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CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

INDUSTRIAL APPEAL COURT—Appeal against decision of Full Bench—

2001 WASCA 30

JURISDICTION: WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

CITATION: KAMEL LEBEIDI T/A SUGAR GUM RESTAURANT *v.* NAPOLI [2001] WASCA 30

CORAM: KENNEDY J (Presiding Judge)
SCOTT J
PARKER J

HEARD: 1 FEBRUARY 2001

DELIVERED: 1 FEBRUARY 2001

PUBLISHED: 13 FEBRUARY 2001

FILE NO/S: IAC 9 of 1999

BETWEEN: KAMEL LEBEIDI T/A SUGAR GUM RESTAURANT, Appellant
AND
REBECCA AIMY NAPOLI, Respondent

Catchwords—

Industrial law—Appeal to Full Bench from Commissioner's finding of unfair dismissal—No appearance before Full Bench by or on behalf of the appellant—Appeal to the Full Bench dismissed—Appeal to Industrial Appeal Court against dismissal of appeal—No question of law—Appeal to Industrial Appeal Court dismissed

Legislation—

Industrial Relations Act 1979, s 90(1)

Result—

Appeal dismissed as being incompetent

Representation—

Counsel—

Appellant: In person
Respondent: Ms K A Williams

Solicitors—

Appellant: In person
Respondent: Gibson & Gibson

Case(s) referred to in judgment(s)—

Barker v Wilson (1901) 27 VLR 36
Hoskins v Van Den-Braak (1998) 43 NSWLR 290

Case(s) also cited—

Western Australian Builders Labourers Painters and Plasterers Union of Workers v Clark (1996) 40 AILR 13-063

1 **JUDGMENT OF THE COURT**: On 1 February 2001, the Court dismissed this appeal on the ground that the decision appealed from was neither erroneous in law nor in excess of jurisdiction. The following are the reasons of the Court for arriving at this conclusion.

2 On 8 February 1999, Commissioner A R Beech found that the appellant had unfairly dismissed the respondent and he ordered that the appellant forthwith pay to the respondent the sum of $2,902.68. By a notice filed on 25 February 1999, the appellant appealed against the decision of the Commissioner on the ground that he had been denied natural justice for the reason that his case had not been better presented with the help of a lawyer. He sought an order that the decision of the Commissioner be quashed "and rehearing of witnesses". The notice of appeal showed the respondent's address as Sugar Gum Restaurant, 105 Terrace Road, Guildford 6055.

3 The appeal was called on for hearing before the Full Bench of the Industrial Relations Commission on 1 September 1999. There being no appearance by or on behalf of the appellant, the President adjourned the appeal for a short time to enable the appellant to be called outside the door of the court and to have his Associate ascertain whether the appellant was in the vicinity of the hearing room. When the hearing was resumed, there was still no appearance by the appellant. The President indicated that a check had been made on two other floors of the building in order to see whether the appellant might, in error, have gone to those floors, but that there had been no sighting of him. The President, in the circumstances, having observed that notice of the hearing had been duly given to the appellant, no doubt by giving notice by post to the address given by him in his notice of appeal, Sugar Gum Restaurant, 105 Terrace Road, Guildford 6055, invited counsel who appeared for the respondent to move for the dismissal of the appeal, as well as for the dismissal of the appellant's applications to extend time for filing an appeal and for extending the time for making an application to extend time for filing an appeal book. Counsel moved accordingly, and those orders were made.

4 On 20 September 1999, the appellant filed a notice of appeal to this Court from the decision of the Full Bench. The notice gave the appellant's address as Sugar Gum Restaurant, c/- 3A Harry Way, Willetton. The grounds of the appeal were that the appellant had failed to receive notice to attend the hearing of the Full Bench because his address had changed due to the loss of his restaurant, and medical factors, and that the Full Bench, in dismissing the appeal without giving him the right to be heard, had denied him natural justice. In his affidavit filed in support of his appeal to this Court, the appellant deposed that he had changed his address in June 2000. He continued: "I think I did give notice but I can't be sure as I was in and out of hospital, but I did give my new address to the Commission and to the Supreme Court of Appeal". The affidavit concluded: "I'm still suffering from depression. I can't recall if I did give notice or not." June 2000 was long after the dismissal by the Full Bench of the appellant's appeal. From what the President said in dismissing the appeal, the notice of hearing had been duly served, in that the notice must have been posted to the address of the appellant in the Commission's records.

5 An appeal court is entitled to dismiss an appeal if the appellant does not make an appearance. It has no duty to make further inquiries-see ***Barker v Wilson*** (1901) 27 VLR 36, at 38. By s 12 of the *Industrial Relations Act*, the Industrial Relations Commission is constituted a court of record and the Full Bench, for the present purposes, is constituted as a court of appeal.

6 In the circumstances, the Full Bench was entirely justified in making the orders which it did. It is abundantly clear that it did not commit any error of law, or exceed its jurisdiction in so doing. The only grounds upon which an appeal lies to this Court are that the decision appealed from is erroneous in law or is in excess of jurisdiction-see s 90(1) of the Act. The appeal was therefore incompetent, and this Court had no jurisdiction to hear it. It had accordingly to be dismissed.

7 We would add that, in an appropriate case, an appellant whose appeal has been struck out on the ground of his non-appearance, provided that his non-appearance was due to no fault on his part and that no injustice to other parties would be involved, may have a remedy. In those circumstances, the appellate court may set aside the order of dismissal-see ***Hoskins v Van Den-Braak*** (1998) 43 NSWLR 290, per Mason P at 293-295, and the cases there cited.

8 Although, as we have indicated, in an appropriate case, a remedy may be available to the appellant, we should not be understood as indicating that any application by the appellant to the Full Bench at this stage has any prospects of success. It is the obligation of every party to proceedings to notify the tribunal or the court in which those proceedings are being maintained of any change of address. A great deal of time has now elapsed since the order was made by Commissioner Beech. Furthermore, the grounds of appeal to the Full Bench, on their face, would appear to be of no substance.

FULL BENCH—
Appeals against decision of Commission—

2001 WAIRC 02816

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS, APPELLANT
	v.
	BHP IRON ORE PTY LTD, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	CHIEF COMMISSIONER W S COLEMAN
	SENIOR COMMISSIONER G L FIELDING
DELIVERED	WEDNESDAY, 16 MAY 2001
FILE NO/S	FBA 2 OF 2001
CITATION NO.	2001 WAIRC 02816

Decision	Appeal dismissed.
Appearances	
Appellant	Mr M D Llewellyn
Respondent	Mr A J Power (of Counsel), by leave, and with him,
	Mr H M Downes (of Counsel), by leave

Reasons for Decision.

INTRODUCTION

1 This is an appeal against the decision of the Commission, constituted by a single Commissioner, and properly brought pursuant to s.49 of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "the Act"). The decision appealed against is a declaration made on 29 January 2001 in matter No CR 308 of 2000. Formal parts omitted, the declaration reads as follows—

> "THAT the work of the cleaning and maintenance of reflectors and signs at the respondent's Mt Newman mining operations as proposed to be performed by a contractor commencing 22 December 2000 should proceed."

2 (Appeal No FBA 6 of 2001, an appeal by the abovenamed respondent against the same decision, was dismissed upon the motion of the appellant, BHP Iron Ore Pty Ltd.)

GROUNDS OF APPEAL

3 It is against the whole of that decision that the appellant appeals on the following grounds—

> "1. That the Learned Commissioner erred in fact and law with respect to the definition that was applied to "Detrimental"
>
> 2. That as a result of this definition the learned Commissioner erred by not placing sufficient weight on the evidence with respect to a reversed overtime ban being placed by BHP Iron Ore.
>
> 3. The Learned Commissioner erred in fact and law by failing to determine the question of "available reasonable hours of work"
>
> 4. Having found that "available Reasonable Hours of Work" meant something more than normal hours of work. The Commission erred at law by not considering this in the context of a detriment.
>
> 5. That the decision of the Commission in matter CR 308 of 2000 be quashed and in lieu there of a determination that there would be a detrimental

effect on the employees and the work should not proceed by way of contractors. Or—

6. That the declaration in matter No CR 308 of 2000 be quashed the appeal up held and the matter be referred to the Commission in the first instance to be determined according to law."

BACKGROUND

4 The appellant (hereinafter referred to as "the AWU") is an organisation of employees which represents, inter alia, employees employed by the respondent employer (hereinafter referred to as "BHP"). Both the AWU and BHP are parties to the *Iron Ore Production and Processing (Mt Newman Mining Company Pty Limited) Award* No A29 of 1984 (hereinafter referred to as "the award").

5 The matter was referred to the Commission by the AWU pursuant to s.44 of the Act because of a dispute between the AWU, as applicant, and BHP, as respondent, in relation to a decision by BHP to contract out the work of maintaining and cleaning signs and reflectors at its Mt Newman mining operations in the Pilbara region of this State.

6 The terms of the dispute are set out in the Memorandum of Matters Referred for Hearing and Determination and read as follows—

"On 22 September 2000 the respondent gave notice to the relevant unions pursuant to clause 29(5) of the Iron Ore Production and Processing (Mt Newman Mining Company Pty Ltd) Award No A29 of 1984 ("the Award") that it intended that the job of maintaining and cleaning signs and reflectors at the mine would in future be performed by a contractor.

The applicant opposes the utilisation of a contractor on the basis that it considers it will detrimentally effect the availability of reasonable hours of work of its members contrary to the terms of clause 29 of the Award.

The respondent claims that the introduction of a contractor to do the work—

(a) will not be on a "side by side" basis and, therefore, clause 29(1)(b) of the Award does not apply; and

(b) in any event, will not have a detrimental effect on the available reasonable hours of work of the applicant's members

and says that the work should proceed accordingly".

(See page 7 of the appeal book (hereinafter referred to as "AB").)

7 No other ground, other than that referred to in the Memorandum of Matters Referred, was advanced by the AWU at first instance as to why the work should not be performed by a contractor.

8 The AWU at first instance contended that the course proposed by BHP was not consistent with Clause 29—Utilisation of Contractors, of the award. BHP, however, contended that the contracting out the work of maintaining and cleaning signs and reflectors at the mine was consistent with this provision of the award and that work should proceed to be performed by independent contractors, rather than mine worker employees.

9 Clause 29 of the award reads as follows—

" 29—UTILISATION OF CONTRACTORS

(1) (a) When it is necessary for the employer to retain the services of a contractor, the employer shall give prior notice to the union or unions concerned through the convenors of the nature of the work to be performed, the name of the contractor, standard hours to operate during the contract and the likely duration of the contract.

(b) No employee to whom this Award applies shall suffer any detrimental effect in respect of his normal earnings, job security or available reasonable hours of work by reason of the employment of contractors' employees on a "side by side" basis.

(c) A "side by side" basis shall mean that those employees and employees having similar expertise are working together on the same work in the same work section, location and locale.

(2) No employee to whom this award applies shall be retrenched because of the employment of contractors.

(3) The provisions of this clause shall not act in a manner prejudicial to the employer's operations in the event of an emergency circumstance arising e.g. railway wash-away or substantial mechanical failure to plant or equipment beyond the normal and immediate manning resources of the employer.

(4) Contractors will generally be employed for construction, modification and project work. Contractors may, however, be necessary to perform in-plant maintenance under warranty arrangements or to meet requirements for specialised equipment or specialised services. Where in particular circumstances it is proposed to utilise contractors to meet requirements for specialised equipment or specialised services, the employer will notify, and if requested discuss the matter with, representatives of the union or unions concerned prior to any commencement of the work by the said contractors.

(5) Where a particular job is usually performed by employees to whom this award applies, and it is intended that such job will in the future be performed by contractors, the employer shall give to representatives of the union or unions concerned notice of the matter not less than three months prior to the date on which it is intended that contractors commence work on that job. If requested, the employer shall discuss the matter with representatives of the union or unions concerned prior to any commencement of work on that job by the said contractors."

10 The facts in the matter were not in any real dispute. Reflectors, flashing lights and signs are located in the mining operations area on all roads, ramps, benches and dumps to ensure that there is a safe and unimpeded traffic flow around the mining area. These signs and reflectors are required to be maintained and cleaned to ensure that they remain in a safe and operating condition.

11 Placement of reflectors, flashing lights and signs, and their maintenance and cleaning, was the subject of a work instruction issued by BHP's mining department, the latest version of which is dated March 2000. This was tendered in evidence as exhibit A3 (see pages 160-165(AB)).

12 This work instruction provided that the signs and reflectors should be cleaned every "pay Friday", or as required, to help provide effective signposting and delineation of haul roads. This work instruction replaced an earlier work instruction dated May 1999 which provided that the frequency of cleaning should be once every four shifts for each shift (exhibit A2 (see pages 154-159(AB)).

13 Mr Ross Kawa Kumeroa, a convenor of the AWU, was and is employed by BHP as a production worker level 4 (a classification also referred to as "mine worker"). He gave evidence at first instance. His evidence was that his duties included operating trucks, plant, dozers and shovels, as well as doing labouring work. The labouring work involved the cleaning of signs and reflectors, and that work was the subject of the dispute before the Commission.

14 The uncontroverted evidence was that employees of BHP, employed in the mine worker classification levels 1 to 4, had customarily done the cleaning of signs and reflectors as part of the general labouring duties required of those classifications. However, the evidence of both Mr Kumeroa and Mr Gregory Allen Spoonheim, BHP's Manager of Mining at Mt Whaleback and part of the BHP mining operations, that the work of cleaning signs and reflectors formed only a small portion of the duties of those employees, with the dominant duty being the driving of trucks and other equipment.

15 Mr Kumeroa gave evidence that, in about 1998, however, a number of changes directed to bringing about greater efficiency was introduced by BHP, one of which was the almost total elimination of overtime. Indeed, Mr Kumeroa's evidence was that he had not performed work on overtime since about 1996, nor had anyone else, as far as he could say, since these changes were made. He said that, since about the time of these changes, mine worker employees have only generally worked their normal hours of 42.5 per week or thereabouts. Mr Spoonheim gave evidence to that effect, too.

16 The purpose of BHP's decision, according to Mr Spoonheim, was to, as far as possible, eliminate the working of overtime for the sake of efficiency. He admitted in evidence that mine worker employees now had no real choice but to work the normal hours of work.

17 In about mid 1999, there were discussions between the AWU and BHP in relation to a "90 day notice" issued by BHP pursuant to the award (Clause 29), proposing that the work of sign and reflector maintenance and cleaning be contracted out. After the discussions, changes were made to the system of sign and reflector maintenance to accommodate BHP's then concerns. As a result, the contracting out proposal was not proceeded with, and it was agreed that the new arrangements would be put in place on a trial basis with a further review to take place in the future.

18 This was set out in a memorandum from the Acting Manager Mining to the various union convenors dated 6 August 1999, tendered as exhibit A4 (see page 166(AB)).

19 It was common ground that mine worker classification employees had done this particular work during ordinary hours and machine operators were brought in on an overtime basis to "supplement production time" as a result. According to the evidence, this had been the practice for a number of years.

20 By memorandum dated 22 September 2000 (exhibit A5 (see page 167(AB))), BHP notified the various union conveners that, in accordance with Clause 29 of the award, BHP intended to contract out the maintenance of signs and reflectors in the mine. The contractor's employees were to commence work on 22 December 2000, or earlier by agreement.

21 It was foreshadowed that discussions between the parties would take place prior to the implementation date. The contractor's employees would be required to work an estimated 24 hours per week cleaning reflectors and signs, but more or less hours could be worked, depending upon BHP's requirements.

22 A number of meetings took place between the AWU and BHP at site level to discuss the proposed contracting out, in the course of which the AWU attempted to persuade BHP to keep the work "in house".

23 BHP did not accede to these representations and informed the Commissioner that it intended to proceed to contract out the work; however, it agreed to defer the implementation of the contracting out, pending the hearing and determination of this application by the Commission.

24 The evidence from Mr Spoonheim was that the rationale for the use of a contractor for this work was to better utilise BHP's mine worker classification employees on their principal tasks, and this involved the operation of equipment, rather than cleaning reflectors and signs. Mr Spoonheim said that BHP estimated that the efficiency savings occasioned by putting this into effect would be in the order of some $650,000.00 net per annum. In other words, contractor(s) to maintain signs and reflectors were to be used because the cost was less than that of mine worker employees.

25 It was common ground that the introduction of a contractor for this work would lead to no diminution in normal working hours or earnings for mine worker employees. That is, employees would continue to work 42.5 hours per week and earn the same remuneration as they were already earning. It was also the evidence that BHP did advise the AWU and other unions during discussions about this issue that, from time to time, there might still be a need for employees of BHP to clean signs and reflectors.

26 It was also admitted by Mr Spoonheim in his evidence that the contractor's employees would be working in and around the employees of BHP in the mining operations area.

FINDINGS, ISSUES AND CONCLUSIONS

27 By virtue of Clause 29 of the award, BHP has the right to use contractors and does not act contrary to the award, provided that it complies with the provisions of Clause 29. At first instance, in order to conclude that the declaration sought ought to be made, it was necessary for the Commissioner to determine whether the requirements of Clause 29 were satisfied. The matter was conducted at first instance on the basis that Clause 29(1) would not be complied with if contractor's employees were used (see, in particular, Clauses 29(1)(b) and (c)).

28 As a matter of fact, the Commissioner found, most relevantly, that it was common ground that, in the past, employees in the mine worker classifications levels 1 to 4 performed those duties as part of the general labouring duties required of those classifications. What, therefore, was proposed to be effected was that those duties be no longer performed by the mine workers who performed them and to require independent contractors to perform that work.

29 It was common ground that, in the past and for some years, this work was performed during ordinary hours by mine workers and not by working overtime. If production time was required to be maintained, as a result, then machine operators were brought in on an overtime basis to "supplement the production time".

30 In 1998, BHP introduced a number of changes at its Mt Newman operation. Significantly, for the purposes of this matter, it was decided that overtime work would no longer be worked by employees in the mine worker classifications. That is also what the Commissioner found. The evidence was that this decision was taken in order to reduce costs by the effective elimination of regular overtime. That evidence was not contradicted or effectively challenged.

31 The Commissioner also found that the decision in 1998 not to use the relevant employees to perform work outside ordinary hours was not a decision made so as to enable the use of contractors.

32 In or about the middle of 1999, discussions between the AWU and BHP took place because BHP gave notice, purportedly under the award, that it proposed to contract out the work of maintaining signs and reflectors.

33 On 22 September 2000 (see exhibit A5 (page 167(AB))), BHP notified the various AWU convenors (amongst others) that, in accordance with Clause 29 of the award, BHP intended to contract out the maintenance of signs and reflectors, etc, commencing on 22 December 2000 or earlier by agreement. There were meetings held between the parties about the issues. There was also evidence that $650,000.00 would be saved by BHP by contracting out this work.

34 It was, and it was not disputed, common ground and the Commissioner so found that the proposed introduction of contractors for this work would lead to no diminution in normal working hours or earnings for mine worker employees; that is, they would continue to work 42.5 hours per week and earn the same remuneration. It was also the evidence that, in time, there might still be a need for mine worker employees to clean signs and reflectors.

35 The Commissioner also found that there was no suggestion, on the evidence, that BHP's decision in 1998 to eliminate overtime was for the express purpose of engaging contractors.

36 At first instance, the Commissioner found too, within the meaning of Clause 29(1)(a) and (b) of the award, that the employees of any contractor doing work in the maintenance of signs, etc. would be working "side by side". That finding was not a matter raised in this appeal.

37 The central issue raised by this appeal is whether, on the evidence, it was open to the Commissioner to find, as he did, that no employee would suffer any "detrimental effect" within the meaning of Clause 29(5) of the award in relation to his/her available hours of work as a result of the engagement of contractors instead of mine worker employees to perform the sign and reflector cleaning and maintenance.

38 It is necessary to examine the grounds of appeal. There are four grounds of appeal, Grounds 1 to 4, alleging error. No ground of appeal attacks the findings of fact which I have related above. The only complaint about findings of fact is that the Commissioner erred in fact and law by failing to determine the question of available hours and that the meaning given to "detrimental effect" was a meaning attributed as an error of law and fact. I will say more about that later.

39 Grounds 5 and 6 relate to the remedy sought if the appeal is successful.

40 The Commissioner, as the basis of his decision, found that "detrimental" in Clause 29 of the award means "harmful, causing loss".

41 I am not at all persuaded that the meaning which he attributed to "detrimental" was in error. The word "detrimental" clearly has the meaning which the Oxford Dictionary defines it as having and which meaning was adopted by the Commissioner. The word "detrimental" is defined, too, in the Macquarie Dictionary, to mean—

> "causing detriment; injurious; prejudicial"

which is almost identical to the definition in the Oxford Dictionary.

42 I can find no authority directly apposite to this situation. However, all of the authorities attribute a similar meaning (see, for example, *R and Another v Associated Northern Collieries and Others* 14 CLR 387 and *Brewer v R* [1994] 2 NZLR 229 at 235 per Robertson J).

43 There is therefore established no error in law in attributing the meaning attributed to it by the Commissioner. Further, I do not understand why the attribution of such a meaning could be said to be attributed in error, as a matter of fact. The exercise of construction was to be carried out and was in accordance with the well know principles in *Norwest Beef Industries Limited and Derby Meat Processing Co Ltd v West Australian Branch, Australian Meat Industry Employees Union, Industrial Union of Workers, Perth* 64 WAIG 2124. Indeed, the Commissioner attributed the correct meaning.

44 The Commissioner went on to find that, attributing that meaning to "detrimental", there was no detrimental effect which would be suffered by employees by reason of the engagement of a contractor, because—

(a) There would be no diminution in terms of earnings or any effect on the working hours of mine worker employees which had stood at 42.5 hours per week since 1998.

(b) The decision to effectively eliminate overtime work in 1998 in order to reduce costs was not a recent phenomenon, but made two years ago. (Indeed, as Mr Kumeroa said, he had not worked overtime since in or about 1996.)

(c) There was no suggestion, on the evidence, that BHP's decision to eliminate overtime in this context was for the express purpose of engaging contractors, but for the purpose of reducing costs (see page 15(AB)).

45 Those findings were based on the facts as the Commissioner found them. Those findings were, in any event, open to him on the evidence. The only evidence was that, in or about 1998, overtime was no longer available for mine workers by a decision of BHP, a decision made along with other decisions at that time. Thus, overtime had not been available for mine workers for about two years and there was no evidence that it would be reinstated. Further and significantly, it was the evidence and it was open to find that the signs and reflector maintenance and cleaning work was only a small part of the duties of mine workers and was never part of any overtime work performed by them.

46 The evidence was that the decision was taken in the interests of efficiency which, in my opinion, by implication, includes cost reduction. That evidence was not challenged. There was no other inference open to reasonably draw that the decision was taken in order to enable a future decision for the use of contractors to be taken. Indeed, there was uncontradicted evidence from Mr Spoonheim that one reason for the use of contractors to do the sign and reflector maintenance and cleaning work was to enable mine workers to be more efficient and, as I understood the evidence, by implication, to do mining work and not labouring work. That evidence was not contradicted and it was open to the Commissioner to accept it and so find.

47 Further, the evidence of savings in cost by the use of contractors whilst, at the same time, mine workers worked their normal hours at an unreduced wage was a clearly open finding.

48 Further, the findings made as to fact were not seriously, generally, or directly challenged in the grounds of appeal.

49 Accordingly, as the Commissioner found, and it was not suggested that he erred in so finding in the grounds of appeal based on findings of fact or by inferences open to be drawn from findings of fact, he was unable to conclude that BHP's employees would suffer any "detrimental effect" as the result of the engagement of a contractor.

50 There is nothing in the evidence which vitiates the finding that it was not established that any detriment, being loss, damage or prejudice, arose in the form of loss of wages or overtime or risk to job security would arise from the engagement of contractors. That finding was clearly open and correct, for the reasons which I have expressed above.

51 It was open to find that the loss of overtime was occasioned solely by the 1998 decision by BHP and continued to be unavailable as a result of that decision. Indeed, it was possible that some such loss originated from around 1996. Such loss of overtime was not established on the evidence to have any link to the decision to engage contractors.

52 As to Ground 2, there is reliance on what is termed a reverse overtime ban, that is, as I understand it, one placed by the employer on overtime. It is quite clear, on Mr Spoonheim's evidence, that the unavailability of overtime for the mine workers is the result of the decision which was made in 1998 and that decision continues to have effect (see Mr Spoonheim's evidence at page 86(AB), and in particular the following—

> Q. "And that evolved out of a decision that you said you made back in 1998 to reduce the overtime down."
>
> A. "That would be a fair comment.")

53 That is evidence of the continuity of the effect of the 1998 decision and its effect. I apply the observations which I made in relation to Ground 1.

54 I would add, to make it clear, that the facts cannot alter the proper meaning to be attributed to the words "detrimental effect", which is an exercise in interpretation. Further, in any event, there was no evidence that the use of contractors would deprive mine workers of overtime, overtime not having been available to them for about two years, and the work in question never having been performed by them on overtime.

55 I would make a general observation. *Maritime Union of Australia v Geraldton Port Authority* [2000] FCA 16 AILR 4-240 is not a case in point. That case related to the *Workplace Relations Act* 1996 (Cth), s.298K, s.298T, s.298U and s.347 and involved an allegation of breaches of that Act, where the contravening conduct was altering the position of the relevant employees in their employment to their prejudice for a prohibited reason, by the employer prospectively reducing their entitlement to overtime because the employees were, at all material times, entitled to the benefit of the *Geraldton Port Authority Integrated Port Labour Force Award and Agreement* 1995. In other words, there was found a breach of the award by the reduction of entitlement to overtime.

56 In this case, it was open to find that there was no such entitlement such as to lead to a detriment by its loss, by prejudice or damage, because of a previously made unconnected decision to pay overtime, which decision still operated. That such a decision was not reversed was not a detrimental effect, within the meaning of the award nor, in particular, could it be said to be a detrimental effect arising from the engagement of a contractor. There was no detrimental effect established, within the meaning of Clause 29(1) of the award.

57 It was open to the Commissioner, for those reasons, to find that it was not established pursuant to Clause 29(1)(b) of the award and on a proper construction of it, that any employee to whom the award applied would suffer any detrimental effect in respect of his normal earnings (which would not be reduced), his job security (in relation to which there was no evidence of risk), or his available reasonable hours of work, because of the employment of contractors' employees on a side by side basis.

58 In my opinion, the Commissioner's finding that he should not apply to the words "available reasonable hours of work" a meaning of something more than "normal hours of work" does not assist the AWU. Whatever "available reasonable hours of work" means, I am not persuaded by the submissions made on this occasion, that overtime hours were reasonably available because, as was found and not challenged on appeal, overtime was not available while the 1998 decision not to afford overtime to mine workers was in force, and that was a decision not linked to or made with the intention of engaging contractors.

59 Further, it was open to find that this work was never performed as overtime work and was only a small part of the work of mine workers, who were regarded as being employed more efficiently if they were doing mine production work rather than labouring. The maintenance and cleaning work was described as "labouring".

60 Thus, insofar as it is relevant, there is no evidence that the decision to use contractor's employees deprived mine workers of overtime. Overtime work had been unavailable and remained unavailable for mine workers as a result of the decision in 1998. Thus, there was no deprivation of overtime and no detriment, for those reasons also.

61 It is not necessary to consider Grounds 5 and 6 which deal with the remedies sought if the appeal were upheld.

62 The Commissioner was correct in finding as he did and making the declaration which he made.

63 For those reasons, it is clear that no ground of appeal has been made out. I would, therefore, dismiss the appeal.

CHIEF COMMISSIONER W S COLEMAN—

64 I have read the reasons for decision of His Honour the President. I agree with those reasons and have nothing to add.

SENIOR COMMISSIONER G L FIELDING—

65 I have had the advantage of reading, in draft, the reasons for decision prepared by the President. I agree, essentially for the reasons he has outlined, that the appeal should be dismissed. I add the following observations.

66 I agree with the submission advanced by the agent for the Appellant that the provisions of clause 29 of the Award are interrelated and that sub-clause 29(5) cannot be separated from the other provisions of the clause. Hence, as well as complying with the provisions of sub-clause 29(5), the Respondent is required to comply with the provisions of sub-clause 29(1). Furthermore, I accept the submission that the expression "available reasonable hours of work" in paragraph 29(1)(b) is not confined to ordinary hours of work but may include reasonable overtime. Nonetheless, it is important to appreciate that the provisions of clause 29 of the Award do not prohibit the use of contractors. They merely stipulate, so as is relevant, that the contractors must be utilised in a way that no employee of the Respondent suffers any detrimental effect in respect of any of the matters mentioned in sub-paragraph 29(1)(b). Moreover, any such detrimental effect must occur not simply by reason of the employment of a contractor or its employees, but by reason of the employment of those employees on a "side by side" basis. Where the employees of the contractor do not work on a "side by side" basis as defined in paragraph 29(1)(c) the protection afforded to the employees of the Respondent by paragraph 29(1)(b) has no application.

67 I agree, for the reasons advanced by the President, that it was open to the learned Commissioner to find, as he did, that the employees of the Respondent did not suffer any detrimental effect within the scope of the Award. If indeed they suffered any detrimental effect in respect of any of the matters specified in clause 29 it was by reason of what the Appellant chooses to call the Respondent's "reverse overtime ban", which was long standing, not by reason of the engagement of a contractor.

68 The position in this instance is quite different from that considered in *Maritime Union of Australia v Geraldton Port Authority* [1999] FCA 899; 94 IR 244, and in *Maritime Union of Australia v Geraldton Port Authority* [2000] 47 AILR 4-240 to which the agent for the Appellant referred. In those cases the employer proposed to reduce the overtime the employees were then working. In this instance there is not any question of there being a reduction in overtime. Instead, the Respondent proposed that the status quo be maintained with respect to overtime.

69 In the circumstances the learned Commissioner was right to conclude, as he did, that the Appellant had not made out its case that its members suffered a detriment of the kind within the scope of clause 29 of the Award.

THE PRESIDENT—

70 For those reasons, the appeal is dismissed.

Order accordingly

2001 WAIRC 02817

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS, APPELLANT
	v.
	BHP IRON ORE LTD, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	CHIEF COMMISSIONER W S COLEMAN
	SENIOR COMMISSIONER G L FIELDING
DELIVERED	WEDNESDAY, 16 MAY 2001
FILE NO/S	FBA 2 OF 2001
CITATION NO.	2001 WAIRC 02817

Decision	Appeal dismissed.
Appearances	
Appellant	Mr M D Llewellyn
Respondent	Mr A J Power (of Counsel), by leave, and with him,
	Mr H M Downes (of Counsel), by leave

Order.

This matter having come on for hearing before the Full Bench on the 30th day of April 2001, and having heard Mr M D Llewellyn on behalf of appellant and Mr A J Power (of Counsel), by leave, and with him Mr H M Downes (of Counsel), by leave on behalf of the respondent, and the Full Bench having reserved its decision on the matter, and reasons for decision being delivered on the 16th day of May 2001 wherein it was found that the appeal should be dismissed, it is this day,

the 16th day of May 2001, ordered that appeal No FBA 2 of 2001 be and is hereby dismissed.

By the Full Bench

(Sgd.) P.J. SHARKEY,
[L.S.] President.

2001 WAIRC 02730

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	ILUKA RESOURCES LIMITED AND ANOTHER, APPELLANTS
	v.
	THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS AND OTHERS, RESPONDENTS
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	CHIEF COMMISSIONER W S COLEMAN
	COMMISSIONER S WOOD
DELIVERED	TUESDAY, 8 MAY 2001
FILE NO/S	FBA 11 OF 2001
CITATION NO.	2001 WAIRC 02730

Decision Appeal discontinued by consent.

Order.

This matter having been due to come on for hearing before the Full Bench on the 8th day of May 2001, and the parties herein, on the 3rd day of May 2001, having filed in the Registry of the Commission a Proposed Minute of Consent Order to discontinue the appeal and the parties having waived their rights conferred on them by s.35 of the *Industrial Relations Act* 1979 (as amended) , it is this day, the 8th day of May 2001, ordered, by consent, as follows—

(1) THAT there be leave granted and leave is hereby granted for appeal No FBA 11 of 2001 to be discontinued.

(2) THAT the Full Bench refrain from hearing the said appeal further.

(3) THAT the hearing date of the 8th day of May 2001 be and is hereby vacated.

By the Full Bench

(Sgd.) P. J. SHARKEY,
[L.S.] President.

2001 WAIRC 02849

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	BHP IRON ORE PTY LTD, APPELLANT
	v.
	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS — WESTERN AUSTRALIAN BRANCH, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	CHIEF COMMISSIONER W S COLEMAN
	COMMISSIONER S WOOD
DELIVERED	MONDAY, 21 MAY 2001
FILE NO/S	FBA 21 OF 2001
CITATION NO.	2001 WAIRC 02849

Decision	Appeal dismissed.
Appearances	
Appellant	Mr A D Lucev (of Counsel), by leave, and with him,
	Mr H M Downes (of Counsel), by leave
Respondent	Mr D H Schapper (of Counsel), by leave

Reasons for Decision.

THE PRESIDENT—

1 These are the unanimous reasons for decision of the Full Bench.

2 This is an appeal by the abovementioned employer, BHP Iron Ore Pty Ltd (hereinafter referred to as "BHP") against a decision of the Commission made by a single Commissioner in matter No CR 117 of 2000 on 10 April 2001. The appeal is brought pursuant to s.49 of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "the Act").

3 The appeal is against part of the decision, namely—

> "that the Appellant's application pursuant to section 23A(1a)(b) requiring the Commission to order compensation instead of reinstatement be dismissed, and that the applicant be reinstated"

4 The decision appealed against was made on 10 April 2001 and, formal parts and parts of the decision irrelevant to this appeal omitted, reads as follows—

> "1. DECLARES that Mr Steven Jones was harshly, oppressively and unfairly dismissed from his employment as a mechanical shift fitter at Finucane Island by the respondent on or about 4 May 2000.
>
> 2. ORDERS that the respondent within 21 days of the date hereof shall reinstate Mr Steven Jones in its employment as a mechanical shift fitter at Finucane Island.
>
> 3. ORDERS that a written warning be placed on Mr Jones' personal file in the following terms "that any repetition of conduct involving the making of unwelcome remarks and/or the use of derogatory or offensive words to any employee of the respondent contrary to the BHP Iron Ore Non Harassment Policy will result in the termination of your employment"."

GROUNDS OF APPEAL

5 It is against that decision that the appellant now appeals on the following grounds, as amended—

> "The Commission erred in law in dismissing the Appellant's application under section 23A(1a)(b) of the Industrial Relations Act, 1979 (WA) ("the Act"), and in ordering that the Respondent's member, Mr S Jones, be reinstated.
>
> **Particulars**
>
> 1. The Commission did not have jurisdiction, alternately power, under section 23A of the Act, or otherwise, to order reinstatement of the Respondent's member once the Appellant pursuant to section 23A(1a)(b) of the Act, agreed to pay compensation to the Respondent's member.
>
> 2. Once the Appellant agreed, under section 23A(1a)(b) of the Act, to pay compensation to the Respondent's member, the Commission's jurisdiction, alternately power, was limited to ordering that the Respondent's member be paid compensation pursuant to section 23A(1)(ba) of the Act."

BACKGROUND

6 The matter was referred for hearing and determination pursuant to s.44(9) of the Act, by the respondent, the applicant at first instance, (hereinafter referred to as "the AFMEPKIU") which, at all material times, was an organisation of employees duly registered under the Act.

The AFMEPKIU had alleged that its member, Mr Steven Jones, was unfairly dismissed from his employment by BHP on 4 May 2000.

7 The AFMEPKIU sought an order that Mr Jones be reinstated and that application was opposed by BHP.

8 The Commissioner found, after a hearing, that Mr Jones was harshly, oppressively and unfairly dismissed from his employment as a mechanical shift fitter at Finucane Island in the State of Western Australia by BHP on or about 4 May 2000.

9 The finding that Mr Jones was harshly, oppressively and unfairly dismissed from his employment was not challenged upon this appeal.

The Remedy

10 The Commissioner turned to the question of a remedy, observing that the AFMEPKIU sought reinstatement for Mr Jones. The onus was on BHP, the respondent at first instance, in such matters to establish that reinstatement is impracticable. The Commissioner found that reinstatement or re-employment was the primary remedy which the Commissioner should consider in a case where unfairness has been found.

11 The Commissioner observed that he had considered this matter carefully and, in his opinion, it would not, in all of the circumstances, be impracticable to reinstate Mr Jones. The Commissioner observed, that reinstatement was the primary remedy under the Act and that, if it can be done, then it should be done. He was not persuaded that BHP had discharged the burden on it in this regard.

12 The Commissioner, as we have said above, ordered that Mr Jones be reinstated within twenty-one days of the date of the order, namely 10 April 2001 (the order was perfected on 10 April 2001) in his employment by BHP as a fitter on Finucane Island in this State.

13 The Commissioner then went on to conclude, too, that an appropriate penalty ought to be imposed on Mr Jones and that it should be on the basis that he be given a written warning in very clear terms that any further contravention of the non harassment policy will lead to his dismissal. The Commissioner then advised that he proposed to reflect the terms of such a written warning in his minutes of proposed order.

14 The Commissioner published his reasons for decision and issued the minute of proposed order on 21 March 2001.

15 After that occurred and before the order for reinstatement was perfected, the solicitors for BHP, by letter dated 23 March 2001, advised the Commission that BHP agreed to pay compensation instead of reinstating Mr Jones. BHP, in expressing that agreement, relied on s.23A(1a)(b) of the Act.

16 On 29 and 30 March 2001, the Commissioner heard submissions, including the submission which BHP made, when the Commissioner permitted it to re-open its case, and held that the effect of s.23A(1a)(b) of the Act was not to extinguish the power of the Commission to order the reinstatement or re-employment of an unfairly dismissed employee. The order appealed against issued subsequently on 10 April 2001, as we have observed above.

ISSUES AND CONCLUSIONS

The Statute—S.23A of the Act

17 The complaint of BHP upon appeal was that the order to reinstate Mr Jones as an employee of BHP was outside the jurisdiction or power of the Commission once BHP had agreed, because the Commissioner's jurisdiction or power was limited to making an order that the AFMPEKIU's member, Mr Jones, be paid compensation pursuant to s.23A(1)(ba) of the Act.

18 S.23A(1) of the Act, in its relevant provisions, and s.23A(4) of the Act read as follows—

> "**23A. Powers of Commission on claims of unfair dismissal**
>
> (1) On a claim of harsh, oppressive or unfair dismissal, the Commission may—
>
> (a) order the payment to the claimant of any amount to which the claimant is entitled;
>
> (b) order the employer to reinstate or re-employ a claimant who has been harshly, oppressively or unfairly dismissed;
>
> (ba) subject to subsections (1a) and (4), order the employer to pay compensation to the claimant for loss or injury caused by the dismissal; and
>
> .....
>
> (1a) The Commission is not to make an order under subsection (1)(ba) unless —
>
> (a) it is satisfied that reinstatement or re-employment of the claimant is impracticable; or
>
> (b) the employer has agreed to pay the compensation instead of reinstating or re-employing the claimant.
>
> ....
>
> (4) The amount ordered to be paid under subsection (1)(ba) or (3) is not to exceed 6 months' remuneration of the claimant, and for the purposes of this subsection the Commission may calculate the amount on the basis of an average rate received during any relevant period of employment."

19 The answer to the question posed on this appeal depends upon the construction and interpretation of s.23A of the Act. In doing so, the relevant provisions of s.23A(1) should be read in the context of the whole of the Act and in the context of the whole of s.23A.

20 We propose to interpret the relevant parts of the section by ascribing to the words thereof their ordinary, natural meaning, except where to do so would lead to absurdity or ambiguity, or lead to an interpretation which is inconsistent with the tenor of the Act as a whole.

21 It is permissible to examine extrinsic material in the interpretation of the section in order to discover the underlying purpose or object and then to confirm that the literal meaning was intended (see s.19 of the *Interpretation Act* 1984 (as amended)). If the provision under consideration is clear on its face, extrinsic materials may only be used to confirm the literal meaning.

22 In other words, extrinsic materials such as extracts from Hansard which were sought to be relied upon in this case may be referred to, but they cannot alter the interpretation which the court, without reference to those materials, would place upon the provision (see *Australian Federation of Construction Contractors; Ex parte Billing* (1986) 68 ALR 416 at 420, where the High Court in a joint judgment said—

> "Section 15AB of the Acts Interpretation Act 1901 (Cth), as amended, does not permit recourse to that speech for the purpose of departing from the ordinary meaning of the text unless either the meaning of the provision to be construed is ambiguous or obscure or in its ordinary meaning leads to a result that is manifestly absurd or is unreasonable. In our view neither of those conditions is satisfied in the present case. In any event, the Minister's speech does not purport to be an exhaustive description of the of the legislation and must be read in the context of the Bill itself and the explanatory memorandum."

23 The words of a Minister must not be substituted for the text of the law. See *R v Bolton and Another; Ex parte Beane* (1987) 70 ALR 225 at 227-228 where Mason CJ, Wilson and Dawson JJ said—

> "The words of a Minister must not be substituted for the text of the law. Particularly is this so when the intention stated by the Minister but unexpressed in the law is restrictive of the liberty of the individual. It is always possible that through oversight or inadvertence the clear intention of the Parliament fails to be translated into the text of the law. However unfortunate it may be when that happens, the task of the court remains clear. The function of the court is to give effect to the will of Parliament as expressed in the law."

24 The language of s.19 of the *Interpretation Act* 1984 (as amended) and of similar provisions, such as s.15AB of the *Acts Interpretation Act* 1901 (Cth), permits, but does not oblige, a court to refer to extrinsic material which counsel seeks to place before it (see *Brennan v Comcare* (1994) 122 ALR 615 at 634 per Gummow J).

25 It was also submitted by Mr Lucev, counsel on behalf of the appellant, that the Commission must pay regard to the legislative history of the provision. Certainly, there are ample examples of courts looking at prior statutory provisions dealing with the same subject matter in order to enable them to interpret a current statute (see Statutory Interpretation in Australia 4th Ed., Pearce and Geddes at paras. 3.16 to 3.18). However, as Kennedy J said in *RRIA v FEDFU* 67 WAIG 315 at 319 (IAC)—

> ".... in an Act such as the present, which is subject to regular amendment, I would hesitate to draw any positive inference from the repeal or amendment of any particular section."

26 Next, and significantly, the meaning of the section was, to some extent, considered by the Industrial Appeal Court in *City of Geraldton v Cooling* 80 WAIG 5341 (IAC). Relevant to this appeal, that case is authority for the propositions that—

(a) No general power has been conferred on the Commission to award compensation for damage or injury caused by a harsh, oppressive or unfair dismissal.

(b) The only orders which may be made by the Commission exercising the powers conferred upon it on a referral of a claim of harsh, oppressive or unfair dismissal are those authorised by s.23A of the Act. Those powers relevantly are to order reinstatement or to order compensation.

(c) Within s.23A of the Act, the power to order compensation can only be derived from s.23A(1)(ba), which is subject to s.23A(1a)(a) and (b) and (4).

(d) By s.23A(1a) of the Act, the Commission is prohibited from making such an order unless it is satisfied that reinstatement or re-employment is impracticable, or the employer has agreed to pay the compensation instead of reinstating or re-employing the claimant. (It is to be noted that the employer must agree to pay "the compensation" (our emphasis).) The word "the" means the compensation ordered to be paid pursuant to the power conferred by and exercisable pursuant to s.23A(1)(ba) of the Act, which is itself restricted by s.23A(1a) and conditioned by s.23A(4) and which power cannot be exercised concurrent with the power to order reinstatement or re-employment.

(e) An order for compensation cannot be made if an order for reinstatement or re-employment is made; it can only be made "instead of" an order for reinstatement or re-employment in the circumstances prescribed by s.23A(1a) of the Act (see per Kennedy J, with whom Scott and Parker JJ agreed, at page 5343).

(f) Put another way, there is power to order reinstatement or re-employment (see s.23A(1)(b) of the Act) or there is power to order compensation (see s.23A(1)(a) of the Act), but the two are mutually exclusive and cannot be exercised concurrently.

27 The power to order reinstatement or re-employment is the primary remedy, as it is expressed in s.23A of the Act and, for obvious reasons. That meaning is extractable and was extracted by ascribing to the language of s.23A its ordinary and natural meaning. The return to one's employment by way of reinstatement or re-employment would generally be more advantageous than a mere award of compensation. The Commissioner correctly found that reinstatement was the primary remedy.

28 Thus, we apply the interpretation of s.23A of the Act, as it was made in *City of Geraldton v Cooling* (IAC)(op cit), and as we are bound to do.

29 S.23A(1a) of the Act, therefore, on that authority, prohibits the Commission from making an order for compensation, unless it is satisfied that reinstatement or re-employment of the claimant is impracticable. Then, since s.23A(1a)(a) and (b) are joined by the word "or", which is a disjunctive preposition (see s.17 of the *Interpretation Act* 1984 (as amended)), s.23A(1a)(b) prohibits the making of an order to pay compensation to the claimant unless the employer has agreed to pay the (our emphasis) compensation instead of reinstating or re-employing the claimant.

30 In this case, there was a finding that reinstatement or re-employment was not impracticable. There was an order that there be reinstatement, subsequent to which a minute of an order issued, subsequent to which the employer agreed to pay compensation.

31 In our opinion, the agreement referred to in s.23A(1a)(b) of the Act cannot, and does not, at all condition the power of the Commission to order reinstatement or re-employment and does not purport to do so. S.23A(1)(b) of the Act is not conditioned by s.23A(1)(a). The power to reinstate is not conditional. The power to order compensation under s.23A(1)(ba) of the Act is expressly to be exercised, and to be exercised only, subject to s.23A(1a) and (4) of the Act. That is the clear meaning of the provision derived from the plain language of the whole of the section.

32 In our opinion, therefore, the provisions of s.23A(1a) are quite clear. The first, (a), enables the Commission, with reference to no-one, not to order the primary remedy of reinstatement if it is satisfied that such a remedy is not practicable. The second, (b), clearly means that and enables the Commission to order the payment of compensation where the employer has agreed to pay that compensation instead of reinstating or re-employing, but it certainly does not prevent the Commission exercising its clear untrammelled power within the discretion conferred upon it, to order reinstatement.

33 S.23A(1a)(b) of the Act clearly refers mainly to a situation where the claimant seeks compensation only and the employer agrees to pay the compensation; that is, the compensation which is to be fixed by the Commission. Previous to the amendment coming into operation, the Commission could only order compensation where it had made a finding that re-employment was impracticable. It is certainly not a provision which conditions the power to reinstate in a section whose clear purpose is to provide a primary and secondary remedy for unfairly dismissed employees; nor does it extinguish the power to reinstate. S.23A(1a)(b) of the Act clearly applied only to make the power exercisable under s.23A(1)(ba) subject to it.

34 The power to order compensation, which cannot be exercised concurrent with the power to order the primary remedy of reinstatement or re-employment (the two being mutually exclusive) is not to be exercised unless the Commission is satisfied that reinstatement is impracticable or that the employer has agreed to pay compensation. By contrast, there is no restriction at all upon the exercise of the power of reinstatement or re-employment expressed in s.23A of the Act.

35 We would also add this. S.23A of the Act is a section which is remedial or beneficial (see *Bogunovich v Bayside Western Australia Pty Ltd* 79 WAIG 8 (FB) and the cases cited therein). The provision exists to give a benefit to unfairly dismissed employees and, therefore, to remedy an injustice. The primary and unconditional remedy which it provides is reinstatement or re-employment. The section is patently, in its terms, not directed to providing benefit or remedy for employers who effect unfair dismissals, so that it cannot be construed liberally to assist an employer, even if it could. Accordingly, it would be a mis-construction on those principles to construe the section so as to find that the primary remedy was extinguishable at the option of an employer found to have acted unfairly.

36 S.23A of the Act must be construed beneficially and liberally and in a manner favourable to unfairly dismissed employees who are those persons who are to benefit from

the legislation (see *R v Kearney; Ex parte Jurlam* (1984) 52 ALR 24 at 28 and *Zangzinchai v Milanta* (1994) 125 ALR 265 at 272). Their major benefit is reinstatement or re-employment.

37 In any event, for the reasons which we have expressed above, that interpretation is not open. Further, there is no ambiguity in the language of s.23A of the Act. Further, since the plain words of the section lead to the conclusion that s.23A(1a)(a) and (b) do not condition or limit the power to order reinstatement or re-employment, if it were necessary to go further, which it is not, then to place in the hands of an employer who had unfairly dismissed an employee the power to deprive an unfairly dismissed employee of his/her primary remedy would require express and unambiguous words.

38 To extinguish the remedy of reinstatement or re-employment would require express or unambiguous words. Those words do not exist (see *Thompson v Gould & Co* (1910) AC 409 at 420 and *Dalli Kavak v Minister for Immigration and Ethnic Affairs* (1985) 61 ALR 471 at 475-6). In the latter case there is reference to the general disinclination of courts to make implications into a statute. The clear expression of the section in this case is, in any event, to the contrary and would exclude any implication.

39 In any event, s.23A(1a) of the Act cannot be read in isolation from s.23A(1).

40 We would also add that no assistance can be derived by BHP from the language or existence of s.23A(3) of the Act. All that provision prescribes is an alternative remedy if an order for the primary remedy is not complied with. The power can only be exercised if there is disobedience of or non-compliance with an order for reinstatement or re-employment. S.23A(3) of the Act has no effect on the unconditional power to order the primary remedy.

41 To so interpret the section is thus consonant with the judgement in *City of Geraldton v Cooling* (IAC)(op cit), promotes the clear purpose of the Act in the section which is to provide remedies for persons unfairly dismissed, is not inconsonant with the section as a whole and its tenor and purpose, and does not lead to absurdity or unreasonableness. Further, that is the plain meaning of the language of the section which is not obscure or ambiguous.

42 The three presumptions referred to in paragraph 43 of BHP's outline of submissions do not apply, i.e. the *expressio unius* presumption, the *generalia specialibus non derogant* maxim, and the effect of the later provision, because of the approach which we have said above is required to be taken.

43 Further, the fact that, as Kennedy J found in paragraph 20 of *City of Geraldton v Cooling* (IAC)(op cit), s.23A(1)(ba) of the Act is a specific provision covering claims for compensation for loss or injury caused by the dismissal and are subject to the restrictions imposed by s.23A of the Act, and that there is no escape from them is a recognition that the compensation power is a power which stands on its own and conditions which affect it cannot derogate from the power to reinstate.

Extrinsic Material and Past Legislation

44 The legislature speaks clearly and unambiguously through the language of the section and it is not necessary to go to the extrinsic material nor, on the principles of law expressed above, should the Commission (see *Bolton and Another; Ex parte Beane* (HC)(op cit); *Brennan v Comcare* (HC)(op cit) and *Australian Federation of Construction Contractors; Ex parte Billing* (HC)(op cit)). The extrinsic materials cannot, in any event, alter the interpretation.

45 We do not agree with Mr Lucev's submission that the reference to the Minister's Second Reading Speech by Kennedy J in *City of Geraldton v Cooling* (IAC)(op cit) provides any support for his argument. That was referred to merely by His Honour en route to the court's finding as to what constituted "compensation", and the finding that the power to order reinstatement and compensation were mutually exclusive.

46 Therefore, the view we have taken follows, too, inevitably from the interpretation of the section by the Industrial Appeal Court in *City of Geraldton v Cooling* (IAC)(op cit) and by which interpretation the Full Bench is bound.

47 We would add this. Even if one were permitted to resort to Hansard and, for the reasons which we have advanced, one is not, then it takes the matter no further. All it does is recognise that there was no power previously to order compensation unless the reinstatement was impracticable. The new provision provides the power, inter alia, to order compensation where a claim is made for compensation only, and not reinstatement. There is nothing in Hansard which suggests that s.23A(1a)(b) of the Act enables the employer to remove or unilaterally extinguish the separately conferred power to reinstate an unfairly dismissed employee.

48 Further, the legislative history is of very little assistance, because of the piecemeal and frequent amendment of the Act over the years (see per Kennedy J in *RRIA v FEDFU* (IAC)(op cit)). In any event, the history of the insertion of s.23A(1)(a) and then s.23A(1)(b) do not affect the interpretation by the Industrial Appeal Court in *City of Geraldton v Cooling* (IAC)(op cit) and the interpretation of the meaning of s.23A(1a) of the Act which flows from that. All that it demonstrates is that two provisions were inserted at different times (s.23A(1a)(a) and (b)) to condition the exercise of the power to order compensation.

49 Further, we do not think that an offer to pay compensation, which is what it was, correctly characterised by the Commissioner after he had made his order, could be characterised as an agreement "to pay the compensation".

50 It is doubtful, too, that Parliament could validly confer on a party the right to determine how a matter could be decided, which is what would occur if the meaning Mr Lucev invited us to ascribe to s.23A(1a)(b) were ascribed; although we make no judgment on that at this time.

51 In our opinion, for those reasons, the Commissioner acted within power and correctly and validly exercising the unconditional power conferred on him by s.23A(1)(b) of the Act, a power certainly not extinguished, diluted or conditioned by s.23A(1a)(b) of the Act. We would, for those reasons, not regard the findings and the decision to the contrary in *Harwood v Pearlside Investments t/as Midland Monumental* (1998) 79 WAIG 275 as correct.

52 For those reasons, too, we would find that no ground of appeal was made out, and would dismiss the appeal.

Order accordingly

2001 WAIRC 02850

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	BHP IRON ORE PTY LTD, APPELLANT
	v.
	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS — WESTERN AUSTRALIAN BRANCH, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	CHIEF COMMISSIONER W S COLEMAN
	COMMISSIONER S WOOD
DELIVERED	MONDAY, 21 MAY 2001
FILE NO/S	FBA 21 OF 2001
CITATION NO.	2001 WAIRC 02850

Decision	Appeal dismissed.
Appearances	
Appellant	Mr A D Lucev (of Counsel), by leave, and with him,
	Mr H M Downes (of Counsel), by leave
Respondent	Mr D H Schapper (of Counsel), by leave

Order.

This matter having come on for hearing before the Full Bench on the 8th day of May 2001, and having heard Mr A D Lucev (of Counsel), by leave, and with him Mr H M Downes (of Counsel), by leave on behalf of appellant and Mr D H Schapper (of Counsel), by leave, on behalf of the respondent, and the Full Bench having reserved its decision on the matter, and reasons for decision being delivered on the 21st day of May 2001 wherein it was found that the appeal should be dismissed, it is this day, the 21st day of May 2001, ordered that appeal No. FBA 21 of 2001 be and is hereby dismissed.

By the Full Bench,

(Sgd.) P.J. SHARKEY,
[L.S.] President.

2001 WAIRC 02675

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	MATTHEW JAMES EAST, APPELLANT
	v.
	PICTON PRESS PTY LTD, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	CHIEF COMMISSIONER W S COLEMAN
	COMMISSIONER J F GREGOR
DELIVERED	FRIDAY, 4 MAY 2001
FILE NO/S	FBA 3 OF 2001
CITATION NO.	2001 WAIRC 02675

Decision	Appeal upheld and decision at first instance varied.
Appearances	
Appellant	Mr K J Trainer, as agent
Respondent	Ms N F Rutherford, as agent, and with her, Mr W G Dorr

Reasons for Decision.

THE PRESIDENT—

1 This is an appeal against the whole of the decision of the Commission, constituted by a single Commissioner, given on 19 January 2001 in application No 1509 of 2000. The appeal is brought under s.49 of the *Industrial Relations Act* 1979 (as amended).

2 The decision appealed against is an order dismissing an application by the abovenamed appellant, Mr Matthew James East, in which he claimed that he was harshly, oppressively or unfairly dismissed and sought relief.

GROUNDS OF APPEAL

3 The grounds of the appeal are as follows—

"1. The learned Commissioner erred in failing to apply case law principles.

2. The learned Commissioner erred in his findings that the appellant had been given appropriate warnings.

3. The learned Commissioner failed to give proper weight to the evidence concerning budgets.

4. The learned Commissioner failed to give proper consideration to the Respondents obligations to appropriate training, teaching and counselling of the Appellant.

5. The learned Commissioner erred in finding or inferring that the Appellant had been warned that his position was in jeopardy.

6. The learned Commissioner failed to take into account or give proper weight to the Appellants employment history."

BACKGROUND

4 This matter came on for hearing before the Commission on 19 January 2001. At the hearing, Mr Ryan Dhue appeared as agent for the respondent and Mr East was unrepresented.

5 Apart from documentary evidence, there was oral evidence given at first instance by Mr East on his own behalf and, on behalf of the respondent, by Mr William Gary Dorr, the respondent's Sales Manager.

6 At all material times, the respondent was engaged in the business of a printer. The Managing Director of the respondent, at the material time, was identified in evidence as a Mr Payton. Mr East was employed by the respondent from 10 July until 1 September 2000 as an Account Manager, which is another term for sales representative. It was common ground that his duties were to generate new business for the respondent. Mr East said that this was an area where the respondent was not currently strong. Mr East was employed at a salary of $60,000.00 per annum.

7 Mr East's appointment occurred following a selection process where he was interviewed by Mr Dorr and Mr Payton. He had been engaged in sales for fifteen years, but not immediately prior to his appointment. Immediately prior to his appointment, he had spent six years as a corporate marketing manager. He had, therefore, been out of professional selling for six years, and made it clear during the selection process that it would take him some time to regain his contacts. He also made it clear and it was not denied that he had, that it would take him three to six months to achieve (and I paraphrase) what was expected of him.

8 Mr East understood, he said, as did the respondent, that it would take him time to find his legs again.

9 It was an express term of his contract of employment, contained in his letter of appointment of 7 July 2000, that—

> "A period of three calendar months probation shall apply. At any time during this probationary period our employment relationship can be terminated with one weeks notice by either party."

(See exhibit A (see page 60 of the appeal book (hereinafter referred to as "AB").) This was not therefore a fixed period contract or an indefinite period contract subject to and containing a probationary period.

10 Mr East's employment was terminated by the respondent with one week's pay in lieu of notice on 1 September 2000, about two months into the probationary period, and four weeks before its expiry.

11 During those two months, Mr East performed satisfactorily, according to his evidence, if not well. Indeed, his evidence was that he worked very hard renewing old contacts and canvassing for new business.

12 Mr East said that he thought that he was doing well and that he had a career with the respondent. He said that, at no time, was there any indication that he was doing poorly, or that his position was threatened. He received no formal indication from the respondent that his employment was to be terminated. Indeed, his evidence was that, about two or three weeks before he was dismissed, the Sales Manager said to him that he had the team which he wanted and that Mr East was "virtually guaranteed" his job. Mr East also said that he had refused another job two weeks before he was dismissed because he thought that he was secure in his employment with the respondent.

13 In addition to that, Mr East said, in evidence, that, on the evening before he was dismissed, he was "congratulated" by the owner of the business on getting a new $40,000.00 contract. Further, he approached Mr Dorr about two to three weeks before he was dismissed about purchasing a new car and Mr Dorr told him that that would be a good idea. His car was, however, as he admitted, old and in poor condition. Thus, I would observe, it was a fair inference that he needed to acquire a new car in any event.

14 Further, although Mr East spoke to Mr Dorr on a regular basis, Mr Dorr did not indicate that his work was less than satisfactory. He did admit that, on one occasion, Mr Dorr told him that they needed to work longer hours and that Mr Payton had said that he required them to start earlier. Mr East said, and it was not challenged in cross-examination, that, after that, he extended his hours and he was at work from 8.30 am to 6.00 pm most days. He said that revenue was slow in coming in, and that he was working hard and bringing a lot of business in.

15 Mr East gave evidence that Mr Dorr had always led him to believe that he was doing well and just to keep at it and it would all come to him eventually.

16 Indeed, two weeks before, as he put it, he was suddenly dismissed, he was given a new "client base" to work on. He was astounded, he said, at being dismissed. That dismissal coincided with another sales representative starting the next Monday, i.e. immediately after his dismissal.

17 Over eight weeks of employment, Mr East admitted, he had generated $20,000.00 worth of business, including $9,000.00 worth of new business, which he admitted was not a sustainable position. He agreed that he would be expected, after a period, to gross approximately $100,000.00 a month on average in sales. As I have observed, Mr East said in evidence, and he was not cross-examined on it nor was his evidence contradicted, that it would take him some three to six months to build his client base up to where he was writing $100,000.00 per month in sales, and this was made clear by him when he was engaged. He asserted that he was never ever made aware that his sales figures were unacceptable.

18 He was dismissed before three months of his period of employment had elapsed and well before he had been employed for six months.

19 Further, Mr East said he was given no budget to achieve in sales. He did admit, in cross-examination, that it was said to him, in a round about way, that he should have spent more time out on the road looking for business, rather than time in the office.

20 His case was that he was dismissed without warning, without any indication that his job was insecure, and that such a dismissal was unfair because he needed at least another month to test whether he was capable of achieving the necessary sales figures to prove his worth. The dismissal was, he said, unfair. He did obtain alternative employment, starting on 10 December 2000, and at a higher rate of remuneration, having continually sought other work.

21 Mr Dorr was the Sales Manager of the respondent. His role was, somewhat obviously, involved in the day to day running of the sales people (of whom, at one time, there were five, including Mr East), monitoring performance, checking sales strategies and dealing with general problems and worries which sales staff might have. He agreed that, primarily, the role of Mr East (and other sales representatives) was to develop new business, and to bring new business to the respondent.

22 Mr Dorr's evidence was that Mr East was dismissed because the respondent concluded that the employment would not work out and was not paid for three weeks of the probationary period, but was paid one week in lieu of notice. Mr Dorr told the Commission that Mr East was not dismissed without warning but was repeatedly told, even though it was informally, that there were concerns about his work ethic; in particular, the respondent was concerned about the hours of his arrival at work in the morning, and concerned that he was spending too much time in the office and that he was not, as a result, achieving the necessary figures.

23 Mr Dorr said that Mr East should have achieved sales figures in the order of $100,000.00 per month and, on the basis of the figures achieved by Mr East, coupled with his work ethic over the two months, the respondent concluded that things would not work out and he was therefore dismissed.

