - Animal 189
- Application for interpretation of Agreement re Commuted Overtime Allowance - Applicant argued that question to be answered was "is the 15:38 percent Commuted Overtime Allowance counted as salary for the purpose of calculating payment of overtime in accordance with subclause (2) of Clause 9 of the agreement" - Respondent argued that an absurdity arises where the prescribed percentage of the agreement is paid on top of the prescribed award overtime rate - Commission reviewed award, agreement, other evidence and authorities and found commuted overtime allowance to apply-Declared Accordingly - The Civil Service Association of Western Australia Incorporated -v- Director General, Education Department of Western Australia - P 2 of 1999 - SCOTT C. - 02/12/99 - Services to Agriculture..... 189
- Application for variations of awards - Applicant sought to amend the Public Service Award 1992 and the Government Officers Salaries, Allowances and Conditions Award 1989 by varying respectively Schedule C- Camping Allowance and Schedule I - Travelling, Transfer and Relieving Allowance and Schedule F - Camping allowance and Schedule I - Travelling Transfer and Relieving Allowance - Commission ascertained that the previous method of establishing the allowance was no longer supported by DOPLAR - Respondents argued that as employers they had concerns regarding taxation implications if travel allowances prescribed in the awards exceeded those which are deemed reasonable for taxation purposes by the ATO - Respondent further argued that the allowance system utilised by the Australian Public Service should be utilised as this system has more merit - Arbitrator noted that the adoption of the APS rates would cause reductions in the current level of travelling allowance payments in high cost towns in WA - Applicant argued that reimbursement of actual expenses could cover the difference however there are obvious problems in operating a hybrid scheme - Arbitrator further noted that the respondents have not raised any substantive argument why the change should occur - Parties directed to have such negotiations as were necessary to produce agreed schedules of amendments to the Commission - Direction Accordingly - The Civil Service Association of Western Australia Incorporated -v- Albany Port Authority & Others - P 7,8 of 1999 - Public Service Arbitrator - GREGOR C - 01/02/00 - Marine 353

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AWARDS—continued

- Application to vary awards re redundancy - Applicant sought to vary the Bakers (Metropolitan) Award No A13 of 1987, the Bakers (Country) Award No R18 of 1977 and the Pastry cook's Award No A24 of 1981 to reflect redundancy provisions as contained in the TCR test case decision of the then Australian Conciliation and Arbitration Commission in the Termination, Change and Redundancy case (1984) 8 IR 4 - Respondent sought dismissal of the application for want of prosecution on the grounds of the age of the application and the applications were urgently lodged in response to the then immediate matter of redundancy - Commission referred to the principle that the party wishing to seek a dismissal for want of prosecution needs to demonstrate serious prejudice by reason of the delay - Commission determined that at the time of the hearing, when the application for dismissal was made, there was no lack of prosecution as it was appropriate to proceed to hear the applications on their merit - Accordingly the application for dismissal for want of prosecution was dismissed - Applicant sought a standard in relation to termination, change and redundancy, which has been in operation federally and at the state level for 15 years and further argued that as not all employers would enter into a enterprise agreement the awards in question needed to incorporate the redundancy provisions so those employees would not miss out on those provisions - Respondent argued that applicants making an application varying the wages or conditions of an award must support the application with material showing why the matter has not been progressed and/or finalised pursuant to s. 41 of the Act and further argued that there was no mandatory requirement for a business to pursue enterprise agreements - CICS examined the evidence and noted the reasons why enterprise agreements in the industry have not progressed and further noted that the evidence of the applicant was largely uncontested in this regard - Upon examining the evidence, referring to the law and having regard to s.26(1) of the Act, the CICS determined that the applicant had established a case for the variation to the awards in accordance with the State Wage Principles - Granted - The Federated Miscellaneous Workers' Union of Australia, W.A. Branch -v- Acme Bakery - APPL 316,362,363 of 1993 - Commission in Court Session - PARKS C/SCOTT C/KENNER C - 25/01/00 - Baking..... 354
- Application to vary award re redundancy - Applicant submitted the thrust of the application sought to incorporate into the Award, those conditions in relation to redundancy, specifically relating to severance payments, that are "standard" in the building industry and that the Award was a "building industry" Award, notwithstanding the terms of its scope and redundancy provisions - Respondent opposed the claim but consented to a variation to incorporate "standard" Termination, Change and Redundancy (TCR) provisions into the Award - Commission was not persuaded that the Award has the same character as those having application to the building construction industry - Commission was also of view employees covered by the terms of the Award should receive adequate compensation in circumstances of loss of employment through no fault of their own - Order issued to vary Award by inserting the balance of the "TCR" provision in relation to redundancy, save for the retention of the requirement to notify the CES or its substitute to ensure employees terminated as a result of redundancy will have adequate and fair protection - Ordered accordingly. - The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers & Other -v- Coca-Cola Bottlers Pty Ltd & Others - APPL 1652 of 1998 - KENNER C - 25/02/00 - Building 597
- Application re award amendment - Applicant argued the Mental Health Rehabilitation Assistants Award 1965 be amended to include clause 20. - rates of pay, the first and second arbitrated safety net adjustments, of the Public Service Award 1992 - Respondent argued Applicant was at fault in delaying the applications and granting of retrospective wage adjustments is not warranted - Commission found the wage adjustments would only apply to one person and in relation to an ordinary working week, Monday to Friday, the retrospective wage adjustments would be granted - Granted - LIQUOR, HOSPITALITY & MISC -v- Hon Min for Health - APPL 1592 of 1993; APPL 1084 of 1994 - PARKS C - 29/02/00 - Health..... 601
- Application to make a previously declared interpretation in the form of an Order - Applicant argued terms within s27(1) were superfluous and to retain them would only serve to confuse - Respondent union objected on the grounds deletion of the words may alter the practical effect of the subclause and also prejudice the ongoing dispute with employers in the industry re duty status of "on call" arrangements and appropriate level of payment for such - Commission is satisfied that given the interpretation it declared (79 WAIG 1174), clause 27(1) was less likely to be misapplied if varied to read as Applicant asks - Order issued - Brightwater Care Group (Inc) & Other -v- LIQUOR, HOSPITALITY & MISC - APPL 978,1673 of 1998 - PARKS C - 28/02/00 - Community Services..... 604
- Application re Interpretation of award - Applicant employer sought true interpretation of clause 21A of Hotel and Tavern Workers Award 1978 re minimum wage for adult males and females from 9/1/96 - 14/11/97 - Respondent sought interpretation to clarify how additional rates for Adult apprentices applied whom ordinary hours included work on a Saturday or Sunday - Commission found Adult apprentices were entitled to the minimum adult wage in the first instance and additional rates for those ordinary hours worked on a Saturday or Sunday as prescribed by the Award - Declared Accordingly - Chestone Holdings Pty Ltd T/A The Lord Forrest Hotel -v- LIQUOR & ALLIED INDUSTRY UNION & Others - APPL 2275 of 1997; APPL 933 of 1998 - PARKS C - 29/02/00 - Hospitality..... 605
- ²Appeal against Decision of Public Service Arbitrator (80 WAIG 213) re effective date of salary increase as a result of an Enterprise Bargaining Agreement - Appellant argued Commissioner erred in law and acted in excess of jurisdiction in making an order that the appellant pay to its employees sums of money which amounted to giving retrospective effect to an industrial agreement - Respondent argued the appellant had agreed to an effective date of 1st January 1999, however, then reneged on the promise and that this was an order seeking the enforcement of that promise - Full Bench found the order requiring the appellant to pay its employees covered by the EBA salary increases from 1st January 1999 to be impermissible - Upheld - Chief Executive of the Western Australian Tourism Commission -v- The Civil Service Association of Western Australia Incorporated - FBA 32 of 1999 - Full Bench - SHARKEY P/COLEMAN CC/FIELDING C - 27/03/00 - Government Administration 1370
- Application re contractual entitlements - Applicant sought wages and pro rata annual leave due on resignation of employment - Respondent initially argued that Commission did not have jurisdiction to deal with this claim as applicant's employment was governed by Farm Employees Award 1985 and a claim to enforce the award for underpaid wages and annual leave must be made before an Industrial Magistrate - Commission found that it had jurisdiction to deal with applicant's claim because the wage rate agreed between the parties were above award rates and money owed was a non-award benefit - Respondent then argued that applicant's date of resignation was 11 April 1999 but applicant argued that she worked until 28 May 1999 - Respondent further argued that applicant resigned from employment because working full time with long hours was difficult as she cared for 3 children - Commission found that evidence from statutory declaration supported the claim that applicant worked until 28 May 1999 and was therefore entitled to wages of \$800 and pro rata annual leave of \$424 - Granted - Mrs C Boxall -v- Rodney Harry Wisbey (Orlanda Park) - APPL 956 of 1999 - BEECH C - 28/02/00 - Dairy..... 1618
- Application re Unfair Dismissal - Applicant argued that dismissal was unfair and that respondent failed to give notice of termination or one week's wages in lieu, to which he is entitled under clause 10 of the award relating to contract of service - Respondent argued that applicant's services were terminated because he refused to satisfactorily explain absence on 13 December 1996 - Respondent further argued that applicant had previously misled him and offered to resign if not granted a week's leave, and then almost immediately commenced work with a competitor - Commission found that though applicant was not obliged to submit detailed information on personal matters that required absence from work, it was not convinced that respondent's right to terminate applicant was unfair - Dismissed - Mr M McGrath -v- Temkara Pty Ltd T/A Economic Pest Control - APPL 1873 of 1996 - PARKS C - 24/02/97 - PESTICIDES 1641
- Conference referred re interpretation of agreement - Applicant seeks interpretation of the annual leave and long service leave clauses to include 20% shift penalty with wages - Respondent argued that no entitlement to shift penalties while on leave exists in the agreement - Commission found the provision for payment of shift loading is elsewhere in the agreement, but the agreement does not make shift loading as part of the rate of pay, as a result the claims sought cannot be granted after a proper interpretation of the clauses - Dismissed - The Media, Entertainment and Arts Alliance of Western Australia (Union of Employees) -v- Western Australian Sports Centre Trust & Others - PSACR 46 of 1999 - BEECH C - 20/04/00 - Sports 1674

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AWARDS—continued

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Application to amend Argyle Diamonds Productions Award 1996 - Applicant argued that amendments were essentially to improve the scope for increased efficiency through flexible work practices which would add job security through new redundancy provisions and increased levels of remuneration - Commission found application essentially registered a variation to the award rather than creating a new agreement - Commission acceding to the application found the changes were consistent with sensible award modernisation and were consistent with the concept of enterprise bargaining - Order made reflecting the amendments sought - Granted - Argyle Diamond Mines Pty Limited -v- COMM, ELECTRIC, ELECT, ENERGY & Others - APPL 1439 of 1999 - FIELDING C/GREGOR C/SCOTT C. - 17/04/00 - Mining.....	1934
Application for interpretation of Miscellaneous Government Conditions and Allowances Award No. A4 of 1992 re travel rebate for employee dependents - Commission was asked to interpret and declare the true meaning of a provision in the Award - Question "Does travel rebate as specified in Clause 19 apply to dependents who do not reside with the employee?" - Commission found that the Clause included a beneficial consideration in relation to a dependent, but if it did intend for a dependent to travel away from and return to a location different to the workplace of the employee it would have expressed so - Commission's answer to the question was "No" - Dismissed - LIQUOR, HOSPITALITY & MISC -v- Albany Regional Hospital & Others - APPL 2238 of 1997 - PARKS C - 03/03/00 - Education.....	1938
Application re interpretation of Government Officers (Social Trainers) Award 1988 - Applicant Union claimed that any alteration to the start and finishing times with less than 24 hours' notice attracted penalty rates as prescribed by the Award - Respondent argued such change of hours did not constitute a changed shift thus not directed at any alteration to the roster - Commission having to resolve "what constituted the rostered shift" in reference to "a changed shift" to refer to shift which has changed from one shift to another noted that a shift may be changed and can be extended without becoming a new 'changed shift' but a "change in hours" - Dismissed - The Civil Service Association of Western Australia Incorporated -v- Chief Executive Officer Disability Services Commission - P 1 of 2000 - FIELDING C - 12/04/00 - Community.....	1940
Conference re cancellation of Order - Applicant Union argued that the Order issued on 14/12/1999 cancelling AG 21/96 was cancelled by Order issued on 16/12/1999 - Applicant while alluding to the Full Bench determination on the 29/3/2000 that AG 21/96 had ceased to exist argued the union and its members should not have to continue to be covered by an agreement that did not exist and requested that the Order be now cancelled - Respondent argued the Order was effectively in two parts viz it addressed return to work and the issues of resolving the underlying dispute re a new Agreement - Respondent also argued that cancelling the Agreement at this stage would only remove the basis for negotiations, which in turn would cause dislocations to exporters including farmers - Commission contented the Order was only interim and it was necessary to negotiate a new Agreement which is on the verge of being concluded - Commission refused the Union's application to cancel the Order at this stage - Dismissed - The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch -v- Western Australian Government Railways Commission - C 335 of 1999 - BEECH C - 11/04/00 - Rail Transport.....	1976
¹ Appeal against decision of Full Bench (79WAIG3529) re upheld appeal re variation of Mineral Sands Industrial Award 1991 - Question re jurisdiction - Appellant argued that Full Bench erred in law in finding that the subject of the application was an industrial matter, that Full Bench erred in law in holding that an offer by the employer appellants pursuant to the Workplace Agreement Act 1993 was an industrial matter and further, an offer to employ a person under a workplace agreement does not relate to any future or potential employee as defined in the Act and, therefore, is not an industrial matter - IAC allowed the appeal only to the extent of amending par 5 of Full Bench Orders and dismissed the appeal in all other respect - Dismissed - RGC Mineral Sands Ltd & Other -v- CONSTRUCTION, MINING, ENERGY & Others - IAC 10 of 1999 - Industrial Appeal Court - Kennedy J./Scott J./Parker J. - 09/06/00 - Mining.....	2437
² Appeals against decisions of Commission (79WAIG3120) re enterprise bargaining agreements - Appellants argued that the Public Service Arbitrator erred in law and acted in excess of jurisdiction in ordering that, on registration of the enterprise agreement, the date for the purposes of calculating the first pay increase due to employees should be deemed to be the first pay period on or after 12 May 1999 in respect of first Appellant and 10 June 1999 in respect of 2nd Appellant, and in making an order which gave retrospective effect to the industrial agreements, in that such order is not authorised or permitted under the provisions of the Act - Appellants further argued that the date should be the first pay period on or after the registration of the agreements by the Commission - Respondent Union argued that the dates to be used for the purposes of calculating the first pay increases should be 25 March 1999 for first Appellant and 20 April 1999 for second Appellant - Full Bench found that there was no power to make an order that purports to give an industrial agreement any operative effect before the agreement comes into existence - Full Bench acceded to the submissions made by the Appellant's Counsel that the order made was ultra vires and quashed the orders made at first instance - Ordered Accordingly - Chief Executive Officer, Western Australian Centre for Pathology and Medical Research (Pathcentre) -v- Civil Service Association of Western Australia Incorporated - FBA 21,22 of 1999 - Full Bench - SHARKEY P/COLEMAN CC/FIELDING C - 06/06/00 - Health.....	2449
Application to vary award - Applicant sought to vary the Electrical Contracting Industry Award No. R22 of 1978 by deleting the words "named parties" to align the provisions of the award with the current terms of the Act, to "update and administratively consolidate" the award, to delete the Third Schedule and Fourth Schedule and to consolidate two named employers and the Applicant Union into one Named Parties Schedule to the Award - Respondent opposed the application with a view that to vary the award to include both named employers in one Named Parties Schedule with the other named employers, would have the effect of extending the scope and application of the award beyond its present terms - Commission was not inclined to grant the aspect of the application where the issue of substituting the phrase "named parties" for "respondents" - Commission found the phrase in general delineates those parties who are employer parties from those who are organisations of employees under the Act and also, the phrase was well understood and of very long standing both in this Commission and industrial tribunals throughout the land - Commission having regard to all the circumstances and the submissions of the parties considered that application should be granted in part - Granted in Part - COMM, ELECTRIC, ELECT, ENERGY -v- The Electrical Contractors' Association of Western Australia (Union of Employers) & Others - APPL 319 of 1999 - KENNER C - 25/05/00 - Unions.....	2684
³ Application to vary award - Applicant sought to vary the Royal Automobile Club Road Service Employees and Mechanical Services Award 1993, to extend its scope to cover a new area of fleet maintenance and to vary the Award in other respects, some of which involve a variation of the Award above the safety net - Respondent consented to the application - Commission in Court Session, having considered the submissions from both Applicant and Respondent, and the materials tendered in support of the application, were satisfied that the application complied, in all respects, with the Statement of Principles 1999 - CICS found application was consistent with equity and good conscience, was in the interests of the parties directly concerned and involved negligible cost in terms of s.26(1)(d) of the Act - Granted - Royal Automobile Club of WA (Incorporated) -v- AUTO, FOOD, METAL, ENGIN UNION - APPL 1406 of 1999 - Commission in Court Session - KENNER C/SMITH, C/WOOD,C - 04/05/00 - Retail Trade.....	2687
BOARD OF REFERENCE	
Application for Board of Reference re Construction Industry Long Service Leave Payments - Applicant claimed that he was entitled to long service leave credits as a result of working for two employers from 1989 to 1991 - Respondent rejected the claim based on insufficient supporting information - Board examined the evidence and referred to the law and determined that there was insufficient information to ascertain whether the employers were within the definition of construction industry - Board concluded that the employers were not in that industry and therefore the applicant is not entitled to long service leave credits for that period - Dismissed - Mr RJ Prall -v- Construction Industry Long Service Leave Payments Board - BOR 8 of 1999 - Board of Reference - Beech L./Uphill J./SPURLING, J.A. - 22/12/99 - Security.....	223

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BOARD OF REFERENCE—continued

- Application re unfair dismissal and alleged denied contractual benefits seeking compensation - Respondent denied applicant was dismissed and asserted that applicant resigned and that applicant received all entitlements due to him - Commission found that second, third and fourth claims itemised by applicant were seeking enforcement of the award which cannot be prosecuted before the Commission and were struck out - Commission further found that applicant had resigned - Dismissed - Mr AJ Leiskalns -v- Goldrush Holdings Pty Ltd T/A Secureforce International - APPL 195 of 1997 - PARKS C - 01/03/00 - Security 1640
- Application re pro rata long service leave - Applicant argued that as a result of an accident at work she was forced to resign one and a half years prior to qualifying for long service leave - Committee reviewed act and authorities and noted that although applicant was not entitled to Long service leave, the Committee could make a recommendation under special circumstances and would make such recommending the employer make an "ex gratia" payment, equivalent to what might otherwise have been the entitlement- Recommendation Given - Mrs JM Henderson -v- North Metropolitan Health Service - BOR 9 of 1999 - Long Service Leave Board of Reference - SPURLING, J.A. - 29/02/00 - Health Services 1941
- Appeal against a decision that Applicant be required to register as an employer under the Construction Industry Portable Paid Long Service Leave Act 1985("the Act") and make payments to the Construction Industry Long Service Leave Payments Board - The board reviewed the Act and authorities and concluded the applicant was in an industry related to, but not in, the construction industry and accordingly should not be required to register under the Act - Upheld - Kununurra Crane Hire -v- Construction Industry Long Service Leave Payments Board - BOR 7 of 1999 - Long Service Leave Board of Reference - 05/05/00 - Construction Trade Services 1943

BONUS

- Conference referred re wage increase - Applicant Union argued that a \$15.00 increase in pay rates per week was justified by reason of cost savings associated with introduction of shift work and a bonus pay of \$1000.00 to each employee who remained employed with Respondent until 31/12/94 was justified on the basis that such employees ought be rewarded for continuing to serve the employer notwithstanding their future was uncertain - Commission found that there was nothing of substance put to it which would justify a finding that the increased wage level ought be further increased and that the claims for a \$1000.00 bonus, apart from the scant reason given as justification, there was no evidence to support it - Commission found that Applicant Union has failed to establish there was a special case for Commission to award the claims made, or any part of them - Dismissed - The Shop, Distributive and Allied Employees' Association of Western Australia -v- Department of State Services - CR 451 of 1994 - PARKS C - 03/03/00 - Government 676

CASUAL WORK

- Application re harsh, oppressive and unfair dismissal and alleged denied contractual entitlements - Applicant argued he was unfairly dismissed and was owed contractual entitlements - Respondent argued the applicant was a casual employee and the contract of employment could be terminated with one hours notice - Commission noted the intention of the employer was to employ the applicant as a casual although the circumstances of the relationship was such that the employee had a promise of continuing work provided the employer was satisfied with the applicants performance - Commission determined the applicant was not a casual employee and the matter should be re-listed for hearing - Ordered accordingly - Mr BF Stokes -v- The Typing Centre of Perth Pty Ltd (008 740 350) t/as "Australian International College of Commerce" - APPL 779 of 1999 - BEECH C - 23/12/99 - Education 416
- ²Appeal against Decision of Commission (79 WAIG 3461) re unfair dismissal - Appellant argued Commissioner erred on a number of grounds one being that reinstatement of the former employees was impracticable - Full Bench found the commissioner was open to conclude the relationship between the former employees and the appellant had broken down and under the circumstances reinstatement was impracticable and that no other grounds of appeal were made out - Dismissed - Solid Concepts Pty Ltd ACN 009 301 553 -v- LIQUOR, HOSPITALITY & MISC - FBA 23 of 1999 - Full Bench - SHARKEY P/SCOTT C/WOOD,C - 31/03/00 1381
- Application re Unfair Dismissal - Applicant argued that dismissal had been unfair as respondent had selected him for redundancy while others employed later than him were offered training which improved their chances for being retained - Respondent argued that applicant's employment was casual and also felt that applicant was not suitable to undertake training - Respondent further argued that applicant was given a suitable reference because he was reliable and worked well which would indicate there was no animosity between the parties - Commission was satisfied that respondent's decision to terminate applicant was caused by a downturn in a highly seasonal business and also based on operational needs of the business and skill levels of the employees - Commission found no evidence that dismissal was harsh, oppressive or unfair - Dismissed - Mr JA Adams -v- Morton's Specialist Seed & Grain Merchants - APPL 376 of 1999 - SCOTT C. - 13/03/00 - Services to Agriculture 1614
- Application re Unfair Dismissal & Contractual Entitlements - Applicants, permanent bar manager and casual cook, argued that they were unfairly dismissed and sought compensation in lieu of reinstatement/re-employment, loss of income for period of unemployment following dismissal, difference in earnings between reduced levels of income earned since dismissal and for injury arising from stress of being terminated - Applicants also claimed that no warnings were given on their performances or a reasonable period of notice given before dismissal - Respondent denied that applicants were terminated by him and argued that termination was affected by hotel manager after a discussion with him on the state of high percentages, and was surprised when dismissal occurred - Respondent further argued that dismissal was consistent with industry standard and the bar manager should have realised his job was in jeopardy when he did not get the hotel manager's job - Respondent also stated that he was not impressed with the chef's cooking and had criticism of both applicant's dress standards though he had not mentioned it to them - Commission found that parameters of employment were not set nor were percentage targets explained to applicants and rejected respondent's view that the bar manager should have realised his job was in jeopardy when not appointed as hotel manager, but found that respondent took the opportunity to re-employ a former chef when option presented itself - Commission was not satisfied recognition should be given to emotional distress claimed by applicants and felt that as reinstatement was impracticable, ordered compensation to terminated bar manager equivalent to 2 wks pay and to the cook for 90 hours work at \$12.74 per hour - Issued accordingly - Ms PM Barcello -v- Denmark Holdings Pty Ltd - APPL 607,608 of 1999 - COLEMAN CC - 13/03/00 - Hospitality 1615
- Application re unfair dismissal - Applicant argued her termination was harsh, oppressive or unfair as she terminated her employment because she was scared to go back to work - Respondent argued that the applicant was employed on a casual basis under the award - Commission examined the nature of the employment relationship including the continuous period of thirteen months of service and determined that the applicant was not a casual employee - Commission further examined the evidence and found that the applicant had by her own actions left the respondents employ - Dismissed - Ms DJ O'Connor -v- Patricia Alma Clarke / Ian Donald Clarke of Clarke's Lunch Bar - APPL 1420 of 1999 - WOOD,C - 03/03/00 - Cafes 1643
- Applicant argued he was promised ongoing employment, he was told his dismissal was because he was facing a criminal charge and sought compensation in lieu of reinstatement - Respondent argued Applicant was temporary to cover annual leave periods, that at no time was he offered full time employment, that it did not have the funds to continue employing him and it did not have any alternative work to offer him - Respondent further argued it was inappropriate for it to employ anyone who was facing charges of that nature, as its request for ongoing and increased funding, plus its relationships with the police and other agencies such as the Aboriginal Advancement Council were at risk - Commission found that Applicant was employed on a casual basis, that he was engaged to cover periods of annual leave and that it was clear from the Respondents' financial records that it did not have the funding to offer the applicant ongoing full time employment - Commission further found that because the nature of the charge Applicant was facing, Respondent's tenuous funding arrangements and its relationships with other agencies were at risk if it continued to employ Applicant and as Respondent was unable to offer Applicant alternative employment that did not involve client contact, Applicant's termination was not harsh oppressive or unfair - Dismissed - Mr GA Narkle -v- Director, Noongar Alcohol & Substance Abuse Service (Inc) - APPL 947 of 1999 - SMITH, C - 02/06/00 - Community Services 2728

CUMULATIVE DIGEST—continued

Page

CLASSIFICATION

- Application re alleged incorrect application of Regulation 23 of the Public Sector Management (Redeployment and Redundancy) Regulations 1994 regarding rate of pay - Applicant argued that he was entitled to be paid at a higher rate upon redeployment - Respondent argued that the rate paid to the Applicant in his position at the Office of Energy constituted the rate of pay for the position which was Level 5.4, and that he received an allowance to maintain the rate he had previously been paid from SECWA - Respondent further argued the allowance did not constitute an allowance for the purposes of Reg 3 of the PSM Act and therefore the correct rate of pay is the applicant's current rate - Arbitrator examined the evidence and referred to the law and determined that the allowance the applicant had received was not an allowance as defined by Reg 3 of the PSM Act and as the substantive position of the applicant was level 5 the applicant's current rate of pay is correct - Dismissed - Mr PJ Glynn -v- Chief Executive Officer, Office of Energy - P 10 of 1999 - Public Service Arbitrator - SCOTT C. - 27/01/00 - Energy 379
- Application for reclassification of position - Appellant appealed for reclassification of the position on the grounds; that the "present salary" payable to the appellant is not commensurate with the increased level of duties and responsibilities of the office; the current title is not appropriate for the position; and that higher duties have been carried out by him since March 1996 - Respondent submitted that because of the existence of the workplace agreement the Commission was without jurisdiction to hear the matter - Respondent further argued that for the purposes of the IR Act 1979 the Appellant is not an employee nor for the purposes of s.7C of the IR Act is the matter an "industrial matter"- It was further argued by the respondent that due to sections 45 and 46 of the Workplace Agreements Act 1993 the provisions for right of appeal do not apply - Arbitrator examined the IR Act and Workplace Agreements Act and determined that as the Appellant was not employed under the terms and conditions of the relevant award the Arbitrator does not have jurisdiction to hear the matter - Dismissed - Mr NP Dragicevich -v- Department of Resources Development - PSA 2 of 1999 - Public Service Arbitrator - FIELDING C - 17/01/00 - Project 428

COMPENSATION

- Application for unfair dismissal and allegedly denied contractual entitlements-Applicant argued that he was dismissed when he was about to commence annual leave -Counsel for the Applicant argued that the financial circumstances of the Respondent was not grave therefore there was no reasonable cause to dismiss the Applicant and further argued Respondent did not discuss redundancy or what measures were there to avoid or minimise its effects -Respondent argued Applicant's position became redundant and that was the reason for the termination-Commission found that the reasonable notice required to be given was 4 months and that the dismissal was on account of redundancy after 12 months service and as such the Applicant was entitled to the combined benefit of payment in lieu of notice and a redundancy payment-Granted-Counsel for the Applicant raised the issue of compensation on account of alleged injury and the Commission found that for the combination of factors that caused stress the Applicant should receive a compensation for injury-Supplementary reasons issued-Granted. - Mr K Thompson -v- Gregmaun Farms Pty Ltd atf Chris & Evelyn Henderson Family Trust trading as C & E Henderson - APPL 161 of 1999 - PARKS C - 29/12/99 - Farming 252
- Application re unfair dismissal - Applicant claimed that he was harshly, oppressively and unfairly dismissed - Applicant sought compensation in lieu of reinstatement in the event that the Commission granted the claim - Applicant argued that he was effectively forced to resign as a result of the attitude of a manager of the respondent - Applicant further argued that the manager in question placed more work pressure on him as a result of a letter regarding concerns applicable to the manager - Respondent rejected that the applicant was dismissed - Respondent argued that it did not want the applicant to resign however the issue of the applicants performance had being raised - Commission examined extensive evidence and referred to the law and determined that it was not able to conclude that the applicant was dismissed by the respondent in order to find jurisdiction in the matter - Dismissed - Mr R Furfaro -v- The Wrigley Company Pty Ltd - APPL 2098 of 1998 - KENNER C - 10/12/99 - Wholesaling 387
- Application re unfair dismissal - Applicant argued that he was unfairly dismissed and sought compensation for loss of income - Respondent argued that the applicant was not dismissed from employment as the relationship which had existed between the parties was not that of employee and employer but that of contractor and principal - Respondent further argued that the application itself was lodged out of time allowed by s.29 of the IR Act 1979 - Commission determined that the application was lodged out of time and for this reason alone the application failed - Commission further determined that the relationship between the applicant and respondent was based on a written signed agreement that created a contractor principal relationship - Dismissed - Mr RC Heron -v- White Caps Fishing Company Pty Ltd - APPL 1649 of 1996 - PARKS C - 25/01/00 - Fisheries.. 398
- Application re unfair dismissal - Commission to assess loss for which applicant to be compensated after finding applicant to have been unfairly dismissed - Applicant argued they had not been employed since time of dismissal and sought compensation - Respondent argued compensation should not be ordered for the shift allowance component as applicant had not worked and experienced the disability for which that allowance is paid and the commission should take into account the fact that the Respondent entered into an agreement in settlement of a negligence claim in the District Court - Respondent further argued the applicant's employment was covered by a Federal Award however this was not established as a matter of fact - Commission found applicants loss to be the amount she would have earned had she not been dismissed, however, the Commission was limited by legislation to issue a maximum six months compensation - Order issued - Ms JA Hoffmann -v- Western Australian Aboriginal Media Association (Aboriginal Corporation) - APPL 180 of 1999 - BEECH C - 02/02/00 400
- Application re unfair dismissal - Applicant argued he was unfairly dismissed and seeks compensation equivalent of 6 weeks pay - Respondent argued that Applicant had failed to develop the business - Commission found on evidence the Applicant had discharged the onus of establishing that he was unfairly dismissed - Commission found reinstatement was impracticable and ordered compensation be paid within 28 days of the date of Order - Ordered Accordingly - Mr JC Jamison -v- Cenva Pty Ltd t/as SMC Vending Operations - APPL 1293 of 1999 - COLEMAN CC - 12/01/00 - Retailing 401
- Application re unfair dismissal and alleged denied contractual entitlements -Applicant claimed that she was unfairly dismissed and as a result denied benefits under her contract of employment - Commission established in conference that the two claims for the benefits of wages in lieu of notice, and pro rata annual leave are based upon the provisions of the Shop and Warehouse (Wholesale and Retail Establishments) Award which applied to the applicant's employment - Applicant argued that she was dismissed for failing to sign a workplace agreement - Applicant further argued that the respondent advertised for new employees one week before her dismissal - Respondents argued that it had dismissed a number of employees in other stores which had ceased operation due to economic considerations - Commission examined the evidence and determined that the applicant did not discharge the onus of proof of Unfair dismissal - Dismissed - Mrs IM Lawson -v- Night Crest Pty Ltd As Trustee For The King Kong Sales Unit Trading As King Kong Sale - APPL 475 of 1999-PARKS C-21/09/99-Retail Trade..... 404
- Application re alleged unfair dismissal - Applicant argued that she was forced to resign and sought compensation by way of relief - Respondent argued that Applicant was not terminated but she resigned - Respondent argued that Commission lacked jurisdiction to hear and determine the matter, as Applicant was a party to a collective workplace agreement which did not contain a provision for Commission to deal with application of this nature and moreover, if Commission did have jurisdiction, the dismissal was not unfair because Applicant simply was not dismissed - Commission reviewed authorities and found on evidence that it did not have jurisdiction to deal with the matter, as in its view, the provisions of the workplace agreement operate in the circumstances to preclude it from dealing with the matter and therefore, dismissed the application - Dismissed - Ms A Mladineo -v- BRL Hardy Wine Company CRN 008 273 907 - APPL 1954 of 1999 - FIELDING C - 03/02/00 406
- Application re unfair dismissal and alleged denial of contractual benefits - Applicant claimed that he was unfairly dismissed and denied contractual entitlements and sought reinstatement or compensation for loss of wages - Applicant argued that his services were terminated and he was in effect told to leave that day - Respondent argued that the applicant's services were terminated due to the need to reduce the workforce by reason of redundancy and denied that the dismissal was unfair - Respondent further argued that the contractual benefits claimed do not arise under his contract of employment but are benefits under the relevant award - Commission examined the evidence and found that the applicant was asked to work out the period of notice and decided not to - Commission further determined that the applicant was redundant to the respondents needs and therefore his dismissal unfair - Dismissed - Mr P Morete -v- Unique Metal Works Pty Ltd - APPL 1855 of 1996 - PARKS C - 18/01/00 - Sheet Metal Fabrication..... 407

CUMULATIVE DIGEST—continued

COMPENSATION—continued

- Application for contractual entitlements and unfair dismissal - Applicant argued that he had been denied benefits arising from his contract of employment - Commission found on evidence that Applicant was unfairly dismissed - Commission noted its records in respect of attempts to communicate with Respondent, the evidence of the Applicant in regards to his employment and found re-employment or reinstatement was impracticable, and ordered compensation be paid to Applicant - Ordered Accordingly - Mr DC Rath -v- Avtec Security Services Pty Ltd - APPL 1215 of 1999 - SCOTT C. - 28/01/00 - Securities 412
- Application re alleged harsh, oppressive and unfair dismissal - Applicant sought compensation for loss of past earnings, future loss of earnings and for injury and loss of reputation in the sum of \$70,916.40 capped at the equivalent of six months salary at the sum of \$54,000.00 in accordance with s.23A of the Act - Respondent argued that it needed to reduce its operation costs including salaries, therefore, 3 pathologists were asked to reduce their sessions including the applicants - Respondent, further argued that agreement regarding Applicant's sessions could not be reached, therefore termination was warranted - Commission reviewed evidence, authorities and declared that Applicant had been unfairly dismissed and that reinstatement was not available - Commission decided not to assess the amount of loss or injury until it had all of the information - Commission will list the matter in due course to give Applicant opportunity to provide evidence of her loss in order that compensation can be calculated - Granted - Dr LA Smyth -v- St John of God Health Care Inc (ARBN 051 960 911) - APPL 1973 of 1998 - GREGOR C - 24/12/99 - Health 414
- Appeal against decision of Commission (79 WAIG 2632) re unfair dismissal and contractual entitlements - Appellant argued Commission erred on numerous points and sought the decision to be set aside and the matter re-listed for hearing or at the very least compensation to be recalculated - Full Bench found there was no error in the Commissions findings - Dismissed - Robert Blakeman ATF the Blakeman Family Trust T/A McBride's Collectables and Giftware -v- Ms J Gudgin - FBA 19 of 1999 - Full Bench - SHARKEY P/FIELDING C/KENNER C - 22/02/00 - Personal & Household Good Rtlg. 457
- Application for unfair dismissal-Applicant argued dismissal was harsh, oppressive or unfair because after a false accusation of stealing and charges pending by Police, he was dismissed without no warning, discussion or talk and was seeking compensation-Respondent argued Applicant was not dismissed but not placed on the work roster pending the outcome of charges laid against him-Commission found that the fact the Applicant was not rostered for work amounted to a dismissal which attracted the Commission's jurisdiction-Further found that the Applicant failed to provide the Respondent an explanation prior to the termination -Also, the inquiry undertaken gave rise to reasonable grounds on the information available to the Respondent at that time to hold the view that the Applicant was guilty of misconduct-Dismissed. - Mr PE Bloomer -v- Ameerah Pty Ltd and Lozellia Pty Ltd T/A Porters Liquor Warwick - APPL 2275 of 1997;APPL 933 of 1998 - PARKS C - 29/02/00 - Liquor and General Store..... 617
- Application for contractual entitlements - Applicant argued she was employed in the capacity of bookkeeper and was entitled under a contract of employment the sum of \$15.00 per hour for 46.5 hours worked from 10 March 1997 to 9 April 1997 - Respondent conceded that Applicant did work the 46.5 hours and that the work was to be paid at the rate of \$15.00 per hour, however, respondent disputed the work done and refused to pay - Commission found that under section 29 of the I.R. Act, 1979, a matter which may be referred to the Commission by an application, was a matter arising from an employer and employee relationship and in this matter Commission was not satisfied that that relationship existed - Dismissed - Ms J Carslake -v- Rickie Alfred Beehre as Trustee for Beehre Family Trust T/A Beehre Painters & Decorators - APPL 842 of 1997 - PARKS C - 21/07/97 - Decorative 622
- Application re unfair dismissal - Applicant argued he was dismissed after a purported restructure and the hours usually worked by him allocated to other members of staff - Respondent denies that the applicant was unfairly dismissed and moreover, says that there was no dismissal to excite the jurisdiction of the Commission - Counsel for the respondent further argued the applicant was employed on a casual basis, however due to a restructure the applicant was encouraged to apply for two newly created positions, which he elected not to, and thus it is said by reason of his decision there is not a dismissal - Commission found the applicant was an employee with an ongoing obligation to the respondent and also found the applicant had been dismissed unfairly - Commission further found reinstatement impracticable and issued 26 weeks wages as compensation - Ordered accordingly - Mr M Cousins -v- YMCA of Perth - APPL 473 of 1999 - PARKS C - 29/02/00 - Community Services 623
- Application re unfair dismissal - Applicant argued that he was harshly, oppressively and unfairly dismissed and sought compensation - Respondent contested and denied the claim - Counsel for Applicant argued that increased stress was placed upon Applicant through the implementation of the new quality assurances procedures and unrealistic completion dates, provided to the house owners by Respondent, for some houses within Applicant's responsibility - Respondent argued there was a greater onus upon building supervisors to be more accountable for their working due to the implementation of an accredited quality assurances system and that Applicant had failed to comply with this procedures - Commission found that Applicant clearly failed to adhere to company policy and procedures; that prior to termination, Applicant was given a fair and reasonable hearing and an opportunity to put to the Respondent any explanation or mitigating circumstances in relation of his conduct - Commission was far from satisfied that in this case the Respondent had abused its right to terminate the employment, as a matter of equity and good conscience, and found on evidence that Applicant was not dismissed harshly, oppressively and unfairly - Dismissed - Mr RA Knowles -v- Dale Alcock Homes Pty Ltd - APPL 1959 of 1998;APPL 86 of 1999 - PARKS C - 28/02/00 - Building 640
- Application re contractual entitlements - Applicant's claim for commission is in three parts - First part was for commission on sale of three properties at 46.5% and other two parts concerned properties for which rate of commission was separately set - Respondent argued that rate of commission agreed upon on commencement of applicant's employment was 18.6% though no terms of employment were in writing - Commission found that neither party specifically recalled terms of commission structure and further believed that as respondent always paid applicant full commission there was no valid reason why proportionate rates should now be insisted upon - Commission concluded that applicant was owed benefits denied under contract of employment - Ordered accordingly - Mrs SCJ Kouw -v- Rural & Metro Realty Pty Ltd - APPL 359 of 1999- BEECH C - 21/01/00-Property Services 644
- Application re unfair dismissal - Applicant claimed dismissal was due to absence from work resulting from an injury suffered during the performance of duties and sought compensation - for the loss of wages since the date of his dismissal - Respondent argued dismissal was due to Applicant's disruptive work behaviour, disinterest and lack of application - Commission was satisfied that absence from work did not influence the decision to terminate and Applicant failed to show that dismissal was unfair - Dismissed - Mr F Nammour -v- Combined Metal Industries - APPL 383 of 1997 - PARKS C - 01/03/00 - Manufacturing Industry 650
- Application re unfair dismissal-Applicant argued dismissal was unfair and was seeking monetary compensation-Respondent argued dismissal was justified on the grounds that the Applicant failed to address discrepancies in stock, did many things without the authorisation of the Respondent including the cancellation of the licence under which one business was operating, took personal possession of items from the Respondents stock without paying and was on suspension before the dismissal-Commission found that the relationship between the parties deteriorated after the suspension and the judgmental errors made by the Applicant as Manager showed a degree of incompetence, therefore the Respondent had justifiable reason to terminate Applicant's employment-Further, the Applicant was paid full salary and other entitlements throughout the period he was prevented from working-Dismissed from working-Dismissed. - Mr DC Osborne -v- Penny & Barry Kirby Of Braeside Nominees - APPL 2128 of 1998 - PARKS C - 02/03/00 - Pawn broking 653
- Application re unfair dismissal claim for contractual entitlements - Applicant was unable to attend hearing - Commission's original hearing date had to be rescheduled twice with respondent's co-operation to suit applicant but each time applicant sent late notification of inability to attend - Commission felt this was unacceptable as with the passage of time, quality of evidentiary material suffers - Respondent claimed costs in this matter but Commission argued that circumstances in this case cannot be said to be extreme and costs will not be awarded - Dismissed - Mr PT Scully -v- Coastal Business Centre Ince - APPL 197,522,1578,1635 of 1999 - GREGOR C - 09/02/00 - Education 664