24 The benchmark for sales employees was about $100,000.00 per month. Mr Dorr's evidence was that the figures in exhibit 1 (page 64(AB)) achieved by Mr East were unacceptable and that he told him so. It was not put to Mr East in cross-examination that these figures were unacceptable, but that they were unsustainable and that the respondent needed $100,000.00 per month from its sales representatives. However, Mr Dorr's own evidence was "I know it's not achievable right away, but we have to have some indication that it is going to happen" (see page 44(AB)). This led to what Mr Dorr called a formal meeting where, as he described it, they sat down and Mr Dorr said "Let's put some time in and let's .... get out of the office ..." (see page 44(AB)). This, however, was not said to Mr East alone. This was about four or five weeks into the probationary period.

25 Mr Dorr told not only Mr East, but the other sales representatives that they had to be seen to be doing a lot more. There is no evidence that the other sales representatives were dismissed. According to Mr Dorr, Mr East, although he said that he could make more effort, did not, and he departed. One of Mr Dorr's concern was that Mr East spent too much time on the computer and wandered in at 9.00 am or 9.30 am, leaving at 5.00 pm.

26 Mr Dorr did discuss the budget with Mr East and the figure of $100,000.00 per month as a baseline. Pertinently, Mr Dorr admitted that he did not tell Mr East that his sales figures were too low and that he would be dismissed if they did not improve. He did admit that, since that meeting, Mr East's timekeeping was pretty solid.

27 Mr Dorr dismissed Mr East after discussions with Mr Payton, their view being that Mr East was not going to work out for them and that "the work ethic was not there". When he dismissed Mr East, Mr Dorr said that it was not going to work out between them and referred to the lack of time and effort. Mr Dorr said that he did not guarantee Mr East a job. He did not suggest that Mr East buy a new car, saying that it was up to him. He did say that he had the sales team which he wanted, but Mr East remained on probation. Mr East did not "pick up his act" or listen to what Mr Dorr had to say. Nothing tended to change in his daily routine. Mr Dorr said that Mr East was not given another four weeks to finish out his probationary period because the company was under a lot of stress, having just bought a new company and time was of the essence. Therefore, the respondent had to make decisions quickly to make the company a success. Mr East had been given an opportunity and had not taken advantage of it.

FINDINGS

28 The Commissioner observed that there was not a great conflict in the evidence produced in the proceedings but, where there was, he accepted the evidence of Mr Dorr, the Sales Manager of the respondent. In particular, the Commissioner accepted that, at no time, did Mr Dorr guarantee, either virtually or otherwise, Mr East's continued employment. The Commissioner accepted Mr Dorr's evidence that, during the period of probation, such an undertaking simply would not be given and, indeed, was not given.

29 The Commissioner was satisfied that there was mention of the need for sales staff, including Mr East, to keep up the level of sales, given that the respondent acquired another business and that required higher sales figures. That was not disputed by Mr East, but he said that he should have been given more time to prove his worth.

30 The Commissioner also accepted that Mr East was spoken to about the need to work longer hours and, in particular, to be out and about rather than spend as much time as he did in the office.

31 Having regard to the fact that Mr East was on probation and to the fact that the terms of the contract clearly imply, if not expressly state, that employment could be terminated before the expiry of the three month period, as the Commissioner found, and also because of the reasons given by the Sales Manager, apparently with the support of the Managing Director, that the appointment would not work out, the Commissioner was not persuaded that the right which the contract reserved to the employer to terminate the contract was abused.

32 The Commissioner found that Mr East had brought in only $20,260.00 odd worth of business in two months, of which only $9,000.00 was new business.

33 It was, therefore, reasonable to conclude that the arrangement would not work out, but this, the Commissioner observed, was reinforced by the evidence of Mr Dorr that Mr East was spending too much time in the office, notwithstanding that Mr Dorr had expressed concerns to him about this practice.

34 The Commissioner therefore determined that there was no abuse of the contractual right to dismiss Mr East from his employment and that the application should be dismissed.

ISSUES AND CONCLUSIONS

35 The decision appealed against was a discretionary decision, as that term has been defined in *Norbis v Norbis* (1986) 161 CLR 513 and *Coal and Allied Operations Pty Ltd v AIRC* (2000) 74 ALJR 1348 (HC).

36 Since the decision was a discretionary decision, the decision can only be challenged by showing error in the process. Unless the relevant statute directs otherwise, it is only if there is an error in the process that a discretionary decision can be set aside by an appellate tribunal (see *House v The King* [1936] 55 CLR 499; *Gromark Packaging v FMWU* 73 WAIG 220 (IAC) and *Coal and Allied Operations Pty Ltd v AIRC* (HC)(op cit)).

37 As to the role of an appeal tribunal such as this in relation to questions of credibility, that is clearly prescribed by the High Court in *Devries and Another v Australian National Railways Commission and Another* [1992-1993] 177 CLR 472 (see also *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (in liq)* (1999) 73 ALJR 306) and has been followed by Full Benches of this Commission in many appeals.

38 The law relating to unlawful dismissal in relation to employees on contracts for probationary employment has been laid down by Full Benches of this Commission in *Hutchinson v Cable Sands (WA) Pty Ltd* 79 WAIG 951 (FB) and *East Kimberley Aboriginal Medical Service v ANF* 80 WAIG 3155 (FB). Those cases and the principles laid down were not referred to in the reasons for decision at first instance.

39 I reproduce hereunder paragraphs 49 (a), (b), (c), (d) and (e) from *East Kimberley Aboriginal Medical Service v ANF* (FB)(op cit)—

"Again, the following principles apply—

(a) The employer, throughout the period of probation, retains the right to see whether he/she wants the employee or not in his/her employment.

(b) (i) The employer is entitled to consider the employee as if the employee was still at first interview with the following modifications in this case.

(ii) There was an identifiable contract of employment for a period, indeed, a fixed term, including a period of probation of three months. This advances the matter beyond a notional first interview situation.

(c) Probation is an extension of the selection process, a period of learning and a time for attention, assessment and adjustment to standards of performance and conduct. (Inherent in that is that it is a time for teaching, training and counselling.)

(d) (i) However, a probationary employee knows that he/she is on trial and that he/she must establish his/her suitability for the post. The employer, on his side, must give the employee a proper opportunity to prove him/herself, but he/she reserves the right to determine the employment with appropriate notice provided he has reason for so doing (see *Sommerville v Brinzz Pty Ltd Clerk Vehicle Repair Industry* [1994] SAIRComm 8 (31 January 1994), citing *Re J M Hamblin v London Borough of Ealing* (1975) IRLR 354 and see *Hutchinson v Cable Sands (WA) Pty Ltd* (FB)(op cit)).

(ii) Further, an employee on probation can expect to be counselled and informed that she/he is not meeting the required standards of performance, to be given reasonable training in this respect, and to be warned of the possible consequences of a failure to improve. Provided this is done, an employee who is on probation would have little cause to complain if a decision was taken during the course of or at the end of a probationary period to terminate the employment (see *Sommerville v Brinzz Clerk Vehicle Repair Industry* (op cit), citing *Hull v F F Seeley Nominees Pty Ltd* (1988) 55 SAIR 550 at 562).

(e) (i) Consonant with those principles, a probationary employee is able to seek reinstatement, but an employer is entitled to terminate a probationary employee more easily, e.g length of service is not a factor generally, because probationary employment is for a finite period and, in that period, assessment, training and acquisition of skills and demonstration of ability can occur. In addition, any genuine question of compatibility between employer, employee and other employees can be assessed. (This is not a comprehensive inventory of such matters.)

(ii) However, probation is not a licence for harsh, oppressive, capricious, arbitrary or unfair treatment of a probationer (see *Hutchinson v Cable Sands (WA) Pty Ltd* (FB)(op cit) and the cases cited therein)."

40 On a fair reading of the evidence, as will be apparent from my recitation above, of the background facts, it was open to the Commissioner to find that there were no warnings issued during the period of probation of the kind referred to in *Margio v Fremantle Arts Centre Press* 70 WAIG 2559 (FB). There had been, four to five weeks into the probationary period, a suggestion by Mr Dorr that the sales representatives should come in earlier to work and leave later. That, as I have observed, was not directed to Mr East individually.

41 Mr East said in evidence that he did spend more time at work after that. Mr Dorr said that he did not. There was no evidence of any criticism conveyed to him on that score by Mr Dorr after that conversation. That conversation seems to have been more of a counselling and not a warning or any conveying of serious disapproval.

42 There was an allegation, too, that Mr East was spending too much time in the office and not out on the road. This was not conveyed as a criticism to him, nor was it the subject of any warning to him. That was specifically admitted. There was a reference to the need to keep up sales figures. However, the evidence from Mr Dorr and Mr East was that there was no written or exact sales budget which Mr East was required to meet.

43 There seems to have been the mention that a required figure would be $100,000.00 per month.

44 It was not denied that the parties were aware that Mr East had been out of selling for six years.

45 Mr East's work amounted to writing new business, which it seems implicitly is more difficult to do than to sell to existing or committed customers. Mr East

agreed that the amount of business he had written was not sustainable, but maintained that it would take him three to six months, as he advised during the selection process, to build up to a satisfactory figure. At no time was it denied that he had said at interview that it would take three to six months to build up; nor was it denied that that assertion was right.

46 It is fair to observe that, with one month to go at the time of his dismissal, given that a satisfactory figure was said to be $100,000.00 a month, he had not done so. The fact of the matter was, however, that he did not have a precise budget to achieve. However, Mr Dorr's own evidence was that Mr East knew this and was concerned. There was, too, no finding at to what might be achieved in the following month.

47 It was quite clear, as a matter of evidence, that no warning was given to Mr East that he would be dismissed if sales figures were not improved. That was consistent, I might add, with the implied acceptance of Mr East's advice that it would take him three to six months to become fully effective. He was required to achieve higher sales and it was clear that he was aware of it, but that Mr Dodd, and it was not denied by that gentleman that he said so, told him to just keep trying.

48 There was uncontroverted evidence from Mr East, too, that some difficulty was being experienced by him because of higher prices than those of competitors being quoted by the respondent.

49 The question to be answered in this claim was whether Mr East had established that the respondent had harshly, oppressively or unfairly dismissed him, as that concept is described in *Miles and Others t/a Undercliffe Nursing Home v FMWU* 65 WAIG 385 (IAC) (see also *RRIA v CMEWU* 69 WAIG 1027 (FB)). The test has been variously expressed in that case whether the employee has received less than a fair deal or whether the employer has abused his/her/its rights to dismiss the employee. The action, in short, must be one which is harsh or unjust in relation to that employee (see *Miles and Others t/a Undercliffe Nursing Home v FMWU* (IAC)(op cit) at page 387 per Kennedy J).

50 I would observe that it was open to the Commissioner, based on *East Kimberley Aboriginal Medical Service v ANF* (FB)(op cit) and *Hutchinson v Cable Sands (WA) Pty Ltd* (FB) (op cit), to find as follows—

(a) Probation is an extension of the selection process unless an identifiable contract of employment has been entered into to include a fixed term of probation.

(b) Probation, insofar as it is an extension of the selection process, is a period of learning and time for attention, assessment and adjustment to standards of performance and conduct.

(c) The employee knew that he was on trial and that he must establish his suitability for his post. On the other hand, the employer had reserved the right to determine the employment with appropriate notice provided that it had a real, proper and fair reason for so doing. That period of trial existed against a background of the employee having not been involved in selling for six years, and having expressly said, uncontradicted, that he would take three to six months to build up his sales.

(d) Further, the employee, whilst on probation, could expect to be counselled and informed that he was not meeting required standards of performance to be given reasonable training in this respect and to be warned of the possible consequences of a failure to improve.

Probation is not a licence for harsh, oppressive, capricious, arbitrary or unfair treatment of a probationary employee.

51 In this case, it was open to find and the Commissioner should have found that Mr East was not counselled and informed sufficiently or at all as to the standards which he was required to meet. That was evidenced by the lack of a sales budget. It was also evidenced by the fact that the respondent well knew that Mr East had three to six months in which to achieve efficiency, after six years away from selling; and not even three months had expired. It was also evidenced by a general suggestion to the sales representatives, including Mr East, that they work longer hours, a respect for which Mr East improved.

52 Whatever the reason, Mr East was not told sufficiently what standards he was not meeting, nor is there any evidence that he was given training. Further, he received no warning of the possible consequences of a failure to improve. In particular, he was not told that his employment was in jeopardy. Indeed, no evidence was offered as to whether the results were improvable, or the amount of time in which such an improvement might be achieved. He was never told that he would be dismissed. (He did improve the length of his working hours, as Mr Dorr himself admitted.)

53 It was not denied that the difficulties which he said existed did exist. The Commissioner did not have regard to the principles in *East Kimberley Aboriginal Medical Service v ANF* (FB) (op cit) or *Margio v Fremantle Arts Centre Press* (op cit). He erred in failing to do so. It was open to find that principles (c), (d)(i) and (d)(ii) expressed in *East Kimberley Aboriginal Medical Service v ANF* (FB) (op cit) were not complied with.

54 There was no adequate training or counselling. There was no warning or no sufficient warning of the possible consequences of a failure to improve in that he was not seriously or unequivocally warned that his employment was in jeopardy. Again, even though he was given no guarantee of his continued employment, as the Commissioner correctly found, he was not otherwise informed and had some reason to think otherwise. The fact that he was given an entire new client base two weeks before his dismissal was more consistent with his believing that he was doing well than not.

55 Further, Mr Dorr's statement that he had the sales team that he wanted, which team included Mr East, was a statement which might reasonably be believed that Mr East was accepted as an employee, even though Mr Dorr explained in evidence that that was not what he meant by that statement.

56 There was no evidence that an improvement in figures could be achieved in the time available and one would have expected that, when there was evidence that both parties expected him to take three to six months to improve. Further, when Mr East was dismissed, no precise complaints were made, and he was given no chance to answer any allegations.

57 There was no or no sufficient reason to dismiss or none established. It was open to the Commissioner to so find and he should have so found.

58 Further, there was no fair go all round and the employer acted in a procedurally and substantially unfair manner. The dismissal was harsh, oppressive and unfair, for those reasons and ought to have been found to be so. The exercise of the discretion miscarried, for those reasons.

Were the Reasons for Decision Adequate?

59 I turn now to the question of inadequacy of reasons for decision. I am of opinion, on a fair reading, that the reasons are somewhat sparse, but that they are adequate to comply with the Commission's statutory duty, within the principles laid down in *Ruane v Woodside Offshore Petroleum Pty Ltd* 71 WAIG 913 (FB).

60 However, sparse reasons often make it difficult for an appeal tribunal to make a finding that the exercise of a discretion did not miscarry.

61 This is one such case. In particular, there is nothing in the reasons to indicate that the principle in *Margio v Fremantle Arts Centre Press* (op cit) or in *East Kimberley Aboriginal Medical Service v ANF* (FB)(op cit) were complied with or adequately considered. For those reasons, however, Ground 1 is not made out.

Compensation

62 Reinstatement was not sought, it is fair to say. The only remedy, therefore, to be considered is compensation.

63 On a proper construction of the contract, as set out in exhibit A (see pages 60-62(AB)), Mr East could have expected to continue in employment, if the probationary period had been satisfactorily completed in the eyes of the respondent, as there was no requirement to enter into a new and separate contract of employment at the completion of the probationary period, unless he was a satisfactory employee. In this case, it was not established on the balance of probabilities that that would necessarily have been the case, and the amount which should and could be awarded, as compensation for the loss indubitably suffered and established to have been suffered, is an amount equal to three weeks' salary, namely $3,461.54.

FINALLY

64 For the reasons which I have expressed above, the exercise of discretion miscarried. I would make the findings which I say above should have been made. I would then substitute a finding by the Full Bench that there was a harsh, oppressive or unfair dismissal.

65 I would uphold the appeal and vary the order made at first instance by making a declaration of unfair dismissal and ordering the respondent to pay to Mr East the sum of $3,461.54 by way of compensation within seven days.

CHIEF COMMISSIONER W S COLEMAN—

66 I have had the advantage of reading the Hon President's draft of his reasons for decision. I regret that I am unable to agree that the appeal should be upheld.

67 The appellant, an experienced salesperson was dismissed with one weeks notice under the terms of his contract of employment before the expiry of the probationary period of three months. The term of probation was not a finite contract but merely included as a qualification in the letter of appointment which also provided for one weeks notice after the probationary period. The standard against which the dismissal was to be judged is no wider or narrower than that established in *Miles & Ors t/as Undercliffe Nursing Home v Federated Miscellaneous Workers Union of Western Australia* (1985) 65 WAIG 385 @ 385-389. This is consistent with what the Full Bench has said in *East Kimberly Aboriginal Medical Service v Australian Nursing Federation* (2000) 80 WAIG 3155.

68 The grounds for appeal attack the weight given to evidence and findings made in the first instance. These go to whether or not the appellant was given appropriate warnings, if the respondent's obligations with respect to counselling the appellant were carried out and whether proper consideration had been given to evidence concerning budgets or the lack thereof. On these matters the appellant submitted that in the two months of his employment he had performed well and that he had been dismissed without warning. He had not been presented with a budget to work to. However he conceded that his employment would not have been sustainable in the long term on the level of business he had written in the two months of his employment. The appellant claimed that a period of three to six months was necessary for him to "find his feet" given that he had been out of sales and the printing industry for six years. Moreover, the appellant asserted that this was accepted by the respondent when the appointment was made and that during the period of employment assurances had been given that his position was secure.

69 The respondent contended that the dismissal was not effected without warning and that the appellant had been informed of concerns about his work ethic.

70 Where there was conflict in the evidence adduced, the Commissioner in the first instance accepted that of the respondent's witness. In this respect it must be concluded that warnings concerning the level of application necessary to achieve the amount of business expected of the appellant were being given by the respondent albeit that some of these were given in an informal manner. Nevertheless there was evidence than on one occasion it was put directly to the appellant that more effort was needed by him to reach a level of business in the order of $100,000 per month. The evidence accepted by the Commission was that there was no change in the appellant's work routine following this discussion. The implied or explicit "guarantee" about the security of employment was rejected by the Commissioner in the first instance. As to the issue of budgets the finding was that the appellant along with all members of the sales staff were aware of the need to keep up the level of business given the nature of the respondent's operation. Indeed it was the case that the appellant had secured a higher salary than was initially offered on the basis of the amount of business he claimed he could bring to the respondent. The appellant's complaint was that he should have been given more time to deliver. On the basis of the appellant's sales performance, which reflected his work ethic, the respondent concluded that the arrangement was not going to work out and that the appellant was not unfairly dismissed.

71 The findings concerning the appellant's performance, the warnings and the knowledge concerning the required level of business to be written were based to a significant degree on the credibility of the witnesses, that is the appellant and for the respondent, the sales manager. In this respect the advantage the Commission in the first instance had, has not in my view, been shown to have been misused (*Devries and Another v Australian National Railways Commission and Another* [1992-93] 177 CLR 472).

72 I would dismiss the appeal.

COMMISSIONER J F GREGOR—

73 I have had the advantage of reading comment in draft form, the reasons for decision prepared by the President, the facts are sufficiently set out in these reasons and it is unnecessary for me to repeat them.

74 This appeal is decidable upon the application of principles laid down in, *Margio v Fremantle Arts Press Centre* 1970 70 WAIG 2259 (FB) and *East Kimberley Aboriginal Medical Service v ANF* 2000 80 WAIG 3155 (FB) both of these cases are decisions of the Full Bench and bind the Full Bench and the Commission until they are replaced.

75 In my respectful view it was open to the Commission at first instance to find that on the facts before it that the warning which was given to the applicant concerning level of sales was a kind of instruction given to sales staff in many operations in the normal course of operations. It therefore does not qualify on the criteria set out in *Margio v Fremantle Arts Press Centre* (op cit) as a warning by which the recipient would have reached a conclusion that his job was at risk. It is not surprising that the applicant did not seriously dispute the suggestion of the respondent about the need to increase sales he accepted, as one can imply that the other salesman accepted, that the respondent was entitled to want increases in sales. I think the second warning relating to hours of work was more in the way of a suggestion. The principal was happy for the salesmen to work as and when they wanted to as long as they made sales. In that context and in the context of the evidence as I understand it from reading the transcript at first instance, this too, was not a warning in the category of instructions from an employer which would have left the applicant in the position that in no doubt that his employment was at threat.

76 In so far at the application of principles in *East Kimberley Aboriginal Medical Service v ANF* (op cit) are concerned the rules established therein create a regime of decision making which, while acknowledging that probation is an extension of the selection process, require that it is also a time for teaching, training and counselling. This was an extension to the concept of probationary employment which was well established in this jurisdiction in *Westheafer v Marriage Guidance Council of WA* (1995) 65 WAIG 2311. As I understand it Westheafer is an authority for the proposition that probationary employment is an opportunity for the employer to consider whether or not the employer wants an employee in his or her employment. In essence, the period of probation is characterised as an extension of the recruitment process. The test to be applied now after *East Kimberley Aboriginal Medical Service v ANF* (op cit) gives greater emphasis to the responsibility of the

employer to ensure fairness to the probationary employee. His Honour the President has summarised the issues that must be considered in para 50 of his Reasons herein.

77 These issues were not addressed in the Reasons at first instance and it is open to conclude that the tests in *East Kimberley Aboriginal Medical Service v ANF* (op cit) were not applied. In my respectful opinion the decision at first instance thereby miscarried.

78 I would allow the appeal and substitute a finding by the Full Bench that dismissal was unfair. In this case the loss is quantifiable as an amount equal to the balance of the probation period ie three weeks. The respondent should be ordered to pay compensation calculated on that basis in the sum of $3,461.54.

THE PRESIDENT—

79 For those reasons, the appeal is upheld and the decision at first instance varied.

Order accordingly

2001 WAIRC 02805

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	MATTHEW JAMES EAST, APPELLANT
	v.
	PICTON PRESS PTY LTD, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	CHIEF COMMISSIONER W S COLEMAN
	COMMISSIONER J F GREGOR
DELIVERED	MONDAY, 14 MAY 2001
FILE NO/S	FBA 3 OF 2001
CITATION NO.	2001 WAIRC 02805

Decision	Appeal upheld and decision at first instance varied.
Appearances	
Appellant	Mr K J Trainer, as agent
Respondent	Ms N F Rutherford, as agent, and with her, Mr W G Dorr

Order.

This matter having come on for hearing before the Full Bench on the 11th day of April 2001, and having heard Mr K J Trainer, as agent, on behalf of the appellant and

Ms N F Rutherford, as agent, and with her Mr W G Dorr on behalf of the respondent, and the Full Bench having reserved its decision on the matter, and reasons for decision having been delivered on the 4th day of May 2001 wherein it was found that the appeal should be upheld and the matter having been listed for a speaking to the minutes hearing on the 14th day of May 2001, and the parties herein having filed a Minute of Consent Order in the Commission on the 11th day of May 2001 consenting to an amendment to the minutes of proposed order and the Full Bench, in order to reflect the said consent to amendment, having decided to amend the said order so as to order the payment of compensation in the correct sum of $4,846.15, it is this day, the 14th day of May 2001, ordered as follows—

(1) THAT appeal No FBA 3 of 2001 be and is hereby upheld.

(2) THAT the decision of the Commission in matter No 1509 of 2000 made on the 19th day of January 2001 be and is hereby varied by deleting the order made dismissing the application, and substituting therefor a declaration and order in the following terms—

(a) THAT the applicant, Matthew James East, was harshly, oppressively or unfairly dismissed by the respondent, Picton Press Pty Ltd.

(b) THAT the respondent, Picton Press Pty Ltd, do hereby pay, as and by way of compensation, the amount of $4,846.15 to Matthews James East within seven days of the date of this order.

By the Full Bench

(Sgd.) P.J. SHARKEY,
[L.S.] President.

2001 WAIRC 02956

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	THE INDEPENDENT SCHOOLS SALARIED OFFICERS' ASSOCIATION OF WESTERN AUSTRALIA, INDUSTRIAL UNION OF WORKERS, APPELLANT
	v.
	ANGLICAN SCHOOLS COMMISSION (INC) AND OTHERS, RESPONDENTS
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	CHIEF COMMISSIONER W S COLEMAN
	SENIOR COMMISSIONER G L FIELDING
DELIVERED	TUESDAY, 29 MAY 2001
FILE NO/S	FBA 42 OF 2000
CITATION NO.	2001 WAIRC 02956

Decision	Appeal discontinued by consent.

Order.

The Notice of Appeal herein, having been filed in the Registry of the Commission on the 18th day of August 2000, and having been served upon the respondents on the 21st day of August 2000 and a Declaration of Service having been filed in the Registry of the Commission on the 25th day of August 2000, and Counsel for the abovenamed appellant, on the 9th day of May 2001, having filed a Notice of Discontinuance in the Registry of the Commission, and the abovenamed respondents, on the 14th, 17th, 18th and 25th days of May 2001, having advised the Commission, in writing, that the respondents consented to the appeal being discontinued by the appellant, and the Full Bench having decided that the consent to the discontinuance of the appeal constituted special circumstances so as to exempt the parties and each of them from further compliance with Regulation 29 of the *Industrial Relations Commission Regulations* 1985 and having so exempted them, it is this day, the 29th day of May 2001, ordered, by consent, as follows—

(1) THAT there be leave granted and leave is hereby granted for appeal No FBA 42 of 2000 to be discontinued.

(2) THAT the Full Bench refrain from hearing the said appeal further.

By the Full Bench

(Sgd.) P. J. SHARKEY,
[L.S.] President.

2001 WAIRC 02809

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	BHARATHAN KANGATHERAN, APPELLANT
	v.
	ICENET PTY LTD, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	CHIEF COMMISSIONER W S COLEMAN
	SENIOR COMMISSIONER G L FIELDING
DELIVERED	MONDAY, 14 MAY 2001
FILE NO/S	FBA 17 OF 2000
CITATION NO.	2001 WAIRC 02809

Decision	Appeal dismissed.
Appearances	
Appellant	No appearance
Respondent	No appearance

Order.

This matter having come on for hearing before the Full Bench on the 14th day of May 2001, and notice of these proceedings having been given to both parties at the addresses of such parties on the records of the Commission, and there being no appearance by or on behalf of either party, and the Full Bench having determined that the appeal should be dismissed for want of prosecution, no steps having been taken in the proceedings by the appellant since the 16th day of August 2000, pursuant to s.27(1)(a)(ii) and s.27(1)(d) of the *Industrial Relations Act* 1979 (as amended), it is this day, the 14th day of May 2001 ordered that appeal No. FBA 17 of 2000 be and is hereby dismissed.

By the Full Bench

(Sgd.) P. J. SHARKEY,
[L.S.] President.

2001 WAIRC 02998

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPELLANT/ RESPONDENT
	v.
	BURSWOOD RESORT (MANAGEMENT) LTD, RESPONDENT/APPELLANT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	COMMISSIONER J F GREGOR
	COMMISSIONER J H SMITH
DELIVERED	TUESDAY, 12 JUNE 2001
FILE NO/S	FBA 8 OF 2001, FBA 9 OF 2001
CITATION NO.	2001 WAIRC 02998

Decision	Appeals discontinued by consent.

Order.

The Notices of Appeal herein, having been filed in the Registry of the Commission on the 7th day of March 2001, and having been listed for hearing before the Full Bench on the 12th day of June 2001, and the parties herein, on the 28th day of May 2001 in relation to appeal No. FBA 9 of 2001 and on the 1st day of June 2001 in relation to appeal No. FBA 8 of 2001, having filed in the Registry of the Commission a Proposed Minute of Consent Order to discontinue the appeals and the parties having waived their rights conferred on them by s.35 of the *Industrial Relations Act* 1979 (as amended), it is this day, the 12th day of June 2001, ordered and declared, by consent, as follows—

(1) THAT there be leave granted and leave is hereby granted for appeal No FBA 8 of 2001 to be discontinued.

(2) THAT there be leave granted and leave is hereby granted for appeal No FBA 9 of 2001 to be discontinued

(3) THAT the Full Bench refrain from hearing the said appeals further.

(4) THAT the hearing date of the 12th day of June 2001 be and is hereby vacated.

By the Full Bench

(Sgd.) P. J. SHARKEY,
[L.S.] President.

2001 WAIRC 02996

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	PEDRO SOBCZUK, APPELLANT
	v.
	CARNARVON MEDICAL SERVICE ABORIGINAL CORPORATION, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	COMMISSIONER P E SCOTT
	COMMISSIONER J H SMITH
DELIVERED	MONDAY, 11 JUNE 2001
FILE NO/S	FBA 11 OF 1999
CITATION NO.	2001 WAIRC 02996

Decision	Appeal dismissed.
Appearances	
Appellant	No appearance
Respondent	Mr D Howlett (of Counsel), by leave

Reasons for Decision.

THE PRESIDENT AND COMMISSIONER J H SMITH—

1 These are the joint reasons for decision of the President and Commissioner Smith.

2 This is an appeal against the decision of the Commission, constituted by a single Commissioner, and is properly brought pursuant to s.49 of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "the Act"). The decision was made upon applications Nos 1888 of 1998 and No 165 of 1999, both applications having been made by the abovenamed appellant, Mr Pedro Sobczuk, and were dismissed. It is against those decisions that Mr Sobczuk now appeals.

3 In the applications before the Commission at first instance, Mr Sobczuk had claimed that he had been denied benefits to which he was entitled under his contract of employment with the respondent. The applications were opposed by the respondent.

4 What was claimed by Mr Sobczuk, as listed at page 6 of the appeal book (hereinafter referred to as "AB"), was as follows—

"Consultancy/overtime fees	$140,000
Air fares (salary sacrifice)	$9,000
Meal allowances	$900
Relocation expenses	$3,400
Annual leave per contractual agreement	$3,115
Wages per contractual agreement (there was no award)	$31,370"

5 Since this is the first hearing of a matter pursuant to Practice Direction No 2 of 2000 (80 WAIG 5680) and also because of the particular circumstances to this appeal and these proceedings, we propose to deal with the matter in some detail.

The Course of the Appeal

6 It is necessary to outline the history of the appeal. The order dismissing the applications at first instance was made on 11 June 1999 and perfected by being deposited in the office of the Registrar on 14 June 1999.

7 Mr Sobczuk appealed against the whole of both decisions and his Notice of Appeal was filed on 19 November 1999 in the Commission.

8 It is significant that the Notice of Appeal was filed about five months after the decision at first instance was perfected.

9 On 19 November 1999, too, Mr Sobczuk filed an application to extend time to make application to file the Notice of Appeal and to extend time within which to make the application. That application was also made over five months after the decision appealed against. Mr Sobczuk pleaded, in correspondence, the distance between Queensland and Western Australia as the reasons for the delay in attending to these matters.

10 It would seem that, as declared in a Declaration of Service filed on 10 December 1999, none of these applications were served until 1 December 1999.

11 On 20 December 1999, an appeal book was served, according to the Declaration of Service which was filed on 10 January 2000. That was certainly served out of time.

12 On 10 January 2000, an application was filed for an extension of time and for an extension of time to make application to file appeal books.

13 There passed then between Mr Sobczuk and the Registrar and his officers various items of correspondence directed to requesting him to comply with the *Industrial Relations Commission Regulations* 1985 (as amended). He was also sent by the Registrar and his officers the appropriate forms to enable Mr Sobczuk to proceed further with the appeal and the applications.

14 On 28 March 2000, a Declaration of Service was filed declaring that the application to extend time to file appeal books was served on 27 January 2000.

15 An Answer and Counter Proposal to the applications to extend time to file the Notice of Appeal was filed by Gadens, Solicitors, on behalf of the respondent, on 14 April 2000.

16 The applications to extend time were opposed for the reasons which were expressed in the Answer as follows—

"3. The Respondent opposes this application for the following reasons—

(a) the object of the power to extend time is to ensure that the regulations which stipulate the time for filing a notice of appeal do not become an instrument of injustice;

(b) in considering an application of this nature the Full Bench is required to do justice between the parties;

(c) the discretion to extend time can only be exercised in favour of the applicant upon proof that strict compliance with the rules will work an injustice upon the applicant;

(d) having regard to the history of the proceedings, the conduct of the parties, the nature of the litigation and the consequences for the parties of the grant or refusal of the application to extend time, the Full Bench should exercise it's (sic) discretion to refuse (sic) grant the application;

(e) having regard to the decision of Commissioner Beech which issued on 11 June 1999, it is clear that the Commission, at first instance, considered that the applicant had little prospect of convincing the Commission as to the merits of his application. Those same considerations have a bearing on the likelihood of the appellant succeeding in his appeal;

(f) the respondent has a vested right to retain the judgment, being the order issued by Commissioner Beech on 11 June 1999;

(g) there is no material before the Full Bench at present which discloses that the applicant (appellant) would suffer injustice if the application is refused;

(h) there was a delay of five months between the applicant receiving the decision of Commissioner Beech and filing his notice of appeal. In the circumstances that delay was substantial;

(i) the reasons given by the applicant for the delay are—

(i) due to the fact that he now lives in Queensland; and

(ii) the fact that he is not always contactable

those reasons do no constitute sufficient reasons to grant this application.

(j) to grant this application would cause substantial prejudice to the respondent;

(k) the notice of appeal does not disclose on its face, any significant grounds of appeal and moreover contains—

(i) a significant number of contentions which are not relevant to the appeal and are not relevant to the applicant's case at first instance. The question at first instance was whether the applicant had any contractual entitlements which were not entitlements conferred by an award or order;

(ii) the appeal wrongly asserts that the appellant was seeking entitlements which were conferred by law. The Commission would have no jurisdiction to hear such an application (Eleanor Angela Keane v Lomba Pty Ltd 78 WAIG 810);

(iii) the notice of appeal contains a significant amount of assertions and contentions which are scandalous;

(iv) the notice of appeal does not contain any compelling contention by which the Full Bench could conclude that the appellant has a real prospect of succeeding in the appeal.

4. Mr Sobczuk could put nothing to the Commission to convince it to hear the merits of his claim despite being given every opportunity to do so and having been notified of the issues which caused the Commission to consider dismissing the application without hearing the merits.

5. Mr Sobczuk should not be allowed to now make arguments and submissions which he either did make or should have made to the Commission at first instance when invited to do so."

17 This matter has now been brought before the Full Bench of its own motion pursuant to Practice Direction No 2 of 2000, which reads as follows—

> "1. The President, on behalf of the Full Bench of the Commission, will direct the Registrar to bring before a Full Bench, after notice of hearing has been given to all parties at the address for service appearing in the Commission's file, all appeals or other applications to the Full Bench or proceedings before the Full Bench, which no or no sufficient step has been taken to advance the proceedings for a period of more than twelve months from the date of the filing of the Notice of Appeal or other originating application.
>
> 2. On the date notified in such notice of hearing, the Full Bench will give parties, interveners, objectors or s.72A(5) participants an opportunity to be heard as to—
>
> (a) What interlocutory or other directions, if any, should be made; and/or
>
> (b) Whether the appeal or application or any part of it should be dismissed or otherwise dealt with pursuant to s.27(1) of the Act; and/or
>
> (c) Whether any and, if so, what, other orders or directions should be made.
>
> (d) Why the Full Bench should not give directions or make orders."

18 The applications and the appeal are therefore before the Commission as a result of the practice direction and not by the initiative of the parties or either of them.

19 This was done pursuant to a Notice of Hearing forwarded on 27 April 2001 to the address of Mr Sobczuk at 50 Donald Street, Woody Point, Queensland, which is the address for service which appears on all the Notices of Application filed by him.

20 The Associate to the President wrote to Mr Sobczuk at the above address on 15 May 2001 asking, inter alia, if he would be available to attend a telephone hearing in the Full Bench.

21 By letter written by Mr Sobczuk to the Associate to the President dated 19 May 2001 and placed before the Commission on 24 May 2001 (and placed before the Full Bench at Mr Sobczuk's request).

22 Mr Sobczuk's letter of 19 May 2001 contains no real explanation as to why there has been such an inordinate delay in taking the steps required to be taken, nor does it sufficiently seek to establish the merits of Mr Sobczuk's application to extend time within which to appeal, or the merits of the appeal, although one might infer that it was because he did not receive legal assistance and represents himself and because of ill health.

23 Insofar as that letter is concerned, Mr Sobczuk made a number of points in the letter—

(a) That he had not received legal assistance from the Legal Aid Commission of Western Australia.

(b) That he had made complaints about certain authorities and bodies.

(c) He did not respond to the request that he confirm before 22 May 2001 that he would be available to take part in the hearing by telephone on 28 May 2001.

24 In a letter dated 6 May 2001 to the Registrar, Mr Sobczuk indicated that he was unable to represent himself due to his financial situation and his health and made allegations about a number of persons and bodies. In none of the correspondence was there any real attempt to deal with the reasons for delay.

25 There is no evidence by a medical practitioner of any incapacity on the part of Mr Sobczuk to proceed with this matter or to represent himself and no evidence that he could not represent himself. His occupation is that of an accountant; a profession which might qualify him to represent himself better than many people with lesser qualifications who do effectively represent themselves in this Commission.

26 Further, Mr Sobczuk adduced no evidence that he suffered from such ill health that he was incapable of dealing with the requirements of the rules as to time limits or incapable of otherwise pursuing this matter.

27 Significantly, too, when, as directed by the Full Bench, the President's Associate telephoned Mr Sobczuk on two telephone numbers provided to the Commission by Mr Sobczuk at 8.30 am on the morning of the hearing, 28 May 2001, to test the telephone equipment, there was no response on one number and the other had been disconnected.

28 When the Full Bench convened at 9.01 am to hear proceedings on 28 May 2001, the respondent was represented by Counsel. When the telephone hearing commenced, Mr Sobczuk did not answer on one of the telephone numbers provided by him to the Commission and an anonymous recorded voice informed the Full Bench that the other number had been disconnected. Mr Sobczuk therefore elected not to take part in these proceedings, save and except by means of his letter to Madam Associate of 19 May 2001.

29 Being satisfied that Mr Sobczuk was absent and that he had been duly served with notice of the proceedings, the Full Bench proceeded to hear and determine the matter in accordance with the Notice of Hearing and pursuant to s.27(1)(d) of the Act.

30 It was submitted by Mr Howlett of Counsel, on behalf of the respondent, that nothing had been submitted of merit in favour of the application to extend time within which to institute the appeal and, accordingly, the appeal, which was five months out of time, ought to be dismissed and, further, that the appeal instituted out of time was a nullity and ought to be dismissed.

S.27(1)(a) and (1)(d) of the Act

31 We would first observe that Mr Sobczuk absented himself from the hearing in that he refused or failed to take part in a telephone hearing, which was arranged because of his inability or the unnecessary expense and/or hardship which might be occasioned to him by requiring him to travel from Queensland, the State of his residence, as advised by him. As we have already observed, despite several efforts to ensure his participation in the hearing, Mr Sobczuk did not do so.

32 Further, no reason was offered and no case presented to the Full Bench to persuade it that there should be extensions of time granted or that the proceedings should not be dismissed. On the other hand, the respondent appeared through Counsel, participated in the proceedings and submitted that the appeal should be dismissed, as should, necessarily too, the applications for extension of time, all being substantially out of time and nothing having been submitted, or no evidence having been adduced, in support of any case to the contrary.

33 As was said by Their Honours of the Industrial Appeal Court in *Lebeidi t/as Sugar Gum Restaurant v Napoli* [2001] WASCA 30 at page 4 of a joint judgment—

> "An appeal court is entitled to dismiss an appeal if the appellant does not make an appearance. It has no duty to make further inquiries—see *Barker v Wilson* (1901) 27 VLR 36, at 38. By s12 of the *Industrial Relations Act*, the Industrial Relations Commission is constituted a court of record and the Full Bench, for the present purposes, is constituted as a court of appeal."

34 This is a case which applies to the Full Bench's powers and its exercise of them. There was no appearance before the Full Bench on these proceedings and the Full Bench was, on that principle, entitled to dismiss the appeal and the applications to extend time.

35 Further, having regard to s.27(1)(a) of the Act, the Commission has, in the exercise of its jurisdiction under s.29, considerable responsibility to the public, in particular to the litigating public to ensure there is some reasonable expedition in the prosecution of claims (see *Kangatheran v Boans Ltd* (1987) 67 WAIG 1112 at 1113). In this matter the appellant has been afforded every reasonable opportunity to prosecute his appeal but has failed to do

so. His applications should be dismissed as not in the public interest.

36 Accordingly, we agreed, for those reasons, to dismiss the appeal and the applications to extend time.

Dismissal for Other Reasons

37 Although it is not necessary at law to consider any other grounds why the applications should be dismissed, we make the following observations in respect of the material before the Full Bench. These reasons are applicable generally, but are applicable particularly if, in fairness to Mr Sobczuk as an unrepresented person, his correspondence forwarded to the Full Bench were deemed to mean that he had not absented himself from the hearing on 28 May 2001. We now consider the history of the proceedings and those reasons.

Proceedings at First Instance

38 The proceedings at first instance, which involved both applications being heard together, were conducted on the written submissions of both parties, and it is fair to observe that the Commissioner at first instance experienced some difficulty because of the manner in which Mr Sobczuk provided material to the Commission and because of the manner of his conduct of the proceedings on his behalf (see page 7 (AB)).

39 What came before the Commission at first instance was deemed by the Commissioner, without objection, to be an application by the respondent to refrain from hearing the applications because it was not desirable in the public interest so to do. The Commissioner correctly observed that "to discontinue Mr Sobczuk's claim without hearing the merits is an action which should only be taken in exceptional circumstances" (see page 8(AB)).

40 There was nothing before the Commission apart from the submissions on behalf of the parties and a transcript of part of the proceedings in the District Court of Western Australia and statements of evidence by witnesses in those proceedings. The Commissioner referred to that transcript without objection. There was little evidence before the Commission by way of records and there was no agreement which would establish the entitlement to those amounts claimed.

41 The basis for the application by the respondent and its assertion that the proceedings were vexatious and frivolous was expressed in writing to the Commission at first instance as follows—

> "Mr Sobczuk was charged by the police and convicted of stealing from the Carnarvon Medical Service Aboriginal Corporation in October 1997. He received a 2½ year jail term and although we were able to retrieve some of the misappropriated funds by injuncting funds in Sobczuk's bank accounts across Australia via civil legal action, several thousand dollars remain lost and unexplained ... Part of Mr Sobczuk's defence during the trial was that he was owed similar amounts of money (as above) for overtime, etc. and was therefore not guilty of misappropriation. However, the Court found otherwise.
>
> We believe that there is no case to answer and we strongly object to having to incur further costs dealing with this frivolous and vexatious matter."

42 As the Commissioner found, Mr Sobczuk was convicted of seven counts of stealing as a servant from the respondent in the District Court of Western Australia on 23 October 1997. These counts were as follows—

> "1. Between 12 October 1995 and 27 November 1995 at Carnarvon he stole $47,496;
> 2. Between 4 January 1996 and 15 January 1996 at Carnarvon he stole $2,500;
> 3. Between 4 January 1996 and 15 January 1996 at Carnarvon he stole $4,800;
> 4. Between 4 January 1996 and 18 January 1996 at Carnarvon he stole $1,800;
> 5. Between 5 January 1996 and 22 January 1996 at Carnarvon he stole $14,059.11;
> 6. Between 11 January 1996 and 19 January 1996 at Carnarvon he stole $9,600;
> 7. Between 11 January 1996 and 23 January 1996 at Carnarvon he stole $9,800."

43 It was alleged by him that he was employed by the respondent medical service as an accountant from 3 April 1995 to 19 January 1996. It does not seems to have been in dispute that he was so employed.

44 He was sentenced to imprisonment for two and a half years on each count, to be served concurrently. He commenced to serve his sentence on 25 April 1997. His term of imprisonment was subject to parole.

45 The Commissioner was satisfied, as he was entitled to be, that Mr Sobczuk had been found guilty of stealing as a servant from the respondent. (We note also that Counsel in the District Court, upon sentencing, said that there was an agreement that Mr Sobczuk would repay $90,000.00 to the respondent.) These facts were gleaned and gleanable by the Commissioner from the record of the trial of Mr Sobczuk in the District Court.

46 The Commissioner was careful, and correctly so, to observe in his reasons that he was unaware of any rule of law which states that an employee who has been convicted of an offence against his employer is barred from bringing a claim against his employer for benefits allegedly due under the contract of employment between them and that, therefore, the mere fact of Mr Sobczuk's conviction for the above offences would not necessarily mean that any claim which he brought for contractual benefits would be discontinued by the Commission.

47 The Commissioner referred to the charge to the jury by Viol DCJ at trial in the District Court, which referred to Mr Sobczuk's claim for entitlements as follows—

> "...In a nutshell the Crown says that Mr Sobczuk was never authorised or entitled to any of the additional payments claimed by him, there was no basis upon which it could be said that he was authorised to obtain these monies, or that the organisation or any person in it consented to him having them. In effect, it is said that the accused has conducted a scam over many months and, using a variety of dishonest means, to prepare for the stealing and to carry out the stealing including the arranging for each cheque to be signed in circumstances where the director of the organisation knew nothing about them and, in the end, did obtain those monies. There was a deliberate scam in effect to disguise the fact that he was acting in the way he intended to act, and therefore when he obtained the monies in each case it is said he did so fraudulently and that neither of the two defences could apply in his favour."

48 The Commissioner then made the following findings—

> "In effect, as Viol J. made clear in his summing up, the jury had to consider whether Mr Sobczuk had an honest claim of right in relation to each item of property which he was accused of stealing. It is a matter of record that Mr Sobczuk's defence that the monies were payments to which he was entitled in return for the long hours which he worked or for attending meetings and other matters was rejected by the jury.
>
> I attach weight to the fact that the jury in that trial did not accept that Mr Sobczuk had any right to the money which he stole because Mr Sobczuk's two applications now before the Commission claim that he has an entitlement to the monies he lists in his claims. Whilst the applications before the Commission are not the same as the criminal charges for which Mr Sobczuk was convicted, and the sums of money are not identical to sums he was convicted of stealing, the fact that he was unable to resist the charges by showing that he had the entitlements he claimed is a matter of some significance. While the standard of proof before the Commission is the lesser standard of proof than that required in a criminal matter, the nature of Mr Sobczuk's defence in that criminal matter, and its failure, strongly suggests that Mr Sobczuk may be unsuccessful in proving in these two applications that he has an entitlement to the benefits he claims.

Mr Sobczuk's attacks upon those who gave evidence against him and his allegation of wrongdoing by others rather than himself does not inspire confidence in his claims. The fact of his failure to prove that he had any entitlement to the monies he stole is a formidable obstacle for Mr Sobczuk to overcome. I have considerable doubt that he will be able to do so. That is not to say that Mr Sobczuk may not genuinely believe that he has an entitlement to the monies claimed. In sentencing Mr Sobczuk, Viol J. noted that it was of some significance that at no time, including even giving information for the pre-sentence report, did Mr Sobczuk show any remorse for the actions found by the jury to be criminal in nature and that he still persisted in any denial of wrongdoing. His Honour commented upon evidence of some ongoing psychiatric condition on the part of Mr Sobczuk which may have contributed to his continued denials. However, Mr Sobczuk's failure to establish his belief is telling. I am therefore left with the strong impression against these facts that Mr Sobczuk's claims in this Commission have little merit."

The Merits

49 Insofar as the merits of the appeal can be ascertained, they are contained in the grounds of appeal which are as follows—

"**In accordance to Part VII—Appeals, section 29 (1), the appellant seeks that the Full Bench awards to Mr Sobczuk, with the outstanding legal contractual entitlements Of Mr Sobczuk and/or directs the Commissioner to deal with the outstanding legal contractual entitlements of Mr Sobzuk.**

In accordance to Part VII—Appeals, section 29 (1), the appellant relies on the following grounds in support of the appeal—

1. Entitlements by law—

   It is not a matter of honest claim as stated by the Commissioner Beech. it is a matter of entitlements by law. Entitlements by law include Annual Leave. Normal Wages. Overtime (consultancy fees, etc). Meal Allowances and Relocation Expenses.

2. In the best interest of the public—

   a. An accountant of an organisation is responsible to the public at large as well as his employer. Because of the honesty of a white employee, he should not be used a scapegoat and all his legal entitlements to be denied by his employer. It is in the best interest of the public and the public at large that this matter to be dealt by the Full Bench and/or by the Commissioner who has the jurisdiction.

   b. The miscarriage of justice (by denying the full legal outstanding entitlements to a white employee) many times claimed because the employer is an Aboriginal organisation, and there are differences in culture, should not occur. It is in the best interest of the public that the Full Bench deals with this miscarriage of justice regarding the legal outstanding entitlements of an employee.

   c. It is in the best interest of the public that the proceedings continue, where corruption with collusion and nepotism by the director and her family in conjunction with their alleged cousins (the police officer of WA) is involved. Also the denial of legal entitlements following the legal contractual employment (where the hours were worked, and Annual Leave Accumulated) in a civilised country such as Australia should be dealt by the Full Bench and/or the Commissioner who has the Jurisdiction regarding the outstanding legal entitlements.

   d. It is also in the best interest of the public that employees are not denied their entitlements because of their honesty, fight for justice and membership with different organisations such as the Whistleblowers Corporation.

3. Other relevant grounds—

   a. The decision by the Commissioner to discontinue the case without hearing the merits of the claim and the evidence is not in the best interest of the public at large. It can be said that it has been dealt in an un-Australian way in that it was discontinued by the Commissioner without any hearing.

   b. The Commissioner has not addressed all the evidence provided, such as the copy of the minutes obtained.

   c. The Commissioner stated "It is apparent that the benefits Mr Sobczuk claims he was entitled to under the headings of consultancy fees/overtime fees, air fares, meal allowances and relocation expenses, and which he claims have been denied to him, were not part of the written terms of employment"".

   Commissioner Beech has not taken into consideration that under the written agreement Mr Sobczuk is entitled for Annual Leave, relocation expenses, overtime and meal allowances: all of which have been denied by his employer. It is within the proper jurisdiction that the Full Bench and/or the Commissioner hear the matters and awards the outstanding legal contractual entitlements to Mr Sobczuk."

(See page 2(AB).)

50 By the grounds of appeal in their essence, as we understand them, Mr Sobczuk asserts that—

(a) The Commissioner erred in finding that the "contractual entitlements by law" included Annual Leave, Normal Wages, Overtime (Consultancy Fees) etc., Meal Allowances and Relocation Expenses.

(b) That the decision by the Commissioner to discontinue the case was in error.

(c) That the Commissioner did not consider all of the merits.

(d) That the Commissioner erred in finding that, under the written agreement, Mr Sobczuk was not entitled to annual leave, relocation expenses, overtime and meal allowances which were all denied by the employer.

51 A number of crucial findings by the Commissioner at first instance were made as he expressed them in his reasons for decision.

52 These were—

(a) That Mr Sobczuk was unable to resist the charges in the District Court by demonstrating that the entitlements which he claimed were his entitlements.

(b) That, on the balance of probabilities, it was strongly likely that Mr Sobczuk would be unsuccessful in proving an entitlement to the "entitlements", the subject of the two claims (see the extracts from the Commissioner's reasons quoted by us supra).

(c) That the respondent had the right to be protected from having to incur the time, trouble and cost of defending itself against claims which have little or no merit.

(d) Even if it could be said that some of his claims had merit, Mr Sobczuk would face a formidable task to persuade a tribunal, which is to decide matters according to equity, that it should order the respondent to pay monies to Mr Sobczuk, which is similar to a recognition that an employee dismissed for misconduct is not entitled to annual leave which accrued during and after that misconduct.

(e) That the circumstances were exceptional and it was not in the public interest for Mr Sobczuk's claim to continue because he saw little, if any, possibility that a decision could be made in his favour.

(f) Most pertinently and of weight was the fact, as the Commissioner observed, that there was no evidence from Mr Sobczuk, save and except bare denials and assertions of perjury by the Crown witnesses.

53 In passing, we observe that it is also the fact and not denied that the Commission at first instance had difficulty with the communications which it received from Mr Sobczuk (see page 7(AB)).

54 The failure of Mr Sobczuk's to prove that he had any entitlement to the monies which he stole was properly found by the Commissioner at first instance to be a formidable obstacle to the establishment of a credible claim to the amounts claimed as contractual benefits in the face of a denial that he was so entitled. (A relevant conviction is admissible evidence and, once proven, is prima facie evidence that the person did commit the offence of which he was proven guilty, we would observe (see *Mickelberg and Another v The Director of the Perth Mint* [1986] WAR 365).)

55 Mr Sobczuk's answer to that was, inter alia, that the respondent's witnesses had perjured themselves. That is notwithstanding his agreement to repay $90,000.00. Nothing was asserted to the Full Bench to gainsay the finding that the nature of Mr Sobczuk's defence might be unsuccessful in proving that he had an entitlement to the benefits which he claimed. The reasons expressed in paragraph 43 hereof were clearly valid, given that Mr Sobczuk failed in proving his entitlement to monies appropriated by him and the lack of oral and documentary material before the Commission.

56 It was not at all clear that Mr Sobczuk's case was that his entitlements were as he expressed them to be or, in the absence of a written agreement or other evidence of the terms of an agreement, that his claims could be made out. Whilst it was not raised in these proceedings, it is not clear either that the argument that the contract had not been terminated because of its repudiation by Mr Sobczuk by his misconduct and that, as a result, his right to claim benefits under the contract would not necessarily be successful on appeal (see *Sargant v Lowndes Lambert Australia Pty Ltd* 81 WAIG 1149 (FB)).

57 We think that would be a stronger argument than that referred to in paragraph 43 hereof, although the consideration that equity might require the Commission not to order monies to be paid to Mr Sobczuk when he had breached his contract so blatantly and dishonestly might well have constituted a serious consideration and presented a formidable obstacle if the proceedings at first instance had gone further. It was, too, of great weight that there was no evidence or foreshadowing of credible evidence by Mr Sobczuk which might advance his case, save and except bare denials of allegations and allegations of perjury by Crown witnesses.

58 Nothing was put which should persuade the Full Bench that the Commissioner was wrong in finding as he did, for those reasons. Nothing was put to the Full Bench either which would persuade us that the exercise of the Commission's discretion under s.27 of the Act was in error or, in particular also, that Mr Sobczuk would not be unsuccessful if the matter went further (for the reasons we have canvassed) or that the respondent had the right to be protected from having to incur the time, trouble and cost of defending itself against claims of little merit, in this case. There was simply little put forward on which the Commission could find that the claims were likely to succeed.

59 The grounds of appeal and the arguments advanced in favour of them do not demonstrate an arguable case upon appeal, for those reasons.

60 Nothing was said to persuade the Full Bench that the Commissioner erred in the exercise of his discretion or that there was a serious case to argue that he had. The Full Bench suffered disadvantage from the lack of a coherent case for the appellant as had the Commissioner at first instance. We see little or no merit in the grounds of appeal, for those reasons.

Applications to Extend Time

61 In this case, no submissions were made or explanations given to which weight could be attached or which were adequate to establish that there should be an extension of time within which to institute the appeal (see the principles expressed by the Full Bench in *Rosemist Holdings Pty Ltd v Khoury* 79 WAIG 645 (FB) (applying and following *Ryan v Hazelby and Lester trading as Carnarvon Waste Disposals* 73 WAIG 1752 (IAC) and *Tip Top Bakeries v TWU* 74 WAIG 1189 (IAC) and the cases cited therein).

62 We apply the principles laid down in *Rosemist Holdings Pty Ltd v Khoury* (FB)(op cit) as follows—

(a) That a grant of extension of time is not automatic in this case or any case.

(b) That the discretion to extend time is given for the sole purposes of doing justice between the parties.

(c) Discretion can only be exercised in favour of an applicant upon proof that strict compliance with the rules will work an injustice upon the applicant.

(d) In order to determine whether the rules will work an injustice, it is necessary to have regard to the history of the proceedings, the conduct of the parties, the nature of the litigation and the consequence for the parties of the grant or refusal of the application for extension of time.

(e) When the application is for an extension of time in which to file an appeal, it is always necessary to consider the prospects of the applicant succeeding in the appeal.

(f) It is also necessary to bear in mind in such application that, upon the expiry of the time for appealing, the respondent has "a vested right to retain the judgment", unless the application is granted.

(g) It follows that, before the applicant can succeed upon such an application, there must be material upon which the Commission can be satisfied that to refuse the application would constitute an injustice.

(h) The initial step in determining whether there would otherwise be an injustice to the appellant may often be to decide whether the prospect of the appellant succeeding in the substantive appeal if an extension of time were to be granted is a real one.

63 Applying those principles in this case, for the reasons we have expressed above, Mr Sobczuk has not established to the Full Bench that the prospect of his succeeding upon appeal is a real one (indeed, the prospect of succeeding is not real) and, in particular, that the exercise of discretion by the Commission at first instance miscarried. The length of the delay is inadequately explained, too, and the delay is inordinate.

64 It is not sufficiently established or at all that the reason for the delay is Mr Sobczuk's ill health or his inability to represent himself for that reason or any other reason. In particular, there is no independent evidence of his ill health either.

65 Further, it is not at all clear whether he has been refused legal aid or has not pursued an application for legal aid or is not eligible for legal aid. In other words, it has not been established that the delays in instituting the appeal and otherwise are not Mr Sobczuk's fault.

66 There is a limit to the time that the respondent should have to wait while legal aid is sought by the appellant. Many persons represent themselves in this jurisdiction and there was, in any event, no evidence from anyone other than Mr Sobczuk about his efforts to obtain legal aid, and his evidence is fragmentary, the subject of statements from the bar table, as it were. The extent of the prejudice to the respondent is obvious.

67 Mr Sobczuk purported to institute an appeal some five months outside the 21 day period within which he is required by the Act to institute the appeal (see s.49(3) of the Act) which is a substantial unexplained delay. It is now almost two years since the order at first instance was made and over five years since the misconduct which led to the termination of his employment, and the termination of his employment. The prejudice to the respondent caused by those omissions is obvious. The prejudice to Mr Sobczuk, which arises from his own inadequately explained tardiness and neglect is of less weight than the prejudice to the respondent. The respondent has had a vested right to retain judgment since the date of the Commissioner's order, itself made some years after the events alleged to be the subject of the applications.

68 Further, the respondent has not at all been a guilty party in relation to the conduct of these proceedings.

69 The history of the proceedings and the conduct of the parties, as we have outlined them, the nature of the litigation and the consequence for the parties of the refusal of the applications for the extension of time have been considered. The conduct of Mr Sobczuk in relation to the proceedings at first instance and before the Full Bench in the failure to prosecute this appeal, or even take part in the telephone hearing in the Full Bench of 28 May 2001, and the disregard for the regulations and time limits is serious.

70 There is no or no sufficient material in relation to any of the applications to extend time, on which the Full Bench could be satisfied that to refuse any of the applications to extend time would constitute an injustice.

71 Nothing, for those reasons, could be said to persuade the Full Bench that there was substance in the appeal. Further, an elapse of 18 months since the decision was appealed against without any step taken to list the matter for hearing is evidence of a detriment to the respondent.

72 This is a matter where there is no serious likelihood of success on appeal, where there is an inordinate delay with the appeal proceeding which is inadequately explained, where the Commission and the respondent, too, have afforded Mr Sobczuk a large degree of latitude, and the Commission's officers have sought to assist him as far as they could as an unrepresented person.

73 Further, it is not in the public interest that a respondent should have an unresolved appeal hanging over its head for 18 months in this Commission, especially because the claims at first instance originate from events which occurred in 1996. These applications, too, were not filed until 19 October 1998 and 9 February 1999 respectively. Justice would not be done by extending time. There is no proof that strict compliance with the statute, s.49(3) of the Act, would work an injustice upon Mr Sobczuk. For those reasons, we would dismiss all of the applications to extend time.

74 The appeal is therefore a nullity and should be dismissed.

75 Having regard to and applying s.26(1)(a) and s.26(1)(c) of the Act, for those reasons, we agreed to dismiss the appeal and all of the applications to extend time.

Want of Prosecution

76 If we were wrong in what we have just said, then an application to strike out for want of prosecution (applying the principles laid down in *AWU v Barminco Pty Ltd—Plutonic Project* 80 WAIG 3162 (FB) and the cases cited therein) would succeed for the following reasons.

77 Having regard to the abovementioned facts (including the purported institution of the appeal five months out of time, the matter should properly be dismissed for want of prosecution on that authority because—

(a) The length of the delay in taking any steps to bring the appeal to hearing was serious.

(b) The period of the delay from the filing of the appeal to this hearing was, ipso facto, inordinate.

(c) The respondent would be oppressed by further delay and has had the matter hanging over its head for an inordinate length of time.

(d) The explanation of the delay is inadequate.

(e) The delay was characterised by an insufficiently inexplicable disregard for time limits.

(f) The case for the appellant has not been established to be strong enough to support a finding that a dismissal of the claims would cause sufficient prejudice to justify no dismissal.

78 The application to extend time (and the purported appeal, if it were not a nullity) would be, for those reasons, properly dismissible for want of prosecution.

S.27(1)(a)(ii) of the Act

79 That section, in its relevant provisions, provides as follows—

"**27. Powers of Commission**

(1) Except as otherwise provided in this Act, the Commission may, in relation to any matter before it—

(a) at any stage of the proceedings dismiss the matter or any part thereof or refrain from further hearing or determining the matter or part if it is satisfied —

.....

(ii) that further proceedings are not necessary or desirable in the public interest;"

80 Further, having regard to the terms of Practice Direction No 2 of 2000 (op cit) (which expressly warns the parties that the Full Bench may use its power to dismiss where no or no sufficient step has been taken to advance the proceedings for a period of more than twelve months), we would make these additional observations, it is probably not necessary to deal with the question of want of prosecution, qua want of prosecution.

81 Mr Sobczuk, having purported to institute the appeal five months out of time, did nothing to advance the appeal, save and except to lodge further applications to extend time, the last one in January 2000, which were not pursued. It is to the point, too, and significantly to the point, that Mr Sobczuk did not make himself available for the hearing of this matter by telephone and gave no satisfactory explanation as to why he did not do so.

82 This is an appeal, the merit of which has not been established, which relates to proceedings having their origin in 1996, which purported to be instituted five months out of time and in which no or no sufficient step in significant pursuance of finalising the appeal has been taken in 18 months; which is six months in excess of the twelve month period referred to in the Practice Direction.

83 Further, no cogent reason was advanced to persuade the Full Bench that, pursuant to Practice Direction No 2 of 2000, the Full Bench should not have exercised its discretion to dismiss the appeal and the applications.