CUMULATIVE DIGEST—continued

COMPENSATION—continued

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Application re alleged unfair dismissal - Applicant alleged he was unfairly dismissed and sought compensation for his dismissal - Applicant argued further that his termination was unexpected - Respondent denied dismissal was unfair and stated that applicant's performance had been unsatisfactory and the applicant had been admonished twice for using verbally abusive language - Commission was satisfied that dismissal was unfair as nothing was said to applicant to indicate his performance was unsatisfactory following a demotion for a previous discrepancy, but, agreed with respondent that reinstatement was impractical as applicant had secured employment elsewhere, therefore applicant was entitled to compensation - Granted. - Mr W Wedgwood -v- Sherrin Hire - APPL 1464 of 1999 - FIELDING C - 14/02/00 - Retail Trade	666
Application for unfair dismissal-Applicant argued dismissal was unfair because he was dismissed before commencing work and claimed a redundancy package both by way of compensation and contractual entitlement-Respondent denied that a contract of employment was entered upon with the Applicant-Commission found that there was no need to review the whole of the evidence for the reason that, were the Commission to find that the Applicant had been engaged as an employee by the Respondent, the claim that the contract of employment entitled him to two weeks' wages in lieu of notice had not been substantiated - No evidence had been provided that there was an alternative condition that provided the claimed entitlement - Dismissed. - Mr BD Wilson -v- Barminto Pty Ltd - APPL 2301 of 1997 - PARKS C - 11/03/98 - Mining	667
² Appeal against Decision of Commission (79 WAIG 3461) re unfair dismissal - Appellant argued Commissioner erred on a number of grounds one being that reinstatement of the former employees was impracticable - Full Bench found the commissioner was open to conclude the relationship between the former employees and the appellant had broken down and under the circumstances reinstatement was impracticable and that no other grounds of appeal were made out - Dismissed - Solid Concepts Pty Ltd ACN 009 301 553 -v- LIQUOR, HOSPITALITY & MISC - FBA 23 of 1999 - Full Bench - SHARKEY P/SCOTT C./WOOD,C - 31/03/00	1381
Application re Unfair Dismissal & Contractual Entitlements - Applicants, permanent bar manager and casual cook, argued that they were unfairly dismissed and sought compensation in lieu of reinstatement/re-employment, loss of income for period of unemployment following dismissal, difference in earnings between reduced levels of income earned since dismissal and for injury arising from stress of being terminated - Applicants also claimed that no warnings were given on their performances or a reasonable period of notice given before dismissal - Respondent denied that applicants were terminated by him and argued that termination was affected by hotel manager after a discussion with him on the state of high percentages, and was surprised when dismissal occurred - Respondent further argued that dismissal was consistent with industry standard and the bar manager should have realised his job was in jeopardy when he did not get the hotel manager's job - Respondent also stated that he was not impressed with the chef's cooking and had criticism of both applicant's dress standards though he had not mentioned it to them - Commission found that parameters of employment were not set nor were percentage targets explained to applicants and rejected respondent's view that the bar manager should have realised his job was in jeopardy when not appointed as hotel manager, but found that respondent took the opportunity to re-employ a former chef when option presented itself - Commission was not satisfied recognition should be given to emotional distress claimed by applicants and felt that as reinstatement was impracticable, ordered compensation to terminated bar manager equivalent to 2 wks pay and to the cook for 90 hours work at \$12.74 per hour - Issued accordingly - Ms PM Barcello -v- Denmark Holdings Pty Ltd - APPL 607,608 of 1999 - COLEMAN CC - 13/03/00 - Hospitality	1615
Application re unfair dismissal - Applicant conceded acting in a threatening way on the spur of the moment and claimed unfair dismissal and sought reinstatement - Respondent Committee in the Applicant's absence decided to terminate services - Commission found Applicant was not afforded natural justice and therefore dismissal was unfair - Commission also found reinstatement impracticable but awarded compensation - Granted in part - Mr R Bennell -v- Goomburrup Aboriginal Corporation - APPL 1259 of 1997 - PARKS C - 04/11/97 - Community Services	1617
Application re unfair dismissal seeking reinstatement - Applicant argued that he had been unsuccessful in obtaining alternative employment and had suffered financially since his dismissal - Respondent opposed applicant's claim for reinstatement and agreed to pay compensation instead - Commission found that dismissal was procedurally unfair and that reinstatement was not impracticable - Granted - Mr DJ Cooling -v- City of Geraldton - APPL 2151 of 1997 - BEECH C - 10/02/00 - Local Government	1622
Application re unfair dismissal - Applicant argued he was given assurance by Respondent that his job was secure and sought reinstatement - Respondent argued that over time the amount of work had been significantly reduced to a point where the school had made the decision to make the position redundant - Commission found that Respondent did not follow its own policy in that it did not have discussions that were required to be held between it and the Applicant by virtue of the contract of employment in accordance with sections 5 and 41 of the Minimum Conditions of Employment Act 1993 - Commission found that Applicant was unfairly dismissed, that reinstatement was impracticable as position no longer exists and ordered compensation of \$3,464 be paid for loss and injury caused by the dismissal - Ordered Accordingly - Mr AR Ellery -v- St John's School - APPL 950 of 1999 - BEECH C - 24/02/00 - Gardening	1628
Application re unfair dismissal and alleged denied contractual benefits seeking compensation - Respondent denied applicant was dismissed and asserted that applicant resigned and that applicant received all entitlements due to him - Commission found that second, third and fourth claims itemised by applicant were seeking enforcement of the award which cannot be prosecuted before the Commission and were struck out - Commission further found that applicant had resigned - Dismissed - Mr AJ Leiskalns -v- Goldrush Holdings Pty Ltd T/A Secureforce International - APPL 195 of 1997 - PARKS C - 01/03/00 - Security	1640
Application re Unfair Dismissal - Application Granted (80 WAIG 414) compensation to be assessed - Applicant sought compensation on loss of earnings following termination as well as for injury and loss of reputation, mental stress and anxiety - Respondent argued that loss of earnings should be diminished by amount earned by applicant after termination - Commission found that applicant's dismissal was not unexpected as it came after an extended period of negotiation by lawyers and further found no medical evidence of depressive state suffered by applicant - Commission therefore ordered respondent to pay applicant compensation of \$43,743 - Granted - Dr LA Smyth -v- St John of God Healthcare Incorporated - APPL 1973 of 1998 - GREGOR C - 13/03/00 - Health Services	1649
Application re unfair dismissal and compensation - Applicant claimed unfair dismissal and underpayment of wages and commissions - Respondent denied claim arguing that it changed the method it canvassed for funds and applicant's skills level did not display meeting that requirement - Commission found Respondent had to adjust to the new funding criteria and also restructure operation to meet new methods of canvassing and the subsequently there was a reduced need for telephone canvassing - Commission further was not convinced that the respondent undertook to guarantee the payment of commission obtained under a previous employer - Dismissed - Mr TW Wayne -v- Community Policing Crime Prevention Council of WA T/A Constable Care Child Safety Project - APPL 387 of 1997 - PARKS C - 01/05/97 - Community Services	1653
Application re unfair dismissal - Applicant argued that a former employee reverting back to full time employment was the reason for the termination of contract - Respondent argued the reason was a downturn in the number of enrollments, restructuring and the temporary nature of the contract - Commission found contract contained terms which indicated employment was for a far longer duration and that no discussion had taken place with the applicant facing redundancy and dismissal was unfair and awarded wages in lieu of notice and compensation - Granted - LIQUOR, HOSPITALITY & MISC -v- Chesterfield Child Care Centre Pty Ltd - CR 130 of 1999 - BEECH C - 10/03/00 - Community Services	1669

CUMULATIVE DIGEST—continued

Page

COMPENSATION—continued

- Application re unfair dismissal - Applicants argued that further employment was not offered after they had to be back-paid at the behest of their union for being underpaid and sought compensation in lieu of reinstatement - Applicants' Council argued that both Applicants were dismissed unfairly because they were denied natural justice, that the Respondent was under an obligation to inform Applicants as soon as the decision was made to make them redundant and discuss with them alternatives to redundancies or ways that the effect of the redundancies upon them could be minimised - Respondent argued they did not have any particular jobs on upon which the Applicants could be employed - Commission found that even if Respondent had given that opportunity to both Applicants, it would not have made any difference as neither Applicants were able to point to any other work which could have been done, or ways that the effect of the redundancies upon them could have been minimised - Commission reviewed authorities and was not satisfied that denial of natural justice was a most significant matter in the context of this case, particularly given that both employees were aware of the nature of their employment and that the job was coming to an end - Commission found Applicants have failed to make out their claims - Dismissed - Mr P Cooper -v- Grove Construction Services Pty Ltd - APPL 384,461 of 1999 - BEECH C - 10/04/00 - Construction 1951
- ⁴Application for stay of operation of the whole of the Order (80 WAIG 671) - Appeal was against a declaration of unfair dismissal and an order for compensation - President found that balance of convenience favoured applicant because there was a lack of objection from respondent to the application and was satisfied that applicant faced financial difficulties and the probability that compensation would not be recovered with alacrity - Stay Granted - East Kimberley Aboriginal Medical Service -v- The Australian Nursing Federation, Industrial Union of Workers Perth - PRES 2 of 2000 - SHARKEY P - 03/04/00 - Medical 1753
- Application re unfair dismissal and contractual entitlements - Applicant argued that no complaints of unsatisfactory performance had been made and sought 2 weeks additional pay and 4 weeks notice or pay in lieu thereof - Respondent argued that despite providing training, other means of assistance and having discussions with Applicant, he failed to meet the required level of performance - Commission reviewed evidence, authorities and found that Applicant had been given every opportunity to improve his performance and that Respondent was entitled to dismiss Applicant but the circumstances were not such, which would attract a summary dismissal - Commission found that there was no sufficient notice given and ordered that Respondent pay Applicant a further month's pay in lieu of notice - Ordered Accordingly - GF Hulm -v- Western Pacific Holdings Pty Ltd (ACN 009 228 728) T/A Westpoint Star - APPL 197,522,1578,1635 of 1999 - GREGOR C - 03/02/00 - Retail Trade..... 1954
- Application re unfair dismissal - Applicant argued unfair dismissal seeking compensation in lieu of reinstatement - First Respondent argued that Applicant was employed by Second Respondent, a subsidiary of its company - First Respondent denied any liability in respect of the application - Second Respondent argued that Applicant was guilty of serious breaches of safety procedures in the work place justifying the summary termination of his employment - Commission found given the nature and number of breaches of procedure and the fact that this was not the first occasion on which the Applicant had been admonished for breaches of safety, but in effect the third occasion within a very short time, it was not convinced even on balance that the manner of dismissal was so unfair as to render the dismissal itself unfair - Dismissed - Mr KR Porter -v- Eltin Limited (ACN 009 366 036) - APPL 1295 of 1999 - FIELDING C - 17/04/00 - Mining..... 1963
- Application re unfair dismissal and contractual entitlements - Applicant argued dismissal was unfair and that he has been denied benefits arising out of his contract of employment - Respondent argued Applicant was informed that he was required for the freeway job; that his refusal to attend work, put the company in a very difficult situation as it was behind in completing the contract to perform the freeway work, therefore dismissal was warranted - Commission reviewed authorities and found that Applicant had not discharged the onus of proof to establish his claim and ordered the application be dismissed - Dismissed - Mr PL Salter -v- Intersectional Linemarkers Pty Ltd - APPL 639,640 of 1999 - SMITH, C - 17/04/200 - Road 1964
- Application re unfair dismissal and contractual entitlements - Applicant sought relief in the form of compensation due under the Federal Workplace Relations Act - Respondent argued Applicant was not dismissed, rather her employment came to an end by the effluxion of time and that Commission lacked jurisdiction to deal with the matter as notice of application was lodged well outside the 28-day limit imposed by s29 of the I.R. Act - Respondent further argued that Applicant was advised that her "Workplace Agreement" would cease, the position would be re-advertised to which she was welcome to re-apply, which she did but was unsuccessful - Commission found on evidence that even if Applicant was dismissed, the Commission was unable to entertain the application and thus insofar as the application was one for relief in respect of unfair dismissal it must be dismissed and the claim for contractual benefits must fail - Commission further found that it does not have authority to entertain a claim to a benefit under the Workplace Relations Act 1996 - Dismissed - Ms E Saunders -v- Parents and Citizens Association - Rockingham Beach Primary School - APPL 179 of 2000 - FIELDING C - 07/04/00 - Education 1967
- Application re unfair dismissal - Applicant argued dismissal was unfair because it occurred while he was on sick leave - Applicant further argued he was notified that he had been dismissed by someone who was not an employee of the Respondent with words to the effect "don't bother coming back" - Respondent argued it decided that the Applicant should not come back to work if his back was still sore and further stated that the Applicant's job was "always available" - Commission found although the Respondent stated the job was "always available" it never informed the Applicant, that Applicant's sore back was merely due to the nature of work he performed - Commission found that Section 170CK of the Workplace Relations Act 1996 renders it an offence against that Act to dismiss an employee by reasons of temporary absence from work because of illness or injury, that the provision of sick leave or the payment of a casual wage which incorporates the notional lack of sick leave entitlement and the fact of legislation providing for workers' compensation, leads inevitably to the conclusion that an employee should not be dismissed merely because he or she has suffered ill-health or injury while at work - Commission found applicant's dismissal was unfair and since reinstatement was impracticable, compensation was granted - Granted - Mr BJ Stone -v- Varrone Plastering - APPL 1192 of 1999 - BEECH C - 04/05/00 - Plastering 1968
- Application re unfair dismissal (80WAIG1622) - Further Reasons for Decision re compensation after application was granted - Liberty was reserved to the parties to apply to the Commission if they were unable to agree on the sum of wages Applicant would have earned had he not been dismissed, less monies earned by him since his dismissal - Respondent sought to adduce further evidence on the amount of overtime which would have been worked by Applicant - Commission found in all circumstances that it was appropriate, in the interest of fairness on this issue for further evidence to be received - Commission found the certainty of the evidence produced by the Respondent was more accurate as to the amount of overtime which was likely to have been worked and Ordered Respondent to forthwith pay Applicant the sum of \$59,977.85 - Ordered Accordingly - Mr DJ Cooling -v- City of Geraldton - APPL 2151 of 1997 - BEECH C - 19/05/00 - Local Government 2707
- Application re unfair dismissal and contractual entitlements- Applicant argued that dismissal was harsh, oppressive and unfair and sought compensation for loss of income, contractual benefits including commission on sales and distress caused by dismissal - Respondent argued that applicant resigned and was not dismissed therefore was not unfairly dismissed - Respondent further argued that mileage allowance set out in applicant's contract was higher than award rate as verified by DOPLAR - Commission found on evidence that respondent wanted to terminate applicant and that applicant had discharged the onus of establishing that she was unfairly dismissed - Commission further found that as reinstatement was not practicable, compensation should be awarded for loss of wages, commission on proceeds of all sales and mileage as per contract of employment - Ordered and Declared Accordingly - Ms LM Fischer -v- Sassey Pty Ltd ACN 008 996 156 - APPL 1414 of 1999 - SMITH, C - 05/04/00 - Wholesaling..... 2713

CUMULATIVE DIGEST—continued

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COMPENSATION—continued

- Application re unfair dismissal - Applicant argued he was treated unfairly by the retrenchment, that he had signed a contract for 12 months secondment, that the same person who arranged his secondment, terminated it after six weeks - Applicant further argued that he was told in writing that on completion of the secondment he would return to the Respondent but ultimately this was not the case - Applicant argued if there were reasons for the termination of the secondment or why his services were no longer required, it was not discussed with him and that he was not given the opportunity to respond to any allegations against him - Respondent argued that Applicant was the architect of his own misfortune in that his own actions caused the cessation of his secondment, that he was well aware that the Respondent had no work for him other than at the secondment and that Applicant was also well aware that if there had been no secondment he would have been retrenched - Commission reviewed authorities and found that Respondent had an absolute obligation to investigate the circumstances under which the Applicant was asked to leave Solomon, particularly when the ultimate outcome had such a fundamental effect upon the employment contract and because the Respondent did not do this, there had not been a fair go all round, therefore Applicant's dismissal was unfair - Commission further found that re-instatement would not be practicable and ordered that compensation be paid to Applicant - Ordered Accordingly - Mr JR Harris -v- General Gold Resources NL - APPL 1551 of 1999 - GREGOR C - 12/05/00 - Mining..... 2720
- Application re unfair dismissal - Applicant argued his dismissal was unfair and sought relief by way of compensation - Respondent argued Applicant was on probation and failed to display the necessary skills required to perform duties - Commission found that the manner of dismissal was less than ideal, although the fact the Applicant was on probation was taken into account - Commissions found on evidence that Applicant had not established on the balance of probabilities that his dismissal was unfair - Dismissed - Mr GJ King -v- Midalia Steel Pty Ltd - APPL 1622 of 1999 - FIELDING C - 22/05/00..... 2723
- Application re contractual entitlements - Applicant sought an outstanding benefit due under the fixed term appointment contract - Respondent did not appear - Commission, on the evidence presented was satisfied that Applicant entered into a fixed term contract for one year, that remuneration under that contract was \$50,000 - Furthermore, Commission was satisfied that an amount of \$37,502 remained outstanding as a contractual entitlement and ordered that that outstanding amount be paid to Applicant no later than 28 days of the date of the Order - Granted - Ms CA Payne -v- Perfect Meats (Aust) Pty Ltd ACN 088 650 695 - APPL 433 of 2000 - COLEMAN CC - 26/05/00 - Meat..... 2731
- Application re harsh, oppressive and unfair dismissal seeking re-instatement without loss of benefits and bonus payment allegedly denied under contract of employment - Applicant argued that termination was on the grounds that he refused to work overtime - Respondent argued by failing to work overtime, Applicant failed to supervise members of his team which resulted in members of his team working without supervision - Commission found amongst a number of reasons that Applicant's refusal to work the overtime constituted a repudiation of an essential term of the contract - Commission further found that Applicant was unable to make out his claim for denied contractual entitlements - Dismissed - Mr JD Powell -v- KDB Engineering Pty Ltd ACN 008 884 482 - APPL 1405 of 1999 - SMITH, C - 16/05/00 - Manufacture..... 2732
- Application re unfair dismissal - Applicant argued that he was unfairly dismissed and sought compensation for loss of income - Respondent argued dismissal was warranted because applicant was abusive to customers on 3 occasions - Commission found that applicant received no counselling or warnings for alleged abusive behaviour on previous occasions and his actions appeared to be consistent with his responsibilities as an employee - Commission was further satisfied that applicant's conduct overall was not seriously in breach of his contract to warrant termination without notice and concluded that as reinstatement was not practicable, compensation for loss of income be awarded to applicant - Granted - Mr JK Richards -v- Tony W P Lee T/as Maxi Fuel Dianella - APPL 1691 of 1999 - BEECH C - 11/05/00 - Petroleum..... 2739
- Application re unfair dismissal - Applicant argued he was unfairly dismissed and sought relief - Respondent argued Applicant was guilty of deceit and liable to be summarily dismissed - Commission found on evidence the Applicant was largely the architect of his own undoing and guilty of deceit - Dismissed - Mr AJ Rivas-Borge -v- Birtandi Family Trust T/as BBD Distribution T/As BBD Wholesale - APPL 1575 of 1999 - FIELDING C - 17/05/00..... 2741
- Application re denied contractual entitlements - Applicant sought three weeks wages, reimbursement of phone calls and bonus payment for sales - There was no appearance for the Respondent - Commission found that Applicant was an employee of the Respondent for the period claimed, that she performed work in accordance with the directions by the Respondent, that her work was subject to the Respondent's control and ordered the Respondent to pay the contractual entitlements - Commission did not award claim for costs - Ordered Accordingly - Ms PJ Siggers -v- Shutters R Us - APPL 119 of 2000 - WOOD, C - 02/06/00..... 2742
- Application re unfair dismissal (80WAIG1968) - Further Reasons for Decision re compensation after application was granted - Liberty was reserved to the parties to apply to the Commission if they were unable to agree upon the compensation which was ordered to be paid - Commission found that compensation was equal to the wages Applicant would have earned between 12 July 1999 and 31 July 1999 - Commission has, with the agreement of the parties, determined the matter on the basis of written submissions and ordered Respondent to forthwith pay Applicant the sum of \$1,900.00 - Ordered Accordingly - Mr BJ Stone -v- Varrone Plastering - APPL 1192 of 1999 - BEECH C - 09/05/00 - Plastering..... 2743
- Conference referred re unfair dismissal - Applicant union argued that its member was terminated unfairly on the grounds of redundancy and was seeking compensation for loss for the period of unemployment suffered by its member following the redundancy - Respondent argued that because of the completion of major projects and a few other contracts that were coming to an end it had to make some employees redundant - Respondent further stated that the Applicant had to be counselled about his productivity, reliability and flexibility and employees' overall work performance was considered when taking the decision - Commission found that there was no consultation with the Applicant re the decision to make him redundant as required by Clause 32A. - Redundancy of the Award, and the dismissal of the Applicant was harsh, oppressive and unfair - Commission further found that the Applicant was paid a redundancy payment in excess of that prescribed by the award therefore the Applicant did not suffer any loss that was compensable - Declared accordingly by an Order of the Commission. - AUTO, FOOD, METAL, ENGIN UNION -v- Goldfields Contractors W.A. - CR 211 of 1999 - KENNER C - 09/06/00..... 2749

CONFERENCE

- Conference Referred re alleged breach of promise for payment of first salary increase of 1% from 1 January 1999 and to pay the second salary increase of 2% from 1 February 1999 - Respondent opposed the claim based on the arguments that the date of registration is the correct date for payment of the first increase and consequently any other date is contrary to government policy and not valid, further any other date would vary the agreement - Arbitrator examined the evidence and referred to the law and determined that the application is for breach of promise and is not attempting to vary the agreement as the evidence clearly demonstrated that a specific date was agreed - Granted - The Civil Service Association of Western Australia Incorporated -v- Chief Executive Western Australian Tourism Commission - PSACR 9 of 1999 - Public Service Arbitrator - BEECH C - 26/11/99 - Tourism..... 213
- Conference Referred re site allowance - Applicant claimed that due to various conditions and factors on a number of sites a site allowance is warranted - Commission referred to the law and inspected the Wellington St site and determined that an allowance in relation to this matter is warranted - Order Issued - Commission inspected the South Perth site, referred to the law and the Building Trades (Construction) Award 14 of 1978 and determined that the conditions were not beyond the norm contemplated by the terms of the Award and was not satisfied that the site caused excessive difficulties for employees on that site - Dismissed - The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers -v- Hanssen Constructions & Others - CR 259,299 of 1999 - KENNER C - 17/12/99 - Building..... 426

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CONFERENCE—continued

- ¹Appeal against decision of Full Bench (79 WAIG 2091) re effective date of salary increases due under Enterprise Agreement (Dismissed) - Appeal concerns the expression of an operative date for the purposes of calculating the first pay increases due employees contained in the decision of the Public Service Arbitrator (79 WAIG 245) - Appellant argued the same grounds that were argued before the Full Bench, the Order purported to vary an Industrial Agreement, the Order purported to give retrospective effect and the Order purported to give effect prior to the date upon which the Order was lodged in the Commission - IAC found the Arbitrator's Order had the effect of backdating the part of the Agreement providing for salary increases and the Commission/Arbitrator has no power to order that an Industrial Agreement which is being accepted for registration is to have effect from a date prior to its registration - Appeal Upheld - Ministry for Culture & the Arts -v- The Civil Service Association of Western Australia Incorporated & Others - IAC 6 of 1999 - Industrial Appeal Court - 04/02/00 - Government Administration 453
- Conference referred re wage increase - Applicant Union argued that a \$15.00 increase in pay rates per week was justified by reason of cost savings associated with introduction of shift work and a bonus pay of \$1000.00 to each employee who remained employed with Respondent until 31/12/94 was justified on the basis that such employees ought be rewarded for continuing to serve the employer notwithstanding their future was uncertain - Commission found that there was nothing of substance put to it which would justify a finding that the increased wage level ought be further increased and that the claims for a \$1000.00 bonus, apart from the scant reason given as justification, there was no evidence to support it - Commission found that Applicant Union has failed to establish there was a special case for Commission to award the claims made, or any part of them - Dismissed - The Shop, Distributive and Allied Employees' Association of Western Australia -v- Department of State Services - CR 451 of 1994 - PARKS C - 03/03/00 - Government 676
- ²Appeal against Decision of Commission (79 WAIG 3461) re unfair dismissal - Appellant argued Commissioner erred on a number of grounds one being that reinstatement of the former employees was impracticable - Full Bench found the commissioner was open to conclude the relationship between the former employees and the appellant had broken down and under the circumstances reinstatement was impracticable and that no other grounds of appeal were made out - Dismissed - Solid Concepts Pty Ltd ACN 009 301 553 -v- LIQUOR, HOSPITALITY & MISC - FBA 23 of 1999 - Full Bench - SHARKEY P/SCOTT C./WOOD, C - 31/03/00 1381
- Conference re negotiations on framework agreement - Industrial action by union resulted in the Commission issuing an order dated 14 December 1999 providing for framework negotiations to continue, a payment for a \$15.00 per week increase and for a return to work while this occurred - Both Parties have been negotiating with the aim of concluding their Agreement by 17 March 2000, however, recent Industrial action had delayed the target date - Commission found for there to be any conciliated outcome to the negotiations there needed to be an immediate resumption of normal work at all Depots and negotiations between the parties - Ordered accordingly - The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch -v- Western Australian Government Railways Commission - C 335 of 1999 - BEECH C - 17/03/00 - Rail 1662
- Conference referred re level classification - preliminary point - Applicant argued the appropriate level of classification for there member be at level 4, instead of level 3, of the award - Respondent argued that they oppose and object to the claim and that the application should be dismissed for want of jurisdiction. - Commission found that the matter cannot be dealt with under s.46, s.83 or any other special power conferring section of the act, therefore jurisdiction falls in favour of the applicant and has been listed for hearing at a future date - Declared accordingly - INDEPENDENT SCHOOLS SAL OFFIC -v- St Michael's School - CR 177 of 1999 - BEECH C - 18/04/00 - Education 1668
- Conference Referred re dismissal and reinstatement of employee, a dismissal notice be quashed and the recognition of a group of employees as a core group - Applicant withdrew second and third claims and were seeking the reinstatement of a former employee and argued that the employee in question ought to have been retained in preference to two other employees as a result of a re-structure - Commission examined the evidence and determined that the applicant failed to show that the selection process applied by the respondent caused her to be wrongly selected for dismissal - Dismissed - Metals and Engineering Workers' Union - Western Australian Branch -v- Skilled Engineering Pty Ltd - CR 59 of 1994 - PARKS C - 28/02/00 - Brewing 1676
- Conference re cancellation of Order - Applicant Union argued that the Order issued on 14/12/1999 cancelling AG 21/96 was cancelled by Order issued on 16/12/1999 - Applicant while alluding to the Full Bench determination on the 29/3/2000 that AG 21/96 had ceased to exist argued the union and its members should not have to continue to be covered by an agreement that did not exist and requested that the Order be now cancelled - Respondent argued the Order was effectively in two parts viz it addressed return to work and the issues of resolving the underlying dispute re a new Agreement - Respondent also argued that cancelling the Agreement at this stage would only remove the basis for negotiations, which in turn would cause dislocations to exporters including farmers - Commission contended the Order was only interim and it was necessary to negotiate a new Agreement which is on the verge of being concluded - Commission refused the Union's application to cancel the Order at this stage - Dismissed - The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch -v- Western Australian Government Railways Commission - C 335 of 1999 - BEECH C - 11/04/00 - Rail Transport 1976
- Conference re dispute in relation to enterprise bargaining negotiations - Applicants discontinued application by letter and by subsequent notices of discontinuance of application - Matter arose for determination as Respondent argued that it was not competent for Applicants to discontinue application without leave of the Commission in accordance with reg.75 of the Industrial Relations Commission Regulations 1985 - Furthermore, Respondent's Counsel submitted that in the circumstances, leave should not be granted by the Commission - Commission found it was unnecessary to determine leave issue as application had been discontinued by Applicants and leave to do so pursuant to the Regulations, was not required - Commission reviewed relevant sections of the I.R.C. Regulations 1985, authorities and found that as the terms of reg.75(1) prescribe the clear and unambiguous method of bringing proceedings to an end, which method should be complied with to be effective, therefore, this procedure was ultimately complied with in this case - Discontinued - AUTO, FOOD, METAL, ENGIN UNION -v- Midland Brick Co Pty Ltd - C 337 of 1999 - KENNER C - 20/04/00 - Brick 1978
- ²Appeal against decision of Commission (unreported) re employment of contractors - Appellant argued that the Commission erred in law in that it did not comply with the provisions of s.44 of the Act following an objection to the Commission of ostensible bias, therefore the decision of the Commission should be quashed in its entirety - Full Bench found that the matter had not proceeded to arbitration level, there was no agreement reached and was adjourned before the main issue of disagreement or dispute was dealt with - Full Bench found that the decision appealed against was a 'finding' and the Full Bench was required to be satisfied that the matter was of such importance that, in the public interest, an appeal should lie - Full Bench found that because the grounds of appeal were narrowly confined only to the issue of the Commission's jurisdiction and power and particularly the procedure adopted by the single Commissioner under s.44 of the Act, it was not persuaded that the finding related to a matter of such importance in the public interest - Dismissed - COMM, ELECTRIC, ELECT, ENERGY -v- BHP Iron Ore Pty Ltd - FBA 11 of 2000 - Full Bench - SHARKEY P/SCOTT C./KENNER C - 02/06/200 - Mining 2453
- Conference re unfair dismissal - Applicant union argued that the dismissal of its member was harsh, oppressive and unfair - Respondent raised the preliminary issue that as the Applicant was a party to a registered workplace agreement with the Respondent, according to sections 7A, 7B, 7C and 7D of the Workplace Agreement Act the application was not an industrial matter and should be struck out for want of jurisdiction - Commission found that the contract of employment between the parties at the time of the lodgement of the application did not become subject to some other arrangement between them provided for in the expired workplace agreement - Commission found that the matter referred was an industrial matter, the Commission had jurisdiction to enquire and deal with it and adjourned application sine die to be re-listed at the request of either party - Declared and Ordered Accordingly - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Bowra and O'Dea - C 111 of 2000 - BEECH C - 02/06/00 2747

CUMULATIVE DIGEST—continued

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CONFERENCE—continued

Conference referred re unfair dismissal - Applicant union argued that its member was terminated unfairly on the grounds of redundancy and was seeking compensation for loss for the period of unemployment suffered by its member following the redundancy - Respondent argued that because of the completion of major projects and a few other contracts that were coming to an end it had to make some employees redundant - Respondent further stated that the Applicant had to be counselled about his productivity, reliability and flexibility and employees' overall work performance was considered when taking the decision - Commission found that there was no consultation with the Applicant re the decision to make him redundant as required by Clause 32A. - Redundancy of the Award, and the dismissal of the Applicant was harsh, oppressive and unfair - Commission further found that the Applicant was paid a redundancy payment in excess of that prescribed by the award therefore the Applicant did not suffer any loss that was compensable - Declared accordingly by an Order of the Commission. - AUTO, FOOD, METAL, ENGIN UNION -v- Goldfields Contractors W.A. - CR 211 of 1999 - KENNER C - 09/06/00.....

2749

Conference referred re return to work - Applicant's Union argued Applicant made every effort to return to work by presenting the Respondent with professionally created rehabilitation programmes but the Respondent rejected them unreasonably - Applicant's Union argued that any doubt the Respondent might have had as to Applicant's capacity to return to work was put to rest by the report of the occupational physician and that, although the medical assessment of Applicant's doctor made at much the same time was more cautious, it was not inconsistent with that of the occupational physician but simply suggested that she be gradually reintroduced into the work place - Applicant's Union sought payment for the remuneration Applicant should have earned had she been allowed to work on a part time basis and thereafter on a full time basis until she returned to work this year - Respondent argued that Applicant was employed in a full time capacity and that at no time did she present for work on a full time basis until after her Workers' Compensation claim had been dismissed in March last - Respondent further argued Applicant presented medical certificate which suggested that she was not fully fit for work, or limitations were imposed either on the duties she could perform, the location at which she could work or the times during which she could work - Public Service Arbitrator reviewed authorities and found that Respondent should not be held responsible to pay Applicant for full time work when she was not present at work or indeed wanted to work full time - PSA found it unfair to expect Respondent to recompense Applicant for the loss of income which arose because of her inability to work in accordance with her contract when that inability had not been shown to be due to work related causes - Dismissed - Civil Service Association of Western Australia Incorporated -v- The Director, Metropolitan Health Service Board - Perth Dental Hospital & Community Dental Services - PSACR 48 of 1999 - FIELDING C - 12/05/00 - Dental

2752

Conference referred re unfair dismissal - Applicant argued that she entered into an employment contract on the expectation it would lead to ongoing employment - Applicant further argued her expectation at the time she commenced employment was that subject to successful completion of a three-month probation her employment would be ongoing and this expectation was strengthened at the time of signing the second contract and reinforced by her applying for and being granted leave - Respondent argued that Applicant was advised by letter on 10 May 1999 that the hospital would, in the future, be recruiting full-time enrolled nursing staff, she was advised that she would have to apply for an advertised position should she wish to continue employment past her then contract, she was provided with the necessary job description form and advertisement in a letter dated 3 June 1999, she was urged to apply for the full-time position in a letter dated 15 June 1999 and in a letter dated 24 June 1999, she was reminded that she had been invited to apply for the position prior to her departure on holidays overseas - Commission found that the document agreed to by Applicant was unambiguous and her employment ended by agreement through the effluxion of time - Dismissed - LIQUOR, HOSPITALITY & MISC -v- Kondinin District Hospital Board - CR 197 of 1999 - WOOD, C - 18/05/00 - Nursing.....

2753

CONTRACT OF SERVICE

Appeals against decisions of the Commission (79 WAIG 2656) re Application harsh, oppressive and unfair dismissal and denied contractual benefits - Appellant's argued that the learned Commissioner erred when determining who the employer was and erred in finding and relying upon the content and parties at an interview - Full Bench found that the decisions appealed against were not discretionary decisions in that the decisions were the result of a finding that there was no employment contract between the applicants and the respondent or alternatively that none had been established - Full Bench determined that the Commission at first instance correctly determined the matter of employer responsibility - Dismissed - Mr A Richardson -v- Pipunya Pty Ltd (Administrator Appointed) & Other - FBA 17,18 of 1999 - Full Bench - SHARKEY P/COLEMAN CC/GREGOR C - 09/12/99 - Food Retailing.....

14

Application for breach of Minimum Conditions of Employment Act 1993 - Complainant sought an order for alleged failure to pay annual leave as prescribed by the Minimum Conditions of Employment Act - Industrial Magistrate examined the evidence and referred to the law and determined that the Minimum Conditions of Employment Act 1993 applied - IM referred in particular to Bombak and Didco Pty Ltd (75WAIG2314) and applied the dicta of this case and determined that the employee is entitled to payment for annual leave - Annual leave entitlement was determined by the IM to be based on the normal rate of pay not the bonus payment as requested by the agent for the complainant - Proved - Mr DJ Hignett -v- Joburne Pty Ltd - CP 62 of 1999 - Industrial Magistrate - Cicchini IM - 24/11/99 - Real Estate Agency

217

Application for alleged denied contractual benefits - Applicant sought one week's wages as a denied contractual benefit - Applicant tendered a dishonoured cheque for wages upon finalising his employment - Respondent failed to answer the application or attend the hearing - Commission accepted the evidence of the applicant - Granted - Mr DA Belanger -v- Cargroomers WA Pty Ltd - APPL 1526 of 1999 - FIELDING C - 09/12/99 - Motor Vehicle Rtlg & Services

224

Application for unfair dismissal and allegedly denied contractual entitlements - Applicant argued dismissal was harsh, oppressive and unfair and the Respondent failed to afford him benefits to which he is entitled under his contract of employment - Respondent argued Commission did not have the jurisdiction to deal with the claim as the parties were bound by the Federal Award - Commission found it had jurisdiction to hear and determine the matter - Declared accordingly - Mr T Clayton -v- City of Canning - APPL 1011 of 1998 - SMITH, C - 22/12/99 - Community

229

Application for unfair dismissal and allegedly denied contractual entitlements - Applicant summarily dismissed for alleged gross misconduct - As no answering statement or appearance by the Respondent Commission did not have evidence which would allow it to conclude misconduct occurred - Commission heard evidence of Applicant and found dismissal unfair and although his employment would have terminated anyway he had suffered emotionally and financially - Commission granted four weeks wages as compensation in addition to entitlements - Granted - Mr GS Cumming -v- Pro-Team Clean - APPL 1101 of 1999 - BEECH C - Cleaning.....

231

Application re unfair dismissal - Applicant was employed as a bag wrapper on \$8.50 an hour - Applicant argued dismissal was unfair as his employment terminated after he telephoned work 1/2 an hour after normal starting time to say he was unable to attend - Applicant sought one week's pay in lieu of notice - Respondent argued that it was embarrassed by the Applicant's non-attendance and had to employ others at over time rates to do the work the applicant should have done - Commission found the applicant did not inform the respondent of his intentions until well after he was due to start work, showed a complete disregard for his obligations to attend work and it was the applicant who, in effect, brought the employment to an end by his misconduct in this respect and was not entitled to pay in lieu of notice - Dismissed - Mr M Drain -v- Koast Corporation Pty Ltd - APPL 1615 of 1999 - FIELDING C - 13/12/99.....

233

Application for unfair dismissal and allegedly denied contractual entitlements - Applicant argued dismissal was harsh, oppressive and unfair because he was not given an opportunity to explain any of the allegations against him and further argued that he was not given any notice and after some brief discussions his employment was terminated - Respondent argued Applicant was unprofessional and was dismissed for misconduct - Commission found that the Applicant's conduct was so seriously in breach of his contract of employment that by standards of fairness and justice the Respondent was no longer bound to continue the contract and the claim of unfair dismissal was dismissed - Dismissed - Mr GR French -v- Bruce Hawley formerly T/A For - Parts - APPL 205 of 1999 - BEECH C - Motor

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CUMULATIVE DIGEST—continued

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CONTRACT OF SERVICE—continued

- Application re alleged denied contractual benefits - Applicants claimed they were denied a benefit under their contract of employment - Respondent argued that the applicant's employment was subject to the terms of the Hotel Managerial Staff Federal Award 1974 and thus the State Commission did not have jurisdiction to hear the matter - Commission examined the award and employment evidence of the respondent and determined that there was an employer employee relationship that was subject to the responsibility of the Federal award - Dismissed - D Johnson -v- Kapinkoff Nominees PTY LTD - APPL 393,394 of 1999 - GREGOR C - 08/12/99 - Hotels 243
- Application re alleged denied contractual entitlements on the grounds of unfair dismissal - Applicants argued that at all material times, they were employees of the Respondent and sought relief in the form of reinstatement or alternatively compensation - Further, Applicants sought to recover pro rata annual leave and a payment equivalent to three months salary in lieu of reasonable notice due to them under their contract of service - Respondent argued that as Applicants were partners in the business, Commission lacked jurisdiction to hear and determine the matter therefore it should dismiss applications - Commission reviewed authorities and found on evidence that no employee/employer relationship existed and that claims for denied contractual entitlements should be dismissed - Commission further found that the Supreme Court has held that a contractual entitlement to annual leave cannot be converted to a cash entitlement in the absence of some express provision in that regard and that there was no such provision in the King Sound Bargaining Partnership Agreement, therefore Applicants may well have a claim pursuant to provisions of the MCE Act 1993, and if that was the case, it is a matter which is beyond Commission's jurisdiction - Ordered Accordingly and the question of costs adjourned sine die - Mr SI Pederson -v- Carpentaria Marine Pty Ltd ACN 010 996 273 - APPL 2201,2202,2204,2205 of 1998 - FIELDING C - 13/12/09 - Marine 248
- Application re denied contractual benefits - Applicant argued he was entitled to outstanding benefits, being denied commission payments which were due to him under his contract of employment - Respondent argued that the payment of commission was subject to the particular jobs being completed and the applicant reaching the agreed sales targets - Commission found benefit was not due as the jobs in question had not been completed - Dismissed - Mr GJ Plowman -v- Elvin Air Conditioning Services - WAG 7 of 1998; APPL 286 of 1999 - GREGOR C - 22/12/99 - Building 248
- Application for unfair dismissal and allegedly denied contractual entitlements - Applicant argued that he was dismissed when he was about to commence annual leave - Counsel for the Applicant argued that the financial circumstances of the Respondent was not grave therefore there was no reasonable cause to dismiss the Applicant and further argued Respondent did not discuss redundancy or what measures were there to avoid or minimise its effects - Respondent argued Applicant's position became redundant and that was the reason for the termination - Commission found that the reasonable notice required to be given was 4 months and that the dismissal was on account of redundancy after 12 months service and as such the Applicant was entitled to the combined benefit of payment in lieu of notice and a redundancy payment - Granted - Counsel for the Applicant raised the issue of compensation on account of alleged injury and the Commission found that for the combination of factors that caused stress the Applicant should receive a compensation for injury - Supplementary reasons issued - Granted - Mr K Thompson -v- Gregmaun Farms Pty Ltd atf Chris & Evelyn Henderson Family Trust trading as C & E Henderson - APPL 161 of 1999 - PARKS C - 29/12/99 - Farming 252
- Application re unfair dismissal and alleged denial of contractual benefits - Applicant claimed that he was forced to resign from his employment therefore he was unfairly dismissed and the dismissal breached his contract of employment - Applicant argued that upon receiving an amended written warning he was informed by an employee of the respondent that he would receive further warnings to excite his resignation or justify dismissal and was subsequently informed that it would be advisable to seek alternative employment during the period of his planned annual leave - Applicant further argued that it was agreed with the respondent that if he were to resign the respondent would agree to pay his removal costs - Respondent argued that there was no desire for the applicant to resign however his performance was questioned - Commission examined the evidence and preferred the evidence of the respondent and determined that the applicant had resigned without duress and therefore had not been unfairly dismissed - Commission further determined that as the applicant had resigned on his own volition the respondent had not breached the contract of employment and therefore no monies or benefits were owing - Dismissed - Mr DM Betteridge -v- Spotless Services Australia Limited T/A SSL Nationwide Field Catering - APPL 1677 of 1998 - PARKS C - 20/01/00 - Retailing 383
- Application re unfair dismissal and denied contractual benefits - Applicant claimed that she was unfairly dismissed and the respondent did not pay her benefits she was due - Respondent argued the applicant was dismissed for unsatisfactory performance - Commission was not satisfied that the evidence as recollected by the applicant was accurate - Dismissed - Ms R Bull -v- Mobile Communications - APPL 1671 of 1998 - PARKS C - 21/01/00 - Telemarketing 385
- Application re contractual entitlements - Applicant argued he was entitled to commission arising from the listing for sale and/or sale of properties - Applicant argued he received only 25% of the 'gross office commission' to which he was entitled 50% - Respondent argued the 'gross office commission' is the commission received by any particular office and as the office applicant was attached, received 50% of the commission applicant then received 50% of that amount - Respondent further argued applicant was covered by the terms of a written agreement and that the terms thereof had been previously applied and accepted - Commission found that the terms of the agreement did not entitle the applicant to the calculation of commission upon the basis he claims and his application was dismissed - Dismissed - Mr MR Healy -v- Colin King & Eillaine King/The King & I Pty Ltd - APPL 320 of 1997; APPL 2157 of 1998 - PARKS C - 31/01/00 - Real Estate Agency 396
- Application re alleged denial of contractual benefits - Applicant claimed that she was denied payment as an entitlement according to her contract of employment - Respondent did not appear - Commission heard evidence from the applicant and determined that the applicant was denied a contractual benefit - Granted - Ms MC Hocking -v- Mr J Mathias - APPL 2156 of 1998 - PARKS C - 03/03/99 - Telecommun. 399
- Application re unfair dismissal and alleged denied contractual entitlements - Applicant claimed that she was unfairly dismissed and as a result denied benefits under her contract of employment - Commission established in conference that the two claims for the benefits of wages in lieu of notice, and pro rata annual leave are based upon the provisions of the Shop and Warehouse (Wholesale and Retail Establishments) Award which applied to the applicant's employment - Applicant argued that she was dismissed for failing to sign a workplace agreement - Applicant further argued that the respondent advertised for new employees one week before her dismissal - Respondents argued that it had dismissed a number of employees in other stores which had ceased operation due to economic considerations - Commission examined the evidence and determined that the applicant did not discharge the onus of proof of Unfair dismissal - Dismissed - Mrs IM Lawson -v- Night Crest Pty Ltd As Trustee For The King Kong Sales Unit Trading As King Kong Sale - APPL 475 of 1999 - PARKS C - 21/09/99 - Retail Trade 404
- Application re alleged denied contractual entitlements - Applicants argued they were denied an entitlement due to them based on the quantity of hay bales produced - Commission examined the evidence and found that the central issue turned on whether verbal terms of the contract specified the applicants were to be paid by the quantity of bales produced or by their weight - Commission preferred the evidence of the respondent, whom argued the applicants were to be paid by the weight of the bales - Dismissed - Mr LW Cooper -v- Timothy John Sampson - APPL 399,510 of 1999 - BEECH C - 20/12/99 - Agriculture 405
- Application re unfair dismissal and alleged denial of contractual benefits - Applicant claimed that he was unfairly dismissed and denied contractual entitlements and sought reinstatement or compensation for loss of wages - Applicant argued that his services were terminated and he was in effect told to leave that day - Respondent argued that the applicant's services were terminated due to the need to reduce the workforce by reason of redundancy and denied that the dismissal was unfair - Respondent further argued that the contractual benefits claimed do not arise under his contract of employment but are benefits under the relevant award - Commission examined the evidence and found that the applicant was asked to work out the period of notice and decided not to - Commission further determined that the applicant was redundant to the respondents needs and therefore his dismissal unfair - Dismissed - Mr P Morete -v- Unique Metal Works Pty Ltd - APPL 1855 of 1996 - PARKS C - 18/01/00 - Sheet Metal Fabrication 407