84 We would add that this Commission is a court and tribunal which is required to settle (we paraphrase) industrial disputes which exercise of jurisdiction inherently requires (and in this Commission involves) a customary expeditious approach (see s.6(c) of the Act). Having regard to those factors, the Full Bench could decide and properly decided that it is in the public interest, without recourse to the more concrete rules of law and procedure which we have considered above, that the applications to extend time should be dismissed. The appeal then becomes a nullity as being purported to be instituted out of time.

Finally

85 For those reasons, the interests of the respondent, the community and the Commission, and the equity, good conscience and the substantial merits of the case require the dismissal of the appeal and of all of the other applications before the Full Bench in this matter pursuant to s.27(1)(a)(i) and (ii) of the Act and the applications in the public interest, and having regard to the interests of

justice which favour the respondent employer (see s.26(1)(a) and s.26(1)(c) of the Act).

86 For those reasons, we agreed to dismiss the applications and the appeal.

COMMISSIONER P E SCOTT—

87 The reasons for decision of His Honour the President and Commissioner Smith set out the background to these applications and the appeal being brought before the Full Bench, of its own motion, pursuant to Practice Direction No. 2 of 2000.

88 I note that the Associate to the President wrote to Mr Sobczuk asking if he would be available to attend a telephone hearing and he responded to that letter dealing with a number of matters but not responding to the request that he confirm his availability to take part in the hearing by telephone. He did not attend the hearing, and prior to and at the commencement of the hearing, unsuccessful attempts were made by the President's Associate to contact Mr Sobczuk by telephone. As His Honour and Commissioner Smith point out in their reasons, Mr Sobczuk therefore elected not to take part in proceedings save for his letter to the President's Associate of 19 May 2001. No case was presented by him as to the applications to extend time. In those circumstances and pursuant to s.27(1)(a) and (d) of the Industrial Relations Act, 1979, the Full Bench was entitled to dismiss the applications and the appeal, and did so. With the applications dismissed, there was no extension of time granted for the filing of the appeal, and it is out of time.

89 I agree with the reasons for decision of His Honour and Commissioner Smith as to those matters and accordingly the applications and the appeal are dismissed. In my view it is unnecessary to deal with the matter further.

2001 WAIRC 02893

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	PEDRO SOBCZUK, APPELLANT *v.* CARNARVON MEDICAL SERVICE ABORIGINAL CORPORATION, RESPONDENT
CORAM	FULL BENCH HIS HONOUR THE PRESIDENT P J SHARKEY COMMISSIONER P E SCOTT COMMISSIONER J H SMITH
DELIVERED	MONDAY, 28 MAY 2001
FILE NO/S	FBA 11 OF 1999
CITATION NO.	2001 WAIRC 02893

Decision	Appeal dismissed.
Appearances	
Appellant	No appearance
Respondent	Mr D Howlett (of Counsel), by leave

Order.

This matter having come on for hearing before the Full Bench on the 28th day of May 2001, and there being no appearance by or on behalf of the appellant and having heard Mr D Howlett (of Counsel), by leave, on behalf of the respondent, and the Full Bench having determined the matter and having decided that reasons for decision should issue at a future date, it is this day, the 28th day of May 2001, ordered as follows—

(1) THAT the applications filed herein on the 19th day of November 1999 to extend time to file appeal No. FBA 11 of 1999 out of time be and are hereby dismissed.

(2) THAT appeal No. FBA 11 of 1999 be and is hereby dismissed.

By the Full Bench

(Sgd.) P. J. SHARKEY,
[L.S.] President.

AWARDS/AGREEMENTS—Variation of—

BAKERS' (COUNTRY) AWARD.
No. 18 of 1977.

2001 WAIRC 02854

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT *v.* ACME BAKERY AND OTHERS, RESPONDENTS
CORAM	COMMISSIONER A R BEECH
DELIVERED	FRIDAY 18 MAY 2001
FILE NO	APPLICATION 487 OF 2001
CITATION NO.	2001 WAIRC 02854

Result	Award varied.
Representation	
Applicant	Mr J. Ridley
Respondent	No appearance

Order.

WHEREAS the Commission has before it an application to vary the Bakers' (Country) Award by increasing the disability allowance prescribed therein from $5.10 to $5.25;

AND WHEREAS the application is not opposed;

AND WHEREAS the Commission is satisfied that the application fits within the relevant State Wage Principle;

AND HAVING HEARD Mr J. Ridley (by way of written submissions) on behalf of the applicant and there being no appearance on behalf of the respondents, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders—

THAT the *Bakers' (Country) Award No. 18 of 1977* be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 17th day of May 2001.

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

Schedule.

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

(e) Disability Allowance—

In addition to the total wage prescribed in this subclause a disability allowance of $5.25 per week shall be paid to doughmakers and single hand bakers.

GRAIN HANDLING SALARIED OFFICERS' CONSOLIDATED AWARD.
No. 37 of 1965.

2001 WAIRC 02852

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	CO-OPERATIVE BULK HANDLING LIMITED, APPLICANT *v.* WESTERN AUSTRALIAN GRAIN HANDLING SALARIED OFFICERS ASSOCIATION (UNION OF WORKERS), RESPONDENT

CORAM	COMMISSIONER J H SMITH
DELIVERED	
FILE NO	APPLICATION 29 OF 2000
CITATION NO.	2001 WAIRC 02852

Result	Award varied in accordance with Principle 10 of the 2000 State Wage Case Statement of Principles
Representation	
Applicant	Ms M Olins
Respondent	Mr D Crook

Order.

Having heard Ms Olins on behalf of the Applicant and Mr Crook on behalf of the Respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders—

THAT the Grain Handling Salaried Officers' Consolidated Award be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 15 January 2001.

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

Schedule.

Incorporating the "Western Australian Grain Handling Salaried Officers' Enterprise Agreement 1996" into the "Grain Handling Salaried Officers' Consolidated Award, No 37 of 1965".

A. The above award is varied as follows—

(1) Clause 1A—Statement of Principles March 1996: Delete this clause and renumber clause 1B as clause 1A.

(2) Clause 2.—ARRANGEMENT: Delete this clause and insert in lieu the following—

2.—ARRANGEMENT

(1) Title
(1A) Minimum Adult Award Wage
(2) Arrangement
(2B) Award Modernisation
(3) Scope
(4) Term
(4A) Definitions
(4B) Commitments
(5) Payment of Salaries
(6) Contract of Service
(7) Hours of Duty
(8) Shiftwork
(9) All Purpose Allowance
(10) Deleted
(11) Deleted
(12) Travelling Allowance
(13) Transfer Allowance
(14) Camp away from home allowance
(15) Joint Review Committee
(16) Protective Clothing and Safety Footwear
(17) Holidays
(18) Annual Leave
(19) Absence through sickness
(20) Maternity Leave
(21) Bereavement Leave
(22) Long Service Leave
(23) Board of Reference
(24) Union Notices
(25) Interviewing Employees
(26) Records
(27) No Reduction
(28) Equipment
(29) First Aid Equipment
(30) Higher Duties Allowance
(31) Salaries
(32) Appointments and promotions
(33) Isolation Allowance
(34) Casual Employees
(35) Continuous Operations
Appendix—Resolution of Disputes Requirement
Appendix—S.49B—Inspection of records requirements

(3) Clause 4.—TERM: After this clause add a new clauses Clause 4A and Clause 4B as follows—

4A.—DEFINITIONS

"Association" means the Western Australian Grain Handling Salaried Officers' Association (Union of Workers).

"Employer" or "Company" wherever used means Cooperative Bulk Handling Limited.

4B.—COMMITMENTS

(1) The parties to the Award are committed to the principles of Best Practice and Continuous Improvement.

(2) The parties undertake that the terms of this Award shall not be used to progress or obtain similar arrangements or benefits in any other enterprise.

(4) Clause 6.—CONTRACT OF SERVICE: Delete subclause (1) and insert in lieu the following—

(1) (a) The contract of service shall be by the month and shall be terminable by one month's notice or by the payment or forfeiture of one month's pay in lieu of such notice on either side.

(b) Provided that—

(i) during the first three months of employment one week's notice or payment or forfeiture of one weeks pay in lieu of notice on either side shall apply;

(ii) if the employee is over 45 years old and has completed at least 2 years' continuous service, the employer must provide a minimum of 5 weeks notice or payment of 5 weeks pay in lieu of such notice.

(5) Clause 7.—HOURS OF DUTY: Delete this clause and insert in lieu the following—

7.—HOURS OF DUTY

(1) An employee's nominal hours of work shall be 40 per week however additional hours may be required from time to time in order to meet business demands.

(2) Ordinary hours may be worked on any day of the week (Monday to Sunday) including public holidays.

(3) An employee's starting and finishing times shall be flexible and reflect his/her work demands.

(4) Where an employee is regularly required to work in excess of 40 hours per week—

(a) the employer and the employee may agree to the employee taking time off in lieu; and

(b) the Department Head shall review the organisation of work and, where necessary, provide additional employees.

(5) An employee required to travel regularly in the performance of his/her duties shall not be kept away from his/her regular place of residence for more than 12 days.

(6) An employee may be required to work shift work in accordance with the provisions of clause 8—Shift Work.

(6) Clause 8.—SHIFT WORK: Delete this clause and insert in lieu the following—

8.—SHIFT WORK

(1) Employees may be required to work day, afternoon or evening shifts as part of their ordinary weekly hours.

(2) The employer where practicable shall give the employee at least twenty-four hours notice of the commencement of shift work.

(3) An employee may be placed on shift work at any time during the week for one or more shifts.

(4) An employee shall be entitled to the same crib as that commonly applying at the particular workplace.

(5) All shift commencement and finishing times shall be flexible and reflect the work demands.

(6) (a) As far as practicable work shall be arranged so that employees have at least eight consecutive hours off duty between the work of successive days.

(b) Where an employee has worked such hours that he/she has not received at least eight consecutive hours off duty between the termination of work on one day and the commencement of work on the next day, he/she is permitted to be absent without loss of pay until he/she has received eight consecutive hours off duty.

(c) If, on the instructions of the employer, the employee resumes or continues work without having had such eight consecutive hours off duty, the employee is entitled to be absent for eight consecutive hours without loss of pay when released from duty.

(7) Clause 9.—OVERTIME: Delete this clause and insert in lieu the following—

9.—ALL-PURPOSE ALLOWANCE

(1) An employee shall be paid an All-Purpose Allowance of between $500 to $12000 per annum in recognition of the expectation to work outside normal hours and conditions and in lieu of overtime payments, shiftwork penalties, payment for travelling time, disability allowance and meal allowance.

(2) Should a fundamental change in work arrangements occur, the All-Purpose Allowance of affected positions shall be reviewed by the Joint Review Committee at the earliest possible time, and may be varied, subject to the approval of the Company.

(3) For the purpose of voting on amendments to any All-Purpose Allowance, the Review Committee shall comprise equal representation from the Company and the Association.

(4) Any question, dispute or difficulty arising from the operation of these arrangements shall be dealt with in accordance with the provisions of Appendix—Resolution of Disputes Requirement.

(5) The All-Purpose Allowance shall be paid pro rata on a weekly basis.

(6) The All-Purpose Allowance shall be paid on a pro rata basis during all paid periods of sick leave, annual leave, long service leave and any other periods of paid leave.

(7) The All-Purpose Allowance shall not form part of the employee's notional earnings base for the purpose of calculating superannuation contributions.

(8) The 17.5% annual leave loading shall be calculated on the sum of both the Annual Salary and the All-Purpose Allowance.

(8) Clause 10.—MEAL ALLOWANCE: Delete this clause.

(9) Clause 11.—TRAVELLING TIME: Delete this clause.

(10) Clause 15.—DISABILITY ALLOWANCE: Delete this clause and insert in lieu the following—

15.—JOINT REVIEW COMMITTEE

(1) The company and Union shall form a Review Committee to participate in the development and ongoing conduct of the performance review system and salary negotiations.

(2) The Review Committee shall comprise of equal representation from the Company and the Association.

(3) The company shall provide the Union annually with a current list of salaried officers, their positions, salary and allowances.

(11) Clause 17.—HOLIDAYS: Delete the words "9—Overtime" and insert in lieu the following—

7(2)—Hours of Duty.

(12) Clause 27.—PRESERVATION OF ACCRUED RIGHTS: Delete this clause and insert in lieu the following—

27.—NO REDUCTION

No employee shall suffer any reduction in ordinary time earnings due to the operation of this award.

(13) Clause 31.—SALARIES: Delete this clause and insert in lieu the following—

31.—SALARIES

(1) The following annualised rates of salaries shall be payable to adult employees as follows—

Base Rates			Arbitrated Safety Net Adjustment	Minimum Annual Salary Range	
Range 1	$24,193	$28,297	$3,807-$3,703	$28,000	$32,000
Range 2	$28,297	$32,401	$3,703-$3,599	$32,000	$36,000
Range 3	$32,401	$36,401	$3,599	$36,000	$40,000
Range 4	$36,401	$40,401	$3,599	$40,000	$44,000
Range 5	$40,401	$44,401	$3,599	$44,000	$48,000
Range 6	$44,401	$48,401	$3,599	$48,000	$52,000
Range 7	$48,401	$52,401	$3,599	$52,000	$56,000
Range 8	$52,401	$56,401	$3,599	$56,000	$60,000
Range 9	$56,401	$60,401	$3,599	$60,000	$64,000
Range 10	$60,401	$64,401	$3,599	$64,000	$68,000

Identification of Arbitrated Safety Net Adjustments ASNA's since 1993

December 1993		$8	
December 1994		$8	
March 1996		$8	
November 1997		$10	
June 1998	}	$14	- up to $550 per week
	}	$12	- $550—$700 per week
	}	$10	- above $700 per week
July 1999	}	$12	- up to $510 per week
	}	$10	- above $510 per week
June 2000		$15	

Conversion of weekly to annual = x 52.166

(2) The employee shall be in addition be paid the All-Purpose Allowance prescribed in clause 9—All-Purpose Allowance.

(3) Junior employees shall be paid the following percentage of the prescribed adult rate for the work upon which the junior employee is engaged—

16 years	80%
17 years	90%

(4) For the purpose of adjustment and payment the weekly salary shall be calculated as six three hundred and thirteenths of the annual salary, the fortnightly salary as double the weekly salary, and the monthly salary as one twelfth of the annual salary.

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

These arbitrated safety net adjustments may be offset against any equivalent amount in the rate of pay received by employees since 1 November 1991 above the rate prescribed in

the Award, except where such absorption is contrary to the terms of an industrial agreement.

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

(14) Clause 34.—CASUAL EMPLOYEES—

In subclause (1) delete the words "divided by 38" and insert "divided by 40".

In subclause (2) delete the words "plus the relevant shift work penalty prescribed in Clause 8—Shift Work".

GOVERNMENT WATER SUPPLY, SEWERAGE AND DRAINAGE FOREMEN'S AWARD 1984.
No. A10 of 1983.

2001 WAIRC 02950

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	WATER CORPORATION, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DELIVERED	FRIDAY, 1 JUNE 2001
FILE NO	APPLICATION 736 OF 2000
CITATION NO.	2001 WAIRC 02950

Result Variation of Award

Order.

HAVING heard Mr J. Ridley on behalf of the Applicant and Ms K. Hawke and with her Mr W. Lyons for the Respondent, and by consent, the Commission pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Government Water Supply, Sewerage and Drainage Foremen' Award 1984 be varied in accordance with the following Schedule and such variation shall have effect on or after 30 May 2001.

(Sgd.) J. F. GREGOR,
[L.S.] Commissioner.

Schedule.

Schedule F—District Allowance: Delete subclause (6) of this clause and insert in lieu thereof the following—

(6) The weekly rate of district allowance payable to employees pursuant to subclause (3) of this clause shall be as follows—

Column I District	Column II Standard Rate	Column III Exceptions to Rate Standard Rate	Column IV
	$ per week	Town or Place	$ per week
6	61.70	Nil	Nil
5	50.44	Fitzroy Crossing Halls Creek Turner River Camp Nullagine	67.83
		Liveringa (Camballin) Marble Bar Wittenoom	63.17
		Karratha	59.50
		Port Hedland	55.22
4	25.34	Warburton Mission	68.44
		Carnarvon	23.87
3	16.04	Meekatharra Mount Magnet Wiluna Laverton Leonora Cue	25.34
2	11.39	Kalgoorlie Boulder	3.80
		Ravensthorpe Norseman Salmon Gums Marvel Loch Esperance	15.18
1	Nil	Nil	Nil

Note: In accordance with subclause (4) of this clause employees with dependants shall be entitled to double the rate of district allowance shown.

The allowances prescribed in this subclause shall operate from the beginning of the first pay period commencing on or after 30 May 2001.

JOHN LYSAGHT (AUSTRALIA) LIMITED AWARD—THE
No. 27 of 1967.

2001 WAIRC 03008

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGIN & ELECT DIV, WA BRANCH, APPLICANT
	v.
	JOHN LYSAGHTS LTD, COATED PRODUCTS DIVISION, BHP, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DELIVERED	TUESDAY, 12 JUNE 2001
FILE NO	APPLICATION 1320 OF 1999
CITATION NO.	2001 WAIRC 03008

Result Award Varied

Order.

HAVING heard Mr C. Young on behalf of the applicant and Mr S. Foy on behalf of the Respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby orders—

THAT The John Lysaght (Australia) Limited Award No. 27 of 1967 be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 23rd day of April 2001.

(Sgd.) J.F. GREGOR,
[L.S.] Commissioner.

Schedule.

1. Clause 4.—Wages/Payments—

A. Delete paragraph (a) of subclause (2) of this clause and insert in lieu the following—

(a) Rates of Pay

The rates of pay will be—

(i) Non Tradespersons

	Base Rate	Arbitrated Safety Net Adjustments	Total Rate
	$	$	$
Level 5	384.70	75.00	459.70
Level 4	373.60	75.00	448.60
Level 3	363.50	75.00	438.50
Level 2	354.40	75.00	429.40
Level 1	334.80	75.00	409.80
Probation	322.50	75.00	397.50

(ii) Tradespersons

	Base Rate	Arbitrated Safety Net Adjustments	Total Rate
	$	$	$
Tradesperson 1	422.30	75.00	497.30
Tradesperson 2	403.00	75.00	478.00
Tradesperson 3	383.90	75.00	458.90

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

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

Increases in rates of pay otherwise made under the State Wage Case Principles, excepting those resulting from enterprise agreements, are not to be used to offset Arbitrated Safety Net Adjustments.

B. Delete subclause (8) of this clause and insert in lieu the following—

(8) Allowances/Special Rates

(a) Tool Allowance

(i) Tradespersons shall be paid an allowance of $10.00 per week for supplying and maintaining tools ordinarily required in the performance of their work as tradespersons.

This allowance shall apply to apprentices on the same percentage basis as set out in subclause (6)—Apprenticeship of Clause 3.—Employment Relationship of this award.

This allowance shall apply for all purposes of the award.

(ii) Where it was the practice as at 5 November 1979 for the employer to provide all tools ordinarily required by a tradesperson or apprentice in the performance of work, the employer may continue that practice and in that event the allowance prescribed in subparagraph (i) hereof shall not apply.

(iii) Notwithstanding sub-paragraphs (i) and (ii) hereof, an employer shall provide for the use of tradespersons or apprentices all necessary power tools, special purpose tools and precision measuring instruments. Tradespersons or apprentices shall replace or pay for any tools supplied by the employer if lost through their negligence.

(b) Confined Spaces

Employees working in confined spaces (as defined) will be paid an additional 50 cents per hour.

(c) Dirty Work

Employees working in a job that is of an unusually dirty or of an offensive nature will receive an additional 38 cents per hour extra.

(d) Wet Places

An employee whose clothing or boots become saturated because of the working place whether by water, oil or otherwise shall be paid 38 cents per hour extra. Provided that this extra rate shall not be payable to an employee who is provided by the employer with suitable and effective protective clothing and/or footwear. Any employee who becomes entitled to this extra rate shall be paid the extra rate for such part of the day or shift which involves working in wet clothes or boots.

(e) Motor Allowance

(i) Where an employee is required and authorised to use their own personal motor vehicle in the course of their duties, the employee shall be paid an allowance not less than that provided for in the table set out hereunder. Notwithstanding anything contained in this subclause the employer and the employee may make any other arrangement as to car allowance not less favourable to the employee.

(ii) Where an employee in the course of a journey travels through two or more of the separate areas, payment at the rates prescribed herein shall be made at the appropriate rate applicable to the separate areas traversed.

(iii) A year for the purposes of this subclause, shall commence on the 1st day of July and end on the 30th day of June next following.

Rates of Hire for Use of Employee's Own Vehicle on Employer's Business

Area and Details	Engine Displacement (in Cubic Centimetres)		
	Over 2600cc	Over 1600cc - 2600cc	1600cc & under
	Rate per Kilometre (Cents)		
Metropolitan Area	51.6	46.2	40.2
South West Land Division	52.8	47.4	41.2
North of 23.5° South Latitude	58.0	52.2	45.4
Rest of the State	54.6	48.9	42.5
Motor Cycle (in all areas)	17.8 cents per kilometre		

(iv) **"Metropolitan Area"** means that area within a radius of fifty kilometres from the Perth Railway Station.

(v) **"South West Land Division"** means the South West Land Division as defined by Section

28 of the Land Act 1933—1971 excluding the area contained within the Metropolitan Area.

(f) First Aid

An employee who has been trained to render first aid and who is the current holder of appropriate first aid qualifications, such as a certificate from the St John Ambulance Association or similar body, will be paid a weekly allowance of $12.11 if such employee is appointed by the employer to perform first aid duty.

(g) Rates Not Subject to Penalty Additions

The above special rates shall be paid irrespective of the times at which the work is performed and shall not be subject to any premium or penalty conditions.

2. Clause 5.—Hours: Delete paragraph (b) of subclause (3) of this clause and insert in lieu the following—

(b) Shift Work Loading

(i) Other than a permanent night shift employee, an employee working a shift which falls either partially or wholly outside the agreed spread of hours, will be paid a loading for such shift at the rate of $63.80 per week.

(ii) An employee on a permanent night shift will, for each such shift worked, be paid a loading at the rate of $128.30 per week.

(iii) An employee who is engaged on 12 hour rotating shifts will, when employed on night shift, be paid a loading for such shifts at the rate of $84.80 per week.

(iv) A split shift employee will be paid a loading for all such shifts at the rate of $41.20 per week.

(v) The above shift loadings will be paid for all purposes of the award and will be adjusted as appropriate in relation to State Wage Case decisions.

(vi) Shift loadings will not be paid on overtime shifts, or on long service leave.

3. Appendix 7—Rates of Pay: Delete this Appendix and insert in lieu the following—

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Non Tradesperson	Base	Supplementary	Asna	Total
PROBATION	322.50	18.20	75.00	415.70
1	334.80	20.10	75.00	429.90
2	354.40	24.30	75.00	453.70
3	363.50	30.10	75.00	468.60
4	373.60	35.30	75.00	483.90
5	384.70	37.60	75.00	497.30
TRADESPERSON				
1	422.30	33.10	75.00	530.40
2	403.00	31.70	75.00	509.70
3	383.90	30.10	75.00	489.00

4. Schedule A—Named Parties to the Award: Delete this Schedule and insert in lieu the following—

Union Party

The Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division, Western Australian Branch

Employer Party

BHP Steel (JLA) Pty Ltd

AGREEMENTS—
Industrial—Retirements from—

AMEC SERVICES PTY LTD MAINTENANCE CONTRACTS ENTERPRISE BARGAINING AGREEMENT 1995.

No AG 290 of 1995.

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. 869 of 2001

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act

Amec Services Pty Ltd will cease to be a party to the Amec Services Pty Ltd Maintenance Contracts Enterprise Bargaining Agreement 1995 No AG 290 of 1995 on and from the 21st day of June 2001.

DATED at Perth this 22nd day of May 2001.

J. A. SPURLING,
Registrar.

AMEC SERVICES PTY LTD MAINTENANCE CONTRACTS ENTERPRISE BARGAINING AGREEMENT 1996.

No AG 169 of 1996.

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. 868 of 2001

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act

Amec Services Pty Ltd will cease to be a party to the Amec Services Pty Ltd Maintenance Contracts Enterprise Bargaining Agreement 1996 No AG 169 of 1996 on and from the 21st day of June 2001.

DATED at Perth this 22nd day of May 2001.

J. A. SPURLING,
Registrar.

COCKBURN HIRE ENGINEERING ENTERPRISE AGREEMENT.

No AG 85 of 1994.

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. 1085 of 2001

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act

Cockburn Wreckair Hire will cease to be a party to the Cockburn Hire Engineering Enterprise Agreement No AG 85 of 1994 on and from the 12th day of July 2001.

DATED at Perth this 11th day of June 2001.

J.A. SPURLING,
Registrar.

CSR LIMITED—COTTESLOE REFINERY (ENTERPRISE BARGAINING) AGREEMENT 1993.

No AG 27 of 1993.

IN THE WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION

No. 896 of 2001

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act

CSR Limited will cease to be a party to the CSR Limited—Cottesloe Refinery (Enterprise Bargaining) Agreement 1993 No AG 27 of 1993 on and from the 25th day of June 2001.

DATED at Perth this 25th day of May 2001.

J.A. SPURLING,
Registrar.

DORIC CONSTRUCTIONS PTY LTD INDUSTRIAL AGREEMENT.

No AG 303 of 1995.

IN THE WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION

No. 810 of 2001

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act

Doric Constructions Pty Ltd will cease to be a party to the Doric Constructions Pty Ltd Industrial Agreement No AG 303 of 1995 on and from the 10th day of June 2001.

DATED at Perth this 11th day of May 2001.

J. A. SPURLING,
Registrar.

OTIS AUSTRALIA—WESTERN AUSTRALIA CONSTRUCTION & SERVICE EMPLOYEES CERTIFIED AGREEMENT 1995.

No AG 250 of 1995.

IN THE WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION

No. 844 of 2001

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act

Otis Elevator Company Pty Ltd will cease to be a party to the Otis Australia—Western Australia Construction & Service Employees Certified Agreement 1995 No AG 250 of 1995 on and from the 16th day of June 2001.

DATED at Perth this 17th day of May 2001.

J. A. SPURLING,
Registrar.

PRESBYTERIAN LADIES COLLEGE (ENTERPRISE BARGAINING) AGREEMENT 1999.

No. AG 168 of 1999.

IN THE WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION

No. 882 of 2001

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act

Presbyterian Ladies College will cease to be a party to the Presbyterian Ladies College (Enterprise Bargaining) Agreement 1999 No AG 168 of 1999 on and from the 22nd day of June 2001.

DATED at Perth this 23rd day of May 2001.

J.A. SPURLING,
Registrar.

PRESBYTERIAN LADIES COLLEGE (ENTERPRISE BARGAINING) AGREEMENT 1999.

No AG 168 of 1999.

SCOTCH COLLEGE (ENTERPRISE BARGAINING) AGREEMENT 1995.

No AG 87 of 1995.

GUILDFORD GRAMMAR SCHOOL ENTERPRISE BARGAINING AGREEMENT 1994.

IN THE WESTERN AUSTRALIAN.
INDUSTRIAL RELATIONS COMMISSION

No. 892 of 2001

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act

The Independent Schools Salaried Officers Association of Western Australia, Industrial Union of Workers will cease to be a party to the Presbyterian Ladies College (Enterprise Bargaining) Agreement 1999 No AG 168 of 1999; the Scotch College (Enterprise Bargaining) Agreement 1995 No AG 87 of 1995 and the Guildford Grammar School Enterprise Bargaining Agreement 1994

No AG 11 of 1995 on and from the 24th day of June 2001.

DATED at Perth this 24th day of May 2001.

J.A. SPURLING,
Registrar.

PROJECT TILE FIXING INDUSTRIAL AGREEMENT.

No AG 194 of 1995.

IN THE WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION

No. 915 of 2001

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act

Project Tile Fixing will cease to be a party to the Project Tile Fixing Industrial Agreement No AG 194 of 1995 on and from the 28th day of June 2001.

DATED at Perth this 28th day of May 2001.

J.A. SPURLING,
Registrar.

QUALITY ASSURED PROJECTS INDUSTRIAL AGREEMENT.

No AG 92 of 1996.

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. 819 of 2001

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act

Quality Assured Projects will cease to be a party to the Quality Assured Projects Industrial Agreement No AG 92 of 1996 on and from the 13th day of June 2001.

DATED at Perth this 14th day of May 2001.

J. A. SPURLING,
Registrar.

SCOTCH COLLEGE (ENTERPRISE BARGAINING) AGREEMENT.

No AG 87 of 1997.

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. 809 of 2001

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act

Scotch College will cease to be a party to the Scotch College (Enterprise Bargaining) Agreement No AG 87 of 1997 on and from the 10th day of June 2001.

DATED at Perth this 11th day of May 2001.

J.A. SPURLING,
Registrar.

SKILLED ENGINEERING INDUSTRIAL AGREEMENT 1995.

No. AG 329 of 1995.

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. 845 of 2001

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act

Skilled Engineering Limited will cease to be a party to the Skilled Engineering Industrial Agreement 1995 No AG 329 of 1995 on and from the 17th day of June 2001.

DATED at Perth this 18th day of May 2001.

J. A. SPURLING,
Registrar.

STRAMIT INDUSTRIES (MADDINGTON) WESTERN AUSTRALIA ENTERPRISE AGREEMENT 1994.

No AG 33 of 1994.

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. 880 of 2001

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act

Stramit Industries (Maddington) Western Australia will cease to be a party to the Stramit Industries (Maddington) Western Australia Enterprise Agreement 1994 No AG 33 of 1994 on and from the 22nd day of June 2001.

DATED at Perth this 23rd day of May 2001.

(Sgd.) J.A. SPURLING,
[L.S.] Registrar.

STRAMIT INDUSTRIES (MADDINGTON) WESTERN AUSTRALIA ENTERPRISE BARGAINING AGREEMENT 1996.

No AG 95 of 1997.

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. 881 of 2001

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act

Stramit Industries (Maddington) Western Australia will cease to be a party to the Stramit Industries (Maddington) Western Australia Enterprise Bargaining Agreement 1996 No AG 95 of 1997 on and from the 22nd day of June 2001.

DATED at Perth this 23rd day of May 2001.

J. A. SPURLING,
Registrar.

VENTARA HOLDINGS INDUSTRIAL AGREEMENT.

No. AG 6 of 1995.

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. 806 of 2001

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act.

Ventara Holdings Pty Ltd will cease to be a party to the Ventara Holdings Industrial Agreement No AG 6 of 1995 on and from the 9th day of June 2001.

DATED at Perth this 10th day of May 2001.

J. A. SPURLING,
Registrar.

VENTARA HOLDINGS INDUSTRIAL AGREEMENT.
No. AG 214 of 1997.

IN THE WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION

No. 807 of 2001

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act.

Ventara Holdings Pty Ltd will cease to be a party to the Ventara Holdings Industrial Agreement No AG 214 of 1997 on and from the 9th day of June 2001.

DATED at Perth this 10th day of May 2001.

J. A. SPURLING,
Registrar.

NOTICES—
Award/Agreement matters—

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Application No. P 17 of 2001

APPLICATION FOR VARIATION OF AWARD

ENTITLED "GOVERNMENT OFFICERS SALARIES, ALLOWANCES AND CONDITIONS AWARD 1989 No. PSA A3 OF 1989"

NOTICE is given that an application has been made to the Commission by The Civil Service Association of Western Australia Incorporated under the Industrial Relations Act 1979 for a variation of the above Award.

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

Schedule A—List of Respondents

Add—

Director General of the Ministry of Justice

A copy of the proposed variation may be inspected at my office at the AXA Centre, 111 St George's Terrace, Perth.

J. A. SPURLING,
Registrar.

25 June 2001.

PUBLIC SERVICE ARBITRATOR—
Matters Dealt With—

EMPLOYMENT RECORD OF MS ELSIE WALKER.
2001 WAIRC 02900

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	DIRECTOR GENERAL, (DEPARTMENT OF) FAMILY AND CHILDRENS SERVICES, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DELIVERED	MONDAY, 28 MAY 2001
FILE NO	P 3 OF 2001
CITATION NO.	2001 WAIRC 02900

Result Application pursuant to Sections 80 E and 80 F withdrawn by leave

Order.

WHEREAS this is an application pursuant to Sections 80 E and 80 F of the Industrial Relations Act 1979; and

WHEREAS on the 22nd day of May 2001 the Applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby withdrawn by leave.

[L.S.]

(Sgd.) P.E. SCOTT,
Commissioiner/
Public Service Arbitrator.

RETURN TO WORK.
2001 WAIRC 02789

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	MANAGING DIRECTOR, MINISTRY OF HOUSING, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DELIVERED	FRIDAY, 11 MAY 2001
FILE NO/S	P 4 OF 2001
CITATION NO.	2001 WAIRC 02789

Result Application pursuant to Section 80 E dismissed

Order.

WHEREAS this is an application pursuant to Section 80E of the Industrial Relations Act 1979; and

WHEREAS on the 11th and 30th days April 2001 the Commission convened conferences for the purpose of conciliating between the parties; and

WHEREAS on the 10th day of May 2001 the Applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby dismissed.

[L.S.]

(Sgd.) P.E. SCOTT,
Commissioner,
Public Service Arbitrator.

INDUSTRIAL MAGISTRATE—Complaints before—

IN THE INDUSTRIAL MAGISTRATE'S COURT OF WESTERN AUSTRALIA
HELD AT PERTH
Complaint No. 161 of 2000
Date Heard: 19 & 26 April 2001
Delivered: 17 May 2001
BEFORE: G. Cicchini I.M.
B E T W E E N—
Armando La Guidara
Complainant
and
Antonino Tripolitano
Defendant

Appearances—

Mr K C Brown of *Southbrook Enterprises Pty Ltd* appeared as agent for the Complainant.

Mr G McCorry of *Labourline—The Employment Law Specialists* appeared as agent for the Defendant.

Reasons for Decision.

The Claim

The complainant claims $46,338.28 being the value of the underpayments allegedly owing to him with respect to wage payments made by the defendant to the complainant during the course of his employment with the defendant between April 1997 and February 2000.

The complainant alleges that the defendant engaged him to perform work as described within the terms of the *Building Trades (Construction) Award 1987 No R17 of 1978* (the award). He contends that at all material times he performed work in the calling of a labourer assisting a tradesman engaged in the trade of tiling on construction work as defined by clause 7(3)(a) of the award

The complainant alleges that he was—

- entitled to adult rates of pay for the period 1 July 1997 until termination.
- not paid in accordance with the award as a full time employee but was paid a lesser amount for each day worked over the period of continuous service.
- not paid as a casual and was not paid the appropriate minimum weekly rate for each week worked.
- not provided with annual leave and loading.
- not paid accrued annual leave upon termination.
- not paid for public holidays not worked.
- not paid the appropriate rate for public holidays worked.
- not paid the appropriate rate for weekends worked.
- not paid fares and travel allowance.
- not paid severance pay.
- not given the appropriate superannuation contribution.
- not given the appropriate payment in lieu of notice.

Accordingly the complainant seeks to recover the underpayments together with interest thereon. He also seeks the imposition of penalties with respect to the alleged breaches and seeks to recover the costs of these proceedings from the defendant.

The Defence

The defendant maintains that at all material times there was not in existence an employment relationship between the complainant and the defendant. Further, and in the alternative, the defendant says that the complainant, insofar as is relevant to the application of the award was—

- not engaged to perform work described by the terms of the award.
- not performing the work of a labourer assisting a tradesperson in the work of tiling on construction work.
- not entitled to adult rates of pay.
- not entitled to be paid as a full time employee.
- not entitled to be paid the minimum weekly rate for each week worked.
- not entitled to annual leave and loading and had no accrued leave on termination.
- not entitled to be paid for public holidays not worked.
- not entitled to be paid for public holidays allegedly worked.
- not entitled to reasonable pay in lieu of notice.
- not entitled to severance pay.
- not entitled to have superannuation contributions made.

The defendant contends that he engaged the complainant on duties whereby the complainant was kept off the streets, kept usefully occupied and provided *"good teaching and instruction whereby he may profit himself afterwards"*. The defendant says that he did not require the complainant to perform the work of a labourer and was only obliged to pay the complainant an agreed sum based on work performed but being no less than the minimum rates of pay prescribed by order made under the *Minimum Conditions of Employment Act 1993* (MCE Act). The defendant also says that clause 45(1) of the award constitutes a prohibition clause with respect to the employment of junior employees without union approval. Further, and in the alternative, the defendant says that the clause is void and of no effect by reason of section 5 of the MCE Act.

The defendant accordingly denies the complainant's claim.

The Witnesses

The complainant has given evidence, as has his father, Carmelo La Guidara. The complainant's agent, Mr Keith Brown, also gave evidence concerning this matter. The defendant elected not to give evidence or call witnesses.

The Facts

In about April 1997, at which time the complainant was aged 16 years soon to turn 17 years, he was unemployed having left his previous employment as a tiler's labourer. He left on account of having been underpaid and had at that stage remained out of work for about 3 months. He had held that employment for about one year. His parents, quite understandably, were anxious for their son to gain an apprenticeship in tiling. Accordingly they contacted the defendant who comes from the same town in Sicily that the complainant's mother comes from. The complainant testified that his parents asked the defendant that he be taken on as an apprentice. The defendant agreed to take the complainant on trial for a two-week period to assess his suitability as an apprentice. Following that trial period which was successfully completed the defendant agreed to take the complainant on as an apprentice. He agreed to procure the necessary papers to formalize the arrangement. Those papers were never procured and the apprenticeship never formally commenced.

The complainant testified that he worked for the defendant on a weekly basis. His only time off work was when he was sick or when the defendant did not work by reason of his attending the Hopman Cup or being away on holidays. Whilst working for the defendant he carried out duties such as cutting tiles, mixing glue, grouting, mixing topping and washing tools, being much the same as the types of duties he had performed for his previous employer.

The complainant testified that his work for the defendant was carried out at private houses, at houses under construction by builders, at factories and at "Red Rooster". Some of the houses at which he worked were being renovated. He always worked within the metropolitan area. Prior to obtaining his driver's licence he was usually driven to and from his employer's house by his father. Once he obtained his licence he drove himself there and back. On a couple of occasions the defendant picked him up from his home. On some occasions, after having made his way to the defendant's home, he would be told there was no work available and he would have to return home. The defendant would on occasions return him to his home. He normally started work at about 7 am but started earlier, at 6 am, if the defendant had to play tennis. When he started early he finished at 2.30 pm. When he started later he would finish later. The complainant testified that he was absent from work a "couple of times" due to illness. He was not paid sick leave for such absences. He also testified that he

worked "sometimes 8 hours" per day -"sometimes more". He was asked whether there were any occasions when he worked for less than 8 hours to which he responded "no". He was then asked whether in answering that question he meant that he never worked less than eight hours or whether his answer was to signify that he could not recall. He responded by saying that he could not recall. That response is clearly inconsistent with other aspects of his testimony. The complainant told the Court that he worked Mondays to Fridays. Sometimes he worked on weekends. He also worked on public holidays. There were some public holidays that he did not work. He said that he never worked on site alone and that he never actually laid tiles. He was always under the control and direction of the defendant.

The complainant testified that tax was deducted but that his accountant had informed him that the mode of deduction of tax was not right. In fact, tax was deducted under the Prescribed Payments System at the rate of 20%. He also testified that he was always paid by cheque and that each cheque was always deposited at the bank on the same day as it was received. The cheques were always deposited in the complainant's account held at the National Australia Bank. The complainant said that his pay was not always received on time. He was due to be paid each Friday. However, sometimes he was paid a couple of days late. On occasions he was paid a week late. Superannuation was paid for him during the period of his employment.

In January 2000 the complainant wrote to the defendant formally complaining that he had been underpaid. Prior to that, he had verbally and informally advised the defendant that he was being underpaid however nothing eventuated from those approaches. Following his sending of the letter dated 11 January 2000 formally advising the complainant that he believed that he was being underpaid his employment was terminated.

When cross-examined the complainant confirmed that the discussions that took place concerning his engagement as an apprentice were held between his parents on the one hand and the defendant on the other. He was also cross-examined as to when it was that various breaks from work were taken. He told the Court that he could not remember. Further he could not identify the days on which he was sick and for which he claims he was not paid but should have been paid sick leave. He was cross-examined as to his hours of work. He said he worked 8 hours per day for over half the time and less than 8 hours per day for a quarter of the time. Sometimes the jobs finished as early as 11 am and they went home. The complainant admitted that he could not be sure of how many hours he worked on any one day. The complainant similarly was unable to identify which Saturdays or Sundays he worked. He was also unable to say how many hours he worked on the weekend. He could not identify which public holidays were worked. The complainant also said that, although on occasions he was told the night before that he would not be required, sometimes he was told that there was no work available after having made his way to the defendant's home.

The complainant denied having received any cash payments. All payments made to him were made by cheque. Further he conceded during cross-examination that most of the work carried out by the defendant in private houses related to renovation work.

The complainant's father, Carmelo, gave evidence concerning his discussion with the defendant in relation to taking on the complainant as an apprentice. He testified that the defendant took on the complainant on a trial basis. Following the successful trial the defendant indicated to him that the complainant would be taken on as an apprentice. The defendant agreed to procure the necessary papers to facilitate the commencement of the apprenticeship. That did not eventuate. After three months had elapsed, Carmelo confronted the defendant concerning the apprenticeship papers. At that stage he was told that there was no need for the complainant to have a ticket and that he could stay on with him as a labourer. From that point onwards it was understood that the complainant would work as a labourer.

Carmelo La Guidara confirmed that prior to his son gaining his driver's licence he took his son to the defendant's home in the mornings. On occasions he would have to return to the defendant's home soon after drop off in order to pick his son up when work was not available.

When cross-examined Carmelo La Guidara testified that the defendant was anxious to employ his son because "he had to sack the other man" referring to the defendant's then current employee. He confirmed also that the original offer of a job was that in the capacity of an apprentice. At that time wages were not discussed at all.

Keith Charles Brown gave evidence of his analysis of the complainant's bank records, PPS tax statements and superannuation records. He then from those source documents calculated the days worked by the complainant. His evidence speaks for itself. I do not intend to comment further as to his evidence at this stage. Mr Brown has arrived at certain conclusions based on his calculations. Those conclusions relate to the days and weeks worked by the complainant. He asks that I accept his conclusions as being accurate going to prove the days and weeks allegedly worked by the complainant.

No Case to Answer Submission

Upon the conclusion of the complainant's case the defendant submitted that there is no case to answer. In making this submission the defendant elected not to give or call any evidence.

A submission of "no case to answer" is a motion made by the defendant for dismissal of the case against him on the ground that no case has been made out. The submission is based on one or more of the following—

(1) that there has been no evidence of some element essential to the case against the defendant,
(2) that the evidence against him is so inherently unreliable or has been so discredited that no reasonable tribunal could rely on it, or
(3) that on the evidence presented the verdict should go to the defendant.

Generally speaking the making of a "no case to answer" submission in a Magistrate's Court is not a bar to the defendant calling evidence in the event that the submission is unsuccessful. However, if the defendant submits at the close of the complainant's case that although there is some evidence of all the necessary elements required to be proved before the order sought can be made, such evidence is so weak or so unsatisfactory that it should not be accepted, then such is an argument on an issue of fact, and the defendant should not be allowed to argue such a question of fact and, if defeated, then claim to be entitled to call evidence. Questions of fact should be decided only after all of the evidence has been given. It is only questions of law that may be raised and argued at the close of the informant's case without being subjected to the necessity of electing whether or not he will go into evidence (See ***Tate v Johnson*** (1953) 70 WN(NSW) 302).

In this instance it appears that the defendant has elected not to call evidence under a misapprehension that such an election was necessary. Clearly it was not. His submissions related only to the law and not to issues concerning the acceptability of testimony. In that regard there was no submission with respect to the inherent unreliability of a witness or witnesses. Furthermore there was no submission that the evidence of the complainant or other witnesses was so discredited that no reasonable tribunal could rely on it. It follows that if this no case to answer submission is unsuccessful he may wish to argue that he ought to be permitted to withdraw his election erroneously made.

In submissions the defendant's agent contends that the complainant has to prove the following elements, they being that—

1. the complainant was an employee,
2. he was employed in a calling to which the award applies,
3. he was employed without the consent of the union,
4. he was entitled to specific benefits under the award, and
5. he did not receive those benefits.

The defendant argues that none of the elements have been established.

Is There Evidence Before the Court to Establish That the Complainant was an Employee?

The defendant contends that it is not enough to establish the existence of an employment relationship. What must be shown is that there was an intention to create a legal relationship.

The defendant says that whatever arrangements were made, the complainant's father on the one hand and the defendant on the other made them. Even if it could be said to be a contract made for the benefit of his son it still does not demonstrate an employer-employee relationship grounding an application under s83 of the Industrial Relations Act 1979. The defendant cited the High Court authority of ***Dietrich v Dare*** (1980) 54 ALJR 388 to support his proposition that the performance of manual labour and the payment of remuneration are not enough to establish an employment relationship. The defendant suggests that an intention to create legal relations cannot be inferred from the evidence.

Mr Brown for the complainant, in answer to that aspect of the submissions, said that it was "outrageous" to suggest that a relationship which resulted in work being performed, where moneys were paid for work performed and tax deducted therefrom together with other benefits paid, does not constitute an employment relationship.

In my view the evidence before the Court can overwhelmingly establish that an employment relationship existed. The fact that the initial discussions concerning employment took place between the complainant's parents, particularly his father, and the defendant is of no particular significance. It is clear that any contract made by the complainant's father for the complainant's benefit is both valid and enforceable. The conduct of the parties in the performance of the contract is also capable of establishing an employer-employee relationship. The circumstances in this case are not at all like the factual circumstances in ***Dietrich***. The evidence in this case can clearly demonstrate an intention to create legal relations. That is that the complainant would provide his labour to the defendant at the direction of the defendant for remuneration. There is an abundance of evidence that would go to proving that element. I agree with Mr Brown's submissions in that regard.

There is absolutely no force in the defendant's first ground.

Is There Evidence Before the Court That Can Establish That the Complainant was Employed in a Calling to Which the Award Relates?

The defendant contends that the complainant must establish that he was doing work that was subject to the award. It is argued that the evidence cannot establish that he performed work in the callings of "trades labourer" or "plasterers' labourer" as set out in clause 8(2)(b)(iii) of the award. In that regard the defendant says that there is no evidence to establish that the defendant was a building tradesperson.

I find little force in that argument because I take the view that the evidence enables the reasonable inference to be drawn that the defendant is a tradesperson. I say that because the evidence surrounding the discussion between the complainant's parents and the defendant concerning the apprenticeship permits a finding that a representation was made by the defendant that he is a tradesperson and that he was able to take on apprentices. Furthermore, the evidence of the complainant concerning the work carried out by the defendant in the laying of tiles permits such a finding. In my view such evidence suffices for the purposes of these proceedings given the standard of proof required. It can go to establish that the defendant is a tradesperson.

Having found that there is evidence that enables a finding to be made that the defendant is a tradesperson, does the evidence permit a finding that the complainant assisted him in his work? In my view it does. The complainant's testimony going to the nature of his duties performed for the defendant goes to establish that fact. Further, his evidence concerning the localities and structures at and upon which such work was performed is capable of establishing that he assisted the work of a building tradesperson.

Having so found, it is unnecessary for me to consider whether the complainant falls within the calling of "plasterer's labourer". In that regard the defendant's arguments relating to clause 7(10) of the award and the complainant's failure to negate the operation of the *Building Trades Award 1968 No 31 of 1966* falls away.

The defendant further contends that given that the complainant on his evidence was employed with the intention of being an apprentice he could not now be said to be a labourer assisting a tradesman. It is submitted that there is no evidence of any change in the nature of the relationship. I disagree. Carmelo La Guidara testified that about three months after the employment relationship commenced the defendant made it clear that the complainant would not be taken on as an apprentice and that he would continue to work as a labourer. That position was reluctantly accepted. There is evidence to show therefore that the relationship changed at that point in time, in or about July 1997. It is clear that from that time neither party looked at the complainant as being an apprentice.

Was the Consent of the Union Necessary to Enable the Employment of the Complainant and is That a Necessary Element to be Proved by the Complainant?

The defendant says that for the complainant to succeed in his claim to be paid adult rates of pay pursuant to clause 45(1) of the award he first must prove that he was employed without the consent of the union. That is an essential pre-requisite to establishing the claim. Relevantly clause 45(1) of the award provides—

"45.—PROHIBITION OF JUNIOR EMPLOYEES

(1) Except as provided in subclauses (2)-(9) inclusive hereof, the employment of junior employees (except apprentices) on any work which, if performed by an adult employee, would be subject to the provisions of this award is prohibited unless the consent of the union is in each case first obtained. If any junior employee (except an apprentice) is so employed such employee shall be paid not less than the rate of pay of an adult performing similar work."

The defendant argues that the clause is a prohibition clause and not merely a junior workers wage clause. He argues that the second sentence of the subclause merely prescribes the wages to be paid to junior employees when the union gives consent. Mr Brown for the complainant argues that clause 45(1) does not "absolutely" prohibit the employment of junior workers. He says that if the clause does that, that it would be discriminatory and illegal. He contends that the provision is one that simply provides that junior workers be paid at adult rates if such a worker is employed without the consent of the union.

In my view clause 45(1) prohibits the employment of junior workers unless the consent of the union has first been obtained. Accordingly the clause does not "absolutely prohibit" the employment of junior workers but rather requires that the pre-requisite consent of the union be first obtained. In that regard the clause is neither discriminatory nor illegal. It does not prevent the employment of junior workers but rather regulates their employment. If the consent of the union is given, then such junior workers can be employed and are to be paid at adult rates. The second sentence of the subclause cannot in my view be read as a default provision permitting the payment of adult rates regardless of whether the union's consent has been obtained. I take that view because clause 8 of the award refers expressly to adult employees. There is no express provision for wages to be paid to junior employees working with the consent of the union. What are the wages to be paid to such employees? Clearly the answer is the same rate of pay as an adult performing similar work. That is achieved by virtue of the second sentence of clause 45(1). The clause cannot be read in the manner suggested by the complainant. That being so it follows that evidence should have been called to address the issue of consent. Given that was not done it presents the complainant with insurmountable difficulty with respect to his claim.

It is appropriate that I, at this stage, also address the defendant's argument concerning the invalidity of clause 45(1) of the award. The defendant argues in that regard that section 5 of the MCE Act provides that all minimum conditions are implied into all awards and that any provision that is less favourable to an employee than a minimum condition has no effect. The defendant argues that any requirement to have the union's permission is clearly less favourable regardless of what the terms might be if the union's permission was actually granted. In those circumstances it is argued, clause 45(1) is less favourable than a minimum condition and therefore is of no effect.

I find no force in the defendant's argument that clause 45(1) is of no effect. Section 5(2) of the MCE Act provides—

(2) A provision in, or condition of, a workplace agreement, an award or a contract of employment that is less favourable to the employee than a minimum condition of employment has no effect.

"Minimum conditions of employment" is defined in section 3 of the MCE Act as follows—

"minimum condition of employment" means —

(a) a rate of pay, or other requirement as to pay, prescribed by this Act;

(b) a condition for leave prescribed by this Act; or

(c) a condition prescribed by Part 5;

The requirement of the union's consent as a condition precedent to employment of a junior worker is not a minimum condition as contemplated by the MCE Act. It does not fall within the definition of "minimum condition of employment" and any argument such as that of the defendant, founded upon general notions, cannot succeed given the specific provisions of the MCE Act. Clause 45(1) is valid and has force.

Notwithstanding the validity of clause 45(1) the complainant faces insurmountable difficulty by virtue of his failure to call evidence of the union's consent. The union's consent was a pre-condition to his employment under the award. Furthermore the complainant's claim that the second sentence of clause 45(1) operates as a default clause entitling him to adult wages simply cannot be made out. Given that the complainant's claim is entirely based on clause 45(1) it follows that he cannot possibly establish his claim.

For the sake of completeness I will address the other issues that the complainant would have necessarily had to have proved in the event that he was successful in establishing that he comes within clause 45(1) of the award.

Is there Evidence to Show that the Complainant is Entitled to Specific Benefits Under the Award?

In his particulars of claim the complainant maintained that he was entitled to be paid 38 hours each week regardless of whether he worked those hours or not. In submissions it is suggested by Mr Brown that the complainant is entitled to be paid 8 hours for each ordinary day.

The defendant contends that there is nothing in clause 13 of the award that would suggest that an employee is entitled to 38 hours pay regardless of whether he worked those hours or not. In fact it is argued that a proper reading of clauses 8(1), 8(4) and 35 suggests that employees be paid for only the hours worked. Clearly the provisions anticipate periods not worked on account of inclement weather and jobs not being ready, for example. In my view the defendant's argument has considerable force. The complainant must establish that he worked 38 hours in any given five consecutive days of work to claim 38 hours pay for that full week. Given his evidence, or lack of it in that regard, it is impossible for him to establish the same. Mr Brown's evidence, even if accepted, could not establish the same.

The complainant claims that where he has worked less than 5 days he is entitled to be paid casual rates. He relies upon clauses 7(2) and 8(15) of the award. He maintains that any consecutive period in which he worked for less than 5 days or where there was a break between one period of employment and another, that he ceased employment thereby entitling him to pay in lieu of notice, casual rates of pay, holiday pay and the like. In my view the complainant's claims are simply not maintainable in that regard.

I accept the defendant's argument that the concept of employment is one of relationship. The relationship does not necessarily end because there was a break of some duration in the performance of work. The complainant's own testimony reflects a continuing relationship. Indeed there is absolutely no evidence before me that would enable me to find a series of discrete relationships. Just because an employee works for less than 5 days that, of itself, does not result in a conclusion that the employee's status changed to that of a casual employee. The clauses relating to lost time and inclement weather are indicative of that.

The award clearly contemplates payment of wages contingent upon the hours actually worked. In that regard the complainant says that he usually worked within certain hour. He admitted however that he worked for less than those hours for "about twenty-five per cent" of the time that the defendant employed him. He himself has not given evidence identifying the days of the week that he actually worked, which weekends he worked or which public holidays he worked.

In that regard the complainant effectively relies upon Mr Brown's testimony relating to the conclusions he reached as a consequence of calculations performed based on the complainant's bank records, tax records and superannuation records. However Mr Brown's conclusions are not evidence going to the proof of those matters. It is not for Mr Brown to say that the complainant worked the days as set out in exhibit 5. It is for the complainant to give such evidence. The complainant has to prove that he worked the days alleged. He should have testified in much the same way that Mr Brown did as to how, based on calculations, he could determine which days he worked. He has not done that. He has effectively tried to do that by proxy through Mr Brown. Mr Brown cannot establish which days the complainant worked. It is for the complainant to give evidence, which would permit conclusions in that regard. Mr La Guidara has not, in his own testimony, stated which days he believes he worked. He has left that all to Mr Brown. In my view, that cannot be done. It was incumbent upon the complainant to testify that as a consequence of reference to certain documents, he was able to conclude that certain days were worked. His evidence however does not specifically address those matters. It has all been left to Mr Brown. However Mr Brown cannot fill that void.

Even if it is the case that Mr Brown's conclusions are capable of going to the proof of the days that the complainant worked, it is nevertheless the case that the calculations are based on assumptions made without foundation. For example, if 5 days or less were worked in any given week it has been assumed by Mr Brown that all days worked were weekdays. That may be so but equally it may not. For all I know such days may have included weekends. There is absolutely no evidence going to show which days were actually worked by the complainant for the defendant. That being the case, how could this Court possibly make findings as to the days and hours actually worked. Without such evidence the Court is not in a position to make findings as to what the complainant's actual entitlements were. It follows given the state of the evidence, that it is impossible for the complainant to establish his claim.

Does the Evidence Permit a Finding that the Complainant did not Receive Benefits Under the Award?

The defendant submits that in the event that it can be established that the award was operative, that the complainant has been paid in excess of his entitlements. It is submitted that his entitlements were those of junior rates of pay as inserted into the award by order of the Industrial Relations Commission in Court Session on 13 November 1997. The defendant says that the complainant has failed to establish that he has not received entitlements to which he was entitled under that provision.

In my view the complainant cannot, for the very same reasons previously given, establish that he is entitled to the amounts he has particularized in his claim as owing. He has not been able to establish that the award applies (on account of the prohibition clause). Furthermore he cannot establish that he worked the days and hours alleged in his claim. He cannot establish that he was entitled to adult rates of pay on account of clause 45(1) of the award and also on account of clause *"1B.- Minimum Adult Award Wage"* within the award (see 77 WAIG 3186).

Comment

In his submissions to me Mr Brown said that if his client's claim were to fail on account of an inability to produce time and wages records then it would be a licence for unscrupulous employers to fail to comply with awards and get away with it. Employers would facilitate their defence by failing to keep and produce records. He submits that a failure by an employer to keep records should not be the reason for a complaint relating to a significant underpayment to be defeated.

There can be no doubt that Mr Brown has felt a sense of frustration concerning the production of records. In his submissions to me he concludes that records were not kept. However I do not know whether that is the case or not. Clearly there were avenues open for the complainant, at law, to ascertain whether or not the records existed. If they exist he could have subpoenaed them. He did not do that. If they did not exist, then action could have been taken in that regard. Those steps may have well been a necessary practical requirement to facilitate the production of evidence for the purpose of institution of proceedings. I say that because it is important to

reflect upon the fact that the Industrial Magistrate's Court is a Court of law and is not governed by the Industrial Relations Commission's jurisdiction. In particular, section 26 of the *Industrial Relations Act 1979* requiring the Industrial Relations Commission to act *"according to equity, good conscience and the substantial merits of the case"* does not apply. The burden remains with the complainant to establish the elements of the claim either directly or by inference. If the complainant cannot establish the same in his own case then it follows that no case will have been made out.

Conclusion

Given the state of the evidence, the complainant cannot establish on the balance of probabilities that the award applied to his employment by the defendant. Even if it could be established that the award applied, the complainant has failed to produce evidence to establish that he was entitled to adult rates of pay or other specific benefits under the award and further that he did not receive those benefits to which he was entitled.

I find that there is no case to answer.

G. CICCHINI,
Industrial Magistrate.

UNFAIR DISMISSAL—

2001 WAIRC 02734

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	CONSTRUCTION, MINING, ENERGY, TIMBERYARDS, SAWMILLS AND WOODWORKERS UNION OF AUSTRALIA - WESTERN AUSTRALIAN BRANCH, APPLICANT -v- BHP IRON ORE LTD, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DELIVERED	TUESDAY, 8 MAY 2001
FILE NO/S	APPLICATIONS 1393 OF 2000 & 747 of 2001
CITATION NO.	2001 WAIRC 02734

Result	Application upheld. Order issued.
Representation	
Applicant	Mr D Schapper of counsel
Respondent	Mr T Lucev of counsel and with him Mr H Downes as agent

Reasons for Decision.

1 Mr Ray Robinson drove locomotives for the respondent since the commencement of his employment in 1996. Prior to his employment with the respondent, Mr Robinson worked for approximately 24 years for Victorian Railways.

2 On 5 September 2000 by letter of the same date, Mr Robinson was dismissed by the respondent by way of payment in lieu of notice, for breaching the respondent's policy in relation to harassment known as the BHP Iron Ore Non Harassment Policy ("the Policy"). The respondent said that Mr Robinson breached the Policy because he wrote offensive comments on a draft affidavit of another employee of the respondent, which affidavit was being prepared for use in proceedings in the Federal Court.

3 The applicant now brings this application on behalf of Mr Robinson, pursuant to the Industrial Relations Act 1979 ("the Act"), alleging that his dismissal was harsh, oppressive and unfair. The applicant seeks an order from the Commission that Mr Robinson be reinstated. As at the time of the commencement of the application, the applicant also sought compensation for loss suffered by Mr Robinson as a consequence of his dismissal, which relief is now not able to be the subject of an order of the Commission, following the decision of the Industrial Appeal Court in *City of Geraldton v Cooling* (2000) 80 WAIG 5341.

4 The respondent denied the applicant's claim and opposed the relief sought.

Factual Background

5 The material facts in this matter are relatively straightforward and in large part, are not controversial. I can shortly state them as below.

6 In the early hours of one morning on a day not determined on the evidence, after coming off shift, Mr Robinson was in the crib room at the respondent's locomotive yard at Nelson Point, where there was what was described as a "pile of affidavits" on the table. There were other employees present at the time. Some of the employees were very upset with what they read in the affidavit, which was a draft, unexecuted affidavit of another employee of the respondent, Mr Holland, who had apparently recently entered into a workplace agreement with the respondent ("the affidavit"). The affidavit was apparently to be used in upcoming proceedings in the Federal Court in relation to the respondent's introduction of workplace agreements. Mr Robinson also read the draft document. He had known Mr Holland for some years and who had also been, at least until in or about November 1999, the convener for rail operations of the applicant union at Nelson Point. Mr Holland had provided assistance to employees on union matters.

7 When Mr Robinson read the content of the affidavit he became very upset. He was particularly upset with what Mr Holland was saying about the workplace and specifically the applicant union, of which he was formerly a member and official. As a reaction to this, Mr Robinson wrote some words on the document. Those words included the following on various parts of the document: "Scabville"; "as scab c..."; "seeing as I had no mates"; "to create employment for my fellow Australians"; "not a mate as I have none"; "not a mate." Mr Robinson, after having written these words on the document, then received a radio call to attend a job and he left the crib room. Mr Robinson did not know what then happened to the document after this, or indeed all of the other documents in the crib room. He said that the atmosphere in the crib room, when other employees were reading the affidavit, was hostile.

8 Subsequently, Mr Robinson was contacted by the convener of the applicant Mr Burtenshaw, to advise that he would be required to attend an inquiry. Mr Burtenshaw did not know what the inquiry was about but indicated what he thought it might concern. Whether or not Mr Robinson did have prior knowledge of the subject matter of the inquiry was in dispute, however I merely note that Mr Robinson did say that when he became aware of the inquiry, the affidavit upon which he had written did cross his mind.

9 On 4 September 2000 a disciplinary inquiry was convened. In attendance were Mr Robinson, a union representative Mr Young, and representatives of the respondent including Mr Zanders and Ms Kelly. Notes of the inquiry, which took place ultimately over both 4 and 5 September 2000, were tendered as exhibit A1, the content of which was not disputed by Mr Robinson. The header note to the notes on 4 September referred to the following "This is a disciplinary inquiry convened under the Industrial Relations Agreement into the writing and distribution of offensive material on site. As a result of this inquiry you may be subject to disciplinary action up to and including dismissal." At the inquiry Mr Zanders put a number of matters to Mr Robinson. Mr Robinson confirmed that he was aware of the Policy and understood it. Amongst other things, Mr Robinson was shown a copy of the affidavit. He was asked whether he had seen the affidavit before and whether he had anything to do with the writing on it. After Mr Robinson denied authoring

the notations on the affidavit, the respondent presented to Mr Robinson a copy of a forensic hand writing expert's report that indicated that Mr Robinson was the author of the notations. Despite this, Mr Robinson maintained his denial of the conduct.

10 Mr Robinson's evidence on this was that the process of the inquiry intimidated him, in particular the comments and manner of Mr Zanders. In this state of panic, as he described it, he maintained the denial of authorship of the notes on the affidavit, believing that whichever way he responded, he was going to be dismissed. Additionally, Mr Robinson denied distributing any material around the site, including the affidavit.

11 Mr Zanders told Mr Robinson that the writing of this kind of material was unacceptable, would not be tolerated and was in clear breach of the Policy. At the conclusion of the meeting that morning at approximately 10.30am, Mr Robinson was stood down pursuant to the procedures contained in the Industrial Relations Agreement. The meeting was to be reconvened the following day with the attendance of Mr Burtenshaw.

12 The disciplinary inquiry reconvened the next day on 5 September. The respondent reiterated that Mr Robinson was subject to possible dismissal. He was invited by Mr Zanders to add anything further in relation to the affidavit, in response to which Mr Robinson maintained his denial of authorship. He said he did this because having denied it the day before he was committed to this course. The meeting then adjourned for the respondent's representatives to consider their position. On resumption of the meeting the respondent presented to Mr Robinson a letter, dismissing him, which formal parts omitted, is in the following terms (exhibit A3)—

> "I refer to the investigation conducted into breaches of the Company's Non-Harassment Policy and our meetings of Monday 4 and Tuesday 5 September 2000.
>
> At those meetings you were asked if you were involved in the distribution of "scab" stickers, other offensive material and/or marking the affidavit of Anthony Holland with offensive comments.
>
> You denied any involvement in those matters.
>
> It was put to you that the Company has the opinion of a handwriting expert identifying you as the author of a number of the offensive comments marked on the affidavit of Anthony Holland which clearly breach the Company's Non-Harassment Policy.
>
> Notwithstanding the opinion of the handwriting expert you have maintained your denial of involvement in that matter.
>
> Based upon the expert's opinion the Company is of the view that you have breached the Company's Non-Harassment Policy in placing offensive comments on the affidavit of Anthony Holland.
>
> In the circumstances and having considered all matters raised by you the Company considers that you are unsuitable for further employment and that your employment is terminated with a payment in lieu of notice in accordance with clause 5(4) of the Award."

13 Mr Robinson left the site that day and was escorted off site by Mr Zanders.

14 Mr Holland, the deponent to the affidavit, did not at the time see Mr Robinson's notations on the affidavit, and indeed on the evidence as at the time of these proceedings, had never seen them. When he became aware through a supervisor of the respondent, that Mr Robinson had been dismissed he could not understand why this was the case. He was also very upset that his name was referred to in exhibit A3, which suggested that he was in some way linked with Mr Robinson's dismissal. This led to some concerns being expressed by him to representatives of management. Mr Holland was also upset at the fact of the distribution of the affidavit on site that made him "sick in the guts" as he put it. This was a reference to the distribution of the affidavit per se, not the writing upon it by Mr Robinson. He did not know how it came to be that the affidavit was on the site. He testified that he gave it to one of the respondent's managers and within about 48 hours of that, it appeared on the site. Another employee, Mr Gibbons, said that in discussions with Mr Holland, Mr Holland expressed the view that he did not care less what other employees said or wrote about him.

15 I find accordingly.

Consideration

16 The matters falling for consideration in this case are as follows—

(a) did the writings of Mr Robinson on the affidavit constitute a breach of the Policy?

(b) if the answer to (a) is yes, did that conduct of itself warrant dismissal? and

(c) can the fact that Mr Robinson deceived the respondent during the inquiry about the affidavit, subsequently admitted by him, now be grounds for the respondent to justify its decision to dismiss him?

17 I will deal with these issues in turn as follows.

Breach of Policy

18 The Policy relevantly provides as follows:

> *"BHP IRON ORE NON HARASSMENT POLICY*
>
> *BHPIO is opposed to all forms of work related harassment including that related to sex, race, membership or non-membership of trade unions and acceptance or non-acceptance of workplace agreements.*
>
> *Harassment takes many forms but is usually constituted by unwelcome acts or remarks which make the workplace unpleasant or humiliating for the targeted person.*
>
> *Such harassment may compromise of—*
>
> - *verbal abuse, including derogatory words;*
> - *offensive graffiti;*
> - *intimidating behaviour towards another employee or members of that employee's family; and*
> - *direct threats*
>
> *Any employee who believes that they are being subject to harassment, and any employee who observes behaviour which may amount to harassment, should immediately report it to their supervisor or manager.*
>
> *Work related harassment, including threats and intimidation, is unacceptable to BHPIO and any employees found to have engaged in such behaviour will be subject to disciplinary action up to and including summary dismissal.*
>
> *Management will ensure that all complaints are treated confidentially, seriously and sympathetically and that appropriate action is taken whenever harassment occurs.*
>
> *Note that pursuant to the Workplace Agreements Act 1993 (WA) ("the WPA") a person must not by threats or intimidation persuade, or attempt to persuade, another person to not enter into (or enter into) workplace agreements.*
>
> *Further, Section 68(2) of the WPA relevantly provides that a person must not intimidate an employee or threaten, injury or harm to a person or property of an employer because the employee is (or is not) a party to a workplace agreement.*"

19 The clear purpose of the Policy is to prevent employees of the respondent from engaging in any conduct that may have the effect of harassing another employee. It is also clear from the plain language of the Policy, when read as a whole, that for there to be harassment, there needs to be some form of communication and/or conduct engaged in by an employee, which conduct and/or communication is directed at another person, (referred to in the Policy as the "target") and that other person, in some way, shape or form, is in receipt of it. It is a necessary ingredient of harassment in my opinion, for the purposes of the Policy, that the "harassee" be harassed. That is, the subject or "target" must receive it and be affected by it in some way. That is the whole purpose of the Policy.

20 Some assistance as to what is meant by "harassment" in its ordinary and natural meaning, can be obtained from

the Shorter Oxford English Dictionary which defines "harass" as follows—

> "Harass—1. To wear out, or exhaust with fatigue, care, trouble etc. 2. To harry, lay waste 3. To trouble or vex by repeated attacks. 4. To worry, distress with annoying labour, care, importunity, misfortune, etc."

21 Clearly therefore, for a person to be "harassed" under the Policy, the person must, as a necessary ingredient, know of the alleged harassing conduct or communication. In this case, the evidence was that Mr Holland was never aware of the words written by Mr Robinson at any material time prior to his dismissal. Indeed on the evidence, even as at the time of these proceedings, Mr Holland had never seen the notations placed on the affidavit.

22 On the evidence before the Commission, what Mr Robinson did was in the early hours of the morning on a particular day, he made handwritten notations on the affidavit that was lying on the table in the crib room at the respondent's locomotive yard. There was no evidence, and I find accordingly, that Mr Robinson in anyway did or was associated with, the distribution of that material around the site such that Mr Holland had the content of such material communicated to him. As I have already observed, there was no evidence that the "target" of the harassment, Mr Holland, ever knew of the notations on the affidavit and he certainly therefore, could not have been affected by them. Indeed, on the evidence, is open to infer that he would not be so affected in any event.

23 In my opinion, the respondent's case in this matter falls at the first hurdle. The complaint against Mr Robinson, that being that of "placing offensive comments on the affidavit of Anthony Holland" was not in my view, of itself, conduct in breach of the Policy, as was asserted by the respondent in the letter of dismissal as exhibit A3. That is, in my view, the respondent proceeded upon a misconception of what was harassment, in breach of the Policy, in dismissing Mr Robinson. The Policy does not in terms prohibit the writing of comments on documents simpliciter. What it does prohibit is conduct that constitutes harassment. Mr Robinson was dismissed for conduct that did not breach the Policy.

Would the Breach Constitute Grounds for Dismissal?

24 In the alternative, if I am incorrect in characterising Mr Robinson's conduct as not being a breach of the Policy, would his conduct, having regard to all of the circumstances, warrant his dismissal? For the following reasons, I do not consider that it would. The only notations on the affidavit that could in my opinion support the conclusion of harassment were those referring to "scab" on the document. The rest of the notations were relatively innocuous.

25 The Commission has recently considered the use of this language in at least two cases they being the *AFMEPKIU v BHP Iron Ore Pty Ltd* (unreported 2001 WAIRC 02371) and *CEPU v BHP Iron Ore Pty Ltd* (2000) 81 WAIG 327. Having regard to the facts arising in those cases, and the conclusions of the Commission in relation to them, I do not consider that the facts of this case could be seen as warranting the dismissal of Mr Robinson. They may well warrant another form of discipline, falling short of the ultimate sanction of the employer to terminate Mr Robinson's employment.

Reliance by the respondent on Mr Robinson's Deceit

26 The final matter which needs consideration, is whether, as counsel for the respondent submitted, the respondent could now rely upon the admission by Mr Robinson, subsequent to his dismissal, that he lied to the respondent during the inquiry about the affidavit. The submission was that whilst the respondent did not believe Mr Robinson when he denied authoring the comments on the affidavit in the inquiry, and subsequently dismissed him, the fact that this was later confirmed could be further relied upon as being a matter not then known by the respondent, and upon which it can now rely, ex post facto, to justify the dismissal: *Concut Pty Ltd v Worrell* (2000) 75 ALJR 312.

27 In my view, the respondent cannot now rely upon this fact to justify the dismissal. It was abundantly clear on the evidence, and indeed in the letter of dismissal itself, that the respondent did not accept Mr Robinson's denial of his authorship of the comments on the affidavit, in particular having regard to the expert handwriting report. In short, it is clear that the respondent considered that Mr Robinson then lied to it in relation to this matter. In spite of this, the respondent did not dismiss Mr Robinson for telling lies, but dismissed him because of the breach of the Policy. This was the reason and the only reason for dismissal. To that extent, the respondent must be taken to have waived any reference to or reliance upon Mr Robinson not been frank with it in relation to the affidavit.

28 In *Concut*, Gleeson CJ, Gaudron and Gummow JJ said at para 29—

> *"In this Court, no attempt was made, and none would have succeeded, to deny the proposition of law expressed in Shepherd. The proposition that the dismissal of an employee may be justified upon grounds on which the employer did not act and of which the employer was unaware when the employee was discharged is but an application of what, in Shepherd, Dixon J identified as a rule of general application with respect to the discharge of contract by breach."*

29 The respondent knew about Mr Robinson's deceit when they dismissed him and indeed did act upon it, albeit not for that stated reason. The respondent cannot now, ex post facto, resurrect as justification for its decision, a fact that was in existence and upon which it relied at the time of the dismissal.

30 Notwithstanding this, if I am incorrect in this view, then I would not regard the conduct of Mr Robinson, taken in its entire context, as of itself, being sufficient to justify dismissal. Undoubtedly, conduct of that kind cannot be condoned. However, it is trite law to observe that it is not in all cases that an isolated act of misconduct will, of itself, justify dismissal. As was said by Kirby J in *Concut* at para 51—

> "4. It is, however, only in exceptional circumstances that an ordinary employer is entitled at common law to dismiss an employee summarily. Whatever the position may be in relation to isolated acts of negligence, incompetence or unsuitability, it cannot be disputed (statute or express contractual provision aside), that acts of dishonesty or similar conduct destructive of the mutual trust between the employer and employee, once discovered, ordinarily fall within the class of conduct, which without more, authorises summary dismissal. Exceptions to this general position may exist for trivial breaches of the express or implied terms of the contract of employment. Other exceptions may arise where the breaches are ancient in time and where they may have been waived in the past, although known to the employer (sic) judged irrelevant to the (sic). Some breaches may be duties of the particular employee and an ongoing relationship with the employer. But these exceptional cases apart, the establishment of important, relevant instances of misconduct, such as dishonesty on the part of an employee like Mr Wells, will normally afford legal justification for summary dismissal. Such a case will be classified as amounting to a relevant repudiation or renunciation by the employee of the employment contract, thus warranting summary dismissal."

31 Whilst His Honour's observations went to the issue of summary dismissal, they have relevance in my view, to Mr Robinson's conduct and the respondent's reaction to it, in this case. It was not the case that Mr Robinson's denials of his authorship of the comments on the affidavit were in any way, connected to his duties with the respondent as a locomotive driver. On the evidence, his denial, although wrong and a gross error of judgement, arose initially out of a concern to save his employment in a setting in which he felt under threat. The subject matter of the deceit did not go to, in any respect, his duties and

responsibilities in relation to the position for which he was employed by the respondent: cf *FEDFU v Mt Newman Mining Company Pty Ltd* (1980) 60 WAIG 1333. Notably also in *FEDFU*, the employer in that case, dismissed the two employees in question for "deliberately misrepresenting their position by claiming false signalling aspects to be showing at signals 226 and HAN3 on 2 July, 1979." That is, in that case, the reason for dismissal was that the two employees lied about an important operational matter that could have had very significant safety consequences.

32 In this case, Mr Robinson denied, albeit wrongly, being the author of certain notations on the affidavit, which notations related to the subject matter of an ongoing and highly emotive industrial dispute between the respondent and relevant unions representing its workforce. Importantly also, it was common ground that but for Mr Robinson's conduct in relation to the inquiry, he had a "clean" employment record with the respondent. In my opinion, taking all of these matters into consideration, the respondent would not be justified in any event, in dismissing Mr Robinson in these circumstances. The situation may well be different for example, in a case where the employee lied to obtain a benefit he was not entitled to and also had a poor employment record, including a final warning: *State of South Australia v Bahal Singh-Gill* (1994) 61 SAIR 77.

Conclusion

33 For the above reasons, I consider that the dismissal of Mr Robinson was harsh, oppressive and unfair.

34 In terms of the remedy sought, Mr Robinson wishes to be reinstated by the respondent. Counsel for the respondent resisted such an order on the basis that it would be impracticable to restore the former relationship between Mr Robinson and the respondent. In large part, that submission was based upon some evidence adduced through Mr Zanders that he could no longer trust Mr Robinson because of his denial of authorship of the comments on the affidavit. Furthermore, a submission was put that because of the attitude demonstrated by Mr Robinson towards collective as opposed to individual employment regulation, it would be unsuitable for Mr Robinson to resume his employment with the respondent.

35 I am not persuaded that the conduct of Mr Robinson, in all of these circumstances, was such that there has been a total breakdown in the relationship between the parties, such that I should conclude that reinstatement is impracticable. I do not accept the evidence of Mr Zanders in this regard. As I have noted, but for this incident, Mr Robinson has had a good employment record with the respondent, and there was no other evidence or submissions to the contrary. Mr Robinson strongly desires to be reinstated and clearly on the evidence, deeply regretted the incident. I am not therefore persuaded that it has been established by the respondent that in all the circumstances, reinstatement is impracticable. Reinstatement being the primary remedy available under the Act, it is clearly a remedy that should be given effect to if it can be done. I am persuaded that this is the case with this matter.

36 I should note, that in terms of remedy, after the conclusion of the proceedings and by letter dated 23 March 2001 the solicitors for the respondent wrote to my Associate indicating that in the event that the Commission found that the dismissal of Mr Robinson was harsh, oppressive or unfair, then the respondent agreed to pay compensation instead of reinstating or re-employing Mr Robinson, pursuant to s 23A(1a)(b) of the Act. By letter dated 3 April 2001, my Associate notified the solicitors for the respondent that the matter raised in their letter of 23 March 2001 should be the subject of an appropriate application to the Commission. Upon my Associate notifying the parties on 1 May 2001 that my decision in this matter was to be handed down on 2 May 2001, an application by the respondent to re-open was made. The Commission then re-listed this matter to hear the respondent's application on 7 May 2001. Although the application by the respondent has been allocated a separate application number, the Commission is of the view that the application should be regarded as a part of the substantive proceedings and I will deal with it accordingly.

37 Counsel for the respondent in effect adopted the submissions that he put to the Commission on this question in *AFMEPKIU*. Counsel's written outline of submissions were accepted by the Commission as the submissions of the respondent on this point. Counsel for the applicant submitted that the Commission should dismiss the respondent's application. He adopted the Commission's supplementary reasons for decision in *AFMEPKIU* (2001 WAIRC 02581), as the applicant's submissions in opposing leave to re-open, and the Commission's reasons for decision in *Cockburn Cement*, in opposing the application should leave be granted by the Commission.

38 In *AFMEPKIU* noted above, in my supplementary reasons for decision, I considered whether it was open as a matter of right, for an employer to offer to pay compensation instead of reinstating or re-employing an unfairly dismissed employee, after the proceedings had concluded, without leave being required to re-open. I also considered in that matter, further to my decision in *AWU v Cockburn Cement Ltd* (1999) 79 WAIG 1227, whether such an offer extinguished the Commission's power to order the reinstatement or re-employment of an unfairly dismissed employee. In my supplementary reasons for decision, I was not persuaded to take a contrary view to that expressed by me in *Cockburn Cement*, nor was I of the view that such a submission could be made after the conclusion of the proceedings, without an application for leave to re-open being made and granted. I also expressed the view that to grant leave in such a case would require exceptional circumstances to exist.

39 I remain of that view. I am not persuaded that the respondent should, in all the circumstances, be granted leave to re-open its case in this matter. There was nothing additional to that put in *AFMEPKIU* to justify leave to re-open. Accordingly the respondent's application for leave to re-open is refused. In any event, had I been of the view that leave to re-open should be granted, I was not persuaded by counsel for the respondent to adopt a different view on the agreement to pay compensation point, to that I expressed in *AFMEPKIU*.

40 Therefore, I consider that the respondent should reinstate Mr Robinson. However, as I have noted above, Mr Robinson's conduct in misleading the respondent cannot be condoned and as a matter of equity and good conscience, he should receive an appropriate penalty for his behaviour. In my view, taking the conduct in its totality, in his ongoing misrepresentation to the respondent during the course of the inquiry, Mr Robinson should receive a written warning to be placed on his personal file, to the effect that any further conduct of that kind will lead to the termination of his employment. The parties are directed to confer within seven days as to the form of such a warning that will be incorporated into the final order when it issues.

41 A minute of proposed order now issues.

2001 WAIRC 02901

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CONSTRUCTION, MINING, ENERGY, TIMBERYARDS, SAWMILLS AND WOODWORKERS UNION OF AUSTRALIA - WESTERN AUSTRALIAN BRANCH, APPLICANT
	-v-
	BHP IRON ORE LTD, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DELIVERED	MONDAY, 28 MAY 2001

FILE NO/S	APPLICATIONS 1393 OF 2000 & 747 of 2001
CITATION NO.	2001 WAIRC 02901

Result	Application granted. Order issued.
Representation	
Applicant	Mr D Schapper of counsel
Respondent	Mr T Lucev of counsel and with him Mr H Downes as agent

Order.

HAVING heard Mr D Schapper of counsel on behalf of the applicant and Mr T Lucev of counsel and with him Mr H Downes as agent on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby—

1. DECLARES that Mr Ray Robinson was harshly, oppressively and unfairly dismissed from his employment as a locomotive driver at Nelson Point by the respondent on or about 5 September 2000.
2. ORDERS that the respondent within 21 days of the date hereof shall reinstate Mr Ray Robinson in its employment as a locomotive driver at Nelson Point.
3 ORDERS that a written warning be placed on Mr Robinson's personal file in the following terms "that any further conduct by you misleading the Company will result in termination of your employment."

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

2001 WAIRC 02940

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	ILUKA RESOURCES LIMITED and ILUKA MIDWEST LIMITED, APPLICANTS *v.* MARK ANTHONY RULYANCICH and THE CONSTRUCTION, MINING, ENERGY, TIMBERYARDS, SAWMILLS AND WOODWORKERS UNION OF AUSTRALIA—WESTERN AUSTRALIAN BRANCH and THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS, RESPONDENTS
CORAM	COMMISSIONER A R BEECH
DELIVERED	FRIDAY, 1 JUNE 2001
FILE NO	APPLICATION 432 OF 2001
CITATION NO.	2001 WAIRC 02940

Result	Application for Order pursuant to s.23A dismissed.
Representation	
Applicant	Mr A. Lucev and with him Mr B Di Girolami (both of counsel)
Respondent	Mr D. Schapper (of counsel)

Reasons for Decision.

1 On 28 February 2001 the Commission ordered (the Order) the present applicants (Iluka) to reinstate Mr Rulyancich in his employment. The Order was made pursuant to section 23A(1) of the Act. It is common ground that Iluka has failed to comply with the Order. It has brought an application pursuant to section 23A(3) of the Act for an order revoking the Order and making an order for the payment of compensation to Mr Rulyancich in lieu.

2 The application is strongly opposed by Mr Rulyancich. Mr Rulyancich states that the Order was made entirely for his benefit as the result "of the unfair action" of Iluka and that in the course of the hearing of the unfair dismissal application brought by Mr Rulyancich, Iluka did not suggest that reinstatement was impracticable, nor did it agree to pay compensation in lieu of reinstating him.

3 When this matter came on for hearing before the Commission, both Iluka and the respondent presented a number of arguments. For Iluka, it was argued that the legislative history of the relevant provisions of the *Industrial Relations Act* led to the view that compensation in lieu of reinstatement is a choice available to be exercised by the employer. It argues that s.23A(3) creates a right for the employer to refuse to obey an order for reinstatement and in fact to veto reinstatement if it is ordered. It argues that the word "may" as used in that subsection confers a power to make an order and if the pre-condition, that being the employer's failure to comply with the order, exists, the power must be exercised. To deny Iluka the right of veto and to fail to award compensation would render nugatory the intent of the subsection. In its view, the Commission must therefore issue an order for compensation.

4 Iluka further states that if s.23A(3) allows the Commission to exercise a discretion (which Iluka denies) then it says the test to be applied by the Commission is merely the fact of the employer failing to comply with the Order. In the alternative, Iluka argues that if the test is something other than merely failure to comply with the Order, then it must be whether there are reasons, or perhaps good reasons, for the employer's refusal to comply with the Order. In considering those reasons, the respondent invites the Commission to consider the evidence from the prior hearing as a whole together with the further evidence brought by Iluka in these proceedings. Iluka finally suggests that if the appropriate test is impracticability, then the evidence in the original hearing and the evidence in this hearing is sufficient to establish impracticability.

5 For Mr Rulyancich, it is submitted that it is not competent for Iluka to bring the application because the wording of the subsection restricts the "further application" to the original application. It is submitted that a claim revoking an order is not an industrial matter and for that reason it is not open to Iluka to bring the application. Rather, it is for the person who brought the original application which led to the order for reinstatement, to apply for that order to be revoked. It was submitted that it would need clear words in the legislation to allow a party which is in default of an order to be able to revoke it when s.83(1) provides for the enforcement of orders. There is nothing in the legislation providing an employer with a "right" not to comply with an order of the Commission. Section 23A(3) provides an alternative to an employee to bringing a prosecution pursuant to s.83 of the Act.

6 Mr Schapper relies upon s.56 of the *Interpretation Act 1984* (WA) which states that the use of the word "may" means that s.23A(3) is a power to be exercised or not, at discretion. Upon the exercise of that discretion, the Commission should find in favour of Mr Rulyancich and not revoke the Order.

7 Finally, Mr Schapper points out that any issue regarding Mr Rulyancich's alleged unco-operative attitude was the subject of the original hearing. The Commission, nevertheless, ordered his reinstatement and the evidence before the Commission on this occasion is nothing more than a re-agitation of an issue already decided. As to the evidence brought in these proceedings it was submitted on behalf of Mr Rulyancich that there are only some current employees who do not want Mr Rulyancich back and reinstatement is not a popularity contest.

8 I conclude as follows: s.23A(3) provides—

> "If an employer fails to comply with an order under subsection (1)(b) the Commission may, upon further application, revoke that order and subject to

subsection (4) make an order for the payment of compensation for loss or injury caused by the dismissal."

9 The use within the subsection of the words "upon further application" indicates that the subsection is to be invoked by the making of a second or additional application. That is, the making of an application under that subsection is further to the original application before the Commission. The use of those words indicates nothing more than that the application to invoke that subsection is made as a second or additional application to those which were already before the Commission, that is, the claim by Mr Rulyancich, and also by his Union, that his dismissal was harsh, oppressive or unfair.

10 Those words do not in their terms impose a restriction on who is able to make the further application.

11 By s.29(1) of the Act an industrial matter may be referred to the Commission in any case by an employer with sufficient interest in the industrial matter. By definition an industrial matter includes any matter relating to the dismissal of any person. It is settled that reinstatement is a matter relating to the dismissal of any person: *Robe River Iron Associates v. ADSTE* (1987) 68 WAIG 11. It is difficult to see that a claim to revoke an order for reinstatement is not also a matter relating to the dismissal of any person. Accordingly, I find the application before the Commission is an industrial matter and, by virtue of s.29(1) of the Act, Iluka is competent to bring the application.

12 In the absence of clear words restricting the making of a further application pursuant to s.23A(3) to the person who made the original application, who in most cases will be the dismissed employee or that employee's union, I do not find that s.23A(3) is able to be exercised only by the party bringing the original application to which it relates. Therefore, the words "upon further application" relate to the fact of the original application to which the further application relates; it does not relate to the maker of the original application.

13 Section 23A(3) therefore creates a right for an application to be made to the Commission, after an order has been made for reinstatement upon a claim of harsh, oppressive or unfair dismissal, for the order to be revoked and for an order to be made for the payment of compensation. That right may be exercised by either party to the original application. It was submitted by Mr Schapper that s.23A(3) does not confer on an employer the right to defy an order for reinstatement. However, I remain substantially of the view I expressed on an earlier occasion (*Management Committee of the Geraldton Sexual Assault Referral Centre v. Marshall* (1994) 74 WAIG 2628 at 2631) that the wording does create for the employer who has been ordered to reinstate a dismissed employee an apparent right to refuse to obey that order because the employer may bring an application to revoke that order.

14 Iluka's submission is that s.23A(3) is designed to benefit employers. Thus, it should be construed beneficially to Iluka. However, and with respect, the wording of s.23A(3) does not compel that conclusion. It is more consistent with the language of that subsection to hold that it is a mechanism to resolve non-compliance by an employer with an order for reinstatement, as observed by Kenner C in *Australian Workers' Union v. Cockburn Cement Limited* (1999) 79 WAIG 1227.

15 Further, there appears to be no logical reason why the mechanism is to benefit only the employer. There may well be circumstances where it is the former employee who elects to apply to the Commission under s.23A(3) to resolve non-compliance with such an order by an employer: *Butterfield v. Pollock Nominees* (2001) 81 WAIG 866; *Moreno v. Serco (Australia) Pty Ltd* (1996) 76 WAIG 2855. In such a case the employee may well consider it a benefit to have the order revoked and seek to do so.

16 Section 23A, viewed as a whole, prescribes the powers of the Commission on claims of unfair dismissal. Those powers are to provide remedies to a dismissed employee. The powers given are to remedy an injustice: *BHP Iron Ore v. The AFMEPKIU* (2001) WAIRC 02849, 21 May 2001, unreported at paragraph 35; see too *Australian Workers' Union v. Cockburn Cement Limited* (as referred to above). Section 23A, viewed as a whole, is not directed to providing a benefit or remedy for employers who effect unfair dismissals, so that it cannot be construed liberally to assist an employer (*Ibid*.)

17 It may be apparent from the wording of a particular provision that its purpose is an exception to the clause as a whole. In *City of Geraldton—v- Cooling* (1990) 80 WAIG 5341, the Industrial Appeal Court considered s.23A in the context of resolving the issue of whether an order for compensation can co-exist with an order for reinstatement. Kennedy J, with whom Scott and Parker JJ agreed, referred to s.23A(1a) which, for convenience is now set out—

> (1a) The Commission is not to make an order under subsection (1)(ba) [ie., for compensation] unless—
>
> (a) it is satisfied that reinstatement or re-employment of the claimant is impracticable; or
>
> (b) the employer has agreed to pay the compensation instead of reinstating or re-employing the claimant.
>
> (words in parenthesis added)

18 His Honour, referring then to the Second Reading Speech in Hansard 20 March 1997, described the language of s.23A(1a) as allowing employers to decide whether they wish to compensate employees for loss or injury caused by the dismissal instead of reinstatement or re-employment. The Court was not on that occasion concerned with s.23A(3), noting only that that subsection implied that an order for reinstatement cannot co-exist with an order for compensation. Thus although Iluka submits that the comments of Kennedy J referred to are part of "an incisive chain of reasoning" concerning the proper construction of s.23A, His Honour's reference to the apparent purpose behind the 1997 amendment inserting s.23A(1a) are not directly applicable to the wording of s.23A(3) inserted some four years earlier. It seems to state the obvious to observe that the true meaning and effect of s.23A(3) will depend upon the wording of that provision and not upon the stated intention of an amendment later in time and to another provision.

19 Iluka argues that the mere making of the further application is of itself sufficient reason for the revoking of the order. To this submission, Mr Schapper raises the point that the subsection provides that "the Commission may" revoke that order, as distinct from providing that "the Commission shall" revoke that order.

20 Where, in a written law the word "may" is used in conferring a power, that word shall be interpreted to imply that the power so conferred may be exercised, or not, at discretion: *Interpretation Act 1984*, s.56. That provision applies to the *Industrial Relations Act* unless the intent and object of the Act or something in the subject or context of the Act, is inconsistent with that application: *Ibid*, s.3(1)(b). Section 23A confers a number of powers on the Commission on a claim of harsh, oppressive or unfair dismissal. The powers are powers that the Commission "may" order: s.23A(1). I have little doubt that the use of the word "may" in s.23A(1) confers upon the Commission a power to be exercised, or not, at discretion. It is not suggested otherwise. Similarly, the power of the Commission under s.23A(2) to require that an order under subsection (1) be complied with within a specified time, is a power to be exercised, or not, at discretion. I find similarly that the power under subsections (4) and (5) to calculate the amount of compensation on the basis of an average rate received during any relevant period of employment, and to permit the employer concerned to pay the compensation required in instalments, is a power to be exercised, or not, at discretion.

21 In contrast, s.23A(1a) provides that the Commission is not to make an order for compensation unless it is satisfied that reinstatement or re-employment is impracticable, or that the employer has agreed to pay the compensation instead of reinstatement. The use of the words "the

Commission is not" reveals that the matter covered by that particular subsection is not a power to be exercised, or not, at discretion. Rather, the power to award compensation is only able to be exercised if the pre-conditions exist: that the Commission is satisfied of certain matters or the employer has agreed to certain matters. The use of the words "the Commission is not" in that context, means that the Commission's power to award compensation is not solely a matter for its discretion. Rather, the words mean that the power of the Commission is not to be exercised in the absence of the pre-conditions.

22 Section 23A viewed as a whole section thus contains powers that are, in their terms, either exercised, or not, at discretion, or only to be exercised once the pre-conditions are satisfied.

23 In the context of s.23A overall, therefore, I tend to the view that the use in s.23A(3) of the words "the Commission may" is to be interpreted consistently with the use of those words in the balance of that subsection. That is, it is a power to be exercised or not, at discretion. Had the legislature intended the Commission to be obliged to revoke the order for reinstatement, it would have been a simple matter for it to have said so. It has not said so, and to interpret s.23A(3) so that the word "may" means "shall" would mean giving that word an inconsistent interpretation from the interpretation it is given elsewhere within s.23A. Words in legislation are assumed to be used consistently unless the words themselves are sufficiently clear to show that a change in meaning is intended. Although there is a difficulty in maintaining consistency in an Act which has been amended frequently, of which this is an example, this may be somewhat less of a difficulty where the issue is maintaining consistent language within one section of that Act.

24 There are undoubtedly cases in which the word "may" is treated "as giving a jurisdiction of which the conditions being fulfilled the party might demand its exercise" as Burt, J observed in *Federated Clerks' Union of Australia v. Hendry Rae & Court and Others* (1975) 55 WAIG 1677. The Commission was referred to what was seen as a major authority in *Julius v. The Bishop of Oxford* (1880) 5 App Cas 214—

> "Where power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised and the court will require it to be exercised."

25 Whether the word "may" will be so regarded will depend upon the circumstances of the case and the court's assessment of what was the intended effect of the Act (Statutory Interpretation in Australia, Pearce and Geddes (4th edition) 268). Much will, therefore, depend upon the Commission's view of the purpose of the provision in question.

26 I have little difficulty in reaching the conclusion that its purpose is to provide an alternative mechanism to enforcement in the event of non-compliance with an order of reinstatement. It provides an alternative to enforcement of the order to reinstate by permitting the order to be revoked and an order for compensation to be made. Enforcement of the order remains if the order is not revoked and is again not complied with. That is, s.23A(3) does not now provide the only remedy in a case where reinstatement was sought, was practicable, and was ordered, and the order was not complied with. There is, and was prior to s.23A(3), provision for the enforcement of the order before an Industrial Magistrate. The legislature has not excluded from enforcement proceedings the failure of an employer to comply with an order for reinstatement. It has provided for an alternative by s.23A(3).

27 Logic suggests that there may be good reason why the order should be revoked rather than the employer prosecuted for non-compliance. Even if reinstatement was sought by the employee, and ordered, the circumstances of the employee may have changed in the meantime. The obligation upon a dismissed employee to mitigate loss might result in the employee finding preferred employment. Issues raised during the proceedings itself may cause either the dismissed employee or the former employer to change their respective positions regarding the order for reinstatement. The former employer's business may have re-structured such that the position to which the former employee is to be reinstated no longer exists. The business of the former employer may have suffered such that it is no longer practicable for reinstatement to occur notwithstanding the making of the order. These may all be good reasons why the order for reinstatement should be revoked and an order for compensation made.

28 However, it necessarily follows that there may not be good reason why the order should be revoked. This does not render s.23A(3) nugatory. It simply means that the alternative mechanism to resolve non-compliance remains if the order is again not complied with.

29 Iluka has, quite properly, drawn to my attention my comments in the Geraldton Sexual Assault case earlier referred to, that s.23A(3) confers a right of veto to an employer upon the reinstatement of an employee. With the benefit of the submissions of both Mr Lucev and Mr Schapper and the advantage of reading both the *Butterfield* and *Moreno* cases cited earlier, it is quite apparent that those comments overstate the position. For s.23A(3) to operate as an alternative, revocation would not occur as part of some automatic process triggered when the application to revoke is merely filed in the Commission. If the process of revocation was automatic, it would directly impact upon reinstatement as the primary remedy on a claim of unfair dismissal. That is what s.23A(1) provides because the alternative remedy of compensation is only available if reinstatement is impracticable or the employer has agreed to pay compensation. If the process of revocation was automatic it would render nugatory the power of the Commission in s.23A(1) to order reinstatement. It would mean that the Commission is only to order reinstatement if the employer agrees to such an order. However, s.23A(1)(b) is unconditional.

30 It must follow that the purpose of s.23A(3) is to provide the Commission with a power to revoke an order for reinstatement and to make an order for compensation and that power is to be exercised, or not, at discretion. May in this case means just that.

31 The circumstances of this matter include the following—

(1) In the original hearing no real argument was presented against reinstating Mr Rulyancich. The respondent called five witnesses. None of them stated that the reinstatement of Mr Rulyancich would be a difficulty for the respondent. Indeed, that was not an issue put to them. The submission was made that reinstatement would be "singularly inappropriate", but the Commission considered that issue and decided that reinstatement was practicable and that it was appropriate to be granted. To my understanding, none of the findings of the Commission in this regard are challenged.

(2) The evidence brought by Iluka in support of its application to revoke the Order is the evidence of Mr Kettlewell, Mr Parasiliti and Mr Brice of their concerns regarding Mr Rulyancich's attitude and his lack of team spirit. (I regard the statements of Mr Smyth and Mr Giles as having no weight in the circumstances of this case where they did not make themselves available for cross-examination.) Mr Brice refers to a time when he says he found Mr Rulyancich asleep. The evidence related to circumstances prior to Mr Rulyancich's dismissal. It was all information and evidence which Iluka had, or can be taken to have had, upon reasonable investigation, and which it had the opportunity to present during the original hearing. It did not do so. It is trite to observe that a party is bound by the conduct of its case at first instance: *Metwally v. University of Wollongong* (1985) 59 ALJR 481 at 483; 60 ALR

68. It would be contrary to fairness to now allow either party, be it Mr Rulyancich or his Union on the one part, or Iluka on the other, to be allowed to re-open its case and present further evidence on a point that is already decided. Indeed, the authorities would suggest that it is simply not open to allow Iluka to re-open its case, irrespective of the fact that the Commission is *functus officio* in relation to the substantive application (*Flaherty v. Siemens Australia Ltd* (1996) 76 WAIG 4429 at 4432).

32 In my view, therefore, it is not open in an application under s.23A(3) to consider further evidence on a point that is already decided. I observe, in passing, that the burden of the evidence given, evidence regarding Mr Rulyancich's attitude and that his presence inhibits a team environment and that he may be argumentative and abusive, are examples of issues which were recognised by the Commission when it decided that reinstatement was appropriate. The Commission has already observed that the respondent is entitled to expect from Mr Rulyancich some positive reaction demonstrating a recognition that his performance has not been up to scratch and he hopes to improve.

33 The further evidence that some, but not all, operators with whom Mr Rulyancich would otherwise work now say that they do not wish to work with him again is an additional factor. Nevertheless, the issue of Mr Rulyancich's attitude is a matter for supervision by the respondent of all operators and, if appropriate, disciplinary action against Mr Rulyancich. Simply put, for Mr Rulyancich not to be reinstated in these circumstances is to say that an employer may dismiss an employee unfairly and if that employee is unpopular in the workplace, that person will not be reinstated even though the dismissal was unfair. Section 23A of the *Industrial Relations Act* cannot be read that way.

34 It may be appropriate for the Commission to observe, as it did in the original decision, that if Mr Rulyancich is not seen as being a team player the evidence before the Commission at first instance which shows that at least some operators, including Mr Rulyancich himself, have a perception of being treated less equally because they have not signed a workplace agreement may warrant attention by Iluka. There would be a benefit for all concerned for that perception of unequal treatment to be addressed, by Iluka, as well as by Mr Rulyancich.

35 The consideration of whether or not the Order should be revoked needs also to take into account the circumstances of Mr Rulyancich. It is of benefit to Mr Rulyancich that he be reinstated. I assess the benefit of reinstatement to be potentially greater to him over time than the payment to him of compensation which may not exceed six months' remuneration.

36 For all of those reasons, it has not been shown that the equity in this situation warrants the revocation of the Order and the application is therefore dismissed.

2001 WAIRC 02942

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	ILUKA RESOURCES LIMITED and ILUKA MIDWEST LIMITED, APPLICANTS *v.* MARK ANTHONY RULYANCICH and THE CONSTRUCTION, MINING, ENERGY, TIMBERYARDS, SAWMILLS AND WOODWORKERS UNION OF AUSTRALIA—WESTERN AUSTRALIAN BRANCH and THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS, RESPONDENTS
CORAM	COMMISSIONER A R BEECH
DELIVERED	FRIDAY, 1 JUNE 2001
FILE NO	APPLICATION 432 OF 2001
CITATION NO.	2001 WAIRC 02942

Result	Application for Order pursuant to s.23A dismissed.
Representation	
Applicant	Mr A. Lucev and with him Mr B Di Girolami (both of counsel)
Respondent	Mr D. Schapper (of counsel)

Order.

HAVING HEARD Mr A. Lucev and with him Mr B. Di Girolami (both of counsel) on behalf of the applicants and Mr D. Schapper (of counsel) behalf of the respondents, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby orders:

THAT the application be dismissed.

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

2001 WAIRC 02961

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	DOMENIC ALLIA, APPLICANT *v.* C D DODD PTY LTD TRADING AS ROSS'S SALVAGE & HANDYMAN CENTRES, RESPONDENT
CORAM	COMMISSIONER J H SMITH
DELIVERED	WEDNESDAY, 6 JUNE 2001
FILE NO	APPLICATION 1999 OF 2000
CITATION NO.	2001 WAIRC 02961

Result	Applicant unfairly dismissed. Order made for eight days pay as compensation.
Representation	
Applicant	in person
Respondent	in person

Reasons for Decision.

1 The Applicant, Domenic Allia ("the Applicant"), has made an application under s.29(1)(b)(i) of the Industrial Relations Act 1979 ("the Act") for orders pursuant to s.29A of the Act. The Applicant claims that he was unfairly dismissed by C D Dodd Pty Ltd trading as Ross's Salvage and Handyman Centres ("the Respondent").

Background

2 The Applicant was offered and accepted a position with the Respondent at its Maylands Handyman Centre as a Plumbing Salesperson. The Applicant had 20 years experience working in plumbing supplies as a salesman in retail and trade supplies.

3 The Applicant was offered the position of Plumbing Salesperson at the Maylands store by the Manager of the

Maylands Centre, Mr William Robinson. The Respondent had made a decision to build up its Plumbing Supply Section and re-merchandise the area. The Respondent had not previously employed a Plumbing Specialist Salesman in plumbing supplies. At the time the Applicant was engaged the plumbing section was low in stock because of plans to re-merchandise and build stock in that area.

4 Mr Robinson testified that when he offered the Applicant a position of Plumbing Salesperson he said to the Applicant, "We can have a look at you, you can have a look at us… and we'll give it a month's probation".

5 The Applicant commenced employment on Saturday, 28 October 2000. The Applicant testified that when he commenced work he was given no instructions about what was required from him in carrying out his job. He said, however, he knew all the stock and it was his view that it was not a proper plumbing supply section as it had very little stock. In particular he said the plumbing section only had half of the supplies that a usual plumbing shop would have.

6 A few days before Monday, 13 November 2000, Mr Robinson spoke to the Applicant in the hardware area in front of other staff. He informed the Applicant, "You have not been doing that good, and we'll have to let you go." He was given a weeks notice. The Applicant said he felt devastated because he had been in plumbing supplies for 20 years and he did not have an opportunity to prove himself in the position. He testified he felt he should have the entire month to prove how good he was at his job.

7 The Applicant worked until Monday, 13 November 2000. His days off were Tuesday and Wednesday. Whilst on his days off Mr Robinson rang him and told him not to come into work on Thursday and Friday. The Respondent paid the Applicant for those two days. Accordingly the Applicant was paid until 17 November 2000.

8 The Applicant seeks a declaration that the termination of his employment was unfair as his employment was terminated prior to the expiration of the probationary period. The Applicant also seeks an order that the Respondent pay him compensation, to be assessed by having regard to the wages that he would have earned from 17 November 2000 until the expiration of the one month probationary period.

9 In cross-examination it was put to the Applicant that there was no need to show him how to do his work as he was an experienced Plumbing Salesman and all that was required in his job was to sell an item to a customer and take the customer to the cashier who would process the sale. It was also put to the Applicant in cross-examination that when asked by Mr Jamie Kelly to install a set of taps on a vanity basin for a display the Applicant informed Mr Kelly he did not know how to do the task. The Applicant testified that it was not necessary to connect the basin or taps to water. He said it was only necessary to screw the taps on top of the bathroom vanity and when asked to do so he carried out the task. It was also put to the Applicant that he was asked to display a toilet suite and that when he did so he did not remove the cardboard from the top of the ceramic pan so that customers could not see the top clearly. The Applicant gave uncontradicted evidence that there was only one toilet pan in the store and that Mr Robinson had directed him to put the toilet on display. He said he left the cardboard on top of the pan because the top of the pan was chipped. It was also put to the Applicant that when Mr Robinson asked him to go into the office that he said after Mr Robinson terminated him in front of female cashiers, "I'm not going to the fucking office to speak to that fucking person." The Applicant conceded that he did swear, but said he did so in the heat of the moment because Mr Robinson had just informed him he was terminated in front of other staff. Further he gave uncontradicted evidence that other staff in the shop swore.

10 The Applicant testified that despite the lack of plumbing supplies and despite the high price of retail goods that he did start selling items in the second week. In particular he said in the second week he sold a few bathroom cabinets.

11 Mr Robinson testified that the reason why the Applicant's employment was terminated was because the Applicant did not perform, in that sales figures for the plumbing section did not increase. Mr Robinson contended that the Applicant had not sold much stock, however he did not produce any sales figures in support of his contention. Mr Robinson testified that when this issue was raised with the Applicant, the Applicant informed him that the Respondent had insufficient stock and they (the Respondent) needed different and more expensive stock than the Respondent carried in its centre. Mr Robinson conceded that he directed the Applicant to display the toilet suite and that it was the only toilet suite in the store. Further he conceded that this incident occurred after he had informed the Applicant his employment was terminated. He said that when he took the cardboard off the top of the pan, the ceramic edge was jagged. As a result he telephoned the Applicant at home and told him not to come to work on Thursday 16 and Friday 17 November 2000.

12 The Respondent submitted that the reason why the Applicant was employed was they needed someone who had plumbing experience to boost sales in the plumbing area. However it found that the Applicant's ability to merchandise (that is, to display goods) and his selling ability was very poor. The Respondent also contends that the Applicant was terminated due to the fact that he was not the right person for the position.

Conclusion

13 The terms and conditions of his employment were that he was to be on probation for a period of one month. The law relating to unfair dismissal in relation to employees on contracts for probationary employment was recently reconsidered by the Full Bench of this Commission in *East v Picton Press Pty Ltd* [2001] WAIRC 2675 (Unreported) delivered 4 May 2001. At [38] of the President's reasons for decision, he observed principles in respect of contracts of probationary employment had been laid down by Full Benches of this Commission in *Hutchinson v Cable Sands (WA) Pty Ltd* 79 WAIG 951 (FB) and *East Kimberley Aboriginal Medical Service v ANF* 80 WAIG 3155 (FB). Further the President at [39] set out the following principles from *East Kimberley Medical Service v ANF* (op cit)—

> "Again, the following principles apply—
>
> (a) The employer, throughout the period of probation, retains the right to see whether he/she wants the employee or not in his/her employment.
>
> (b) (i) The employer is entitled to consider the employee as if the employee was still at first interview with the following modifications in this case.
>
> (ii) There was an identifiable contract of employment for a period, indeed, a fixed term, including a period of probation of three months. This advances the matter beyond a notional first interview situation.
>
> (c) Probation is an extension of the selection process, a period of learning and a time for attention, assessment and adjustment to standards of performance and conduct. (Inherent in that is that it is a time for teaching, training and counselling.)
>
> (d) (i) However, a probationary employee knows that he/she is on trial and that he/she must establish his/her suitability for the post. The employer, on his side, must give the employee a proper opportunity to prove him/herself, but he/she reserves the right to determine the employment with appropriate notice provided he has reason for so doing (see *Sommerville v Brinzz Pty Ltd Clerk Vehicle Repair Industry* [1994] SAIRComm 8 (31 January 1994), citing *Re J M Hamblin v London Borough*

of Ealing (1975) IRLR 354 and see *Hutchinson v Cable Sand (WA) Pty Ltd* (FB)(op cit)).

(ii) Further, an employee on probation can expect to be counselled and informed that she/he is not meeting the required standards of performance, to be given reasonable training in this respect, and to be warned of the possible consequences of a failure to improve. Provided this is done, an employee who is on probation would have little cause to complain if a decision was taken during the course of or at the end of a probationary period to terminate the employment (see *Sommerville v Brinzz Clerk Vehicle Repair Industry* (op cit), citing *Hull v F F Seeley Nominees Pty Ltd* (1988) 55 SAIR 550 at 562).

(e) (i) Consonant with those principles, a probationary employee is able to seek reinstatement, but an employer is entitled to terminate a probationary employee more easily, e.g length of service is not a factor generally, because probationary employment is for a finite period and, in that period, assessment, training and acquisition of skills and demonstration of ability can occur. In addition, any genuine question of compatibility between employer, employee and other employees can be assessed. (This is not a comprehensive inventory of such matters.)

(ii) However, probation is not a licence for harsh, oppressive, capricious, arbitrary or unfair treatment of a probationer (see *Hutchinson v Cable Sands (WA) Pty Ltd* (FB)(op cit) and the cases cited therein)."

14 The legal principles set out above make it clear that probation insofar as it is an extension of the selection process is a period of learning and time for assessment and adjustment by an employee to the requirements of an employer's standards of conduct and performance. Whilst the Applicant had extensive experience in the plumbing supplies industry it is apparent from the evidence that the Applicant was engaged by the Respondent at a time when its supplies were low. Further it appears that the decision was made to terminate the Applicant's employment about two weeks after he commenced work. Given it was conceded that the plumbing supplies were low and there was insufficient stock to properly merchandise the section, clearly the Applicant was not given sufficient time to prove himself as a competent Plumbing Salesperson in the Respondent's business. Whilst it is not determinative in this matter, I am of the view that the Applicant should not have sworn and Mr Robinson should not have informed the Applicant that his employment was terminated in front of the other staff.

15 In the circumstances I am of the view that the Respondent unfairly terminated the Applicant's employment. Accordingly I will make an order declaring that the Applicant was unfairly dismissed and I will make an order that he be paid eight days pay as compensation which would be the amount he would have received had he been allowed to work a 38 hour week until the end of the probationary period. The Applicant was paid $11.69 per hour. Accordingly I will make an order that the Respondent is to pay the Applicant $710.75.

2001 WAIRC 03017

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	DOMENIC ALLIA, APPLICANT
	v.
	C D DODD PTY LTD TRADING AS ROSS'S SALVAGE & HANDYMAN CENTRES, RESPONDENT
CORAM	COMMISSIONER J H SMITH
DELIVERED	WEDNESDAY, 13 JUNE 2001
FILE NO	APPLICATION 1999 OF 2000
CITATION NO.	2001 WAIRC 03017

Result	Declaration that the Applicant was unfairly dismissed and an order made that the Applicant be paid eight days pay as compensation.
Representation	
Applicant	in person
Respondent	in person

Order.

Having heard the Applicant on his own behalf and Mr S Wong on behalf of the Respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby—

1. Declares that the Applicant was unfairly dismissed.
2. Orders that the Respondent do pay the Applicant $710.75 within seven days of this order as compensation.

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

2001 WAIRC 02887

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	DAVID JOHN CONOLE, APPLICANT
	v.
	JULIA ROSS RECRUITMENT PTY LTD, FIRST RESPONDENT
	TELSTRA CORPORATION LTD, SECOND RESPONDENT
CORAM	COMMISSIONER J H SMITH
DELIVERED	FRIDAY, 25 MAY 2001
FILE NO	APPLICATION 450 OF 2000
CITATION NO.	2001 WAIRC 02887

Result	Applicant unfairly dismissed by Julia Ross Recruitment Pty Ltd
Representation	
Applicant	in person
First Respondent	Mr J Cooper
Second Respondent	no appearance

Reasons for Decision.

1 David John Conole ("the Applicant") made an application under s.29(1)(b)(i) of the Industrial Relations Act 1979 ("the Act") for orders pursuant to s.23 of the Act. The Applicant claims he was harshly, oppressively or unfairly dismissed by Julia Ross Recruitment Pty Ltd and Telstra Corporation Ltd on 10 March 2000.

2 Prior to the commencement of the hearing the Applicant conceded that he was not employed by Telstra Corporation Ltd ("Telstra"). Accordingly Telstra was not served with the notice of hearing of the application.

3 Julia Ross Recruitment Pty Ltd ("Julia Ross") has a three year labour hire agreement contract with Telstra to recruit casual or temporary labour in various cities in Australia including Perth. The Applicant was engaged by Julia Ross and was assigned to work as a customer service representative for Telstra at 170 Wellington Street, Perth in a Telstra call centre.

4 The Applicant was engaged by Julia Ross when he entered into a written temporary employment agreement on 18 March 1999. At the time the Applicant entered into the contract he was working at the Telstra premises as a customer service representative and was employed by another labour hire agency called Adecco. The Applicant was engaged by Adecco to work in the Telstra premises on 7 September 1998. In March of 1999 Adecco lost the contract to provide Telstra with temporary and casual staff to Julia Ross and Julia Ross offered Mr Conole employment.

5 The material terms and conditions of the Applicant's contract of employment were as follows—

> "1. My employment with Julia Ross Personnel is as a temporary on an assignment by assignment basis, with each assignment constituting a discrete period of employment. I may accept or reject any offer of an assignment from Julia Ross Personnel. On completion of an assignment, whether satisfactory or otherwise, Julia Ross Personnel is under no obligation to offer me further assignments.
>
> 2. I understand that Julia Ross Personnel does not control the length of any assignment and I accept that whilst Julia Ross Personnel may indicate the potential length of an assignment with a customer in good faith, the customer may vary the length of an assignment period or terminate my attendance at an assignment at their absolute discretion.
>
> 3. I accept that if a customer of Julia Ross Personnel varies the length of any assignment or terminates my attendance at an assignment, as provided for in point 2 above, Julia Ross Personnel has the right to discontinue my employment and to not offer me further assignments with other customers in the future. Where notice of termination is necessary, such notice shall be in accordance with the terms of the relevant Award, Site or Enterprise Agreement.
>
> 4. I accept that I am under the care, control and supervision of Julia Ross Personnel's customer during the period of any assignment in regard to defined working arrangements and the manner and proficiency in which my work is performed. I acknowledge the right of Julia Ross Personnel's customer to direct my work activities.
>
> 5. I agree to adhere to all Occupational Health and Safety policies of Julia Ross Personnel and Julia Ross Personnel's customer and to obey all lawful and reasonable orders of Julia Ross Personnel's customer with regard to the use of safety equipment, the wearing of protective clothing and noise protection devices and with regard to methods of performing work tasks.
>
> …
>
> 8. My remuneration by Julia Ross Personnel is on an hourly basis according to my classification and is subject to all relevant provisions of any appropriate Award, Site or Enterprise Agreement.
>
> …
>
> 11. My hourly rate includes a loading which is to compensate me for the temporary nature of my engagement. This hourly rate is inclusive of long service leave, 9% annual leave loading, maternity leave, paternity leave, adoption leave, sick leave and public holidays."

6 The Applicant's assignment with Telstra was summarily terminated after it was revealed on 10 March 2000 that the Applicant had made a derogatory comment about a customer in the comments field of his notes screen on the Telstra system. The note stated—

> "Mrs Cavenagh is a crotchety old maid who has a failure in basic mathematic skills. From (sic) May 99 total $570:40, credits are $503:55. At one point she was in credit to $116:75 which was August account. Since then payments have not outweighed debits. Her figures tally with ours yet she refused to understand that her figures agreed with ours. I wasted half an hour on basic info with her. She says if the next account is wrong, she's leaving, if so good riddance to her we don't need miserable old ladies like her making our life a misery!"

7 It is common ground that the entry made by the Applicant came to the attention of Telstra management who advised Ms Tanya Wilkinson (a personnel consultant employed by Julia Ross) that the note was unacceptable and they (Telstra management) requested Julia Ross to terminate the Applicant's assignment to Telstra.

8 The Applicant testified that on 10 March 2000 he received a message that Ms Wilkinson had being trying to contact him for most of the afternoon. He said by the time he received the message he had finished work for the day. He spoke to Ms Wilkinson on the telephone and she asked him to come into the office of Julia Ross. When he arrived Ms Wilkinson informed him there had been a complaint by Telstra and informed him that Telstra had requested Julia Ross remove him from his assignment. She showed him a copy of the note he made. He said he explained to Ms Wilkinson that the nature of the customer's enquiry was to do with her bill, that she felt the bill was incorrect. He also said he told her that he explained to the customer how the bill worked, that the customer agreed with what he was saying, but the customer conveyed to him that she was of the view that Telstra was incorrect. He said he spent at least 30 minutes discussing the account with the customer in an effort to try and clarify the nature of her enquiry.

9 The Applicant testified that when he spoke to Ms Wilkinson he was not given any opportunity to explain why he made the note, that the discussion centred around Telstra's request to remove him. He said he spoke to Ms Wilkinson for approximately 10 minutes and he then left the office.

10 The Applicant testified that he put a note in the customer account to advise any future customer representatives to be on their guard because of her "particular nature" in regard to the enquiry. He conceded that he could see the note could be taken as being abusive but it was intended to be a warning to the next person who spoke to her. He said the note was not readily available to the public. However he conceded that the customer could obtain a copy of the note pursuant to a request made under the Commonwealth Freedom of Information Act 1982.

11 The Applicant worked 37.5 hours per week and was paid an all-up rate of pay of $15.78 per hour. The Applicant testified that he worked at the Telstra premises in accordance with a roster. He worked 5 days a week, Monday to Friday and was generally rostered to work from 8.00am to 4.00pm each day except where daylight saving occurred in the Eastern States when he was rostered to work from 7.00am to 3.00pm. The Applicant was paid until 10 March 2000.

12 Mr John Cooper who is employed by Julia Ross as the National Account Director for the Telstra Account, gave evidence and made submissions that the Applicant was employed under a labour hire agreement whereby the nature of his engagement was casual.

13 Mr Cooper testified that the contract Julia Ross has with Telstra requires that Julia Ross is to maintain a relationship as employer with temporary personnel on assignment to Telstra. The relevant provisions of the contract identify Julia Ross as the supplier and provide as follows—

> "20.1 Neither the Supplier nor its Temporary Personnel are, and nothing in this Agreement will be taken as making either the Supplier or its Temporary Personnel, agents, servants or employees of Telstra.

20.2 The Supplier will be responsible at all times for maintaining its relationship as employer with its Temporary Personnel on Assignment to Telstra.

20.3 The responsibility of the Supplier for maintaining the employer/employee relationship with its Temporary Personnel includes, but is not limited to—

(a) establishing and communicating performance and conduct guidelines; and

(b) monitoring performance and conduct against those guidelines; and

(c) training and development; and

(d) appraisal, counselling and discipline; and

(e) payment to Temporary Personnel of all wages, benefits and allowances that are the employer's responsibility to pay for work performed by the Temporary Personnel in the execution of an Assignment, and payment by the Supplier of all costs occasionally incurred by the Supplier providing Temporary Personnel to Telstra; and

(f) ensuring Temporary Personnel comply with any other requirments notified by Telstra.

20.4 The Supplier will be required to be informed of and instruct its Temporary Personnel in and to abide by the rules, regulations and code of conduct of Telstra whenever on Telstra premises.

20.5 Each Assignment will be carried out following instruction from the Engaging Telstra Manager, however, the Supplier will be responsible at all times for the conduct and performance of its Temporary Personnel.

…

Assigned Temporary Personnel

20.8 The Supplier must provide Temporary Personnel against each Contract with the agreed skills and competencies. Telstra reserves the right to—

(a) unconditionally reject proposed Temporary Personnel; or

(b) in the event that Temporary Personnel that are on Assignment become unavailable for any reason, Telstra may reject proposed replacement Temporary Personnel should the proposed replacement Temporary Personnel not possess the agreed skills or competencies.

…

Training and Development

General

21.1 The Supplier agrees to provide appropriate training and development, including Telstra induction at no additional cost to Telstra to its Temporary Personnel to ensure that its Temporary Personnel maintain an acceptable level of skill and competency."

14 Mr Cooper produced a copy of a document titled "Telstra-Company Values and Code of Conduct" ("the Code of Conduct"). The Code of Conduct is by its terms expressed to apply to employees of Telstra. Attached to the Code of Conduct is a note titled "Privacy" and is dated 24 December 1999. In the Privacy Note it is stated—

> "You MUST NOT make derogatory comments about any customer in the comments field of their NOTES screen on any Telstra system."

15 Mr Copper testified that the Applicant would have been provided with standard training by Julia Ross which would have included a consideration of the requirements of the Code of Conduct together with the Privacy Note.

16 The Applicant testified that he had never seen a copy of the Code of Conduct document or the document titled "Privacy". He said he received training in November and December of 1998 whilst he was employed by Adecco. He said the four weeks training covered the usage of computer systems, knowledge about connection orders and follow up procedures. He said at no stage could he recall being advised of any guidelines or restrictions on notes, or about the nature of notes that he was to make. He said the emphasis of the training was on the level of service to be provided to the client on the telephone. When asked whether he received further training after he entered into the contract with Julia Ross, he said the only training he received were updates on the database or the main program.

Nature of Engagement

17 Whilst it is apparent that the Applicant was paid a casual rate of pay, it is my view that the evidence in this case discloses that the nature of engagement cannot be characterised at law, as casual employment. In *Serco (Australia) Pty Limited v Moreno* (1996) 76 WAIG 937 at 939, the Sharkey P observed—

> 'The concept of casual employment within the common law of employment, untrammelled by award prescription, is generally taken to connote an employee who works under a series of separate and distinct contracts of employment entered into for a fixed period to meet the exigencies of particular work requirements of an employer, rather than under a single and ongoing contract of indefinite duration.'

(See *Squirrell v Bibra Lakes Adventure World Pty Ltd t/a Adventure World* (op cit) at page 1835 per Fielding C and *Stewart v Port Noarlunga Hotel Ltd* (1980) 47 SAIR 406 at 420).

The parties, of course, cannot by use of a label render the nature of a contractual relationship something different to what it is (see *Stewart v Port Noarlunga Hotel Ltd* (op cit) per Haese DPP at pages 5-6)."

18 The Applicant was engaged on a regular continuous ongoing basis. However I accept that his engagement was temporary in the sense that an assignment could be terminated following a request to terminate being made by a customer.

Was the dismissal unfair?

19 The onus is on the Applicant to demonstrate that the dismissal was unfair on the balance of probabilities. However, there is an evidential onus upon the employer to prove that summary dismissal is justified (*Newmont Australia Ltd v The Australian Workers' Union, West Australian Branch, Industrial Union of Workers* 68 WAIG 677 at 679).