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- Application re unfair dismissal and contractual entitlements - Applicant alleges he was owed wages for work conducted at the respondents nightclub and was unfairly dismissed - Respondent disputes Applicant is owed money as he never asked the applicant to perform skilled tradesmen's work and denies the unfair dismissal claim - Commission determined the contract entitlement claim for wages could not be substantiated - Commission reviewed authorities and determined the respondent dismissed the applicant in the heat of the moment in circumstances the respondent could not justify - Commission found applicant to have been unfairly dismissed, reinstatement impractical and issued compensation - Granted in Part - Mr S Naumovski -v- Neil Temple Scott / IV Entertainment Pty Ltd - APPL 1285 of 1998 - GREGOR C - 23/12/99 - Entertainment.. 408
- Application re alleged denied contractual entitlements - Applicant argued she was denied contractual entitlements - Respondent argued that the applicant was employed subject to the Plaster, Plasterglass and cement Workers' Award and the Commission could not enforce award entitlements - Commission found Applicants employment to be covered under the award and determined that it did not have jurisdiction to enforce the award provisions - Dismissed - Ms VK Parker -v- PFK Pty Ltd T/A Limestone Replicas - APPL 347 of 1997 - PARKS C - 31/12/99 - Cement 411
- Application for contractual entitlements and unfair dismissal - Applicant argued that he had been denied benefits arising from his contract of employment - Commission found on evidence that Applicant was unfairly dismissed - Commission noted its records in respect of attempts to communicate with Respondent, the evidence of the Applicant in regards to his employment and found re -employment or reinstatement was impracticable, and ordered compensation be paid to Applicant - Ordered Accordingly - Mr DC Rath -v- Avtec Security Services Pty Ltd - APPL 1215 of 1999 - SCOTT C - 28/01/00 - Securities 412
- Application re alleged denied contractual entitlements - Applicant sought alleged denied superannuation entitlements - Applicant argued that upon resignation he received monies from his superannuation benefit less than his contribution, which is set out in the contract of employment - Applicant further argued that the Commission ought to order the respondent to pay to him directly the difference between what he received from the superannuation fund upon his resignation and what he estimates the respondent would have had to contribute to the fund - Commission examined the evidence and in particular the Trust Deed and found the applicant's superannuation entitlement upon resignation is defined by the Trust Deed and not by the level of contribution to the scheme - Commission determined that even if the respondent had paid into the superannuation scheme the alleged agreed amount the applicant would have not received a greater amount - Commission found that it did not have the authority to order the respondent to pay that difference to the applicant - Commission determined that it could not order for denied contractual benefits due to the terms of the "Trust Deed" and had no authority to order for the difference between the amount paid by the respondent and the amount agreed to be paid into the fund - Dismissed - Mr GD Saunders -v- Woodroffe Industries Pty Ltd - APPL 572 of 1999 - BEECH C - 18/01/00 - Sheet Metal Fabrication 413
- Application re alleged harsh, oppressive and unfair dismissal - Applicant sought compensation for loss of past earnings, future loss of earnings and for injury and loss of reputation in the sum of \$70,916.40 capped at the equivalent of six months salary at the sum of \$54,000.00 in accordance with s.23A of the Act - Respondent argued that it needed to reduce its operation costs including salaries, therefore, 3 pathologists were asked to reduce their sessions including the applicants - Respondent, further argued that agreement regarding Applicant's sessions could not be reached, therefore termination was warranted - Commission reviewed evidence, authorities and declared that Applicant had been unfairly dismissed and that reinstatement was not available - Commission decided not to assess the amount of loss or injury until it had all of the information - Commission will list the matter in due course to give Applicant opportunity to provide evidence of her loss in order that compensation can be calculated - Granted - Dr LA Smyth -v- St John of God Health Care Inc (ARBN 051 960 911) - APPL 1973 of 1998 - GREGOR C - 24/12/99 - Health 414
- Application re unfair dismissal and alleged denied contractual benefits - Applicant sought compensation and the recovery of alleged benefits due according to fixed term contract - Applicant argued that he did not do anything wrong - Respondent argued that the applicant was not unfairly dismissed as the applicant conducted private tuition for payment in contravention to a direction of the employer and contravened a number of other directions - Commission examined the evidence and found that the applicant had committed misconduct by disobeying a general instruction in conducting private tuition and in combination with disobeying a further instruction determined that the respondent was justifiable in terminating the applicant's employment - Commission noted that it was not argued before it that the form of dismissal was either summary or unlawful and assumed therefore that there was acceptance that the payment made to the applicant purportedly in lieu of notice reflected the lawful manner in which the contract of employment might be terminated - Dismissed - Mr DW White -v- Satellite Investments Pty Ltd T/A Perth Heat - APPL 320 of 1997; APPL 2157 of 1998 - PARKS C - 31/01/00 - Sport 418
- Application for allegedly denied contractual entitlement - Applicant claimed a contractual benefit - The monies sought represented a difference in payment between the full time wage and the "casual pool of labour" rate that was received - Respondent argued that Applicant was unable to continue with the full time work and alternative work was not available at any of the Respondent's other sites - Therefore it was agreed that applicant would be placed on the "casual pool" of labour until permanent employment could be found - Commission found that in order to establish an entitlement to payment for the alleged denied benefit the Applicant failed to establish that there was a term expressed or implied somewhere within the contract of employment that provided for the benefit-Dismissed. - Ms S Adams -v- Olten Pty Ltd T/A MSA Guards & Patrols and MSA Security - APPL 461 of 1995; APPL 2322 of 1997 - PARKS C - 01/03/00 - Security 610
- Application re unfair dismissal - Applicant argued that the 'Agency Agreement' constituted a contract of service, and not a contract for service - Question re jurisdiction was heard as a preliminary matter - Respondent argued that as Applicant was an agent, and that no employer/employee relationship existed, Commission lacked jurisdiction to deal with the matter - Commission reviewed authorities and found on evidence that the nature of the relationship of the Applicant to the respondent was one of joint contractor - Dismissed. - C Bennier -v- Totalisator Agency Board of Western Australia - APPL 263 of 1992 - PARKS C - 03/03/00 - Betting 614
- Application for unfair dismissal-Applicant argued dismissal was unfair- After he declined the Respondent's request to be a Director, he was treated differently, had no performance indicators and received little guidance and administrative assistance-Claimed non award contractual benefits of one week's wages and superannuation "as agreed" -Respondent argued Applicant was dismissed for poor work performance and misconduct- Commission found that the employment relationship was irretrievable as it became necessary to have the Police involved and act as intermediaries- As the Respondent had good cause to bring about the termination there was no substantive unfairness -As the termination was justifiably summary the contractual benefits claimed were not owed to the Applicant-Further, the Applicant's Representative confirmed that the superannuation benefit claimed arose from statute and not from contract of employment-Dismissed - Mr GF Burke -v- Sovereign Cove Pty Ltd & Others - APPL 1779 of 1998 - SCOTT C - 18/02/00 - -- 619
- Application for unfair dismissal and allegedly denied contractual entitlements-Applicant argued dismissal was unfair and was seeking relief by way of reinstatement -Respondent argued Applicant was not its employee but was employed by its subsidiary company registered in South Africa and challenged the jurisdiction of the Commission as the relevant provisions of the Industrial Relations Act is limited in their operation to employment within this State -Commission found that it did not have jurisdiction to deal with the matter because it was not a matter which falls within the ambit of an industrial matter as envisaged by the Industrial Relations Act 1979-Further found that the dismissal did not occur and in the circumstances it was not necessary to consider the Commission's jurisdiction-An Order was issued dismissing the application. - Mr C Harris -v- Brandrill Limited ACN 061 845 529 - APPL 1265 of 1999 - FIELDING C - 15/02/00 - Mining..... 629

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- Application re unfair dismissal - Applicant sought payment of \$300.00 per week due under his contract of employment and further amended the claim to \$15600.00 by leave of the Commission - Respondent argued that the contract of employment with the Applicant entitled him to the payment of a set weekly wage and that throughout his employment he was paid that wage in full - Respondent denied that it failed to pay the Applicant a \$300.00 a portion of that wage each week - Commission was satisfied that the \$300.00 per week to which Applicant claimed that he had not received was in fact paid as part of the wages placed in an envelope, sealed and the "payslip" attached to it; that no person was able to, or did, tamper with that sealed envelope before Applicant took possession thereof each week - Commission found it incredible that a person who had been promised in effect \$15600.00 per year of employment and who was otherwise paid \$24024.00 in the year ending 30 June 1996 would not have pursued a failure by the employer to pay around 39% of the promised remuneration - Dismissed - Mr R Holland -v- Carony Pty Ltd - APPL 1959 of 1998; APPL 86 of 1999 - PARKS C - 28/02/00 - Meat..... 632
- Application re unfair dismissal - Applicant argued Respondent failed to pay him benefits due under his contract of employment and sought compensation by way of declarations and orders from Commission that he be paid in total a sum of six week's wages - Respondent denied that it unfairly dismissed Applicant or dismissed him at all and argued that Applicant abandoned his employment - Commission found that Applicant took leave and never returned to his employment - Commission further found that Applicant had not proved the onus of establishing there was conduct by the employer through Mr Angel which constituted a dismissal, that Applicant had not retained a current licence because of his intention to pursue a sales roles, therefore, absent that licence, he was not permitted to perform that part of his usual duties which involved the application of the pesticides - Dismissed - Mr AD Hyland -v- New Image Holdings Pty Ltd (ACN 009 336 636) T/A Barclays Pest Management Services - APPL 1570 of 1998 - PARKS C - 18/11/98 - PESTICIDES..... 634
- Application re alleged unfair dismissal and denied contractual entitlements - Applicant argued he suffered economic loss and sought reimbursement for goods and services purchased for the Respondent's business and outstanding overtime - Respondent argued Applicant failed to recover bad debts, that it never intended to terminate Applicant's employment but to offer a lesser position, which never eventuated as Applicant walked out - Commission found that the economic loss suffered by the Applicant was to a significant extent brought upon himself by his petulant actions and the claim for harsh unfair dismissal was rejected - Commission found that the claim for overtime was not a contractual benefit under the statute and cannot be pursued in Commission's jurisdiction and that there was no entitlement expressed in the contract of service to ground Applicant's claim for reimbursement for goods and services purchased - Dismissed - Mr B Kangatheran -v- ICENet Pty Ltd & Other - APPL 2173 of 1997 - PARKS C - 03/03/00..... 636
- Application re unfair dismissal and contractual entitlements - Applicant argued for damages for unfair dismissal, recovery of moneys on items of expenses and payment in lieu of notice - Respondent denied the claim and asserted applicant resigned on her own volition - Commission found that the items on which applicant claimed recompense on a prima facie case were not shown to be from applicants contract of employment and as such the respondent was not required to answer those allegations - Further the respondents attempts to meet applicant after she abandoned her employment with a view to addressing her concerns were to no avail and as such the application would be dismissed - Dismissed - Mrs DR Karnicki -v- Michele's Creative Music - APPL 1508 of 1998 - PARKS C - 21/08/97 - Educational..... 639
- Application re contractual entitlements - Applicant's claim for commission is in three parts - First part was for commission on sale of three properties at 46.5% and other two parts concerned properties for which rate of commission was separately set - Respondent argued that rate of commission agreed upon on commencement of applicant's employment was 18.6% though no terms of employment were in writing - Commission found that neither party specifically recalled terms of commission structure and further believed that as respondent always paid applicant full commission there was no valid reason why proportionate rates should now be insisted upon - Commission concluded that applicant was owed benefits denied under contract of employment - Ordered accordingly - Mrs SCJ Kouw -v- Rural & Metro Realty Pty Ltd - APPL 359 of 1999 - BEECH C-21/01/00-Property Services..... 644
- Application for outstanding benefits - Applicant claimed respondent union failed to allow him a benefit under his contract of employment, that being the reduction in his pay would be restored once the union finances improved sufficiently - Respondent union denied the wages arrangement included such an undertaking - Commissioned found the arrangement entered into by the parties did not include, what in essence was deferment of payment as alleged by the Applicant - Dismissed - Mr JB Maxwell -v- The Australian Workers' Union, West Australian Branch, Industrial Union of Workers - APPL 978,1673 of 1998 - PARKS C - 28/02/00 - Unions..... 646
- Application re unfair dismissal and contractual benefits - Preliminary point concerning jurisdiction - Commission examined the circumstances regarding the termination of employment and the relevance of the employee's workers compensation case and illness and referred to the law - Commission determined that it lacked jurisdiction due to the application being filed out of time - Dismissed - Mr P Nock -v- Morawa Golf & Bowling Club - APPL 197,522,1578,1635 of 1999 - GREGOR C - 01/02/00 - Sport and Recreation..... 651
- Application re Unfair Dismissal - Applicant argued notice of termination given during annual leave does not take effect until leave has come to an end - Respondent argued application was filed after 28 days from date of termination rendering application invalid - Commission found that the date of termination started from when the applicant finished his annual leave and therefore it had jurisdiction to deal with the claim - Ordered accordingly - Mr I Rebello -v- New Image Holdings Pty Ltd T/A Barclays Pest Control - APPL 1497 of 1998 - COLEMAN CC - 24/02/00 - PESTICIDES..... 660
- Application re unfair dismissal - Applicant argued that he was engaged on a part-time basis and denied that he was informed at the time of engagement that he would be on a 3 months probationary period - Respondent argued that Applicant was engaged on a casual basis and that it was a term of the contract of employment that his engagement was subject to a trial or probationary period of 3 months - Commission found that Applicant was subject to a 3 months probationary period and that his employment was terminated well within that period - Commission was satisfied that the Respondent was entitled to bring the employment to an end as it did - Dismissed - Mr PJ Scott -v- Canon Foods Pty Ltd - APPL 1161 of 1997 - PARKS C - 02/10/97 - Sales..... 662
- Application for unfair dismissal-Applicant argued dismissal was unfair because he was dismissed before commencing work and claimed a redundancy package both by way of compensation and contractual entitlement-Respondent denied that a contract of employment was entered upon with the Applicant-Commission found that there was no need to review the whole of the evidence for the reason that, were the Commission to find that the Applicant had been engaged as an employee by the Respondent, the claim that the contract of employment entitled him to two weeks' wages in lieu of notice had not been substantiated - No evidence had been provided that there was an alternative condition that provided the claimed entitlement - Dismissed - Mr BD Wilson -v- Barmingo Pty Ltd - APPL 2301 of 1997 - PARKS C - 11/03/98 - Mining..... 667
- ²Appeal against Decision of Commission (79 WAIG 3114) re unfair dismissal - Application in first instance dismissed on preliminary matter - Appellant argued the commissioner erred in a number of findings relating to the dismissal of the application on the grounds the incorrect respondent was named - Appellant further argued the commissioner erred in not permitting the applicant to amend the original application to reflect correctly the employer/s - Respondent referred to authorities and argued this was a case of a wrong party being named, not a misdescription of the party's name and should be dismissed - Full Bench reviewed authorities and found the commissioner had erred in not allowing an amendment to the name of the respondent and remitted the application back to the commission at first instance to be listed for hearing and determination according to law - Upheld in Part - Ms PK Rai -v- Dogrin Pty Ltd - FBA 27 of 1999 - Full Bench - SHARKEY P/FIELDING C/GREGOR C - 07/03/00 - Accommodatn, Cafes&Restaurants..... 1375

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Application re contract entitlement - Applicant failed to receive the whole or part of her fortnightly wage, despite assurances from the respondent - Respondent failed to return any appearance forms or appear at the hearing - Commission found, when referring to exhibits 2,3,4, the applicant was underpaid - Granted - Ms T Acacio -v- Wartell Mobile Phone Shop - APPL 1535 of 1997 - PARKS C - 06/04/00 - Sales	1613
Application re contractual entitlements - Applicant sought wages and pro rata annual leave due on resignation of employment - Respondent initially argued that Commission did not have jurisdiction to deal with this claim as applicant's employment was governed by Farm Employees Award 1985 and a claim to enforce the award for underpaid wages and annual leave must be made before an Industrial Magistrate - Commission found that it had jurisdiction to deal with applicant's claim because the wage rate agreed between the parties were above award rates and money owed was a non-award benefit - Respondent then argued that applicant's date of resignation was 11 April 1999 but applicant argued that she worked until 28 May 1999 - Respondent further argued that applicant resigned from employment because working full time with long hours was difficult as she cared for 3 children - Commission found that evidence from statutory declaration supported the claim that applicant worked until 28 May 1999 and was therefore entitled to wages of \$800 and pro rata annual leave of \$424 - Granted - Mrs C Boxall -v- Rodney Harry Wisbey (Orlanda Park) - APPL 956 of 1999 - BEECH C - 28/02/00 - Dairy.....	1618
Application re contractual entitlements - Applicant argued that benefit due under contract of employment was denied and sought payment for anticipated increase in salary following each appraisal after 3rd and 12th months - Respondent argued that applicant was offered only \$40000 per annum (Exhibit L1 re document titled Terms and Conditions of employment prescribed this) - Commission found that applicant provided no evidence to support claims made in application and would be dismissed, and ordered costs against applicant for unnecessary expense to defend action - Dismissed - Mr DA Chevin -v- Wiltrading (WA) Pty Ltd - APPL 1543 of 1997 - PARKS C - 22/01/98 - Unknown Industry.....	1621
Application re unfair dismissal - Applicant argued he was given assurance by Respondent that his job was secure and sought reinstatement - Respondent argued that over time the amount of work had been significantly reduced to a point where the school had made the decision to make the position redundant - Commission found that Respondent did not follow its own policy in that it did not have discussions that were required to be held between it and the Applicant by virtue of the contract of employment in accordance with sections 5 and 41 of the Minimum Conditions of Employment Act 1993 - Commission found that Applicant was unfairly dismissed, that reinstatement was impracticable as position no longer exists and ordered compensation of \$3,464 be paid for loss and injury caused by the dismissal - Ordered Accordingly - Mr AR Ellery -v- St John's School - APPL 950 of 1999 - BEECH C - 24/02/00 - Gardening	1628
Application re contractual entitlements - Applicant argued that he was denied commission benefits due to him as a result of a exclusive sales agreement - Respondent argued that he did not offer the applicant an exclusive right to sell the properties and that the respondent's company was not the only seller of the properties - Commission examined the evidence and determined that the applicant failed to establish his claims - Dismissed - Mr LK Fahy -v- LMS Property Group Pty Ltd - APPL 375 of 1999 - WOOD,C - 31/03/00 - Real Estate Agency	1630
Application re contractual benefits - Applicant argued that he was entitled to receive payment for extra accrued time upon termination as this is a standard industry practice - Respondent argued that there was no agreement entered into in relation to payment for extra time or conversion of time in lieu into cash payment, as the applicant was paid in excess of the relevant award to compensate for extra time worked - Commission examined the evidence and accepted the Respondents evidence as more reliable - Further, Commission examined and applied the law and found that in the absence of some express provision to that effect an employee is not entitled to convert untaken leave to cash - Dismissed - Mr MJ Flatman -v- Sushi and Spice Holdings WA Pty Ltd - APPL 1718 of 1999 - FIELDING C - 23/03/00 - Accommodatn, Cafes&Restaurants	1632
Application re denial of contractual entitlement - Applicant sought 2.5% commission denied on sale of a new home - Respondent argued that application be dismissed because applicant's claim was against incorrect entity, but Commission was satisfied that employer's name had been misdescribed rather than claim made against wrong employer - Applicant argued that he was required to sell new homes to prospective customers and discussed with one such customer who did not want to build the respondent's style of project home, a "sketch plan" for building a new home but did not provide the respondent with any signed contract - Respondent denied that any sketches or drafting work for construction of a new home had been done and stated that unless applicant secured a signed preparation of plans agreement, respondent had no customer - Respondent also declared that applicant was not an employee so the claim was beyond Commission's jurisdiction, and that as applicant did not procure a signed building contract or produce quantification of his claim an order should not be made in applicant's favour - Commission established that applicant was an employee of the respondent and not an independent contractor, that the applicant failed to obtain a signed building contract and receipt from respondent as progress payment and also failed to particularise or quantify the claim - Commission was therefore not satisfied that applicant was entitled to commission in present circumstances and concluded that it should be dismissed - Dismissed - Mr D Lamont -v- Trendsetter Homes - APPL 474 of 1999 - KENNER C - 09/03/00 - Real Estate Agency.....	1637
Application re Unfair Dismissal - Applicant argued that dismissal was unfair and that respondent failed to give notice of termination or one week's wages in lieu, to which he is entitled under clause 10 of the award relating to contract of service - Respondent argued that applicant's services were terminated because he refused to satisfactorily explain absence on 13 December 1996 - Respondent further argued that applicant had previously misled him and offered to resign if not granted a week's leave, and then almost immediately commenced work with a competitor - Commission found that though applicant was not obliged to submit detailed information on personal matters that required absence from work, it was not convinced that respondent's right to terminate applicant was unfair - Dismissed - Mr M McGrath -v- Temkara Pty Ltd T/A Economic Pest Control - APPL 1873 of 1996 - PARKS C - 24/02/97 - PESTICIDES	1641
Application re contractual benefits - Applicant argued that he was denied a benefit as a result of a written undertaking to reimburse him for a previous salary sacrifice - Respondent argued that the written memorandum does not constitute an express undertaking to return the value of the salary deducted from him - Commission examined the evidence and determined that the memorandum did not contain the meaning claimed by the applicant - Dismissed - Mr A Mukerjee -v- Crommelins Operations Pty Ltd - APPL 2255 of 1997 - PARKS C - 21/07/98 - Other	1642
Application for contractual benefits - Applicants claimed pro-rata long service leave arising out of their contract of service - Respondent argued that the Applicants had not accrued the right to pro-rata long service leave by reason of their length of service - Commission having heard claims CR176/97 and CR 211/97 found the common words used in the contract documents "but will not include any qualifying period" and "with no qualifying period" excluded the Applicants from any requirement to serve a qualifying period before becoming entitled to pro-rata payment of long service leave - Granted in part - Hospital Salaried Officers Association of Western Australia (Union of Workers) -v- Diabetes Australia - Western Australia - CR 176,211 of 1997 - PARKS C - 27/10/97 - Health Services	1663
Application re unfair dismissal - Applicant argued that a former employee reverting back to full time employment was the reason for the termination of contract - Respondent argued the reason was a downturn in the number of enrollments, restructuring and the temporary nature of the contract - Commission found contract contained terms which indicated employment was for a far longer duration and that no discussion had taken place with the applicant facing redundancy and dismissal was unfair and awarded wages in lieu of notice and compensation - Granted - LIQUOR, HOSPITALITY & MISC -v- Chesterfield Child Care Centre Pty Ltd - CR 130 of 1999 - BEECH C - 10/03/00 - Community Services	1669

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- ¹Appeal against decision of Full Bench (79 WAIG 1867, 2985 & 3183) re allegedly denied contractual entitlements - Industrial Appeal Court found that Full Bench was in error in concluding that the rate of salary to be paid was a different rate to that in the contract when the contract clearly and unambiguously expressed the rate of salary to be paid to Appellant - IAC was not persuaded otherwise that Full Bench has made any other error, has upheld the Appeal to this extent and remitted the matter back to the Single Commissioner for further hearing and determination regarding under-paid salary - Upheld - Ms AP Ahern - v- Aust Fed of TPI Ex-Serv Men - IAC 8 of 1999 - Industrial Appeal Court - Kennedy J./Anderson J./Scott J. - 31/03/00 1729
- Application re pro rata long service leave - Applicant argued that as a result of an accident at work she was forced to resign one and a half years prior to qualifying for long service leave - Committee reviewed act and authorities and noted that although applicant was not entitled to Long service leave, the Committee could make a recommendation under special circumstances and would make such recommending the employer make an "ex gratia" payment, equivalent to what might otherwise have been the entitlement- Recommendation Given - Mrs JM Henderson -v- North Metropolitan Health Service - BOR 9 of 1999 - Long Service Leave Board of Reference - SPURLING, J.A. - 29/02/00 - Health Services 1941
- Application re contractual entitlements - Applicant sought orders pursuant to clause 48(3)(a) of the Metropolitan Health Service Board AMA Medical Practitioners Agreement 1999, or alternatively to resolve the dispute pursuant to clause 48(3)(a) or sections 23(1) and s29(1)(b)(ii) of the I.R. Act - Applicant further argued that to undertake work was a benefit to which she was entitled under her contract of employment - Respondent argued that clause 48(3) of the Agreement only enables "parties" identified as the MHSB and the W.A. Branch of the AMA Inc to bring matter to the Commission and that Applicant is not a party to the Agreement - Respondent argued s.29 of the Act sets out those matters which the Act enables employees to bring to the Commission, that this matter is not such a matter and there was no benefit under Applicant's contract of employment to enable her to bring a matter of the provision of work to the Commission - Commission reviewed Agreement, I.R. Act, Authorities and was not satisfied that to undertake work was a benefit to which Applicant was entitled under her contract of service - Commission concluded that what the Applicant sought does not constitute a benefit to which she was entitled under her contract of employment, nor was the Applicant able to bring the matter to the Commission pursuant to clause 48 of the Agreement - Dismissed - Prof LA Cala -v- Metropolitan Health Service Board & Other - APPL 300 of 2000 - SCOTT C. - 17/04/00 - Health 1946
- Application re contractual entitlements - Applicant argued employer had reneged on the contract of employment and claimed restitution - Respondent opposed, arguing applicant's salary reflected award provisions - Respondent further argued Commissioner's prior involvement in the making of the award might not bring an impartial or unprejudiced view to the matter - Commission citing cases which addressed similar circumstances where qualification of a member of a court or tribunal was addressed could not find any good reason not to proceed with this matter - Commission dismissed application after a Notice of Discontinuance was filed by the Applicant on 6/4/2000 - Dismissed - Ms G Clunies-Ross -v- Mercedes College - APPL 2288 of 1998 - SCOTT C. - 15/10/99 - Education 1949
- Application re contractual entitlements - Applicant sought commission due upon sale of property - Respondent denied claim arguing the two deals were separate unrelated property transactions and Applicant could not claim entitlement to a sale he played no part in - Commission found that according to the applicant's Workplace Agreement a conjunctural sale had not taken place - Commission further found a conjunctural sale also required the consent of the manager which in this instance was absent - Commission allowed Respondent seven days from date of Order to apply for costs - Dismissed - Mr MR Healy -v- The King and I Pty Ltd - APPL 1195 of 1999 - BEECH C - 05/05/00 - Property Service 1952
- Application re unfair dismissal and contractual entitlements - Applicant argued that no complaints of unsatisfactory performance had been made and sought 2 weeks additional pay and 4 weeks notice or pay in lieu thereof - Respondent argued that despite providing training, other means of assistance and having discussions with Applicant, he failed to meet the required level of performance - Commission reviewed evidence, authorities and found that Applicant had been given every opportunity to improve his performance and that Respondent was entitled to dismiss Applicant but the circumstances were not such, which would attract a summary dismissal - Commission found that there was no sufficient notice given and ordered that Respondent pay Applicant a further month's pay in lieu of notice - Ordered Accordingly - GF Hulm -v- Western Pacific Holdings Pty Ltd (ACN 009 228 728) T/A Westpoint Star - APPL 197,522,1578,1635 of 1999 - GREGOR C - 03/02/00 - Retail Trade 1954
- Application re contractual entitlements - Applicant sought incentive payments (commission) for placement of stock as investment agent - Respondent argued resignation from employment disqualified applicant from receiving claimed amount - Commission found terms relied upon in the application's case were clearly inconsistent with the express terms of the contract that provided for discretionary incentive payments, with no incentive payments to staff who had given notice of termination - Commission determined that the applicant's resignation ceased respondent's obligation to pay incentive payments - Dismissed - Ms M Ladner -v- J B Were & Son/Were Holdings Ltd - APPL 1735 of 1999 - SMITH, C - 03/05/00 - STOCKS AND SHARES 1960
- Application re unfair dismissal and contractual entitlements - Applicant argued dismissal was unfair and that he has been denied benefits arising out of his contract of employment - Respondent argued Applicant was informed that he was required for the freeway job; that his refusal to attend work, put the company in a very difficult situation as it was behind in completing the contract to perform the freeway work, therefore dismissal was warranted - Commission reviewed authorities and found that Applicant had not discharged the onus of proof to establish his claim and ordered the application be dismissed - Dismissed - Mr PL Salter -v- Intersectional Linemarkers Pty Ltd - APPL 639,640 of 1999 - SMITH, C - 17/04/200 - Road 1964
- Application re unfair dismissal and contractual entitlements - Applicant sought relief in the form of compensation due under the Federal Workplace Relations Act - Respondent argued Applicant was not dismissed, rather her employment came to an end by the effluxion of time and that Commission lacked jurisdiction to deal with the matter as notice of application was lodged well outside the 28-day limit imposed by s29 of the I.R. Act - Respondent further argued that Applicant was advised that her "Workplace Agreement" would cease, the position would be re-advertised to which she was welcome to re-apply, which she did but was unsuccessful - Commission found on evidence that even if Applicant was dismissed, the Commission was unable to entertain the application and thus insofar as the application was one for relief in respect of unfair dismissal it must be dismissed and the claim for contractual benefits must fail - Commission further found that it does not have authority to entertain a claim to a benefit under the Workplace Relations Act 1996 - Dismissed - Ms E Saunders -v- Parents and Citizens Association - Rockingham Beach Primary School - APPL 179 of 2000 - FIELDING C - 07/04/00 - Education 1967
- Application re unfair dismissal and contractual entitlements - Applicant sought compensation for dismissal and unpaid contractual entitlements - Respondent argued dismissal was a result of financial circumstances and acknowledged debt of contractual entitlement - Commission found respondent had previously acknowledged the debt to applicant and further dismissal not to have been harsh, unfair or oppressive - Dismissed - Ms F Wilson -v- The Australian Optimal Learning Centre Pty Ltd - APPL 691 of 1999 - GREGOR C - 17/04/00 - Education 1970
- Application re dispute in respect of termination and annual leave - Applicant made a referral to the Commission for determination of a question or dispute that has arisen between Applicant and Respondent about the meaning or effect of a workplace agreement, namely whether Respondent, being a party to a registered workplace agreement was entitled to require Applicant, to take annual leave during a period of one month's notice in writing of termination of his employment - Commission reviewed authorities, I.R. Act, Workplace Agreement and the Minimum Conditions of Employment Act 1993 and found that the meaning or effect of the workplace agreement executed by Applicant and Respondent, including the meaning or effect of the term implied into the workplace agreement under s.24(2)(b) of the Minimum Conditions of Employment Act 1993 was that "on the giving of one month's notice of termination of the contract of employment under the termination clause of the workplace agreement, the Applicant was entitled to be paid for accrued annual leave that he had not taken prior to the date of the termination notice", therefore, the Respondent could not require the Applicant to take annual leave during a period of notice of termination of the employment contract - Determination Issued Accordingly - Mr P Hunt -v- Swan Barrack Holdings - WAG 3 of 2000 - SMITH, C - 16/05/00 - Education 2699

CUMULATIVE DIGEST—continued

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CONTRACT OF SERVICE—continued

- Application re unfair dismissal and contractual entitlements- Applicant argued that dismissal was harsh, oppressive and unfair and sought compensation for loss of income, contractual benefits including commission on sales and distress caused by dismissal - Respondent argued that applicant resigned and was not dismissed therefore was not unfairly dismissed - Respondent further argued that mileage allowance set out in applicant's contract was higher than award rate as verified by DOPLAR - Commission found on evidence that respondent wanted to terminate applicant and that applicant had discharged the onus of establishing that she was unfairly dismissed - Commission further found that as reinstatement was not practicable, compensation should be awarded for loss of wages, commission on proceeds of all sales and mileage as per contract of employment - Ordered and Declared Accordingly - Ms LM Fischer -v- Sassey Pty Ltd ACN 008 996 156 - APPL 1414 of 1999 - SMITH, C - 05/04/00 - Wholesaling..... 2713
- Application re denied contractual entitlements - Applicant sought entitlements relating to wages, superannuation and expenses incurred during the course of his employment both in Australia and China - Applicant further argued, though he was assured by the Respondent that he would be reimbursed all expenses incurred, he did not receive these even after numerous telephone discussions - Respondent's representative initially denied Applicant's claim but later during the course of evidence conceded - Commission found the commencement date of Applicant's employment was different from that of the amended claim, that the claim in respect of superannuation contributions appeared to be based on the statutory contribution required under the Superannuation Guarantee (Administration) Act 1992, therefore it was not recoverable as a contractual benefit and ordered Respondent to forthwith pay Applicant the sum of \$19,897.00 less tax - Granted - Mr JW Greenhalgh -v- Buon Amici WA Pty Ltd - APPL 1903 of 1999 - KENNER C - 30/05/00 - Restaurant..... 2719
- Application re contractual entitlements - Applicant sought to recover monies for outstanding annual leave loading and underpayment of salary - Respondent argued that contract had been altered removing benefit of leave loading and alleged Applicant had been overpaid - Commission found Applicant had made out, at least on balance, his claim and was entitled to recover contractual entitlements denied to him under his contract of employment - Granted - Mr DI Holden -v- Teravin Group Pty Ltd ACN 009 445 121 - APPL 436 of 2000 - FIELDING C - 09/05/00..... 2722
- Application re unfair dismissal - Applicant argued dismissal was unfair because he was given a brief warning on the afternoon of the breakdown of the company vehicle and a week later was terminated for the reason "careless driving" - Respondent argued that the reason for the termination was the damage to the vehicle because as a Trades Assistant Applicant should have picked up that the motor was overheating and that the Applicant's progress "still had a long way to go" and still had to grasp mechanical concepts - Commission found that no attempt had been made to ascertain the cause of the damage nor allow the Applicant to explain the circumstances and the written report on the incident was undertaken some time after the termination - Commission further found that the Applicant was denied the chance to prove his aptitude and suitability for the position - Granted - Mr AP Lamb -v- Goldfield Contractors WA - APPL 851 of 1998 - COLEMAN CC - 09/06/00 - Vehicle..... 2724
- Application re contractual entitlements - Applicant sought an outstanding benefit due under the fixed term appointment contract - Respondent did not appear - Commission, on the evidence presented was satisfied that Applicant entered into a fixed term contract for one year, that remuneration under that contract was \$50,000 - Furthermore, Commission was satisfied that an amount of \$37,502 remained outstanding as a contractual entitlement and ordered that that outstanding amount be paid to Applicant no later than 28 days of the date of the Order - Granted - Ms CA Payne -v- Perfect Meats (Aust) Pty Ltd ACN 088 650 695 - APPL 433 of 2000 - COLEMAN CC - 26/05/00 - Meat..... 2731
- Application re harsh, oppressive and unfair dismissal seeking re-instatement without loss of benefits and bonus payment allegedly denied under contract of employment - Applicant argued that termination was on the grounds that he refused to work overtime - Respondent argued by failing to work overtime, Applicant failed to supervise members of his team which resulted in members of his team working without supervision - Commission found amongst a number of reasons that Applicant's refusal to work the overtime constituted a repudiation of an essential term of the contract - Commission further found that Applicant was unable to make out his claim for denied contractual entitlements - Dismissed - Mr JD Powell -v- KDB Engineering Pty Ltd ACN 008 884 482 - APPL 1405 of 1999 - SMITH, C - 16/05/00 - Manufacture..... 2732
- Application re denied contractual entitlements - Applicant sought three weeks wages, reimbursement of phone calls and bonus payment for sales - There was no appearance for the Respondent - Commission found that Applicant was an employee of the Respondent for the period claimed, that she performed work in accordance with the directions by the Respondent, that her work was subject to the Respondent's control and ordered the Respondent to pay the contractual entitlements - Commission did not award claim for costs - Ordered Accordingly - Ms PJ Saggars -v- Shutters R Us - APPL 119 of 2000 - WOOD, C - 02/06/00..... 2742

CONTRACT OUT OF AWARD

- Application for contractual entitlements - Applicant argued she was employed in the capacity of bookkeeper and was entitled under a contract of employment the sum of \$15.00 per hour for 46.5 hours worked from 10 March 1997 to 9 April 1997 - Respondent conceded that Applicant did work the 46.5 hours and that the work was to be paid at the rate of \$15.00 per hour, however, respondent disputed the work done and refused to pay - Commission found that under section 29 of the I.R. Act, 1979, a matter which may be referred to the Commission by an application, was a matter arising from an employer and employee relationship and in this matter Commission was not satisfied that that relationship existed - Dismissed - Ms J Carslake -v- Rickie Alfred Beehre as Trustee for Beehre Family Trust T/A Beehre Painters & Decorators - APPL 842 of 1997 - PARKS C - 21/07/97 - Decorative..... 622
- Application re unfair dismissal and compensation - Applicant claimed unfair dismissal and underpayment of wages and commissions - Respondent denied claim arguing that it changed the method it canvassed for funds and applicant's skills level did not display meeting that requirement - Commission found Respondent had to adjust to the new funding criteria and also restructure operation to meet new methods of canvassing and the subsequently there was a reduced need for telephone canvassing - Commission further was not convinced that the respondent undertook to guarantee the payment of commission obtained under a previous employer - Dismissed - Mr TW Wayne -v- Community Policing Crime Prevention Council of WA T/A Constable Care Child Safety Project - APPL 387 of 1997 - PARKS C - 01/05/97 - Community Services..... 1653
- ¹Appeal against decision of Full Bench (79 WAIG 1867, 2985 & 3183) re allegedly denied contractual entitlements - Industrial Appeal Court found that Full Bench was in error in concluding that the rate of salary to be paid was a different rate to that in the contract when the contract clearly and unambiguously expressed the rate of salary to be paid to Appellant - IAC was not persuaded otherwise that Full Bench has made any other error, has upheld the Appeal to this extent and remitted the matter back to the Single Commissioner for further hearing and determination regarding under-paid salary - Upheld - Ms AP Ahern -v- Aust Fed of TPI Ex-Serv Men - IAC 8 of 1999 - Industrial Appeal Court - Kennedy J./Anderson J./Scott J. - 31/03/00..... 1729

CUSTOM AND PRACTICE

- Application re contractual benefits - Applicant argued that he was entitled to receive payment for extra accrued time upon termination as this is a standard industry practice - Respondent argued that there was no agreement entered into in relation to payment for extra time or conversion of time in lieu into cash payment, as the applicant was paid in excess of the relevant award to compensate for extra time worked - Commission examined the evidence and accepted the Respondents evidence as more reliable - Further, Commission examined and applied the law and found that in the absence of some express provision to that effect an employee is not entitled to convert untaken leave to cash - Dismissed - Mr MJ Flatman -v- Sushi and Spice Holdings WA Pty Ltd - APPL 1718 of 1999 - FIELDING C - 23/03/00 - Accommodation, Cafes&Restaurants..... 1632

CUMULATIVE DIGEST—continued

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CUSTOM AND PRACTICE—continued

Application re contractual entitlements - Applicant sought incentive payments (commission) for placement of stock as investment agent - Respondent argued resignation from employment disqualified applicant from receiving claimed amount - Commission found terms relied upon in the application's case were clearly inconsistent with the express terms of the contract that provided for discretionary incentive payments, with no incentive payments to staff who had given notice of termination - Commission determined that the applicant's resignation ceased respondent's obligation to pay incentive payments - Dismissed - Ms M Ladner -v- J B Were & Son/Were Holdings Ltd - APPL 1735 of 1999 - SMITH, C - 03/05/00 - STOCKS AND SHARES..... 1960

Application re unfair dismissal and contractual entitlements - Applicant argued he was dismissed without notice when he refused to work with faulty equipment and that he was denied a contractual entitlement - Respondent argued that Applicant resigned and equipment was in good working order although did not dispute applicant's claim for an entitlement - Commission found the Applicant was unable to discharge the onus of proof that he was harshly oppressively or unfairly dismissed, however granted the contractual entitlement claim - Ordered Accordingly - Mr C Boulazemis -v- Stand Roston - APPL 810,1521 of 1999 - SMITH, C - 20/04/00 - Shearing Contractor..... 2705

EMPLOYEE

Application re denial of contractual entitlement - Applicant sought 2.5% commission denied on sale of a new home - Respondent argued that application be dismissed because applicant's claim was against incorrect entity, but Commission was satisfied that employer's name had been misdescribed rather than claim made against wrong employer - Applicant argued that he was required to sell new homes to prospective customers and discussed with one such customer who did not want to build the respondent's style of project home, a "sketch plan" for building a new home but did not provide the respondent with any signed contract - Respondent denied that any sketches or drafting work for construction of a new home had been done and stated that unless applicant secured a signed preparation of plans agreement, respondent had no customer - Respondent also declared that applicant was not an employee so the claim was beyond Commission's jurisdiction, and that as applicant did not procure a signed building contract or produce quantification of his claim an order should not be made in applicant's favour - Commission established that applicant was an employee of the respondent and not an independent contractor, that the applicant failed to obtain a signed building contract and receipt from respondent as progress payment and also failed to particularise or quantify the claim - Commission was therefore not satisfied that applicant was entitled to commission in present circumstances and concluded that it should be dismissed - Dismissed - Mr D Lamont -v- Trendsetter Homes - APPL 474 of 1999 - KENNER C - 09/03/00 - Real Estate Agency 1637

Application re unfair dismissal - Applicant argued he was treated unfairly by the retrenchment, that he had signed a contract for 12 months secondment, that the same person who arranged his secondment, terminated it after six weeks - Applicant further argued that he was told in writing that on completion of the secondment he would return to the Respondent but ultimately this was not the case - Applicant argued if there were reasons for the termination of the secondment or why his services were no longer required, it was not discussed with him and that he was not given the opportunity to respond to any allegations against him - Respondent argued that Applicant was the architect of his own misfortune in that his own actions caused the cessation of his secondment, that he was well aware that the Respondent had no work for him other than at the secondment and that Applicant was also well aware that if there had been no secondment he would have been retrenched - Commission reviewed authorities and found that Respondent had an absolute obligation to investigate the circumstances under which the Applicant was asked to leave Solomon, particularly when the ultimate outcome had such a fundamental effect upon the employment contract and because the Respondent did not do this, there had not been a fair go all round, therefore Applicant's dismissal was unfair - Commission further found that re-instatement would not be practicable and ordered that compensation be paid to Applicant - Ordered Accordingly - Mr JR Harris -v- General Gold Resources NL - APPL 1551 of 1999 - GREGOR C - 12/05/00 - Mining 2720

ENFORCEMENT OF AWARDS/ORDERS

Conference re cancellation of Order - Applicant Union argued that the Order issued on 14/12/1999 cancelling AG 21/96 was cancelled by Order issued on 16/12/1999 - Applicant while alluding to the Full Bench determination on the 29/3/2000 that AG 21/96 had ceased to exist argued the union and its members should not have to continue to be covered by an agreement that did not exist and requested that the Order be now cancelled - Respondent argued the Order was effectively in two parts viz it addressed return to work and the issues of resolving the underlying dispute re a new Agreement - Respondent also argued that cancelling the Agreement at this stage would only remove the basis for negotiations, which in turn would cause dislocations to exporters including farmers - Commission contented the Order was only interim and it was necessary to negotiate a new Agreement which is on the verge of being concluded - Commission refused the Union's application to cancel the Order at this stage - Dismissed - The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch -v- Western Australian Government Railways Commission - C 335 of 1999 - BEECH C - 11/04/00 - Rail Transport 1976

DATE OF OPERATION

Conference Referred re alleged breach of promise for payment of first salary increase of 1% from 1 January 1999 and to pay the second salary increase of 2% from 1 February 1999 - Respondent opposed the claim based on the arguments that the date of registration is the correct date for payment of the first increase and consequently any other date is contrary to government policy and not valid, further any other date would vary the agreement - Arbitrator examined the evidence and referred to the law and determined that the application is for breach of promise and is not attempting to vary the agreement as the evidence clearly demonstrated that a specific date was agreed - Granted - The Civil Service Association of Western Australia Incorporated -v- Chief Executive Western Australian Tourism Commission - PSACR 9 of 1999 - Public Service Arbitrator - BEECH C - 26/11/99 - Tourism 213

¹Appeal against decision of Full Bench (79 WAIG 2091) re effective date of salary increases due under Enterprise Agreement (Dismissed) - Appeal concerns the expression of an operative date for the purposes of calculating the first pay increases due employees contained in the decision of the Public Service Arbitrator (79 WAIG 245) - Appellant argued the same grounds that were argued before the Full Bench, the Order purported to vary an Industrial Agreement, the Order purported to give retrospective effect and the Order purported to give effect prior to the date upon which the Order was lodged in the Commission - IAC found the Arbitrators Order had the effect of backdating the part of the Agreement providing for salary increases and the Commission/Arbitrator has no power to order that an Industrial Agreement which is being accepted for registration is to have effect from a date prior to its registration - Appeal Upheld - Ministry for Culture & the Arts -v- The Civil Service Association of Western Australia Incorporated & Others - IAC 6 of 1999 - Industrial Appeal Court - 04/02/00 - Government Administration 453

CUMULATIVE DIGEST—continued

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ENTRY RIGHT OF

Applications re right of entry and declaration of accredited officials in relation to the Burswood International Resort Casino Employees' Industrial Agreement 1977 - Application 1545 of 1999 sought a declaration in relation to 32 persons whom the respondent Union, by way of a resolution adopted on 8 September 1999, accredited as "officials" of the Union for all purposes relating to the right of entry, posting of notices, employee representation and dispute resolution - Application 1675 of 1999 sought a declaration in relation to 40 persons, 32 of whom are the same persons accredited as "officials" whom the Union has also appointed to be "temporary organisers" for a period of six months - Commission found the crucial matter for both applications was right of entry - Both parties agreed to the Commission proceeding with application 1545 of 1999 alone - Applicant argued that a reasonable interpretation be given to Clause 37 "Right of Entry" - Applicant further argued that the term "official" limits the class of person to the holder of an office with the Union or has a level of responsibility within the union - Respondent argued that there is assistance to be found in the decision PRES 11 of 1999 which stayed an interim order of the Commission in reference to PRES 7 of 1999 that expressed the view that persons are accredited officials by a valid resolution of the organization - Commission referred to case law (64 WAIG 2124) that established the relevant principles - Commission determined the term "accredited official" is to be construed to mean the occupant of a role that has been validly created by the respondent and carries with it a degree of responsibility and authority necessary to act on behalf of the union - That is, the occupant is charged with the official duty to act for the respondent Union - Interpretation given - Burswood Resort (Management) Limited -v- LIQUOR & ALLIED INDUST UNION - APPL 1545,1675 of 1999 - PARKS C - 06/12/99 - Gaming.....

308

HOURS OF WORK

Application re interpretation of Government Officers (Social Trainers) Award 1988 - Applicant Union claimed that any alteration to the start and finishing times with less than 24 hours' notice attracted penalty rates as prescribed by the Award - Respondent argued such change of hours did not constitute a changed shift thus not directed at any alteration to the roster - Commission having to resolve "what constituted the rostered shift" in reference to "a changed shift" to refer to shift which has changed from one shift to another noted that a shift may be changed and can be extended without becoming a new 'changed shift' but a "change in hours" - Dismissed - The Civil Service Association of Western Australia Incorporated -v- Chief Executive Officer Disability Services Commission - P 1 of 2000 - FIELDING C - 12/04/00 - Community

1940

INDUSTRIAL ACTION

Conference re negotiations on framework agreement - Industrial action by union resulted in the Commission issuing an order dated 14 December 1999 providing for framework negotiations to continue, a payment for a \$15.00 per week increase and for a return to work while this occurred - Both Parties have been negotiating with the aim of concluding their Agreement by 17 March 2000, however, recent Industrial action had delayed the target date - Commission found for there to be any conciliated outcome to the negotiations there needed to be an immediate resumption of normal work at all Depots and negotiations between the parties - Ordered accordingly - The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch -v- Western Australian Government Railways Commission - C 335 of 1999 - BEECH C - 17/03/00 - Rail

1662

INDUSTRIAL MATTER

Application to join the (proposed respondents) as respondents to the substantive applications - Applicant argued that the application did not involve an abuse of the Commission's power and further argued that by reason of the relationship between the respondent and the proposed respondents that they may have in their possession, power or control, documents that are relevant to the substantive application - Proposed respondents argued that this application was not an industrial matter and therefore the Commission did not have jurisdiction and further argued that the matter is an abuse of the Commission - Commission referred to the law and the IR Act 1979 and determined that the matter is an industrial matter - Commission then dealt with the matter of abuse of the Commission - Commission referred to the law and determined that as the intent of the application is solely based on obtaining discovery of documents that the proposed respondents deny possessing, the application to join these respondents is an abuse - Dismissed - Mr KC LANDWEHR -v- Wynnes Pty Ltd - APPL 366 of 1999 - KENNER C - 15/12/99 - Meat

402

²Appeal against decision of Commission (79 WAIG 3459) re wearing of badges by union members during hours of employment - Appellant appealed on a number of grounds including that the Commission erred in finding the respondents policy prohibiting the wear of union badges is not unreasonable - Appellant argued employees wore a number of badges apart from their identification badges and there was no evidence that the wearing of union badges had been complained about by the public or that they were detrimental to the operations - Respondent argued it had a blanket ban on all unauthorised badges and further argued that, if an exception were to be made in the case of membership badges issued by the appellant, exceptions would have to be made for others - Full Bench found the Commission had erred in grounds 3 and 4 of the appeal and that the order made at first instance in application No. CR 159 of 1999 be suspended and be remitted back to the commission to be heard and determined according to law - Appeal Upheld - LIQUOR, HOSPITALITY & MISC -v- Burswood Resort (Management) Ltd - FBA 30 of 1999 - Full Bench - SHARKEY P/BEECH C/SMITH, C - 15/03/00

1359

Application re unfair dismissal - Applicant argued that she was dismissed over the phone and by letter, while on annual leave, despite there being no warnings or complaints against her, thus the dismissal being unfair and harsh - Respondent argued that it was during the applicants annual leave that they were made aware of the problems and complaints, these related to irate phone calls regarding property management and jobs not done and rental cheques not banked, which it claims is a breach of the Real Estate and Business Agents Act, 1978 - Commission found the evidence of the respondent was creditable and that the applicant failed to show that the respondent had dismissed her unfairly or harshly - Dismissed - Ms KM Dell -v- Mystical Holdings Pty Ltd - APPL 98 of 1999 - BEECH C - 19/04/00 - Real Estate Agency

1626

Application re unfair dismissal - Applicant initially sought reallocation of the matter on the apprehension of bias because of Commission's awareness of failed negotiations - Respondent opposed this and advised that respondent company had ceased to trade - Applicant then sought to add 2nd respondent to application and requested adjournment of hearing date to consider related costs and also because she was getting married - Respondent opposed adjournment as it would cause real inconvenience - Commission found it was inappropriate to adjourn at this point as both parties were aware of hearing dates since early December 1999 and associated costs - Commission concluded that applicant must have known her wedding date for weeks and that balance of convenience rested with respondent not with applicant and denied adjournment - Dismissed - Ms CM Staphorst -v- Captains Girl MV Pty Ltd T/as Captains Girl MV - APPL 423 of 1999 - SCOTT C. - 21/03/00 - Water Transport

1650

¹Appeal against decision of Full Bench (79WAIG3529) re upheld appeal re variation of Mineral Sands Industrial Award 1991 - Question re jurisdiction - Appellant argued that Full Bench erred in law in finding that the subject of the application was an industrial matter, that Full Bench erred in law in holding that an offer by the employer appellants pursuant to the Workplace Agreement Act 1993 was an industrial matter and further, an offer to employ a person under a workplace agreement does not relate to any future or potential employee as defined in the Act and, therefore, is not an industrial matter - IAC allowed the appeal only to the extent of amending par 5 of Full Bench Orders and dismissed the appeal in all other respect - Dismissed - RGC Mineral Sands Ltd & Other -v- CONSTRUCTION, MINING, ENERGY & Others - IAC 10 of 1999 - Industrial Appeal Court - Kennedy J./Scott J./Parker J. - 09/06/00 - Mining

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CUMULATIVE DIGEST—continued

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INDUSTRIAL MATTER—continued

- Application re dispute in respect of termination and annual leave - Applicant made a referral to the Commission for determination of a question or dispute that has arisen between Applicant and Respondent about the meaning or effect of a workplace agreement, namely whether Respondent, being a party to a registered workplace agreement was entitled to require Applicant, to take annual leave during a period of one month's notice in writing of termination of his employment - Commission reviewed authorities, I.R. Act, Workplace Agreement and the Minimum Conditions of Employment Act 1993 and found that the meaning or effect of the workplace agreement executed by Applicant and Respondent, including the meaning or effect of the term implied into the workplace agreement under s.24(2)(b) of the Minimum Conditions of Employment Act 1993 was that "on the giving of one month's notice of termination of the contract of employment under the termination clause of the workplace agreement, the Applicant was entitled to be paid for accrued annual leave that he had not taken prior to the date of the termination notice", therefore, the Respondent could not require the Applicant to take annual leave during a period of notice of termination of the employment contract - Determination Issued Accordingly - Mr P Hunt -v- Swan Barrack Holdings - WAG 3 of 2000 - SMITH, C - 16/05/00 - Education..... 2699

INTERPRETATION - WORDS AND PHRASES

- Application for interpretation of Animal Welfare Industry Award No.8 of 1968-Preliminary Point-Applicant sought interpretation to ascertain whether the award would apply to cohuna koala park-Respondent denies consenting to the application nor agreeing to pay wages based upon the outcome of a determination by the commission-Respondent further argued that all employees are parties to registered workplace agreements and it did not intend employing people other than on workplace agreements-Commission found respondent had agreed to an interpretation in settlement of a previous unfair dismissal claim and allowing there was a substantial delay found there was sufficient justification for the matter to proceed-Application allowed - LIQUOR, HOSPITALITY & MISC -v- Cohuna Koala Park - APPL 178 of 1999 - BEECH C - 25/11/99 - Animal 189
- Application for interpretation of Agreement re Commuted Overtime Allowance - Applicant argued that question to be answered was "is the 15:38 percent Commuted Overtime Allowance counted as salary for the purpose of calculating payment of overtime in accordance with subclause (2) of Clause 9 of the agreement" - Respondent argued that an absurdity arises where the prescribed percentage of the agreement is paid on top of the prescribed award overtime rate - Commission reviewed award, agreement, other evidence and authorities and found commuted overtime allowance to apply-Declared Accordingly - The Civil Service Association of Western Australia Incorporated -v- Director General, Education Department of Western Australia - P 2 of 1999 - SCOTT C. - 02/12/99 - Services to Agriculture..... 189
- Application for interpretation of Full Bench Order No. FBA 3 of 1999 (79 WAIG 3567) and clarification of Full Bench Order FBA 3 of 1999 issued on 10 November 1999 in regards to the exact number of breaches proven by the Full Bench - Full Bench found that the first question which arose was whether the Full Bench was "functus officio" - Respondent conceded that the Full Bench which heard and determined the appeal was functus officio - Applicant submitted that whilst the doctrine of functus officio, when applied to the proceedings prevented the Full Bench from hearing new evidence or going back a second time after it had performed its authorised function, the order was "alterable" if inconsistencies or anomalies were established to exist in it - Employer argued that it's application was made under s. 46 of the IR Act which was not defeated by the doctrine of functus officio and was a new matter - Full Bench found the application was a fresh application unrelated to the appeal - Full Bench referred to the law and determined that the matter is functus officio and further determined that there is a question as to whether s.46 of the Act is applicable to this type of matter - Dismissed - Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch -v- Pinnacle Services Pty Ltd - FBA 3 of 1999 - Full Bench - SHARKEY P/PARKS C/KENNER C - 31/01/00 - Road Transport..... 307
- Applications re right of entry and declaration of accredited officials in relation to the Burswood International Resort Casino Employees' Industrial Agreement 1977 - Application 1545 of 1999 sought a declaration in relation to 32 persons whom the respondent Union, by way of a resolution adopted on 8 September 1999, accredited as "officials" of the Union for all purposes relating to the right of entry, posting of notices, employee representation and dispute resolution - Application 1675 of 1999 sought a declaration in relation to 40 persons, 32 of whom are the same persons accredited as "officials" whom the Union has also appointed to be "temporary organisers" for a period of six months - Commission found the crucial matter for both applications was right of entry - Both parties agreed to the Commission proceeding with application 1545 of 1999 alone - Applicant argued that a reasonable interpretation be given to Clause 37 "Right of Entry" - Applicant further argued that the term "official" limits the class of person to the holder of an office with the Union or has a level of responsibility within the union - Respondent argued that there is assistance to be found in the decision PRES 11 of 1999 which stayed an interim order of the Commission in reference to PRES 7 of 1999 that expressed the view that persons are accredited officials by a valid resolution of the organization - Commission referred to case law (64 WAIG 2124) that established the relevant principles - Commission determined the term "accredited official" is to be construed to mean the occupant of a role that has been validly created by the respondent and carries with it a degree of responsibility and authority necessary to act on behalf of the union - That is, the occupant is charged with the official duty to act for the respondent Union - Interpretation given - Burswood Resort (Management) Limited -v- LIQUOR & ALLIED INDUST UNION - APPL 1545,1675 of 1999 - PARKS C - 06/12/99 - Gaming..... 308
- Application for interpretation of the terms of the Education Department of Western Australia (CSA) Enterprise bargaining Agreement 1998 PSA AG32 of 1998 with regards to Clause 24 and schedule C setting aside the provisions of Clause 27 (Annual Leave Loading) - Commission examined other enterprise agreements and determined that the term "annualisation of annual leave loading" in Schedule C - Personnel 2000 means payment annually and it does not set aside or oust the provisions of Clause 27 - Annual Leave Loading - Order accordingly - The Civil Service Association of Western Australia Incorporated -v- Director General, Education Department of Western Australia - P 18 of 1999 - SCOTT C. - 24/01/00 - Education..... 373
- Application for interpretation of Clause 5.7 "Review of Remote Location Conditions & Allowances" of the Water Corporation Agreement 1997 - Parties disagreed as to the proper interpretation of the Clause, particularly as it governs the operative date for the implementation of any adjustments from the review referred to in the clause - Applicant argued the Clause should be interpreted as requiring any adjustments made as a consequence of the results of a review to be from the date in the clause - Applicant further argued that the Clause should be read literally so that the words "subject to agreement being reached between the parties" qualifies only the implementation or otherwise of the results of the review, and not the date of the implementation - Respondent argued that the Clause should read as providing that the operative date of the first pay period commencing on or after the 1 July 1998 was to apply only if agreement was reached regarding the changes before 1 July 1998 and the clause should not be read as authorising a retrospective adjustment - Commission referred to the law and established that the Clause is capable of being given a sensible meaning by applying the ordinary and natural meaning of the language used in the clause - Commission determined that the question posed by the Applicant should be answered in the affirmative but only in so far as it concerns changes resulting from the results of the review contemplated by Clause 5.7 - Order Accordingly - The Civil Service Association of Western Australia Incorporated -v- Managing Director, Water Corporation - P 24 of 1999 - Public Service Arbitrator - FIELDING C - 04/02/00 - Household..... 377
- ¹Appeal against decision of Full Bench (79 WAIG 2091) re effective date of salary increases due under Enterprise Agreement (Dismissed) - Appeal concerns the expression of an operative date for the purposes of calculating the first pay increases due employees contained in the decision of the Public Service Arbitrator (79 WAIG 245) - Appellant argued the same grounds that were argued before the Full Bench, the Order purported to vary an Industrial Agreement, the Order purported to give retrospective effect and the Order purported to give effect prior to the date upon which the Order was lodged in the Commission - IAC found the Arbitrators Order had the effect of backdating the part of the Agreement providing for salary increases and the Commission/Arbitrator has no power to order that an Industrial Agreement which is being accepted for registration is to have effect from a date prior to its registration - Appeal Upheld - Ministry for Culture & the Arts -v- The Civil Service Association of Western Australia Incorporated & Others - IAC 6 of 1999 - Industrial Appeal Court - - 04/02/00 - Government Administration 453

CUMULATIVE DIGEST—continued

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INTERPRETATION - WORDS AND PHRASES—continued

- Application re Interpretation of award - Applicant employer sought true interpretation of clause 21A of Hotel and Tavern Workers Award 1978 re minimum wage for adult males and females from 9/1/96 - 14/11/97 - Respondent sought interpretation to clarify how additional rates for Adult apprentices applied whom ordinary hours included work on a Saturday or Sunday - Commission found Adult apprentices were entitled to the minimum adult wage in the first instance and additional rates for those ordinary hours worked on a Saturday or Sunday as prescribed by the Award - Declared Accordingly - Chestone Holdings Pty Ltd T/A The Lord Forrest Hotel -v- LIQUOR & ALLIED INDUST UNION & Others - APPL 2275 of 1997/APPL 933 of 1998 - PARKS C - 29/02/00 - Hospitality 605
- Application for contractual benefits - Applicants claimed pro-rata long service leave arising out of their contract of service - Respondent argued that the Applicants had not accrued the right to pro-rata long service leave by reason of their length of service - Commission having heard claims CR176/97 and CR 211/97 found the common words used in the contract documents "but will not include any qualifying period" and "with no qualifying period" excluded the Applicants from any requirement to serve a qualifying period before becoming entitled to pro-rata payment of long service leave - Granted - The Australian Nursing Federation, Industrial Union of Workers Perth -v- Diabetes Association of WA Inc t/a Diabetes Australia - CR 176,211 of 1997 - PARKS C - 27/10/97 - Health Services 1663
- Conference referred re interpretation of agreement - Applicant seeks interpretation of the annual leave and long service leave clauses to include 20% shift penalty with wages - Respondent argued that no entitlement to shift penalties while on leave exists in the agreement - Commission found the provision for payment of shift loading is elsewhere in the agreement, but the agreement does not make shift loading as part of the rate of pay, as a result the claims sought cannot be granted after a proper interpretation of the clauses - Dismissed - The Media, Entertainment and Arts Alliance of Western Australia (Union of Employees) -v- Western Australian Sports Centre Trust & Others - PSACR 46 of 1999 - BEECH C - 20/04/00 - Sports 1674
- Application for interpretation of Miscellaneous Government Conditions and Allowances Award No. A4 of 1992 re travel rebate for employee dependents - Commission was asked to interpret and declare the true meaning of a provision in the Award - Question "Does travel rebate as specified in Clause 19 apply to dependents who do not reside with the employee?" - Commission found that the Clause included a beneficial consideration in relation to a dependent, but if it did intend for a dependent to travel away from and return to a location different to the workplace of the employee it would have expressed so - Commission's answer to the question was "No" - Dismissed - LIQUOR, HOSPITALITY & MISC -v- Albany Regional Hospital & Others - APPL 2238 of 1997 - PARKS C - 03/03/00 - Education 1938
- Application re contractual entitlements - Applicant argued employer had reneged on the contract of employment and claimed restitution - Respondent opposed, arguing applicant's salary reflected award provisions - Respondent further argued Commissioner's prior involvement in the making of the award might not bring an impartial or unprejudiced view to the matter - Commission citing cases which addressed similar circumstances where qualification of a member of a court or tribunal was addressed could not find any good reason not to proceed with this matter - Commission dismissed application after a Notice of Discontinuance was filed by the Applicant on 6/4/2000 - Dismissed - Ms G Clunies-Ross -v- Mercedes College - APPL 2288 of 1998 - SCOTT C. - 15/10/99 - Education 1949
- ²Appeal against decision of Commission (unreported) re employment of contractors - Appellant argued that the Commission erred in law in that it did not comply with the provisions of s.44 of the Act following an objection to the Commission of ostensible bias, therefore the decision of the Commission should be quashed in its entirety - Full Bench found that the matter had not proceeded to arbitration level, there was no agreement reached and was adjourned before the main issue of disagreement or dispute was dealt with - Full Bench found that the decision appealed against was a 'finding' and the Full Bench was required to be satisfied that the matter was of such importance that, in the public interest, an appeal should lie - Full Bench found that because the grounds of appeal were narrowly confined only to the issue of the Commission's jurisdiction and power and particularly the procedure adopted by the single Commissioner under s.44 of the Act, it was not persuaded that the finding related to a matter of such importance in the public interest - Dismissed - COMM, ELECTRIC, ELECT, ENERGY -v- BHP Iron Ore Pty Ltd - FBA 11 of 2000 - Full Bench - SHARKEY P/SCOTT C./KENNER C - 02/06/200 - Mining 2453

INTERVENTION

- ²Questions of Law referred to Full Bench re whether Industrial Agreement No. AG21 of 1995 continued to bind the Western Australian Government Railways Commission (WAGRC) and its employees notwithstanding the notice of retirement given by the Australian Rail, Tram and Bus Industry Union (ARTBIU), on 12th November 1999 and whether the Agreement continued in force in respect of the WAGRC after the retirement of ARTBIU from the agreement on December 13, 1999, until a new agreement or an award in substitution for the Industrial Agreement has been made - Leave to intervene by the Minister for Labour Relations was granted - Submissions on behalf of Applicant and intervener were both directed to persuading the Full Bench that the answer to both questions posed was "No" - Respondent made no submissions - Full Bench reviewed I.R. Act, authorities and found the answer to the said questions were "No" and ordered Respondent to pay costs to Applicant within 14 days of the date of the Determination - Determined Accordingly - The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch -v- Western Australian Government Railways Commission - APPL 1728 of 1999 - Full Bench - COLEMAN CC - 11/04/00 - Rail 1740
- Application for orders to stop disciplinary proceedings instituted under the Public Sector Management Act (PSMA) - Counsel for the Applicant sought an order that disciplinary proceedings which had been instituted by the Respondent be suspended while parallel criminal proceedings are dealt with - Counsel for the Applicant submitted that section 80E of the Act gives the Public Service Arbitrator exclusive jurisdiction to enquire into and deal with any industrial matter relating to a government officer and Applicant was, without objection from the Department, clearly a government officer - Commission found that there was no suggestion at all that the disciplinary proceedings under the PSMA had not been properly invoked, neither the legitimate interests of the parties nor the administration of justice require this Commission to interfere even if it had jurisdiction - Commission reviewed authorities and found that it would not interfere with the proceedings of the disciplinary enquiry, that it was not in the public interest to delay the disciplinary enquiry and as the Applicant continued to be paid, the Department was entitled to certainty in its operations - Dismissed - Civil Service Association of Western Australia Incorporated -v- Director General, Department of Transport - P 5 of 2000 - GREGOR C - 23/05/00 - Government 2697

JURISDICTION

- Application for unfair dismissal and allegedly denied contractual entitlements - Applicant argued dismissal was harsh, oppressive and unfair and the Respondent failed to afford him benefits to which he is entitled under his contract of employment - Respondent argued Commission did not have the jurisdiction to deal with the claim as the parties were bound by the Federal Award - Commission found it had jurisdiction to hear and determine the matter - Declared accordingly - Mr T Clayton -v- City of Canning - APPL 1011 of 1998 - SMITH, C - 22/12/99 - Community 229
- Application re alleged denied contractual entitlements on the grounds of unfair dismissal - Applicants argued that at all material times, they were employees of the Respondent and sought relief in the form of reinstatement or alternatively compensation - Further, Applicants sought to recover pro rata annual leave and a payment equivalent to three months salary in lieu of reasonable notice due to them under their contract of service - Respondent argued that as Applicants were partners in the business, Commission lacked jurisdiction to hear and determine the matter therefore it should dismiss applications - Commission reviewed authorities and found on evidence that no employee/employer relationship existed and that claims for denied contractual entitlements should be dismissed - Commission further found that the Supreme Court has held that a contractual entitlement to annual leave cannot be converted to a cash entitlement in the absence of some express provision in that regard and that there was no such provision in the King Sound Bargaining Partnership Agreement, therefore Applicants may well have a claim pursuant to provisions of the MCE Act 1993, and if that was the case, it is a matter which is beyond Commission's jurisdiction - Ordered Accordingly and the question of costs adjourned sine die - Mr M Donnelly -v- Carpentaria Marine Pty Ltd ACN 010 996 273 - APPL 2201,2202,2204,2205 of 1998 - FIELDING C - 13/12/99 - Marine 248

CUMULATIVE DIGEST—continued

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JURISDICTION—continued

- Application re unfair dismissal - Applicant claimed on behalf of its member that he was harshly, unfairly and unreasonably dismissed from his employment and sought an order reinstating the employee without loss of wages and entitlements - Respondent argued that the employee was terminated as a consequence of his ongoing substandard performance - Commission examined the evidence and noted that the preliminary enquiry undertaken in fact became the final enquiry which resulted in the employee's dismissal - Commission determined that the enquiry process was flawed for this reason and for the incorrect use of informal conversations - Commission found Applicant Unfairly Dismissed, however, reinstatement impractical and granted compensation—Granted in part loyment then it ought not to due to the difficulty in redeploying blue collar employees within the public sector - Commission determined that even if it had jurisdiction to hear and decide on the matter of redeployment that it would not decide to as this would be unfair as it would result in a "contrived" redeployment - Commission further determined that the employee failed to mitigate his loss which was taken into consideration in granting the quotum - Granted - COMM. ELECTRIC, ELECT, ENERGY -v- South-East Metropolitan College of TAFE - CR 208 of 1999 - SCOTT C. - 06/12/99 - Education..... 262
- Application re unfair dismissal - Applicant argued that he was unfairly dismissed and sought compensation for loss of income - Respondent argued that the applicant was not dismissed from employment as the relationship which had existed between the parties was not that of employee and employer but that of contractor and principal - Respondent further argued that the application itself was lodged out of time allowed by s.29 of the IR Act 1979 - Commission determined that the application was lodged out of time and for this reason alone the application failed - Commission further determined that the relationship between the applicant and respondent was based on a written signed agreement that created a contractor principal relationship - Dismissed - Mr RC Heron -v- White Caps Fishing Company Pty Ltd - APPL 1649 of 1996 - PARKS C - 25/01/00 - Fisheries.. 398
- Application to join the (proposed respondents) as respondents to the substantive applications - Applicant argued that the application did not involve an abuse of the Commission's power and further argued that by reason of the relationship between the respondent and the proposed respondents that they may have in their possession, power or control, documents that are relevant to the substantive application - Proposed respondents argued that this application was not an industrial matter and therefore the Commission did not have jurisdiction and further argued that the matter is an abuse of the Commission - Commission referred to the law and the IR Act 1979 and determined that the matter is an industrial matter - Commission then dealt with the matter of abuse of the Commission - Commission referred to the law and determined that as the intent of the application is solely based on obtaining discovery of documents that the proposed respondents deny possessing, the application to join these respondents is an abuse - Dismissed - Mr ML Peterson -v- Wynnes Pty Ltd - APPL 366,367 of 1999 - KENNER C - 15/12/99 - Meat 402
- Application re alleged unfair dismissal - Applicant argued that she was forced to resign and sought compensation by way of relief - Respondent argued that Applicant was not terminated but she resigned - Respondent argued that Commission lacked jurisdiction to hear and determine the matter, as Applicant was a party to a collective workplace agreement which did not contain a provision for Commission to deal with application of this nature and moreover, if Commission did have jurisdiction, the dismissal was not unfair because Applicant simply was not dismissed - Commission reviewed authorities and found on evidence that it did not have jurisdiction to deal with the matter, as in its view, the provisions of the workplace agreement operate in the circumstances to preclude it from dealing with the matter and therefore, dismissed the application - Dismissed - Ms A Mladineo -v- BRL Hardy Wine Company CRN 008 273 907 - APPL 1954 of 1999 - FIELDING C - 03/02/00 406
- Application re unfair dismissal and alleged denial of contractual benefits - Applicant claimed that he was unfairly dismissed and denied contractual entitlements and sought reinstatement or compensation for loss of wages - Applicant argued that his services were terminated and he was in effect told to leave that day - Respondent argued that the applicant's services were terminated due to the need to reduce the workforce by reason of redundancy and denied that the dismissal was unfair - Respondent further argued that the contractual benefits claimed do not arise under his contract of employment but are benefits under the relevant award - Commission examined the evidence and found that the applicant was asked to work out the period of notice and decided not to - Commission further determined that the applicant was redundant to the respondents needs and therefore his dismissal unfair - Dismissed - Mr P Morete -v- Unique Metal Works Pty Ltd - APPL 1855 of 1996 - PARKS C - 18/01/00 - Sheet Metal Fabrication..... 407
- Application re alleged denied contractual entitlements - Applicant argued she was denied contractual entitlements - Respondent argued that the applicant was employed subject to the Plaster, Plaster glass and cement Workers' Award and the Commission could not enforce award entitlements - Commission found Applicants employment to be covered under the award and determined that it did not have jurisdiction to enforce the award provisions - Dismissed - Ms VK Parker -v- PFK Pty Ltd T/A Limestone Replicas - APPL 347 of 1997 - PARKS C - 31/12/99 - Cement 411
- Application for reclassification of position - Appellant appealed for reclassification of the position on the grounds; that the "present salary" payable to the appellant is not commensurate with the increased level of duties and responsibilities of the office; the current title is not appropriate for the position; and that higher duties have been carried out by him since March 1996 - Respondent submitted that because of the existence of the workplace agreement the Commission was without jurisdiction to hear the matter - Respondent further argued that for the purposes of the IR Act 1979 the Appellant is not an employee nor for the purposes of s.7C of the IR Act is the matter an "industrial matter"- It was further argued by the respondent that due to sections 45 and 46 of the Workplace Agreements Act 1993 the provisions for right of appeal do not apply - Arbitrator examined the IR Act and Workplace Agreements Act and determined that as the Appellant was not employed under the terms and conditions of the relevant award the Arbitrator does not have jurisdiction to hear the matter - Dismissed - Mr NP Dragicevich -v- Department of Resources Development - PSA 2 of 1999 - Public Service Arbitrator - FIELDING C - 17/01/00 - Project 428
- Application re unfair dismissal - Applicant argued that the 'Agency Agreement' constituted a contract of service, and not a contract for service - Question re jurisdiction was heard as a preliminary matter - Respondent argued that as Applicant was an agent, and that no employer/employee relationship existed, Commission lacked jurisdiction to deal with the matter - Commission reviewed authorities and found on evidence that the nature of the relationship of the Applicant to the respondent was one of joint contractor - Dismissed - C Bennier -v- Totalisator Agency Board of Western Australia - APPL 263 of 1992 - PARKS C - 03/03/00 - Betting 614
- Application for unfair dismissal-Applicant argued dismissal was harsh, oppressive or unfair because after a false accusation of stealing and charges pending by Police, he was dismissed without no warning, discussion or talk and was seeking compensation-Respondent argued Applicant was not dismissed but not placed on the work roster pending the outcome of charges laid against him-Commission found that the fact the Applicant was not rostered for work amounted to a dismissal which attracted the Commission's jurisdiction-Further found that the Applicant failed to provide the Respondent an explanation prior to the termination -Also, the inquiry undertaken gave rise to reasonable grounds on the information available to the Respondent at that time to hold the view that the Applicant was guilty of misconduct-Dismissed. - Mr PE Bloomer -v- Ameerah Pty Ltd and Lozellia Pty Ltd T/A Porters Liquor Warwick - APPL 2275 of 1997;APPL 933 of 1998 - PARKS C - 29/02/00 - Liquor and General Store 617
- Application re unfair dismissal - Applicant argued he was dismissed after a purported restructure and the hours usually worked by him allocated to other members of staff - Respondent denies that the applicant was unfairly dismissed and moreover, says that there was no dismissal to excite the jurisdiction of the Commission - Counsel for the respondent further argued the applicant was employed on a casual basis, however due to a restructure the applicant was encouraged to apply for two newly created positions, which he elected not to, and thus it is said by reason of his decision there is not a dismissal - Commission found the applicant was an employee with an ongoing obligation to the respondent and also found the applicant had been dismissed unfairly - Commission further found reinstatement impracticable and issued 26 weeks wages as compensation - Ordered accordingly - Mr M Cousins -v- YMCA of Perth - APPL 473 of 1999 - PARKS C - 29/02/00 - Community Services..... 623

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JURISDICTION—continued

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Application re unfair dismissal - Applicant sought Order against Respondent in respect of alleged unfair dismissal - Respondent, by notice of answer and counter proposal, challenged the jurisdiction of the Commission - Commission found the application was lodged well beyond the 28 days statutory limitation and it was plainly not competent and hence no good purpose would be served dealing with the other jurisdictional challenges made on behalf of the Respondent - Dismissed - Mr PM Golding -v- Telstra Corporation Limited - APPL 1915 of 1997 - PARKS C - 28/02/00 - Telecommun.....	628
Application for unfair dismissal and allegedly denied contractual entitlements-Applicant argued dismissal was unfair and was seeking relief by way of reinstatement -Respondent argued Applicant was not its employee but was employed by its subsidiary company registered in South Africa and challenged the jurisdiction of the Commission as the relevant provisions of the Industrial Relations Act is limited in their operation to employment within this State -Commission found that it did not have jurisdiction to deal with the matter because it was not a matter which falls within the ambit of an industrial matter as envisaged by the Industrial Relations Act 1979-Further found that the dismissal did not occur and in the circumstances it was not necessary to consider the Commission's jurisdiction-An Order was issued dismissing the application. - Mr C Harris -v- Brandrill Limited ACN 061 845 529 - APPL 1265 of 1999 - FIELDING C - 15/02/00 - Mining	629
Application re alleged unfair dismissal and denied contractual entitlements - Applicant argued he suffered economic loss and sought reimbursement for goods and services purchased for the Respondent's business and outstanding overtime - Respondent argued Applicant failed to recover bad debts, that it never intended to terminate Applicant's employment but to offer a lesser position, which never eventuated as Applicant walked out - Commission found that the economic loss suffered by the Applicant was to a significant extent brought upon himself by his petulant actions and the claim for harsh unfair dismissal was rejected - Commission found that the claim for overtime was not a contractual benefit under the statute and cannot be pursued in Commission's jurisdiction and that there was no entitlement expressed in the contract of service to ground Applicant's claim for reimbursement for goods and services purchased - Dismissed - Mr B Kangatheran -v- ICENet Pty Ltd & Other - APPL 2173 of 1997 - PARKS C - 03/03/00	636
Application re unfair dismissal and contractual benefits - Preliminary point concerning jurisdiction - Commission examined the circumstances regarding the termination of employment and the relevance of the employee's workers compensation case and illness and referred to the law - Commission determined that it lacked jurisdiction due to the application being filed out of time -Dismissed - Mr P Nock -v- Morawa Golf & Bowling Club - APPL 197,522,1578,1635 of 1999 - GREGOR C - 01/02/00 - Sport and Recreation	651
Application re Unfair Dismissal - Applicant argued notice of termination given during annual leave does not take effect until leave has come to an end - Respondent argued application was filed after 28 days from date of termination rendering application invalid - Commission found that the date of termination started from when the applicant finished his annual leave and therefore it had jurisdiction to deal with the claim - Ordered accordingly - Mr I Rebello -v- New Image Holdings Pty Ltd T/A Barclays Pest Control - APPL 1497 of 1998 - COLEMAN CC - 24/02/00 - PESTICIDES	660
² Appeal against Decision of Public Service Arbitrator (80 WAIG 213) re effective date of salary increase as a result of an Enterprise Bargaining Agreement - Appellant argued Commissioner erred in law and acted in excess of jurisdiction in making an order that the appellant pay to its employees sums of money which amounted to giving retrospective effect to an industrial agreement - Respondent argued the appellant had agreed to an effective date of 1st January 1999, however, then reneged on the promise and that this was an order seeking the enforcement of that promise - Full Bench found the order requiring the appellant to pay its employees covered by the EBA salary increases from 1st January 1999 to be impermissible - Upheld - Chief Executive of the Western Australian Tourism Commission -v- The Civil Service Association of Western Australia Incorporated - FBA 32 of 1999 - Full Bench - SHARKEY P/COLEMAN CC/FIELDING C - 27/03/00 - Government Administration	1370
² Appeal against Decision of Commission (79 WAIG 3114) re unfair dismissal - Application in first instance dismissed on preliminary matter - Appellant argued the commissioner erred in a number of findings relating to the dismissal of the application on the grounds the incorrect respondent was named - Appellant further argued the commissioner erred in not permitting the applicant to amend the original application to reflect correctly the employer/s - Respondent referred to authorities and argued this was a case of a wrong party being named, not a misdescription of the party's name and should be dismissed - Full Bench reviewed authorities and found the commissioner had erred in not allowing an amendment to the name of the respondent and remitted the application back to the commission at first instance to be listed for hearing and determination according to law - Upheld in Part - Ms PK Rai -v- Dogrin Pty Ltd - FBA 27 of 1999 - Full Bench - SHARKEY P/FIELDING C/GREGOR C - 07/03/00 - Accommodatn, Cafes&Restaurants	1375
Application re contractual entitlements - Applicant sought wages and pro rata annual leave due on resignation of employment - Respondent initially argued that Commission did not have jurisdiction to deal with this claim as applicant's employment was governed by Farm Employees Award 1985 and a claim to enforce the award for underpaid wages and annual leave must be made before an Industrial Magistrate - Commission found that it had jurisdiction to deal with applicant's claim because the wage rate agreed between the parties were above award rates and money owed was a non-award benefit - Respondent then argued that applicant's date of resignation was 11 April 1999 but applicant argued that she worked until 28 May 1999 - Respondent further argued that applicant resigned from employment because working full time with long hours was difficult as she cared for 3 children - Commission found that evidence from statutory declaration supported the claim that applicant worked until 28 May 1999 and was therefore entitled to wages of \$800 and pro rata annual leave of \$424 - Granted - Mrs C Boxall -v- Rodney Harry Wisbey (Orlanda Park) - APPL 956 of 1999 - BEECH C - 28/02/00 - Dairy	1618
Application re unfair dismissal - Commission examined the preliminary issue of jurisdiction as the Respondent argued that it was not the employer - Applicant argued that as he was an apprentice and the respondent due to its participation in his apprenticeship indenture was the employer - Commission examined the evidence and referred to the law and determined that the respondent was not the employer - Dismissed - Mr A Follows -v- Western Australian Turf Club - APPL 358 of 1999 - BEECH C - 28/03/00 - Sport and Recreation	1633
Application re unfair dismissal - Applicant stated employment relationship was governed by a registered state workplace agreement - Respondent pleaded that the agreement expressly provided for a three month probationary period and the application was incompetent and the Commission lacked jurisdiction to deal with it - Commission requested applicant to file the registered work place agreement with the commission to determine whether Commission had jurisdiction to deal with the application - In the absence of production of the workplace agreement and the non appearance of both parties to the listed proceeding Commission dismissed application for lack of jurisdiction - Dismissed - Ms J Isitt -v- Top Optical Pty Ltd - APPL 1557 of 1999 - GREGOR C - 07/03/00 - Optometrics	1635
Application re denial of contractual entitlement - Applicant sought 2.5% commission denied on sale of a new home - Respondent argued that application be dismissed because applicant's claim was against incorrect entity, but Commission was satisfied that employer's name had been misdescribed rather than claim made against wrong employer - Applicant argued that he was required to sell new homes to prospective customers and discussed with one such customer who did not want to build the respondent's style of project home, a "sketch plan" for building a new home but did not provide the respondent with any signed contract - Respondent denied that any sketches or drafting work for construction of a new home had been done and stated that unless applicant secured a signed preparation of plans agreement, respondent had no customer - Respondent also declared that applicant was not an employee so the claim was beyond Commission's jurisdiction, and that as applicant did not procure a signed building contract or produce quantification of his claim an order should not be made in applicant's favour - Commission established that applicant was an employee of the respondent and not an independent contractor, that the applicant failed to obtain a signed building contract and receipt from respondent as progress payment and also failed to particularise or quantify the claim - Commission was therefore not satisfied that applicant was entitled to commission in present circumstances and concluded that it should be dismissed - Dismissed - Mr D Lamont -v- Trendsetter Homes - APPL 474 of 1999 - KENNER C - 09/03/00 - Real Estate Agency	1637