20 Whilst the Applicant's contract of employment expressly provides that if a customer terminates the Applicant's attendance at an assignment, the Respondent has the right to discontinue his employment and not to offer him further assignments, it is my view that the right to terminate must not be exercised so harshly or oppressively against the employee so as to amount to an abuse of that right (*Ronald David Miles, Norma Shirley Miles, Lee Gavin Miles and Rose & Crown Hiring Service trading as The Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385 at 386).

21 Although Mr Cooper contended that the Applicant had been offered further work, there is no evidence that any offers of any other assignments were made. The question then becomes whether Julia Ross acted fairly in terminating the Applicant's assignment to Telstra.

22 The requirements of procedural fairness in respect of an investigation into alleged misconduct were considered by the Full Bench of the South Australian Industrial Relations Commission in *Bi-Lo Pty Ltd v Hooper* (1992) 53 IR 224. In the *Bi-Lo* case the Full Bench of the South Australian Commission observed at 229—

> "Where the dismissal is based upon the alleged misconduct of the employee, the employer will satisfy the evidentiary onus which is cast upon it if it demonstrates that insofar as was within its power, before dismissing the employee, it conducted as full and extensive investigation into all of the relevant matters surrounding the alleged misconduct as was reasonable in the circumstances; it gave the employee every reasonable opportunity and sufficient time to

answer all allegations and respond thereto; and that having done those things the employer honestly and genuinely believed and had reasonable grounds for believing on the information available at that time that the employee was guilty of the misconduct alleged; and that, taking into account any mitigating circumstances either associated with the misconduct or the employee's work record, such misconduct justified dismissal. A failure to satisfactorily establish any of those matters will probably render the dismissal harsh, unjust or unreasonable." (see also *Western Mining Corporation Limited v The Australian Workers' Union, West Australian Branch, Industrial Union of Workers* (1997) 77 WAIG 1079 at 1084 per Sharkey P and Coleman C.C.)

23 Despite the requirement to accord procedural fairness, not every denial of procedural fairness will entitle an employee to a remedy. No injustice will result if after a review of all the circumstances of the termination it can be said that the employee could be justifiably dismissed (*Shire of Esperance v Mouritz* (1990) 71 WAIG 891; *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 430 per Brennan CJ, Dawson and Toohey JJ, and at 466 per McHugh and Gummow JJ).

24 I am of the view that the Respondent has abused its right to terminate the Applicant's employment. Firstly, it is apparent the Telstra customer made no complaint about the service the Applicant provided to her. Secondly, Ms Wilkinson made no enquiry of the Applicant as to why he made the note. Thirdly, although Julia Ross had a contractual obligation to inform and instruct its employees in (and to abide with) the Code of Conduct, Julia Ross did not do so. All the training the Applicant received (other than updates of computer programmes) was not provided by Julia Ross and was prior to the creation of the Privacy instruction.

25 Ms Wilkinson failed to enquire of the Applicant whether he had knowledge of the Privacy instruction. If she had done so, she should have advised Telstra that the Applicant's training pre-dated the Privacy instruction, and that he had no knowledge of the instruction. If she discussed the Applicant's explanation with a Telstra representative, Telstra may not have instructed the Respondent to terminate the Applicant's assignment. Even if they did so, Julia Ross should have taken steps to ascertain whether it was in a position to offer another assignment to the Applicant.

Remedy

26 Reinstatement is not sought by the Applicant. Further, I am satisfied reinstatement is not practicable.

27 The Applicant testified that he applied for numerous positions after being terminated by Julia Ross. In June 2000 he was employed for eight weeks by Hays Metier at a rate of pay that was comparable to the rate he received when engaged by Julie Ross. In September 2000 he was employed by the Australian Tax Office until 8 January 2001 at a rate of pay that was higher that the rate paid by the Respondent. He then worked for two weeks with Australian Integrated Management Services in February 2001 and was paid $10.60 per hour.

28 At the time of making of the application the Applicant sought an award of compensation to be assessed at 12 weeks' pay together with superannuation. Pursuant to s.20 of the Superannuation Guarantee (Administration) Act 1992 the charge percentage of superannuation payments was 8% of the Applicant's pay at the date the Applicant's employment was terminated.

29 Having regard to evidence given by Mr Cooper that the contract with Telstra is to supply temporary staff for three years and to the fact that other than the writing of the note the Applicant was otherwise an exemplary employee, I have concluded that, the Applicant's employment with the Respondent would have continued to at least the date of the hearing of this matter, if not until the contract to supply temporary staff to Telstra expired sometime in early 2002.

30 I am satisfied that the Applicant has attempted to mitigate his loss. Since his employment was terminated the Applicant has been employed at a comparable rate of pay for approximately six months. Pursuant to s.23A of the Act, the Commission has a discretion to order an employer to pay compensation that is not to exceed 6 months remuneration. Remuneration is wider in meaning than "wages" and includes superannuation (*Bogunovich v Bayside Western Australia Pty Ltd* (1998) 79 WAIG 8 at 10 per Sharkey P).

31 I am satisfied that at the date of the hearing that the Applicant has proved that his loss is at least $15.78 x 37.5 hours per week for 26 weeks which is $15,385.50. Added to that amount is $1,230.84 as a loss 8% in superannuation contributions.

32 In light of my findings I will make an order declaring that Julia Ross unfairly dismissed the Applicant and order that it pay the Applicant $16,616.34.

2001 WAIRC 02960

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	DAVID JOHN CONOLE, APPLICANT *v.* JULIA ROSS RECRUITMENT PTY LTD, TELSTRA CORPORATION LTD, RESPONDENT
CORAM	COMMISSIONER J H SMITH
DELIVERED	TUESDAY, 5 JUNE 2001
FILE NO	APPLICATION 450 OF 2000
CITATION NO.	2001 WAIRC 02960

Result	Applicant unfairly dismissed by Julia Ross Recruitment Pty Ltd
Representation	
Applicant	Mr D Conole in person
Respondent	Mr J Cooper in person

Order.

HAVING HEARD the Applicant and Mr J Cooper on behalf of the First Respondent, the Commission, Pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby—

1. Declares that the Applicant was unfairly dismissed by the First Respondent;
2. Orders that the First Respondent pay the Applicant $16,616.34 within 7 days of the date of this order as compensation;
3. Orders that the application be and is otherwise dismissed.

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

2001 WAIRC 02987

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	KELLY JAMES COUGHLAN, APPLICANT *v.* CATALYST RECRUITMENT SYSTEMS, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	THURSDAY, 7 JUNE 2001
FILE NO	APPLICATION 1665 OF 2000
CITATION NO.	2001 WAIRC 02987

Result	Order issued.
Representation	
Applicant	Mr K. Coughlan
Respondent	Mr M. Gilham

Reasons for Decision.

1 The parties to this application reached an agreement before the Commission. The terms of the agreement were that the respondent would pay Mr Coughlan the sum of $1,080.10 less tax, being two weeks' wages to him. The Commission understands from a facsimile received from the respondent which contains a copy of the cheque butt and the bank statement, that the payment has been forwarded by the respondent and that the cheque has been presented. However, Mr Coughlan has sworn before me, on oath, that he has not received the payment. He informs the Commission that he has changed his address since the lodging of the application in the Commission, but that the respondent is aware of his new address because he has received correspondence from the Perth Office of the respondent at that new address.

2 I accept Mr Coughlan's evidence. I also accept that the respondent has forwarded the cheque in good faith. I am irresistibly drawn to the conclusion that the respondent, through its head office in Sydney, forwarded the cheque to Mr Coughlan's previous address. Its fate from that point forward is not known. However, I am satisfied that Mr Coughlan has not received the cheque and I even accept that Mr Coughlan has returned to his previous address to enquire regarding the cheque.

3 In those circumstances, the Commission will now issue an order requiring the respondent to pay Mr Coughlan the agreed sum, by cheque, to Mr Coughlan at 2 Rudge Street, Willagee, Western Australia, 6156. This application will thereby be discontinued.

4 Whilst I appreciate that leaves the respondent with the issue of what has happened to the cheque already sent, that is ultimately a matter for it to follow up separately from this matter.

5 An Order now issues.

2001 WAIRC 02988

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	KELLY JAMES COUGHLAN, APPLICANT
	v.
	CATALYST RECRUITMENT SYSTEMS, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	THURSDAY, 7 JUNE 2001
FILE NO	APPLICATION 1665 OF 2000
CITATION NO.	2001 WAIRC 02988

Result	Order issued.
Representation	
Applicant	Mr K. Coughlan
Respondent	Mr M. Gilham

Order.

WHEREAS an application was lodged in the Commission pursuant to section 29 of the *Industrial Relations Act 1979*;

AND WHEREAS a conference between the parties was convened;

AND WHEREAS an agreement was subsequently reached between the parties;

AND WHEREAS ON 7 June 2001 Mr Coughlan informed the Commission that the respondent had not implemented the agreement;

AND WHEREAS the Commission is of the view that the agreement ought be reflected in an order of the Commission;

AND HAVING HEARD Mr K. Coughlan on behalf of himself as the applicant and Mr M. Gilham on behalf of the respondent;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979*, hereby order—

1. THAT Catalyst Recruitment Services forthwith pay Kelly James Coughlan the sum of $1,080.10 less tax as full and final settlement of this application by cheque posted to Kelly James Coughlan at 2 Rudge Street, Willagee, Western Australia, 6156.
2. THAT this application otherwise be discontinued.

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

2001 WAIRC 02684

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	BLAIR EDWARD DAVIES, APPLICANT
	v.
	PHOENIX PAINTS PTY LTD, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	MONDAY, 7 MAY 2001
FILE NO	APPLICATION 2019 OF 2000
CITATION NO.	2001 WAIRC 02684

Result	Application alleging unfair dismissal granted.
Representation	
Applicant	Mrs J. Davies (as agent)
Respondent	Mr V. Gordon and with him Dr N. Vincent

Reasons for Decision.

1 Mr Davies claims that his dismissal from the respondent on 1 December 2000 was unfair. Mr Davies' commenced his employment with the respondent on 27 January 2000. He was employed as a production assistant and factory hand. His duties also involved cleaning, garden maintenance, assisting the supervisor and other matters as directed. The respondent employs five employees of which two, and Mr Davies was one of these, work on the factory floor. Mr Davies' evidence is that he completed a three-month probationary period, he thought his employment was good and that he had received positive feedback. Mr Davies recalls being complemented on the cleanliness of the factory when he had cleaned it for the first time shortly after commencing his employment. He was due to receive a wage increase on his 18th birthday in July, and he received the wage increase one week early believing that it was because he was doing a good job. Indeed, he maintains that Dr Vincent, one of the two directors of the company who appeared in the Commission, stated that he was an asset to the company. His evidence is that in approximately November 2000 work was slowing down and that there were not so many orders for the company and he did, at the company's instigation, take annual leave during these quiet periods. He believed he had received two bonus payments on 4 and 11 November 2000 and believed this was further proof of his good performance at work.

2 Mr Davies admits that "every now and then" Mr Gordon or Dr Vincent would pass comments about him talking while working, or walking too slowly, but he did not treat these comments as "warnings". He does not believe that his supervisor, Mr Bradley, told him off at all, unless it was for perhaps taking a little bit too long in a particular job.

3 He states that when he was dismissed he was shocked, and that the dismissal came "totally out of the blue". He was somewhat disbelieving of his dismissal, but he understood from comments that he says were made to him by Mr Gordon, or possibly Dr Vincent, at the time of

his dismissal that it was related to the fact that his supervisor might be taking leave of absence in early January and that apparently some changes would need to be made to cover this period. Mr Davies admits that he had decided to study full-time at university in 2001 and that it was his intention to work only until approximately the middle of February 2001 when university starts. He admits that he did not discuss his intentions formally with the two directors of the company although he maintains that he did not keep his intentions secret. He mentioned it to his supervisor and understood that it may even have been "common knowledge". He did mention to Mr Gordon whilst they were driving in a car on 24 November 2000 that he was going to re-enrol at university and it was therefore his intention to leave. He denies, however, the suggestion of the company that this amounted to him giving notice of termination to the company.

4 Evidence in support of Mr Davies was given by his mother, who also appeared on his behalf as his agent in these proceedings. She relayed to the Commission her understanding of her son's keenness to do the job, his punctuality and his strong work ethic. Her son had relayed to her his pleasure at receiving his pay rise early and the two bonuses which he states he received. She states that her son told her that the atmosphere had changed after he took a day off in order to re-enrol at university. She also gave evidence of his distress and upset at his dismissal.

5 The respondent, however sees things quite differently. The principal evidence for the respondent was given by Dr Vincent. He referred to diary notes which he made on 12 and 30 October 2000 recording the "strong words" he had had with Mr Davies because Mr Davies had been lounging about, chatting to his supervisor and stopping work while talking. He told Mr Davies he had a habit of shambling around at a snail's pace. On 30 October 2000, when Mr Davies had reported for work early in order to work on a production order which would attract the bonus, Dr Vincent found Mr Davies five minutes before the due start time lounging around with his feet on the table while his own supervisor was working.

6 Dr Vincent also recalls giving what he describes as "verbal warnings" to Mr Davies in the last six months of his employment. He denies that he had ever said that Mr Davies was an "asset" to the company and indeed, by the time the company took the decision to dismiss Mr Davies, Dr Vincent had become more and more fed up with Mr Davies and was quite pleased when he became aware that Mr Davies was considering leaving to return to university because it meant that there would be no need to dismiss him. Dr Vincent is adamant that Mr Davies certainly was not doing all that was required of him and that this would be apparent to Mr Davies because of the frequency with which he was spoken to about his lack of work performance. Indeed, Dr Vincent believes that in October and November 2000 Mr Davies' performance deteriorated particularly because he had made the decision to return to university and that he was going to "cruise it" until university started. Dr Vincent also stated that Mr Davies had received one bonus not two, but it had been spread over two pay periods because of the length of the production work involved. Dr Vincent also stated that although a bonus of $125.00 was paid to Mr Davies, it was far less a sum than he would have received had he worked hard. As I understand it, Dr Vincent's evidence is that if Mr Davies had worked hard he would have received a bonus of $400.00, and that the bonus of $125.00 is a reflection of how poor his work was. In his view, Mr Davies would have been blind not to have seen that his job with the respondent had no future.

7 Mr Gordon, the second director of the company, also gave evidence. He had made notes in October 2000, between 30 October 2000 to 2 November 2000 and on 3 November 2000 that Mr Davies had been warned to stop stumbling around and to get a move on, that he was still slow and lethargic in his approach to work and that he had been standing around chatting on several occasions. As I understand this evidence, it largely corroborates the warnings which were said to have been given by Dr Vincent. Mr Gordon also gave evidence that from his office he was able to observe Mr Davies and his supervisor working together and talking, but that Mr Davies stopped work when he talked.

8 Mr Bradley also gave evidence. Mr Bradley is the supervisor previously referred to. Mr Bradley was careful to state that he had nothing personal against Mr Davies and in fact he had liked working with him. However, Mr Bradley's evidence also is that he did ask Mr Davies to work harder and to stop talking and that there was an issue regarding Mr Davies' general speed. Mr Bradley believed that Mr Davies wasn't really there to impress, but rather was taking a year off from school or perhaps university. Mr Davies' approach did make Mr Bradley's work a little bit harder and he needed to supervise Mr Bradley more than he would have to supervise another employee of the same age, or perhaps one year older. Mr Bradley's evidence is that he would often warn Mr Davies regarding his work and he was of the view that Mr Davies was on "shaky ground" anyway towards the end of his period of employment.

Conclusion

9 The Commission approaches the matter this way. Firstly, the wording of the letter of 1 December 2000 from the respondent to Mr Davies states that he was being given "two weeks' notice of termination of your employment". Although there was some suggestion from Mr Gordon that Mr Davies' statement that he would be returning to university is an effective resignation, I find that the reason Mr Davies' employment came to an end when it did was because he was given notice by the company. His two-weeks' notice expired on 15 December 2000 at which point his employment ended. I find that Mr Davies was dismissed. He did not resign.

10 Support for this conclusion may also be found from the fact that in order to give a valid resignation under the written terms of the contract of employment between Mr Davies and the respondent company, Mr Davies would have been required to give two weeks' notice of termination. From the evidence, it is clear to me that in the discussion Mr Davies had with Mr Gordon he did not give two weeks' notice of termination and it accordingly cannot be said that Mr Davies resigned. If anything, Mr Davies had given Mr Gordon advance notification of his future intentions. There is much to Mr Davies' credit in him doing so if only because the two week notice period required under the contract is a minimum period and Mr Davies could, if he had wished, simply said nothing until two weeks before university commenced in February 2001. Whether his employment would have continued for that length of time, in any event, is a different issue. It may not have done, but Mr Davies was, in his view, at least being open about his future intentions.

11 I find that Mr Davies was dismissed for two reasons. The first reason is that the respondent believed that he was under-performing at work, that he had been warned and that he showed no signs of improvement. The second reason why Mr Davies was dismissed is because he was going to be leaving anyway and on that basis the respondent needed to replace Mr Davies with another employee who would be employed in the longer term.

12 In relation to these two reasons, I find as follows. On the evidence, Mr Davies was under-performing in the last month or two of his employment. I take into account in reaching this conclusion the times that Mr Davies was absent from the workplace on approved annual leave due to the downturn in work. I reach this conclusion because the evidence of Dr Vincent, Mr Gordon and Mr Bradley is overwhelming that Mr Davies was frequently spoken to regarding his under performance. Indeed, even Mr Davies admits that the "warnings" to which Dr Vincent referred were given to him as described. He admits that he was spoken to about these matters throughout the year and that they were given over time. The evidence of Mr Bradley, evidence which I accept, corroborates much of the evidence of Mr Gordon and Dr Vincent. Importantly, Mr Bradley's evidence shows that Mr Bradley was affected by Mr Davies' lack of performance and also that Mr Bradley spoke to him about his poor performance

with a greater frequency than Mr Davies recalls. I accept Mr Bradley's evidence.

13 As to the second reason for dismissal, the evidence of Dr Vincent and Mr Gordon make it clear that the company was "working towards" dismissing him but had not yet decided to take that step. It was Mr Davies' announcement that he was going to be returning to university that prompted the company to dismiss him when it did.

14 As to these two reasons, I also make the following findings. The respondent is quite correct to refer to the written terms of the contract of employment signed by Mr Davies which require him to devote the "whole of his time, attention and abilities during usual business hours for the business of the company" and to "diligently and faithfully serve the company and use his utmost endeavours to promote the company's interests". Mr Davies' under-performance towards the end of his period of employment would give the respondent the right to dismiss him. However, the issue before the Commission is not the legal right of the respondent to dismiss Mr Davies. It is a question of whether the legal right to dismiss Mr Davies was exercised so harshly or oppressively towards him as to amount to an abuse of that right so that the dismissal was unfair even if it was lawful. Certainly, Mr Davies' dismissal was lawful: he was given the required period of notice and paid all of his entitlements pursuant to his contract of employment.

15 However, where an employee is to be dismissed for under-performance, fairness requires that the employee be given warning that his work is not up to the required standard and that unless he improves his employment will be in jeopardy. Such a warning may be given orally or in writing. The importance of a warning in that form is that it ensures that the employee knows the respondent's view of his performance at work and the consequences of not improving that performance.

16 I suspect that Mr Gordon and Dr Vincent would not strongly disagree with this observation. Both of them in their evidence, and in the cross-examination of Mr Davies, refer to them having "warned" Mr Davies on many occasions about his poor performance. Indeed, and as already noted, Dr Vincent is of the view that Mr Davies would have to be "blind" not to realise that his job was on the line.

17 I also acknowledge, and appreciate, the evidence of the two directors and of Mr Bradley, that in a business with such a small number of staff, matters of discipline were dealt with in an informal way. An employee needed to be quite out of line before they were spoken to by one of the directors and you had to "really deserve" being told off before it would happen. I also appreciate the comments of Dr Vincent and Mr Gordon that Mr Davies was of the same age as their own sons and that their preference was to deal with such issues in a way that would not affect Mr Davies' future employment prospects or cause low morale. However, I also note that to dismiss an employee is a serious, and legal, step. If that dismissal is to occur for poor performance, then it is appropriate that a more serious and formal step be taken in the warning process.

18 I find on the evidence that this did not occur. Mr Davies gave evidence that while he had been spoken to frequently, he understood this to have been not a sign that his job was in jeopardy because he had otherwise been praised by the company. For example, he had received two bonuses in the month prior to his dismissal. Indeed, he described the bonuses as being large in his view. On the evidence, Mr Davies was indeed entitled to have that view as he, and his mother, attest. This is because although from the company's evidence the bonus was less than he would otherwise had received, no one told Mr Davies this was so. Therefore, from Mr Davies' point of view he was entitled to believe that he received two bonuses for good work. No one told him otherwise. Had Mr Davies been told somewhat more formally that his employment was not up to standard, or even if he had been told that the bonus paid to him was far less than he might otherwise had received because his work was not up to standard, it would be far more difficult for Mr Davies to argue that his dismissal was unfair. By the time Mr Davies found out the company's true attitude towards him, he had already been dismissed and it was too late.

19 The fact that the bonus payments were in close proximity to his dismissal makes them more important than the comments otherwise made to Mr Davies. For example, comments made about the cleanliness of the shop floor were made earlier in Mr Davies' employment. If he had been told he was an "asset" to the company, which is denied by the respondent, that was a comment made in July and it has less significance in support of Mr Davies' claim.

20 In the view which I have reached, Mr Davies was quite entitled on the pay days of 3 and 24 November 2000 to believe that the company had paid him two bonuses because his work was up to an acceptable standard, perhaps even beyond that standard. To then dismiss him on 1 December 2000 was quite unfair towards him. I do not lose sight of the plea by Mr Gordon that fairness in matters such as this includes fairness towards the company as well as towards the employee. Had the respondent explained the bonus payments to him so that he could not see them as a reward for good work, Mr Davies would have faced a more difficult task in persuading this Commission that his dismissal was unfair. For the reason which I have just given, I do find that the dismissal of Mr Davies was unfair.

21 In reaching this conclusion, however, I find that the reason for the unfairness was because Mr Davies had not been warned that his employment was in jeopardy due to under-performance. This conclusion is significant. It means that Mr Davies' dismissal was unfair because of a procedural issue. The company otherwise would have had grounds to dismiss him had it warned him, whether verbally or in writing, that his under performance was viewed by the company so seriously that his employment was in jeopardy.

22 When an employee is unfairly dismissed, the Commission is to consider whether or not he should be reinstated in his employment. On this issue, it is common ground that reinstatement is impracticable. It is not sought by Mr Davies who is now studying full-time. From the point of view of the company, Mr Davies' position has been filled by another employee.

23 Once it is found that reinstatement is impracticable, then the Commission is to consider awarding Mr Davies compensation for the loss or injury arising from his employment. Loss is usually the economic loss occasioned by the dismissal. Injury can encompass hurt feelings and distress arising from the dismissal.

24 As to the question of loss, it is significant that Mr Davies' dismissal was unfair by reason of the absence of a proper warning. For example, on the evidence before the Commission, even if Mr Davies had been given a proper warning, there is no evidence which would allow the Commission to conclude that his performance would have improved and he would have remained in employment until he commenced university on 12 February 2001. Indeed, there is evidence particularly from Dr Vincent that even if there had been a discussion between the company and Mr Davies and he had been given another chance, his employment might not have exceeded two, three or perhaps four weeks of further work. I note Mr Bradley's evidence that in his opinion Mr Davies' work performance would not of itself have warranted dismissal. However, and with the utmost respect to Mr Bradley, that is a decision which would need to be made to the two directors of the company who, on the evidence, had their own direct knowledge of Mr Davies' work. This leads me to the conclusion that even if Mr Davies had been given a formal warning, it is more likely than not that his employment would have ended in two, three or four weeks time in any event and that his loss is no greater than two, three or four weeks' wages.

25 The precise loss suffered by Mr Davies is a matter for assessment by the Commission on the evidence overall. I propose to adopt the middle of the periods of time mentioned by Dr Vincent and find that even if a more

formal warning had been given, Mr Davies is unlikely to have remained in employment for more than a further three weeks. That is the measure of his loss.

26 I have had regard to comments made by Mr Gordon about whether or not Mr Davies made suitable attempts to find alternative employment. However, the fact that his termination occurred within three weeks of the Christmas holidays means that it is by no means clear whether or not he would have readily found alternative employment. On the evidence before the Commission, it is difficult for the Commission to conclude that if Mr Davies had been more actively engaged in seeking alternate work from the date of his dismissal that he would have indeed found that work in the three-week period which I find represents his loss.

27 I have also had regard for the comments of Mr Gordon that the company has been put to inconvenience, indeed even expense in gleaning information from Mr Davies, or his mother as his agent, for the purposes of this hearing. However, even if Mr Gordon's submission is made out, that does not affect the loss otherwise suffered by Mr Davies. In any event, I am not inclined to disbelieve the explanation proffered by Mrs Davies that she had sought legal advice and did not believe the that the information sought by the company was information that was obliged to be produced and that she acted in good faith.

28 Finally, I turn to the issue of compensation for injury. Mr Davies' evidence, evidence corroborated by his mother, and to some extent by Mr Bradley, is that Mr Davies was shocked, perhaps later, distressed, at the time he was given notice. However, it needs also to be said that it is very rare for any dismissal not to carry with it some element of distress or upset. The "injury" for which compensation is ordered is injury over and above what would ordinarily be felt by the dismissed employee. On the evidence before the Commission, I am not satisfied that the distress felt by Mr Davies goes beyond what would be the distress ordinarily felt by an employee who had been dismissed. That distress might include the fear of the economic consequences of the dismissal to which Mr Davies referred. For that reason, I am not persuaded on the evidence overall to award a separate sum regarding "injury" as claimed.

29 In conclusion, therefore, I have decided for the above reasons that Mr Davies' dismissal was unfair and that the respondent should pay Mr Davies a sum of money equivalent to three week's ordinary wages as compensation for the loss suffered by him as a consequence of the dismissal.

30 A minute of proposed Order now issues.

2001 WAIRC 02859

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	BLAIR EDWARD DAVIES, APPLICANT
	v.
	PHOENIX PAINTS PTY LTD, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	MONDAY, 21 MAY 2001
FILE NO	APPLICATION 2019 OF 2000
CITATION NO.	2001 WAIRC 02859

Result	Application alleging unfair dismissal granted.
Representation	
Applicant	Mrs J. Davies (as agent)
Respondent	Mr V. Gordon and with him Dr N. Vincent

Supplementary Reasons for Decision.

1 Following the issuance to the parties of the Minutes of Proposed Order and the Reasons for Decision in this matter, the Commission received written communication from the respondent. The communication from the respondent refers, in particular, to paragraph 27 of the Reasons for Decision, on the basis that "the expressed intention of the Commission's Reasons for Decision is open to interpretation and may therefore lead to mitigation". In its correspondence, the respondent argues that whether Mrs Davies acted in good faith or otherwise is not relevant to the fact that "on behalf of the respondent she caused the respondent unnecessary expense in the reasonable pursuit of their defence against the claim". The respondent states that they put this cost at between $1,500 and $2,000 and as Mrs Davies is the direct representative of the applicant she forced the respondent to incur this on his behalf, and unnecessarily so.

2 The respondent therefore asks, as I understand it, that this cost to the respondent be offset against the three weeks' wages the Commission has ordered with the effect that the Commission's Order would result in nil payment from the respondent to Mr Davies.

3 The issue raised by the respondent is to be approached in this manner. The comments of Mr Gordon, which are referred to in paragraph 27, relate to the inconvenience and indeed even expense faced by the respondent in it seeking information from Mr Davies. Mr Davies was represented by his mother. For the purposes of the *Industrial Relations Act, 1979*, Mrs Davies was her son's agent. By virtue of s.31(3) of the *Industrial Relations Act*, Mr Davies is bound by the acts of his agent in this case, his mother. Therefore, to the extent that the respondent states that Mrs Davies is the direct representative of the applicant, the point has substance.

4 The issue of gleaning information refers to the respondent seeking to obtain various documents and information from Mr Davies which it believed was critical to its response. The record shows that the respondent sent a fax to Mrs Davies on 29 March; it forwarded a copy of that to the Commission on 5 April together with a request that because of the failure of Mrs Davies to provide the documents sought, it asked for the hearing to be vacated. The Commission then liaised between the respondent and Mrs Davies in order to facilitate the documents being received. This resulted in the respondent not pressing its request that the hearing of the application be vacated.

5 The respondent further wrote to the Commission on 12 April indicating its dissatisfaction with Mrs Davies' response and repeating its request for the Commission to again consider removing the application from the hearing list. A further facsimile of 17 April 2001 attached a reply from Mrs Davies which had been received by the respondent. That facsimile recorded the respondent's view that it had been put to considerable time and effort to obtain information from Mrs Davies, which had been denied them despite several requests. It repeated that the respondent is a "very small business" and that the issue was consuming inordinate amounts of time and it queried whether a telephone conference may be of value. A telephone conference was held, but it is a matter of record that no agreement was reached between the parties and the matter did proceed to hearing.

6 The request of the respondent is that the Commission accept that this process is a cost of $1,500 to $2,000 to it and that this is a payment which ought now be made from Mr Davies to the respondent. In fact, no payment would be made, it is merely that cost due to the respondent would cancel out any payment that the respondent would otherwise pay to Mr Davies in accordance with the Commission's Order.

7 Section 27(1)(c) provides—

"Except as otherwise provided in this Act, the Commission may, in relation to any matter before it —

(c) order any party to the matter to pay to any other party such costs and expenses, including expenses of witnesses as are specified in the Order, but so that no costs shall be allowed for the services of any legal practitioner or agent."

8 The Commission, therefore has the power to award costs. However, it is certainly true to say that the Commission

does not ordinarily award costs in proceedings before it. The Industrial Relations Commission is not a court in the usual sense. It is a tribunal which is able to deal with industrial relations issues in a way that facilitates access by parties themselves. Its filing fee is a nominal $5 fee. It means that persons who may not have the financial resources which might be required if a matter was to proceed in an ordinary court of law, to know that a matter can go to the Commission and he or she, or a business, does not have to pay the costs of the winning side, if they themselves lose. This is as true for an employee who is recently dismissed and is now unemployed as it is for a small business with tight margins and not a significant capacity to absorb costs. It is for this reason that a Full Bench of this Commission has commented that the general policy in industrial relations jurisdictions is that costs are not awarded except in extreme cases. (*Brailey v. Mendex Pty Ltd t/a Mair and Co.* (1992) 73 Western Australian Industrial Gazette, page 26) Indeed, it may not go too far to say that where the parties are themselves unrepresented, costs might not be awarded unless the circumstances were exceptional, as commented on in the case of *Halliday v. Beeson* (1996) 68 Industrial Reports p.238 and page 246.

9 Therefore, for the Commission to award costs against Mr Davies in the sum identified by the respondent the Commission would need to decide that Mr Davies' case was an extreme case. It is difficult to find that it is so. As for the merit of Mr Davies' application, his case obviously had enough merit for it to succeed. It could not, for example, be considered a frivolous or vexatious application which had no prospect of success and that the respondent therefore incurred cost unnecessarily.

10 In relation to the actions of Mrs Davies, in her capacity as "agent", actions taken prior to the hearing of the case, the Commission is bound to take into account the fact that Mrs Davies is not a paid, registered agent whose business is representing parties before industrial tribunals. The Commission will allow a certain latitude to an agent, whether that agent is representing a dismissed employee or representing the former employer, in the issues which arise prior to the hearing of the case. In this case, and as I noted in paragraph 27, I am not inclined to disbelieve Mrs Davies explanation that the reason that she did not provide some of the information sought by the respondent was that her legal advice was that it was not information she was obliged to produce and that she acted in good faith. This conclusion is important. Had I reached the conclusion that Mrs Davies was acting in a way that showed either a lack of seriousness of purpose, or acting in a way so as to deliberately increase costs to the respondent, or with malice, I would have been more inclined to consider favourably the respondent's request. However, on the evidence before me, I do not reach that conclusion. I am therefore unable to reach the conclusion that Mr Blair's case was an extreme case.

11 I acknowledge that the respondent was obliged to devote more time to this issue than it wished to. I accept that in a business, particularly perhaps a very small business, it is onerous to have to bear the cost incurred as a result of the time involved. Nevertheless, the circumstances of this matter do not warrant the Commission making an order of costs against Mr Davies and accordingly, the respondent's submission is not agreed to.

12 Neither party has otherwise raised an issue regarding the wording of the Minute of Proposed Order. Accordingly, the Minute now issues in final form and this matter is now concluded.

2001 WAIRC 02857

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	BLAIR EDWARD DAVIES, APPLICANT *v.* PHOENIX PAINTS PTY LTD, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	MONDAY, 21 MAY 2001
FILE NO	APPLICATION 2019 OF 2000
CITATION NO.	

Result	Application alleging unfair dismissal granted.
Representation	
Applicant	Mrs J. Davies (as agent)
Respondent	Mr V. Gordon and with him Dr N. Vincent

Order.

HAVING HEARD Mrs J. Davies on behalf of the applicant and Mr V. Gordon and with him Dr N. Vincent on behalf of the respondent, the Commission, pursuant to the powers conferred on it pursuant to the *Industrial Relations Act 1979*, hereby—

(1) DECLARES that Blair Edward Davies was unfairly dismissed by Phoenix Paints Pty Ltd;

(2) DECLARES that reinstatement is impracticable;

(3) ORDERS that Phoenix Paints Pty Ltd forthwith pay Blair Edward Davies a sum equal to 3 weeks' wages as compensation for the dismissal that occurred.

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

2001 WAIRC 02742

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	STEVEN DAVEY, APPLICANT *v.* SHIRE OF COLLIE, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DELIVERED	TUESDAY, 8 MAY 2001
FILE NO/S	APPLICATION 1358 OF 2000
CITATION NO.	2001 WAIRC 02742

Result	Application upheld. Order issued
Representation	
Applicant	Mr A Johnson
Respondent	Mr S White as agent

Reasons for Decision.

1. This is an application pursuant to s 29 of the Industrial Relations Act 1979 ("the Act") by which the applicant alleges the respondent harshly, oppressively and unfairly dismissed him on or about 25 August 2000. The applicant initially sought reinstatement but during the course of the proceedings, sought and was granted leave to amend his claim to seek compensation instead.

2. The respondent, a local government authority, wholly denied the applicant's claim and opposed the relief sought.

3. At the conclusion of the hearing on 30 March 2001, the Commission announced its decision upholding the applicant's claim and granting relief by way of compensation, with its reasons for decision to be published in due course. These are my reasons so deciding, which I can relatively briefly state.

4. Mr Davey testified that he first commenced employment with the respondent in January 1999 as a casual transfer station attendant. This employment ran from 5 January 1999 up until 13 April 1999. At the conclusion of this period, the applicant received a reference from Mr Donnelly, the respondent's principal works supervisor, referring to the applicant's duties and stating that "Mr Davey has been a very conscientious and tidy worker, who made many changes for the good at the Transfer Station."

5. In May 1999, the applicant said he was re-employed by the respondent, again as a casual transfer station attendant at level four, under the relevant industrial instruments they being the Municipal Employees Western Australia Award 1999 (Cth) and the Shire of Collie Enterprise Bargaining Municipal Employees Agreement No. 2 of 1999 (Cth). The applicant said that he was required to work five days per week and had Monday and Tuesday off. On Wednesdays, he commenced work at 10am. His evidence was that mostly he worked alone, in attending to the duties of transfer station attendant, which in essence, involved supervising the tip operation, including dealing regularly with customers each day. The applicant said that his only relief was for his lunch hour of one hour, when another employee of the respondent from another section would attend the transfer station. In total, only two employees worked at the transfer station, with the other employee, a Mr Gisborne, working the other days in the week on roster. It was the applicant's evidence that from his re-commencement with the respondent, he worked regularly for 38 hours each week in accordance with the roster up until his dismissal.
6. It was common ground that the position occupied by the applicant, was to cover for the absence of another employee who was and who had been for some time, on workers compensation. I will return to this issue later in these reasons.
7. The applicant testified that when he commenced employment, apart from receiving a duty statement for the transfer station attendant position, he received little training from the respondent, including how to deal with customers, particularly those who may be difficult. It was the applicant's evidence that he had to learn on the job.
8. An incident occurred involving the applicant receiving a "written confirmation of verbal warning" on 8 December 1999 from Mr Donnelly. It was alleged that the applicant had reacted in "a hostile and abrupt manner" towards a customer a Mr McIntyre, who attended the tip and threw a battery onto the tip pad, instead of it being placed in the appropriate location for batteries. It was the applicant's evidence that he had no real opportunity to give his side of the story, but was simply presented with the "warning".
9. The applicant testified that the incident that he thought actually occurred was one involving a customer in about October 1999 and not December 1999, as referred to in the warning. He testified that he saw a person from a distance of approximately 20 to 30 feet away throw a battery onto the pad of the tip. He said that this pad was about 8 feet down from the location where trailers are unloaded. His evidence was he was concerned about the possibility of an acid spill from the battery, as it broke apart when hitting the concrete pad. The applicant denied he was never hostile but accepted that when he saw the customer throw the battery he did shout to get his attention to stop what he was doing. His evidence was that he felt it was his responsibility to warn the customer about what he was doing. Apparently, batteries are to be disposed of at a separate area at the tip.
10. In January 2000, the applicant testified that he received a second "written warning" from Mr Donnelly regarding an alleged complaint from a further customer a Mr Rhodes, which alleged that the applicant had "yelled abuse at the customer for not crushing boxes, then smashed boxes with the loader and charged the wall to pick up the boxes, hitting the wall so hard the back wheels spun." This warning was given on or about 28 January, but referred to the alleged unsatisfactory service as occurring on or about 20 January 2000.
11. The applicant testified that he did not know a Mr Rhodes at all, and said that an incident that the warning may have referred to was when a person named "Graham" from "Retravision", who the applicant knew, threw uncrushed boxes into the tip with the applicant querying why he did not crush them. He denied yelling abuse at anybody and certainly denied spinning the wheels of the vehicle and hitting the wall. The applicant's evidence was that Mr Donnelly again simply gave him the warning without any discussion. A few days later, the applicant said he went to Mr Donnelly and complained about the warning as he was upset about it but did not know what his rights were to protest against it being given to him.
12. Reference was also made in evidence to council works memoranda dated 24 February and 7 June 2000 respectively, dealing with the operation of the backhoe by both the applicant and the other employee of the respondent employed at the transfer station.
13. A further alleged incident occurred when on 23 August 2000, the applicant was presented with a further "warning" from Mr Donnelly, referring to a report by the applicant's co-employee, Mr Gisborne, that the tow ball and tongue on the backhoe were severely bent. This matter was reported on Monday 21 August 2000 and apparently, Mr Gisborne denied causing the damage. The "warning" refers to alleged unsatisfactory service between the dates of 13-18 August 2000. The applicant gave evidence that he was not at work between 14 August and up until 10 am on 18 August, these being his days of. He was at work on 17 and 18 August. His evidence was he could not recall any incident of this kind on these two days where he bent the tow ball and tongue on the backhoe. Indeed, he testified that they were already bent and had been for some time. The applicant's evidence also was that Mr Gisborne never raised this matter with him on the job.
14. On 23 August at about 10am, the applicant said that he had cause to go to the respondent's office and he saw Mr Donnelly. Mr Donnelly asked the applicant what he knew about the tow ball. The applicant said he knew nothing about it. Mr Donnelly advised him that "he was putting him off on Friday and he was causing nothing but problems." The applicant's evidence was he was dumbfounded. According to the applicant, Mr Donnelly did not wish to listen to his side of the story at all. Furthermore, the applicant said he had never seen any statements as to the various incidents that were raised in these proceedings. He also said he had never been given a real opportunity to put his side of the events or to obtain representation in order to do this.
15. In cross-examination, the applicant did not dispute that he operated the backhoe incorrectly in the way referred to in the council memorandum of 24 February 2000, posted in the transfer station shed. However, he said Mr Gisborne also did this, and after the memorandum was posted, he stopped operating the machine in the manner described.
16. For the respondent, Mr Donnelly gave evidence. As to the "confirmation of verbal warning" which he said he gave the applicant on or about 8 December 1999, Mr Donnelly said a Mr McIntyre came to his office and complained about the applicant's conduct. He gave the warning because of this. As to the incident with Mr Rhodes, he said that he gave the "written warning" notice dated 28 January 2000 to the applicant, and Mr Donnelly said that he gave the applicant the warning because "abuse of machines was getting out of hand." He acknowledged that the applicant denied the conduct. I note also that as of the date of this warning, there was no evidence before the Commission that there had been abuse of the machinery.
17. In terms of the final "warning" of 23 August 2000, Mr Donnelly testified that he gave this warning to the applicant because of information supplied to him from Mr Gisborne. Mr Donnelly confirmed that when he mentioned this to the applicant, the applicant denied he was responsible for this damage. In terms of the discrepancy in the dates on the warning, it was Mr Donnelly's evidence that he simply made a mistake in this regard. There was no evidence of any further investigations in relation to the various incidents, either through Mr Donnelly or other officers of the respondent. It appears that Mr Donnelly simply accepted what he had been told by others, and issued the warnings to the applicant accordingly. It was Mr Donnelly's evidence that after this warning was issued, he decided to "put the applicant off" and he was given 24 hours notice.
18. It is also to be noted, that in cross-examination, it was revealed that Mr Donnelly had recently threatened to dismiss Mr Gisborne for refusing to perform duties, which warning was a "final warning", according to the evidence.

19. On behalf of the respondent, evidence was also adduced from Mr Botica, the respondent's shire engineer. He made the decision to dismiss the applicant, based upon the warnings shown to him by Mr Donnelly. Additionally, he said that he had received comments from councillors and other staff members, about the applicant's employment. However, none of these issues were ever put to the applicant, and nor did it seem, did Mr Botica undertake any further inquiries in relation to the allegations against the applicant. It was Mr Botica's evidence that the respondent reviewed the applicant's employment, simply because of the three warnings that had issued and that this was sufficient to dismiss him.

Conclusions

20. In this case there were a number of alleged incidents in which the applicant was said to have engaged in unsatisfactory conduct. The only direct evidence as to these matters before the Commission was the evidence of the applicant. He disputed the warnings issued to him and he was not aware of his rights in relation to them. The only other additional evidence sought to be adduced by the respondent, was by way of three statutory declarations from a Mr Rhodes, a Mr Rees, a mechanic at the respondent, and Mr Gisborne. In the case of Mr Rhodes, the statutory declaration was unexecuted. In any event, none of the deponents of the statutory declarations were called to give evidence, and hence, they could not be cross-examined.
21. I did not find the evidence of the applicant to be inherently unreliable. In my view, he gave his evidence in a very forthright fashion and I do not doubt his evidence. To the extent that there is a conflict on the evidence, I therefore preferred the version of the events as outlined by the applicant, particularly in the absence of there being any ability to test the evidence, by way of cross-examination of the deponents to the executed statutory declarations.
22. I am therefore satisfied and I find that the subject matter of the "warnings" issued to the applicant was in dispute. Moreover, it is apparent from the evidence, this being the case, that there were no inquiries undertaken by the respondent into the circumstances of the incidents, beyond merely accepting the complaints at face value. Furthermore, I am far from persuaded on the evidence that the applicant had any real and proper opportunity to answer the allegations against him, and to obtain appropriate representation if he so desired.
23. Additionally, it was clear that the respondent simply relied upon the issuance of the three "warnings" per se, as the trigger for the applicant's dismissal, notwithstanding the content thereof was in dispute. Importantly in this regard, I note that shortly before the issuance of the third warning on 23 August 2000, by memorandum dated 29 June 2000, tendered as exhibit A4, the respondent confirmed the applicant's position as a casual employee at the Collie Waste Transfer Station. This memorandum referred to the ongoing absence of Mr Jones on workers compensation, and that the position would be reviewed on a three monthly basis.
24. In my opinion, in light of this "confirmation" of the applicant's employment, it was not open for the respondent to simply rely upon the previous two "warnings", even if those warnings were valid. It would be indeed passing strange for an employer that was contemplating the dismissal of an employee, to shortly thereafter re-confirm his or her employment.
25. For all of these reasons, I concluded that the applicant's dismissal was harsh, oppressive and unfair. Despite the applicant's employment as being described as "casual", he clearly on the evidence worked continuously and regularly for the respondent over a considerable period of time. In the circumstances of this case, this fact is no barrier to a finding of unfair dismissal, or to reinstatement if that is the remedy sought: *Serco (Australia) Pty Ltd v Moreno* (1996) 76 WAIG 937; *Swan Yacht Club (Inc) v Bramwell* (1998) 78 WAIG 579.
26. I now turn to the question of relief. As noted, the applicant, during the course of the proceedings, sought and was granted leave to amend his claim to seek compensation instead of reinstatement. In my view that is probably sufficient to conclude that reinstatement of the applicant would be impracticable. The applicant gave evidence that since his dismissal he has largely been unemployed and has been in receipt of Centrelink benefits. He testified that it is very difficult to obtain employment in the Collie region. The only employment he has been able to obtain has been some casual work at the Collie Hospital where he earned approximately $1,600.00 gross. The applicant said that he was now also undertaking a horticulture course, in order to improve his job prospects.
27. As to the prospect of ongoing employment, beyond dismissal, this is clearly a relevant consideration for the Commission in assessing compensation: *Bogunovich v Bayside Western Australia Pty Ltd* (1998) 78 WAIG 8. On Mr Botica's evidence, the employee on workers compensation, Mr Jones, that the applicant had replaced, was, as at the time of these proceedings, still on workers compensation and had been so since the applicant's dismissal in August 2000. Moreover, as I have noted above already, on 29 June 2000 the applicant's employment was re-confirmed by the respondent. Having regard to all of these matters, I am not persuaded that it would have been unlikely, but for the applicant's unfair dismissal, that the employment would not have continued on for a reasonable period.
28. I consider and find that in the circumstances in which he found himself, the applicant has taken all reasonable steps to mitigate his loss. In any event, the onus of establishing a failure to mitigate fell upon the respondent, which onus it did not discharge.
29. Having regard to all of these matters, I declared that the applicant's dismissal was harsh, oppressive and unfair. I ordered that the respondent pay to the applicant six months compensation less income that he has received from other sources and in that regard, I directed the parties to confer and to advise the Commission of the quantum. Failing agreement, the matter would be re-listed to determine this issue.

2001 WAIRC 02813

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	STEVEN DAVEY, APPLICANT
	v.
	SHIRE OF COLLIE, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DELIVERED	FRIDAY, 11 MAY 2001
FILE NO/S	APPLICATION 1358 OF 2000
CITATION NO.	2001 WAIRC 02813

Result	Application granted. Order issued.
Representation	
Applicant	Mr A Johnson as agent
Respondent	Mr S White as agent

Order.

HAVING heard Mr A Johnson as agent on behalf of the applicant and Mr S White as agent on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby—

1. DECLARES that Mr Steven Davey was harshly, oppressively and unfairly dismissed from his employment as a transfer station recycling depot operator by the respondent on or about 25 August 2000.
2. DECLARES that reinstatement is impracticable.
3. ORDERS the respondent to pay to Mr Davey within 7 days of the date of this order the gross sum of $15,372.59.

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

2001 WAIRC 02837

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	JAMES AUSTIN FULLER, APPLICANT
	v.
	NORTH BEACH BOWLING CLUB, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DELIVERED	FRIDAY, 18 MAY 2001
FILE NO	APPLICATION 1943 OF 1999
CITATION NO.	2001 WAIRC 02837

Result	Dismissed
Representation	
Applicant	Mr M. Llewellyn appeared on behalf of the applicant
Respondent	Mr L H Pilgrim appeared on behalf of the respondent

Reasons for Decision.

1 On 24 December 1999 James Austin Fuller (the Applicant) applied to the Commission for orders pursuant to s.29 of the Industrial Relations Act, 1979 (the Act), claiming that he had been unfairly dismissed from employment with the North Beach Bowling Club (the Respondent) and that he was entitled to outstanding contractual benefits.

2 The Applicant is a qualified greenkeeper who worked for the Respondent from 1989 until 24 December 1999 on which day he was dismissed. According to the Applicant there were various people occupying elected office in the management of the Respondent who made clear their purpose to get rid of him as the greenkepper. They eventually succeeded in doing so in a year in which the Applicant had suffered serious health problems about which they were aware. The Applicant claims those health problems had rectified themselves prior to the date the termination took effect.

3 The Applicant says he was told that the reason for the dismissal was that he was unable to comply with the Respondent's requests to keep the greens at standards required by them but even if that were true the greens were at the standards required by the Western Australian Bowling Association, the pre-imminent body for the sport in Western Australia. The greens were at sufficient standard for the State Pairs to be played on them on 2 January 2000 just two weeks after the Applicant was dismissed. It is argued that in those circumstances that the dismissal was unfair.

4 The Respondent says that there is a history commencing in 1996 where there had been dissatisfaction expressed from time to time about the Applicant's application to his duties and in particular his level of performance in keeping the playing surfaces of the four bowling rinks at the club at the standard required by the bowling members. At the same time it is conceded that on occasions during the Applicant's employment the club members on the Greens Committee said they were satisfied with the duties of the Applicant and had given him appropriate encouragement. During the time he was sick, due to his contribution to the club, they had allowed him a greater period of leave than that to which he was entitled.

5 Notwithstanding these good points about his employment he received a warning on 26 October 1996 about the poor condition and availability of the greens. He was told he was not spending enough time on the job and green staff were not putting in the hours for which they were paid. This complaint was repeated on a number of occasions in ensuing years.

6 There was another incident on 24 February 1997 when there were problems concerning the speed of greens which were to be measured at 15 seconds or higher. The desired speed was not obtained until much later. There was problems with the rolling of the greens on pennant days and the Applicant was reminded of a written warning which had been given to him earlier due to two greens being out of play for renovation and not coming back to play on time. There were also problems with minor matters such as sweeping of the ditches and maintenance of rink side equipment.

7 In 1998 there was a letter of complaint from a member where the committee discussed dissatisfaction of the failure to cut and roll C green the day prior to the club's First Division B side playing on that green. The Applicant was told that his actions placed the committee members under criticism from playing members and he was asked to ensure that he abided by the minimum standard requirement of daily cutting and rolling of the greens.

8 In September 1999 there were complaints about the lack of time being spent on the job and the undesirability of allowing the apprentice to work short hours. Then the Greens Manager raised with the Applicant that there was concern that the young apprentice misunderstood what duties were required of him, because he was sitting for long periods of time in the shed. The Greens Manager thought this developed bad habits and left the apprentice with the wrong impression.

9 In and around this time the Respondent complained that the Applicant was asked on at least four separate occasions to fill holes and rough spots on the greens. On the last occasion he was asked to do so his answer was unsatisfactory in that he said the work had not been done because there were too many holes to fill.

10 On 25 October 1999 a written warning was given to the Applicant concerning the poor condition and availability of greens. Again there was a complaint about the lack of time being spent on the job. He was also told that the condition of C green was not satisfactory and instructed to take remedial action. He agreed to do so but was at the very least tardy in doing so. In any event he had not conducted the work by the time the Greens Committee conducted a meeting on 24 November 1999.

11 There was a suggestion from Mr John Parish the Greens Manager that Algryl sheeting was available to cover the north ditch to promote growth. That advice and request was ignored by the Applicant. It was again observed to the Applicant that the apprentice was not doing enough work. It was suggested he could cut the top lawn and assist another employee but the Applicant was not in favour of this. There was issues raised with him about couplings for water pipes, there was a concern about waste of water. His response was that members of the Greens Committee could deal with the problem. Again the subject of the rolling of the greens was brought up and the Applicant's response was that the Greens Committee could roll them themselves.

12 The Respondent says similar incidents were still continuing on 11 November 1999. Greens had not been rolled and on Saturday 14 November 1999 one of the greens had been rolled but not cut. As at 24 November 1999 there were holes and rough spots in A green and the surface was not smooth.

13 In a report to the Greens Committee on 7 January 2000 a number of statements which had been made by the Applicant were canvassed, Mr Mather expressed a view that a number of these were not true. The Applicant had claimed the greens had been passed for pennant play therefore they must have met Bowls WA standard. But he omitted to say that when he was told a few days before the inspectors from Bowls WA came to inspect the greens, that he expressed the opinion there was no way they would be approved because of their condition. There were quality issues raised by the inspectors but Mr Mather was present and was able to convince them to pass the greens for play. According to Mr Mather the Applicant was amazed when he was told.

14 As for the greens being ready for the State Pairs the club tendered for the competition a few weeks prior to the event, hoping that work which would be done on the greens in the meanwhile would get them to an acceptable playing condition. Mr Mather's evidence was that the inspector asked him if the Respondent was awarded State

Pairs games on what greens would they be played. He was told 'B' and 'C' greens, but he did not inspect them. Mr Mather's evidence is "*if he had [Mather] was certain that the competition would not have been played at the club.*"

15 Mr Mather disbelieved the Applicant's claim that he worked 50 hours a week. On Monday through Saturdays the Applicant was rarely seen at the club after 11.45am. Only in the last few weeks of employment of the club was he seen at around 2:00pm. This was so unusual that some members commented upon it. Mr Mather estimated the time spent on duty was between 20 and 24 hours a week. The Applicant may have been at the premises for longer but he and the apprentice spent long periods of time sitting in the work shed.

16 It was without doubt that the greens at the club were substandard so much so that the Applicant had suggested that a number of them be closed down for renovations. This was impossible for the Respondent to do.

17 In November 1999 the Applicant had met with Mr Mather, Mr Parish and Mr Hicky. He was asked why he had not complied with the request of the committee to fill all the holes, rough spots and imperfections and to explain why he was not double cutting and double rolling. He stormed out of the meeting using abusive language.

18 It was the Respondent's contention that it was obvious to every member of the club that over a number of years that the Applicant had been short changing the club regarding the amount of time and energy he was putting into his work. At times the greens had been shocking; this was not satisfactory. The Applicant had proved in the past that he was capable of doing much better work and he had been congratulated when that occurred. However attention to a proper exercise of his skills waned as the employment period continued. The Respondent had been mindfull of the Applicant's health problem and had taken it into account.

19 These events led the Management Committee at the meeting on 23 November 1999 to pass a resolution that in view of the number of complaints and their ongoing nature, 'that steps be initiated to investigate the legal possibility of terminating the [Applicant's] employment'. It was also resolved that 'subject to there being no impediment, that the quality standards of the club be put in writing, and served on [the Applicant]. A refusal to comply with demands would lead to the club initiating dismissal proceedings'. An appropriate letter was prepared by the Managing Secretary. When the Management Committee next met again on 23 December 1999 it reviewed what had happened in the intervening period and concluded that the Applicant had not achieved the requirements. It resolved that the Applicant be offered the opportunity to resign by 24 December 1999 with all benefits intact. If he did not resign, his employment would be terminated immediately with all benefits.

20 It is the evidence of the Respondent that the Applicant was given notice in writing of what was required of him to ensure that he retained his employment. He was clearly warned that failure to meet the required standards would not be tolerated by the Management Committee and may result in his termination. He was required by the Management Committee to ensure that all greens were prepared so that they would play at the minimum speed of 14 seconds on a smooth surface measured by an official timing device. This was to apply to all greens in play on Tuesday to Sunday during the pennant season. In addition all greens were to be at double cut and rolled daily. The Applicant was to be in attendance to supervise the apprentice at all times. In addition the Management Committee referred the Applicant to clause 4 of his Workplace Agreement which requires that he carry out all duties within his competence and as reasonably requested by the club. Translated into practice, he was expected to attend for work reliably on such days as the club required including Saturdays, Sundays and public holidays. The agreement provided that the days of the week and the hours to be worked on those days would vary according to the summer and winter season bowl programs and any additional or special events which might occur from time to time.

21 In that context too the agreement requires that the Applicant have control of green management to ensure the maintenance of greens to a high standard as required by the club.

22 The Commission heard from a large number of witnesses, the Applicant gave extensive examination in chief and was cross examined at length by Mr Pilgrim who appeared for the Respondent. Evidence was called on his behalf from Mr G.W. Davis who had been in an office bearers position, but resigned in November 1999 because of events involving the Applicant. He said that in his experience the condition of the greens at the club was normally good. There had only been minimal improvements since the Applicant left. In cross examination he also hinted at some collusion to replace the Applicant with another person. Evidence was also called from Mr A.R. Hollier in support of the Applicant.

23 The Respondent provided a large volume of evidence to the Commission. It is not necessary to summarise that evidence in full, I will deal with it in my analysis. The witnesses were Mr B.R.J. Game who had served in office holding positions in the Respondent, Mr C.H.C. Murray another office holder, Mr E. Bartle a playing member of the club, Mr J.D. Mather who gave detailed evidence of his role in the club as Greens Manager, Mr J.A. Parish club a member and sometime chairman of the Greens Committee. Mr Parish had also been an employee of the Department of Agriculture providing consultant services to the turf industry. On retirement he became a turf consultant, he had extensive experience in dealing with the growing of grass in many contexts in Western Australia including government departments, local government sporting associations, sporting clubs and through a home advisory service. He is a holder of a degree in agriculture from the University of Western Australia. The evidence of Mr Parish concerning the Applicant is encapsulated in his comment that the Applicant 'was a knowledgeable greenkeeper but he did not have the right attitude for the job in that he did not put in sufficient hours to do the work that was required'. In the opinion of Mr Parish the Applicant 'certainly knew what to do but he did not give himself the time to do it, his attitude prevented him from providing a satisfactory service'. The outcome of that bad attitude was the green surfaces were not as good as they could have been and sometimes they were not up to standard at all. This was the product of the Applicant with failing to put in the work that was needed.

24 It should be noted that Mr Parish gave evidence that he would totally deny a suggestion that he did not know how to deal with the growing of grass on bowling greens. He had been an advisor to the Western Australian Bowling Association and individual clubs over many years. He attended upon bowling greens from Karratha in the north to Pink Lake at Esperance in the south.

25 Evidence was also taken from a member of the club, Mr J.E. Burgess who had been vice captain in latter part of 1999. Mr Burgess plays bowls at a high level and gave evidence that he understood what needed to be done to have greens at a high standard. He gave evidence that Mr Parish was very supportive of the Applicant but that gradually changed after a lot of requests from him were not met by the Applicant. The greens gradually became worse, developing holes, pits and bad coverage notwithstanding the best efforts of the elected officers to get the Applicant to do his job. There were many occasions where efforts were made to improve the Applicant's work ethic but he did not respond. On one occasion the entire blue and white division of the club signed a petition asking the Management Committee to approach the greenkeeper to improve the playing surface of the greens. The greens deteriorated to such a stage where they were an embarrassment. The club as a whole was getting no satisfaction, that is why it was resolved to put the complaints in writing and give the Applicant a time frame to improve. Despite the warnings the Applicant did not do what was required of him.

26 The Commission has had the opportunity of seeing all of the witnesses give their evidence. It must decide on the credibility of the evidence given. The Commission was able, over an extensive period, to watch the Applicant give his evidence. He gave the impression of being a taciturn man. He was not upset by the questions he received while he was in the witness box. He handled aggressive questioning by Mr Pilgrim quietly and calmly. These responses give an indicator as to what sort of person he is. His conduct in the witness box gives some support to the contentions of witnesses of the Respondent that no matter what happened the Applicant would answer questions the way he wanted to answer them and do things the way he wanted to do them. Apart from one occasion there is no evidence that the Applicant ever became upset and raised his voice at anyone. It is more likely than not he absorbed criticism, let it wash around him and did what he thought was appropriate in the circumstances. That is the way he gave his evidence in the Commission and I suspect that is the way he behaved at work. It is clear that the Applicant thought that members of the club had little competence to raise questions about how he ought to do the job of maintaining the greens at the standard suggested by the club. That came through strongly in his evidence. The evidence of Mr R. Hollier does little to add to the Commission's knowledge of events but to the extent that he does support the Applicant, his answers seemed self serving and almost offhanded, his evidence deserves little weight.

27 The witnesses for the Respondent all appeared to give their evidence from the best of their knowledge, I cannot see any reason to disbelieve any of them, although I must say with respect that one or two of the gentlemen appeared to have some difficulty in recalling the events. However in the generality it more likely than not that the evidence given to the Commission by the preponderous of the witnesses on behalf of the Respondent is more likely to be correct than that given by the Applicant himself.

28 The Commission is not to interfere with the decision of the employer to terminate the services of an employee unless that decision is harsh and unfair. What the Commission has to decide is whether there has been a 'fair go all round' in the termination. The primary authority for this is *Undercliffe Nursing Home v Federated Miscellaneous Workers Union of Australia (1985) 65 WAIG 385*.

29 Although the test is simple sometimes the facts of the matter are not, in this case there has been a large volume of evidence adduced. What the Commission is required to do is analyse the evidence and reach a conclusion on the balance of probabilities. Having done so I have concluded that more likely than not the relevant events and the inferences to be drawn from them are as follows.

30 The Applicant was a long term employee of the club, he had proved over a number of years that he was a competent greenkeeper. He had been able to recover greens from bad situations in the past and this skill had been recognised by the Respondent who had passed resolutions of congratulation to him.

31 In early 1999 the Applicant was diagnosed with a serious and life threatening illness. He was treated for that illness and had an extensive period off work. After he returned to work he was still required on five days a week for a period of four weeks to attend radiation therapy at 1:30pm in the afternoon. It is relevant to note this because it would be obvious that the Applicant would have had to leave work early during that period. I have taken this into account when considering the complaints made by the Respondent about the Applicant's alleged failure to work sufficient hours.

32 It is clear and the evidence is overwhelming on this point that the standard of the greens dropped away in 1998/1999. There were continual complaints by succeeding Greens Committee Managers about the standard of greens in response to complaints that were made to them by members of the club and indeed from their own experience.

33 I find that the various managers tried to improve the standard of the greens and had a number of discussions with the Applicant about them. It is true that on one occasion the Applicant used abusive language to members of the Greens Committee when they had brought some complaints to his notice, but it would be wrong to say his conduct in that respect was part of a continueum. His usual response was to go about the business of maintaining greens the way he wanted to do it as if they had not told him anything.