CUMULATIVE DIGEST—continued

JURISDICTION—continued

Conference referred re level classification - preliminary point - Applicant argued the appropriate level of classification for there member be at level 4, instead of level 3, of the award - Respondent argued that they oppose and object to the claim and that the application should be dismissed for want of jurisdiction. - Commission found that the matter cannot be dealt with under s.46, s.83 or any other special power conferring section of the act, therefore jurisdiction falls in favour of the applicant and has been listed for hearing at a future date - Declared accordingly - INDEPENDENT SCHOOLS SAL OFFIC -v- St Michael's School - CR 177 of 1999 - BEECH C - 18/04/00 - Education.....	1668
Referral to Full Bench by Public Service Arbitrator, as per s80E(6)(b) of the Act, three questions - Full Bench found it was not appropriate to deal with the questions, as framed and further it was inappropriate to hear the matter when the terms of the Presidents consent (Required for referral) may not have been met - Therefore matter was to be remitted back to the Arbitrator - Remitted - Ms MM In De Braekt -v- Chief Executive Officer, Department of Productivity and Labour Relations - P 42 of 1997 - Full Bench - FIELDING C - 27/04/00 - Government Administration	1744
Application seeking Respondents be punished for contempt of the Full Bench of the Commission - Applicant argued Respondents intimidated a colleague whom had signed a proof of evidence on behalf of the Union - Respondent seeks an order dismissing the application on the grounds the it is not validly brought and, further, that there is no case to answer - Commission found, it was not beyond reasonable doubt, that the predominant purpose of the respondents was to interfere with a witness or to deter her from giving evidence and for those reasons found there was no case to answer - Dismissed - The Food Preservers' Union of Western Australia, Union of Workers -v- Ms E Truslove & Other - PRES 6 of 2000 - President - SHARKEY P - 19/04/00 - Food, Beverage and Tobacco Mfg.....	1754
¹ Appeal against decision of Full Bench (79WAG3529) re upheld appeal re variation of Mineral Sands Industrial Award 1991 - Question re jurisdiction - Appellant argued that Full Bench erred in law in finding that the subject of the application was an industrial matter, that Full Bench erred in law in holding that an offer by the employer appellants pursuant to the Workplace Agreement Act 1993 was an industrial matter and further, an offer to employ a person under a workplace agreement does not relate to any future or potential employee as defined in the Act and, therefore, is not an industrial matter - IAC allowed the appeal only to the extent of amending par 5 of Full Bench Orders and dismissed the appeal in all other respect - Dismissed - RGC Mineral Sands Ltd & Other -v- CONSTRUCTION, MINING, ENERGY & Others - IAC 10 of 1999 - Industrial Appeal Court - Kennedy J./Scott J./Parker J. - 09/06/00 - Mining	2437
² Appeal against decision of Commission (unreported) re employment of contractors - Appellant argued that the Commission erred in law in that it did not comply with the provisions of s.44 of the Act following an objection to the Commission of ostensible bias, therefore the decision of the Commission should be quashed in its entirety - Full Bench found that the matter had not proceeded to arbitration level, there was no agreement reached and was adjourned before the main issue of disagreement or dispute was dealt with - Full Bench found that the decision appealed against was a 'finding' and the Full Bench was required to be satisfied that the matter was of such importance that, in the public interest, an appeal should lie - Full Bench found that because the grounds of appeal were narrowly confined only to the issue of the Commission's jurisdiction and power and particularly the procedure adopted by the single Commissioner under s.44 of the Act, it was not persuaded that the finding related to a matter of such importance in the public interest - Dismissed - COMM, ELECTRIC, ELECT, ENERGY -v- BHP Iron Ore Pty Ltd - FBA 11 of 2000 - Full Bench - SHARKEY P/SCOTT C./KENNER C - 02/06/200 - Mining	2453
² Application re variation of Union Rules - Applicant Union sought alteration to Rule 6 of the CSA Rules by excluding from membership persons "employed in Level 1 and Level 2 positions and who are eligible for membership of the Australian Municipal, Administrative, Clerical and Services Union of Employees, WA Clerical and Administrative Branch" - Full Bench was satisfied on evidence that application complied with the relevant sections of the I.R. Act - Granted - Civil Service Association of Western Australia Incorporated -v- (Not applicable) - FBM 2 of 2000 - Full Bench - SHARKEY P/COLEMAN CC/FIELDING C - 06/06/00 - Unions	2462
Application for orders to stop disciplinary proceedings instituted under the Public Sector Management Act (PSMA) - Counsel for the Applicant sought an order that disciplinary proceedings which had been instituted by the Respondent be suspended while parallel criminal proceedings are dealt with - Counsel for the Applicant submitted that section 80E of the Act gives the Public Service Arbitrator exclusive jurisdiction to enquire into and deal with any industrial matter relating to a government officer and Applicant was, without objection from the Department, clearly a government officer - Commission found that there was no suggestion at all that the disciplinary proceedings under the PSMA had not been properly invoked, neither the legitimate interests of the parties nor the administration of justice require this Commission to interfere even if it had jurisdiction - Commission reviewed authorities and found that it would not interfere with the proceedings of the disciplinary enquiry, that it was not in the public interest to delay the disciplinary enquiry and as the Applicant continued to be paid, the Department was entitled to certainty in its operations - Dismissed - Civil Service Association of Western Australia Incorporated -v- Director General, Department of Transport - P 5 of 2000 - GREGOR C - 23/05/00 - Government	2697
Application re denied contractual entitlements - Applicant sought entitlements relating to wages, superannuation and expenses incurred during the course of his employment both in Australia and China - Applicant further argued, though he was assured by the Respondent that he would be reimbursed all expenses incurred, he did not receive these even after numerous telephone discussions - Respondent's representative initially denied Applicant's claim but later during the course of evidence conceded - Commission found the commencement date of Applicant's employment was different from that of the amended claim, that the claim in respect of superannuation contributions appeared to be based on the statutory contribution required under the Superannuation Guarantee (Administration) Act 1992, therefore it was not recoverable as a contractual benefit and ordered Respondent to forthwith pay Applicant the sum of \$19,897.00 less tax - Granted - Mr JW Greenhalgh -v- Buon Amici WA Pty Ltd - APPL 1903 of 1999 - KENNER C - 30/05/00 - Restaurant.....	2719
Application re unfair dismissal - Respondent argued a Preliminary point re jurisdiction based upon s.170HB of the Workplace Relations Act 1996 - Respondent argued that when Applicant lodged her claim in this Commission, there was in existence a claim under s.170CE of the Workplace Relations Act 1996 alleging that her dismissal was harsh, unjust or unreasonable - Respondent further argued that s.170HB(4) provides that if an application under s.170CE was made in respect of her dismissal, Applicant was not entitled to take proceedings in respect of that dismissal under the I.R. Act 1979 and accordingly, her application should be dismissed - Commission reviewed authorities and found that s.170HB(4) permits the withdrawal of a prior application up until the commencement of the substantive proceedings in the Commission if necessary - Commission found that in that case, Applicant had withdrawn her prior federal application, therefore Respondent had suffered no prejudice whatsoever, that its preliminary point regarding jurisdiction was quite without substance and accordingly it should be dismissed and application be re-listed for hearing and determination - Ordered Accordingly - Ms NR Munteanu -v- QBE Management Services Pty Ltd - APPL 151 of 2000 - BEECH C - 13/06/00 - Insurance.....	2726
Conference re unfair dismissal - Applicant union argued that the dismissal of its member was harsh, oppressive and unfair - Respondent raised the preliminary issue that as the Applicant was a party to a registered workplace agreement with the Respondent, according to sections 7A, 7B, 7C and 7D of the Workplace Agreement Act the application was not an industrial matter and should be struck out for want of jurisdiction - Commission found that the contract of employment between the parties at the time of the lodgement of the application did not become subject to some other arrangement between them provided for in the expired workplace agreement - Commission found that the matter referred was an industrial matter, the Commission had jurisdiction to enquire and deal with it and adjourned application sine die to be re-listed at the request of either party - Declared and Ordered Accordingly - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Bowra and O'Dea - C 111 of 2000 - BEECH C - 02/06/00	2747

CUMULATIVE DIGEST—continued

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LONG SERVICE LEAVE	
Application for Board of Reference re Construction Industry Long Service Leave Payments - Applicant claimed that he was entitled to long service leave credits as a result of working for two employers from 1989 to 1991 - Respondent rejected the claim based on insufficient supporting information - Board examined the evidence and referred to the law and determined that there was insufficient information to ascertain whether the employers were within the definition of construction industry - Board concluded that the employers were not in that industry and therefore the applicant is not entitled to long service leave credits for that period - Dismissed - Mr RJ Prall -v- Construction Industry Long Service Leave Payments Board - BOR 8 of 1999 - Board of Reference - Beech L/Uphill J/SPURLING, J.A. - 22/12/99 - Security	223
Application for contractual benefits - Applicants claimed pro-rata long service leave arising out of their contract of service - Respondent argued that the Applicants had not accrued the right to pro-rata long service leave by reason of their length of service - Commission having heard claims CR176/97 and CR 211/97 found the common words used in the contract documents "but will not include any qualifying period" and "with no qualifying period" excluded the Applicants from any requirement to serve a qualifying period before becoming entitled to pro-rata payment of long service leave - Granted in part - Hospital Salaried Officers Association of Western Australia (Union of Workers) -v- Diabetes Australia - Western Australia - CR 176,211 of 1997 - PARKS C - 27/10/97 - Health Services	1663
Conference referred re interpretation of agreement - Applicant seeks interpretation of the annual leave and long service leave clauses to include 20% shift penalty with wages - Respondent argued that no entitlement to shift penalties while on leave exists in the agreement - Commission found the provision for payment of shift loading is elsewhere in the agreement, but the agreement does not make shift loading as part of the rate of pay, as a result the claims sought cannot be granted after a proper interpretation of the clauses - Dismissed - The Media, Entertainment and Arts Alliance of Western Australia (Union of Employees) -v- Western Australian Sports Centre Trust & Others - PSACR 46 of 1999 - BEECH C - 20/04/00 - Sports	1674
Application re pro rata long service leave - Applicant argued that as a result of an accident at work she was forced to resign one and a half years prior to qualifying for long service leave - Committee reviewed act and authorities and noted that although applicant was not entitled to Long service leave, the Committee could make a recommendation under special circumstances and would make such recommending the employer make an "ex gratia" payment, equivalent to what might otherwise have been the entitlement- Recommendation Given - Mrs JM Henderson -v- North Metropolitan Health Service - BOR 9 of 1999 - Long Service Leave Board of Reference - SPURLING, J.A. - 29/02/00 - Health Services	1941
Appeal against a decision that Applicant be required to register as an employer under the Construction Industry Portable Paid Long Service Leave Act 1985("the Act") and make payments to the Construction Industry Long Service Leave Payments Board - The board reviewed the Act and authorities and concluded the applicant was in an industry related to, but not in, the construction industry and accordingly should not be required to register under the Act - Upheld - Kununurra Crane Hire -v- Construction Industry Long Service Leave Payments Board - BOR 7 of 1999 - Long Service Leave Board of Reference - 05/05/00 - Construction Trade Services	1943
MATERNITY LEAVE	
Application re unfair dismissal - Applicant argued that she was unfairly dismissed by the respondents on her return from maternity leave and no notice of termination had been received - Respondents argued that their business was sold on 30 November 1998 but had advised the new owners that applicant would be returning to the Centre - Respondents also arranged for applicant to meet new owners at the end of November 1998 - Commission found that applicant was not terminated by respondents but by new owners of the business and that application could not succeed because applicant incorrectly named employer who terminated her - Dismissed - Mrs A Radwell - Rogers -v- Mr Samuel + Mrs Angela Bailey - APPL 516 of 1999 - SCOTT C. - 07/03/00 - Community Services	1645
MISCONDUCT	
¹ Appeal against decision of the Full Bench (79WAIG2305) - Appellant argued that the Commission's discretion miscarried in that it failed to have regard to any relevant factor, apart from the alleged assault itself - Appellant further argued that the Commission should have taken into consideration, the immediate acknowledgement of fault by Mr Baron, minor nature of the alleged assault, the alleged assault was incidental to the physical nature of the assault, the unblemished service and exemplary character of the employee and whether there was any other appropriate way with which the misconduct should have been dealt - IAC examined the evidence and referred to the law and determined that the nature of the offence was not minor due to the matter of maintaining authority within the employment relationship and occurred as a result of anger and insubordination - Dismissed - AUTO, FOOD, METAL, ENGIN UNION -v- Dampier Salt Operations Ltd - IAC 7 of 1999 - Industrial Appeal Court - - 13/12/99 - Mining	4
Application for alleged unfair, harsh or oppressive dismissal pursuant to Sections 18 and 51 of the Workplace Agreements Act 1993 - Industrial Magistrate established that the complainant bears the onus of proving on the balance of probabilities that she was unfairly harshly or oppressively dismissed - IM examined the evidence which detailed that the complainant received numerous written complaints from passengers and work colleagues concerning her performance and attitude - Further evidence detailed that the complainant was counselled concerning her performance and attitude - IM found that the complainant was justly terminated and was afforded procedural fairness - Dismissed - Ms H Inglis -v- Decron Hospitality Management - CP 267 of 1998 - Industrial Magistrate - Cicchini IM - 22/12/99 - Rail	219
Application for unfair dismissal and allegedly denied contractual entitlements-Applicant summarily dismissed for alleged gross misconduct-As no answering statement or appearance by the Respondent Commission did not have evidence which would allow it to conclude misconduct occurred-Commission heard evidence of Applicant and found dismissal unfair and although his employment would have terminated anyway he had suffered emotionally and financially- Commission granted four weeks wages as compensation in addition to entitlements-Granted. - Mr GS Cumming -v- Pro-Team Clean - APPL 1101 of 1999 - BEECH C - Cleaning	231
Application for unfair dismissal and allegedly denied contractual entitlements-Applicant argued dismissal was harsh, oppressive and unfair because he was not given an opportunity to explain any of the allegations against him and further argued that he was not given any notice and after some brief discussions his employment was terminated -Respondent argued Applicant was unprofessional and was dismissed for misconduct-Commission found that the Applicant's conduct was so seriously in breach of his contract of employment that by standards of fairness and justice the Respondent was no longer bound to continue the contract and the claim of unfair dismissal was dismissed -Dismissed - Mr GR French -v- Bruce Hawley formerly T/A For - Parts - APPL 205 of 1999 - BEECH C - Motor	234
Application re unfair dismissal and alleged denied contractual benefits - Applicant sought compensation and the recovery of alleged benefits due according to fixed term contract - Applicant argued that he did not do anything wrong - Respondent argued that the applicant was not unfairly dismissed as the applicant conducted private tuition for payment in contravention to a direction of the employer and contravened a number of other directions - Commission examined the evidence and found that the applicant had committed misconduct by disobeying a general instruction in conducting private tuition and in combination with disobeying a further instruction determined that the respondent was justifiable in terminating the applicant's employment - Commission noted that it was not argued before it that the form of dismissal was either summary or unlawful and assumed therefore that there was acceptance that the payment made to the applicant purportedly in lieu of notice reflected the lawful manner in which the contract of employment might be terminated - Dismissed - Mr DW White -v- Satellite Investments Pty Ltd T/A Perth Heat - APPL 320 of 1997;APPL 2157 of 1998 - PARKS C - 31/01/00 - Sport	418

CUMULATIVE DIGEST—continued

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MISCONDUCT—continued

- Application for unfair dismissal-Applicant argued dismissal was harsh, oppressive or unfair because after a false accusation of stealing and charges pending by Police, he was dismissed without no warning, discussion or talk and was seeking compensation-Respondent argued Applicant was not dismissed but not placed on the work roster pending the outcome of charges laid against him-Commission found that the fact the Applicant was not rostered for work amounted to a dismissal which attracted the Commission's jurisdiction-Further found that the Applicant failed to provide the Respondent an explanation prior to the termination -Also, the inquiry undertaken gave rise to reasonable grounds on the information available to the Respondent at that time to hold the view that the Applicant was guilty of misconduct-Dismissed. - Mr PE Bloomer -v- Ameera Pty Ltd and Lozellia Pty Ltd T/A Porters Liquor Warwick - APPL 2275 of 1997;APPL 933 of 1998 - PARKS C - 29/02/00 - Liquor and General Store 617
- Application for unfair dismissal-Applicant argued dismissal was unfair- After he declined the Respondent's request to be a Director, he was treated differently, had no performance indicators and received little guidance and administrative assistance-Claimed non award contractual benefits of one week's wages and superannuation "as agreed" -Respondent argued Applicant was dismissed for poor work performance and misconduct- Commission found that the employment relationship was irretrievable as it became necessary to have the Police involved and act as intermediaries- As the Respondent had good cause to bring about the termination there was no substantive unfairness -As the termination was justifiably summary the contractual benefits claimed were not owed to the Applicant-Further, the Applicant's Representative confirmed that the superannuation benefit claimed arose from statute and not from contract of employment-Dismissed - Mr GF Burke -v- Sovereign Cove Pty Ltd & Others - APPL 1779 of 1998 - SCOTT C. - 18/02/00 619
- Application re unfair dismissal - Applicant argued he was terminated without any explanation after his release from gaol; he was verbally abused for allegedly making derogatory comments about a female employee and a supervisor and he was not given an opportunity to defend his claim - Respondent argued Applicant breached the company's "Work Rule" when he drove a company vehicle without a licence; that Applicant was verbally abusive towards other employees, therefore dismissal was warranted - Commission found that Applicant's dismissal was as a result of his serious misconduct in making the false allegations of sexual impropriety against his Supervisor and a Senior Officer of the respondent, that it was a duty of an employer to act without delay in such circumstances and that happened in this case - Dismissed - Mr HA Humphries -v- Gnulla Aboriginal Employment Corporation - APPL 806 of 1999 - GREGOR C - 12/04/00 - Employment..... 1957
- Application re unfair dismissal - Applicant argued dismissal was unfair because he was given a brief warning on the afternoon of the breakdown of the company vehicle and a week later was terminated for the reason "careless driving" - Respondent argued that the reason for the termination was the damage to the vehicle because as a Trades Assistant Applicant should have picked up that the motor was overheating and that the Applicant's progress "still had a long way to go" and still had to grasp mechanical concepts - Commission found that no attempt had been made to ascertain the cause of the damage nor allow the Applicant to explain the circumstances and the written report on the incident was undertaken some time after the termination - Commission further found that the Applicant was denied the chance to prove his aptitude and suitability for the position - Granted. - Mr AP Lamb -v- Goldfield Contractors WA - APPL 851 of 1998 - COLEMAN CC - 09/06/00 - Vehicle..... 2724

NATURAL JUSTICE

- Application re unfair dismissal - Applicants argued that further employment was not offered after they had to be back-paid at the behest of their union for being underpaid and sought compensation in lieu of reinstatement - Applicants' Council argued that both Applicants were dismissed unfairly because they were denied natural justice, that the Respondent was under an obligation to inform Applicants as soon as the decision was made to make them redundant and discuss with them alternatives to redundancies or ways that the effect of the redundancies upon them could be minimised - Respondent argued they did not have any particular jobs on upon which the Applicants could be employed - Commission found that even if Respondent had given that opportunity to both Applicants, it would not have made any difference as neither Applicants were able to point to any other work which could have been done, or ways that the effect of the redundancies upon them could have been minimised - Commission reviewed authorities and was not satisfied that denial of natural justice was a most significant matter in the context of this case, particularly given that both employees were aware of the nature of their employment and that the job was coming to an end - Commission found Applicants have failed to make out their claims - Dismissed - Mr P Cooper -v- Grove Construction Services Pty Ltd - APPL 384,461 of 1999 - BEECH C - 10/04/00 - Construction 1951

NIGHT AND WEEKEND WORK

- Application re unfair dismissal and contractual entitlements - Applicant argued dismissal was unfair and that he has been denied benefits arising out of his contract of employment - Respondent argued Applicant was informed that he was required for the freeway job; that his refusal to attend work, put the company in a very difficult situation as it was behind in completing the contract to perform the freeway work, therefore dismissal was warranted - Commission reviewed authorities and found that Applicant had not discharged the onus of proof to establish his claim and ordered the application be dismissed - Dismissed - Mr PL Salter -v- Intersectional Linemarkers Pty Ltd - APPL 639,640 of 1999 - SMITH, C - 17/04/200 - Road 1964

ORDER

- Conference Referred re application for order to increase the salaries of employees of the Director General and Attorney General in the Ministry of Justice - Applicant sought a flat increase in lieu of a percentage increase in consideration of equity issues as a percentage increase favours higher classifications - Applicant argued that the flat increase proposal was to cover a two year period based on productivity gains - Applicant rejected the argument that the value of the increase should be determined by the limit imposed under the Government's then wages policy of 7% over two years - Respondent argued that the wage increase should be dependent on the attainment of target savings and divisional performance outcomes under a performance management model resulting in an initial 2% increase with a second 3.5% 12 months later - Respondent further argued that the matters are to be determined in accordance with the Wage Fixing Principles - Commission in Court Session found that there has been an improvement in performance and productivity since 1997, that performance outcomes should be aggregated for employees across divisions and the impact of what was determined is consistent with the public interest - Ordered accordingly - The Civil Service Association of Western Australia Incorporated -v- Director General, Ministry of Justice - PSACR 35 of 1998 - Commission in Court Session - COLEMAN CC/GREGOR C/SCOTT C. - 08/12/99 - Government 193
- Conference re cancellation of Order - Applicant Union argued that the Order issued on 14/12/1999 cancelling AG 21/96 was cancelled by Order issued on 16/12/1999 - Applicant while alluding to the Full Bench determination on the 29/3/2000 that AG 21/96 had ceased to exist argued the union and its members should not have to continue to be covered by an agreement that did not exist and requested that the Order be now cancelled - Respondent argued the Order was effectively in two parts viz it addressed return to work and the issues of resolving the underlying dispute re a new Agreement - Respondent also argued that cancelling the Agreement at this stage would only remove the basis for negotiations, which in turn would cause dislocations to exporters including farmers - Commission contented the Order was only interim and it was necessary to negotiate a new Agreement which is on the verge of being concluded - Commission refused the Union's application to cancel the Order at this stage - Dismissed - The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch -v- Western Australian Government Railways Commission - C 335 of 1999 - BEECH C - 11/04/00 - Rail Transport..... 1976

CUMULATIVE DIGEST—continued

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OVER AWARD PAYMENT

Conference referred re wage increase - Applicant Union argued that a \$15.00 increase in pay rates per week was justified by reason of cost savings associated with introduction of shift work and a bonus pay of \$1000.00 to each employee who remained employed with Respondent until 31/12/94 was justified on the basis that such employees ought be rewarded for continuing to serve the employer notwithstanding their future was uncertain - Commission found that there was nothing of substance put to it which would justify a finding that the increased wage level ought be further increased and that the claims for a \$1000.00 bonus, apart from the scant reason given as justification, there was no evidence to support it - Commission found that Applicant Union has failed to establish there was a special case for Commission to award the claims made, or any part of them - Dismissed - The Shop, Distributive and Allied Employees' Association of Western Australia -v- Department of State Services - CR 451 of 1994 - PARKS C - 03/03/00 - Government

676

Application re unfair dismissal and contractual entitlements- Applicant argued that dismissal was harsh, oppressive and unfair and sought compensation for loss of income, contractual benefits including commission on sales and distress caused by dismissal - Respondent argued that applicant resigned and was not dismissed therefore was not unfairly dismissed - Respondent further argued that mileage allowance set out in applicant's contract was higher than award rate as verified by DOPLAR - Commission found on evidence that respondent wanted to terminate applicant and that applicant had discharged the onus of establishing that she was unfairly dismissed - Commission further found that as reinstatement was not practicable, compensation should be awarded for loss of wages, commission on proceeds of all sales and mileage as per contract of employment - Ordered and Declared Accordingly - Ms LM Fischer -v- Sassey Pty Ltd ACN 008 996 156 - APPL 1414 of 1999 - SMITH, C - 05/04/00 - Wholesaling

2713

PIECEWORK

Application re unfair dismissal and contractual entitlements - Applicant argued he was dismissed without notice when he refused to work with faulty equipment and that he was denied a contractual entitlement - Respondent argued that Applicant resigned and equipment was in good working order although did not dispute applicant's claim for an entitlement - Commission found the Applicant was unable to discharge the onus of proof that he was harshly oppressively or unfairly dismissed, however granted the contractual entitlement claim - Ordered Accordingly - Mr C Boulazemis -v- Stand Roston - APPL 810,1521 of 1999 - SMITH, C - 20/04/00 - Shearing Contractor

2705

PRINCIPLES

Conference referred re wage increase - Applicant Union argued that a \$15.00 increase in pay rates per week was justified by reason of cost savings associated with introduction of shift work and a bonus pay of \$1000.00 to each employee who remained employed with Respondent until 31/12/94 was justified on the basis that such employees ought be rewarded for continuing to serve the employer notwithstanding their future was uncertain - Commission found that there was nothing of substance put to it which would justify a finding that the increased wage level ought be further increased and that the claims for a \$1000.00 bonus, apart from the scant reason given as justification, there was no evidence to support it - Commission found that Applicant Union has failed to establish there was a special case for Commission to award the claims made, or any part of them - Dismissed - The Shop, Distributive and Allied Employees' Association of Western Australia -v- Department of State Services - CR 451 of 1994 - PARKS C - 03/03/00 - Government

676

³Application to vary award - Applicant sought to vary the Royal Automobile Club Road Service Employees and Mechanical Services Award 1993, to extend its scope to cover a new area of fleet maintenance and to vary the Award in other respects, some of which involve a variation of the Award above the safety net - Respondent consented to the application - Commission in Court Session, having considered the submissions from both Applicant and Respondent, and the materials tendered in support of the application, were satisfied that the application complied, in all respects, with the Statement of Principles 1999 - CICS found application was consistent with equity and good conscience, was in the interests of the parties directly concerned and involved negligible cost in terms of s.26(1)(d) of the Act - Granted - Royal Automobile Club of WA (Incorporated) -v- AUTO, FOOD, METAL, ENGINE UNION - APPL 1406 of 1999 - Commission in Court Session - KENNER C/SMITH, C/WOOD, C - 04/05/00 - Retail Trade

2687

PROCEDURAL MATTERS

Application to join the (proposed respondents) as respondents to the substantive applications - Applicant argued that the application did not involve an abuse of the Commission's power and further argued that by reason of the relationship between the respondent and the proposed respondents that they may have in their possession, power or control, documents that are relevant to the substantive application - Proposed respondents argued that this application was not an industrial matter and therefore the Commission did not have jurisdiction and further argued that the matter is an abuse of the Commission - Commission referred to the law and the IR Act 1979 and determined that the matter is an industrial matter - Commission then dealt with the matter of abuse of the Commission - Commission referred to the law and determined that as the intent of the application is solely based on obtaining discovery of documents that the proposed respondents deny possessing, the application to join these respondents is an abuse - Dismissed - Mr KC LANDWEHR -v- Wynnes Pty Ltd - APPL 366 of 1999 - KENNER C - 15/12/99 - Meat

402

Referral to Full Bench by Public Service Arbitrator, as per s80E(6)(b) of the Act, three questions - Full Bench found it was not appropriate to deal with the questions, as framed and further it was inappropriate to hear the matter when the terms of the Presidents consent (Required for referral) may not have been met - Therefore matter was to be remitted back to the Arbitrator - Remitted - Ms MM In De Braekt -v- Chief Executive Officer, Department of Productivity and Labour Relations - P 42 of 1997 - Full Bench - FIELDING C - 27/04/00 - Government Administration

1744

PUBLIC INTEREST

⁴Application for Orders re Breach of Union Rules - Applicant argued Committee of Management for the first Respondent (FLAIEU) was not properly constituted due to discrepancies with their election and this was subject to litigation in the Federal Court - Applicant sought Orders to declare the election void and Interim Orders to ensure Respondents refrain from Industrial Agreement negotiations with Burswood or taking steps to bring about an election of vacant Committee positions - Applicant further argued the FLAIEU and Burswood had made Industrial Agreements covering the employment of workers irrespective of their membership to the FLAIEU or the ALHMCU whom also had coverage over Burswood - Leave to amend Application (not opposed) was granted requesting the urgent initiation and prosecution of an application for the amalgamation of the (FLAIEU) and the ALHMCU and various Orders to allow the first Respondent (FLAIEU) to operate in the Interim and the amalgamation and associated Orders were seen to give rise to the potential resolution of this application - Interim Orders issued accordingly and leave granted for application to be discontinued - Discontinued - Mr SJ Farrell -v- LIQUOR & ALLIED INDUST UNION & Others - PRES 7 of 1999 - President - SHARKEY P - 10/09/99 - Other Services

23

Application re S27(1)(a) to dismiss application No. 95 of 1994 (unfair dismissal claim) - Commission found that no proof of service had been filed in relation to interlocutory applications made on behalf of Ms Davey and no request had been lodged requesting the Commission schedule proceedings in relation to her primary application - Commission further found application No. 95 of 1994 to have suffered from inactivity and neglect and it would be unreasonable to require Aitkins Liquor Store to defend the claim and accordingly application No. 95 of 1994 would be dismissed - Ordered accordingly - Aitkins Liquor Store (Victoria Park Stores) -v- Ms LN Davey - APPL 461 of 1995; APPL 2322 of 1997 - PARKS C - 01/03/00 - Food, Beverage and Tobacco Mfg

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CUMULATIVE DIGEST—continued

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PUBLIC INTEREST—continued

- ²Appeal against decision of Commission (79 WAIG 3459) re wearing of badges by union members during hours of employment - Appellant appealed on a number of grounds including that the Commission erred in finding the respondents policy prohibiting the wear of union badges is not unreasonable - Appellant argued employees wore a number of badges apart from their identification badges and there was no evidence that the wearing of union badges had been complained about by the public or that they were detrimental to the operations - Respondent argued it had a blanket ban on all unauthorised badges and further argued that, if an exception were to be made in the case of membership badges issued by the appellant, exceptions would have to be made for others - Full Bench found the Commission had erred in grounds 3 and 4 of the appeal and that the order made at first instance in application No. CR 159 of 1999 be suspended and be remitted back to the commission to be heard and determined according to law - Appeal Upheld - LIQUOR, HOSPITALITY & MISC -v- Burswood Resort (Management) Ltd - FBA 30 of 1999 - Full Bench - SHARKEY P/BEECH C/SMITH, C - 15/03/00 1359
- Application seeking Respondents be punished for contempt of the Full Bench of the Commission - Applicant argued Respondents intimidated a colleague whom had signed a proof of evidence on behalf of the Union - Respondent seeks an order dismissing the application on the grounds the it is not validly brought and, further, that there is no case to answer - Commission found, it was not beyond reasonable doubt, that the predominant purpose of the respondents was to interfere with a witness or to deter her from giving evidence and for those reasons found there was no case to answer - Dismissed - The Food Preservers' Union of Western Australia, Union of Workers -v- Ms E Truslove & Other - PRES 6 of 2000 - President - SHARKEY P - 19/04/00 - Food, Beverage and Tobacco Mfg 1754
- Application for orders to stop disciplinary proceedings instituted under the Public Sector Management Act (PSMA) - Counsel for the Applicant sought an order that disciplinary proceedings which had been instituted by the Respondent be suspended while parallel criminal proceedings are dealt with - Counsel for the Applicant submitted that section 80E of the Act gives the Public Service Arbitrator exclusive jurisdiction to enquire into and deal with any industrial matter relating to a government officer and Applicant was, without objection from the Department, clearly a government officer - Commission found that there was no suggestion at all that the disciplinary proceedings under the PSMA had not been properly invoked, neither the legitimate interests of the parties nor the administration of justice require this Commission to interfere even if it had jurisdiction - Commission reviewed authorities and found that it would not interfere with the proceedings of the disciplinary enquiry, that it was not in the public interest to delay the disciplinary enquiry and as the Applicant continued to be paid, the Department was entitled to certainty in its operations - Dismissed - Civil Service Association of Western Australia Incorporated -v- Director General, Department of Transport - P 5 of 2000 - GREGOR C - 23/05/00 - Government 2697
- Conference re unfair dismissal - Applicant union argued that the dismissal of its member was harsh, oppressive and unfair - Respondent raised the preliminary issue that as the Applicant was a party to a registered workplace agreement with the Respondent, according to sections 7A, 7B, 7C and 7D of the Workplace Agreement Act the application was not an industrial matter and should be struck out for want of jurisdiction - Commission found that the contract of employment between the parties at the time of the lodgement of the application did not become subject to some other arrangement between them provided for in the expired workplace agreement - Commission found that the matter referred was an industrial matter, the Commission had jurisdiction to enquire and deal with it and adjourned application sine die to be re-listed at the request of either party - Declared and Ordered Accordingly - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Bowra and O'Dea - C 111 of 2000 - BEECH C - 02/06/00 2747

REDUNDANCY/RETRENCHMENT

- Application re unfair dismissal - Applicant claimed on behalf of its member that he was harshly, unfairly and unreasonably dismissed from his employment and sought an order reinstating the employee without loss of wages and entitlements - Respondent argued that the employee was terminated as a consequence of his ongoing substandard performance - Commission examined the evidence and noted that the preliminary enquiry undertaken in fact became the final enquiry which resulted in the employee's dismissal - Commission determined that the enquiry process was flawed for this reason and for the incorrect use of informal conversations - Commission found Applicant Unfairly Dismissed, however, reinstatement impractical and granted compensation—Granted in part loyment then it ought not to due to the difficulty in redeploying blue collar employees within the public sector - Commission determined that even if it had jurisdiction to hear and decide on the matter of redeployment that it would not decide to as this would be unfair as it would result in a "contrived" redeployment - Commission further determined that the employee failed to mitigate his loss which was taken into consideration in granting the quorum - Granted - COMM, ELECTRIC, ELECT, ENERGY -v- South-East Metropolitan College of TAFE - CR 208 of 1999 - SCOTT C. - 06/12/99 - Education 262
- Application to vary award re redundancy - Applicant submitted the thrust of the application sought to incorporate into the Award, those conditions in relation to redundancy, specifically relating to severance payments, that are "standard" in the building industry and that the Award was a "building industry" Award, notwithstanding the terms of its scope and responsibility provisions - Respondent opposed the claim but consented to a variation to incorporate "standard" Termination, Change and Redundancy (TCR) provisions into the Award - Commission was not persuaded that the Award has the same character as those having application to the building construction industry - Commission was also of view employees covered by the terms of the Award should receive adequate compensation in circumstances of loss of employment through no fault of their own - Order issued to vary Award by inserting the balance of the "TCR" provision in relation to redundancy, save for the retention of the requirement to notify the CES or its substitute to ensure employees terminated as a result of redundancy will have adequate and fair protection - Ordered accordingly. - The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers & Other -v- Coca-Cola Bottlers Pty Ltd & Others - APPL 1652 of 1998 - KENNER C - 25/02/00 - Building 597
- Application re Unfair Dismissal - Applicant argued that dismissal had been unfair as respondent had selected him for redundancy while others employed later than him were offered training which improved their chances for being retained - Respondent argued that applicant's employment was casual and also felt that applicant was not suitable to undertake training - Respondent further argued that applicant was given a suitable reference because he was reliable and worked well which would indicate there was no animosity between the parties - Commission was satisfied that respondent's decision to terminate applicant was caused by a downturn in a highly seasonal business and also based on operational needs of the business and skill levels of the employees - Commission found no evidence that dismissal was harsh, oppressive or unfair - Dismissed - Mr JA Adams -v- Morton's Specialist Seed & Grain Merchants - APPL 376 of 1999 - SCOTT C. - 13/03/00 - Services to Agriculture 1614
- Application re unfair dismissal - Applicant argued he was given assurance by Respondent that his job was secure and sought reinstatement - Respondent argued that over time the amount of work had been significantly reduced to a point where the school had made the decision to make the position redundant - Commission found that Respondent did not follow its own policy in that it did not have discussions that were required to be held between it and the Applicant by virtue of the contract of employment in accordance with sections 5 and 41 of the Minimum Conditions of Employment Act 1993 - Commission found that Applicant was unfairly dismissed, that reinstatement was impracticable as position no longer exists and ordered compensation of \$3,464 be paid for loss and injury caused by the dismissal - Ordered Accordingly - Mr AR Ellery -v- St John's School - APPL 950 of 1999 - BEECH C - 24/02/00 - Gardening 1628
- Application re unfair dismissal - Applicant argued that dismissal by reason of redundancy and that being judged less experienced and unable to work unsupervised, was unfair and harsh - Respondent argued redundancy of one driller was necessary and the criteria taken was experience, safety and the ability to work unsupervised, which the applicant was the least qualified. - Commission found the dismissal to be unfair and granted compensation taking into account applicant was likely to be made redundant in the near future - Granted - Mr AS Kerr -v- Cooks Construction Pty Ltd ACN 004 782 558 - APPL 519 of 1999 - BEECH C - 19/04/00 - Drilling 1635

CUMULATIVE DIGEST—continued

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REDUNDANCY/RETRENCHMENT—continued

- Application re unfair dismissal - Applicant argued that a former employee reverting back to full time employment was the reason for the termination of contract - Respondent argued the reason was a downturn in the number of enrollments, restructuring and the temporary nature of the contract - Commission found contract contained terms which indicated employment was for a far longer duration and that no discussion had taken place with the applicant facing redundancy and dismissal was unfair and awarded wages in lieu of notice and compensation - Granted - LIQUOR, HOSPITALITY & MISC -v- Chesterfield Child Care Centre Pty Ltd - CR 130 of 1999 - BEECH C - 10/03/00 - Community Services 1669
- Appeal against Decision of Commission (80 WAIG 252) re Unfair dismissal and contractual entitlements - Appellant argued Commission erred in calculating annual salary, redundancy and compensation after finding appellant to have proven his claim - Full bench reviewed authorities and found Commission to have erred in the calculation of appellants redundancy and compensation and varied the Order in the first instance to reflect findings - Upheld - Mr K Thompson -v- Gregmaun Farms Pty Ltd atf Chris & Evelyn Henderson Family Trust trading as C & E Henderson - FBA 1 of 2000 - Full Bench - SHARKEY P/SCOTT C./KENNER C - 11/04/00 - Agriculture..... 1733
- Application re unfair dismissal - Applicant argued he was treated unfairly by the retrenchment, that he had signed a contract for 12 months secondment, that the same person who arranged his secondment, terminated it after six weeks - Applicant further argued that he was told in writing that on completion of the secondment he would return to the Respondent but ultimately this was not the case - Applicant argued if there were reasons for the termination of the secondment or why his services were no longer required, it was not discussed with him and that he was not given the opportunity to respond to any allegations against him - Respondent argued that Applicant was the architect of his own misfortune in that his own actions caused the cessation of his secondment, that he was well aware that the Respondent had no work for him other than at the secondment and that Applicant was also well aware that if there had been no secondment he would have been retrenched - Commission reviewed authorities and found that Respondent had an absolute obligation to investigate the circumstances under which the Applicant was asked to leave Solomon, particularly when the ultimate outcome had such a fundamental effect upon the employment contract and because the Respondent did not do this, there had not been a fair go all round, therefore Applicant's dismissal was unfair - Commission further found that re-instatement would not be practicable and ordered that compensation be paid to Applicant - Ordered Accordingly - Mr JR Harris -v- General Gold Resources NL - APPL 1551 of 1999 - GREGOR C - 12/05/00 - Mining 2720

REGISTRATION

- ⁴Application for Orders re Breach of Union Rules - Applicant argued Committee of Management for the first Respondent (FLAIEU) was not properly constituted due to discrepancies with their election and this was subject to litigation in the Federal Court - Applicant sought Orders to declare the election void and Interim Orders to ensure Respondents refrain from Industrial Agreement negotiations with Burswood or taking steps to bring about an election of vacant Committee positions - Applicant further argued the FLAIEU and Burswood had made Industrial Agreements covering the employment of workers irrespective of their membership to the FLAIEU or the ALHMFU whom also had coverage over Burswood - Leave to amend Application (not opposed) was granted requesting the urgent initiation and prosecution of an application for the amalgamation of the (FLAIEU) and the ALHMFU and various Orders to allow the first Respondent (FLAIEU) to operate in the Interim and the amalgamation and associated Orders were seen to give rise to the potential resolution of this application - Interim Orders issued accordingly and leave granted for application to be discontinued - Discontinued - Mr SJ Farrell -v- LIQUOR & ALLIED INDUST UNION & Others - PRES 7 of 1999 - President - SHARKEY P - 10/09/99 - Other Services 23

REINSTATEMENT

- Application re unfair dismissal - Applicant claimed on behalf of its member that he was harshly, unfairly and unreasonably dismissed from his employment and sought an order reinstating the employee without loss of wages and entitlements - Respondent argued that the employee was terminated as a consequence of his ongoing substandard performance - Commission examined the evidence and noted that the preliminary enquiry undertaken in fact became the final enquiry which resulted in the employee's dismissal - Commission determined that the enquiry process was flawed for this reason and for the incorrect use of informal conversations - Commission found Applicant Unfairly Dismissed, however, reinstatement impractical and granted compensation—Granted in part loyment then it ought not to due to the difficulty in redeploying blue collar employees within the public sector - Commission determined that even if it had jurisdiction to hear and decide on the matter of redeployment that it would not decide to as this would be unfair as it would result in a "contrived" redeployment - Commission further determined that the employee failed to mitigate his loss which was taken into consideration in granting the quatum - Granted - COMM, ELECTRIC, ELECT, ENERGY -v- South-East Metropolitan College of TAFE - CR 208 of 1999 - SCOTT C. - 06/12/99 - Education 262
- Application re unfair dismissal and alleged denial of contractual benefits - Applicant claimed that he was unfairly dismissed and denied contractual entitlements and sought reinstatement or compensation for loss of wages - Applicant argued that his services were terminated and he was in effect told to leave that day - Respondent argued that the applicant's services were terminated due to the need to reduce the workforce by reason of redundancy and denied that the dismissal was unfair - Respondent further argued that the contractual benefits claimed do not arise under his contract of employment but are benefits under the relevant award - Commission examined the evidence and found that the applicant was asked to work out the period of notice and decided not to - Commission further determined that the applicant was redundant to the respondents needs and therefore his dismissal unfair - Dismissed - Mr P Morete -v- Unique Metal Works Pty Ltd - APPL 1855 of 1996 - PARKS C - 18/01/00 - Sheet Metal Fabrication 407
- Application re unfair dismissal - Matter remitted to the Commission as a result of appeal to the Full Bench to consider the question of relief after Full Bench found the Applicants dismissal to be harsh, oppressive and unfair - Applicant and respondent appeared before the Commission - Respondent elected after a short period of time to no longer maintain his presence - Commission noted that in general the respondent's behaviour was most offensive and further noted the Commission's inability to deal with the respondents behaviour due to the repeal of former s.101 of the IR Act 1979 in 1984, regarding contempt in the face of the Commission - Commission heard evidence and submissions from the applicant and noted that the applicant did not wish to seek reinstatement due to the work environment - Commission determined that the applicant did suffer loss for a brief period and awarded monies accordingly - Order given extemporaneous - Ms GL Tan -v- Gabriels' Cafe - APPL 1842 of 1998 - KENNER C - 15/12/99 - Food Retailing 418
- Application re unfair dismissal - Applicant claimed any instructions for rectifying his behaviour had not been put to him clearly - Respondent argued Applicant had been counselled regarding unacceptable conduct, absences and tardiness - Failure to rectify behaviour would render his job in jeopardy - Commission found Applicant an architect of his own misfortune - Respondent had afforded Applicant with ample opportunity to rectify his behaviour before deciding to dismiss - Respondent did not act unfairly - Dismissed - Mr MJ Vallelonga -v- Tierney Contracting Pty Ltd - APPL 2060 of 1997 - PARKS C - 11/03/98 - General Construction 663
- Application re unfair dismissal - Applicant sought reinstatement - Commission found that in an application such as this one, the obligation lies with the Applicant to prove that there was an unfairness in the dismissal and that in its view, Applicant had failed to discharge the onus of establishing that he was unfairly dismissed - Dismissed - Mr S Tapiki -v- Morton's Specialist Seed & Grain Merchants - APPL 1377 of 1997 - PARKS C - 06/10/97 - Sales 665
- ²Appeal against Decision of Commission (79 WAIG 3461) re unfair dismissal - Appellant argued Commissioner erred on a number of grounds one being that reinstatement of the former employees was impracticable - Full Bench found the commissioner was open to conclude the relationship between the former employees and the appellant had broken down and under the circumstances reinstatement was impracticable and that no other grounds of appeal were made out - Dismissed - Solid Concepts Pty Ltd ACN 009 301 553 -v- LIQUOR, HOSPITALITY & MISC - FBA 23 of 1999 - Full Bench - SHARKEY P/SCOTT C./WOOD, C - 31/03/00 1381

CUMULATIVE DIGEST—continued

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REINSTATEMENT—continued

- Application re unfair dismissal seeking reinstatement - Applicant argued that he had been unsuccessful in obtaining alternative employment and had suffered financially since his dismissal - Respondent opposed applicant's claim for reinstatement and agreed to pay compensation instead - Commission found that dismissal was procedurally unfair and that reinstatement was not impracticable - Granted - Mr DJ Cooling -v- City of Geraldton - APPL 2151 of 1997 - BEECH C - 10/02/00 - Local Government 1622
- Application re Unfair Dismissal - Applicant argued that dismissal was harsh as at time of dismissal he had family and personal problems and had lost his motor vehicle driver's licence which was not disclosed to respondent - Respondent argued that City of Perth was exposed to significant insurance risk by applicant continuing to drive their vehicles for 2 months after losing his driver's licence - Commission found that applicant's action amounted to misconduct but respondent did not suffer any real loss - Commission further found applicant's conduct, considering his age, limited range of skills and that he had given the City of Perth 22 years of almost excellent service, together with family circumstances at time of misconduct to be uncharacteristic - Commission considered applicant's evidence in deciding this matter and established that respondent's decision to dismiss applicant may not have been unjust or unreasonable but was harsh in the circumstances, which could result in much distress to applicant - Commission concluded that re-employment into a new position and not reinstatement was appropriate, as applicant had regained his driver's licence, but no order will be made for compensation or continuity of service - Ordered accordingly - Mr PG Crawford -v- City of Perth - APPL 967 of 1999 - BEECH C - 08/03/00 - Local Government 1625
- Application re unfair dismissal - Applicant argued he was given assurance by Respondent that his job was secure and sought reinstatement - Respondent argued that over time the amount or work had been significantly reduced to a point where the school had made the decision to make the position redundant - Commission found that Respondent did not follow its own policy in that it did not have discussions that were required to be held between it and the Applicant by virtue of the contract of employment in accordance with sections 5 and 41 of the Minimum Conditions of Employment Act 1993 - Commission found that Applicant was unfairly dismissed, that reinstatement was impracticable as position no longer exists and ordered compensation of \$3,464 be paid for loss and injury caused by the dismissal - Ordered Accordingly - Mr AR Ellery -v- St John's School - APPL 950 of 1999 - BEECH C - 24/02/00 - Gardening 1628
- Application re unfair dismissal - Applicant sought reinstatement to a driller's job he asserts he was offered and accepted in a telephone interview - Respondent argued that was not so because company practice was to interview all prospective applicants by phone and have them undergo the induction while selection is continuing - Commission found that as no offer of employment was made or accepted there was no dismissal from employment - Dismissed - Mr DJ Shaw -v- Brandrill Limited ACN 061 845 529 - APPL 80 of 1995 - PARKS C - 01/03/00 - Other Mining 1646
- Application re Unfair Dismissal - Application Granted (80 WAIG 414) compensation to be assessed - Applicant sought compensation on loss of earnings following termination as well as for injury and loss of reputation, mental stress and anxiety - Respondent argued that loss of earnings should be diminished by amount earned by applicant after termination - Commission found that applicant's dismissal was not unexpected as it came after an extended period of negotiation by lawyers and further found no medical evidence of depressive state suffered by applicant - Commission therefore ordered respondent to pay applicant compensation of \$43,743 - Granted - Dr LA Smyth -v- St John of God Healthcare Incorporated - APPL 1973 of 1998 - GREGOR C - 13/03/00 - Health Services 1649
- Conference Referred re dismissal and reinstatement of employee, a dismissal notice be quashed and the recognition of a group of employees as a core group - Applicant withdrew second and third claims and were seeking the reinstatement of a former employee and argued that the employee in question ought to have been retained in preference to two other employees as a result of a re-structure - Commission examined the evidence and determined that the applicant failed to show that the selection process applied by the respondent caused her to be wrongly selected for dismissal - Dismissed - Metals and Engineering Workers' Union - Western Australian Branch -v- Skilled Engineering Pty Ltd - CR 59 of 1994 - PARKS C - 28/02/00 - Brewing 1676
- ⁴Application for stay of operation of decision (80 WAIG 623) pending appeal to Full Bench - Applicant was required to establish that the balance of convenience favoured it and that there was a serious issue to be tried, namely, that should applicant's appeal succeed the result would be nugatory by its inability to recover monies paid to respondent - Respondent argued that there were no serious issues to be tried and gave evidence of assets, income and lack of debt - President found that balance of convenience favoured a stay until respondent's cross-appeal regarding reinstatement is resolved and ordered the monies to be paid into and held on trust - Ordered Accordingly - YMCA of Perth -v- Mr M Cousins - PRES 3 of 2000 - President - SHARKEY P - 18/04/00 - Community Services 1759
- Application re harsh, oppressive and unfair dismissal seeking re-instatement - Applicant sought leave to discontinue application - Respondent wholly contested the Applicant's claim and did not oppose discontinuance - Respondent argued for costs to be awarded because of the Applicant's lateness in discontinuing application and failing to follow directives of the Commission - Commission found on evidence that Applicant had decided not to proceed at least 2 weeks prior to the hearing date and awarded costs against Applicant - Ordered Accordingly - Mr EH Davey -v- Churches of Christ Homes and Community Services Inc - APPL 1050 of 1999 - KENNER C - 15/05/00 - Community Services 2708
- Application re unfair dismissal - Applicant argued he was treated unfairly by the retrenchment, that he had signed a contract for 12 months secondment, that the same person who arranged his secondment, terminated it after six weeks - Applicant further argued that he was told in writing that on completion of the secondment he would return to the Respondent but ultimately this was not the case - Applicant argued if there were reasons for the termination of the secondment or why his services were no longer required, it was not discussed with him and that he was not given the opportunity to respond to any allegations against him - Respondent argued that Applicant was the architect of his own misfortune in that his own actions caused the cessation of his secondment, that he was well aware that the Respondent had no work for him other than at the secondment and that Applicant was also well aware that if there had been no secondment he would have been retrenched - Commission reviewed authorities and found that Respondent had an absolute obligation to investigate the circumstances under which the Applicant was asked to leave Solomon, particularly when the ultimate outcome had such a fundamental effect upon the employment contract and because the Respondent did not do this, there had not been a fair go all round, therefore Applicant's dismissal was unfair - Commission further found that re-instatement would not be practicable and ordered that compensation be paid to Applicant - Ordered Accordingly - Mr JR Harris -v- General Gold Resources NL - APPL 1551 of 1999 - GREGOR C - 12/05/00 - Mining 2720
- Application re harsh, oppressive and unfair dismissal seeking re-instatement without loss of benefits and bonus payment allegedly denied under contract of employment - Applicant argued that termination was on the grounds that he refused to work overtime - Respondent argued by failing to work overtime, Applicant failed to supervise members of his team which resulted in members of his team working without supervision - Commission found amongst a number of reasons that Applicant's refusal to work the overtime constituted a repudiation of an essential term of the contract - Commission further found that Applicant was unable to make out his claim for denied contractual entitlements - Dismissed - Mr JD Powell -v- KDB Engineering Pty Ltd ACN 008 884 482 - APPL 1405 of 1999 - SMITH, C - 16/05/00 - Manufacture 2732
- Application re unfair dismissal - Applicant argued that he was unfairly dismissed and sought compensation for loss of income - Respondent argued dismissal was warranted because applicant was abusive to customers on 3 occasions - Commission found that applicant received no counselling or warnings for alleged abusive behaviour on previous occasions and his actions appeared to be consistent with his responsibilities as an employee - Commission was further satisfied that applicant's conduct overall was not seriously in breach of his contract to warrant termination without notice and concluded that as reinstatement was not practicable, compensation for loss of income be awarded to applicant - Granted - Mr JK Richards -v- Tony W P Lee T/as Maxi Fuel Dianella - APPL 1691 of 1999 - BEECH C - 11/05/00 - Petroleum 2739

CUMULATIVE DIGEST—continued

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SAFETY	
Conference referred re dismissal of an employee - Applicant union argued the dismissal of an employee Mr (S) for punching a colleague Mr (W) was unfair and the class of persons engaged in railway gang work are more likely to engage in conduct of the type which would not be tolerated in other employment situations - Further the Applicant union argued both employees were equally involved and it was unfair to reprimand one and dismiss another - Respondent argued the necessity to provide a safe workplace and that it would not tolerate that type of behaviour - Commission found Mr(S) to have punched Mr(W) in the face with no warning and that the respondent acted appropriately when it dismissed Mr(S) - Dismissed - Australian Railways Union of Workers, West Australian Branch -v- Western Australian Government Railways Commission - CR 314 of 1994 - PARKS C - 28/02/00 - Rail Transport	673
Application re unfair dismissal - Applicant argued unfair dismissal seeking compensation in lieu of reinstatement - First Respondent argued that Applicant was employed by Second Respondent, a subsidiary of its company - First Respondent denied any liability in respect of the application - Second Respondent argued that Applicant was guilty of serious breaches of safety procedures in the work place justifying the summary termination of his employment - Commission found given the nature and number of breaches of procedure and the fact that this was not the first occasion on which the Applicant had been admonished for breaches of safety, but in effect the third occasion within a very short time, it was not convinced even on balance that the manner of dismissal was so unfair as to render the dismissal itself unfair - Dismissed - Mr KR Porter -v- Eltin Limited (ACN 009 366 036) - APPL 1295 of 1999 - FIELDING C - 17/04/00 - Mining	1963
Application re unfair dismissal - Applicant argued amongst a number of other grounds that he was not adequately trained on the MT3600, therefore his dismissal was harsh, oppressive and unfair - Respondent argued that Applicant made a conscious decision to allow the truck to accelerate to an unsafe speed, the probability for a catastrophic accident involving both Applicant and others was very high, that Applicant was adequately experienced and trained in operating haul trucks to know that this was an unsafe practice and Applicant was an experienced safety representative/acting supervisor, therefore termination was justified - Commission found on evidence that Applicant did commit a serious safety breach and that on the balance of probabilities his dismissal was not harsh, oppressive or unfair - Dismissed - Mr P Baldwin -v- Hamersley Iron Pty Ltd - APPL 1913 of 1999 - BEECH C - 09/06/00 - Mining	2701
SHIFT WORK	
Application re interpretation of Government Officers (Social Trainers) Award 1988 - Applicant Union claimed that any alteration to the start and finishing times with less than 24 hours' notice attracted penalty rates as prescribed by the Award - Respondent argued such change of hours did not constitute a changed shift thus not directed at any alteration to the roster - Commission having to resolve "what constituted the rostered shift" in reference to "a changed shift" to refer to shift which has changed from one shift to another noted that a shift may be changed and can be extended without becoming a new 'changed shift' but a "change in hours" - Dismissed - The Civil Service Association of Western Australia Incorporated -v- Chief Executive Officer Disability Services Commission - P 1 of 2000 - FIELDING C - 12/04/00 - Community	1940
STAY OF PROCEEDINGS	
⁴ Application for stay of operation of the whole of the Order (80 WAIG 671) - Appeal was against a declaration of unfair dismissal and an order for compensation - President found that balance of convenience favoured applicant because there was a lack of objection from respondent to the application and was satisfied that applicant faced financial difficulties and the probability that compensation would not be recovered with alacrity - Stay Granted - East Kimberley Aboriginal Medical Service -v- The Australian Nursing Federation, Industrial Union of Workers Perth - PRES 2 of 2000 - SHARKEY P - 03/04/00 - Medical	1753
⁴ Application for stay of operation of decision (80 WAIG 623) pending appeal to Full Bench - Applicant was required to establish that the balance of convenience favoured it and that there was a serious issue to be tried, namely, that should applicant's appeal succeed the result would be nugatory by its inability to recover monies paid to respondent - Respondent argued that there were no serious issues to be tried and gave evidence of assets, income and lack of debt - President found that balance of convenience favoured a stay until respondent's cross-appeal regarding reinstatement is resolved and ordered the monies to be paid into and held on trust - Ordered Accordingly - YMCA of Perth -v- Mr M Cousins - PRES 3 of 2000 - President - SHARKEY P - 18/04/00 - Community Services	1759
SUPERANNUATION	
Application re alleged denied contractual entitlements - Applicant sought alleged denied superannuation entitlements - Applicant argued that upon resignation he received monies from his superannuation benefit less than his contribution, which is set out in the contract of employment - Applicant further argued that the Commission ought to order the respondent to pay to him directly the difference between what he received from the superannuation fund upon his resignation and what he estimates the respondent would have had to contribute to the fund - Commission examined the evidence and in particular the Trust Deed and found the applicant's superannuation entitlement upon resignation is defined by the Trust Deed and not by the level of contribution to the scheme - Commission determined that even if the respondent had paid into the superannuation scheme the alleged agreed amount the applicant would have not received a greater amount - Commission found that it did not have the authority to order the respondent to pay that difference to the applicant - Commission determined that it could not order for denied contractual benefits due to the terms of the "Trust Deed" and had no authority to order for the difference between the amount paid by the respondent and the amount agreed to be paid into the fund - Dismissed - Mr GD Saunders -v- Woodroffe Industries Pty Ltd - APPL 572 of 1999 - BEECH C - 18/01/00 - Sheet Metal Fabrication	413
Application for unfair dismissal - Applicant argued dismissal was unfair - After he declined the Respondent's request to be a Director, he was treated differently, had no performance indicators and received little guidance and administrative assistance - Claimed non award contractual benefits of one week's wages and superannuation "as agreed" - Respondent argued Applicant was dismissed for poor work performance and misconduct - Commission found that the employment relationship was irretrievable as it became necessary to have the Police involved and act as intermediaries - As the Respondent had good cause to bring about the termination there was no substantive unfairness - As the termination was justifiably summary the contractual benefits claimed were not owed to the Applicant - Further, the Applicant's Representative confirmed that the superannuation benefit claimed arose from statute and not from contract of employment - Dismissed - Mr GF Burke -v- Sovereign Cove Pty Ltd & Others - APPL 1779 of 1998 - SCOTT C - 18/02/00	619
Appeal against Decision of Commission (80 WAIG 252) re Unfair dismissal and contractual entitlements - Appellant argued Commission erred in calculating annual salary, redundancy and compensation after finding appellant to have proven his claim - Full bench reviewed authorities and found Commission to have erred in the calculation of appellants redundancy and compensation and varied the Order in the first instance to reflect findings - Upheld - Mr K Thompson -v- Gregmaun Farms Pty Ltd aff Chris & Evelyn Henderson Family Trust trading as C & E Henderson - FBA 1 of 2000 - Full Bench - SHARKEY P/SCOTT C/KENNER C - 11/04/00 - Agriculture	1733
⁴ Application for stay of the operation of Orders 2 and 3 issued by the Commission - The appeal was against the decision issued on 8/7/99 (80 WAIG 1622) and was about the compensation ordered - The Applicant filed an affidavit and testified that it had a genuine concern that if the back-pay was paid to the respondent there would be considerable difficulty recovering that back-pay if the appeal was successful - President found that the balance of convenience favoured the respondent as it suffered financial hardship because of the dismissal - Further, there was no evidence that he would be unable to repay the back-pay money particularly since he had been reinstated in his employment - President further found that there was no need for a stay of the operation of the decision - The equity, good conscience and the substantial merits of the case favoured the respondent - Dismissed - City of Geraldton -v- Mr DJ Cooling - PRES 4 of 2000 - President - SHARKEY P	1751

CUMULATIVE DIGEST—continued

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SUPERANNUATION—continued

- Application re denied contractual entitlements - Applicant sought entitlements relating to wages, superannuation and expenses incurred during the course of his employment both in Australia and China - Applicant further argued, though he was assured by the Respondent that he would be reimbursed all expenses incurred, he did not receive these even after numerous telephone discussions - Respondent's representative initially denied Applicant's claim but later during the course of evidence conceded - Commission found the commencement date of Applicant's employment was different from that of the amended claim, that the claim in respect of superannuation contributions appeared to be based on the statutory contribution required under the Superannuation Guarantee (Administration) Act 1992, therefore it was not recoverable as a contractual benefit and ordered Respondent to forthwith pay Applicant the sum of \$19,897.00 less tax - Granted - Mr JW Greenhalgh -v- Buon Amici WA Pty Ltd - APPL 1903 of 1999 - KENNER C - 30/05/00 - Restaurant..... 2719

SUPPLEMENTARY AND SERVICE PAYMENTS

- Application re contractual entitlements - Applicant argued that benefit due under contract of employment was denied and sought payment for anticipated increase in salary following each appraisal after 3rd and 12th months - Respondent argued that applicant was offered only \$40000 per annum (Exhibit L1 re document titled Terms and Conditions of employment prescribed this) - Commission found that applicant provided no evidence to support claims made in application and would be dismissed, and ordered costs against applicant for unnecessary expense to defend action - Dismissed - Mr DA Chevin -v- Wiltrading (WA) Pty Ltd - APPL 1543 of 1997 - PARKS C - 22/01/98 - Unknown Industry 1621
- Application re contractual entitlements - Applicant sought incentive payments (commission) for placement of stock as investment agent - Respondent argued resignation from employment disqualified applicant from receiving claimed amount - Commission found terms relied upon in the application's case were clearly inconsistent with the express terms of the contract that provided for discretionary incentive payments, with no incentive payments to staff who had given notice of termination - Commission determined that the applicant's resignation ceased respondent's obligation to pay incentive payments - Dismissed - Ms M Ladner -v- J B Were & Son/Were Holdings Ltd - APPL 1735 of 1999 - SMITH, C - 03/05/00 - STOCKS AND SHARES..... 1960

TERMINATION

- Appeal against decision of the Full Bench (79WAIG2305) - Appellant argued that the Commission's discretion miscarried in that it failed to have regard to any relevant factor, apart from the alleged assault itself - Appellant further argued that the Commission should have taken into consideration, the immediate acknowledgement of fault by Mr Baron, minor nature of the alleged assault, the alleged assault was incidental to the physical nature of the assault, the unblemished service and exemplary character of the employee and whether there was any other appropriate way with which the misconduct should have been dealt - IAC examined the evidence and referred to the law and determined that the nature of the offence was not minor due to the matter of maintaining authority within the employment relationship and occurred as a result of anger and insubordination - Dismissed - AUTO, FOOD, METAL, ENGIN UNION -v- Dampier Salt Operations Ltd - IAC 7 of 1999 - Industrial Appeal Court - - 13/12/99 - Mining..... 4
- Application re unfair, harsh or oppressive dismissal pursuant to Section 18 of the Workplace Agreements Act 1993 - Industrial Magistrate examined the evidence and circumstances of the termination and determined that the employer had lawfully terminated the employment of the complainant due to economic considerations - IM further found that the complainant was offered a lesser position but refused the offer based on the grounds of qualifications - Dismissed - Ms MJ Exell -v- Maylands Child Care Centre - CP 282 of 1998 - Industrial Magistrate - Tarr IM - 03/11/99 - Child..... 215
- Application for alleged unfair, harsh or oppressive dismissal pursuant to Sections 18 and 51 of the Workplace Agreements Act 1993 - Industrial Magistrate established that the complainant bears the onus of proving on the balance of probabilities that she was unfairly harshly or oppressively dismissed - IM examined the evidence which detailed that the complainant received numerous written complaints from passengers and work colleagues concerning her performance and attitude - Further evidence detailed that the complainant was counselled concerning her performance and attitude - IM found that the complainant was justly terminated and was afforded procedural fairness - Dismissed - Ms H Inglis -v- Decron Hospitality Management - CP 267 of 1998 - Industrial Magistrate - Cicchini IM - 22/12/99 - Rail 219
- Application for unfair, harsh or oppressive dismissal pursuant to Sections 18 and 51 of the Workplace Agreements Act 1993 - Evidence was presented concerning the attitude of the complainant and the complainant's relationship with her distributors - IM examined the evidence and noted that the complainant appeared to be in denial of reasonable requests and observations - IM determined that the complainant was unwilling to alter her manner and left the defendant with no choice but to dismiss her for fear of jeopardizing the defendants business interests - Dismissed - Mrs JS Marshall -v- Ascent Business Directions Pty Ltd - CP 102 of 1999 - Industrial Magistrate - Tarr IM - 03/11/99 - Personal & Household Good W/sg 221
- Application re alleged unfair dismissal - Applicant argued that at no time was he advised by the Respondent company that his continued employment was at risk; that his performance was not satisfactory or that he was not sufficiently performing his duties and that disciplinary action may be taken against him - Applicant further argued that he was advised two days before the termination that action would be taken if his performance did not improve over the next few weeks, therefore dismissal was unfair - Respondent argued that as Credit Manager, Applicant had a duty to manage his section and staff in the best interests of the employer's business, however, Applicant failed to do this in that he refused to accept lawful instructions; displayed a level of insolence to the director and senior management and despite being warned to 'lift his game' and frequent verbal requests, Applicant had failed to establish control and reporting methods - Commission found on evidence that Applicant was advised that he had to 'lift his game' and that in all circumstances did not consider that Applicant had discharged the onus of showing that the action taken by the Respondent to have been unfair, harsh or oppressive - Dismissed - Mr MA Byrnes -v- Austcomm Tele Services Pty Ltd - APPL 1613 of 1997 - COLEMAN CC - 11/11/99 - Telecommun..... 224
- Application for unfair dismissal and allegedly denied contractual entitlements-Applicant argued dismissal was harsh, oppressive and unfair and the Respondent failed to afford him benefits to which he is entitled under his contract of employment-Respondent argued Commission did not have the jurisdiction to deal with the claim as the parties were bound by the Federal Award-Commission found it had jurisdiction to hear and determine the matter-Declared accordingly - Mr T Clayton -v- City of Canning - APPL 1011 of 1998 - SMITH, C - 22/12/99 - Community..... 229
- Application for unfair dismissal and allegedly denied contractual entitlements-Applicant summarily dismissed for alleged gross misconduct-As no answering statement or appearance by the Respondent Commission did not have evidence which would allow it to conclude misconduct occurred-Commission heard evidence of Applicant and found dismissal unfair and although his employment would have terminated anyway he had suffered emotionally and financially- Commission granted four weeks wages as compensation in addition to entitlements-Granted. - Mr GS Cumming -v- Pro-Team Clean - APPL 1101 of 1999 - BEECH C - Cleaning..... 231
- Application re unfair dismissal-Applicant was employed as a bag wrapper on \$8.50 an hour-Applicant argued dismissal was unfair as his employment terminated after he telephoned work 1/2 an hour after normal starting time to say he was unable to attend-Applicant sought one weeks pay in lieu of notice-Respondent argued that it was embarrassed by the Applicant's non-attendance and had to employ others at over time rates to do the work the applicant should have done -Commission found the applicant did not inform the respondent of his intentions until well after he was due to start work, showed a complete disregard for his obligations to attend work and it was the applicant who, in effect, brought the employment to an end by his misconduct in this respect and was not entitled to pay in lieu of notice-Dismissed. - Mr M Drain -v- Koast Corporation Pty Ltd - APPL 1615 of 1999 - FIELDING C - 13/12/99..... 233

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- Application for unfair dismissal and allegedly denied contractual entitlements—Applicant argued dismissal was harsh, oppressive and unfair because he was not given an opportunity to explain any of the allegations against him and further argued that he was not given any notice and after some brief discussions his employment was terminated -Respondent argued Applicant was unprofessional and was dismissed for misconduct—Commission found that the Applicant's conduct was so seriously in breach of his contract of employment that by standards of fairness and justice the Respondent was no longer bound to continue the contract and the claim of unfair dismissal was dismissed -Dismissed - Mr GR French -v- Bruce Hawley formerly T/A For - Parts - APPL 205 of 1999 - BEECH C - Motor 234
- Application re unfair dismissal - Applicant argued his termination was harsh, oppressive and unfair for alleged misbehaviour - Respondent argued that the applicant had being warned on previous occasions concerning his undesirable behaviour and as it continued he was dismissed - Commission examined the evidence and accepted that the employer had previously warned the applicant concerning his behaviour and referring to the law determined the respondent had not abused his right to dismiss - Dismissed - Mr MA Fuschbichler -v- Marla Gurru Gurru Pty Ltd - APPL 766 of 1999 - KENNER C - 24/11/99 - Services to Transport 239
- Application re alleged denied contractual entitlements on the grounds of unfair dismissal - Applicants argued that at all material times, they were employees of the Respondent and sought relief in the form of reinstatement or alternatively compensation - Further, Applicants sought to recover pro rata annual leave and a payment equivalent to three months salary in lieu of reasonable notice due to them under their contract of service - Respondent argued that as Applicants were partners in the business, Commission lacked jurisdiction to hear and determine the matter therefore it should dismiss applications - Commission reviewed authorities and found on evidence that no employee/employer relationship existed and that claims for denied contractual entitlements should be dismissed - Commission further found that the Supreme Court has held that a contractual entitlement to annual leave cannot be converted to a cash entitlement in the absence of some express provision in that regard and that there was no such provision in the King Sound Barging Partnership Agreement, therefore Applicants may well have a claim pursuant to provisions of the MCE Act 1993, and if that was the case, it is a matter which is beyond Commission's jurisdiction - Ordered Accordingly and the question of costs adjourned sine die - Mr PI Pederson -v- Carpentaria Marine Pty Ltd ACN 010 996 273 - APPL 2201,2202,2204,2205 of 1998 - FIELDING C - 13/12/99 - Marine 248
- Application re alleged unfair dismissal - Applicant argued that she was dismissed for racial reasons, involvement in internal disputes and was selected for dismissal on an arbitrary basis - Respondent argued that the applicant was dismissed for the purpose of reducing financial operating costs - Commission examined the evidence and referred to the law and determined that the employers decision was based on economic and length of service considerations - Dismissed - Ms C Phylactou -v- St Andrew's Grammar (Under the Auspices of the Hellenic Community of WA Inc) - APPL 88 of 1998 - PARKS C - 22/12/99 - Education. 248
- Application re unfair dismissal - Applicant claimed that she was unfairly dismissed from her teaching position by being made redundant - Applicant argued that her services should have being retained due to her particular skills in early childhood and that another teacher in particular should have being made redundant - Commission examined the circumstances surrounding the applicants termination and determined that the employers selection process for the redundancy was based on the schools needs and did not result in the employee being unfairly dismissed - Dismissed - Ms S Reys -v- Cúlunga Community School Aboriginal Corporation - APPL 588 of 1997 - PARKS C - 22/12/99 - Education 250
- Application re unfair dismissal - Applicant claimed that he was unfairly dismissed on returning to work after being on workers compensation and was informed that there was no work for him - Respondent argued the applicant was not dismissed and was offered alternative work as the cleaning contract was not renewed - Respondent further argued that the applicants work performance had being previously questioned - Commission examined the evidence and preferred the evidence of the respondent - Dismissed - Mr N Saifee -v- Mastercare Property Services Pty Ltd - APPL 1167 of 1999 - FIELDING C - 17/12/99 - Restaurant 251
- Application for unfair dismissal and allegedly denied contractual entitlements—Applicant argued that he was dismissed when he was about to commence annual leave -Counsel for the Applicant argued that the financial circumstances of the Respondent was not grave therefore there was no reasonable cause to dismiss the Applicant and further argued Respondent did not discuss redundancy or what measures were there to avoid or minimise its effects -Respondent argued Applicant's position became redundant and that was the reason for the termination—Commission found that the reasonable notice required to be given was 4 months and that the dismissal was on account of redundancy after 12 months service and as such the Applicant was entitled to the combined benefit of payment in lieu of notice and a redundancy payment—Granted—Counsel for the Applicant raised the issue of compensation on account of alleged injury and the Commission found that for the combination of factors that caused stress the Applicant should receive a compensation for injury—Supplementary reasons issued—Granted. - Mr K Thompson -v- Gregmaun Farms Pty Ltd atf Chris & Evelyn Henderson Family Trust trading as C & E Henderson - APPL 161 of 1999 - PARKS C - 29/12/99 - Farming 252
- Application re unfair dismissal - Applicant claimed that the employee in question was harshly, oppressively and unfairly dismissed in relation to an incident concerning the removal of fuel from the respondent's premises - Commission examined the evidence, referred to the law and specifically the circumstances of termination - Commission found that the employer's inquiry was flawed in that it failed to take into account relevant evidence - Granted - AUTO, FOOD, METAL, ENGIN UNION -v- WesTrac Equipment Pty Ltd - CR 283 of 1999 - KENNER C - 07/12/99 - Services to Transport 259
- Application re unfair dismissal - Applicant claimed on behalf of its member that he was harshly, unfairly and unreasonably dismissed from his employment and sought an order reinstating the employee without loss of wages and entitlements - Respondent argued that the employee was terminated as a consequence of his ongoing substandard performance - Commission examined the evidence and noted that the preliminary enquiry undertaken in fact became the final enquiry which resulted in the employee's dismissal - Commission determined that the enquiry process was flawed for this reason and for the incorrect use of informal conversations - Commission found Applicant Unfairly Dismissed, however, reinstatement impractical and granted compensation—Granted in part loyment then it ought not to due to the difficulty in redeploying blue collar employees within the public sector - Commission determined that even if it had jurisdiction to hear and decide on the matter of redeployment that it would not decide to as this would be unfair as it would result in a "contrived" redeployment - Commission further determined that the employee failed to mitigate his loss which was taken into consideration in granting the quotum - Granted - COMM, ELECTRIC, ELECT, ENERGY -v- South-East Metropolitan College of TAFE - CR 208 of 1999 - SCOTT C. - 06/12/99 - Education 262
- Application re alleged unfair dismissal - Applicant Union sought payment of monetary compensation for loss and injury suffered by its member as a consequence of the dismissal - Respondent argued that Applicant's performance was unsatisfactory therefore dismissal was justified - Commission found that although Applicant had been wrongly accused of unsatisfactory work performance on occasions, there are those where he has exercised poor judgement and displayed unsatisfactory workmanship - Further, Commission was satisfied that there was adequate reason for the Respondent to decide that over time Applicant had not performed his duties in the manner, and to the standard, that was reasonably required, therefore Respondent had justifiable reason to exercise its right to terminate the employment relationship - Dismissed - LIQUOR, HOSPITALITY & MISC -v- Sin-Aus-Vale Pty Ltd T/A Red Castle Motel - CR 115 of 1999 - PARKS C - 16/12/99 - Hospitality 264
- Application re arbitration concerning termination—Applicant argued she should have received a redundancy payment as per an agreement between herself and the General Manager of the respondent - Respondent argued the claim had been withdrawn and there was no matter to be arbitrated, even if it was found that it had not been withdrawn the applicant should not receive the payment either legally or as a matter of fairness as she had no entitlement to a payment—Commission found the Applicant was not made redundant and the respondent had wished to retain her services - Commission found also the Applicant resigned and no unfairness had arisen - Decision issued. - Ms J O'Donoghue -v- Argyle Diamond Mines Pty Ltd - WAG 7 of 1998;APPL 286 of 1999 - GREGOR C - 22/12/99 - Diamond 381

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- Application re unfair dismissal and alleged denial of contractual benefits - Applicant claimed that he was forced to resign from his employment therefore he was unfairly dismissed and the dismissal breached his contract of employment - Applicant argued that upon receiving an amended written warning he was informed by an employee of the respondent that he would receive further warnings to excite his resignation or justify dismissal and was subsequently informed that it would be advisable to seek alternative employment during the period of his planned annual leave - Applicant further argued that it was agreed with the respondent that if he were to resign the respondent would agree to pay his removal costs - Respondent argued that there was no desire for the applicant to resign however his performance was questioned - Commission examined the evidence and preferred the evidence of the respondent and determined that the applicant had resigned without duress and therefore had not been unfairly dismissed - Commission further determined that as the applicant had resigned on his own volition the respondent had not breached the contract of employment and therefore no monies or benefits were owing - Dismissed - Mr DM Betteridge -v- Spotless Services Australia Limited T/A SSL Nationwide Field Catering - APPL 1677 of 1998 - PARKS C - 20/01/00 - Retailing 383
- Application re unfair dismissal and denied contractual benefits - Applicant claimed that she was unfairly dismissed and the respondent did not pay her benefits she was due - Respondent argued the applicant was dismissed for unsatisfactory performance - Commission was not satisfied that the evidence as recollected by the applicant was accurate - Dismissed - Ms R Bull -v- Mobile Communications - APPL 1671 of 1998 - PARKS C - 21/01/00 - Telemarketing 385
- Application re unfair dismissal - Applicant claimed that he was harshly, oppressively and unfairly dismissed - Applicant sought compensation in lieu of reinstatement in the event that the Commission granted the claim - Applicant argued that he was effectively forced to resign as a result of the attitude of a manager of the respondent - Applicant further argued that the manager in question placed more work pressure on him as a result of a letter regarding concerns applicable to the manager - Respondent rejected that the applicant was dismissed - Respondent argued that it did not want the applicant to resign however the issue of the applicants performance had being raised - Commission examined extensive evidence and referred to the law and determined that it was not able to conclude that the applicant was dismissed by the respondent in order to find jurisdiction in the matter - Dismissed - Mr R Furfaro -v- The Wrigley Company Pty Ltd - APPL 2098 of 1998 - KENNER C - 10/12/99 - Wholesaling 387
- Application re unfair dismissal - Applicant argued that he was unfairly dismissed as his personal circumstances required him to take time off to attend to his daughters medical condition and the respondent had terminated his employment however allowed him to select the manner thereof - Respondent argued that it had informed the applicant of the difficulties they were experiencing due to his adhoc absences and offered compassionate leave - Commission determined that due to the circumstances the dismissal of the applicant was not unreasonable - Dismissed - Mr T Harper -v- Toms Tyres & Other - APPL 1946 of 1997 - PARKS C - 19/01/00 - Vehicle 395
- Application re unfair dismissal - Applicant argued that he was unfairly dismissed and sought compensation for loss of income - Respondent argued that the applicant was not dismissed from employment as the relationship which had existed between the parties was not that of employee and employer but that of contractor and principal - Respondent further argued that the application itself was lodged out of time allowed by s.29 of the IR Act 1979 - Commission determined that the application was lodged out of time and for this reason alone the application failed - Commission further determined that the relationship between the applicant and respondent was based on a written signed agreement that created a contractor principal relationship - Dismissed - Mr RC Heron -v- White Caps Fishing Company Pty Ltd - APPL 1649 of 1996 - PARKS C - 25/01/00 - Fisheries.. 398
- Application re unfair dismissal - Applicant argued he was unfairly dismissed and seeks compensation equivalent of 6 weeks pay - Respondent argued that Applicant had failed to develop the business - Commission found on evidence the Applicant had discharged the onus of establishing that he was unfairly dismissed - Commission found reinstatement was impracticable and ordered compensation be paid within 28 days of the date of Order - Ordered Accordingly - Mr JC Jamison -v- Cenva Pty Ltd t/as SMC Vending Operations - APPL 1293 of 1999 - COLEMAN CC - 12/01/00 - Retailing 401
- Application to join the (proposed respondents) as respondents to the substantive applications - Applicant argued that the application did not involve an abuse of the Commission's power and further argued that by reason of the relationship between the respondent and the proposed respondents that they may have in their possession, power or control, documents that are relevant to the substantive application - Proposed respondents argued that this application was not an industrial matter and therefore the Commission did not have jurisdiction and further argued that the matter is an abuse of the Commission - Commission referred to the law and the IR Act 1979 and determined that the matter is an industrial matter - Commission then dealt with the matter of abuse of the Commission - Commission referred to the law and determined that as the intent of the application is solely based on obtaining discovery of documents that the proposed respondents deny possessing, the application to join these respondents is an abuse - Dismissed - Mr ML Peterson -v- Wynnes Pty Ltd - APPL 366,367 of 1999 - KENNER C - 15/12/99 - Meat 402
- Application re unfair dismissal and alleged denied contractual entitlements -Applicant claimed that she was unfairly dismissed and as a result denied benefits under her contract of employment - Commission established in conference that the two claims for the benefits of wages in lieu of notice, and pro rata annual leave are based upon the provisions of the Shop and Warehouse (Wholesale and Retail Establishments) Award which applied to the applicant's employment - Applicant argued that she was dismissed for failing to sign a workplace agreement - Applicant further argued that the respondent advertised for new employees one week before her dismissal - Respondents argued that it had dismissed a number of employees in other stores which had ceased operation due to economic considerations - Commission examined the evidence and determined that the applicant did not discharge the onus of proof of Unfair dismissal - Dismissed - Mrs IM Lawson -v- Night Crest Pty Ltd As Trustee For The King Kong Sales Unit Trading As King Kong Sale - APPL 475 of 1999-PARKS C-21/09/99-Retail Trade..... 404
- Application re alleged unfair dismissal - Applicant argued that she was forced to resign and sought compensation by way of relief - Respondent argued that Applicant was not terminated but she resigned - Respondent argued that Commission lacked jurisdiction to hear and determine the matter, as Applicant was a party to a collective workplace agreement which did not contain a provision for Commission to deal with application of this nature and moreover, if Commission did have jurisdiction, the dismissal was not unfair because Applicant simply was not dismissed - Commission reviewed authorities and found on evidence that it did not have jurisdiction to deal with the matter, as in its view, the provisions of the workplace agreement operate in the circumstances to preclude it from dealing with the matter and therefore, dismissed the application - Dismissed - Ms A Mladineo -v- BRL Hardy Wine Company CRN 008 273 907 - APPL 1954 of 1999 - FIELDING C - 03/02/00 406
- Application re unfair dismissal and alleged denial of contractual benefits - Applicant claimed that he was unfairly dismissed and denied contractual entitlements and sought reinstatement or compensation for loss of wages - Applicant argued that his services were terminated and he was in effect told to leave that day - Respondent argued that the applicant's services were terminated due to the need to reduce the workforce by reason of redundancy and denied that the dismissal was unfair - Respondent further argued that the contractual benefits claimed do not arise under his contract of employment but are benefits under the relevant award - Commission examined the evidence and found that the applicant was asked to work out the period of notice and decided not to - Commission further determined that the applicant was redundant to the respondents needs and therefore his dismissal unfair - Dismissed - Mr P Morete -v- Unique Metal Works Pty Ltd - APPL 1855 of 1996 - PARKS C - 18/01/00 - Sheet Metal Fabrication..... 407

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Application re unfair dismissal and contractual entitlements - Applicant alleges he was owed wages for work conducted at the respondents nightclub and was unfairly dismissed - Respondent disputes Applicant is owed money as he never asked the applicant to perform skilled tradesmen's work and denies the unfair dismissal claim - Commission determined the contract entitlement claim for wages could not be substantiated - Commission reviewed authorities and determined the respondent dismissed the applicant in the heat of the moment in circumstances the respondent could not justify - Commission found applicant to have been unfairly dismissed, reinstatement impractical and issued compensation - Granted in Part - Mr S Naumovski -v- Neil Temple Scott / IV Entertainment Pty Ltd - APPL 1285 of 1998 - GREGOR C - 23/12/99 - Entertainment..	408
Application re alleged denied contractual entitlements - Applicant argued she was denied contractual entitlements - Respondent argued that the applicant was employed subject to the Plaster, Plasterglass and cement Workers' Award and the Commission could not enforce award entitlements - Commission found Applicants employment to be covered under the award and determined that it did not have jurisdiction to enforce the award provisions - Dismissed - Ms VK Parker -v- PFK Pty Ltd T/A Limestone Replicas - APPL 347 of 1997 - PARKS C - 31/12/99 - Cement	411
Application for contractual entitlements and unfair dismissal - Applicant argued that he had been denied benefits arising from his contract of employment - Commission found on evidence that Applicant was unfairly dismissed - Commission noted its records in respect of attempts to communicate with Respondent, the evidence of the Applicant in regards to his employment and found re -employment or reinstatement was impracticable, and ordered compensation be paid to Applicant - Ordered Accordingly - Mr DC Rath -v- Avtec Security Services Pty Ltd - APPL 1215 of 1999 - SCOTT C - 28/01/00 - Securities	412
Application re alleged harsh, oppressive and unfair dismissal - Applicant sought compensation for loss of past earnings, future loss of earnings and for injury and loss of reputation in the sum of \$70,916.40 capped at the equivalent of six months salary at the sum of \$54,000.00 in accordance with s.23A of the Act - Respondent argued that it needed to reduce its operation costs including salaries, therefore, 3 pathologists were asked to reduce their sessions including the applicants - Respondent, further argued that agreement regarding Applicant's sessions could not be reached, therefore termination was warranted - Commission reviewed evidence, authorities and declared that Applicant had been unfairly dismissed and that reinstatement was not available - Commission decided not to assess the amount of loss or injury until it had all of the information - Commission will list the matter in due course to give Applicant opportunity to provide evidence of her loss in order that compensation can be calculated - Granted - Dr LA Smyth -v- St John of God Health Care Inc (ARBN 051 960 911) - APPL 1973 of 1998 - GREGOR C - 24/12/99 - Health	414
Application re harsh, oppressive and unfair dismissal and alleged denied contractual entitlements - Applicant argued he was unfairly dismissed and was owed contractual entitlements - Respondent argued the applicant was a casual employee and the contract of employment could be terminated with one hours notice - Commission noted the intention of the employer was to employ the applicant as a casual although the circumstances of the relationship was such that the employee had a promise of continuing work provided the employer was satisfied with the applicants performance - Commission determined the applicant was not a casual employee and the matter should be re-listed for hearing - Ordered accordingly - Mr BF Stokes -v- The Typing Centre of Perth Pty Ltd (008 740 350) t/as "Australian International College of Commerce" - APPL 779 of 1999 - BEECH C - 23/12/99 - Education.....	416
Application re unfair dismissal - Matter remitted to the Commission as a result of appeal to the Full Bench to consider the question of relief after Full Bench found the Applicants dismissal to be harsh, oppressive and unfair - Applicant and respondent appeared before the Commission - Respondent elected after a short period of time to no longer maintain his presence - Commission noted that in general the respondent's behaviour was most offensive and further noted the Commission's inability to deal with the respondents behaviour due to the repeal of former s.101 of the IR Act 1979 in 1984, regarding contempt in the face of the Commission - Commission heard evidence and submissions from the applicant and noted that the applicant did not wish to seek reinstatement due to the work environment - Commission determined that the applicant did suffer loss for a brief period and awarded monies accordingly - Order given extemporaneous - Ms GL Tan -v- Gabriels' Cafe - APPL 1842 of 1998 - KENNER C - 15/12/99 - Food Retailing	418
Application re unfair dismissal and alleged denied contractual benefits - Applicant sought compensation and the recovery of alleged benefits due according to fixed term contract - Applicant argued that he did not do anything wrong - Respondent argued that the applicant was not unfairly dismissed as the applicant conducted private tuition for payment in contravention to a direction of the employer and contravened a number of other directions - Commission examined the evidence and found that the applicant had committed misconduct by disobeying a general instruction in conducting private tuition and in combination with disobeying a further instruction determined that the respondent was justifiable in terminating the applicant's employment - Commission noted that it was not argued before it that the form of dismissal was either summary or unlawful and assumed therefore that there was acceptance that the payment made to the applicant purportedly in lieu of notice reflected the lawful manner in which the contract of employment might be terminated - Dismissed - Mr DW White -v- Satellite Investments Pty Ltd T/A Perth Heat - APPL 320 of 1997;APPL 2157 of 1998 - PARKS C - 31/01/00 - Sport.....	418
Appeal against decision of Commission (79 WAIG 2632) re unfair dismissal and contractual entitlements - Appellant argued Commission erred on numerous points and sought the decision to be set aside and the matter re-listed for hearing or at the very least compensation to be recalculated - Full Bench found there was no error in the Commissions findings - Dismissed - Robert Blakeman ATF the Blakeman Family Trust T/A McBride's Collectables and Giftware -v- Ms J Gudgin - FBA 19 of 1999 - Full Bench - SHARKEY P/FIELDING C/KENNER C - 22/02/00 - Personal & Household Good Rtlg	457
Application re unfair dismissal - Applicant sought re -employment or compensation - Applicant argued he was offered a transfer of employment, and accepted, but was subsequently told he was not required for work - Respondent argued a commercial decision based on project requirements led to termination, and applicant was compensated by de -mobilisation back to Canberra - Commission found respondent made a bone-fide commercial decision based on project requirements, that applicant was compensated by re -mobilisation back to Canberra and applicant understood termination was subject to one weeks notice - Dismissed - AUTO, FOOD, METAL, ENGIN UNION -v- Monadelphous Group of Companies - CR 252 of 1999 - KENNER C - Construction.....	611
Application re unfair dismissal - Applicant argued that the 'Agency Agreement' constituted a contract of service, and not a contract for service - Question re jurisdiction was heard as a preliminary matter - Respondent argued that as Applicant was an agent, and that no employer/employee relationship existed, Commission lacked jurisdiction to deal with the matter - Commission reviewed authorities and found on evidence that the nature of the relationship of the Applicant to the respondent was one of joint contractor - Dismissed. - C Bennier -v- Totalisator Agency Board of Western Australia - APPL 263 of 1992 - PARKS C - 03/03/00 - Betting	614
Application for unfair dismissal-Applicant argued dismissal was harsh, oppressive or unfair because after a false accusation of stealing and charges pending by Police, he was dismissed without warning, discussion or talk and was seeking compensation-Respondent argued Applicant was not dismissed but not placed on the work roster pending the outcome of charges laid against him-Commission found that the fact the Applicant was not rostered for work amounted to a dismissal which attracted the Commission's jurisdiction-Further found that the Applicant failed to provide the Respondent an explanation prior to the termination -Also, the inquiry undertaken gave rise to reasonable grounds on the information available to the Respondent at that time to hold the view that the Applicant was guilty of misconduct-Dismissed. - Mr PE Bloomer -v- Ameerah Pty Ltd and Lozellia Pty Ltd T/A Porters Liquor Warwick - APPL 2275 of 1997;APPL 933 of 1998 - PARKS C - 29/02/00 - Liquor and General Store	617