34 I think it is clear and I find from the Applicant's own evidence that he had little respect for the members of the club insofar as their knowledge of maintaining greens is concerned. It might be correct that some of them had less knowledge than he due to his vocation. However he was intolerant of this alleged lack of knowledge which in his eyes meant that the elected office bearers of the club were not competent to give him any advice about how he should go about keeping the greens. It is true that on one occasion his recommendations had been interfered with and as a result a green was lost from play because it was cut too short. However he was absolved from any responsibility for that and there is no hint that the events leading to the loss of the green were in consideration by the Respondent when it reached the decision to bring his employment to an end in December 1999.

35 I do not accept the Applicant's contentions that what was being put to him by the elected officers of the club about the standard of the greens was wrong because WA Bowls had approved the greens to be fit for play in the State Pairs competition. I accept the evidence from Mr Mather that the greens in question were not inspected by Mr Bennett who was the inspector sent by WA Bowls immediately prior to the event in January 2000. I accept that Mr Parish hoped that some way or other the greens could be improved so that the tournament could take place. That the competition did take place in my view does not confirm the Applicant's contentions that the greens were satisfactory given my finding about the state of the greens prior to the playing of the championship. It matters not whether the championship was for the second division or the fourth division, what the Applicant relies on is that there was a championship played and therefore the greens must have been satisfactory. Because they were there was no grounds for the complaints made against him. I specifically reject that contention holds any substance.

36 The Respondent says that it tried on numerous occasions to have the Applicant work on the greens in the way that they wanted him to do, not the way he wanted to. They wanted him to spend more time at the club to conduct mowing and rolling operations in the way they required. There was a constant battle between them to get the Applicant to comply. It is open to find that when he did comply it was reluctantly and not long lasting. Invariably he returned to running the maintenance of the greens in the way he thought was appropriate.

37 An employee has a duty to comply with his employer's instructions, if those instructions are incompetent the Commission might find that a lack of compliance is not fundamental to the continuation of a contract of employment, but that is not the case here. Amongst the club members was a highly qualified person, Mr John Parish who has had a life time of professional involvement in turf management. His opinions in the matter must be treated as expert. It was his opinion that the fundamental problem with the Applicant is that he did not put the time in that was necessary to get the greens to the proper standards. Mr Parish conceded that the Applicant was knowledgeable as a greenkeeper but said that the fundamental flaw in the way he went about his job was his lack of application. He just did not put sufficient hours into getting the work done and this prevented him from providing a satisfactory service to the club. Mr Parish tried to support the Applicant in a number of ways, but he did not respond. It is not that some of the decision making about removal of the greens from play was incorrect, Mr Parish agreed with the Applicant on a technical basis but the club had a duty to provide services to its bowlers and the greens had to stay in play until

renovations took place. Mr Parish conceded in his cross examination that in 1998 there was problems with the greens and the Applicant had done a good job and brought them back into play, but it did not detract from his fundamental position that later on the Applicant did not do enough to keep the greens at the desired standard. The Applicant was given enough time to do so in the two weeks the Respondent had allowed him, even though that would not have repaired the greens it would have them reach a standard for them to be available for competition play.

38 The Commission received some conflicting evidence about how the termination was effected. The critical thing is did the Applicant know that he might be dismissed and was he suitably warned? One view of evidence may be that the dismissal is procedurally flawed, however it is open to find and I do that the Applicant had no doubt at all that his position was in jeopardy. There is also no doubt that the improvements sought were not delivered to the satisfaction of the Respondent in the period that the Applicant was allowed. It is open to find that the Respondent was not seeking perfection in that period, what it wanted was an improvement. It did not receive satisfaction in that respect and were entitled to take the action that it did. Even if the dismissal is procedurally flawed when weighed in the balance there is no doubt that the Applicant knew what was likely to happen and did not respond in time to save his position. He lost his position because of continued failure to do what was asked of him by the Respondent. It is open to conclude from his feelings or contentions that members of the club were not sufficiently qualified to know what ought to be done and he was superior to them in that respect. That contention in my respectful view was wrong. The Applicant in this matter was not unfairly dismissed. The application therefore will be dismissed.

2001 WAIRC 02838

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	JAMES AUSTIN FULLER, APPLICANT *v.* NORTH BEACH BOWLING CLUB, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DELIVERED	FRIDAY, 18 MAY 2001
FILE NO	APPLICATION 1943 OF 1999
CITATION NO.	2001 WAIRC 02838

Result	Dismissed

Order.

HAVING heard Mr M. Llewellyn on behalf of the Applicant and Mr L.H. Pilgrim on behalf of the Respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby orders—

THAT the application be, and is hereby, dismissed.

(Sgd.) J. F. GREGOR,
[L.S.] Commissioner.

2001 WAIRC 02820

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	MONTY REWIRI HENRY, APPLICANT *v.* HANSSEN PTY LTD, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DELIVERED	TUESDAY, 15 MAY 2001
FILE NO	APPLICATION 1549 OF 2000
CITATION NO.	2001 WAIRC 02820

Result	Application for unfair dismissal dismissed
Representation	
Applicant	Mr G Stubbs, of counsel
Respondent	Mr F Kroon, agent

Reasons for Decision.

1 The applicant claims that he has been harshly, oppressively and unfairly dismissed from his employment with the respondent. The applicant was engaged by the respondent as a steel fixer and he worked on the respondent's Blue Water Apartments project site in South Perth from 5 August 2000 until his termination by Gerry Hanssen on 6 September 2000.

2 The Commission has heard evidence from the applicant; from Leslie John Jackson, a fellow steel fixer and friend of the applicant also employed on the site; Gerry Hanssen, the Managing Director of the respondent; Brendan McGovern, Project Manager for the site; Steven James Clark, Assistant Supervisor on the site, and Loloma Viti Van Nus, the Office Administrator on site. Having observed the witnesses as they gave their evidence, I make the following findings about that evidence. I find that the applicant's evidence was unreliable in the extreme. He was evasive, his answers to questions unclear and contradictory. Other than where his evidence is supported by the evidence of other witnesses, I am unable to rely upon it. I found the evidence of Leslie John Jackson to be credible. The evidence of Brendan McGovern, Steven John Clark and Loloma Van Nus was credible also. The evidence of Gerry Hanssen was generally able to be relied upon however two issues of concern arise. The first is that Steven Clark told him that the applicant did not work through his lunch break. Mr Hanssen said that others told him the same thing but he cannot remember who else told him. This latter evidence was unconvincing. The other aspect of Mr Hanssen's evidence which causes concern is that Mr Hanssen has been in disputes involving a union and appears to see the applicant's failure to accept directions to use the time clock on the site as being associated with those disputes and clearly believes that the union has caused considerable aggravation to his business.

3 I accept Brendan McGovern's evidence that he told the applicant only a week or so prior to the termination of his employment that the applicant's work was going to finish in a week or so because there was not sufficient work to retain the whole steel fixing team.

4 There is some conflict in the evidence as to the working hours of the site. The conflict in that evidence relates to the starting time for work and whether it was 6.30am or 7.00am during the time that the applicant was employed. The time sheets submitted in evidence state only the number of hours purportedly worked each day not starting and finishing times. Whatever the starting and finishing times, there was some flexibility in that each day was a standard 8 hours plus a half hour lunch break, and on Monday to Thursday, there was an optional extra hour available to be worked. There could be approval given for a worker to work through the lunch break however, this was problematic and was part of the reason for the time clock being installed.

5 Assuming that the applicant took half an hour for lunch each day, some simple calculations can demonstrate the number of hours potentially worked by him each day. Had the applicant worked from 6.30am until 3.00pm he would have worked 8 hours. If he worked from 6.30am until 4.00pm he would have worked 8 hours plus the optional extra hour. If he worked from 7.00am until 3.00pm he would have worked 7 and a half hours and if he worked from 7.00am until 4.30pm he would have worked 8 hours plus the optional hour. If he had taken no lunch break, approval would have been required, and there is no evidence of such approval being sought and granted. Even if he did work through lunch, and started as early as 6.30am, the applicant would have to have finished at 3.30pm to be entitled to claim 9 hours pay. I find that on the balance of probabilities, the applicant took a half hour lunch break each day. His time records (Exhibit 2 and the schedule attached to Exhibit 1) indicate that each day Monday to Thursday the applicant claimed to have worked 9 hours. The applicant's evidence was quite inconsistent about any days upon which he did not work 9 hours. At one point, he indicated that on a particular day, it could have been a Thursday, he finished at 2.50pm rather than the usual finishing time of 3.30pm, and he wrote 9 hours on his time sheet when it ought to have been 8. However, later in his evidence, he said that it was a Thursday, Friday or a Monday that he left early but did not change the time sheet and when he became aware of this he asked Loloma Van Nus, to change the time sheet for him. Ms Van Nus gave evidence that he made no such request of her and I accept her evidence. Accordingly, I find that on any day if the applicant left site at around 2.50pm he had worked no more than 8 hours. Yet each time sheet shows that on other than Fridays and Saturdays, he never claimed less than 9 hours worked.

6 I accept Mr McGovern's, Mr Clark's, Ms Van Nus's and Mr Hanssen's evidence that on a number of occasions they saw the applicant, together with Mr Jackson, leaving the site at around 3.00pm. Although this conflicts with Mr Jackson's evidence that he and the applicant never finished earlier than 4.20pm Monday to Thursday and I have found that Mr Jackson's evidence was credible, on this issue I prefer the evidence of the other 4 witnesses where that evidence conflicts. Mr McGovern did not raise the matter with them on the basis that Mr Jackson had already given in his notice, and there was only a short time for the applicant to continue to work, and Mr McGovern did not wish to create any difficulty, and he assumed that the applicant was correctly recording his hours of work on his time sheet. Mr Clark did not raise the matter with Mr Jackson or the applicant because it was not his responsibility. Mr Clark raised the issue with Mr Hanssen and Mr McGovern. In any event, the issue is not whether the applicant left early, but how much time he claimed to have worked for the purpose of claiming payment.

7 I find that on a number of days during employment of just over 4 weeks, including the last week of his employment, the applicant left work at around 2.50pm, having worked a maximum of 8 hours and yet claimed 9 hours worked on his time sheets. This constitutes a falsification of his time sheets. His time sheets constituted a claim for payment and accordingly he claimed payment for time not worked.

8 Soon after the applicant commenced work at the site, the respondent had a time clock installed. There were two reasons for this. The first was related to inaccuracies in time keeping by the workforce and the second was to enable a proper record to be kept as to who was on site at any given time in case of emergencies and for safety reasons. The workers were instructed by both a notice posted in the smoko shed and during a meeting on 30 August 2000 that a time clock was to be installed and they were required to use it. At the meeting on 30 August 2000, a number of workers including the applicant voiced their objection to using the time clock, however, after a short time all of the members of the workforce except the applicant had made a practice of regularly using the time clock. Some of those who had voiced objections to the time clock had soon left the workforce in any event. The applicant failed to use the time clock. On a couple of occasions he was approached by Mr McGovern about this matter and in response he indicated that he would use the time clock but in fact did not do so. I accept Mr McGovern's evidence that if the applicant had told him that he was not going to use the time clock there may have been an ultimatum issued to him, however, no ultimatum was issued because he kept indicating that he would use the clock.

9 I accept that there were good reasons for the introduction of the time clock being both for safety purposes and for ensuring accuracy of time recording and claiming of payment.

10 I am satisfied that the applicant refused to utilise the time clock and this failure constituted a refusal to comply with a lawful instruction. His failure to use the time clock meant that his hours could not be verified other than by his attendance being observed by his employer. The applicant knew from both the notice posted in the smoko shed and from the meeting that accurate time keeping was an issue.

11 The applicant says that the reason for his dismissal was his refusal to sign a subcontract agreement presented to him by the respondent. I find the applicant to be quite disingenuous in this claim. I use the term "sub contract" loosely and it has not been argued before me nor do I determine whether or not the arrangement between the applicant and the respondent was a true subcontract arrangement notwithstanding that the applicant failed to sign the document and that Mr Hanssen purported to change the payment arrangement for the last few days of the applicant's pay. The respondent took no challenge to the question of jurisdiction on the basis of the applicant's employment status and appears to have accepted that the applicant was in fact an employee. Firstly, I accept Mr Hanssen's evidence of the applicant's failure to sign the subcontract agreement, that the issue was not raised with the applicant at the time of his termination or if it was raised it was not raised as a reason for his dismissal. A day or two before the termination, there was an exchange between the applicant and Mr Hanssen about the applicant's failure to sign the agreement, when the applicant said to Mr Hanssen that he would not be intimidated into signing the agreement. In any event, I am satisfied that at the commencement of his engagement at the site, the applicant knew and clearly understood the terms of engagement being that he was to be paid an all-up rate and that it was both parties intention that he be a subcontractor. He provided to the respondent details for the purpose of the respondent ascertaining his ABN. He received the benefits of the lower taxation rate that applied. The applicant continued to fail to return a signed copy of the agreement which had been previously been given to him. Mr Hanssen's response was not to drop his rate of pay per se but to say to the applicant that his failure to complete the subcontract agreement meant that the respondent was obliged to pay him as an employee, according to the award. The hourly rate of pay under the award was lower than the all-up subcontract rate. Mr Hanssen had foreshadowed this action at the meeting of 30 August 2000.

12 In all of the circumstances then, I find that, as I have noted earlier, the applicant falsified his time sheets on a number of occasions and claimed payment for time not worked. I find that he failed to comply with a lawful instruction. His employment was not terminated on account of his failure to sign the so-called subcontract agreement. The question then arises as to the basis of his termination. I am satisfied that the applicant's employment was terminated on the basis of his falsification of his time sheets and his claims for payment, and of his failure to comply with a lawful direction. In all of the circumstances such conduct constitutes grounds for dismissal. It also constitutes grounds for dismissal for serious misconduct on the basis that the applicant has demonstrated by his conduct an intention to repudiate or not be bound by the terms of his contract of employment. To falsify time records and claim payment for time worked and to deliberately fail to comply with a lawful direction, are

actions which strike at the heart of the contract of employment. I do not consider that the latter action alone may have justified termination without further action on the part of the respondent. However, the two issues, taken together demonstrate the applicant's intention to repudiate the contract, particularly in light of the issue of accurate time keeping and claims for payment being raised on 30 August 2000, one week before the termination. Accordingly, I am satisfied that the applicant's termination of employment was justified.

13 The question arises as to whether or not the termination was conducted in a fair manner and whether the applicant was denied procedural fairness. I conclude from the evidence that the applicant knew that he was obliged to use the time clock. This was made clear to him both through the notice issued to staff in the smoko shed and at the meeting of 30 August 2000. However, the applicant was not told that failure to comply could result in termination of his employment. The applicant also falsely claimed payment not due to him. I am satisfied that the applicant's conduct was such as to enable the respondent to rely upon that conduct for the purposes of terminating the applicant's employment. However, the respondent was required to give the applicant the opportunity to be heard before terminating the employment. I accept Mr Hanssen's evidence that before terminating the applicant's employment he told the applicant that he considered that he, the applicant, had been falsifying his time sheets. The applicant did not respond, and his employment was terminated. Given the circumstances of Mr Hanssen and others witnessing the applicant leaving work at times which did not accord with the hours of work he was claiming, and his failure to use the time clock as directed by his employer and as he was reminded by Mr McGovern on a number of occasions to use the time clock, the applicant's conduct was clearly intentional and deliberate. That conduct was clear and unmistakable to the respondent's supervisory and managerial personnel on site. Based on my own observations of the applicant and the manner in which he has given his evidence, and on his explanations given to the Commission, I am satisfied that even if he had been given further opportunity to respond to the issues prior to his termination, it is unlikely the applicant would have provided an honest and reasonable explanation to his employer as to that conduct such as to have satisfied his employer and enabled him to remain in employment. If there was a failure to provide procedural fairness it does not, in all the circumstances, make the dismissal unfair. (*Shire of Esperance v Mouritz IAC 1990* 71 WAIG 891) Those circumstances include the applicant's conduct, being not simply one of failure to comply with a lawful instruction but which constituted repeated dishonesty, his length of service being just over one month, and the likely future prospects in the job, being only approximately one week's work left.

14 If I am wrong in this and the applicant has been denied procedural fairness which warrants a finding that he has been unfairly dismissed, then I note Mr McGovern's evidence which I earlier indicated I accepted, that he had told the applicant a week or so before his termination of employment that there was only a week's further work for him. Therefore the applicant's employment would have terminated at the most, a week later than it did.

15 If there had been unfairness in the dismissal then, the first remedy to be considered is reinstatement. Reinstatement is impracticable because of the relationship between the parties is no longer one of trust and the necessary trust is unlikely to be able to be re-established. Further, there was no further work for steel fixers on site at the time of the hearing. Accordingly, the question would arise as to whether the applicant would be entitled to compensation. The compensation to which he would be entitled being loss of earnings would constitute no more than a further week's pay, on account of the work running out in accordance with Mr McGovern's advice to the applicant a week or so prior to termination.

16 An order of dismissal shall issue.

2001 WAIRC 02821

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	MONTY REWIRI HENRY, APPLICANT *v.* HANSSEN PTY LTD, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DELIVERED	TUESDAY, 15 MAY 2001
FILE NO	APPLICATION 1549 OF 2000
CITATION NO.	2001 WAIRC 02821

Result	Application for unfair dismissal dismissed

Order.

HAVING heard Mr G Stubbs, of counsel on behalf of the applicant and Mr F Kroon, agent on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT this application be, and is hereby dismissed.

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

2001 WAIRC 02836

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	GEOFFREY STEPHEN HINCKS, APPLICANT *v.* DARRELL CROUCH AND ASSOCIATES PTY LTD, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	FRIDAY, 18 MAY 2001
FILE NO	APPLICATION 1320 OF 2000
CITATION NO.	2001 WAIRC 02836

Result	Application alleging denied contractual entitlements granted in part.
Representation	
Applicant	Mr G. Hincks
Respondent	Mr D. Crouch

Further Reasons for Decision.

1 In its decision of 2 February 2001 the Commission declared that Mr Hincks is not entitled to a 3% over rider commission for all sales generated by other companies' representatives' net commissions past 23 December 1999. The application was adjourned on the understanding that the respondent would reconcile the various exhibits tendered to the Commission to see whether or not they show that there have been completed sales in any given month, for which an 8% advertising allowance was due, and for which in the following month, there was an advertising expense incurred. Those results were to be calculated within fourteen days of the hearing and a copy sent to Mr Hincks (transcript page 75). This provided both Mr Hincks and Mr Crouch with the opportunity for them both to approach, on a purely arithmetical basis, the remaining differences between them. The Commission encouraged both Mr Hincks and Mr Crouch to consider talking through, between themselves, any outstanding matters. If no agreement was possible between them, and there is for any month a transaction for which Mr Hincks claims the 8% should have been credited, and it was not credited, then that is something I would then determine

on the evidence and the various exhibits before the Commission.

2 The application was also adjourned on the basis that within a similar time frame the respondent would prepare a schedule showing all of the nett commissions for all company representatives' sales generated between May and September 1999.

3 On 6 February the respondent wrote to the Commission advising that nett sales commissions made by the country representatives between 1 July 1999 and 23 December 1999 was $23,449.95, thus making an over rider commission of $703.50 payable to Mr Hincks. The respondent denied that any advertising allowance is due and payable, and in fact alleged that Mr Hincks was overpaid by $102.80 in January 1999. It indicates a preparedness, therefore, to pay the amount of $600.70.

4 After the Commission contacted Mr Hincks, it became apparent that the respondent had not forwarded a copy of its correspondence to him, as the Commission had understood would happen, at the conclusion of the hearing, and the Commission itself, forwarded a copy of the respondent's letter to Mr Hincks. In reply, received by the Commission on 8 March, Mr Hincks submitted a three-page letter with attachments.

5 Relevantly, Mr Hincks queried whether the sum of $23,449.95 referred to in the respondent's letter, included sales from Mr Matthews and Mr Davidson. (Mr Hincks also refers to a representative, Mrs Hodder, he believes accumulated $31,996.00 worth of commission and states that this figure "has not been taken into account in these proceedings".) Mr Hincks also denies that $102.80 was credited to his advertising account.

6 The Commission then wrote to the respondent requesting it to advise the Commission whether or not its calculation included sales from Mr Matthews and Mr Davidson. A reply was received indicating that all sales had been taken into account during that period.

7 As no agreement between Mr Hincks and the respondent is possible, the Commission is obliged to determine Mr Hincks' claim. It does so on the evidence and exhibits produced during the formal hearing before the Commission and by reference to those parts of the correspondence from the respondent and Mr Hincks which was required of them at the conclusion of the hearing.

Over Rider Commission

8 The sales representative employment agreement signed by the parties and dated 17 May 1999 (exhibit 1) records in the Schedule attached to it—

> "SPECIAL AGREEMENTS:
>
> The representative is to receive a 3% over rider income for all sales generated by other company representatives' nett commission until further notice. This added benefit is also inclusive of superannuation."

9 I accept the sum of $23,449.95 referred to in the respondent's letter. Mr Hincks' reply to that letter queried only whether it included sales from Mr Matthews and Mr Davidson and I accept from the respondent's reply that it does. Accordingly, I make the finding that the 3% over rider commission, calculated in accordance with the contract of employment, amounts to $703.50.

Advertising Allowance

10 I have considered Mr Hincks' claims under this heading and I am not persuaded by his evidence and submissions that any advertising allowance is owed to him. Although his copy of the respondent's commission internal records for representatives (exhibit 3) shows a total for page 1 of $1,168.50, and he points to the fact that $1,239.70 was carried forward to page 2, the more complete copy of that document tendered by Mr Crouch and which became exhibit D shows that the correct amount was in fact carried forward. The complete version of page 1 shows an amount of $1,239.70 at the foot of that page. That was the proper amount to carry forward. Therefore, I do not accept there is a shortfall based upon an allegation that the incorrect amount was carried forward.

11 The other two matters he refers to, they being a property sold to Vivian and settled in April 1999 and two properties sold in October 1999 for Miller, and land in Popanyinning were referred to in the evidence. Having considered Mr Crouch's evidence in relation to each of the two matters, I am simply not satisfied that Mr Hincks has shown that an error has occurred. Whilst I appreciate that Mr Hincks will not agree with this conclusion, the balance of the evidence does not show that the money was due to him as he has claimed. By way of illustration, at page 48 of the transcript Mr Hincks cross-examined Mr Crouch on the claim that there should be a credit for Vivians and Mr Crouch denied it was due. I expressly invited Mr Hincks to show me by question and answer that Mr Crouch's evidence was wrong otherwise the evidence is merely balanced and Mr Hincks would not have proven his claim. Mr Hincks stated that he understood, however, he did not return to the issue at all. I am entitled to conclude from that that he would be unable to show that Mr Crouch was wrong. Accordingly, the claim is simply not made out and it fails.

12 Mr Hincks then refers to a commission of 80% for a property known as "Lot 13". This was raised in evidence on pages 76 and 77 of the transcript. Mr Crouch's evidence is that—

> "…there was no sales transaction. It was annexed from the overall property by the previous owner before I bought it and did the actual transaction. It wasn't a sale. The next door neighbour bought it and annexed from the Westdale estate. It is not a transaction, not a sales transaction where a real estate agent was involved. It was a subdivision annexation."

Mr Hincks did not pursue the matter. He bears the onus of proving his claim and there is simply no evidence that there was sales transaction.

13 Finally, in relation to the claim regarding the fencing between Lots 6 and 7 and Lot 8, I am not satisfied that this claim forms part of the application before the Commission. This claim does not, on the evidence before the Commission, relate to the respondent to this application. Mr Hincks informs the Commission that after he had left the respondent's employment Mr Crouch had asked him to do fencing on the property. Mr Hincks' evidence suggests that this understanding was "outside of the real estate side of it". This evidence is corroborated, in effect, by the evidence of Mr Crouch at page 40 of the transcript where Mr Crouch states that Mr Hincks was "commissioned" as a fencing contractor to him, directly. The amount of $158.40 which is claimed by Mr Hincks is denied by Mr Crouch and but even if the amount is due, I am not satisfied that it is due from this respondent.

14 Mr Crouch claims that Mr Hincks has been over-paid the amount of $102.80. The Commission understands the $102.80 referred to is found on page 1 of exhibit D and again in exhibit E. In exhibit E, the entry is—

> "Avon Loc. 6290, Poppanyinning (*sic*) and he recieved (*sic*) 8% Adv. (although no previous Sales in previous Months as we felt sorry for him.)"

15 In his letter dated 8 March 2001 to the Commission, Mr Hincks states—

> "…there never was $102.80 credited to my advertising account. The $102.80 is the amount I am claiming for a sale of a property I made in December 1998 to a Mrs Aulthous against advertising in January."

However, the evidence suggests to the contrary. During the hearing, Mr Crouch was cross-examined by Mr Hincks and at page 45 of the transcript, Mr Hincks refers to "January 1999 when I was credited with the $102.80".

16 Further, I invited Mr Hincks to put to Mr Crouch why Mr Crouch's evidence was incorrect and at page 45B the following exchange occurs—

> "Mr Hincks: Can you show me on these pieces of paper where I have been credited with advertising allowance?
>
> Mr Crouch: Yes.

Mr Hincks: On these pieces of paper, because that's where the running total at the end is saying?

Mr Crouch: As the Commissioner has just visually seen, January 1999 you were paid $200.00 and $102.80 page 1….

Beech, C: and then there is a second entry for $102.80 and Mr Crouch says that's a crediting to you of an advertising allowance.

Mr Crouch: It's in writing sir.

Mr Hincks: That's one. That's the only one I can see. There aren't any others."

17 By that evidence Mr Hincks appears to accept that the $102.80 was credited to him. Based upon that evidence, I accept Mr Crouch's statement that the $102.80 was credited to Mr Hincks' advertising account. Although I understand Mr Hincks to say that the $102.80 was credited as a result of the sale to Mrs Aulthous, I am not persuaded that the sale to Mrs Aulthous was made the previous month. In Mr Hincks' own document (exhibit 2) the Aulthous sale appears to have occurred in January 1999. This appears to have been confirmed by Mr Hincks himself in his evidence in the Commission when at page 7 of the transcript he states—

> "…..for instance, on January 1999 I sold a property to Mrs Aulthous, my commission for that was $1,285.00 and the 8% commission on that, I should have had $102.83."

I therefore conclude that $102.80 was indeed credited to Mr Hincks' account, but it was not an amount to which he was actually entitled pursuant to his contract of employment.

Conclusion

18 I therefore assess that Mr Hincks is owed $600.70 and I therefore propose to order Darrell Crouch and Associates to forthwith pay the sum of $600.70 to Mr Hincks.

19 A Minute of the Order to issue is to attached these Further Reasons for Decision. As with the Order which issued on an earlier occasion, the parties are now given the opportunity to ensure that the wording of the Order is consistent with the Further Reasons for Decision. If the wording of the Order is not consistent with the Reasons, the parties are requested to advise the Commission within two working days of the delivery of this decision, pointing out where the inconsistency lies between the Order and the Further Reasons for Decision. This is not an opportunity for either party to further argue their respective cases, nor to present material which was not presented at first instance. If nothing is heard from the parties, the Order will then issue in the terms of the Minute.

2001 WAIRC 02870

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	GEOFFREY STEPHEN HINCKS, APPLICANT *v.* DARRELL CROUCH AND ASSOCIATES PTY LTD, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	TUESDAY, 22 MAY 2001
FILE	APPLICATION 1320 OF 2000
CITATION NO.	2001 WAIRC 02870

Result	Application alleging denied contractual entitlements granted in part.
Representation	
Applicant	Mr G. Hincks
Respondent	Mr D. Crouch

Order.

HAVING HEARD Mr Hincks on his own behalf and Mr Crouch on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby—

(A) DECLARES that Geoffrey Stephen Hincks has been denied a benefit under his contract of employment; and

(B) ORDERS that Darrell Crouch and Associates Pty Ltd forthwith pay Geoffrey Stephen Hincks the sum of $600.70.

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

2001 WAIRC 03001

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	ALEECIA HOARE, APPLICANT *v.* NOONGAR LAND COUNCIL, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DELIVERED	TUESDAY, 12 JUNE 2001
FILE NO	APPLICATION 764 OF 2000
CITATION NO.	2001 WAIRC 03001

Result	Dismissed
Representation	
Applicant	Ms E. Cole and with her Mr S. Bibby appeared on behalf of the applicant
Respondent	Ms P. Giles (of Counsel) appeared on behalf of the respondent

Reasons for Decision.

1 On 17th May 2000 Allecia Hoare (the Applicant) applied to the Commission for an order pursuant to s.29 of the Industrial Relations Act, 1979 on the grounds that her dismissal from employment with the Noongar Land Council (the Respondent) was harsh, oppressive and unfair. The dismissal is unusual; it is claimed that at the instigation of the Respondent the Applicant's hours of duty were drastically reduced and this amounts to termination of the original contract of employment. There is controversy between the parties as to the form of the contract.

2 Ms Cole, who appeared for the Applicant, says that she was engaged as a permanent part time employee on 24th July 1998, she worked two days per week and during University breaks on a systematic basis for a period of 22 months. It is asserted that the Applicant was dismissed from a position of permanent part time receptionist, that the termination was harsh and unfair and there was no valid reason for it.

3 It appears the Applicant commenced working for the Respondent on or about 12th December 1997. It is conceded that she worked as a casual in a general administrative role over the Christmas holidays period. It is alleged that on 1st April 1998 the Applicant was asked by the Administration Manager, Mr Andrew Beigel, to take on the role of receptionist for four and a half days a week for two weeks, which was extended for four months. That the Administration Manager made this request was said to be important by Ms Cole who emphasised that the Applicant was not offered employment by the Respondent's then Executive Officer, John Hoare, who is her father. During the ensuing months the Applicant says she worked throughout the period on 1st April through to 24th July 1998 as a full time employee. Then, after a receptionist had been appointed to work 3 days a week, the Applicant says she was asked to work the remaining

two days as a receptionist. It is from this time the Applicant says she ought to be regarded as a permanent part time employee. It is not submitted that the rate of pay changed or that there was any other identifier which would demonstrate a change in status from casual to part time.

4 The Applicant says that she also worked in addition to her two days per week. During University holidays she relieved other workers and worked full time during those periods, she also worked additional hours on request and these were substantial. The hours worked have been scheduled by the Applicant in Exhibit C13 and displayed graphically in Exhibit G19 by the Respondent. I will deal with the information contained in these documents later in my analysis.

5 It was submitted by the Applicant that she enjoyed the opportunity for flexible arrangements to assist her meet University commitments. There was minimal consequence to the operations of the Respondent due to other employees being able to assist on work when they were required. It was not unusual for the Respondent to help employees with study commitments although there was no evidence called in support of this contention.

6 The Applicant says that her permanent part time office was terminated on or around 20th April 2000 and she was in effect offered another type of contract which might be described as casual. After this date she was given as little as four and half hours work a week and there were longer gaps between offers of work. This led her to decide that she would no longer work at the Respondent's business. She advised her intention in a letter addressed to the Chief Executive Officer in the following terms—

> *"Employment with the Noongar Land Council*
>
> *Since my hours have been reduced, I have now sought to mitigate my loss and have taken up employment with B Digital. I will no longer be available to work at the Noongar Land Council."*

This letter is important in the disposition of this case.

7 The Applicant's case turns around the assertion that she was a part time not a casual employee. It is argued the use of the term 'casual' in defining employment status is wrong when tested against authorities which identify as a matter of law the nature of a contractual relationship. It is suggested that the Commission should ignore that the Applicant was labelled a casual. In so far as the regularity of the employment is concerned it should be concluded that she regularly worked 15 hours per week during a period of part time employment and that her two days per week engagement was stable and ongoing. It should be acknowledged that she worked longer hours during University holidays and that work consisted of general administrative duties. The employment was of a fixed nature and was regular, the Applicant was required to inform the Administrative Manager verbally and later by email of her roster availability. There was a reasonable expectation of on going employment, she had worked continuously on a two day per week roster as a receptionist for 22 months. For a period of more than 2 years she worked every week with exception of six weeks. It is said that combined, these indicia should lead to the conclusion the nature of employment could not be categorised as casual.

8 In any event the appellation 'casual' did not comply with clause 6.2.2 of the Noongar Land Council Policy and Procedures Manual (Exhibit C12). In fact the definition contained therein excluded the type of employment contract under which the Applicant worked.

9 It was submitted for the Applicant that the termination of what she describes as permanent part time employment came through a confusing series of emails and verbal communication between the Applicant and the Administration Manager (see Exhibit C6, C7 and C9). Thereafter the Applicant became unsure as to her employment status and sought advice on the matter. She had hoped that negotiations with the Respondent would allow her to resume the type of relationship, particularly in respect of hours of work, she had enjoyed previously. From the week ending 5th May to the week ending 19th May she received no work at all. This led her to conclude that she would not be asked to work again and that her services had been terminated around 26th April 2000.

10 However after this the Administrative Manager began inviting her to work on a casual basis, the Applicant says this was only because she filed an application in this Commission for unfair dismissal. The Respondent actions were nothing but a smoke screen to obscure what had been a termination of a permanent part time employment contract. She had sought to clarify her employment status but received conflicting messages and had therefore sought professional help to clarify her situation. The actions of the employer in April 2000 were in effect a unilateral variation of the contract which amounted to a dismissal.

11 The Applicant says that she was employed by the Respondent as a permanent part time employee on 24th July 1998. That permanent part time employment was harshly and unfairly terminated by unilateral variation around about 26th April 2000. That termination was harsh and unfair and for no valid reason. The Applicant thereby seeks a declaration saying the dismissal was of that nature. As she now has other employment she does not seek reinstatement.

12 Ms Giles (of Counsel) says on behalf of the Respondent that this is a simple matter. The Applicant's employment status throughout the employment period was one of a casual nature. There is no doubt that was the basis on which she started working with the Respondent and she remained in that status throughout her employment until she indicated that she was no longer available.

13 The hours of work fluctuated enormously. The Applicant was denoted as a casual and even though denotation is not determinative of the relationship it is a fact which ought to be taken into account. There were no rosters, the employee was able to refuse particular offers of hours of work and she did so on a regular basis (see Exhibit G11). The Applicant picked the time she would go on leave and made her unavailability crystal clear to the Respondent. She did not seek payment until very late in the piece for holidays, overtime or sick leave. There is no evidence available of any consistent starting or finishing times and there was no requirement by the employer that she provide notice of leave dates. There was no expectation of ongoing work or in any event no reasonable expectation of that nature. She knew and ought to have known that this was a grace and favour engagement arranged by courtesy of her father's influence in the Respondent.

14 The Commission was invited by Ms Giles to draw the conclusion that the failure of Mr John Hoare to give evidence after indications that he would, should to lead to adverse conclusions about the probity of the evidence presented by the Applicant.

15 Ms Giles submitted that the Applicant was a casual in the true sense, it cannot follow that she was dismissed. A proper construction of the relationship that she was performed a series of short term contracts of employment of a regular duration, not to meet the needs of the organisation but rather to meet her needs by providing her with financial support while she studied at university. While her efforts to obtain tertiary qualifications are laudable, to do so at the expense of the Respondent which amongst other things is created to support and encourage accumulative of native title among Aboriginal people is to exploit that organisation.

16 On the evidence before the Commission the Applicant does not come anywhere near proving there was a dismissal on 20th April 2000. There was no suggestion of such a termination until quite late in the proceedings. It is necessary for an employee to establish that on the day upon which the application shows that he/she was dismissed that they in fact were dismissed. If it was to have been on 26th April 2000 there needs to be evidence to support that contention. If there in fact was a dismissal on that day the application it is out of time.

17 The Applicant's own view of her employment relationship varies, she thought she was permanent part time on at least four different dates. There is no evidence at all that the Applicant was terminated on 26th April 2000 or in fact on any other day. An appropriate construction of what happened during April is that the Applicant's employment relationship were varied. Even if she could establish that she was permanent on that date, which is denied, the most significant event which occurred about that time was a decision by the Executive Committee to put the Applicant's employment under the control of Mr Beigel and out of the control of her father. All of these events point to the continuation of a casual employment albeit on a less regular basis, or alternatively a variation. The Commission has no power to consider the fairness of a variation of contract, notwithstanding that the submission of the Respondent there was no termination at the time. As a consequence there is no jurisdiction.

18 The Applicant cannot prove that her services were terminated at all, in fact she resigned. There is no evidence to support her contentions that she was dismissed particularly relating to the fairness or unfairness of any so called decision to dismiss. The reason the Respondent cut her hours back was because the labour she offered was vastly in excess of their requirements. There was a requirement or need for more than one casual receptionist to be available for various reasons. There was no funding for a permanent position and Mr Beigel decided that, given he had complete discretion in respect of employment, he would call upon the Applicant when he judged the needs of the Respondent dictated. There was evidence from Dr Birdsall which is clear and uncontradicted that the Applicant's services were generally speaking not required.

19 The Respondent had various difficulties with the Applicant concerning her lack of devotion to duty and Ms Giles referred to those. But more important was the hours that the Applicant worked. In short, her employment contract was a grace and favour arrangement organised by her father at the expense of the Respondent in order that his daughter could have financial support during university studies. Exhibit G19 graphically shows that during university holidays the Applicant was suddenly very available for work at the Respondent. That alone is probably sufficient to show what a rort and sham the arrangement was. The decision by Mr Beigel to cut the Applicant's hours and the way he did it was not unfair, it was a right and proper thing to do on behalf of the Respondent and for the tax payers who support it. It was entirely fair in both circumstances.

20 The Commission is required to make findings on the credibility of witnesses. The Applicant gave evidence and was subject to a vigorous and lengthy cross examination by Ms Giles. The Applicant did not fare well in that exercise. There were a number of occasions when she repudiated her evidence in chief and it was therefore important that the contentions that she advanced be corroborated. Apart from some confusing documentary evidence relating to the status of her employment there is nothing other than her viva voce evidence upon which the Commission can make a judgement of her credibility.

21 On the other hand the Commission heard evidence from Mr Beigel, who recited the events relating to the Applicant's employment in detail, supported by contemporaneous documentation. His contentions concerning the Applicant's application to her duties and her deployment were supported by the Respondent's Senior Anthropologist, Dr Birdsall. The corroboration by Dr Birdsall of the evidence given by Mr Beigel relating to the Applicant's duties gives force to the conclusion that his evidence ought to be regarded as worthy of weight. Having considered what has been said by the Applicant and by the Respondents witnesses I reach the conclusion easily that the evidence of the Respondent is far more compelling and reliable than the evidence given by the Applicant and where the evidence differs I favour that advanced on behalf of the Respondents.

22 At the nub of this application was the form of relationship between the parties. The examination of the documentary evidence shows that in Exhibit G2 the Applicant is described as a casual. She says that she was told to fill in that part of the form which so described her and that she was unaware of the significance of doing so. In Exhibit G3 is a note where the Applicant advises when she was available on certain days in June and that she could only work on Mondays. She was described as a casual receptionist at her own request in a letter signed by the Administration Manager on 2nd December 1998 (Exhibit G4). There are various exhibits in the bundle of exhibits produced by Ms Giles which show correspondence between the Applicant and Mr Beigel and others which seem to support the contention that she may have been a casual employee. By her own hand the Applicant sought the continuation of her 'ongoing casual employment' with the Respondent while attending university, this happened on 24th February 1999 (Exhibit G14). There is also various correspondence which offers permanent part time employment. It would be passing strange to make offers in the terms used if she were already a part time employee.

23 A telling example of the way the Applicant regarded the employment is contained in Exhibit C2, where in a memorandum to the Administrative Manager copied to the Executive Director the Applicant says as follows—

> *"Please note I will be holidaying on the Gold Coast between the 7th to the 15th February 2000 return to the office on 17th February 2000. I apologise for any inconvenience re my time off as I originally stated that my holiday was from 7th of the 2nd to the 11th of the 2nd however this was incorrect…"*
>
> Exhibit C2

This document, clearly shows that she specified when she was going on holidays; she did not request leave. In other words she did not think that she was committed to provide work at any particular time other than the time that she thought appropriate to her own circumstances. Exhibit G19 is also of relevance here; between 24th December 1997 to 23rd December 1998 there is a varying amount of weekly hours shown except during the holiday periods when there seems to be a consistent work performed for a period between 27th May and 27th July 1998. These longer periods in employment, according to the graph, occur at regular times which are associated with university semester breaks. Between 5th January 1999 and 29th December 1999 there is a variation of the amount of hours worked each week by the Applicant. However on one occasion there was no hours worked at all. The exhibit supplied by the Applicant herself contains similar information about the hours of work.

24 What one concludes from this information was that there was a varying number of hours of work except during semester breaks when the Applicant seemed to be able to present full time. There is no evidence that she was requested or needed by the Respondent to work longer in that period, it seems as though 'work' was just made available to her during that time. It is open to conclude that the number of hours which were worked by the Applicant were very much in her control. There is no evidence at all that the Respondent had any influence over the number of hours she worked until it was decided by the Respondent's Council that something had to be done about her status of employment. This happened soon before she decided to leave, in fact from around about 26th April 2000 and later on when Mr Beigel was given control of the amount of hours she could work. He then asked her to work as and when the Respondent required her to be present. It can be seen from the exchanges of emails with her that even then she was not available on some of the occasions, yet she now complains that she was denied work in that period to the extent that she decided that she needed to deem the relationship at an end apparently on the so called basis to 'mitigate her loss'. This language is not normally used by an employee in such circumstances and one is led to the conclusion that she was advised that those words ought to be put in to her letter of termination in order to protect her situation in view of a claim before this Commission.

25 Much store has been put on the type of employment relationship by the Applicant, she has argued strongly to

assert that she was a part time worker for the majority of the employment period and that a major change in the hours which she was to work then constituted change of that contract so she could claim that variation, unilaterally made by the Respondent, was therefore a repudiation of the contract and was unfair. I need to examine this proposition (see *Serco (Australia) Pty Ltd v Moreno (1996) 76 WAIG 937* and *Squirrell v Adventure World (1984) 64 WAIG 1834*).

26 It does not ultimately matter whether the contract was casual or part time, its nature did not change at all until late April 2000 when the decision making about how many hours the Applicant would work was taken out of her hands and put in the hands of the Respondent. Nothing else in the relationship changed other than that, she continued to get a similar rate of pay, there was various offers made about engagements related to part time employment but in my view they are not germane to the matters which are for decision here.

27 The Applicant says that the contract was bought to an end by the respondent not giving her work in the ensuing few weeks. I observe that if she is correct about that and the relationship did then come to an end then this application is out of time.

28 But I reject that argument. The relationship continued until such time as the Applicant submitted her resignation. She decided that she would work for another employer. If she was a genuine part time worker or casual there would be no reason if she was not working in the same type of employment that she could not work for both employers, however she did not do so and clearly she resigned. Section 29(a)(1) is only excited by the dismissal by an employer of an employee from the employment contract. This employee was not dismissed. She resigned. The Commission has no jurisdiction and therefore this application must be dismissed. Additionally there is no hint that the Applicant was pushed by the Respondent into her decision to leave. The essential ingredients of a constructive dismissal are absent (see *Attorney General v Western Australian Prison Officers Union (1995) 75 WAIG 3166*)

29 If I am wrong about jurisdiction I examine the merits of the matter. A less meritorious application would be hard to envisage. Here is a situation where on the evidence a job was created in the Respondent by the Applicant's father for her. Everything about the job was tailored to meet her study requirements. At the start of each semester she could adjust the days and hours when she attended for work to suit her lecture timetable and during semester breaks she could work full time, regardless of whether there was work for her or not. That there was not work on occasions is clear from the evidence of Mr Beigel and Dr Birdsall. This was clearly a grace and favour arrangement from which the Applicant received a great advantage. To say, as was by her advocate, that the Applicant worked to a roster supplied by the Respondent is a distortion of language.

30 The Respondent tried to bring the employment relationship back into a position where it would get some benefit from the work of the Applicant. It allocated her work whenever it was available and I accept the evidence of Dr Birdsall to that end. This was not good enough for the applicant and she decided to go and work somewhere else. That was her right. But she brought the relationship to an end when she did so. If there was a repudiation of the contract by the Respondent diminishing the amount of hours available to the Applicant, which I doubt, that repudiation was not accepted by the Applicant and she continued to work until the time she decided to leave. If she had thought there had been a repudiation of the contract she should not have accepted it. However she did, notwithstanding that she was being advised by various professional people at the time.

31 Finally I comment upon the status of the employment. Even if she was a part time worker, which I doubt, it is not a matter which goes to the root of the contract to vary the hours of a part time worker. One can apply the indicia for identification of a contract as casual or part time to this arrangement and depending upon the weight given to various factors one could categorise it either as casual or part time. As I have said earlier it really does not matter in the final disposition of this case. What is clear is that there was a sweet arrangement for the Applicant to get money while she was studying. There is much to be said for the submission of Ms Giles that the job did nothing more than impose a burden on the tax payers through the Respondent to pay money to the Applicant while she was studying. This was on top of any other social service benefits she might get while she was doing so.

32 There is no merit in this application at all there was a fair go all round. The application will be dismissed (*Undercliffe Nursing Home v Federated Miscellaneous Workers Union of Australia, Hospital, Service and Miscellaneous, W.A. Branch (1985)* 65 WAIG 385).

2001 WAIRC 02997

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	ALEECIA HOARE, APPLICANT *v.* NOONGAR LAND COUNCIL, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DELIVERED	TUESDAY, 12 JUNE 2001
FILE NO	APPLICATION 764 OF 2000
CITATION NO.	2001 WAIRC 02997

Result	Dismissed

Order.

HAVING heard Ms E. Cole and with her Mr S. Bibby on behalf of the Applicant and Ms P. Giles (of Counsel) on behalf of the Respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders—

THAT the application be, and is hereby, dismissed.

(Sgd.) J.F. GREGOR,
[L.S.] Commissioner.

2001 WAIRC 02830

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	JEREMY KERR, APPLICANT *v.* TRINET DIGITAL LTD, RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	FRIDAY, 11 MAY 2001
FILE NO	APPLICATION 342 OF 2001
CITATION NO.	2001 WAIRC 02830

Result	Contractual benefits claim granted
Representation	
Applicant	Mr J Kerr on his own behalf
Respondent	No appearance

Reasons for Decision.

(Given extemporaneously and subsequently edited by the Commissioner)

1 This is an application made by Mr Jeremy Kerr, the applicant, against Trinet Digital Ltd, the respondent. The application was made on 22 February 2001. No answers

were lodged by the respondent, even following requests from the Commission. The matter was brought on for conference pursuant to section 32 of the *Industrial Relations Act 1979* on 30 April 2001, at which time the respondent did not appear.

2 The matter was referred for hearing. The parties were advised by the Commission on 1 May 2001. I have heard Mr Kerr give credible evidence in relation to the payments that he says are owed to him as expressed in his application. He says the amount is $2,959.12 for unpaid wages, including accumulated holiday pay.

3 His length of service was from 11 January 2000 to 6 December 2000, a period of approximately 11 months. He says he did not take any annual leave during the time of his employment, and I find that his claim for annual leave of 3 weeks should thus be awarded. His net weekly figure as per his bank statement [Exhibit JK3] and the e-mail [Exhibit JK2], is a net figure of $459.20 per week. This gives a 3-weekly total of $1,377.60 per week net, which is the holiday pay that I would award him. I should say that Mr Kerr has provided the Commission with no evidence of a written contract, nor is there any indication that he is paid pursuant to an award. The company engaged Mr Kerr as a web developer and for programming and systems administration.

4 I similarly find that his claim for a dishonoured payment of $459.20 is proven. Exhibit JK3 shows a dishonoured cheque of 27 November 2000 for that amount. Likewise, the payslips, which I have marked as [Exhibit JK1], show payments up until that time being 10 November 2000.

5 He then claims pay for the remainder of his time, being 2 weeks at $459.20 per week, and one part week, being $275.52. I find all these amounts are due, from the evidence and the exhibits that he has tendered today. Mr Kerr has deducted an amount of $100 which, on his evidence, was given as a cash advance because he was not being paid at the time.

6 He has also included an amount of $9 for an account fee for a dishonoured cheque. The amount of the $9 for the dishonoured cheque is not one that I would, or could I believe, incorporate in his award of denied contractual benefits. I make the total figure, then, $2,930.72 as the amount owing, as per not his application but as per [Exhibit JK2]. I should say also that the email [Exhibit JK4] is sufficient proof in my view that the respondent has indicated that the amounts claimed by the applicant are, in fact, owed.

7 For all of those reasons, I would award Mr Kerr the sum of $2,930.72 as a net figure, taxation being the responsibility of the respondent, and would so order.

2001 WAIRC 02882

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	JEREMY KERR, APPLICANT *v.* TRINET DIGITAL LTD, RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	WEDNESDAY, 23 MAY 2001
FILE NO	APPLICATION 342 OF 2001
CITATION NO.	2001 WAIRC 02882

Result	Contractual benefits claim granted
Representation	
Applicant	Mr J Kerr on his own behalf
Respondent	No appearance

Order.

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

WHEREAS the Commission having heard the applicant finds that the amounts as claimed are owed;

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

THAT the sum of $2,930.72, be paid to Jeremy Kerr within 7 days by the respondent Trinet Digital Ltd.

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

2001 WAIRC 02986

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	JOHN LANE, APPLICANT *v.* AUSSIE ONLINE LTD, RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	THURSDAY, 17 MAY 2001
FILE NO	APPLICATION 440 OF 2001
CITATION NO.	2001 WAIRC 02986

Result	Order discontinuing application 1039 of 2000 is revoked
Representation	
Applicant	Mr M Bennett of Counsel
Respondent	Mr S Shepard of Counsel

Reasons for Decision.

(Given extemporaneously and subsequently edited by the Commissioner)

1 My decision is based on the written submissions of the parties leading to the hearing and the additional written and oral submissions at hearing. Suffice to say, parties are bound by the way they conduct their cases. The applicant refers to the decision of Beech C in *Denise Brailey v Mendex Pty Ltd T/A Mair and Co Maylands* 72 WAIG 850 @ 852 which quotes the Full Bench decision in *Kangatheran v Boans Ltd 67 WAIG 1113*—

> "This Commission has in the exercise of its jurisdiction under section 29 considerable responsibility to the public and to the litigating public in particular, those who come before it with claims, those who are respondents to those claims. There are many, many applications of a similar sort which are dealt with day by day and there is every reason why individual Commissioners dealing with them are at pains to ensure some reasonable expedition in the prosecution of those claims."

2 I mention that as a backdrop. I mention also as a backdrop that quite clearly I am bound to act in accordance with section 26 of the Act; it being pre-eminent in the exercise of the way in which I conduct myself. Section 26 is clear: I shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms.

3 Quite clearly what has happened from the correspondence between the parties is that an agreement which was all but settled in the conference of the 28th of November 2000, bar for some wording in a deed of settlement (which was to be confidential between the parties), bar for that, a settlement was achieved. It is quite clear from the correspondence that that wording was never in fact settled for whatever reason, and the correspondence is explicit about that. I will not deal with all the correspondence. However, the letter of 15 December 2000 from counsel for the respondent is self evident. It states:

> "1. We have received no correspondence from you since our letter of 6 December.

2. Given the delays which have occurred in connection with this matter (none of which have been attributable to our client), we are instructed to inform you that, should you not accept our client's proposal for settlement by 5.00pm today, all offers from our client will lapse immediately thereafter.

3. If no or no adequate response is received by that time, we propose writing to the Commissioner requesting a directions hearing in the new year and a date for trial."

I say nothing further about the correspondence other than it is clear a settlement was not achieved.

4 To not allow Mr Lane to pursue his case would, I consider, be in breach of my duties under section 26 given that the terms of my original order are also clear. It says in part in the recitations, they forming part of the order, that—

> "Whereas on the 28th of November 2000 a conference was held pursuant to section 32 of the Act at which time terms of settlements were agreed."

That is an error. Likewise the letter of the Commission of the 30th of January 2001 is also an error. The letter states—

> "A conciliation conference pursuant to section 32 of the Industrial Relations Act 1979 was held before Commissioner Wood on 28 November 2000. At the conclusion of which the matter was settled and the Commission advised that the matter would be adjourned for seven days.
>
> On 6 December 2000 correspondence was received from the applicant's solicitor indicating that the matter was settled and a notice of discontinuance would be filed within 10 days.
>
> Please advise the Commission, in writing, of progress with the matter or alternatively file a notice of discontinuance by close of business Wednesday 14 February 2001. If the Commission has not had a reply by this date the matter will be discontinued on the Commission's own motion."

The correspondence of counsel for the applicant, of 6 December 2000 to the Commission states—

> " We write to confirm that the matter has now been settled between the parties with the only outstanding matter being the execution of the Deed of Settlement—now substantially settled between the parties—the payment of the settlement sum, and the filing of the Notice of Discontinuance (which must await the execution of the Deed and payment of the settlement sum).
>
> We shall write to you immediately if there are any difficulties experienced in the settlement of the above Application, which we anticipate should be completed, and a Notice of Discontinuance filed within the next 10 days."

5 The normal practice of the Commission, and understandably so, is to alert parties to what the Commission will do and ask for their response. No response was received from counsel for the applicant. Now all I have from Mr Bennett is an explanation that the letter may not have arrived. I have no evidence to that effect, other than those comments from the bar table. I take that no further, other than to say that it is normal practice for the Commission in finalising matters to write and advise parties what will happen if there is, in fact, no response. That is what has happened in this case. Having said that, it does not take away from the point; and the clear point is the order was made in error because no settlement was achieved. In giving you my reasons I go through the logic of it, rather than address all the points of law raised before me. I do that because the crux of my decision is a simple one and hence there is no need to address all points raised by counsel. I do this as well so that parties can get on with their next order of business, namely deciding whether to further negotiate or litigate the claim which has taken some time to get to this point.

6 There having been an error made it brings me to section 27(1)(m) of the Act provides for the Commission to—

> "correct, amend or waive any error, defect or irregularity whether in substance or in form."

7 If I was not to exercise my discretion to so amend the error that was made, then I would be ruling out Mr Lane's application to have his unfair dismissal matter conciliated or, alternately, determined, and that would be a wrong exercise of my obligations under the Act.

8 What I would do, then, is to revoke my order which was made and deposited on the 16th of February 2001. This effectively reinstates Mr Lane's application and returns it to a point of conciliation.

9 Now to take it one step further, I would say that I am not making the order pursuant to section 27(1)(v). In respect of application 440 of 2001 I will be asking the Registrar to cease that file, and it will be part of application 1039 of 2000. The matters are effectively the same matter, and, in fact, in my view, the approach made to the Commission by application 440 of 2001 could have effectively been made by correspondence to the Commission because the applicant is seeking that matter 1039 of 2000 be reinstated or revived.

10 This deals with the point made on behalf of the respondent that application 440 of 2001 is a separate application. It will no longer be a separate application. In saying that I would indicate that I have the power under section 27(1)(m) to correct any defects in that regard, and I would see it as such. Likewise, if I am wrong on that point, then clearly I have the power to act without regard to technicalities or legal form.

11 In short form, the order of 16 February 2001 will be revoked and Mr Lane's section 29 application will be returned to conciliation.

12 The respondent contends that the Commission does not have the power to entertain application 440 of 2001, as by virtue of the order of 16 February 2001, he says the Commission is functus officio in respect of Mr Lane's section 29 application. Clearly by my decision I do not consider this to be the case. Although it did not occur in this matter, arguably the matter could not have been dismissed as no hearing was convened. However, the matter was clearly intended to be finalised by the Commission on the premise that settlement had been achieved.

13 Section 27(1)(a) of the Act states that the Commission may, and I paraphrase

> "refrain from further hearing or determining the matter or part if it is satisfied—
>
> (iv) that for any other reason the matter or part should be dismissed or the hearing thereof discontinued, as the case may be;"

14 The applicant raises the decision of his Honour the President in *Kevin William Cuneo, Barry Patrick Duck and Kevin Alban Foreman v The United Firefighters Union of Western Australia* 75 WAIG 2344 @ 2345 where he states—

> "It is noteworthy, of course, under s.27 that the Commission may dismiss part of a matter or refrain from hearing a matter or part of it. Of course, if the Commission refrains from further hearing a matter or part thereof it has power to reconsider the question and is not functus officio."

I would concur with those comments which are relevant to this matter and say in not dismissing the matter, but rather refraining from hearing the matter by its discontinuance, the Commission is not functus officio.

15 If I am wrong on this point, and the Commission is functus officio, then I would note the decision of *Quentin Redvers Cook v Australia Postal Corporation [1997]* 597 FCA which covers a useful exposition of the concept of functus officio. The judgment refers to a decision in Ex parte *Hassell; Re Quirk [1937] 37 SR(NSW) 192*, Davidson J with whom Street and Maxwell JJ concurred, at 195:

> "It is established by the cases to which reference has been made that, when an arbitrator or judicial

officer has given his award or adjudication, as the case may be, he or she is functus officio, and cannot add to, amend, or detract from what he had done."

The judgment in *Cook* also says:

"the functus officio concept is referable only where the duty concerned has been finally performed, by a relevant order or award or decision, and not where some mere interim or preliminary conclusion has been reached; an interlocutory order may be set aside."

Further the *Cook* judgment states:

"Perhaps like most, if not all, rules, exceptions to its strict application have developed. The "slip rule" constitutes the major exception to the general rule of functus officio and admits corrections in respect of a clerical mistake or an error arising from an accidental slip or omission. A detailed consideration of the slip rule is contained in *Arnett v Holloway [1960] VR 22*. Apart from the slip rule, there is also recognised, at least for a court but which may be doubted for an administrative body, an inherent power after judgment to correct an order so as to give effect to the court's true meaning and intention. In the absence of a relevant "slip" or imperfect formulation of the true intent, the remedy for correction must and can only be by way of appeal, where available, or, perhaps, by a fresh action of the matter which is not estopped in some way such as being res judicata (that is the subject matter has been adjudicated upon). *Halsbury's Laws of England 4th ed Vol 2 at par 613 and Vol 26 at pars 566, 557*."

16 In the context of this matter, having found there is an error and having regard to section 26 of the Act, if the Commission is functus officio, and I do not consider this to be the case, then I consider the "slip rule' would apply. For the Commission to correct the clear error that has been made, the original order discontinuing Mr Lane's section 29 application would have to be revoked. In that sense I note also in the decision of *Cook v Australian Postal Corporation* (op cit) the following:

"Whether "the purposes of justice" will, even perhaps in a more refined way rather than a judicial discretion at large, become an exception to the functus officio rule must remain moot."

Clearly in the context of the Western Australian *Industrial Relations Act, 1979* this is a resort to section 26 as sought by the applicant.

2001 WAIRC 02985

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	JOHN LANE, APPLICANT
	v.
	AUSSIE ONLINE LTD, RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	FRIDAY, 8 JUNE 2001
FILE NO	APPLICATION 440 OF 2001
CITATION NO.	2001 WAIRC 02985

Result	Order discontinuing application 1039 of 2000 is revoked
Representation	
Applicant	Mr M Bennett of Counsel
Respondent	Mr S Shepard of Counsel

Order.

WHEREAS this is an application made pursuant to section 27(1)(v) of the *Industrial Relations Act 1979* (the Act) seeking to set aside the order discontinuing matter number 1039 of 2000; and

WHEREAS this matter came on for conference pursuant to section 32 of the Act on 9 and 23 April 2001; and

WHEREAS the matter was unable to be resolved and was referred for hearing and determination; and

WHEREAS the Commission finds that the order of 16 February 2001 in matter number 1039 of 2000 was made in error;

NOW THEREFORE, the Commission, pursuant to powers under section 27(1)(m) of the Act and having regard to equity, good conscience and the substantial merits of the matter hereby orders—

THAT the order of 16 February 2001 in matter number 1039 of 2000 be revoked.

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

2001 WAIRC 02774

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	IAIN LAWLESS, APPLICANT
	v.
	GHIRARDI RESTAURANT PTY LTD (ACN 081 550 469), RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DELIVERED	THURSDAY, 3 MAY 2001
FILE NO	APPLICATION 1822 OF 1999
CITATION NO.	2001 WAIRC 02774

Result	Unfairly Dismissed/Compensation of $8,198
Representation	
Applicant	Mr J. Sicard (of Counsel) appeared on behalf of the Applicant
Respondent	Mr T. Mijatovic (of Counsel) appeared on behalf of the Respondent

Supplementary
Reasons for Decision

1 On 19th January the Commission issued Reasons for Decision in this matter, it found that the dismissal of the Applicant by the Respondent was harsh and unfair.

2 The Commission concluded that reinstatement was not possible and it proceeded to examine the question of compensation.

3 In paragraph fifteen of its Reasons for Decision of 19th January 2001 the Commission set out the issues relating to compensation which were then before it. There were no submissions from the Respondent concerning the quantum of compensation and on the basis of the submissions received from Counsel for the Applicant the Commission awarded the sum of $10,000 compensation.

4 Minutes of Proposed Order issued, the Commission was then advised that the Respondent had engaged Counsel and at the Speaking to the Minutes held on 22nd February 2001, Mr Mijatovic of Counsel who then appeared for the Respondent argued a motion to reopen for his client to make further submissions concerning the quantum of compensation.

5 After hearing Mr Mijatovic the Commission decided to reopen the matter. The proceedings were adjourned and were relisted for 20th April 2001 in order to hear from Counsel on the quantum of compensation alone. On 20th April 2000 both of the parties presented affidavits on behalf of the Respondent, from Ms Jo Ghirardi an affidavit sworn on 19th March 2000 and on behalf of the Applicant Iain Lawless an affidavit which it appears was sworn around 19th April 2000 before a Justice of the Peace outside this jurisdiction.

6 The Commission has considered and attached the appropriate weight to both of the affidavits, has reviewed the transcript referred to it by Counsel and is taken into account submissions made during the hearing on 20th April 2000.

7 The relevant facts as they relate to economic loss are that the Applicant was unemployed from 3rd November 1999 until 10th December 1999 and during this period it is undisputed that he took a holiday away from Perth. According to him,on his return he commenced by looking for work. He was successful in obtaining casual employment at Frazer's Restaurant between 10th December to 25th December 1999. There was a gap in employment until 2nd January 2000 when he was employed as a casual at King Street Café. Between 3rd January and 20th February 2000 he was unemployed. On the 21st February 2000 he commenced employment at Oriele Café on a full time basis.