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- Application for unfair dismissal-Applicant argued dismissal was unfair- After he declined the Respondent's request to be a Director, he was treated differently, had no performance indicators and received little guidance and administrative assistance-Claimed non award contractual benefits of one week's wages and superannuation "as agreed" -Respondent argued Applicant was dismissed for poor work performance and misconduct- Commission found that the employment relationship was irretrievable as it became necessary to have the Police involved and act as intermediaries- As the Respondent had good cause to bring about the termination there was no substantive unfairness -As the termination was justifiably summary the contractual benefits claimed were not owed to the Applicant-Further, the Applicant's Representative confirmed that the superannuation benefit claimed arose from statute and not from contract of employment-Dismissed - Mr GF Burke -v- Sovereign Cove Pty Ltd & Others - APPL 1779 of 1998 - SCOTT C - 18/02/00 619
- Applicant re unfair dismissal - Applicant alleged unfair dismissal for repeating derogatory comments to another worker allegedly made by respondent - Applicant further stated respondent had said "catch you later" at end of discussion on this incident and understood this to mean dismissal - Respondent argued that he always used that phrase to end phone conversations and there was no intention to dismiss the applicant as he had no problem with his quality of work and would employ him again - Applicant does not seek reinstatement or compensation but wants to ensure that respondent "doesn't get away with what he did in this case" - Commission believes there was a misunderstanding in communication - Dismissed - Mr RS Chadwick -v- PL & SC Worthington - APPL 197,522,1578,1635 of 1999 - GREGOR C - 31/01/99 - Construction Trade Services 622
- Application re unfair dismissal - Applicant argued he was dismissed after a purported restructure and the hours usually worked by him allocated to other members of staff - Respondent denies that the applicant was unfairly dismissed and moreover, says that there was no dismissal to excite the jurisdiction of the Commission - Counsel for the respondent further argued the applicant was employed on a casual basis, however due to a restructure the applicant was encouraged to apply for two newly created positions, which he elected not to, and thus it is said by reason of his decision there is not a dismissal - Commission found the applicant was an employee with an ongoing obligation to the respondent and also found the applicant had been dismissed unfairly - Commission further found reinstatement impracticable and issued 26 weeks wages as compensation - Ordered accordingly - Mr M Cousins -v- YMCA of Perth - APPL 473 of 1999 - PARKS C - 29/02/00 - Community Services 623
- Application re Costs - Applicant had earlier failed in his claim for unfair dismissal and was aware Commission had granted costs against him but made no attempt at rebutting the many items of costs claimed by the Respondent - Commission in handing down Order for costs was mindful of Applicant is a lay person - Granted in Part. - BM Drake -v- B.P. Refinery (Kwinana) - APPL 640 of 1994 - PARKS C - 01/03/00 - Mining 625
- Application re unfair dismissal - Applicant denied that he was engaged on a probationary period and argued that he was unfairly dismissed - Respondent argued that Applicant was on a 3-month probationary period - Commission found that Applicant did not perform to the levels required by the Respondent employer, that there were occasions he was counselled to that effect and that in some areas the Applicant continued to perform in an unsatisfactory manner - Commission found that Respondent employer had shown that there was a valid reason to terminate Applicant's employment and that Applicant had not discharged the onus to show that Respondent exercised its right to do so unfairly - Dismissed - Mr JA Evans -v- Busselton Beach Resort - APPL 932 of 1995 - PARKS C - 28/02/00 - Accommodation 627
- Application re unfair dismissal - Applicant argued she was a victim of sexual harassment from a fellow employee and unfair criticism from her direct supervisor - Respondent denied the claim and opposed the order sought and argued that from commencement of Applicant's employment, members of staff made claims of irrational behaviour and laziness - Commission was convinced that during Applicant's employment, she did not always follow directives, she created disruptions within the workplace and threatened a fellow employee with a knife - Commission found in all the circumstances and evidence into account that Respondent was entitled to dismiss Applicant summarily - Dismissed - Ms G Forsyth -v- St Barbara Mines Limited - APPL 961 of 1994 - PARKS C - 01/03/00 - Hospitality 627
- Application re unfair dismissal - Applicant sought Order against Respondent in respect of alleged unfair dismissal - Respondent, by notice of answer and counter proposal, challenged the jurisdiction of the Commission - Commission found the application was lodged well beyond the 28 days statutory limitation and it was plainly not competent and hence no good purpose would be served dealing with the other jurisdictional challenges made on behalf of the Respondent - Dismissed - Mr PM Golding -v- Telstra Corporation Limited - APPL 1915 of 1997 - PARKS C - 28/02/00 - Telecommun..... 628
- Application for unfair dismissal and allegedly denied contractual entitlements-Applicant argued dismissal was unfair and was seeking relief by way of reinstatement -Respondent argued Applicant was not its employee but was employed by its subsidiary company registered in South Africa and challenged the jurisdiction of the Commission as the relevant provisions of the Industrial Relations Act is limited in their operation to employment within this State -Commission found that it did not have jurisdiction to deal with the matter because it was not a matter which falls within the ambit of an industrial matter as envisaged by the Industrial Relations Act 1979-Further found that the dismissal did not occur and in the circumstances it was not necessary to consider the Commission's jurisdiction-An Order was issued dismissing the application. - Mr C Harris -v- Brandrill Limited ACN 061 845 529 - APPL 1265 of 1999 - FIELDING C - 15/02/00 - Mining 629
- Application re unfair dismissal - Applicant sought payment of \$300.00 per week due under his contract of employment and further amended the claim to \$15600.00 by leave of the Commission - Respondent argued that the contract of employment with the Applicant entitled him to the payment of a set weekly wage and that throughout his employment he was paid that wage in full - Respondent denied that it failed to pay the Applicant a \$300.00 a portion of that wage each week - Commission was satisfied that the \$300.00 per week to which Applicant claimed that he had not received was in fact paid as part of the wages placed in an envelope, sealed and the "payslip" attached to it; that no person was able to, or did, tamper with that sealed envelope before Applicant took possession thereof each week - Commission found it incredible that a person who had been promised in effect \$15600.00 per year of employment and who was otherwise paid \$24024.00 in the year ending 30 June 1996 would not have pursued a failure by the employer to pay around 39% of the promised remuneration - Dismissed - Mr R Holland -v- Carony Pty Ltd - APPL 1959 of 1998;APPL 86 of 1999 - PARKS C - 28/02/00 - Meat 632
- Application re unfair dismissal - No appearance on behalf of the Applicant - Counsel for Respondent argued that application be dismissed as there are no appearance on behalf of the Applicant - Commission found in the absence of Applicant to prosecute his claim, application should be dismissed as Applicant had received adequate notice to appear and be heard - Dismissed - Mr L Humphreys -v- Ambassador Cycles - APPL 644 of 1997 - PARKS C - 10/07/97 - Retail Trade 634
- Application re unfair dismissal - Applicant argued Respondent failed to pay him benefits due under his contract of employment and sought compensation by way of declarations and orders from Commission that he be paid in total a sum of six week's wages - Respondent denied that it unfairly dismissed Applicant or dismissed him at all and argued that Applicant abandoned his employment - Commission found that Applicant took leave and never returned to his employment - Commission further found that Applicant had not proved the onus of establishing there was conduct by the employer through Mr Angel which constituted a dismissal, that Applicant had not retained a current licence because of his intention to pursue a sales roles, therefore, absent that licence, he was not permitted to perform that part of his usual duties which involved the application of the pesticides - Dismissed - Mr AD Hyland -v- New Image Holdings Pty Ltd (ACN 009 336 636) T/A Barclays Pest Management Services - APPL 1570 of 1998 - PARKS C - 18/11/98 - PESTICIDES 634

CUMULATIVE DIGEST—continued

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- Application re alleged unfair dismissal and denied contractual entitlements - Applicant argued he suffered economic loss and sought reimbursement for goods and services purchased for the Respondent's business and outstanding overtime - Respondent argued Applicant failed to recover bad debts, that it never intended to terminate Applicant's employment but to offer a lesser position, which never eventuated as Applicant walked out - Commission found that the economic loss suffered by the Applicant was to a significant extent brought upon himself by his petulant actions and the claim for harsh unfair dismissal was rejected - Commission found that the claim for overtime was not a contractual benefit under the statute and cannot be pursued in Commission's jurisdiction and that there was no entitlement expressed in the contract of service to ground Applicant's claim for reimbursement for goods and services purchased - Dismissed - Mr B Kangatheran -v- ICENet Pty Ltd & Other - APPL 2173 of 1997 - PARKS C - 03/03/00 636
- Application re unfair dismissal - Applicant claimed she was unfairly dismissed - Respondent argued Applicant failed to respond adequately to the areas that were identified she lacked in performance - Commission found Applicant was offered employment according to written statement of agreement which the Applicant denies receiving a copy - Applicant was not subject to a period of probation - Obligation for establishing Respondent acted unfairly lay with the Applicant - though Commission found the termination could have been handled better it could not find Respondent had acted unfairly - Dismissed - Ms NL Jeppesen -v- Sea Eagle Holdings Pty Ltd T/A Buffet House - APPL 1017 of 1997 - PARKS C - 21/08/97 - Hospitality 636
- Application re unfair dismissal and contractual entitlements - Applicant argued for damages for unfair dismissal, recovery of moneys on items of expenses and payment in lieu of notice - Respondent denied the claim and asserted applicant resigned on her own volition - Commission found that the items on which applicant claimed recompense on a prima facie case were not shown to be from applicants contract of employment and as such the respondent was not required to answer those allegations - Further the respondents attempts to meet applicant after she abandoned her employment with a view to addressing her concerns were to no avail and as such the application would be dismissed - Dismissed - Mrs DR Karnicki -v- Michele's Creative Music - APPL 1508 of 1998 - PARKS C - 21/08/97 - Educational 639
- Application re unfair dismissal - Applicant argued that he was harshly, oppressively and unfairly dismissed and sought compensation - Respondent contested and denied the claim - Counsel for Applicant argued that increased stress was placed upon Applicant through the implementation of the new quality assurances procedures and unrealistic completion dates, provided to the house owners by Respondent, for some houses within Applicant's responsibility - Respondent argued there was a greater onus upon building supervisors to be more accountable for their working due to the implementation of an accredited quality assurances system and that Applicant had failed to comply with these procedures - Commission found that Applicant clearly failed to adhere to company policy and procedures; that prior to termination, Applicant was given a fair and reasonable hearing and an opportunity to put to the Respondent any explanation or mitigating circumstances in relation of his conduct - Commission was far from satisfied that in this case the Respondent had abused its right to terminate the employment, as a matter of equity and good conscience, and found on evidence that Applicant was not dismissed harshly, oppressively and unfairly - Dismissed - Mr RA Knowles -v- Dale Alcock Homes Pty Ltd - APPL 1959 of 1998; APPL 86 of 1999 - PARKS C - 28/02/00 - Building 640
- Application re contractual entitlements - Applicant's claim for commission is in three parts - First part was for commission on sale of three properties at 46.5% and other two parts concerned properties for which rate of commission was separately set - Respondent argued that rate of commission agreed upon on commencement of applicant's employment was 18.6% though no terms of employment were in writing - Commission found that neither party specifically recalled terms of commission structure and further believed that as respondent always paid applicant full commission there was no valid reason why proportionate rates should now be insisted upon - Commission concluded that applicant was owed benefits denied under contract of employment - Ordered accordingly - Mrs SCJ Kouw -v- Rural & Metro Realty Pty Ltd - APPL 359 of 1999 - BEECH C-21/01/00-Property Services 644
- Application re unfair dismissal - Applicant argued the dismissal was a constructive dismissal, not a resignation - Respondent argued the applicant had taken photograph's of furniture for use on her internet furniture sales business site, this was done during business hour's with the reluctant assistance of other staff, after a meeting with the respondent, the applicant resigned her position - Commission found the applicant had failed to establish that she had been constructively dismissed, she had resigned at a meeting with the respondent - Dismissed - Ms S Melville -Main -v- Half Price Pine Furniture - APPL 1047 of 1999 - GREGOR C - 22/02/00 - Sales 648
- Application re unfair dismissal - Applicant claimed dismissal was due to absence from work resulting from an injury suffered during the performance of duties and sought compensation - for the loss of wages since the date of his dismissal - Respondent argued dismissal was due to Applicant's disruptive work behaviour, disinterest and lack of application - Commission was satisfied that absence from work did not influence the decision to terminate and Applicant failed to show that dismissal was unfair - Dismissed - Mr F Nammour -v- Combined Metal Industries - APPL 383 of 1997 - PARKS C - 01/03/00 - Manufacturing Industry 650
- Application re unfair dismissal and contractual benefits - Preliminary point concerning jurisdiction - Commission examined the circumstances regarding the termination of employment and the relevance of the employee's workers compensation case and illness and referred to the law - Commission determined that it lacked jurisdiction due to the application being filed out of time - Dismissed - Mr P Nock -v- Morawa Golf & Bowling Club - APPL 197,522,1578,1635 of 1999 - GREGOR C - 01/02/00 - Sport and Recreation 651
- Application re unfair dismissal-Applicant argued dismissal was unfair and was seeking monetary compensation-Respondent argued dismissal was justified on the grounds that the Applicant failed to address discrepancies in stock, did many things without the authorisation of the Respondent including the cancellation of the licence under which one business was operating, took personal possession of items from the Respondents stock without paying and was on suspension before the dismissal-Commission found that the relationship between the parties deteriorated after the suspension and the judgmental errors made by the Applicant as Manager showed a degree of incompetence, therefore the Respondent had justifiable reason to terminate Applicant's employment-Further, the Applicant was paid full salary and other entitlements throughout the period he was prevented from working-Dismissed from working-Dismissed. - Mr DC Osborne -v- Penny & Barry Kirby Of Braeside Nominees - APPL 2128 of 1998 - PARKS C - 02/03/00 - Pawn broking 653
- Application re unfair dismissal - Applicant argued dismissal was harsh and unfair and sought reinstatement - Respondent argued contract was temporary and the short notice was compensated by payment in lieu of notice - Commission found there was a breakdown of trust between parties and applicant was never warned about poor work performance, Commission also found Applicant had suffered shock and injury arising from dismissal and awarded compensation but reinstatement impracticable - Granted in part - Mr J O'Keefe -v- City of Albany - APPL 2282 of 1998 - BEECH C - 10/02/00 - Local Government 655
- Application re unfair dismissal - Applicant was dismissed from her employment due to unacceptable behaviour - Respondent accepted that the applicant was dismissed and argued that the applicant's employment was based on a separate contract for each occasion work was performed - Commission examined the evidence and determined that the applicant's employment contract was based separately on each occasion work was performed and therefore there was no claim to unfair dismissal - Dismissed - Ms L Piscioneri -v- Claremont Yacht Club Inc - APPL 1933 of 1997 - PARKS C - 08/04/98 - Sport and Recreation 659
- Application re Unfair Dismissal - Applicant argued notice of termination given during annual leave does not take effect until leave has come to an end - Respondent argued application was filed after 28 days from date of termination rendering application invalid - Commission found that the date of termination started from when the applicant finished his annual leave and therefore it had jurisdiction to deal with the claim - Ordered accordingly - Mr I Rebello -v- New Image Holdings Pty Ltd T/A Barclays Pest Control - APPL 1497 of 1998 - COLEMAN CC - 24/02/00 - PESTICIDES 660

CUMULATIVE DIGEST—continued

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TERMINATION—continued

- Application re unfair dismissal - Applicant argued that he was engaged on a part-time basis and denied that he was informed at the time of engagement that he would be on a 3 months probationary period - Respondent argued that Applicant was engaged on a casual basis and that it was a term of the contract of employment that his engagement was subject to a trial or probationary period of 3 months - Commission found that Applicant was subject to a 3 months probationary period and that his employment was terminated well within that period - Commission was satisfied that the Respondent was entitled to bring the employment to an end as it did - Dismissed - Mr PJ Scott -v- Canon Foods Pty Ltd - APPL 1161 of 1997 - PARKS C - 02/10/97 - Sales 662
- Application re unfair dismissal - Applicant claimed any instructions for rectifying his behaviour had not been put to him clearly - Respondent argued Applicant had been counselled regarding unacceptable conduct, absences and tardiness - Failure to rectify behaviour would render his job in jeopardy - Commission found Applicant an architect of his own misfortune - Respondent had afforded Applicant with ample opportunity to rectify his behaviour before deciding to dismiss - Respondent did not act unfairly - Dismissed - Mr MJ Vallelonga -v- Tierney Contracting Pty Ltd - APPL 2060 of 1997 - PARKS C - 11/03/98 - General Construction 663
- Application re unfair dismissal claim for contractual entitlements - Applicant was unable to attend hearing - Commission's original hearing date had to be rescheduled twice with respondent's co-operation to suit applicant but each time applicant sent late notification of inability to attend - Commission felt this was unacceptable as with the passage of time, quality of evidentiary material suffers - Respondent claimed costs in this matter but Commission argued that circumstances in this case cannot be said to be extreme and costs will not be awarded - Dismissed - Mr PT Scully -v- Coastal Business Centre Ince - APPL 197,522,1578,1635 of 1999 - GREGOR C - 09/02/00 - Education 664
- Application re unfair dismissal - Applicant sought reinstatement - Commission found that in an application such as this one, the obligation lies with the Applicant to prove that there was an unfairness in the dismissal and that in its view, Applicant had failed to discharge the onus of establishing that he was unfairly dismissed - Dismissed - Mr S Tapiki -v- Morton's Specialist Seed & Grain Merchants - APPL 1377 of 1997 - PARKS C - 06/10/97 - Sales 665
- Application re unfair dismissal - Respondent denied claim arguing dismissal was due to unsatisfactory work practices - Commission faced with directly conflicting testimony found Applicant had completed his probation however preferred evidence given by respondent - Commission further found respondent had valid reason to dismiss the applicant and he had not shown that the respondent had acted unfairly in the exercise of its right to terminate his services - Dismissed - Mr C Van Der Neut -v- Canon Foods Pty Ltd - APPL 836 of 1997 - PARKS C - 26/08/97 - Services 666
- Application re alleged unfair dismissal - Applicant alleged he was unfairly dismissed and sought compensation for his dismissal - Applicant argued further that his termination was unexpected - Respondent denied dismissal was unfair and stated that applicant's performance had been unsatisfactory and the applicant had been admonished twice for using verbally abusive language - Commission was satisfied that dismissal was unfair as nothing was said to applicant to indicate his performance was unsatisfactory following a demotion for a previous discrepancy, but, agreed with respondent that reinstatement was impractical as applicant had secured employment elsewhere, therefore applicant was entitled to compensation - Granted. - Mr W Wedgwood -v- Sherrin Hire - APPL 1464 of 1999 - FIELDING C - 14/02/00 - Retail Trade 666
- Application for unfair dismissal-Applicant argued dismissal was unfair because he was dismissed before commencing work and claimed a redundancy package both by way of compensation and contractual entitlement-Respondent denied that a contract of employment was entered upon with the Applicant-Commission found that there was no need to review the whole of the evidence for the reason that, were the Commission to find that the Applicant had been engaged as an employee by the Respondent, the claim that the contract of employment entitled him to two weeks' wages in lieu of notice had not been substantiated - No evidence had been provided that there was an alternative condition that provided the claimed entitlement - Dismissed. - Mr BD Wilson -v- Barmenco Pty Ltd - APPL 2301 of 1997 - PARKS C - 11/03/98 - Mining 667
- Application for unfair dismissal-There was no appearance by the Applicant at the conciliation conference-Applicant also failed to attend the Court hearing to show cause why the application should not be dismissed-Therefore the Commission dismissed the application for the reason that the Applicant had been afforded adequate opportunity to attend and be heard in relation to his application but failed to respond to correspondence and the notices forwarded to him and to attend proceedings before the Commission-Dismissed. - Mr PA Wright -v- CA & CK Plane - APPL 1068 of 1997 - PARKS C - 23/07/97 668
- Application re unfair dismissal- Applicant argued dismissal was harsh, oppressive and unfair and seeks compensation for lost earnings- Respondent argued the employment contract made it clear the respondent could terminate employment after the 3 month probationary period, in which time the applicants performance proved unsatisfactory resulting in dismissal- Commission found the probationary period had passed at time of dismissal, further the respondent was neglect in informing the applicant about performance- Granted - The Australian Nursing Federation, Industrial Union of Workers Perth -v- East Kimberley Aboriginal Medical Service Aboriginal Corporation - CR 172 of 1998 - PARKS C - 28/02/00 - Health 671
- Conference referred re dismissal of an employee - Applicant union argued the dismissal of an employee Mr(S) for punching a colleague Mr(W) was unfair and the class of persons engaged in railway gang work are more likely to engage in conduct of the type which would not be tolerated in other employment situations - Further the Applicant union argued both employees were equally involved and it was unfair to reprimand one and dismiss another - Respondent argued the necessity to provide a safe workplace and that it would not tolerate that type of behaviour - Commission found Mr(S) to have punched Mr(W) in the face with no warning and that the respondent acted appropriately when it dismissed Mr(S) - Dismissed - Australian Railways Union of Workers, West Australian Branch -v- Western Australian Government Railways Commission - CR 314 of 1994 - PARKS C - 28/02/00 - Rail Transport 673
- Application re S27(1)(a) to dismiss application No. 95 of 1994 (unfair dismissal claim) - Commission found that no proof of service had been filed in relation to interlocutory applications made on behalf of Ms Davey and no request had been lodged requesting the Commission schedule proceedings in relation to her primary application - Commission further found application No. 95 of 1994 to have suffered from inactivity and neglect and it would be unreasonable to require Aitkins Liquor Store to defend the claim and accordingly application No. 95 of 1994 would be dismissed - Ordered accordingly - Aitkins Liquor Store (Victoria Park Stores) -v- Ms LN Davey - APPL 461 of 1995; APPL 2322 of 1997 - PARKS C - 01/03/00 - Food, Beverage and Tobacco Mfg 678
- ²Appeal against Decision of Commission (79 WAIG 3114) re unfair dismissal - Application in first instance dismissed on preliminary matter - Appellant argued the commissioner erred in a number of findings relating to the dismissal of the application on the grounds the incorrect respondent was named - Appellant further argued the commissioner erred in not permitting the applicant to amend the original application to reflect correctly the employer/s - Respondent referred to authorities and argued this was a case of a wrong party being named, not a misdescription of the party's name and should be dismissed - Full Bench reviewed authorities and found the commissioner had erred in not allowing an amendment to the name of the respondent and remitted the application back to the commission at first instance to be listed for hearing and determination according to law - Upheld in Part - Ms PK Rai -v- Dogrin Pty Ltd - FBA 27 of 1999 - Full Bench - SHARKEY P/FIELDING C/GREGOR C - 07/03/00 - Accommodatn, Cafes&Restaurants 1375
- ²Appeal against Decision of Commission (79 WAIG 3461) re unfair dismissal - Appellant argued Commissioner erred on a number of grounds one being that reinstatement of the former employees was impracticable - Full Bench found the commissioner was open to conclude the relationship between the former employees and the appellant had broken down and under the circumstances reinstatement was impracticable and that no other grounds of appeal were made out - Dismissed - Solid Concepts Pty Ltd ACN 009 301 553 -v- LIQUOR, HOSPITALITY & MISC - FBA 23 of 1999 - Full Bench - SHARKEY P/SCOTT C/WOOD,C - 31/03/00 1381

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- Application re Unfair Dismissal - Applicant argued that dismissal had been unfair as respondent had selected him for redundancy while others employed later than him were offered training which improved their chances for being retained - Respondent argued that applicant's employment was casual and also felt that applicant was not suitable to undertake training - Respondent further argued that applicant was given a suitable reference because he was reliable and worked well which would indicate there was no animosity between the parties - Commission was satisfied that respondent's decision to terminate applicant was caused by a downturn in a highly seasonal business and also based on operational needs of the business and skill levels of the employees - Commission found no evidence that dismissal was harsh, oppressive or unfair - Dismissed - Mr JA Adams -v- Morton's Specialist Seed & Grain Merchants - APPL 376 of 1999 - SCOTT C. - 13/03/00 - Services to Agriculture 1614
- Application re Unfair Dismissal & Contractual Entitlements - Applicants, permanent bar manager and casual cook, argued that they were unfairly dismissed and sought compensation in lieu of reinstatement/re-employment, loss of income for period of unemployment following dismissal, difference in earnings between reduced levels of income earned since dismissal and for injury arising from stress of being terminated - Applicants also claimed that no warnings were given on their performances or a reasonable period of notice given before dismissal - Respondent denied that applicants were terminated by him and argued that termination was affected by hotel manager after a discussion with him on the state of high percentages, and was surprised when dismissal occurred - Respondent further argued that dismissal was consistent with industry standard and the bar manager should have realised his job was in jeopardy when he did not get the hotel manager's job - Respondent also stated that he was not impressed with the chef's cooking and had criticism of both applicant's dress standards though he had not mentioned it to them - Commission found that parameters of employment were not set nor were percentage targets explained to applicants and rejected respondent's view that the bar manager should have realised his job was in jeopardy when not appointed as hotel manager, but found that respondent took the opportunity to re-employ a former chef when option presented itself - Commission was not satisfied recognition should be given to emotional distress claimed by applicants and felt that as reinstatement was impracticable, ordered compensation to terminated bar manager equivalent to 2 wks pay and to the cook for 90 hours work at \$12.74 per hour - Issued accordingly - Mr JS Barcello -v- Denmark Holdings Pty Ltd - APPL 607,608 of 1999 - COLEMAN CC - 13/03/00 - Hospitality 1615
- Application re unfair dismissal - Applicant conceded acting in a threatening way on the spur of the moment and claimed unfair dismissal and sought reinstatement - Respondent Committee in the Applicant's absence decided to terminate services - Commission found Applicant was not afforded natural justice and therefore dismissal was unfair - Commission also found reinstatement impracticable but awarded compensation - Granted in part - Mr R Bennell -v- Goomburrup Aboriginal Corporation - APPL 1259 of 1997 - PARKS C - 04/11/97 - Community Services 1617
- Application re unfair dismissal seeking reinstatement - Applicant argued that he had been unsuccessful in obtaining alternative employment and had suffered financially since his dismissal - Respondent opposed applicant's claim for reinstatement and agreed to pay compensation instead - Commission found that dismissal was procedurally unfair and that reinstatement was not impracticable - Granted - Mr DJ Cooling -v- City of Geraldton - APPL 2151 of 1997 - BEECH C - 10/02/00 - Local Government 1622
- Application re Unfair Dismissal - Applicant argued that dismissal was harsh as at time of dismissal he had family and personal problems and had lost his motor vehicle driver's licence which was not disclosed to respondent - Respondent argued that City of Perth was exposed to significant insurance risk by applicant continuing to drive their vehicles for 2 months after losing his driver's licence - Commission found that applicant's action amounted to misconduct but respondent did not suffer any real loss - Commission further found applicant's conduct, considering his age, limited range of skills and that he had given the City of Perth 22 years of almost excellent service, together with family circumstances at time of misconduct to be uncharacteristic - Commission considered applicant's evidence in deciding this matter and established that respondent's decision to dismiss applicant may not have been unjust or unreasonable but was harsh in the circumstances, which could result in much distress to applicant - Commission concluded that re-employment into a new position and not reinstatement was appropriate, as applicant had regained his driver's licence, but no order will be made for compensation or continuity of service - Ordered accordingly - Mr PG Crawford -v- City of Perth - APPL 967 of 1999 - BEECH C - 08/03/00 - Local Government 1625
- Application re unfair dismissal - Applicant argued that she was dismissed over the phone and by letter, while on annual leave, despite there being no warnings or complaints against her, thus the dismissal being unfair and harsh - Respondent argued that it was during the applicants annual leave that they were made aware of the problems and complaints, these related to irate phone calls regarding property management and jobs not done and rental cheques not banked, which it claims is a breach of the Real Estate and Business Agents Act, 1978 - Commission found the evidence of the respondent was creditable and that the applicant failed to show that the respondent had dismissed her unfairly or harshly - Dismissed - Ms KM Dell -v- Mystical Holdings Pty Ltd - APPL 98 of 1999 - BEECH C - 19/04/00 - Real Estate Agency 1626
- Application re unfair dismissal - Applicant argued he was given assurance by Respondent that his job was secure and sought reinstatement - Respondent argued that over time the amount or work had been significantly reduced to a point where the school had made the decision to make the position redundant - Commission found that Respondent did not follow its own policy in that it did not have discussions that were required to be held between it and the Applicant by virtue of the contract of employment in accordance with sections 5 and 41 of the Minimum Conditions of Employment Act 1993 - Commission found that Applicant was unfairly dismissed, that reinstatement was impracticable as position no longer exists and ordered compensation of \$3,464 be paid for loss and injury caused by the dismissal - Ordered Accordingly - Mr AR Ellery -v- St John's School - APPL 950 of 1999 - BEECH C - 24/02/00 - Gardening 1628
- Application re unfair dismissal - Commission examined the preliminary issue of jurisdiction as the Respondent argued that it was not the employer - Applicant argued that as he was an apprentice and the respondent due to its participation in his apprenticeship indenture was the employer - Commission examined the evidence and referred to the law and determined that the respondent was not the employer - Dismissed - Mr A Follows -v- Western Australian Turf Club - APPL 358 of 1999 - BEECH C - 28/03/00 - Sport and Recreation 1633
- Application re unfair dismissal - Applicant stated employment relationship was governed by a registered state workplace agreement - Respondent pleaded that the agreement expressly provided for a three month probationary period and the application was incompetent and the Commission lacked jurisdiction to deal with it - Commission requested applicant to file the registered workplace agreement with the commission to determine whether Commission had jurisdiction to deal with the application - In the absence of production of the workplace agreement and the non appearance of both parties to the listed proceeding Commission dismissed application for lack of jurisdiction - Dismissed - Ms J Isitt -v- Top Optical Pty Ltd - APPL 1557 of 1999 - GREGOR C - 07/03/00 - Optometrics 1635
- Application re denial of contractual entitlement - Applicant sought 2.5% commission denied on sale of a new home - Respondent argued that application be dismissed because applicant's claim was against incorrect entity, but Commission was satisfied that employer's name had been misdescribed rather than claim made against wrong employer - Applicant argued that he was required to sell new homes to prospective customers and discussed with one such customer who did not want to build the respondent's style of project home, a "sketch plan" for building a new home but did not provide the respondent with any signed contract - Respondent denied that any sketches or drafting work for construction of a new home had been done and stated that unless applicant secured a signed preparation of plans agreement, respondent had no customer - Respondent also declared that applicant was not an employee so the claim was beyond Commission's jurisdiction, and that as applicant did not procure a signed building contract or produce quantification of his claim an order should not be made in applicant's favour - Commission established that applicant was an employee of the respondent and not an independent contractor, that the applicant failed to obtain a signed building contract and receipt from respondent as progress payment and also failed to particularise or quantify the claim - Commission was therefore not satisfied that applicant was entitled to commission in present circumstances and concluded that it should be dismissed - Dismissed - Mr D Lamont -v- Trendsetter Homes - APPL 474 of 1999 - KENNER C - 09/03/00 - Real Estate Agency 1637

CUMULATIVE DIGEST—continued

TERMINATION—continued

Application re unfair dismissal and alleged denied contractual benefits seeking compensation - Respondent denied applicant was dismissed and asserted that applicant resigned and that applicant received all entitlements due to him - Commission found that second, third and fourth claims itemised by applicant were seeking enforcement of the award which cannot be prosecuted before the Commission and were struck out - Commission further found that applicant had resigned - Dismissed - Mr AJ Leiskalns -v- Goldrush Holdings Pty Ltd T/A Secureforce International - APPL 195 of 1997 - PARKS C - 01/03/00 - Security	1640
Application re Unfair Dismissal - Applicant argued that dismissal was unfair and that respondent failed to give notice of termination or one week's wages in lieu, to which he is entitled under clause 10 of the award relating to contract of service - Respondent argued that applicant's services were terminated because he refused to satisfactorily explain absence on 13 December 1996 - Respondent further argued that applicant had previously misled him and offered to resign if not granted a week's leave, and then almost immediately commenced work with a competitor - Commission found that though applicant was not obliged to submit detailed information on personal matters that required absence from work, it was not convinced that respondent's right to terminate applicant was unfair - Dismissed - Mr M McGrath -v- Temkara Pty Ltd T/A Economic Pest Control - APPL 1873 of 1996 - PARKS C - 24/02/97 - PESTICIDES	1641
Application re unfair dismissal - Applicant argued her termination was harsh, oppressive or unfair as she terminated her employment because she was scared to go back to work - Respondent argued that the applicant was employed on a casual basis under the award - Commission examined the nature of the employment relationship including the continuous period of thirteen months of service and determined that the applicant was not a casual employee - Commission further examined the evidence and found that the applicant had by her own actions left the respondents employ - Dismissed - Ms DJ O'Connor -v- Patricia Alma Clarke / Ian Donald Clarke of Clarke's Lunch Bar - APPL 1420 of 1999 - WOOD,C - 03/03/00 - Cafes	1643
Application re unfair dismissal - Applicant argued that she was unfairly dismissed by the respondents on her return from maternity leave and no notice of termination had been received - Respondents argued that their business was sold on 30 November 1998 but had advised the new owners that applicant would be returning to the Centre - Respondents also arranged for applicant to meet new owners at the end of November 1998 - Commission found that applicant was not terminated by respondents but by new owners of the business and that application could not succeed because applicant incorrectly named employer who terminated her - Dismissed - Mrs A Radwell - Rogers -v- Mr Samuel + Mrs Angela Bailey - APPL 516 of 1999 - SCOTT C. - 07/03/00 - Community Services	1645
Application re unfair dismissal - Applicant sought reinstatement to a driller's job he asserts he was offered and accepted in a telephone interview - Respondent argued that was not so because company practice was to interview all prospective applicants by phone and have them undergo the induction while selection is continuing - Commission found that as no offer of employment was made or accepted there was no dismissal from employment - Dismissed - Mr DJ Shaw -v- Brandrill Limited ACN 061 845 529 - APPL 80 of 1995 - PARKS C - 01/03/00 - Other Mining	1646
Application re Unfair Dismissal - Application Granted (80 WAIG 414) compensation to be assessed - Applicant sought compensation on loss of earnings following termination as well as for injury and loss of reputation, mental stress and anxiety - Respondent argued that loss of earnings should be diminished by amount earned by applicant after termination - Commission found that applicant's dismissal was not unexpected as it came after an extended period of negotiation by lawyers and further found no medical evidence of depressive state suffered by applicant - Commission therefore ordered respondent to pay applicant compensation of \$43,743 - Granted - Dr LA Smyth -v- St John of God Healthcare Incorporated - APPL 1973 of 1998 - GREGOR C - 13/03/00 - Health Services	1649
Application re unfair dismissal - Applicant initially sought reallocation of the matter on the apprehension of bias because of Commission's awareness of failed negotiations - Respondent opposed this and advised that respondent company had ceased to trade - Applicant then sought to add 2nd respondent to application and requested adjournment of hearing date to consider related costs and also because she was getting married - Respondent opposed adjournment as it would cause real inconvenience - Commission found it was inappropriate to adjourn at this point as both parties were aware of hearing dates since early December 1999 and associated costs - Commission concluded that applicant must have known her wedding date for weeks and that balance of convenience rested with respondent not with applicant and denied adjournment - Dismissed - Ms CM Staphorst -v- Captains Girl MV Pty Ltd T/as Captains Girl MV - APPL 423 of 1999 - SCOTT C. - 21/03/00 - Water Transport	1650
Application re unfair dismissal - Applicant alleged he was unfairly dismissed from employment - Commission's initial attempt at conciliating between Parties did not take place as Applicant was in Tasmania attending to urgent family matters - Commission found the many endeavour to establish contact with the Applicant in an attempt to facilitate a conciliation meeting had failed - Commission was satisfied that both the Respondent company and the public purse ought not be put to any further expense in relation to this application - Dismissed - Mr AJ Teller -v- A Exclusive Timber Blinds and Shutters Company - APPL 2009 of 1997 - PARKS C - 22/07/98 - Manufacturing Industry	1652
Application re unfair dismissal - Applicant argued that he was dismissed and had not resigned - It was further argued by the Applicant that he was verbally abused by his supervisor and that he had merely walked off from the situation - Respondent argued that there was no basis for the claim by the applicant that he had been unfairly dismissed and that evidence of witnesses showed that the applicant resigned - Commission examined the evidence and referred to the law and determined that the applicant had resigned - Dismissed - Mr B Zoccoli -v- Mercy College - APPL 629 of 1999 - GREGOR C - 28/03/00 - Education	1654
Application re unfair dismissal - Applicant argued that a former employee reverting back to full time employment was the reason for the termination of contract - Respondent argued the reason was a downturn in the number of enrollments, restructuring and the temporary nature of the contract - Commission found contract contained terms which indicated employment was for a far longer duration and that no discussion had taken place with the applicant facing redundancy and dismissal was unfair and awarded wages in lieu of notice and compensation - Granted - LIQUOR, HOSPITALITY & MISC -v- Chesterfield Child Care Centre Pty Ltd - CR 130 of 1999 - BEECH C - 10/03/00 - Community Services	1669
Application re unfair dismissal - Applicant argued that she had never received any warnings or complaints about her work performance or attendance, that it was only after she did not sign a workplace agreement that she was dismissed - Respondent argued dismissal was warranted due to several performance warnings and absenteeism - Commission found the applicants evidence to be creditable and the dismissal to be unfair, however, reinstatement was inappropriate, therefore compensation should be granted. - Granted - LIQUOR, HOSPITALITY & MISC -v- Professional Enterprises - CR 146 of 1999 - GREGOR C - 17/04/00 - Cleaning	1672
Conference Referred re dismissal and reinstatement of employee, a dismissal notice be quashed and the recognition of a group of employees as a core group - Applicant withdrew second and third claims and were seeking the reinstatement of a former employee and argued that the employee in question ought to have been retained in preference to two other employees as a result of a re-structure - Commission examined the evidence and determined that the applicant failed to show that the selection process applied by the respondent caused her to be wrongly selected for dismissal - Dismissed - Metals and Engineering Workers' Union - Western Australian Branch -v- Skilled Engineering Pty Ltd - CR 59 of 1994 - PARKS C - 28/02/00 - Brewing	1676
Appeal against Decision of Commission (80 WAIG 252) re Unfair dismissal and contractual entitlements - Appellant argued Commission erred in calculating annual salary, redundancy and compensation after finding appellant to have proven his claim - Full bench reviewed authorities and found Commission to have erred in the calculation of appellants redundancy and compensation and varied the Order in the first instance to reflect findings - Upheld - Mr K Thompson -v- Gregmaun Farms Pty Ltd att Chris & Evelyn Henderson Family Trust trading as C & E Henderson - FBA 1 of 2000 - Full Bench - SHARKEY P/SCOTT C./KENNER C - 11/04/00 - Agriculture	1733

CUMULATIVE DIGEST—continued

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TERMINATION—continued

- Application re contractual entitlements - Applicant sought orders pursuant to clause 48(3)(a) of the Metropolitan Health Service Board AMA Medical Practitioners Agreement 1999, or alternatively to resolve the dispute pursuant to clause 48(3)(a) or sections 23(1) and s29(1)(b)(ii) of the I.R. Act - Applicant further argued that to undertake work was a benefit to which she was entitled under her contract of employment - Respondent argued that clause 48(3) of the Agreement only enables "parties" identified as the MHSB and the W.A. Branch of the AMA Inc to bring matter to the Commission and that Applicant is not a party to the Agreement - Respondent argued s.29 of the Act sets out those matters which the Act enables employees to bring to the Commission, that this matter is not such a matter and there was no benefit under Applicant's contract of employment to enable her to bring a matter of the provision of work to the Commission - Commission reviewed Agreement, I.R. Act, Authorities and was not satisfied that to undertake work was a benefit to which Applicant was entitled under her contract of service - Commission concluded that what the Applicant sought does not constitute a benefit to which she was entitled under her contract of employment, nor was the Applicant able to bring the matter to the Commission pursuant to clause 48 of the Agreement - Dismissed - Prof LA Cala -v- Metropolitan Health Service Board & Other - APPL 300 of 2000 - SCOTT C. - 17/04/00 - Health 1946
- Application re unfair dismissal - Applicants argued that further employment was not offered after they had to be back-paid at the behest of their union for being underpaid and sought compensation in lieu of reinstatement - Applicants' Council argued that both Applicants were dismissed unfairly because they were denied natural justice, that the Respondent was under an obligation to inform Applicants as soon as the decision was made to make them redundant and discuss with them alternatives to redundancies or ways that the effect of the redundancies upon them could be minimised - Respondent argued they did not have any particular jobs on upon which the Applicants could be employed - Commission found that even if Respondent had given that opportunity to both Applicants, it would not have made any difference as neither Applicants were able to point to any other work which could have been done, or ways that the effect of the redundancies upon them could have been minimised - Commission reviewed authorities and was not satisfied that denial of natural justice was a most significant matter in the context of this case, particularly given that both employees were aware of the nature of their employment and that the job was coming to an end - Commission found Applicants have failed to make out their claims - Dismissed - Mr P Cooper -v- Grove Construction Services Pty Ltd - APPL 384,461 of 1999 - BEECH C - 10/04/00 - Construction 1951
- Application re unfair dismissal and contractual entitlements - Applicant argued that no complaints of unsatisfactory performance had been made and sought 2 weeks additional pay and 4 weeks notice or pay in lieu thereof - Respondent argued that despite providing training, other means of assistance and having discussions with Applicant, he failed to meet the required level of performance - Commission reviewed evidence, authorities and found that Applicant had been given every opportunity to improve his performance and that Respondent was entitled to dismiss Applicant but the circumstances were not such, which would attract a summary dismissal - Commission found that there was no sufficient notice given and ordered that Respondent pay Applicant a further month's pay in lieu of notice - Ordered Accordingly - GF Hulm -v- Western Pacific Holdings Pty Ltd (ACN 009 228 728) T/A Westpoint Star - APPL 197,522,1578,1635 of 1999 - GREGOR C - 03/02/00 - Retail Trade 1954
- Application re unfair dismissal - Applicant argued he was terminated without any explanation after his release from gaol; he was verbally abused for allegedly making derogatory comments about a female employee and a supervisor and he was not given an opportunity to defend his claim - Respondent argued Applicant breached the company's "Work Rule" when he drove a company vehicle without a licence; that Applicant was verbally abusive towards other employees, therefore dismissal was warranted - Commission found that Applicant's dismissal was as a result of his serious misconduct in making the false allegations of sexual impropriety against his Supervisor and a Senior Officer of the respondent, that it was a duty of an employer to act without delay in such circumstances and that happened in this case - Dismissed - Mr HA Humphries -v- Gnulla Aboriginal Employment Corporation - APPL 806 of 1999 - GREGOR C - 12/04/00 - Employment 1957
- Application re unfair dismissal - Applicant argued unfair dismissal seeking compensation in lieu of reinstatement - First Respondent argued that Applicant was employed by Second Respondent, a subsidiary of its company - First Respondent denied any liability in respect of the application - Second Respondent argued that Applicant was guilty of serious breaches of safety procedures in the work place justifying the summary termination of his employment - Commission found given the nature and number of breaches of procedure and the fact that this was not the first occasion on which the Applicant had been admonished for breaches of safety, but in effect the third occasion within a very short time, it was not convinced even on balance that the manner of dismissal was so unfair as to render the dismissal itself unfair - Dismissed - Mr KR Porter -v- Eltin Limited (ACN 009 366 036) - APPL 1295 of 1999 - FIELDING C - 17/04/00 - Mining 1963
- Application re unfair dismissal and contractual entitlements - Applicant argued dismissal was unfair and that he has been denied benefits arising out of his contract of employment - Respondent argued Applicant was informed that he was required for the freeway job; that his refusal to attend work, put the company in a very difficult situation as it was behind in completing the contract to perform the freeway work, therefore dismissal was warranted - Commission reviewed authorities and found that Applicant had not discharged the onus of proof to establish his claim and ordered the application be dismissed - Dismissed - Mr PL Salter -v- Intersectional Linemarkers Pty Ltd - APPL 639,640 of 1999 - SMITH, C - 17/04/200 - Road 1964
- Application re unfair dismissal and contractual entitlements - Applicant sought relief in the form of compensation due under the Federal Workplace Relations Act - Respondent argued Applicant was not dismissed, rather her employment came to an end by the effluxion of time and that Commission lacked jurisdiction to deal with the matter as notice of application was lodged well outside the 28-day limit imposed by s29 of the I.R. Act - Respondent further argued that Applicant was advised that her "Workplace Agreement" would cease, the position would be re-advertised to which she was welcome to re-apply, which she did but was unsuccessful - Commission found on evidence that even if Applicant was dismissed, the Commission was unable to entertain the application and thus insofar as the application was one for relief in respect of unfair dismissal it must be dismissed and the claim for contractual benefits must fail - Commission further found that it does not have authority to entertain a claim to a benefit under the Workplace Relations Act 1996 - Dismissed - Ms E Saunders -v- Parents and Citizens Association - Rockingham Beach Primary School - APPL 179 of 2000 - FIELDING C - 07/04/00 - Education 1967
- Application re unfair dismissal - Applicant argued dismissal was unfair because it occurred while he was on sick leave - Applicant further argued he was notified that he had been dismissed by someone who was not an employee of the Respondent with words to the effect "don't bother coming back" - Respondent argued it decided that the Applicant should not come back to work if his back was still sore and further stated that the Applicant's job was "always available" - Commission found although the Respondent stated the job was "always available" it never informed the Applicant, that Applicant's sore back was merely due to the nature of work he performed - Commission found that Section 170CK of the Workplace Relations Act 1996 renders it an offence against that Act to dismiss an employee by reasons of temporary absence from work because of illness or injury, that the provision of sick leave or the payment of a casual wage which incorporates the notional lack of sick leave entitlement and the fact of legislation providing for workers' compensation, leads inevitably to the conclusion that an employee should not be dismissed merely because he or she has suffered ill-health or injury while at work - Commission found applicant's dismissal was unfair and since reinstatement was impracticable, compensation was granted - Granted - Mr BJ Stone -v- Varrone Plastering - APPL 1192 of 1999 - BEECH C - 04/05/00 - Plastering 1968
- Application re unfair dismissal and contractual entitlements - Applicant sought compensation for dismissal and unpaid contractual entitlements - Respondent argued dismissal was a result of financial circumstances and acknowledged debt of contractual entitlement - Commission found respondent had previously acknowledged the debt to applicant and further dismissal not to have been harsh, unfair or oppressive - Dismissed - Ms F Wilson -v- The Australian Optimal Learning Centre Pty Ltd - APPL 691 of 1999 - GREGOR C - 17/04/00 - Education 1970

CUMULATIVE DIGEST—continued

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TERMINATION—continued

- ¹Appeal against decision of Full Bench (79WAIG3529) re upheld appeal re variation of Mineral Sands Industrial Award 1991 - Question re jurisdiction - Appellant argued that Full Bench erred in law in finding that the subject of the application was an industrial matter, that Full Bench erred in law in holding that an offer by the employer appellants pursuant to the Workplace Agreement Act 1993 was an industrial matter and further, an offer to employ a person under a workplace agreement does not relate to any future or potential employee as defined in the Act and, therefore, is not an industrial matter - IAC allowed the appeal only to the extent of amending par 5 of Full Bench Orders and dismissed the appeal in all other respect - Dismissed - RGC Mineral Sands Ltd & Other -v- CONSTRUCTION, MINING, ENERGY & Others - IAC 10 of 1999 - Industrial Appeal Court - Kennedy J./Scott J./Parker J. - 09/06/00 - Mining 2437
- Application re unfair dismissal - Applicant argued amongst a number of other grounds that he was not adequately trained on the MT3600, therefore his dismissal was harsh, oppressive and unfair - Respondent argued that Applicant made a conscious decision to allow the truck to accelerate to an unsafe speed, the probability for a catastrophic accident involving both Applicant and others was very high, that Applicant was adequately experienced and trained in operating haul trucks to know that this was an unsafe practice and Applicant was an experienced safety representative/acting supervisor, therefore termination was justified - Commission found on evidence that Applicant did commit a serious safety breach and that on the balance of probabilities his dismissal was not harsh, oppressive or unfair - Dismissed - Mr P Baldwin -v- Hamersley Iron Pty Ltd - APPL 1913 of 1999 - BEECH C - 09/06/00 - Mining 2701
- Application re unfair dismissal and contractual entitlements - Applicant argued he was dismissed without notice when he refused to work with faulty equipment and that he was denied a contractual entitlement - Respondent argued that Applicant resigned and equipment was in good working order although did not dispute applicant's claim for an entitlement - Commission found the Applicant was unable to discharge the onus of proof that he was harshly oppressively or unfairly dismissed, however granted the contractual entitlement claim - Ordered Accordingly - Mr C Boulazemis -v- Stand Roston - APPL 810,1521 of 1999 - SMITH, C - 20/04/00 - Shearing Contractor 2705
- Application re unfair dismissal (80WAIG1622) - Further Reasons for Decision re compensation after application was granted - Liberty was reserved to the parties to apply to the Commission if they were unable to agree on the sum of wages Applicant would have earned had he not been dismissed, less monies earned by him since his dismissal - Respondent sought to adduce further evidence on the amount of overtime which would have been worked by Applicant - Commission found in all circumstances that it was appropriate, in the interest of fairness on this issue for further evidence to be received - Commission found the certainty of the evidence produced by the Respondent was more accurate as to the amount of overtime which was likely to have been worked and Ordered Respondent to forthwith pay Applicant the sum of \$59,977.85 - Ordered Accordingly - Mr DJ Cooling -v- City of Geraldton - APPL 2151 of 1997 - BEECH C - 19/05/00 - Local Government 2707
- Application re harsh, oppressive and unfair dismissal seeking re-instatement - Applicant sought leave to discontinue application - Respondent wholly contested the Applicant's claim and did not oppose discontinuance - Respondent argued for costs to be awarded because of the Applicant's lateness in discontinuing application and failing to follow directives of the Commission - Commission found on evidence that Applicant had decided not to proceed at least 2 weeks prior to the hearing date and awarded costs against Applicant - Ordered Accordingly - Mr EH Davey -v- Churches of Christ Homes and Community Services Inc - APPL 1050 of 1999 - KENNER C - 15/05/00 - Community Services 2708
- Application re unfair dismissal and contractual entitlements- Applicant argued that dismissal was harsh, oppressive and unfair and sought compensation for loss of income, contractual benefits including commission on sales and distress caused by dismissal - Respondent argued that applicant resigned and was not dismissed therefore was not unfairly dismissed - Respondent further argued that mileage allowance set out in applicant's contract was higher than award rate as verified by DOPLAR - Commission found on evidence that respondent wanted to terminate applicant and that applicant had discharged the onus of establishing that she was unfairly dismissed - Commission further found that as reinstatement was not practicable, compensation should be awarded for loss of wages, commission on proceeds of all sales and mileage as per contract of employment - Ordered and Declared Accordingly - Ms LM Fischer -v- Sassey Pty Ltd ACN 008 996 156 - APPL 1414 of 1999 - SMITH, C - 05/04/00 - Wholesaling 2713
- Application re unfair dismissal - Applicant argued he was treated unfairly by the retrenchment, that he had signed a contract for 12 months secondment, that the same person who arranged his secondment, terminated it after six weeks - Applicant further argued that he was told in writing that on completion of the secondment he would return to the Respondent but ultimately this was not the case - Applicant argued if there were reasons for the termination of the secondment or why his services were no longer required, it was not discussed with him and that he was not given the opportunity to respond to any allegations against him - Respondent argued that Applicant was the architect of his own misfortune in that his own actions caused the cessation of his secondment, that he was well aware that the Respondent had no work for him other than at the secondment and that Applicant was also well aware that if there had been no secondment he would have been retrenched - Commission reviewed authorities and found that Respondent had an absolute obligation to investigate the circumstances under which the Applicant was asked to leave Solomon, particularly when the ultimate outcome had such a fundamental effect upon the employment contract and because the Respondent did not do this, there had not been a fair go all round, therefore Applicant's dismissal was unfair - Commission further found that re-instatement would not be practicable and ordered that compensation be paid to Applicant - Ordered Accordingly - Mr JR Harris -v- General Gold Resources NL - APPL 1551 of 1999 - GREGOR C - 12/05/00 - Mining 2720
- Application re unfair dismissal - Applicant argued his dismissal was unfair and sought relief by way of compensation - Respondent argued Applicant was on probation and failed to display the necessary skills required to perform duties - Commission found that the manner of dismissal was less than ideal, although the fact the Applicant was on probation was taken into account - Commissions found on evidence that Applicant had not established on the balance of probabilities that his dismissal was unfair - Dismissed - Mr GJ King -v- Midalia Steel Pty Ltd - APPL 1622 of 1999 - FIELDING C - 22/05/00 2723
- Application re unfair dismissal - Applicant argued dismissal was unfair because he was given a brief warning on the afternoon of the breakdown of the company vehicle and a week later was terminated for the reason "careless driving" - Respondent argued that the reason for the termination was the damage to the vehicle because as a Trades Assistant Applicant should have picked up that the motor was overheating and that the Applicant's progress "still had a long way to go" and still had to grasp mechanical concepts - Commission found that no attempt had been made to ascertain the cause of the damage nor allow the Applicant to explain the circumstances and the written report on the incident was undertaken some time after the termination - Commission further found that the Applicant was denied the chance to prove his aptitude and suitability for the position - Granted - Mr AP Lamb -v- Goldfield Contractors WA - APPL 851 of 1998 - COLEMAN CC - 09/06/00 - Vehicle 2724
- Application re unfair dismissal - Respondent argued a Preliminary point re jurisdiction based upon s.170HB of the Workplace Relations Act 1996 - Respondent argued that when Applicant lodged her claim in this Commission, there was in existence a claim under s.170CE of the Workplace Relations Act 1996 alleging that her dismissal was harsh, unjust or unreasonable - Respondent further argued that s.170HB(4) provides that if an application under s.170CE was made in respect of her dismissal, Applicant was not entitled to take proceedings in respect of that dismissal under the I.R. Act 1979 and accordingly, her application should be dismissed - Commission reviewed authorities and found that s.170HB(4) permits the withdrawal of a prior application up until the commencement of the substantive proceedings in the Commission if necessary - Commission found that in that case, Applicant had withdrawn her prior federal application, therefore Respondent had suffered no prejudice whatsoever, that its preliminary point regarding jurisdiction was quite without substance and accordingly it should be dismissed and application be re-listed for hearing and determination - Ordered Accordingly - Ms NR Munteanu -v- QBE Management Services Pty Ltd - APPL 151 of 2000 - BEECH C - 13/06/00 - Insurance 2726

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- Applicant argued he was promised ongoing employment, he was told his dismissal was because he was facing a criminal charge and sought compensation in lieu of reinstatement - Respondent argued Applicant was temporary to cover annual leave periods, that at no time was he offered full time employment, that it did not have the funds to continue employing him and it did not have any alternative work to offer him - Respondent further argued it was inappropriate for it to employ anyone who was facing charges of that nature, as its request for ongoing and increased funding, plus its relationships with the police and other agencies such as the Aboriginal Advancement Council were at risk - Commission found that Applicant was employed on a casual basis, that he was engaged to cover periods of annual leave and that it was clear from the Respondents' financial records that it did not have the funding to offer the applicant ongoing full time employment - Commission further found that because the nature of the charge Applicant was facing, Respondent's tenuous funding arrangements and its relationships with other agencies were at risk if it continued to employ Applicant and as Respondent was unable to offer Applicant alternative employment that did not involve client contact, Applicant's termination was not harsh oppressive or unfair - Dismissed - Mr GA Narkle -v- Director, Noongar Alcohol & Substance Abuse Service (Inc) - APPL 947 of 1999 - SMITH, C - 02/06/00 - Community Services 2728
- Application re harsh, oppressive and unfair dismissal seeking re-instatement without loss of benefits and bonus payment allegedly denied under contract of employment - Applicant argued that termination was on the grounds that he refused to work overtime - Respondent argued by failing to work overtime, Applicant failed to supervise members of his team which resulted in members of his team working without supervision - Commission found amongst a number of reasons that Applicant's refusal to work the overtime constituted a repudiation of an essential term of the contract - Commission further found that Applicant was unable to make out his claim for denied contractual entitlements - Dismissed - Mr JD Powell -v- KDB Engineering Pty Ltd ACN 008 884 482 - APPL 1405 of 1999 - SMITH, C - 16/05/00 - Manufacture..... 2732
- Application re unfair dismissal - Applicant argued that he was unfairly dismissed and sought compensation for loss of income - Respondent argued dismissal was warranted because applicant was abusive to customers on 3 occasions - Commission found that applicant received no counselling or warnings for alleged abusive behaviour on previous occasions and his actions appeared to be consistent with his responsibilities as an employee - Commission was further satisfied that applicant's conduct overall was not seriously in breach of his contract to warrant termination without notice and concluded that as reinstatement was not practicable, compensation for loss of income be awarded to applicant - Granted - Mr JK Richards -v- Tony W P Lee T/as Maxi Fuel Dianella - APPL 1691 of 1999 - BEECH C - 11/05/00 - Petroleum..... 2739
- Application re unfair dismissal - Applicant argued he was unfairly dismissed and sought relief - Respondent argued Applicant was guilty of deceit and liable to be summarily dismissed - Commission found on evidence the Applicant was largely the architect of his own undoing and guilty of deceit - Dismissed - Mr AJ Rivas-Borge -v- Birtandi Family Trust T/as BBD Distribution T/As BBD Wholesale - APPL 1575 of 1999 - FIELDING C - 17/05/00..... 2741
- Application re denied contractual entitlements - Applicant sought three weeks wages, reimbursement of phone calls and bonus payment for sales - There was no appearance for the Respondent - Commission found that Applicant was an employee of the Respondent for the period claimed, that she performed work in accordance with the directions by the Respondent, that her work was subject to the Respondent's control and ordered the Respondent to pay the contractual entitlements - Commission did not award claim for costs - Ordered Accordingly - Ms PJ Sagers -v- Shutters R Us - APPL 119 of 2000 - WOOD, C - 02/06/00 2742
- Application re unfair dismissal (80WAIG1968) - Further Reasons for Decision re compensation after application was granted - Liberty was reserved to the parties to apply to the Commission if they were unable to agree upon the compensation which was ordered to be paid - Commission found that compensation was equal to the wages Applicant would have earned between 12 July 1999 and 31 July 1999 - Commission has, with the agreement of the parties, determined the matter on the basis of written submissions and ordered Respondent to forthwith pay Applicant the sum of \$1,900.00 - Ordered Accordingly - Mr BJ Stone -v- Varrone Plastering - APPL 1192 of 1999 - BEECH C - 09/05/00 - Plastering 2743
- Conference re unfair dismissal - Applicant union argued that the dismissal of its member was harsh, oppressive and unfair - Respondent raised the preliminary issue that as the Applicant was a party to a registered workplace agreement with the Respondent, according to sections 7A, 7B, 7C and 7D of the Workplace Agreement Act the application was not an industrial matter and should be struck out for want of jurisdiction - Commission found that the contract of employment between the parties at the time of the lodgement of the application did not become subject to some other arrangement between them provided for in the expired workplace agreement - Commission found that the matter referred was an industrial matter, the Commission had jurisdiction to enquire and deal with it and adjourned application sine die to be re-listed at the request of either party - Declared and Ordered Accordingly - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Bowra and O'Dea - C 111 of 2000 - BEECH C - 02/06/00 2747
- Conference referred re unfair dismissal - Applicant union argued that its member was terminated unfairly on the grounds of redundancy and was seeking compensation for loss for the period of unemployment suffered by its member following the redundancy - Respondent argued that because of the completion of major projects and a few other contracts that were coming to an end it had to make some employees redundant - Respondent further stated that the Applicant had to be counselled about his productivity, reliability and flexibility and employees' overall work performance was considered when taking the decision - Commission found that there was no consultation with the Applicant re the decision to make him redundant as required by Clause 32A - Redundancy of the Award, and the dismissal of the Applicant was harsh, oppressive and unfair - Commission further found that the Applicant was paid a redundancy payment in excess of that prescribed by the award therefore the Applicant did not suffer any loss that was compensable - Declared accordingly by an Order of the Commission. - AUTO, FOOD, METAL, ENGIN UNION -v- Goldfields Contractors W.A. - CR 211 of 1999 - KENNER C - 09/06/00..... 2749
- Conference referred re return to work - Applicant's Union argued Applicant made every effort to return to work by presenting the Respondent with professionally created rehabilitation programmes but the Respondent rejected them unreasonably - Applicant's Union argued that any doubt the Respondent might have had as to Applicant's capacity to return to work was put to rest by the report of the occupational physician and that, although the medical assessment of Applicant's doctor made at much the same time was more cautious, it was not inconsistent with that of the occupational physician but simply suggested that she be gradually reintroduced into the work place - Applicant's Union sought payment for the remuneration Applicant should have earned had she been allowed to work on a part time basis and thereafter on a full time basis until she returned to work this year - Respondent argued that Applicant was employed in a full time capacity and that at no time did she present for work on a full time basis until after her Workers' Compensation claim had been dismissed in March last - Respondent further argued Applicant presented medical certificate which suggested that she was not fully fit for work, or limitations were imposed either on the duties she could perform, the location at which she could work or the times during which she could work - Public Service Arbitrator reviewed authorities and found that Respondent should not be held responsible to pay Applicant for full time work when she was not present at work or indeed wanted to work full time - PSA found it unfair to expect Respondent to recompense Applicant for the loss of income which arose because of her inability to work in accordance with her contract when that inability had not been shown to be due to work related causes - Dismissed - Civil Service Association of Western Australia Incorporated -v- The Director, Metropolitan Health Service Board - Perth Dental Hospital & Community Dental Services - PSACR 48 of 1999 - FIELDING C - 12/05/00 - Dental 2752

CUMULATIVE DIGEST—continued

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TERMINATION—continued

- Conference referred re unfair dismissal - Applicant argued that she entered into an employment contract on the expectation it would lead to ongoing employment - Applicant further argued her expectation at the time she commenced employment was that subject to successful completion of a three-month probation her employment would be ongoing and this expectation was strengthened at the time of signing the second contract and reinforced by her applying for and being granted leave - Respondent argued that Applicant was advised by letter on 10 May 1999 that the hospital would, in the future, be recruiting full-time enrolled nursing staff, she was advised that she would have to apply for an advertised position should she wish to continue employment past her then contract, she was provided with the necessary job description form and advertisement in a letter dated 3 June 1999, she was urged to apply for the full-time position in a letter dated 15 June 1999 and in a letter dated 24 June 1999, she was reminded that she had been invited to apply for the position prior to her departure on holidays overseas - Commission found that the document agreed to by Applicant was unambiguous and her employment ended by agreement through the effluxion of time - Dismissed - LIQUOR, HOSPITALITY & MISC -v- Kondinin District Hospital Board - CR 197 of 1999 - WOOD, C - 18/05/00 - Nursing..... 2753

TRANSFER

- ²Appeal against Decision of Commission (79 WAIG 3461) re unfair dismissal - Appellant argued Commissioner erred on a number of grounds one being that reinstatement of the former employees was impracticable - Full Bench found the commissioner was open to conclude the relationship between the former employees and the appellant had broken down and under the circumstances reinstatement was impracticable and that no other grounds of appeal were made out - Dismissed - Solid Concepts Pty Ltd ACN 009 301 553 -v- LIQUOR, HOSPITALITY & MISC - FBA 23 of 1999 - Full Bench - SHARKEY P/SCOTT C./WOOD, C - 31/03/00 1381
- Conference referred re transfer - Applicant argued that after he was unfairly dismissed and reinstated, he was unfairly transferred - Respondent argued there was no jurisdiction for the commission to deal with this claim and it should be dismissed - Commission found it had jurisdiction to deal with the claim, but by now the applicant no longer worked for the respondent, therefore there was no longer a dispute between the parties - Dismissed - Australian Railways Union of Workers, West Australian Branch -v- Western Australian Government Railways Commission - CR 290 of 1994 - PARKS C - 21/10/94 - Railways..... 1665

TRAVELLING

- Application for variations of awards - Applicant sought to amend the Public Service Award 1992 and the Government Officers Salaries, Allowances and Conditions Award 1989 by varying respectively Schedule C- Camping Allowance and Schedule I - Travelling, Transfer and Relieving Allowance and Schedule F - Camping allowance and Schedule I - Travelling Transfer and Relieving Allowance - Commission ascertained that the previous method of establishing the allowance was no longer supported by DOPLAR - Respondents argued that as employers they had concerns regarding taxation implications if travel allowances prescribed in the awards exceeded those which are deemed reasonable for taxation purposes by the ATO - Respondent further argued that the allowance system utilised by the Australian Public Service should be utilised as this system has more merit - Arbitrator noted that the adoption of the APS rates would cause reductions in the current level of travelling allowance payments in high cost towns in WA - Applicant argued that reimbursement of actual expenses could cover the difference however there are obvious problems in operating a hybrid scheme - Arbitrator further noted that the respondents have not raised any substantive argument why the change should occur - Parties directed to have such negotiations as were necessary to produce agreed schedules of amendments to the Commission - Direction Accordingly - The Civil Service Association of Western Australia Incorporated -v- Commissioner, Aboriginal Affairs & Others - P 7,8 of 1999 - Public Service Arbitrator - GREGOR C - 01/02/00 - Welfare 353
- Application for interpretation of Miscellaneous Government Conditions and Allowances Award No. A4 of 1992 re travel rebate for employee dependents - Commission was asked to interpret and declare the true meaning of a provision in the Award - Question "Does travel rebate as specified in Clause 19 apply to dependents who do not reside with the employee?" - Commission found that the Clause included a beneficial consideration in relation to a dependent, but if it did intend for a dependent to travel away from and return to a location different to the workplace of the employee it would have expressed so - Commission's answer to the question was "No" - Dismissed - LIQUOR, HOSPITALITY & MISC -v- Albany Regional Hospital & Others - APPL 2238 of 1997 - PARKS C - 03/03/00 - Education..... 1938

UNIONS

- Application for the registration of a new organisation by the amalgamation of two unions - Application was made by the two unions, The Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Branch and The Federated Liquor and Allied Industries Employee's Union of Australia Western Australian Branch Union of Workers - There was no objection to the application - Full Bench being satisfied that all statutory requirements of law had been complied with, authorised the registration of the "Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch" - Ordered Accordingly - LIQUOR, HOSPITALITY & MISC & Other -v- (Not applicable) - FBM 2 of 1999 - Full Bench - SHARKEY P/COLEMAN CC/FIELDING C - 10/12/99 - Unions..... 20
- ⁴Application for Orders re Breach of Union Rules - Applicant argued Committee of Management for the first Respondent (FLAIEU) was not properly constituted due to discrepancies with their election and this was subject to litigation in the Federal Court - Applicant sought Orders to declare the election void and Interim Orders to ensure Respondents refrain from Industrial Agreement negotiations with Burswood or taking steps to bring about an election of vacant Committee positions - Applicant further argued the FLAIEU and Burswood had made Industrial Agreements covering the employment of workers irrespective of their membership to the FLAIEU or the ALHMCWU whom also had coverage over Burswood - Leave to amend Application (not opposed) was granted requesting the urgent initiation and prosecution of an application for the amalgamation of the (FLAIEU) and the ALHMCWU and various Orders to allow the first Respondent (FLAIEU) to operate in the Interim and the amalgamation and associated Orders were seen to give rise to the potential resolution of this application - Interim Orders issued accordingly and leave granted for application to be discontinued - Discontinued - Mr SJ Farrell -v- LIQUOR & ALLIED INDUSTRY UNION & Others - PRES 7 of 1999 - President - SHARKEY P - 10/09/99 - Other Services 23
- ²Application to Full Bench seeking declarations pursuant to s.71 - Applicant sought declaration that - a) "the Rules of the Applicant and its Counterpart Federal Body relating to the qualifications of persons for membership are, or are deemed to be, the same in accordance with s.71(2) and, b) the Rules of the Counterpart Federal Body prescribing the offices which shall exist in the Branch are, or are deemed to be, the same as the Rules of the Applicant prescribing offices which shall exist in the Applicant in accordance with s.71(4) of the Act" - Full Bench upon careful examination of all the evidence concluded that the WA Branch of the abovementioned federal organisation was a "Counterpart Federal Body" as defined in s.71(1) of the Act and that the rules of the state organisation prescribing the offices should be deemed to be the same as the rules of its Counterpart Federal Body - Full Bench further found that the eligibility rules in each case were therefore deemed to be the same - Declared Accordingly - Murdoch University Academic Staff Association -v- (Not applicable) - FBM 3 of 1999 - Full Bench - SHARKEY P/COLEMAN CC/SMITH, C - 03/03/00 - Unions 1743
- ²Application re variation of Union Rules - Applicant Union sought alteration to Rule 6 of the CSA Rules by excluding from membership persons "employed in Level 1 and Level 2 positions and who are eligible for membership of the Australian Municipal, Administrative, Clerical and Services Union of Employees, WA Clerical and Administrative Branch" - Full Bench was satisfied on evidence that application complied with the relevant sections of the I.R. Act - Granted - Civil Service Association of Western Australia Incorporated -v- (Not applicable) - FBM 2 of 2000 - Full Bench - SHARKEY P/COLEMAN CC/FIELDING C - 06/06/00 - Unions 2462

CUMULATIVE DIGEST—continued

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UTILISATION OF CONTRACTORS

- Application re unfair dismissal - Applicant argued he was given assurance by Respondent that his job was secure and sought reinstatement - Respondent argued that over time the amount of work had been significantly reduced to a point where the school had made the decision to make the position redundant - Commission found that Respondent did not follow its own policy in that it did not have discussions that were required to be held between it and the Applicant by virtue of the contract of employment in accordance with sections 5 and 41 of the Minimum Conditions of Employment Act 1993 - Commission found that Applicant was unfairly dismissed, that reinstatement was impracticable as position no longer exists and ordered compensation of \$3,464 be paid for loss and injury caused by the dismissal - Ordered Accordingly - Mr AR Ellery -v- St John's School - APPL 950 of 1999 - BEECH C - 24/02/00 - Gardening 1628

VICTIMISATION

- Application re unfair dismissal - Applicant argued she was a victim of sexual harassment from a fellow employee and unfair criticism from her direct supervisor - Respondent denied the claim and opposed the order sought and argued that from commencement of Applicant's employment, members of staff made claims of irrational behaviour and laziness - Commission was convinced that during Applicant's employment, she did not always follow directives, she created disruptions within the workplace and threatened a fellow employee with a knife - Commission found in all the circumstances and evidence into account that Respondent was entitled to dismiss Applicant summarily - Dismissed - Ms G Forsyth -v- St Barbara Mines Limited - APPL 961 of 1994 - PARKS C - 01/03/00 - Hospitality 627
- Application seeking Respondents be punished for contempt of the Full Bench of the Commission - Applicant argued Respondents intimidated a colleague whom had signed a proof of evidence on behalf of the Union - Respondent seeks an order dismissing the application on the grounds that it is not validly brought and, further, that there is no case to answer - Commission found, it was not beyond reasonable doubt, that the predominant purpose of the respondents was to interfere with a witness or to deter her from giving evidence and for those reasons found there was no case to answer - Dismissed - The Food Preservers' Union of Western Australia, Union of Workers -v- Ms E Truslove & Other - PRES 6 of 2000 - President - SHARKEY P - 19/04/00 - Food, Beverage and Tobacco Mfg 1754

WAGES

- Application for interpretation of Animal Welfare Industry Award No.8 of 1968-Preliminary Point-Applicant seeks interpretation to ascertain whether the award would apply to cohuna koala park-Respondent denies consenting to the application nor agreeing to pay wages based upon the outcome of a determination by the commission-Further argued that all employees are parties to registered workplace agreements and it did not intend employing people other than on workplace agreements-Commission found respondent had agreed to an interpretation in settlement of a previous unfair dismissal claim and allowing there was a substantial delay found there was sufficient justification for the matter to proceed-Application allowed - LIQUOR, HOSPITALITY & MISC -v- Cohuna Koala Park - APPL 178 of 1999 - BEECH C - 25/11/99 - Animal 189
- Conference Referred re application for order to increase the salaries of employees of the Director General and Attorney General in the Ministry of Justice - Applicant sought a flat increase in lieu of a percentage increase in consideration of equity issues as a percentage increase favours higher classifications - Applicant argued that the flat increase proposal was to cover a two year period based on productivity gains - Applicant rejected the argument that the value of the increase should be determined by the limit imposed under the Government's then wages policy of 7% over two years - Respondent argued that the wage increase should be dependent on the attainment of target savings and divisional performance outcomes under a performance management model resulting in an initial 2% increase with a second 3.5% 12 months later - Respondent further argued that the matters are to be determined in accordance with the Wage Fixing Principles - Commission in Court Session found that there has been an improvement in performance and productivity since 1997, that performance outcomes should be aggregated for employees across divisions and the impact of what was determined is consistent with the public interest - Ordered accordingly - The Civil Service Association of Western Australia Incorporated -v- Director General, Ministry of Justice - PSACR 35 of 1998 - Commission in Court Session - COLEMAN CC/GREGOR C/SCOTT C. - 08/12/99 - Government 193
- Application re Interpretation of award - Applicant employer sought true interpretation of clause 21A of Hotel and Tavern Workers Award 1978 re minimum wage for adult males and females from 9/1/96 - 14/11/97 - Respondent sought interpretation to clarify how additional rates for Adult apprentices applied whom ordinary hours included work on a Saturday or Sunday - Commission found Adult apprentices were entitled to the minimum adult wage in the first instance and additional rates for those ordinary hours worked on a Saturday or Sunday as prescribed by the Award - Declared Accordingly - Chestone Holdings Pty Ltd T/A The Lord Forrest Hotel -v- LIQUOR & ALLIED INDUST UNION & Others - APPL 2275 of 1997;APPL 933 of 1998 - PARKS C - 29/02/00 - Hospitality 605
- Application for outstanding benefits - Applicant claimed respondent union failed to allow him a benefit under his contract of employment, that being the reduction in his pay would be restored once the union finances improved sufficiently - Respondent union denied the wages arrangement included such an undertaking - Commission found the arrangement entered into by the parties did not include, what in essence was deferment of payment as alleged by the Applicant - Dismissed - Mr JB Maxwell -v- The Australian Workers' Union, West Australian Branch, Industrial Union of Workers - APPL 978,1673 of 1998 - PARKS C - 28/02/00 - Unions 646
- Application re contractual entitlements - Applicant argued he failed to receive benefits he was entitled to under the contract of employment, which was a facsimile sent with an offer of employment at a rate of \$27000 per annum - Respondent argued the facsimile was forwarded for the purpose of satisfying the appropriate authorities, that the applicant be allowed to come to Western Australia - Commission found no evidence as part of the contract of employment, the right to payments of extra monies for time worked beyond 38 hours in any week - Dismissed - Mr M Zare Sani -v- West Lavash - APPL 1257 of 1997 - PARKS C - 23/09/97 - Unknown Industry 669
- Application re wages - Applicant argued altering of wages payment day delayed wages payment by two days and a transitional assistance option put forward was rejected by the respondent - Respondent argued recovery of monetary advances lacked certainty under the Financial Administration and Act 1981, that the transitional assistance option put forward by respondent was rejected by applicant and the MHSB computer system failed to indicate if any monetary advances had been granted making the recovery of monies difficult upon termination - Commission found MHSB computer system adequate to cope with the transitional assistance options with the recovery of monies not being impracticable on termination - Ordered Accordingly - Metropolitan Health Service Board - Sir Charles Gairdner Hospital -v- AUTO, FOOD, METAL, ENGIN UNION & Others - CR 366 of 1997 - PARKS C - 29/02/00 - Hospital 674
- Conference referred re wage increase - Applicant Union argued that a \$15.00 increase in pay rates per week was justified by reason of cost savings associated with introduction of shift work and a bonus pay of \$1000.00 to each employee who remained employed with Respondent until 31/12/94 was justified on the basis that such employees ought be rewarded for continuing to serve the employer notwithstanding their future was uncertain - Commission found that there was nothing of substance put to it which would justify a finding that the increased wage level ought be further increased and that the claims for a \$1000.00 bonus, apart from the scant reason given as justification, there was no evidence to support it - Commission found that Applicant Union has failed to establish there was a special case for Commission to award the claims made, or any part of them - Dismissed - The Shop, Distributive and Allied Employees' Association of Western Australia -v- Department of State Services - CR 451 of 1994 - PARKS C - 03/03/00 - Government 676
- Application re contract entitlement - Applicant failed to receive the whole or part of her fortnightly wage, despite assurances from the respondent - Respondent failed to return any appearance forms or appear at the hearing - Commission found, when referring to exhibits 2,3,4, the applicant was underpaid - Granted - Ms T Acacio -v- Wartell Mobile Phone Shop - APPL 1535 of 1997 - PARKS C - 06/04/00 - Sales 1613

CUMULATIVE DIGEST—continued

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WAGES—continued

- Application re Unfair Dismissal & Contractual Entitlements - Applicants, permanent bar manager and casual cook, argued that they were unfairly dismissed and sought compensation in lieu of reinstatement/re-employment, loss of income for period of unemployment following dismissal, difference in earnings between reduced levels of income earned since dismissal and for injury arising from stress of being terminated - Applicants also claimed that no warnings were given on their performances or a reasonable period of notice given before dismissal - Respondent denied that applicants were terminated by him and argued that termination was affected by hotel manager after a discussion with him on the state of high percentages, and was surprised when dismissal occurred - Respondent further argued that dismissal was consistent with industry standard and the bar manager should have realised his job was in jeopardy when he did not get the hotel manager's job - Respondent also stated that he was not impressed with the chef's cooking and had criticism of both applicant's dress standards though he had not mentioned it to them - Commission found that parameters of employment were not set nor were percentage targets explained to applicants and rejected respondent's view that the bar manager should have realised his job was in jeopardy when not appointed as hotel manager, but found that respondent took the opportunity to re-employ a former chef when option presented itself - Commission was not satisfied recognition should be given to emotional distress claimed by applicants and felt that as reinstatement was impracticable, ordered compensation to terminated bar manager equivalent to 2 wks pay and to the cook for 90 hours work at \$12.74 per hour - Issued accordingly - Ms PM Barcello -v- Denmark Holdings Pty Ltd - APPL 607,608 of 1999 - COLEMAN CC - 13/03/00 - Hospitality 1615
- Application re contractual entitlements - Applicant sought wages and pro rata annual leave due on resignation of employment - Respondent initially argued that Commission did not have jurisdiction to deal with this claim as applicant's employment was governed by Farm Employees Award 1985 and a claim to enforce the award for underpaid wages and annual leave must be made before an Industrial Magistrate - Commission found that it had jurisdiction to deal with applicant's claim because the wage rate agreed between the parties were above award rates and money owed was a non-award benefit - Respondent then argued that applicant's date of resignation was 11 April 1999 but applicant argued that she worked until 28 May 1999 - Respondent further argued that applicant resigned from employment because working full time with long hours was difficult as she cared for 3 children - Commission found that evidence from statutory declaration supported the claim that applicant worked until 28 May 1999 and was therefore entitled to wages of \$800 and pro rata annual leave of \$424 - Granted - Mrs C Boxall -v- Rodney Harry Wisbey (Orlanda Park) - APPL 956 of 1999 - BEECH C - 28/02/00 - Dairy..... 1618
- Application re contractual entitlements - Applicant argued that benefit due under contract of employment was denied and sought payment for anticipated increase in salary following each appraisal after 3rd and 12th months - Respondent argued that applicant was offered only \$40000 per annum (Exhibit L1 re document titled Terms and Conditions of employment prescribed this) - Commission found that applicant provided no evidence to support claims made in application and would be dismissed, and ordered costs against applicant for unnecessary expense to defend action - Dismissed - Mr DA Chevin -v- Wiltrading (WA) Pty Ltd - APPL 1543 of 1997 - PARKS C - 22/01/98 - Unknown Industry..... 1621
- Application re contractual entitlements - Applicant argued that he was denied commission benefits due to him as a result of a exclusive sales agreement - Respondent argued that he did not offer the applicant an exclusive right to sell the properties - Commission examined the evidence and determined that the applicant failed to establish his claims - Dismissed - Mr LK Fahy -v- LMS Property Group Pty Ltd - APPL 375 of 1999 - WOOD, C - 31/03/00 - Real Estate Agency 1630
- Application to amend Argyle Diamonds Productions Award 1996 - Applicant argued that amendments were essentially to improve the scope for increased efficiency through flexible work practices which would add job security through new redundancy provisions and increased levels of remuneration - Commission found application essentially registered a variation to the award rather than creating a new agreement - Commission acceding to the application found the changes were consistent with sensible award modernisation and were consistent with the concept of enterprise bargaining - Order made reflecting the amendments sought - Granted - Argyle Diamond Mines Pty Limited -v- COMM, ELECTRIC, ELECT, ENERGY & Others - APPL 1439 of 1999 - FIELDING C/GREGOR C/SCOTT C. - 17/04/00 - Mining..... 1934
- ¹Appeal against decision of Full Bench (79 WAIG 1867, 2985 & 3183) re allegedly denied contractual entitlements - Industrial Appeal Court found that Full Bench was in error in concluding that the rate of salary to be paid was a different rate to that in the contract when the contract clearly and unambiguously expressed the rate of salary to be paid to Appellant - IAC was not persuaded otherwise that Full Bench has made any other error, has upheld the Appeal to this extent and remitted the matter back to the Single Commissioner for further hearing and determination regarding under-paid salary - Upheld - Ms AP Ather -v- Aust Fed of TPI Ex-Serv Men - IAC 8 of 1999 - Industrial Appeal Court - Kennedy J./Anderson J./Scott J. - 31/03/00 1729
- Application re unfair dismissal and contractual entitlements - Applicant argued he was dismissed without notice when he refused to work with faulty equipment and that he was denied a contractual entitlement - Respondent argued that Applicant resigned and equipment was in good working order although did not dispute applicant's claim for an entitlement - Commission found the Applicant was unable to discharge the onus of proof that he was harshly oppressively or unfairly dismissed, however granted the contractual entitlement claim - Ordered Accordingly - Mr C Boulazemis -v- Stand Roston - APPL 810,1521 of 1999 - SMITH, C - 20/04/00 - Shearing Contractor..... 2705
- Application re unfair dismissal and contractual entitlements- Applicant argued that dismissal was harsh, oppressive and unfair and sought compensation for loss of income, contractual benefits including commission on sales and distress caused by dismissal - Respondent argued that applicant resigned and was not dismissed therefore was not unfairly dismissed - Respondent further argued that mileage allowance set out in applicant's contract was higher than award rate as verified by DOPLAR - Commission found on evidence that respondent wanted to terminate applicant and that applicant had discharged the onus of establishing that she was unfairly dismissed - Commission further found that as reinstatement was not practicable, compensation should be awarded for loss of wages, commission on proceeds of all sales and mileage as per contract of employment - Ordered and Declared Accordingly - Ms LM Fischer -v- Sassey Pty Ltd ACN 008 996 156 - APPL 1414 of 1999 - SMITH, C - 05/04/00 - Wholesaling..... 2713
- Application re denied contractual entitlements - Applicant sought entitlements relating to wages, superannuation and expenses incurred during the course of his employment both in Australia and China - Applicant further argued, though he was assured by the Respondent that he would be reimbursed all expenses incurred, he did not receive these even after numerous telephone discussions - Respondent's representative initially denied Applicant's claim but later during the course of evidence conceded - Commission found the commencement date of Applicant's employment was different from that of the amended claim, that the claim in respect of superannuation contributions appeared to be based on the statutory contribution required under the Superannuation Guarantee (Administration) Act 1992, therefore it was not recoverable as a contractual benefit and ordered Respondent to forthwith pay Applicant the sum of \$19,897.00 less tax - Granted - Mr JW Greenhalgh -v- Buon Amici WA Pty Ltd - APPL 1903 of 1999 - KENNER C - 30/05/00 - Restaurant..... 2719
- Application re contractual entitlements - Applicant sought to recover monies for outstanding annual leave loading and underpayment of salary - Respondent argued that contract had been altered removing benefit of leave loading and alleged Applicant had been overpaid - Commission found Applicant had made out, at least on balance, his claim and was entitled to recover contractual entitlements denied to him under his contract of employment - Granted - Mr DI Holden -v- Teravin Group Pty Ltd ACN 009 445 121 - APPL 436 of 2000 - FIELDING C - 09/05/00..... 2722

CUMULATIVE DIGEST—continued

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WORKER PARTICIPATION

²Appeal against decision of Commission (79 WAIG 3459) re wearing of badges by union members during hours of employment - Appellant appealed on a number of grounds including that the Commission erred in finding the respondents policy prohibiting the wear of union badges is not unreasonable - Appellant argued employees wore a number of badges apart from their identification badges and there was no evidence that the wearing of union badges had been complained about by the public or that they were detrimental to the operations - Respondent argued it had a blanket ban on all unauthorised badges and further argued that, if an exception were to be made in the case of membership badges issued by the appellant, exceptions would have to be made for others - Full Bench found the Commission had erred in grounds 3 and 4 of the appeal and that the order made at first instance in application No. CR 159 of 1999 be suspended and be remitted back to the commission to be heard and determined according to law - Appeal Upheld - LIQUOR, HOSPITALITY & MISC -v- Burswood Resort (Management) Ltd - FBA 30 of 1999 - Full Bench - SHARKEY P/BEECH C/SMITH, C - 15/03/00

1359

WORKERS COMPENSATION

Conference referred re return to work - Applicant's Union argued Applicant made every effort to return to work by presenting the Respondent with professionally created rehabilitation programmes but the Respondent rejected them unreasonably - Applicant's Union argued that any doubt the Respondent might have had as to Applicant's capacity to return to work was put to rest by the report of the occupational physician and that, although the medical assessment of Applicant's doctor made at much the same time was more cautious, it was not inconsistent with that of the occupational physician but simply suggested that she be gradually reintroduced into the work place - Applicant's Union sought payment for the remuneration Applicant should have earned had she been allowed to work on a part time basis and thereafter on a full time basis until she returned to work this year - Respondent argued that Applicant was employed in a full time capacity and that at no time did she present for work on a full time basis until after her Workers' Compensation claim had been dismissed in March last - Respondent further argued Applicant presented medical certificate which suggested that she was not fully fit for work, or limitations were imposed either on the duties she could perform, the location at which she could work or the times during which she could work - Public Service Arbitrator reviewed authorities and found that Respondent should not be held responsible to pay Applicant for full time work when she was not present at work or indeed wanted to work full time - PSA found it unfair to expect Respondent to recompense Applicant for the loss of income which arose because of her inability to work in accordance with her contract when that inability had not been shown to be due to work related causes - Dismissed - Civil Service Association of Western Australia Incorporated -v- The Director, Metropolitan Health Service Board - Perth Dental Hospital & Community Dental Services - PSACR 48 of 1999 - FIELDING C - 12/05/00 - Dental

2752

WORKPLACE AGREEMENTS

Conference re unfair dismissal - Applicant union argued that the dismissal of its member was harsh, oppressive and unfair - Respondent raised the preliminary issue that as the Applicant was a party to a registered workplace agreement with the Respondent, according to sections 7A, 7B, 7C and 7D of the Workplace Agreement Act the application was not an industrial matter and should be struck out for want of jurisdiction - Commission found that the contract of employment between the parties at the time of the lodgement of the application did not become subject to some other arrangement between them provided for in the expired workplace agreement - Commission found that the matter referred was an industrial matter, the Commission had jurisdiction to enquire and deal with it and adjourned application sine die to be re-listed at the request of either party - Declared and Ordered Accordingly - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Bowra and O'Dea - C 111 of 2000 - BEECH C - 02/06/00

2747