8 The Respondent says that there is no loss that the Applicant can point to because in the period in which he was unemployed he did not attempt to sufficiently mitigate his loss. In the period between 3rd November 1999 to 10th December 1999 he was first of all on holiday in Thailand then apparently resting, certainly he did not produce any evidence that he sought work up until 10th December 1999. There is similarly no evidence of any real effort to obtain work between 3rd January and 21st February 2000, therefore the Applicant failed to mitigate his loss during those periods. For the balance of the period during 3rd November 1999 to 21st February 2000 he was in paid employment at salary rates higher than that he was receiving with the Respondent and therefore suffered no loss.

9 The thrust of the argument of Mr Sicard of Counsel who appeared for the Applicant is that there is a clear period of time between 19th November and 10th December 1999 and 2nd January 2000 and 21st February 2000 when the Applicant was not employed at all and when he was looking for gainfull employment, proof of which is that he succeeded on three occasions in obtaining some.

10 It is implicit in that submission that the Applicant finds it difficult to argue that between 3rd November 1999 and 19th November 1999 that his activities could be categorised as those which one must undertake to mitigate a loss.

11 Having considered the submissions of the parties the Commission is obliged to apply the law relating to finding of loss and injury and the assessment of compensation as it is described in the cases *Manning v Huntingdale Veterinary Clinic (1998) 78 WAIG 1107; Bogunovich v Bayside Western Australia Pty Ltd (1999) 79 WAIG 8; Capewell v Cadbury Schweppes Australia Ltd (1998) 78 WAIG 299 and Gilmore and Another v Cecil Bros and Others (1998) 78 WAIG 1999*. Duties of the Commission insofar as loss is concerned have been further explained by the Full Bench in *Nicholas Richard Lynham v La Targo Pty Ltd (Delivered 29th March 2000 Citation No. 2000 WAIRC 02420 unreported)* where among other things the Full Bench has noted that "an injury is constituted interalia by humiliation, injury to feelings, the result of callous treatment, loss of reputation and nervous shock. Because s23 of the Act has the characteristics of the statutory fact it was open to find that if an applicant is shocked, stressed and indeed by the nature of treatment meted out to him was humiliated and suffered injury that is injury of the character contemplated by the Act and for which compensation ought to be awarded". In *Lynham's Case (op cit)* where at first instance the Commission had found there was no injury to the Appellant at all, the Full Bench decided that a fair award for the injury on the facts would have been $4,500 but because the agent for Lynham told the Full Bench his client would be content with less, namely $3,500, that sum was awarded.

12 As to loss in present context the Respondent says that the Applicant was able to obtain work in quality restaurants after the dismissal is proof that he was not injured at all, because it follows that he would not have been able to obtain work in these establishments if his name had been damaged in any way. The evidence of the Applicant is to the contrary. He says injury to him personally and to his reputation is profound. Exhibit G3 contains newspaper cuttings relevant to these events. If it describes anything it identifies that the Applicant was a person of considerable professional notoriety in the hospitality industry and particularly the fine dining restaurant part of the market. It is open to find that in this context a contested dismissal from a restaurant that carried his name would damage his reputation and cause him hurt and humiliation. However I do not accept that the Applicant continues to suffer an impact upon his professional reputation, although this might well be through his own efforts. In all of the circumstances it is appropriate that an award be made to him for injury. As the Full Bench said in *Lynham's Case* (op cit) the quantum of compensation for injury remains an open question. In the circumstances I believe a fair award for an injury suffered would be in the sum of $2,500.

13 I accept that the total period of 15 weeks during which the Applicant was not earning money between 4th November 1999 and 20th February 2000 should be decreased by 5 weeks during which time it is more likely than not that he did not make sufficient efforts to mitigate his loss. This means that the loss calculated on the basis of $759 gross per week, is $7,690 less earnings totalling $1,992; being a total loss of $5,698 plus $2,500 for injury making a grand total of $8,198. Orders will issue that the Applicant was unfairly dismissed, that reinstatement would be unavailing and that he be compensated for loss and injury in the sum of $8,198.

2001 WAIRC 02735

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	IAIN LAWLESS, APPLICANT *v.* GHIRARDI RESTAURANT PTY LTD (ACN 081 550 469), RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DELIVERED	FRIDAY, 4 MAY 2001
FILE NO	APPLICATION 1822 OF 1999
CITATION NO.	2001 WAIRC 02735

Result	Unfairly Dismissed/Compensation of $8,198

Order.

HAVING heard Mr J. Sicard (of Counsel), on behalf of the Applicant and Mr T. Mijatovic (of Counsel) on behalf of the Respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders—

1. THAT the Applicant was unfairly dismissed.
2. THAT reinstatement would be unavailing.
3. THAT the Respondent pay the Applicant the sum of $8,198.00 for compensation for loss and injury.

(Sgd.) J. F. GREGOR,
[L.S.] Commissioner.

2001 WAIRC 02982

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	JEAN LOTH, APPLICANT
	v.
	CHILDREN'S THERAPY & EDUCATION CLINIC, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	FRIDAY, 8 JUNE 2001
FILE NO	APPLICATION 348 OF 2001
CITATION NO.	2001 WAIRC 02982

Result	Application alleging denied contractual entitlements granted.
Representation	
Applicant	Ms J. Loth
Respondent	No appearance on behalf of the respondent.

Reasons for Decision (Extemporaneous).

1 The Commission has before it an application by Ms Jean Loth saying that she has not been paid the benefit due to her under her contract of employment with her former employer. The material before the Commission consists of Ms Loth's own evidence, which she has given under oath, and with due respect to her, I assess her evidence as being given in an honest and straightforward manner and I do accept her evidence.

2 I therefore find that Ms Loth was employed by the Children's Therapy & Education Clinic as she alleges. I do so in the knowledge that none of the payslips that she showed to the Commission carried the respondent's name and there is no document from the respondent which shows that she was an employee. Nevertheless, it would seem to me from the paperwork that has been received by the Commission and from Ms Loth's own evidence that she was employed by that body.

3 I am also satisfied from the documents, particularly exhibit 1, that she has worked the hours that she has worked and I also accept her evidence that she has not been paid for those hours worked.

4 Accordingly, and in summary form, it states the obvious to say that Ms Loth was entitled to be paid $27.00 per hour for each of the hours that she worked. That is clearly an entitlement under her contract. I am satisfied that she has worked the hours that she has indicated and that she has not been paid for those hours. It simply follows, therefore, that an order should now issue which requires the Children's Therapy & Education Clinic to forthwith pay Ms Loth the sum that she has claimed.

5 It would seem that the appropriate order to issue is that the Children's Therapy & Education Clinic forthwith pay to Ms Jean Loth the sum of $3,964.00, less the appropriate taxation, by way of a benefit due to her under her contract of employment.

6 I order accordingly.

2001 WAIRC 02979

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	JEAN LOTH, APPLICANT
	v.
	CHILDREN'S THERAPY & EDUCATION CLINIC, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	FRIDAY, 8 JUNE 2001
FILE NO	APPLICATION 348 OF 2001
CITATION NO.	2001 WAIRC 02979

Result	Application alleging denied contractual entitlements granted.
Representation	
Applicant	Ms J. Loth
Respondent	No appearance on behalf of the respondent.

Order.

HAVING HEARD Ms J. Loth on behalf of herself as the applicant and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby—

(A) DECLARES THAT Jean Loth has been denied a benefit due to her under her contract of employment with the Children's Therapy and Education Clinic;

(B) ORDERS THAT the Children's Therapy and Education Clinic forthwith pay Jean Loth the sum of $3,964.00 less the appropriate taxation by way of a benefit due to her under her contract of employment.

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

2001 WAIRC 02793

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	WAYNE MANSON, APPLICANT
	v.
	ALLCLASS HOLDINGS PTY LTD TRADING AS GOURMET PROFESSIONAL CATERING COMPANY W.A., RESPONDENT
CORAM	COMMISSIONER J H SMITH
DELIVERED	FRIDAY, 11 MAY 2001
FILE NO	APPLICATION 1816 OF 2000
CITATION NO.	2001 WAIRC 02793

Result	Application for unfair dismissal and contractual benefits dismissed
Representation	
Applicant	in person
Respondent	Mr C Fayle as agent

Reasons for Decision.

1 Wayne Manson ("the Applicant") made an application under s.29(1)(b)(i) of the Industrial Relations Act 1979 ("the Act") for orders pursuant to s.23A of the Act. The Applicant claims that he was harshly, oppressively or unfairly dismissed by Allclass Holdings Pty Ltd trading as Gourmet Professional Catering Company WA ("the Respondent"). The Applicant also claims that he has been denied a benefit not being a benefit arising from an award or order to which he is entitled under his contract of employment. His claim for contractual benefits is for $263.40, being two weeks pay at 10 hours per week at the rate of $13.17 per hour. The Applicant claims that at the time his employment was terminated his contract of employment was for 40 hours per week. The Applicant was paid two weeks pay in lieu of notice, calculated at 30 hours per week at $13.17 per hour. Accordingly he claims the pay he received in lieu of notice should have been calculated at 40 hours per week.

2 At the time of termination of his employment the Applicant was employed by the Respondent as Food Production Manager. The Applicant was employed by the Respondent on 1 November 1999 when the Respondent purchased the business of Gourmet Professional Catering Company WA from its former owner Garrett Nominees. The Applicant had been employed by Garrett Nominees as a Kitchenhand from

August 1998. When the Respondent purchased the business it offered employment to the Applicant as a Kitchenhand. A couple of weeks later the Applicant was offered and accepted the position as Food Production Manager on the basis of permanent part-time work for no less than 30 hours per week. However during the currency of the Applicant's employment with the Respondent he usually worked an average of 45 hours per week.

3 The Applicant's employment was terminated on Tuesday, 17 October 2000. The Respondent says that the Applicant's employment was terminated because of an incident involving misconduct and negligence on Sunday 15 October 2000.

4 On 15 October 2000, the Applicant was late in returning the Respondent's van to its commercial kitchen at Bayswater which caused the late delivery of food to a function in Wanneroo. The Respondent says that the Applicant attempted to blame an apprentice for the food being delivered late which in the circumstances constituted misconduct. Further, after the apprentice had left to take the van to the function the Applicant failed to lock the premises. The Respondent says he was negligent in failing to secure the property. In addition the Applicant had on two previous occasions failed to secure premises and had been warned that he was required to ensure the premises were locked. The Respondent says that in all the circumstances it was entitled to summarily dismiss the Applicant. However it did not do so and paid the Applicant two weeks pay in lieu of notice.

5 The Applicant's duties and responsibilities as Food Production Manager included food preparation, supervision of staff, quality of timeliness of orders, occupational health, safety and hygiene.

6 The Respondent contends that it had a reasonable working relationship with the Applicant during the currency of his employment but that a series of events occurred which made it clear that the Applicant could not be relied upon. The Respondent's Directors, Mr Tim Parry and Mr Christian Kelly, testified that in December 1999 the front door of the Respondent's commercial kitchen was left open on a Sunday. The front door to the building had direct access into the rest of the premises. The door was not discovered to be unlocked until the next morning. The Applicant was rostered for work on the Sunday. Both Mr Parry and Mr Kelly gave evidence that Mr Kelly spoke to the Applicant and informed him that as Food Production Manager he was responsible for ensuring that at the end of the day the premises were secured. The Applicant denied that the door had been left open or that he had been spoken to by the Directors about ensuring the premises were locked at the end of his shift in December 1999.

7 In the beginning of August 2000, the Applicant was promoted to the position of Function Manager at the La Traviata Function Centre in Scarborough ("La Traviata"). The premises had been recently purchased by the Respondent so as to provide a permanent function centre for clients. Although the Applicant continued to be engaged on the basis of permanent part-time employment with guaranteed hours of a minimum of 30 hours per week, he worked at La Traviata as the Function Manager for about two months and his average hours were approximately 60 hours per week.

8 On 9 September 2000, a function was held for an ex-staff member at La Traviata. The Applicant started work at about midday and worked until about 2am the following morning. The Applicant testified that he was the last to leave the building and that he locked up the premises before he left. However the next morning one of the staff members who worked the previous night went to the building to pick up an item of clothing. When she arrived she found the back door open and swinging in the wind. She called the police, who attended and secured the premises. The Applicant met with Mr Parry and Mr Kelly the next morning. They informed him the premises had been left unlocked. The Applicant testified that he told them he had checked all the doors in the building prior to leaving. Both Mr Parry and Mr Kelly testified that they informed him again it was part of the Applicant's job to ensure that the premises were secure and that if this occurred again his employment was in jeopardy. The Applicant strongly denied that he was warned at that meeting that his employment would be in jeopardy if he failed to secure premises.

9 A few days after this incident the Applicant approached Mr Parry and Mr Kelly for a pay rise as he was working long hours as the Manager of La Traviata Function Centre. He told Mr Parry and Mr Kelly that if a pay rise was not forthcoming he wanted to be returned to his previous position as Food Production Manager and he wanted to be employed full-time in that position. Mr Parry testified they were unable to afford to provide the Applicant with a pay rise so they agreed he could return to his previous position as Food Production Manager. The Applicant testified that Mr Parry agreed that he would be re-engaged in that position on the basis of permanent full-time. However both Mr Kelly and Mr Parry testified that they did not agree to vary his guaranteed minimum hours per week.

10 The Applicant recommenced working in the position of Food Production Manager. On Saturday, 14 October 2000 the Applicant worked at La Traviata from 7.00am in the morning until 11.00pm at night (with a three hour break). He said he took the food from the commercial kitchen down to La Traviata in the work van, prepared it, heated it up and served a buffet. He was rostered off the next day. Prior to finishing work on Saturday night he spoke to Mr Parry and asked if he could take the van home and return the van back to the commercial factory in Bayswater the next morning. Mr Parry agreed and the Applicant drove the van to his home in Dianella that night. The next morning he drove into the city in another vehicle and dropped his girlfriend off as she was going on a tour of the Swan Valley. He returned home, watched television and fell asleep. He said he woke about 12 o'clock to the sound of his work mobile phone ringing. He said Mr Parry was ringing and asked, "Where is the work van? It hasn't been returned to work yet". He said he immediately got in the van and drove to Bayswater within 15 minutes. He said when he arrived Shane Callahan a second year apprentice was preparing the final stages of a job. He said he helped Mr Callahan finish the job and load all the food into the van. Mr Callahan departed and he (the Applicant) cleaned up the kitchen and left the premises by leaving through the side door. He said he locked the side door and closed the side gate to the kitchen entrance and his friend picked him up about 1.15pm. The Applicant testified that he rang Mr Parry when he got home, apologised for returning the work van late and explained that even if he returned the van on time that Mr McCallahan did not have the job ready to depart as he still needed to pack up and had not finished preparing a few dressings for salads.

11 Mr Parry testified that the side door can be opened or locked from the inside, however, that only he and Mr Kelly have a key to open the door from the outside, that all other employees including the Applicant have keys to the front door. The Applicant denied this was the case, he testified that he and the two apprentices had keys to the side door. The effect of his evidence was that it was necessary to have a key to the side door to load the van, as it would be impracticable to load the van with food from the front entrance as they would have to take the food through the office.

12 The Applicant testified that he worked the next day, Monday 16 October 2000, from 7.00am until 6.00pm at the commercial kitchen and that Mr Parry also worked at the same premises that day. He said that Mr Callahan was not there as he was at TAFE.

13 The Applicant said that on the next morning, Mrs Josephine Parry telephoned him and asked if he could come in early. He said that when he arrived at work Mr Parry called him outside with Mr Callahan and another chef, Mr Mark Richards. The Applicant testified that Mr Parry told him that he discussed with Mr Callahan what

had happened on the Sunday and said that Mr Callahan had found the front door unlocked when he returned from the job. The Applicant said that Mr Parry also told him that it was a disgraceful effort in the kitchen on the Monday, that the jobs had taken too long. He said that Mr Parry informed him that someone had to be held accountable for the door being left unlocked, for the work van being returned late and for the performance of the kitchen on the Monday. He said Mr Parry then turned to him (the Applicant), lifted up his hand, waved and said "Bye-bye. You are finished." The Applicant said that he was shocked as he had had no prior indication that his job was in jeopardy and he had only received positive feedback in relation to his performance. Mr Parry told him to go and collect a cheque from Mrs Parry who is the payroll clerk. The Applicant testified that he went to the office and spoke to Mrs Parry. She arranged for his final pay to be calculated and presented him with a cheque for two weeks pay in lieu of notice calculated at the rate of 30 hours per week, and pro rata annual leave. He said he asked Mrs Parry for a reference. Mrs Parry provided a written reference that stated—

> "Wayne Manson worked for Gourmet Professional Catering for 3 years.
>
> In that time he showed enthusiasm, honesty, and reliability.
>
> His duties were Kitchen Management, food preparation, driver, function Co-ordinator and many others.
>
> Wayne works well in a Team environment as well as trustworthy on his own.
>
> We wish Wayne well in the future and anyone who employs him will not be disappointed."

14 The Applicant testified that he was shocked by the dismissal and he felt his self worth had been stripped away. He said it affected his ability to look for work. The Applicant did however obtain some casual work as a cook in December 2000 and installing tile heating mats into new and established homes. In early February 2001, he commenced employment as a trainee car salesman. At the time of the hearing of the application the Applicant had secured permanent employment as a car salesman.

15 Mr Parry testified that on Saturday, 14 October 2000, the Applicant approached him and asked whether he could take the van and equipment back to Bayswater early Sunday morning. Mr Parry said he agreed on the condition the van was returned by 10.30am because a job had to be delivered to Wanneroo and that the serving time for the food was 1.00pm. He said Mr Callahan needed the van and the equipment in the van back by 10.00am at the latest, so he could complete the job and load the van up in time to get to the function. Mr Parry testified that at about 10.00 o'clock in the morning Mr Callahan telephoned him and said that he was worried because the van was not at the Bayswater factory. Mr Callahan told him he had finished the job, but that he needed to put the salads in the bowls and the bowls were in the van. Mr Parry said he tried to ring Mr Manson on his mobile phone several times and left several messages. He said that the Applicant finally answered the phone at about 11.45am. He said that the Applicant apologised for sleeping on the lounge and informed him (Mr Parry) that he would get the van to the factory as soon as possible.

16 Mr Kelly testified that the Wanneroo job was about 45 minutes drive away from the commercial kitchen and it was a 40th birthday function for the parents of one of his friends. He said the food was supposed to arrive at the function at 12.15pm and to be served at 1.00pm.

17 Mr Parry testified that the Applicant was not at work on Monday, 16 October 2000, and that on Tuesday morning, 17 October 2000, he spoke to Mr Callahan about what had occurred on Sunday. He said that Mr Callahan informed him that he was not late, that the Applicant had made him late by the van arriving with the equipment late. He said that Mr Callahan also informed him that when he returned back to the factory at approximately 7.30pm the front door of the building was open.

18 Mr Parry testified that when the Applicant arrived at work on 17 October 2000, he called the Applicant outside together with Mr Callahan and Mr Richards. Mr Parry testified that the Applicant blamed Mr Callahan for being late. He said he turned to Mr Callahan who repeated that he was not late, that he was made late because he (the Applicant) was late with the van. Mr Parry said he then looked at the Applicant who shrugged his shoulders. He then asked the Applicant, "Who was responsible for the premises being unlocked?" to which the Applicant said, "I was". Mr Parry said he then said to the Applicant that this had happened on three occasions, his conduct was totally unacceptable, and he could not employ someone who keeps doing this. He then told the Applicant that he was dismissed, that he could pick up a cheque from Mrs Parry on his way out for his last two weeks pay and he then said, "Bye-bye". Mr Parry testified that he felt he had no choice but to dismiss the Applicant because he could not trust the Applicant with his property.

19 Mr Richards testified that in October 2000 he was employed by the Respondent as a casual chef. He said that on 17 October 2000, Mr Parry asked him to go outside whilst he spoke to the Applicant. Mr Richards gave evidence which substantially corroborated Mr Parry's version as to what was said outside the building of the commercial kitchen that morning.

20 Mrs Parry gave evidence that she is the Respondent's pay mistress. She said the pay records for the Applicant indicate that the Applicant was employed as a Kitchen Production Manager on a permanent part-time basis for a minimum of 30 hours per week. She said the Applicant was upset when he came in for his final pay and asked if she could write him a reference to enable him to get another job. She testified she did so but did not speak to the Directors or anyone else involved in the company prior to preparing the reference.

21 The onus is on the Applicant to demonstrate on the balance of probabilities that he was harshly, oppressively or unfairly dismissed.

22 In determining whether a dismissal is harsh, oppressive or unfair, the Commission must apply the principle that it is the legal right of the employer to terminate unless the right to do so has been exercised so harshly or oppressively against the employee so as to amount to an abuse of that right (*Ronald David Miles, Norma Shirley Miles and Lee Gavin Miles and Rose & Crown Hiring Service trading as The Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385).

23 The Applicant contends that his termination was industrially unfair because he was a loyal employee who had been promoted within the company. He says it was unfair for the Respondent to dismiss him because he delivered the work van 30 minutes late on his rostered day off and because he caused the premises to remain unlocked for a period of five hours. The Applicant contends that before his employment was terminated the Respondent failed to consider that prior to 15 October 2000, he had never returned the work van late or failed to properly secure the work premises. He also says that the Respondent failed to consider that the front door is never usually used on weekends, that it was reasonable to expect a mistake. He also contends that the employer failed to consider a different punishment such as a warning. Further he contends that the dismissal was oppressive, because the termination was not carried out in private.

Conclusion

24 The Applicant conceded that he was responsible for the door being unlocked on Sunday, 15 October 2000.

25 I accept the evidence given by Mr Parry that the van contained equipment such as bowls which were required by Mr Callahan to finish preparing for the Wanneroo job and that the failure to return the van and equipment caused the food to be delivered late. I find that even though it was the Applicant's rostered day off, as Food Production Manager and because he undertook to return the van and

equipment, he was responsible for the timeliness of the order.

26 Whilst the conduct in failing to return the van in time may not of itself be sufficient to justify termination, I am satisfied that his failure to secure the premises on 15 October 2000 caused the Respondent's Directors to lose trust in the Applicant, as it is clear that this was not the first time that the Applicant had failed to secure premises. Even if the Applicant's evidence is accepted that he did not receive a warning in December 1999 that the commercial kitchen at Bayswater had been left unsecured, it is apparent that the premises at La Traviata were left unsecured on the evening of 9 September 2000, as his own evidence establishes that he was the last person to leave those premises on the night in question.

27 Whilst Mr Parry should have informed the Applicant in private that his employment was terminated, I am satisfied that the Applicant was afforded an adequate opportunity to put his version of events, prior to Mr Parry informing him that his employment was terminated.

28 Having considered all of the evidence I have concluded that the Applicant has been unable to discharge the onus of proof that he was harshly, oppressively or unfairly dismissed.

29 In relation to the Applicant's claim for denied contractual benefits, whilst Mr Parry said in his evidence that on average the Applicant worked between 40 to 60 hours per week, he testified that he could not vary the Applicant's guarantee of a minimum of 30 hours per week because business was insecure. I understand what he meant by that was that he was unsure whether La Traviata would continue to generate sufficient business to enable the Respondent to offer the Applicant ongoing full-time employment.

30 Having considered all of the evidence, including the pay records, I have concluded that the Applicant has been unable to discharge the onus of proof that at the time of termination of his employment his contract of employment was for 40 hours work per week.

2001 WAIRC 02791

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	WAYNE MANSON, APPLICANT
	v.
	ALLCLASS HOLDINGS PTY LTD TRADING AS GOURMET PROFESSIONAL CATERING COMPANY W.A, RESPONDENT
CORAM	COMMISSIONER J H SMITH
DELIVERED	FRIDAY, 11 MAY 2001
FILE NO	APPLICATION 1816 OF 2000
CITATION NO.	2001 WAIRC 02791

Result	Application for unfair dismissal and contractual benefits dismissed
Representation	
Applicant	in person
Respondent	Mr C Fayle as agent

Order.

Having heard the applicant and Mr C Fayle as agent on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the application be and is hereby dismissed.

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

2001 WAIRC 02949

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	LAUREN ANDREA MARCH, APPLICANT
	v.
	TECHNOTRON PTY LTD t/a HUNGRY HOLLOW TAVERN, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	WEDNESDAY, 6 JUNE 2001
FILE NO	APPLICATION 1722 OF 1999
CITATION NO.	2001 WAIRC 02949

Result	Application alleging unfair dismissal dismissed.
Representation	
Applicant	Mr D. Smith (of counsel)
Respondent	Mr D. Gardiner

Reasons for Decision.

1 Ms March was employed at the Hungry Hollow Tavern as a bar attendant for approximately four weeks prior to her dismissal. She claims that her dismissal, on Melbourne Cup night 1999, occurred when she was working under pressure, that the manager at the time, Mr Jordan, was affected by alcohol and abusive and that for a period of over three hours two patrons harassed her causing her distress. Mr Jordan then instructed that she be dismissed.

2 The respondent's position is outlined in a statement that Mr Jordan made for the respondent prior to him leaving the State. The statement is unsworn and for that matter, undated, although it bears a facsimile transmission date in April 2000. While Mr Smith, who appeared on behalf of Ms March, objected to the admission of the statement as evidence, the statement is at least part of the record outlining the respondent's position. It states that Ms March was employed as a casual experienced bar attendant for three weeks at approximately 15 hours per week, depending upon demand. She was expected to work quickly, to work as part of a team and to keep the work area clean and hygienic. Mr Jordan's statement is that he spoke to Ms March regarding her lack of friendliness, speed, enthusiasm and cleanliness and therefore placed her on slower shifts. He had expected the 1999 Melbourne Cup night to be as slow as it apparently had been in 1998. Ms March had been rostered, together with Denise, another bar attendant, and Doug, who was an assistant manager. Two other employees were rostered in the restaurant. The 1999 Melbourne Cup night was, in fact, a busy night; so busy that management had to assist behind the bar. Mr Jordan's statement says that he spoke to Ms March about her attitude and her speed on that particular night; he states that Doug told him he, too, had spoken to Ms March on a number of occasions and following this discussion he, Mr Jordan, instructed Doug, as he was in charge of the shift, to dismiss Ms March and explain to her the reasons.

3 When the matter was heard by the Commission, Ms March gave evidence and also called evidence from a friend, Mr Darcy, whom she had telephoned shortly after her dismissal. For the respondent, evidence was called from a director of the respondent, Mr Daqui, who had been at the tavern on the night in question and had at one stage helped behind the bar. The respondent also tendered the statement from Mr Jordan. Over the objection of Mr Smith, I accepted the statement as evidence. I did so noting that the Commission is not bound by the rules of evidence, that the maker of the statement was no longer employed by the respondent and no longer resident in the State, and had not been so since, apparently, some five months after the night in question. I did so on the stated understanding that the authorities say that a greater weight is to be given to sworn evidence, particularly oral evidence which is tested by cross-examination in court, than to mere statements or statutory declarations: See *WA Branch,*

Australasian Meat Industry Employees' Union v. Harris (1994) 74 WAIG 214 at 216. That does not mean, however, that the statement has no weight at all. There are parts of the statement which are consistent with other evidence before the Commission and in those cases I am prepared to give weight to Mr Jordan's statement.

4 I do note that even if the delay to this matter had not occurred, Mr Jordan would not have been present in the State at the time the hearing of this claim would otherwise have occurred. The issues that arise from the respondent relying only upon his written statement would have existed in any event.

5 I turn to consider the evidence regarding Ms March's status. Ms March's evidence is that she enquired about a job on her own initiative and spoke to Mr Jordan. She was offered a part time position of 20 to 25 hours per week and she commenced employment the following week, being a date in mid October 1999. The respondent, through its director Mr Gardiner, submitted that Ms March was employed as a casual employee. Mr Jordan's statement also is that Ms March was employed as a casual employee.

6 Ms March's evidence is that she worked according to a roster which changed every week and she did not know in advance the precise hours which she would be asked to work. The time and wages record for the four weeks of her employment show, respectively, 20¼, 15½, 15¼ and 10½ hours per week (the last figure being a short week). I also note that when Ms March's application was lodged in this Commission, it described Ms March's employment as "casual". While the Commission is not a court of pleadings and the Notice of Application was not completed by Ms March herself, I attach some significance to the Notice of Application. I do so because it is a document more contemporaneous with the events in question than Ms March's current evidence. Even though it was completed by her legal representative, I assume the detail of the application results from Ms March's instructions. For that reason I have not preferred Ms March's oral evidence regarding her status to the other evidence, including the statement of Mr Jordan.

7 On balance I find that Ms March was a casual employee. I am influenced in this conclusion particularly by the variability of her hours and that she did not know in advance the precise hours which she would be asked to work. This conclusion is significant because the tenure of employment of a casual employee is substantially different to the tenure of a part-time employee. This is recognised by the *Hotel and Tavern Workers Award* to which Mr Smith referred. A casual employee may be terminated with one hour's notice; for a part-time employee, one week's notice is required.

8 That is not to say that I think Ms March was engaged for a fixed term of 3 weeks. To the extent that Mr Jordan's statement may be read such that she was engaged only for a three week period, and I am not sure that it is meant to be read that way, I find that no time limit was agreed between Mr Jordan and Ms March.

9 Although Ms March's evidence is that she was employed to work 20-25 hours per week, the evidence shows that in fact she worked an average between 15 and 20 hours per week. The hours she actually worked are more consistent with, and thus corroborate, the hours stated in Mr Jordan's statement. It is an additional reason why I give a greater weight to Mr Jordan's statement than its status would otherwise permit.

10 I turn to consider the claim by Ms March that she was unfairly dismissed. Ms March's evidence is that she commenced the shift at 6:00pm. There was no set finishing time for the shift. The end of the shift would depend upon the demand for her services. I accept Ms March's evidence that the tavern licence would expire at midnight and that her shift would not continue past midnight. However, there was no set finishing time.

11 Her evidence is that from the commencement of her shift she was "flat out" to approximately 8:00pm. There was only one till. She had very little time to clean up. At approximately 7:30pm Mr Jordan assisted behind the bar. She observed Mr Jordan drinking "shooters". He was critical of the set-up of the bar and said whoever set up the bar should be fired. At one stage Ms March asked him to open a refrigerator door because she was carrying a tray of glasses and he opened the wrong one and swore at her. Some cleaning up of the till was done by Doug. Mr Daqui assisted behind the bar for approximately 15 minutes and she assisted him with prices.

12 Ms March states that at approximately 8:30pm two particular customers came in to the tavern. By approximately 9:00pm they were making comments to Ms March about her not talking to them and their comments were such that it started to affect Ms March's work. Her evidence is that Doug eventually told them not to make comments but to merely pay for their drinks. She observed one of the customers spitting over the bar and reported this to Doug. According to her evidence Doug asked the customers to move on. The customers remained there for a further half an hour and eventually Ms March admits that she raised her voice to them saying words to the effect of "finish your drinks and get out". Ms March was crying and everything "snowballed" from the evening's pressure. She observed Doug and another person following the two customers when they left and at the suggestion of the other bar attendant, Ms March went out to the back and smoked a cigarette. This was at approximately 10:00pm or perhaps 10:30pm. Doug came to her and said words to the effect of "sorry mate", he had been instructed to let Ms March go because she was too slow behind the bar.

13 Ms March effectively finished her employment at that stage. She did, however, remain behind and drank a "staff" drink on the customer's side of the bar. At this time she also engaged in some casual conversation with Mr Jordan and she described Mr Jordan as slurring his words. Her evidence is that he at times stated that she was sacked and she was too slow and then at other times she wasn't sacked. She had telephoned her friend, Mr Darcy, who then attended and eventually Mr Jordan told her and Mr Darcy to leave the premises.

14 Ms March denies that during the course of her employment overall, Mr Jordan spoke with her about her work performance, or about her having a lack of friendliness, speed or enthusiasm and about the cleaning up of the work area. She believes that she was unfairly dismissed because the night of the dismissal was an unusually busy night and there were a number of reasons why things did not go particularly well that night. These included a customer who wanted eftpos, which meant that she had to wait for the machine to operate, and the number of people requiring service meant that she would frequently be walking past other customers who were waiting for attention while she was serving a customer.

15 Ms March called evidence from Mr Darcy, who is a security/crowd control agent who has been a friend of Ms March's for some time. He came to the tavern following her call and he observed Mr Jordan's speech being slightly slurred and his motor skills not accurate. He heard Mr Jordan describe Ms March as being "too slow". He heard Mr Jordan indicating to Ms March that she was sacked, and then that she was not sacked, and even that Ms March was "useless" and at that stage, Mr Darcy stepped in and he and Mr Jordan had a conversation. In Mr Darcy's words this conversation became "quite warm" and eventually Mr Jordan asked them both to leave.

16 The respondent called evidence from Mr Daqui. He confirms that he was in the tavern earlier in the evening and that he assisted behind the bar. He departed at approximately 8:00pm or 8:15pm. He confirms that it was busy behind the bar and that Ms March assisted him regarding the prices of various drinks. He did not see or hear anything else of relevance. I note Mr Smith's submission that Mr Daqui did not say that in his observation Ms March was slow that particular evening.

17 Mr Daqui did say that when he first attended the tavern that night Mr Jordan had spoken to him. Mr Jordan was, according to Mr Daqui, a bit upset that night and did say

to him that he (Mr Jordan) was going to make some changes to the staff because "Ms March was not pulling her weight" and that Mr Jordan had told her a few times when the pressure was on.

18 The respondent called no other evidence. Mr Smith makes the point that it would have been open to the respondent, even if Mr Jordan was unavailable, for them to have called at least one other person who was present on the night, even if that person was not behind the bar, to give some evidence in support of Mr Jordan's statement and the respondent's position. The respondent did not do so.

19 I note also, however, that Ms March, through Mr Smith, indicated an intention to call a further witness but did not do so.

Conclusion

20 The respondent's submission is that Ms March was dismissed for being too slow over the course of her employment. However, Mr Smith submitted that this was not the genuine reason. Rather, he submitted that Ms March was dismissed following the events of that night. I have considered Mr Smith's submission, and reserved my decision to do so. With due respect to him, I do not agree with his submission.

21 I accept the respondent's position that it chose to dismiss Ms March for being too slow over the course of her employment. There is evidence which would permit that conclusion to be reached. It is asserted in Mr Jordan's statement, and to some extent the evidence of Mr Darcy is corroboration of this. Mr Darcy's evidence is that in the times he has observed Ms March, she "is not the fastest and most efficient employee", and his assessment is that she would be approximately in the "middle of the road" regarding efficiency. I regard this comment as indicating that the issue which runs consistently through Mr Jordan's statement has credibility. I find it likely that Ms March's speed behind the bar may well have been the subject of some comment, or some concern on the part of the respondent.

22 Ms March was in her fourth week of employment. Her hours had already been reduced from 20 to 15 per week. She was a casual employee. Mr Gardiner submitted that Ms March was on a trial period. Ms March denies that Mr Jordan stated she was on a trial period and I note that Mr Jordan's statement does not suggest that she was on a trial period.

23 Whether an employee is engaged for a probationary period is a matter of fact. Some employers do engage an employee on a probationary period. Others do not. In this regard, Ms March claims to be employed pursuant to the *Hotel and Tavern Workers' Award* and I note in clause 7(13)—

> "Upon commencement of employment an employee may be subject to a probationary period of up to three months."

24 I do not read the use of the word "may" in that subclause as imposing a probationary period when one was not otherwise agreed. In this case, there is no evidence before the Commission which would allow the conclusion that, as a matter of fact, when Ms March was employed, she was employed for a trial, or probationary period. However, it is certainly not unusual for the first few weeks of employment to be seen by both the employer and employee as a period where each is getting used to how the other operates in practice.

25 In those circumstances I accept Mr Daqui's evidence regarding Mr Jordan's comment to him. Mr Daqui presented as a truthful witness and I am not inclined to disregard his evidence, as Mr Smith urged. While Mr Daqui's evidence does not prove the truth of what Mr Jordan stated, it contributes to the weight of evidence overall.

26 As to the circumstances of her dismissal, Ms March's principal complaint, as I understand it, goes to her allegation that Mr Jordan had not been on duty that evening, he was intoxicated, at least at one point abusive towards her, and that the bar was understaffed on an extremely busy evening. She states that in those circumstances, to dismiss her while she was having a smoking break was unfair.

27 There can be little doubt that the events of the night are largely in accordance with Ms March's evidence. The fact that Mr Daqui served behind the bar when he was not familiar with pricing strongly suggests that the bar was understaffed on an extremely busy evening. That also, once again, is entirely consistent with Mr Jordan's statement where he writes that the bar was busier that night than he had anticipated. If service was slow that night, and it must have been, it is unfair to blame that on Ms March. It also would have been unfair to dismiss Ms March by reason only of the events of that evening.

28 However, I am not persuaded on the evidence overall that the reason Ms March was dismissed was simply the events of that night. I accept Mr Jordan's statement that he had been concerned from the first shift. I regard this as corroborated by that fact that if, as Ms March states, she was employed to work 20-25 hours per shift she was rostered for less after the first week. This supports Mr Jordan's statement where he says he had to change Ms March's shifts. I find Mr Daqui's evidence, in that context, to be plausible. I find on the balance of probabilities that Mr Jordan had already reached the decision to dismiss Ms March prior to that evening.

29 That conclusion reduces the significance of the timing of the dismissal. As to that, there is no evidence of when Ms March's shift that night would otherwise have finished. Ms March herself does not know. There is the clear evidence that things were quieter at 10:00pm, or perhaps 10:30pm and that the number of customers had dropped. It appears likely therefore that Ms March was dismissed at the time her shift would otherwise have ended. Even though the tavern remained open for a period of time past 10:30pm, it is not clear that Ms March would otherwise have been required to remain on shift.

30 The evidence that Mr Jordan was intoxicated is also clear. I note that he was not on shift. Nevertheless, the appearance created by the manager of the tavern being on the premises affected by alcohol should be a cause for concern for the owners, with respect, even on Melbourne cup night. In that state, he implemented the decision to dismiss Ms March at the end of the evening and it is entirely understandable that she would regard his decision as wrong because of that very fact.

31 Nevertheless, on the evidence, it is likely he would have implemented his decision shortly thereafter, in any event, if he had not done so on that night. I have not found the evidence of Mr Jordan's condition to be decisive of Ms March's claim. In fact, in that context, it was proper for him to have required the acting bar manager to dismiss Ms March rather than do it himself.

32 On balance, the manner in which Ms March's dismissal was implemented was not professional. I can understand Ms March being upset at her dismissal especially given the bad conduct of the two customers referred to which had itself caused upset. The manner of a person's dismissal can be a reason why a dismissal is unfair. It is however only one factor to be taken into consideration: *Shire of Esperance v. Mouritz* (1991) 71 WAIG 891. Whether the dismissal was unfair is answered by looking at all of the circumstances. For the reasons I have set out, and while I have no doubt that Ms March sees things from a different perspective, and that she enjoyed working at the tavern, she has not discharged the onus upon her to show that her dismissal was harsh, oppressive or unfair.

33 I add the following comment. Even had the opposite conclusion been reached, and the dismissal was unfair, the order for compensation to be made by the Commission is most unlikely to have exceeded the wages Ms March would have earned for a further 2 weeks time. The authorities within the Commission make it plain that the Commission is first to assess Ms March's loss: *Bogunovich v. Bayside Western Australia* (1998) 79 WAIG 8 at 10. The evidence that Ms March commenced alternative employment two weeks after her dismissal is highly significant. It is by no means clear that the loss she experienced after that job is causally linked to her

dismissal from the respondent. Her status as a casual employee, at the least, makes it unclear whether, even had the dismissal not occurred, she would have remained continuously employed by the respondent to the end of the year, or for a period longer than that.

34 Order accordingly.

2001 WAIRC 02945

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	LAUREN ANDREA MARCH, APPLICANT
	v.
	TECHNOTRON PTY LTD t/a HUNGRY HOLLOW TAVERN, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	WEDNESDAY, 6 JUNE 2001
FILE NO	APPLICATION 1722 OF 1999
CITATION NO.	2001 WAIRC 02945

Result	Application alleging unfair dismissal dismissed.
Representation	
Applicant	Mr D. Smith (of counsel).
Respondent	Mr D. Gardiner.

Order.

HAVING HEARD Mr D. Smith (of counsel) on behalf of the applicant and Mr D. Gardiner on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby orders—

That the application be dismissed.

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

2001 WAIRC 02974

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	ADAM WILLIAM MCCONKEY, APPLICANT
	v.
	M & A'S OF DENMARK, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	THURSDAY, 7 JUNE 2001
FILE NO	APPLICATION 1951 OF 2000
CITATION NO.	2001 WAIRC 02974

Result	Application for costs granted in part.
Representation	
Applicant	Mr A. Chay (as agent) by way of correspondence.
Respondent	Mr A. Daems by way of correspondence.

Reasons for Decision—Costs.

1 The Order issued by the Commission reserved to the respondent in this matter liberty to apply for an order for costs incurred as a result of the applicant's non-attendance at the conference held in Albany on 20 March 2001. The respondent provided a schedule claiming the following costs—

(a) Travel 152km	$ 76.00
(b) Shop Assistant wages for two persons for half a day:	$ 96.00
(c) Preparation of information for the conference (shop assistant hired for a week so that preparation could be done)	$480.00

2 By way of reply, Mr McConkey, through his agent, has stated that the respondent's business is in the Denmark township some 54kms from Albany and that the distance therefore travelled, Denmark to Albany and return would be a maximum of 110kms. The cost for this matter therefore should be $55.00, utilising the figure of 50c per kilometre apparently applied by the respondent in the schedule.

3 In reply to the shop assistant wages claim, Mr McConkey submits that it was not necessary or reasonable for both principals of the respondent to attend the conciliation conference. Therefore, the applicant submits that the wages of only one shop assistant ought properly be met, that being $48.00.

4 In reply to the preparation costs claimed, Mr McConkey states that the claim is unreasonable in its entirety because the conciliation conference is designed to be an informal attempt to negotiate a settlement between the parties and little or no preparation was required for that conference. If preparation was required, it would not be for five full eight-hour days. He states that any costs for preparation ought to be the subject of proof by the respondent, showing a detailed schedule of the work done and records to establish that an "extra" shop assistant was hired for that specific purpose over and above the normal staffing practices at the firm.

5 The respondent has replied indicating that the travel cost based upon was the distance actually travelled from their home, and not their business, when attending the conference. Mr Daems states that it was necessary for both Mr and Mrs Daems to attend the conference and as two people were taken out of the shop, two shop assistants were necessary to maintain the minimum staff level. Furthermore, even if the conciliation conference may be informal, the respondent needed to present facts and the collection of those facts involved a complicated process. The work performed could not have been done without a "full retreat" from the usual work routine of the business. The respondent hired a shop assistant for the purpose and is able to provide a record of account. The shop assistant was hired specifically to provide Mrs Daems time to research and collate the information.

6 Both parties expressly consented to the Commission determining this matter on the basis of their written submissions.

The consideration of the Commission is as follows—

7 Section 27(1)(c) gives power to the Commission to order any party to a matter to pay to any other party such costs and expenses as are specified in the Order, but so that no costs shall be allowed for the services of any legal practitioner or agent. Costs are not ordinarily awarded in the Commission and it takes a somewhat exceptional circumstance, such as the one which led to the Order being made, which would warrant the Commission making an order for costs. The Commission's notification of conference was posted to Mr McConkey at the address stated in the Notice of Application. Mail was not returned and there was no indication from Mr McConkey prior to the conference being held that he was unable to attend. The fact that Mr McConkey did not attend the conference meant that the respondent's attendance at the conference was time largely wasted. In those circumstances, it would seem to me to be unreasonable for the respondent to bear the cost which was incurred in good faith.

8 I turn then to consider the three matters claimed—

Travel

9 The difference between the parties is that Mr McConkey states that the costs should be based upon the distance between Albany and the place of the respondent's business. The respondent's claim is based upon the

distance they travelled from their home. It appears to me that the purpose of ordering that costs be paid is met by reference to the distance actually travelled. If as they say, on the day, Mr and Mrs Daems drove from their home to Albany and thus drove 152kms, then that is the appropriate distance for the calculation of costs. On that basis, I would order Mr McConkey to pay the respondents the sum of $76.00 being the sum based upon the distance actually travelled.

Shop assistant wages

10 In relation to the claim for shop assistant wages, the difference between the parties goes to whether or not it would be reasonable for the respondent to have to have employed two shop assistants rather than one for the duration of the absence of both Mr and Mrs Daems. I would be more inclined to accept that one shop assistant would be needed if only Mr Daems, or Mrs Daems but not both, attended the conference. However, I accept for the reasons they have given that it was necessary for both to attend the conference and I find that it is not unreasonable to have each of them replaced during their absence. I find the sum of $96.00 to be reasonable. I would therefore include that in any order to issue.

Preparation Costs

11 This claim, however, in my view falls into a different category. While the respondent may well have needed to prepare for the conference, I regard that preparation as directed to the need to defend the application lodged in the Commission against the respondent. As such, it is not a cost related to the travel and expense of attending the conference. If, for example, the application had been re-scheduled, or indeed if a further application is now lodged, then the cost would be incurred. To put the point another way, it is not a cost thrown away only because of Mr McConkey's non-attendance at the conference. It is for that purpose only that the liberty to apply for order for costs was reserved to the respondent. Accordingly, I would disallow the claim for costs for preparation.

Conclusion

12 In conclusion, therefore, I find that the respondent has made out its claim for costs to the extent of $172.00. A Minute of Proposed Order now issues and the parties will be given an opportunity to speak to that Minute if either party wishes to do so.

2001 WAIRC 03003

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	ADAM WILLIAM MCCONKEY, APPLICANT *v.* M & A'S OF DENMARK, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	TUESDAY, 12 JUNE 2001
FILE NO	APPLICATION 1951 OF 2000
CITATION NO.	2001 WAIRC 03003

Result	Application for costs granted in part.
Representation	
Applicant	Mr A. Chay (as agent) by way of correspondence.
Respondent	Mr A. Daems by way of correspondence.

Order—Costs.

HAVING HEARD Mr A. Chay (of counsel) on behalf of the applicant and Mr A. Daems on behalf of the respondent both by way of correspondence, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby orders:

THAT Adam William McConkey forthwith pay M & A's of Denmark the sum of $172.00 by way of costs.

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

2001 WAIRC 02771

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	LEE FRANCIS OLIVER, APPLICANT *v.* COOLGARDIE COMMUNITY CARE INCORPORATED, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DELIVERED	THURSDAY, 10 MAY 2001
FILE NO/S	APPLICATION 1075 OF 2000
CITATION NO.	2001 WAIRC 02771

Result	Application upheld. Order issued.
Representation	
Applicant	Mr S Bibby as agent
Respondent	Mr G McCorry as agent

Reasons for Decision.

1. By this application pursuant to s 29(1)(b) of the Industrial Relations Act 1979 ("the Act") the applicant complains that she was harshly, oppressively and unfairly dismissed by the respondent on or about 30 June 2000. The applicant seeks reinstatement by the respondent or in the alternative, compensation.
2. The respondent denies that it treated the applicant unfairly and opposes the order sought.

Facts

3. The applicant was employed at all material times by the respondent in the position of co-ordinator. Her employment commenced in April 1994 and she was appointed co-ordinator in 1995. The respondent is an association incorporated under the Associations Incorporation Act 1987 and is managed by a management committee, comprising volunteers, as appointed under the respondent's constitution. The respondent provides a range of services to elderly clients in the Coolgardie Shire region, including home help, transport, respite, personal care, day care and meals on wheels. As co-ordinator, the applicant was generally responsible for the day-to-day management of the respondent, as well as liaising with the management committee on operational matters.
4. Whilst it was not entirely clear on the evidence, it appeared that the applicant was employed on the basis of yearly fixed term contracts, which notionally expired at the end of each financial year. However, the evidence was, that the contracts were "rolled over" from year to year, such that in effect, the employment was continuous. Whilst it was also not entirely clear on the evidence as to what were the applicant's other terms and conditions of employment, it would appear that an unexecuted written contract of employment, annexed to the applicant's witness statement, formed the basis of the other terms and conditions of employment. Perhaps importantly, clause 2 of that document, is in the following terms—

> *"2.1 The employer may terminate this contract by giving the employee not less than 14 days notice in writing, that their employment will cease on the expiry of the current term of contract*
>
> *2.2 If employment is not terminated on the date of expiry of the current term, the terms and conditions of this contract shall be assumed to extend for another period."*

5. Whilst the term referred to in this written document was 1 January 1999 to 31 December 1999, it appeared common ground that the successive contracts expired and were "rolled over" at the end of each financial year, being 30 June.

6. The applicant said that in about late November 1999 she received a telephone call from Mr Fraser, the newly elected chairperson of the management committee, to attend a meeting. A meeting then took place, at which the applicant was advised that there was going to be a "rearrangement" of the contracts to change them to a yearly basis with all positions to be terminated and re-advertised on the expiry of the then contracts. Mr Fraser advised that this was the way that these matters should now be handled, but assured the applicant that the process was but a mere formality.

7. As a result of meetings of the management committee chaired by Mr Fraser, which the applicant attended, she felt that he was hostile to her. Additionally, a decision was taken that the co-ordinator not attend meetings unless invited. There appeared to follow some instability amongst employees of the respondent, regarding the management committee's proposal to "spill and fill" the staff positions. There followed in April 1999, an incident involving a client of the respondent, that led to tensions between the applicant and in particular, Mr Fraser, involving the overturning of a decision by the applicant to withdraw care from the particular client. The applicant became concerned that she was no longer being supported by the management committee in the management of the day-to-day affairs of the respondent.

8. On 31 May 1999 the applicant received a letter from the respondent in the following terms, formal parts omitted—

> "*The Management Committee of Coolgardie Community Care has resolved to terminate all positions as of 30 June 2000. The purpose of the resolution is to ensure that the services provided to the Coolgardie and Kambalda Communities are flexible and appropriate to the clientele.*
>
> *The position of Coordinator will be advertised in the near future and you are encouraged to apply.*"

9. On the basis of the previous discussions the applicant had with Mr Fraser, she assumed that this was a part of the process of renewing the contracts of employment for a four year term rather than one year terms as previously. Because of this, she had no concerns on receiving the letter. Subsequently, on 3 June 2000, the position of co-ordinator for Coolgardie was advertised. It was however, advertised only as a part-time position for 25 hours per week. The applicant was shocked to discover this, as she had not been advised by anyone from the management committee, indicating that there would be such a change to her position. The decision to make this change was in fact taken it would appear on the evidence of Mr Fraser, in May 2000. The decision was to split the co-ordinator's position into two part time positions, one for Coolgardie and the other for Kambalda. None of this was however, discussed with the applicant at the material time.

10. On 30 June 2000, the applicant received a telephone call from Ms Tomsen, who the applicant described as the "un-elected secretary" of the respondent. The next day, at approximately 4.30 pm, a meeting took place in the applicant's office, involving herself, a member of the management committee, Ms Tomsen and the treasurer of the respondent. At this meeting, the applicant was handed a letter dated 30 June 2000, which formal parts omitted is in the following terms—

> "*RE: TERMINATION OF CONTRACT*
>
> *Further to the letter dated 31 May 2000 in relation to the restruction (sic) of Coolgardie Community Care (Inc) and services. The current position of Co-ordinator at 38 hours per week has been abolished and therefore the term of your contract (sic).*
>
> *You have been paid for normal wages up until the 30th June 2000. A redundancy package will be put to the committee within 14 days and you will be informed when the decision has been made.*
>
> *We require you to hand over your keys and any other property of Coolgardie Community Care (Inc) on 30 June 2000 at 4.30pm.*
>
> *On Monday the 3 July 2000 you will be aloud (sic) in the company of a committee member to remove any of your personal effects documents etc.*
>
> *A statement of service can be obtained from the Chairman after the 3 July 2000. Thank you for your services.*"

11. Apparently, Mr Boucher, a member of the management committee, had no knowledge about this event. The applicant protested that in her view, an invalidly constituted management committee had taken this decision. The applicant was advised that she would need to proceed through the interview process for the new positions, the same as everyone else. She was required to hand over her keys and she then left the office. The applicant inquired of other committee members as to whether they were aware that there were other applicants other than the incumbent, for other advertised positions. She was apparently advised that there were.

12. The applicant said that to the best of her knowledge, she was the only staff member to receive a letter of termination of employment.

13. Apparently, another person temporarily occupied the position of co-ordinator for Coolgardie and the position was re-advertised on 4 September. The position for a part time co-ordinator in Kambalda was advertised on 28 August 2000.

14. The applicant subsequently applied for the position of part-time co-ordinator for Coolgardie and attended an interview in relation to that position. On attending the interview, the applicant did not think that the interview panel was impartial because two members of it were associated with the respondent. Because of this, and despite assurances from the chairperson that the panel was quite impartial, the applicant declined to continue with the interview for this position. The position was subsequently filled and there is also now apparently, a part-time co-ordinator in Kambalda. The applicant did receive a "redundancy and termination package" from the respondent of eight weeks pay in lieu of notice, two weeks pay for each year of service and two weeks holiday pay. This totalled $15,732 gross, $9,753.84 net.

15. Since her departure from the respondent, the applicant has sought but has not been successful in obtaining other employment. The applicant commenced receiving social security benefits some 18 weeks following the termination of her employment. She said that also since in or about mid June 1999 she began to experience panic attacks in relation to which she consulted her medical practitioner and was prescribed anti-depressants. The applicant felt in the circumstances she could no longer remain in Coolgardie because she felt totally humiliated by what had occurred. As at the time of these proceedings, the applicant was still suffering regular panic attacks and tendered in support of her condition, was a copy of a medical opinion dated 28 November 2000 from her medical practitioner, Dr Nadin.

Consideration

16. The applicant's agent in support of her claim made a number of submissions. It was said that despite there being yearly contracts of employment, in reality, the applicant's employment should be regarded as continuous up until the time of its termination. There was no evidence or allegation that the applicant was performing poorly in the position of co-ordinator. Furthermore, there was a submission that relevant decisions taken by the respondent were ultra vires the constitution of the respondent, because a validly constituted management committee under the respondent's constitution did not take them. This was said to include the termination of employment letter of 30 July 2000, and earlier decisions.

17. There were also submissions put to the Commission to the effect that the intent of the respondent in restructuring the affairs of the organisation by way of a "spill and fill" was merely a device in effect, to get rid of the applicant.

It was also submitted that there was inadequate consultation between the respondent and the applicant as to the proposed restructuring generally, and as it affected her specifically. In this regard, it was therefore submitted that the process engaged by the respondent was fundamentally unfair and as it impacted upon her personally, was in breach of the requirements imposed on the respondent by the Minimum Conditions of Employment Act 1993 ("the MCEA"). On this basis alone it was submitted, the applicant's dismissal was unfair. The agent for the applicant submitted that the applicant should be reinstated or alternatively, paid compensation as a consequence of the unfair dismissal.

18. For the respondent, it's agent simply said in submissions that the respondent engaged in a genuine restructuring of its operations to provide better delivery of services to the Coolgardie Shire and that in accordance with the terms of the employees' contracts of employment, all positions were declared vacant as of 30 June 2000. All existing employees were invited to apply for their positions and it was submitted that the only reason the applicant did not get the position that she applied for, was because she declined to continue with the selection process. It was submitted that by reason of the terms of her contract of employment, there was in fact and law, no dismissal. The applicant's contract of employment came to an end by the effluxion of time on 30 June 2000.

19. There were also submissions put by the respondent as to whether the decision making of the management committee was ultra vires or not. The respondent submitted that there was no "conspiracy" to remove her from her position and at all material times, the respondent acted fairly and reasonably. Also, in this regard, the respondent submitted that it paid to the applicant a substantial redundancy payment, which was a relevant factor. It was therefore submitted that in all the circumstances, the applicant had not been treated unfairly. If the Commission was to however find unfairness, because the applicant declined to continue with the selection process for the co-ordinator's position, she had failed to mitigate her loss and as a matter of equity and good conscience, no further order of compensation should be made in the applicant's favour.

20. There are a number of issues arising in this case to be determined. Firstly, is the issue of whether the applicant was dismissed for the purposes of the Commission's jurisdiction and power to entertain the present claim. In my opinion, having regard to all of the evidence, the applicant was clearly dismissed by the respondent and I reject the respondent's submissions in this regard. Whilst it was the case that the applicant was employed under yearly contracts of employment, it was abundantly clear that those contracts were simply "rolled over" from year to year. There was no evidence of any break in service between contracts. The position was that the applicant had an expectation that the contract would be renewed each year and it was: *Scally & Ors v Board of Management of Sir Charles Gairdner Hospital* (1996) 40 AILR 3-316; *D'Lima v Board of Management of Princess Margaret Hospital for Children* 1995 AILR 3-173; *Minister for Health v Ferry* (1996) 65 IR 374.

21. This evidence is consistent with the terms of clause two of the document which appears, as a matter of common ground, as I have noted above, to have been the governing terms of the applicant's appointment leaving aside the dates in the document. It is clear that the terms of the contract of employment do not simply come to an end by the effluxion of time. To bring the contract of employment to an end requires the employer to give notice of not less than 14 days that the employment will cease on the expiry of the current term. But for this notice, the express terms of the contract of employment provide that the contract continues beyond the nominal expiry date. This is also confirmed by the terms of the letter of 31 May 2000 from the respondent to the applicant, set out above. Clearly, from this letter, the management committee, presumably in reliance upon the contractual provision set out above, gave notice of its intention to terminate the employment of the applicant as at 30 June 2000. In my opinion, taking all of these matters into account, the respondent terminated the applicant's contract of employment and she was therefore "dismissed" for the purposes of the Act. Moreover, the payment by the respondent of the "redundancy and termination payment" is inconsistent with the submission that the applicant's contract of employment came to an end by the effluxion of time.

22. The next issue is whether the decision to terminate the applicant's employment was validly taken pursuant to the respondent's constitution. A copy of the constitution was tendered as exhibit A3. Clause 7.0 of the constitution provides for the composition of the management committee. Clause 8.0 deals with the powers of the management committee. A quorum of the management committee is five members. On the applicant's own submissions, between November 1999 and June 2000, the management committee was validly constituted. The letter of 31 May 2000 was written by Mr Fraser, as chairman, and authorised at a meeting of the committee on 15 May 2000, the minutes of which were annexed to Mr Boucher's witness statement.

23. A resolution was put and carried at the meeting that as of 1 July 2000, the employees' contracts of employment would be up for renewal and that all positions be declared vacant as of 30 June 2000. The minutes of the meeting reveal that those present at the meeting were duly elected committee members and a quorum was present. In my opinion, the letter of 31 May 2000 from Mr Fraser, gave effect to the resolution of the management committee carried at its meeting on 15 May 2000. So regarded, in my view, it was this letter that was the letter giving notice to the applicant of the termination of her contract of employment on 30 June 2000. I do not regard the letter of 30 June 2000, set out above, as the notice of termination of the applicant's contract of employment. It was a letter that merely confirmed what had already occurred by the earlier letter. I am not therefore persuaded that as a matter of law, the notice of termination of the applicant's employment was in any respect ultra vires the powers of the management committee.

24. As to the submissions of the agent for the applicant that there was a conspiracy engaged in by certain persons within the respondent to remove her from the co-ordinator's position, I am not persuaded on all of the evidence, that this was so. An employer retains the right to structure its operations in the most appropriate manner that it considers in the best interests of its purposes and objectives. What changes such as those put in place by the respondent require however, is appropriate consideration of its legal obligations under relevant statutes, awards and other industrial instruments, and sound management handling of what are, in many cases, sensitive issues. Employees need to be consulted about changes and in the case of changes having a detrimental effect upon employees, consideration be given to measures to avert or minimise such detrimental effects. These obligations are imposed by statute in the MCEA. On Mr Fraser's evidence, it appeared that the decision to abolish the co-ordinator's position and create two part-time positions was taken in about May 2000. There was no consultation with the applicant, being the person directly affected by this change, as required by the MCEA.

25. Having regard to all of the evidence, I am not persuaded that the respondent's proposal to restructure the organisation were other than a bona fide attempt to improve service delivery to the relevant constituents. Clearly however, the respondent did not in my opinion, implement these changes particularly well. This no doubt, in large part, led to the applicant feeling aggrieved. The fact that the respondent clearly failed to consult with the applicant as it was required to do under the MCEA, of itself, leads to the conclusion that the applicant's dismissal was unfair on this basis alone: *AFMEPKIU v Goldfields Contractors Pty Ltd* (2000) 80 WAIG 2749; *Gilmore v FDR Pty Ltd & Cecil Brothers Pty Ltd* (1996) 76 WAIG 4445. I also consider that the manner of the termination of employment on 30 June 2000 left a lot to be desired.

Remedy

26. On the evidence, I am not persuaded that the respondent should reinstate the applicant. The applicant had every reasonable opportunity to pursue the restructured positions arising from the changes implemented by the respondent, however, for her own reasons, she chose to not pursue those alternatives. In my opinion, in those circumstances, it would not be consistent with equity and good conscience to order the reinstatement or re-employment of the applicant, in positions that have now been filled by others.

27. The next question therefore is what, as a matter of fact, has been established by the applicant in terms of loss and/or injury, compensable by an award of compensation: *Bogunovich v Bayside Western Australia Pty Ltd* (1999) 79 WAIG 8. I have concluded that the restructuring by the respondent was bona fide, albeit that it could have been handled much better, in terms of how the applicant was treated. Also, the applicant was paid on termination of employment, a not insignificant termination payment, by way of a redundancy package. Furthermore, the applicant, of her own volition, declined to continue with the prospect of being appointed to at least one of the newly created positions, for the reasons she outlined in her evidence. It seems open to infer, and I do infer, from all of the evidence, that it would have been highly likely that she would have been appointed to that position had she continued in the selection process. I am therefore of the view that to this extent, the applicant did not mitigate her loss. I am therefore not able to conclude on the evidence, that the applicant has been deprived of ongoing employment, by reason of the conduct of the respondent itself.

28. Taking that into consideration along with the payment made to the applicant on termination of the applicant's employment, whilst I have some sympathy for the circumstances in which the applicant found herself, I am not persuaded that the applicant has suffered any further loss that should be compensated by an order of the Commission.

29. In terms of injury however, there is clear evidence that the manner by which the changes were implemented clearly and unequivocally affected the applicant. She required, and as at the time of these proceedings, still required, ongoing medical treatment. Additionally, she felt humiliated as a consequence of the relevant events and felt compelled to leave Coolgardie and move to Kambalda because of this humiliation.

30. The quantification of loss for injury is of necessity, an imprecise science. Each case will vary according to the facts as found. An award of compensation for injury in one case, may not necessarily in my view, provide a benchmark for other cases, where the factual circumstances are significantly different. I am of the view that in this case, in all the circumstances, the applicant should be compensated by an order that the respondent pay to the applicant the sum of $3000.00.

31. A minute of proposed order now issues.

2001 WAIRC 02814

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	LEE FRANCIS OLIVER, APPLICANT
	v.
	COOLGARDIE COMMUNITY CARE INCORPORATED, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DELIVERED	MONDAY, 14 MAY 2001
FILE NO/S	APPLICATION 1075 OF 2000
CITATION NO.	2001 WAIRC 02814

Result	Application upheld. Order issued.
Representation	
Applicant	Mr S Bibby as agent
Respondent	Mr G McCorry as agent

Order.

HAVING heard Mr S Bibby as agent on behalf of the applicant and Mr G McCorry as agent on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby—

1. DECLARES that Ms Lee Oliver was harshly, oppressively and unfairly dismissed from her employment as co-ordinator by the respondent on or about 30 June 2000.
2. DECLARES that reinstatement of Ms Oliver is impracticable;
3. ORDERS the respondent to pay to Ms Oliver the sum of $3,000.00 less any amount payable to the Commissioner of Taxation pursuant to the Income Tax Assessment Act 1936 and actually paid.

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

2001 WAIRC 02711

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	PRANEE PAWABOOT, APPLICANT
	v.
	EASTERN REGION DOMESTIC VIOLENCE SERVICES NETWORK INC., RESPONDENT
CORAM	COMMISSIONER J H SMITH
DELIVERED	FRIDAY, 4 MAY 2001
FILE NO	APPLICATION 1321 OF 2000 and APPLICATION 1725 OF 2000
CITATION NO.	2001 WAIRC 02711

Result	Application 1321 of 2000 Dismissed Application 1725 of 2000—Declaration that the Applicant was unfairly dismissed and an order made that the Applicant be paid five weeks pay as compensation
Representation	
Applicant	in person
Respondent	Mr M Connor as agent

Reasons for Decision.

1 Pranee Pawaboot ("the Applicant") made an application on 24 August 2000 under s.29(1)(b)(i) of the Industrial Relations Act 1979 ("the Act") claiming she was harshly, oppressively or unfairly dismissed from her position as Manager by Eastern Region Domestic Violence Services Network Inc ("the Respondent") on 31 July 2000. The Applicant also makes a claim under s.29(1)(b)(ii) of the Act that she had been denied a benefit to which she was entitled under her contract of employment (not being a benefit under an Award or Order), in that she was entitled to be paid approximately $28,462.50 as payment of wages due and owing from 1 August 2000 to 12 March 2001.

2 At the time of the alleged termination of the contract as a Manager, the Applicant was engaged as a Refuge Coordinator ("Coordinator") by the Respondent. On 25 October 2000 the Respondent terminated the Applicant's employment as Coordinator. On 30 October 2000 the Applicant made a further application to the Commission under s.29(1)(b)(i) of the Act claiming that her employment was harshly, oppressively or unfairly dismissed by the Respondent on 25 October 2000.

Background

3 The Respondent is a community based organisation and has charity status. It is managed by a Management Committee ("the Committee") whose members do not receive payment for their role as members. The Respondent is engaged in running the Koolkuna Refuge ("the Refuge") and provides support services for women. The Respondent also provides medium term housing for people who have left the Refuge as temporary accommodation to assist them in returning back to their community environment.

4 The Applicant commenced employment at the Refuge as a part-time support worker on 2 November 1998. She was paid as a Level 3 Community Services Worker as set out in the Crisis Assistance, Supported Housing Industry, Western Australia Award 1997 (Federal) ("the CASH Award").

5 At all material times the Respondent was not a named Respondent to the CASH Award, but the Applicant was paid in accordance with the wage and salary rates set out in the CASH Award. The Respondent argues that the CASH Award in its entirety applied to the Applicant's employment at all material times. The Applicant concedes that the wage and salary rates set out in the CASH Award applied to her employment but makes no submission as to whether all of the provisions of the CASH Award applied as a condition of her contract of her employment.

6 Prior to commencing employment with the Respondent the Applicant was employed as an Ethnic Support Worker in women's refuges for about eight years. The Applicant is Thai. She speaks Thai, Laos and English. She was educated in Thailand and came to Australia in 1981. Although she speaks English fluently, English is her third language.

7 In late 1999 the Respondent decided to create a position of Coordinator. The Respondent only employed one manager, the Refuge Manager. It also employed a team leader who had no supervisory powers. Ms Lorena Rose, the substantive holder of the office of Manager of the Refuge testified that the reason why the position of Coordinator was created was that when she went on leave or when she was not at the Refuge there was no person to whom the employees reported to.

8 On 11 December 1999 the Respondent advertised the position of Coordinator. The advertisement stated that—

> "The position reports to the Manager and involves the co-ordination of the refuge and domestic violence programmes.
>
> The successful applicant will possess proven skills in staff supervision, programme co-ordination, extensive experience in working with and understanding of the needs of women and children in crises and a thorough understanding of case management principles and domestic violence issues."

9 The Applicant applied for the position of Coordinator on 14 December 1999. In her application she referred to her experience in community services work, as a business owner and a real estate and business broker. She also referred to the fact that she had worked in Thailand as a Principal of a Kindergarten and a Primary School. In particular she stated in her application—

> "I have management, skills, co-ordinating and consulting experience as well as being a self-starter, a motivator and self confident. I have good mediation, negotiation and counselling skills as well as knowledge of legal issues, experience in child care and good communication skills."

10 The Committee resolved on 1 February 2000 to endorse the appointment of the Applicant to Coordinator. In a letter to the Applicant from Ms Rose the terms of her contract were set out as follows—

> "On behalf of the Eastern Region Domestic Violence Services Network I am pleased to offer you the Position of Coordinator with Koolkuna Women's Refuge.
>
> Your employment is on a full-time basis, 75 hours per fortnight commencing on 3 February 2000.
>
> Your salary will be based on level 6.1, first year of commencement salary of $36,192.00 gross per annum ($18.56 per hour) and will be adjusted from time to time in accordance with salary movements for the CASH Award.
>
> There are a number of formal conditions of appointment which need to be identified and these are—
>
> - A three month probationary period is to apply. If at the conclusion of this period the standards of performance set for this position are achieved your appointment on a permanent basis will be confirmed.
> - Duties are described in the Duty Statement which you have already been given.
> - You are required to follow the policies and procedures of the Refuge.
>
> I welcome you to the position of Coordinator, if you require further information please contact me on the above number."

11 In early February 2000 Ms Rose informed the Respondent's Committee that she had been successful in an application for a 12 month secondment to work on a special project for the Department of Family and Children's Services. She requested and was granted 12 months leave without pay. As Ms Rose was to take up the position within a short period of time, the Committee immediately initiated discussions as to who should be engaged as the Refuge Manager whilst Ms Rose was on 12 months leave without pay. Ms Patricia Tassell, a Personnel Consultant (who in 1999 had been engaged to conduct personnel profiles and staff assessments), suggested to a member of the Committee, Ms Margaret Holland, that the Applicant would be able to fill the role as Refuge Manager whilst Ms Rose was on leave. When the matter was considered by the Committee, Ms Rose supported the suggestion that Ms Pawaboot be offered the position.

12 The Committee resolved to offer the position to Ms Pawaboot on 15 February 2000. It was noted in the Committee Minutes that where Ms Pawaboot has identified weaknesses (i.e. written skills) the Committee expected that the replacement Coordinator will address these weaknesses.

13 The Applicant testified that she met with Ms Day and Ms Rose and was asked if she would work in the Refuge in the position of Manager whilst Ms Rose was seconded to the Department of Family and Children Services. She said she had just been appointed to the position as Coordinator for a week so she asked Ms Day, "How do you know that I have the skills to fill the manager's position?" She said she also pointed out that English was not her first language. She testified that she was reassured by Ms Day that one of the conditions of Ms Rose being allowed to take up the secondment is that she (Ms Rose) would be able to come back to the Refuge to support her (the Applicant) until she (the Applicant), Ms Day and Ms Rose felt comfortable. Further she says that Ms Day informed her that the Committee was behind her and would support her in the position 150%. The Applicant also testified that at the time she was appointed Coordinator, other members of staff were not happy with her appointment and that they threatened to walk out from a meeting. She said that she informed Ms Day of this when Ms Day offered her the position of Refuge Manager and Ms Day told her, "Not to worry, Pranee, we are going to come and meet with the staff." Ms Day denied that the Applicant informed her that staff had threatened to walk out.

14 Ms Rose testified that she did not think that the Applicant would accept the position of appointment to Refuge Manager as she thought that the Applicant lacked confidence and that her English skills would let her down. She said that when the Applicant was appointed as Coordinator she had not anticipated any difficulty with her appointment to that position as she (Ms Rose) had the skills the Applicant lacked.

15 Ms Rose also testified that at the time the Applicant accepted the offer to work as Refuge Manager she took over the Refuge at a very difficult time. She said that at that time two long standing refuge workers and a team leader had left and the Refuge was short staffed.

16 The Applicant accepted the offer as Refuge Manager and Ms Rose was instructed by Ms Day to draw up a letter of appointment. Ms Day gave no instructions as to salary. Ms Rose drew up a letter dated 11 March 2000. The letter contains the terms and conditions of appointment of Refuge Manager which are as follows—

> "On behalf of the Eastern Region Domestic Violence Services Network Inc. Committee of Management, I am pleased to offer you employment as Refuge Manager.
>
> Your employment will be for a period of 52 weeks commencing on 13 March 2000 and expiring on 12 March 2001 at 75 hours per week.
>
> Your salary will be based on level 8.2 on a commencement salary of $22.73 per hour and will be adjusted from time to time in accordance with salary movements for the CASH award.
>
> Your duties are outlined in the Duty Statement which you have already been given.
>
> Should you require further clarification on any matter relative to your employment please discuss these with the Chairperson, Dorothy Day."

17 The attached Duty Statement for Refuge Manager stated the duties of the position were among others to—

> "1.1 Manage and co ordinate all projects and programmes within the refuge…
>
> 1.3 Ensure maintenance of appropriate records and statistical data collection…
>
> Financial Management
>
> 2.1 Preparation of reports, budgets or forecasts to meet Management Committee or Legislative requirements.
>
> 2.2 Ensure regular collection and banking of monies, payment of wages and accounts, and the maintenance of a bookkeeping system in line with SAAP guidelines, legal requirements and to the satisfaction of the Management Committee.
>
> 2.3 Explore sources of funding and prepare submissions in response to identified need.
>
> Staff
>
> 3.1 Supervise Refuge Coordinator to ensure that the refuge consistently meets SAAP standards for service delivery.
>
> 3.3 Work for the resolution of any grievance according to refuge procedures if required."

18 After the Applicant accepted the offer to work as Refuge Manager, Ms Day met with all of the staff and informed them that the Board had appointed the Applicant as Refuge Manager whilst Ms Rose was on secondment.

19 The position of Coordinator was advertised and was filled by Ms Angela Niblett. At the time of the appointment Ms Niblett was a part-time staff member of the Refuge. Ms Niblett was engaged as Coordinator for the period Ms Rose was on secondment.

Events that occurred after the Applicant was appointed Refuge Manager

20 The Applicant commenced working as Refuge Manager on 13 March 2000.

21 The Applicant testified that in the first few weeks after she was appointed she had problems with staff members. She said the staff were not happy and after two weeks one of the staff asked to take some sick leave and holidays because she (the staff member) "could not cope with the new Manager (the Applicant) and the new Coordinator (Ms Niblett)".

22 When engaged as the Coordinator Ms Niblett also worked in a clerical position for the Eastern Region Domestic Violence Prevention Council. A dispute between the Applicant and Ms Niblett initially arose as Ms Niblett made changes to her rostered hours to accommodate her employment in the other job without consulting the Applicant. On 29 March 2000 the Applicant wrote to Ms Niblett advising her that her performance and the standards expected of her are those set out in the policies and procedures manual and that in the event that she does not meet those standards her employment may be terminated. The Respondent's Policy and Procedures Manual required all employees to work the hours indicated by the shift except where changes have been authorised by the Manager.

23 Other staff later raised a number of issues with the Applicant concerning Ms Niblett. On 10 April 2000 the Applicant met with three Refuge workers to discuss the issues. The Applicant then met with Ms Niblett on 11 April 2000 to discuss the issues raised by the staff.

24 On 4 May 2000 the Applicant wrote to Ms Niblett setting out a number of issues including attendance at staff meetings, follow up for staff training, being a good role model for staff members and the roster issue.

25 On 5 May 2000, the Applicant presented a Manager's report to the monthly meeting of the Respondent's Committee. She advised the Committee that the Coordinator was new to her position and unsure of her duties but that she had met with her on 11 April 2000 and Ms Niblett had apologised. She also advised the Committee that all the staff are now very clear about the duties of the workers and the Coordinator. Further she advised the Committee that she had organised mediation to resolve ongoing personal issues between Ms Niblett and two other staff members. She advised the Committee that she had appointed Madeleine who was employed as a clerical worker to mediate the dispute.

26 The Committee on 5 May 2000 resolved that the Applicant should no longer deal with the disciplinary issues with Ms Niblett and that the proposed mediation was to be cancelled. The mediator was considered by the Committee members to be an inappropriate person as she was employed at a lower level of classification than the Coordinator. The Committee resolved that Ms Day would get appropriate advice, take responsibility for the issues to be raised with Ms Niblett and provide a report to the Board at the next meeting.

27 Having being present at that meeting and despite the resolution of the Committee, the Applicant wrote a letter to Ms Niblett on 5 May 2000 raising a number of issues that she (the Applicant) said needed to be addressed (including the issue in respect of rostered hours) and gave the letter to Ms Niblett on 6 May 2000.

28 The Applicant sent a copy of the letter to Ms Day. On receipt of the letter Ms Day immediately wrote to Ms Niblett and advised her that she should disregard the Applicant's letter as it was provided without the approval of the Committee. Ms Day also sent a letter on 9 May 2000 to the Applicant formally directing her to provide in writing an explanation by 11 May 2000 as to why she (the Applicant) took action contrary to the directive of the Committee. The letter pointed out that as the letter to Ms Niblett was written without authority, Ms Day had requested Ms Niblett to disregard it. The Applicant was advised that unless she provided an explanation acceptable to the Committee her actions could be viewed as wilful misconduct, which could result in termination of her employment.

29 The Applicant responded to Ms Day on 11 May 2000. In her response the Applicant advised Ms Day that—

> "… I acknowledge and respect the decisions of the Management Committee my intentions in writing to Andrea were not to exacerbate an already difficult situation. On the contrary, it was an honest attempt to alleviate the situation by informing Andrea of the issues at hand. I had previously attempted to speak with Andrea however we were unable to discuss the issue in full."

30 On 12 May 2000 Ms Day replied to the Applicant as follows—

> "Thank you for your letter of 11 May 2000.

I wish to confirm my verbal advice to you today, that the Management Committee accepts your explanation for your actions regarding the matters outlined in my letter of 9 May 2000.

The Management Committee accepts that you are new to the Manager's position and are well aware of the difficulties you have experienced in some areas of staff management. It was for this reason that they determined on this occasion to take no further action.

As a Management Committee our role is to ensure the continued development of services at Koolkuna. It is essential that you meet the standards required of a Manager. This includes—

- Taking direction from the Management Committee, in particular the Chairperson
- Accepting management responsibilities. You are Manager, and were appointed on the basis that you possessed or had the ability to acquire the skills to effectively manage Koolkuna. You are not required to, and should not find it necessary to seek advice from the previous Manager. Direction, support or advice should be sought from, and will be freely given by the Chairperson of the Management Committee
- Managing staff in an assertive but where possible, non directive manner
- Adhering to the tasks outlined in your job description
- Delegating operational tasks as appropriate to the Coordinator to enable you to undertake the strategic management tasks required

To assist you participate more effectively in management committee meetings, would you please arrange for a minute taker to be employed for future meetings. This should not be a previous or current member of Koolkuna staff.

I acknowledge your commitment to the service, and trust that our recent difficulties have been constructive in identifying solutions to current problems, and in clarifying your role in relation to the management committee.

I am always available to provide you with support and guidance should it be required."

31 In May 2000 the Committee arranged for Ms Patricia Tassell to provide assistance to the Applicant in developing management skills. Ms Tassell was also engaged to prepare a report to the Committee in respect of the professional management practices operating within the Refuge. In preparation of the report Ms Tassell interviewed members of staff including Ms Niblett and the Applicant. Staff members were asked to fill out a personality profile questionnaire. The purpose of the questionnaire was to assist Ms Tassell to gain an understanding of how staff communicated their work style and to assess their suitability for their roles.

32 Ms Tassell presented a report to the Committee. In her report she stated that her enquiry found that staff conflict issues had taken precedence over the normal operations of the centre. In her report under the heading "Summary" she stated—

> "The present Koolkuna environment appears to be one where workers are unsure of their roles, afraid to ask questions of the Co-ordinator for fear of being ridiculed or demeaned, are frustrated and generally lacking in motivation to meet the needs of clients. It is extremely important that steps are taken to support the Manager, clarify the role of Co-ordinator and document a very clear chain of command. A lack of clarity about boundaries was again raised as a major issue. It is extremely important that matters relevant to staffing policies be dealt with during work time."

33 Ms Tassell made a number of recommendations, including that steps be taken to support the Manager, to clarify the role of Coordinator and to document a very clear chain of command.

34 On 12 May 2000 Ms Day wrote to Ms Niblett and advised her that her work with the Eastern Region Domestic Violence Prevention Council was conflicting with her work at the Refuge as Coordinator. Ms Day advised her that the Committee had determined that her hours of work must coincide with those required by the organisation. She was directed that from 12 June 2000 her hours of work would be from 8.30 to 4.30 Monday to Friday and that during the next four weeks until the amended hours of work are in place she must adhere to the current roster. Further she was directed to demonstrate courteous professional and supportive behaviour towards the Applicant and to other employees. She was also advised that a meeting would be held on 9 June 2000 to review her performance.

35 On 9 June 2000 Ms Day wrote to Ms Niblett and advised her that her review period would be extended until 23 June 2000.

36 On 12 June 2000 one of the Refuge workers, Ms Atetha Naitanui telephoned Ms Day and informed her that the staff wanted a meeting with her as soon as possible and that the staff wished to meet with her in the absence of the Applicant and Ms Niblett. Ms Day and Ms Holland arranged to meet with the staff at 3.30pm the same afternoon. Ms Naitanui testified that at that meeting the staff raised the fact that there was only one permanent full-time staff member apart from the Manager and the Coordinator. Further they advised Ms Day and Ms Holland that they were sick of the lack of focus on clients and they wanted to be left out of the power struggle between the Applicant and Ms Niblett. They complained that staff had been stopped from involvement in case management. Ms Naitanui testified that all staff were very stressed and that is why she telephoned Ms Day. Ms Naitanui's evidence in respect of the staff meeting was corroborated by the evidence given by Ms Day.

37 Ms Day met with the Applicant the next day. Ms Day testified that the Applicant asked why she was excluded from the meeting and that Ms Day replied, "They excluded you from the meeting, Pranee, and I have to be really blunt and honest with you because they have no confidence in you as a manager." She said that halfway during the meeting Ms Holland arrived and informed the Applicant that the conflict was to stop, that the focus was to be on the clients and that the situation was intolerable.

38 The Applicant testified the reason why Ms Day met with her was because Ms Day wanted to know exactly how many staff were employed full-time and part-time. She said that when she asked why she was excluded from the meeting Ms Day informed her, "It is not so much about you, it's about the mess from Lorena, Lorena left the mess." She agreed that Ms Holland came into the meeting and said she was not happy to hear that the agency only had three full-time workers, being the Manager, the Coordinator and one support worker. She said that Ms Holland told Ms Day to sort it out with her (the Applicant). The Applicant denied that she had a problem with Ms Niblett, that the problem was between Ms Niblett and other staff.

39 The Committee arranged for a team building weekend on 23 and 24 June 2000 to increase morale amongst the staff. Both the Applicant and Ms Niblett, together with five other employees went to stay in Mandurah for the weekend. The Applicant testified that after the team building weekend all grievances were settled and everyone at the weekend agreed to move on and that after the weekend staff got on very, very well. Ms Josephine Isaacs one of the Refuge workers who attended that weekend, gave similar evidence. Another Refuge worker, Ms Katherine Galbraith, also testified she thought that the team building weekend brought some positive feelings to the group. Ms Joy Baker, the Refuge bookkeeper, also gave evidence that after the team building weekend the tension between staff members was reduced.

40 The members of staff who attended the team building weekend sent a memorandum to the Committee. It is

apparent from that document the weekend was spent relaxing and drinking substantial amounts of alcohol. In relation to the resolution to put aside all past conflicts, it is recorded in the memorandum, "Saturday, also, we had a small meeting where all staff decided to let the past be the past and start fresh. We did this because we had to or the management committee would not have paid for our drunken revels of the weekend. Most staff decided it was worth the time to get a freebie weekend."

41 Ms Tassell held a planning and assessment seminar with the staff on 30 June 2000. The seminar was designed to address the way in which services were delivered, how policies and procedures should be followed, to facilitate open communication, to increase information flow, to develop career paths and to create an effective evaluation of the service.

42 The Applicant met with Ms Tassell for a second management supervision meeting on 8 July 2000. In her Manager's report to the Committee dated 7 July 2000 the Applicant stated that she would like to thank the Committee for their support and understanding in providing this service to her.

43 The Committee held its monthly meeting on 7 July 2000. At that meeting, Ms Day asked the Applicant whether it was true that Ms Niblett had attended a meeting of the Eastern Region Domestic Violence Prevention Council during the hours she was rostered to work at the Refuge. Ms Day testified that the Applicant informed her that Ms Niblett had attended the meeting. Ms Day said that she then asked the Applicant whether she gave her (Ms Niblett) permission to attend. Ms Day testified that the Applicant said, "yes" but she then said that she did not know that Ms Niblett was going to be at that meeting until she (the Applicant) arrived at the meeting. Ms Day said she asked the Applicant whether Ms Niblett's timesheet indicated she had attended that meeting because the meeting went for 2 ½ or 3 hours. She said that the Applicant replied that Ms Niblett's timesheet states 8.30am to 4.30pm and that she (the Applicant) told her (Ms Niblett) to put those hours on the timesheet as they were her rostered hours. Ms Day said that the Applicant then informed her that Ms Niblett stayed back that day and made up the hours. Ms Day testified that she was very angry with the Applicant because the Committee had directed Ms Niblett not to deviate from the roster under any circumstances and that the actions of the Applicant in allowing her (Ms Niblett) to attend the meeting, undermined the disciplinary action and processes put in place in respect of Ms Niblett. Ms Day testified that she informed the Applicant that she could be sacked on the spot for her actions. Ms Day also testified that she asked the Applicant why did she allow Ms Niblett to vary the hours and the Applicant replied, that she was the Manager and that she was allowed to make decisions.

44 The Applicant when questioned about what was said by Ms Day to her at the Committee meeting conceded in cross examination that Ms Day had informed her that she could be sacked on the spot. Notwithstanding this concession the Applicant testified that she did not know that Ms Niblett was attending the meeting until she (the Applicant) arrived at the meeting. She agreed that Ms Niblett was rostered to work 8.30am to 4.30pm but said that Ms Niblett worked until 6pm that night because new clients arrived at the Refuge and it was necessary for Ms Niblett to stay back as an inexperienced member of staff was on duty on her own.

45 Ms Day testified that after the Committee meeting she and the other members of the Committee formed the view that the Applicant was not functioning as a manager. Further that clients' services were in jeopardy because of the conflict between Ms Niblett and the Applicant, and the Applicant's lack of managerial skills.

46 The Committee determined it would relieve the Applicant from her duties as Refuge Manager. Ms Day gave notice to the Applicant on 19 July 2000 that she would return to her position as Coordinator from 31 July 2000. The notice stated—

> "It is with regret that I inform you that the Management Committee have decided to relieve you of your higher duties as Manager of Koolkuna. You will return to your original position as Coordinator on Monday 31 July 2000.
>
> The reason for our decision is that you have not demonstrated that you hold management skills at the level required to ensure the professional operation of Koolkuna. This places the organisation at risk of non compliance to contractual and legal obligations, and duty of care to both staff and clients.
>
> As you are aware the Management Committee have for the past four months endeavoured to assist you develop your skills. This has included giving advice and guidance, assistance with letters and submissions, management of staff issues on your behalf, and providing one to one training. This support however has not resulted in you demonstrating the ability to take direction or manage the service effectively.
>
> By resuming the position of Coordinator you will have the opportunity to work under the professional guidance of an experienced Manager which will assist you develop your skills. This will also relieve you of some of the undoubted pressure you are currently experiencing.
>
> We would be seriously remiss in our duty of care to Koolkuna to allow the current situation to continue.
>
> On behalf of the Management Committee, I would like to take this opportunity to thank you for the effort you have given in the last four months, and express regret that your efforts were unsuccessful."

47 The effect of the decision to relieve the Applicant from the position of Refuge Manager was that Ms Niblett ceased to work as Coordinator and Ms Niblett was returned to her position of support worker.

Events following the regression to Cooordinator

48 The Applicant started work as Coordinator on 31 July 2000. She did not however accept the regression and the Australian Services Union West Australian Clerical and Services Branch ("the Union") took up the dispute on her behalf. On 31 July 2000 the Union wrote to Ms Day and advised the Applicant was seeking re-instatement to a position of Refuge Manager. Ms Day met with the Union on 11 August 2000. On 17 August 2000 Ms Day wrote a lengthy letter to the Union setting out a number of issues which the Respondent contended that the Applicant's management skills were not to the standard required for the efficient operation of the Refuge. In summary, the allegations raised in the letter are as follows—

(a) The Applicant had received a complaint from a client in March 2000 and was directed by her (Ms Day) to follow the complaints procedure. In April 2000 the Applicant advised that she had spoken to Ms Rose who advised her to ignore the client's complaint which she did. She (Ms Day) told her (the Applicant) she was to follow the directions of the Committee.

(b) The conflict between the Applicant and Ms Niblett.

(c) The Applicant had failed to seek funding for the Residential Education Program in a timely and proper fashion. In particular the Applicant reported to the Committee on 7 July 2000 that preliminary action to obtain funds had only just been taken. Further that the Applicant then submitted the proposal to the potential funding body in July without seeking approval or amendment from the delegated Committee member or Chair.

(d) The Applicant had prepared a sub-standard submission to obtain funds from the Lotteries Commission to replace the Refuge bus.

(e) Since action was taken by the Respondent to revert the Applicant to the position of Coordinator her performance and conduct was intolerable. She was intimidating towards staff and created substantial insecurity regarding their positions. She did not attend work for two days prior to the commencement of the new Manager and did not give

a reasonable explanation for her absence. Further she did not attend work for one day in the following week and she did not give a reasonable explanation or provide a medical certificate.

49 Ms Day advised the Union in the letter dated 17 August 2000 that the Committee was now of the opinion that the Applicant's continued employment was putting the service at risk. Further there was a strong likelihood that staff would take sick leave or resign due to the untenable negative atmosphere created by the dispute. Ms Day also advised the Union that notwithstanding the Committee's decision to place the Applicant back in the Coordinator's position, her continued employment was now under review. The letter then went on to state that before proceeding any further the Applicant would be given an opportunity to respond to the matters raised in the letter and to provide the Committee with any suggestion or strategy whereby her dispute with staff could be concluded. To allow the Applicant time to consult with the Union and to provide a written response she was relieved of her duties on pay from 18 August 2000 until 24 August 2000.

50 The Union responded on behalf of the Applicant on 28 August 2000. The letter contained a detailed response and a request that Ms Day meet with the Applicant and the Union in an endeavour to resolve the dispute. A further meeting was held on 14 September 2000. At that meeting further issues relating to the Applicant's performance were raised by Ms Day. It was apparent from the evidence that each of these issues arose after the decision was made to revert the Applicant to the position of Coordinator. These issues were raised in a letter to the Applicant dated 15 September 2000 and related to an alleged failure to complete the six monthly service progress reports, the computerised accounting system being out of date and not being GST compliant, and an allegation that on 31 July 2000 the Refuge computer held very few documents and many of the diskettes which were labelled as holding documentation of the organisation were found to be empty.

51 At the meeting on 14 September 2000 the Applicant advised Ms Day that staff of the Refuge supported her return to the position of Refuge Manager. The Applicant remained on full pay, however she was not directed to attend work.

52 As a result of the Applicant's comments about views of the staff, Ms Day conducted a survey of staff members. She left seven survey forms at the Refuge whereby members of staff were asked to fill out the form without identifying their name. If they chose to complete the form they were required to tick "Yes" or "No" to two questions. The first question was, "Would you accept Pranee back as the Manager of Koolkuna?" and the second was, "Would you accept Pranee back as the Coordinator of Koolkuna?"

53 Six of seven survey forms were returned. Five of the six forms had the boxes ticked indicating the authors would not accept the Applicant back as Refuge Manager, or as the Coordinator. The author of the other form left the question blank as to whether the Applicant should be accepted back as Manager but had ticked the box indicating yes the author would accept the Applicant back as the Coordinator.

54 On 21 September 2000 the Applicant responded to the issues raised in the letter to the Applicant dated 15 September 2000. She refuted each of the allegations and stated that she admitted that she lacked management skills as a Refuge Manger. Further she stated that she informed Ms Day on the day Ms Day offered her the position as Manager that she did not have experience working as a manager in the Refuge.

55 A special Committee meeting was held on 20 October 2000. The Committee determined that the Applicant's employment be terminated. On 25 October 2000 the Applicant was notified of the Committee's decision to terminate her employment. In the letter dated 25 October 2000 the Applicant was advised—

> "Further to meetings and correspondence between us during the period you have been relieved of duty, I now advise you of the Committee's decision with regard to your employment at Koolkuna.
>
> After serious consideration of all of the issues involved, the Committee has unanimously determined at its Committee meeting on 20 October, 2000 that your services with Koolkuna be terminated.
>
> While regard was had to the performance of your duties over the period of your employment prior to and during your appointment to Manager, the view is that your return to duty would seriously undermine the endeavours of the Committee, the Manager and staff to re establish a stable effective environment for staff and clients alike.
>
> The organisation is now under professional management and the working environment is stabilising and progressing to the satisfaction of Family and Children's Services and the Management Committee. The administration and financial records are being managed efficiently. It is vital to the continued operation of the service that this stability is maintained.
>
> The Committee is required to exercise their duty of care to current staff by providing them a secure harmonious workplace. The Committee cannot afford to risk the continued commitment to the organisation of the Manager or the experienced and loyal staff. It is also critical that services to clients continue to be delivered to the highest standards, and meet the outcomes required by Family and Children's Services. Any disruption to the staff profile at this stage will unquestionably jeopardise those standards and thus the future of the service.
>
> The Committee concluded therefore, having regard to the issues which have been raised in the process of reviewing your employment; your failure to accept responsibility for your part in the breakdown of relationships between staff and yourself, and the loss of confidence by the Board in your ability to fulfil their reasonable requirements and act in the interests of the organisation, that your employment is to cease effective immediately.
>
> In view of your refusal to consider any mutual basis for an agreed separation, the Committee has no alternative but to terminate by payment in lieu of the notice period and you will be paid all accrued and pro rata annual leave to which you are entitled."

56 The Applicant was paid two weeks pay in lieu of notice.

57 On 12 November 2000 the Committee considered three reports from consultants engaged to examine the staff structure of the Refuge and noted that each of those reports had recommended that the position of Coordinator be abolished as two management level positions to supervise five (full-time equivalent positions) was not tenable.

Nature of engagement of Refuge Manager

58 The Respondent argues that the Applicant was engaged for a temporary contract as a Refuge Manager and that the terms and conditions of the CASH Award applied to the contract. Pursuant to clause 16.5.2 of the CASH Award employees can be employed for a specific project which an employer has a reason to believe has a duration of 12 months or less. Further clause 16.5.1 of the CASH Award provides that a fixed term employee may be engaged to work on a full-time or part-time basis, for a period not exceeding 52 weeks in a position which is temporary in nature for a specified period of time, or to relieve in a vacant position arising from an employee taking leave in accordance with the Award.

59 It is clear from the terms of her appointment as Refuge Manager that the nature of the engagement was for a period of 52 weeks commencing on 13 March 2000. Further that the salary for the position as Refuge Manager was required to be adjusted in accordance with salary adjustments for the CASH Award.

60 In my view whether the contract was made pursuant to the terms of the CASH Award is immaterial, as the nature of the contract was for a period of fixed time. It is clear from the express terms of the contract that there was no provision for termination of the contract by the giving of

notice. It is also clear that the nature of the engagement as Refuge Manager was temporary in the sense that when the secondment of Ms Rose came to an end the Applicant was required to revert to her position of Coordinator. However when the contract for the Refuge Manager was entered into it was anticipated that the Applicant would not return to the position of Coordinator until Ms Rose returned from her secondment in March 2001.

61 Clearly the Respondent unilaterally varied the terms of the Applicant's contract of employment by reverting her to the position of Coordinator. I am satisfied that regression in these circumstances constitutes in law, a dismissal. However I have formed the view that the termination of the Applicant's contract as Refuge Manager was not in the circumstances harsh, oppressive or unfair. I am of the view that the Applicant's performance as Refuge Manager was such as to show that she disregarded the essential conditions of her contract (which was of such a nature that constituted a repudiation of one of the essential conditions of the contract) so as to entitle the Respondent to accept the repudiation and to terminate the Applicant's contract.

62 The reasons why I have reached this conclusion are as follows—

(a) I accept Ms Day's evidence that from the very early days of the Applicant's engagement as Refuge Manager the Applicant showed poor management skills. Although the Applicant argues that the Committee did not support her as Manager and provide her with training and assistance, the evidence does not support that contention. Ms Madeleine Hicks gave evidence on behalf of the Applicant that she assisted the Applicant in drafting correspondence and report writing. Further Ms Tassell gave evidence that she provided the Applicant with counselling and supervision in an attempt to assist the Applicant in her role as Refuge Manager. In addition it is clear from the evidence that when the problem with Ms Niblett emerged that Ms Day took over that disciplinary issue. However the Applicant by her conduct did not assist that process, to the contrary her conduct was subversive.

(b) I do not accept the Applicant's evidence that there was no conflict between her and Ms Niblett. Ms Isaacs, Ms Galbraith and Ms Baker all gave evidence on behalf of the Applicant. Each one of those witnesses testified that there was friction between Ms Niblett and the Applicant which made it difficult for the support workers to do their work.

(c) I do not accept the Applicant's evidence about what occurred at the meeting she had with Ms Day and Ms Holland on 13 June 2000. There is no evidence that Ms Rose left the refuge in an unsatisfactory state when she left on secondment. Further given that Ms Day regularly visited the refuge I do not accept the Applicant's evidence that Ms Day called a meeting because she (Ms Day) wished to ascertain how many full-time and part-time workers worked at the Refuge.

(d) I do not accept the Applicant's version of events as to what she said to Ms Day at the Committee meeting on 7 July 2000. I accept Ms Day's evidence that the Applicant informed the Committee that the Applicant had given Ms Niblett permission to attend the Eastern Region Domestic Violence Prevention Council meeting.

(e) In the duty statement of the Refuge Manager (annexed to the contract of employment as Refuge Manager) two of the essential criteria are proven organisational and management skills, and staff management and development skills.

63 Whilst it is clear that in retrospect the Respondent should not have offered the position as Refuge Manager to the Applicant as she did not have the necessary skills, that does not mean that the Respondent was not entitled to terminate her employment as Refuge Manager after it was revealed that her lack of skills resulted in conflict that made it difficult for the Respondent's services to function efficiently.

Termination of the position of Coordinator of the Refuge

64 After the Applicant was regressed to the position of Coordinator from 31 July 2000, the Applicant worked as Coordinator for a period of three weeks. Although it was suggested in a letter to the Union that the Applicant's performance in that position was unacceptable and Ms Day made a passing reference in her evidence that the Applicant had harassed staff after she was regressed it was not put to the Applicant that her performance as Coordinator in that period of time was unsatisfactory. It appears the reason why the Applicant was stood down on 18 August 2000 on full pay was for her to be provided with an opportunity to answer the performance issues which had been raised in respect of her duties as Manager. Further it is clear from the time that the Applicant's position as Refuge Manager was terminated that the Applicant demanded and continued to demand that she be reinstated to the position of Refuge Manager. However at no time after 18 August 2000 until the Applicant's employment was terminated on 25 October 2000 was the Applicant directed to return work as a Coordinator.

65 In light of my findings in paragraph 64, in particular to the fact that the Applicant was not directed to work as Coordinator after 18 August 2000, I am satisfied that she has made out a claim that she was unfairly dismissed from that position.

Compensation

66 It is clear that the terms of the Applicant's contract as Coordinator was that the contract was subject to the express term that the Applicant was to be engaged on three months probation. The Applicant's evidence established that she worked in that position for five weeks from 1 February 2000 to 13 March 2000 and for a further three weeks from 31 July 2000 to 18 August 2000.

67 In light of the fact that the Respondent made a decision to abolish the position of Coordinator on 12 November 2000 it is clear that the Applicant's contract as Coordinator would have been terminated in any event.

68 As the Applicant had only served eight weeks of the probationary period it is my view that an award for compensation should be made for five weeks remuneration at the rate of pay paid to the Applicant as Coordinator. As Commissioner Fielding (as he then was) held in *Charles William Westheafer v Marriage Guidance Council of WA* (1985) 65 WAIG 2311 at 2311—

> "The concept of probationary employment is well known and well understood in employment law. It is that an employer by engaging someone on probation throughout the period of probation retains a right to see whether he wants the employee or not in his employment as if the employee was still at the first interview. Hence there is no obligation on the employer to even objectively consider whether or not he should re-engage an employee at the end of the probationary period."

69 The Applicant has given evidence that following her termination she has unsuccessfully applied for domestic violence services work. Accordingly I am satisfied that she has attempted to mitigate her loss.

Conclusion

70 In light of my finding that the Applicant was not harshly, oppressively or unfairly dismissed in her position as Refuge Manager, Application 1321 of 2000 that she was unfairly dismissed will be dismissed. Further in light of that finding, her claim for contractual benefits will also be dismissed. In relation to Application 1725 of 2000 that the Applicant was harshly, oppressively or unfairly dismissed from her employment as Coordinator, I will make a declaration that she was unfairly dismissed and order that the Applicant be paid the sum of $3,480 as compensation.

2001 WAIRC 02696

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	PRANEE PAWABOOT, APPLICANT *v.* EASTERN REGION DOMESTIC VIOLENCE SERVICES NETWORK INC., RESPONDENT
CORAM	COMMISSIONER J H SMITH
DELIVERED	FRIDAY, 4 MAY 2001
FILE NO	APPLICATION 1321 OF 2000
CITATION NO.	2001 WAIRC 02696

Result	Dismissed
Representation	
Applicant	in person
Respondent	Mr M Connor as agent

Order.

HAVING heard the applicant and Mr M Connor as agent on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the application be and is hereby dismissed.

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

2001 WAIRC 02769

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	PRANEE PAWABOOT, APPLICANT *v.* EASTERN REGION DOMESTIC VIOLENCE SERVICES NETWORK INC., RESPONDENT
CORAM	COMMISSIONER J H SMITH
DELIVERED	WEDNESDAY, 9 MAY 2001
FILE NO	APPLICATION 1725 OF 2000
CITATION NO.	2001 WAIRC 02769

Result	Declaration that the Applicant was unfairly dismissed and an order made that the Applicant be paid five weeks pay as compensation
Representation	
Applicant	in person
Respondent	Mr M O'Connor as agent

Order.

HAVING heard the Applicant and Mr M O'Connor as agent on behalf of the Respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby—

1. Declares that the Applicant was unfairly dismissed.
2. Orders that the Respondent do pay the Applicant $3,480 within 7 days of the date of this order as compensation.

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

2001 WAIRC 02968

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	JASMINE L PORTER, APPLICANT *v.* SAM SORENSEN PTY LTD ACN 078 460 278 T/AS CLAREMONT VETERINARY CLINIC, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DELIVERED	FRIDAY, 1 JUNE 2001
FILE NO/S	APPLICATION 357 OF 2000
CITATION NO.	2001 WAIRC 02968

Result	Order issued.
Representation	
Applicant	Ms J L Porter
Respondent	Ms S Sorensen

Order.

HAVING heard Ms L Porter on her own behalf and Mr S Sorensen on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 and in particular s 27(1)(a), hereby orders—

THAT the Commission refrains from further hearing the respondent's application for costs against the applicant.

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

2001 WAIRC 02861

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	JACOB RAKITIC, APPLICANT *v.* PERTH AUTO ALLIANCE (CENTRE FORD NORTHBRIDGE), RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	WEDNESDAY, 16 MAY 2001
FILE NO	APPLICATION 292 OF 2001
CITATION NO.	2001 WAIRC 02861

Result	Application dismissed for want of jurisdiction
Representation	
Applicant	Mr J Rakitic on his own behalf
Respondent	Mr B Walker as agent

Reasons for Decision—
Preliminary hearing on jurisdiction

(Given extemporaneously and subsequently edited by the Commissioner)

1 This is an application made pursuant to section 29(l)(b)(i) of the *Industrial Relations Act 1979*, (the Act) by Mr Jacob Rakitic, the applicant, alleging unfair dismissal by Perth Auto Alliance (Centre Ford Northbridge), the respondent.

2 The applicant filed the application in the Commission on 15 February 2001. The application properly displays a stamp of the Registrar on that day. The application came on for conference pursuant to section 32 of the *Act* on 27 March 2001 and could not be settled by conciliation. The matter was thus referred for hearing.

3 In the respondent's notice of answer and counter-proposal filed on 6 March 2001, the respondent raised the

jurisdiction of the Commission to hear the matter, claiming the applicant had lodged his claim out of time. The respondent claimed the date of termination to be 16 January 2001. The applicant claimed the date of termination to be 18 January 2001, in his application.

4 The matter was brought on for preliminary hearing on 16 May 2001 to determine whether the application was made within time and whether it is competent to be heard and determined by the Commission.

5 The Commission has heard evidence from the applicant Mr Jacob Rakitic, Mr Ross McIntosh, a previous employee of the respondent and Mr Torri Mancuso, the Service Operations Manager of the respondent. All have come forward and honestly given their evidence. Having said that it is clear from the applicant's evidence that the last day worked was 16 January 2001. This is confirmed by the letter of termination [Exhibit JR1] and further by the unchallenged evidence of Mr McIntosh and Mr Mancuso.

6 Mr Rakitic in his evidence says that he was unsure and thought that he was given time on 16 January 2001 to decide when he wanted to end his employment. This is a claim that is refuted in evidence by Mr Mancuso for the respondent who under cross examination stated that he gave both Mr Rakitic and Mr McIntosh the option of working out their notice or leaving straight away. His evidence was that both agreed to take the payment in lieu and leave.

7 Mr McIntosh's evidence supports Mr Mancuso in that regard in so far as it relates to himself. He says it was even clear, by his restricted access to the computer to clock off, that his services were terminated on 16 January 2001. He later came back to hand in his uniform and have his termination pay explained to him. Mr McIntosh was clearly not happy about being made redundant.

8 In addition to the evidence of Mr Mancuso and Mr McIntosh, the letter of termination and separation certificate for Mr Rakitic are clear and specify 16 January 2001 as the date of termination.

9 On the weight of the evidence balanced against the uncertainty expressed by Mr Rakitic, I find that the date of termination to be 16 January 2001.

10 In *Siagian—v- Sanel Pty Limited* 54 IR 185 @ 206 Wilcox CJ says—

> "It seems to me that, in the absence of evidence of a contrary intention, it should usually be inferred that the employer intended the termination to take effect immediately. This conclusion not only reflects the more accurate meaning of the phrase "payment in lieu"; it accords with common sense. An employer who wishes to terminate an employee's services, and is prepared to pay out a period of notice without requiring the employee to work, will surely usually wish to end the relationship immediately. If the employee is not to work, there is no advantage to the employer in keeping the relationship alive during the period for which payment is made".

It is clear and undisputed that Mr Rakitic was paid in lieu of notice. I find that this took effect on 16 January 2001.

11 I accept and adopt the reasoning of the Senior Commissioner in *E.J.Richardson v Cecil Bros Pty Ltd* 74 WAIG 1018.

> "There is a difference between a time limit which conditions the exercise of jurisdiction and the time limit which governs its exercise (see General Motors Holden's Ltd v Di Fazio (1979) 141 CLR 659). It is apparent from section 29(2) that the time limit stipulated therein is an integral part of and conditions the right of a former employee to refer an application to the Commission alleging harsh, oppressive or unfair dismissal from employment. In those circumstances there is much to be said for the view that the power to extend time has no application in this case since, on its proper construction, section 29(2) does not merely attach a time limit for instituting the proceedings but imposes a time limit 'which is an essential condition of the right itself and unless the condition is satisfied there is no right."'

12 For these reasons, I am of the opinion that the Commission is without jurisdiction to hear this application further and I would dismiss the application and order as such.

2001 WAIRC 02858

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	JACOB RAKITIC, APPLICANT *v.* PERTH AUTO ALLIANCE (CENTRE FORD NORTHBRIDGE), RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	MONDAY, 21 MAY 2001
FILE NO	APPLICATION 292 OF 2001
CITATION NO.	2001 WAIRC 02858

Result	Application dismissed for want of jurisdiction
Representation	
Applicant	Mr J Rakitic on his own behalf
Respondent	Mr B Walker as agent

Order.

HAVING heard Mr J Rakitic on his own behalf and Mr B Walker on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the application be and is hereby dismissed for want of jurisdiction.

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

2001 WAIRC 02772

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	ELIZABETH REEVES, APPLICANT *v.* NAOMI RUTH VICKERY TRADING AS TOP MODELS INTERNATIONAL, RESPONDENT
PARTIES	PENELOPE JEAN LAMBERT, APPLICANT *v.* NAOMI RUTH VICKERY TRADING AS TOP MODELS INTERNATIONAL, RESPONDENT
CORAM	COMMISSIONER J H SMITH
DELIVERED	THURSDAY, 12 APRIL 2001
FILE NO/S	APPLICATION 1825 OF 1999 and APPLICATION 20 OF 2000
CITATION NO.	2001 WAIRC 02772

Result	Applications for orders for payments of denied contractual benefits granted
Representation	
Applicants	in person
Respondent	no appearance

Reasons for Decision (extempore).

1 In each case Ms Elizabeth Reeves and Ms Penelope Jean Lambert made applications under s.29(1)(b)(ii) of the

Industrial Relations Act ("the Act"), claiming that they are owed a sum of money, being a benefit to which they are entitled under a contract of employment, not being a benefit under an award or order.

2 Ms Reeves testified that she was employed as a model by Top Models International on the 6 August 1999 to work eight hours work for "No Regrets". She produced a Model Booking confirmation, that she would be paid the amount of $1250 for that day's work.

3 Ms Lambert testified that she was employed by Top Models International on four occasions, 25 January 1999, 2 February 1999, 9 February 1999 and 10 February 1999. She says that the terms of her engagement were that she would be paid between $55 and $65 per hour with a deduction of 20% commission.

4 Ms Lambert has testified, based on the hours that she worked and the rate that she was to be paid (less commission) that she is owed the amount of $240. Ms Lambert received a cheque in the account name of Top Models International for the sum of $200. The cheque is dated 26 March 1999 and was dishonoured by the Commonwealth Bank on 30 March 1999.

5 In each case following a direction to investigate by the Chief Commissioner, meetings were convened by a Deputy Registrar of the Commission. In Ms Reeves' case, Deputy Registrar Bastian convened a meeting on 29 February 2000. At that conference a Mr Leslie Vickery attended the meeting. Ms Bastian testified that he informed her that he was the father of Naomi Ruth Vickery, and he advised her (Ms Bastian) that Ms Reeves would be paid an amount of $1600 in monthly instalments, from 1 March 2000, to be completed by 1 June 2000. Ms Reeves had unsuccessfully engaged the services of a debt collection agency prior to making this application to the Commission. An agreement was reached with Mr Vickery to pay her the amount of $1600 to compensate her for her costs in seeking to have a debt collection agency recover the money that was owing. Ms Reeves testified that no payments have been received by her.

6 In relation to Ms Lambert, the Clerk to the Commission, Mr Arthur Wilson, convened a meeting on the 14 March 2000. Ms Reeves attended, but there was no appearance on behalf of the Respondent. Mr Wilson later received a telephone message from a Mr Len Vickery. Mr Wilson spoke to Mr Vickery by telephone, who informed him that he was the father of Ms Lesley Vickery and that the money owed to Ms Lambert would be paid within a fortnight. No payment has been received by her.

7 In Ms Reeves' case she claims that the Respondent's name is Top Models International. In Ms Lambert's case she says that the Respondent is Top Models International and that Lesley Vickery is the principal of the business. It is apparent from the evidence given by Ms Bastian and by Mr Wilson that there was some confusion as to who was the principal of the business. The Commission file reveals that no Answer or Counter-Proposal has been filed on behalf of the Respondent in either case, and there has been no appearance by Ms Lesley Vickery or Naomi Ruth Vickery at the hearing or at the meetings convened by the Commission.

8 The Commission's records reveal that a facsimile was received by the Commission on 7 April 2001 from Lesley P Vickery. In that facsimile, which is addressed to the Industrial Commission of Western Australia, it is stated—

> "Subject: Re 185 of 1999 E Reeves, and 20 of 2000 P Lambert.
>
> Dear Sir/Madam, I am writing to advise that Top Models International, a registered business name formerly owned by Naomi Vickery, ceased trading on or about June 30 2000. A business of the same name was registered by myself on 8 August 2000. As the owner of the new business I do not accept any of the liabilities of the former business or its owner. Further, Ms Naomi Vickery is no longer living at her former home address, and I do not know her current whereabouts. I do, however, understand that unless her circumstances have changed she is not in full time employment.
>
> Your faithfully,
>
> Lesley P. Vickery."

9 Ms Bastian was directed by the Commission on 8 June 2000 to investigate and prepare a report whether Naomi Ruth Vickery is the principal of Top Models International, the place of business of the Respondent, and whether Naomi Ruth Vickery admits she owes the amounts claimed.

10 Ms Bastian testified that she unsuccessfully attempted to locate Naomi Ruth Vickery, however she did locate the place of business and made searches of the business name details of Top Models International.

11 The Business Names Extract of the Department of Fair Trading (created on 2 June 2000) states the principal place of business of Top Models International as Suite 3, 1st Floor, Queen's Chambers, 97 William Street, Perth. Further that the person carrying on the business is Naomi Ruth Vickery, her address is 4 Rawlinna Heights, Ballajura, Western Australia and she commenced business on 10 June 1997.

12 Contrary to the place of business stated in the Business Names Extract, Ms Bastian located the Respondent's business at 1st Floor, 158 William Street, Perth.

13 As a result of Deputy Registrar Bastian's inquiries a notice of hearing of this matter, was served at the address of 1st floor, 158 William Street, Perth, on 23 February 2001.

14 Having regard to all of the evidence I am satisfied that in both cases the Applicant's claim for payment is made out.

15 I will make an order declaring, in the case of Ms Lambert's application, that at all material times the principal of Top Models International was Naomi Ruth Vickery, and order that Naomi Ruth Vickery trading as Top Models International do pay within seven days from the date of this order the amount of $240 to Penelope Jean Lambert.

16 In the case of Ms Reeves I make a similar declaration and order that Naomi Ruth Vickery trading as Top Models International do pay within seven days of the date of this order the amount of $1,250 to Ms Reeves.

2001 WAIRC 02576

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	PENELOPE JEAN LAMBERT, APPLICANT
	v.
	NAOMI RUTH VICKERY TRADING AS TOP MODELS INTERNATIONAL, RESPONDENT
CORAM	COMMISSIONER J H SMITH
DELIVERED	THURSDAY, 12 APRIL 2001
FILE NO	APPLICATION 20 OF 2000
CITATION NO.	2001 WAIRC 02576

Result	Application for contractual benefits granted
Representation	
Applicant	in person
Respondent	no appearance

Order.

HAVING heard the applicant the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby—

1. DECLARES that at all material times the principal of Top Models International was Naomi Ruth Vickery.

2. ORDERS that Naomi Ruth Vickery trading as Top Models International do pay within 7 days of the date of this order the amount of $240 to Penelope Jean Lambert.

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

2001 WAIRC 02573

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	ELIZABETH REEVES, APPLICANT
	v.
	NAOMI RUTH VICKERY TRADING AS
	TOP MODELS INTERNATIONAL, RESPONDENT
CORAM	COMMISSIONER J H SMITH
DELIVERED	THURSDAY, 12 APRIL 2001
FILE NO	APPLICATION 1825 OF 1999
CITATION NO.	2001 WAIRC 02573

Result	Application for contractual benefits granted
Representation	
Applicant	in person
Respondent	no appearance

Order.

HAVING heard the applicant the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby—

1. DECLARES that at all material times the principal of Top Models International was Naomi Ruth Vickery.
2. ORDERS that Naomi Ruth Vickery trading as Top Models International do pay within 7 days of the date of this order the amount of $1,250 to Elizabeth Reeves.

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

2001 WAIRC 02846

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	KELLY RUSTON, APPLICANT
	v.
	LEADER LOUNGE FURNISHINGS, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	THURSDAY, 17 MAY 2001
FILE NO	APPLICATION 1547 OF 2000
CITATION NO.	2001 WAIRC 02846

Result	Application alleging unfair dismissal dismissed
Representation	
Applicant	Ms K Ruston appeared on behalf of herself as the applicant
Respondent	Mr G Wake appeared on behalf of the respondent

Reasons for Decision (Extemporaneous).

1 Miss Ruston was employed by the respondent at the time of her dismissal to answer telephones, to sew, to stuff cushions, to make coffees, to cut calicos and to clean up. On the evidence of Ms Hills she can be described as a trainee machinist. She was originally employed from April 1998. Her employment ended on 15 September 2000 after the expiry of three weeks' notice. She claims that her dismissal was unfair. She claims that she was told she had taken too many sick days in August and the business needed only two sewers. She says that she had the longest service and claims that after her dismissal the respondent employed someone to do the duties of cutting calico and quilts which was half her job. She also claims that she was dismissed because she was pregnant.

2 The respondent states that it needed to reduce staff and that process continued after

3 Ms Ruston's dismissal. Mr Wake, on behalf of the respondent, gave Ms Ruston three weeks' notice and he says he was unaware that Ms Ruston was pregnant.

4 Having heard all persons who gave evidence this morning I can say that generally I believe that both Ms Ruston and Mr Wake, and indeed Ms Hills for that matter, gave their evidence truthfully.

5 In a matter such as this where Ms Ruston claims that she was unfairly dismissed, it is up to

6 Ms Ruston to prove her claim according to the evidence. I accept from the evidence that the issue of Ms Ruston's sick days was a reason for the dismissal, however, as Ms Ruston herself acknowledges, at the time she was dismissed she was given two reasons for her dismissal, the second one being the need to have only two sewers. Therefore even on Ms Ruston's own evidence, there were two reasons for her dismissal. As to that, I accept the evidence of

7 Mr Wake that the principal reason for the dismissal was the need to down-size. I accept

8 Mr Wake's evidence for the need to reduce the numbers of the staff for the reasons he has given and the changes which have occurred to the business. This means that the issue of the number of Ms Ruston's sick days becomes of less importance. That is, it is reasonable to assume that even if Ms Ruston had not taken the number of sick days that the respondent believed, then on the evidence, the down-sizing would still have needed to occur.

9 I therefore find that the number of days that Ms Ruston was sick in August is not a material issue, although I note that Ms Ruston, in her paperwork and her evidence this morning, says that she had only one day in August. According to the documents supplied by the company there were two days. I understood that Ms Ruston agreed with those documents. So even

10 Ms Ruston's recollection on that one point is not 100% accurate, and I do not say that as any criticism, merely as an observation. The evidence, therefore, does not show that the number of sick days, itself, can be a reason why Ms Ruston's dismissal was unfair rather, that is an issue which was, perhaps, a reason why Ms Ruston was selected to be made redundant.

11 Having accepted Mr Wake's evidence regarding the business and the need to reduce its size and its staff numbers, it then becomes apparent that somebody needed to go. In this regard

12 Ms Ruston points to "Glynnis" (and I intend no discourtesy by referring to her by just her christian name, that is just how the parties have referred to her) and "Angela". The evidence of Ms Hills, evidence which Ms Ruston is obliged to accept, having called Ms Hills as a witness, is that in sewing, experience is important. On that basis it will always be difficult for

13 Ms Ruston, as a trainee machinist, to show that she should have been retained in employment against Glynnis, who I understand has some twenty years' experience.

14 I accept the evidence that when Glynnis commenced employment she did not know all of the range of jobs that the respondent required of her, however, as I understand the evidence, if that was true when she commenced her employment it was not true at the time Ms Ruston was dismissed. Although Ms Ruston says that

she had longer service than Glynnis, and I find that to be true, the general rule is that although length of service is an important criterion in deciding who is to be made redundant, it is not the only criterion.

15 It is difficult to point to only length of service, given that Glynnis has longer experience as a sewer. I am not able to find on the evidence, therefore, that the fact that Glynnis was retained and Ms Ruston was not is a reason why Ms Ruston's dismissal was unfair.

16 In relation to Angela, on the evidence, she was employed for a one month period and part of her duties were also the duties that Ms Ruston was to perform. On the evidence, Angela was not employed to replace staff who were leaving: That is, the employment of Angela is not, on the evidence before me, a reason not to accept that down-sizing was the reason for redundancies. Rather, on the evidence, which I do not believe Ms Ruston has contested, Angela was employed for a particular function and even if her duties may have overlapped

17 Ms Ruston's this was for a period of time which would have been for a week or two past

18 Ms Ruston's employment at the most. The evidence is that Angela was employed for four weeks only, and that even if Ms Ruston did the work that Angela had done, particularly the cleaning up and the cutting of calico, it is unlikely to have made a difference to the need for the business to reduce its staff. Even if it did, it may have only extended Ms Ruston's employment for perhaps a week or two at the most. I therefore find that on the evidence before me in relation to Angela, the fact that she was employed for all of the reasons given by Mr Wake, is not a reason why Ms Ruston's redundancy, that being what it is, was unfair.

19 The next reason put forward by Ms Ruston is the issue of her pregnancy. As Ms Ruston admits, there is in fact no evidence before this Commission this morning that Mr Wake knew of her pregnancy. Ms Ruston did not bring any evidence that Mr Wake knew about it.

20 Mr Wake gave evidence that he did not know and Ms Ruston did not cross-examine him on that point to argue that he wasn't being truthful on this issue. She has not even suggested in her submissions that Mr Wake is not being truthful on this issue. There is then as a matter of fact, no evidence before this Commission that Mr Wake did know Ms Ruston was pregnant. Perhaps if I put it this way: If Mr Wake did know, there is no evidence to prove this. On that basis I cannot find that Ms Ruston's pregnancy was an issue in the redundancy that occurred.

21 I would add that if there had not been evidence of the respondent's need to down-size and that there was no apparent reason for Ms Ruston to have been dismissed, then perhaps this is an issue that would have required a bit more evidence to be brought for the Commission to in fact act upon it. However, in circumstances where the evidence overall is that the respondent needed to reduce staff, then I cannot find on the evidence before the Commission, that

22 Ms Ruston's pregnancy was an issue.

23 The final matter that arises is that if an employee is to be made redundant, section 41 of the Minimum Conditions of Employment Act requires there to be discussions between the employer and the employee about the consequences of the decision to down-size and what alternatives are available. Even if Ms Ruston's employment was covered by the Furniture Trades' Industry Award, and no one has suggested that, the Award provides a similar obligation.

24 The Industrial Relations Commission does not enforce the Act neither does it enforce the Award. The Commission looks at it from this point of view: On the evidence there were no discussions between the respondent and Ms Ruston about alternatives. However, on the evidence even if there had been discussions, it is not clear that there would have been any alternative. Ms Ruston has not suggested, for example that, putting Angela to one side, there was other work that she could have done even on a part time basis. It is therefore, on the evidence before me, not apparent that even if there had been those discussions it would have made any difference.

25 For all of those reasons, therefore, I have not been able to find that Ms Ruston has shown on the evidence that her dismissal was unfair and accordingly, her application must be dismissed.

26 Accordingly, an Order now issues.

2001 WAIRC 02842

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	KELLY RUSTON, APPLICANT *v.* LEADER LOUNGE FURNISHINGS, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	FRIDAY, 18 MAY 2001
FILE NO	APPLICATION 1547 OF 2000
CITATION NO.	2001 WAIRC 02842

Result	Application alleging unfair dismissal dismissed
Representation	
Applicant	Ms K Ruston appeared on behalf of herself as the applicant.
Respondent	Mr G Wake appeared on behalf of the respondent.

Order.

HAVING HEARD Ms K Ruston on her own behalf as the applicant and Mr G Wake on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby orders:

THAT the application be dismissed.

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

2001 WAIRC 02975

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	JULIA MARY TEMBY, APPLICANT *v.* ALBANY AND DISTRICTS SKILLS TRAINING COMMITTEE INCORPORATED, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DELIVERED	THURSDAY, 7 JUNE 2001
FILE NO/S	APPLICATION 1927 OF 2000
CITATION NO.	2001 WAIRC 02975

Result	Application granted. Order issued.
Representation	
Applicant	Mr N Graham of counsel
Respondent	Mr E Rea as agent

Reasons for Decision.

1. At material times the applicant was employed by the respondent as its administration/training manager and IT network administrator. Her employment commenced with

the respondent on or about 18 June 1998 and came to an end on or about 7 November 2000 in controversial circumstances. The applicant now brings this application to the Commission pursuant to s 29(1)(b)(i) of the Industrial Relations Act 1979 ("the Act") alleging she was harshly oppressively and unfairly dismissed by the respondent at or about that time.

2. The respondent denied that it unfairly dismissed the applicant and indeed, denies there was a dismissal at all for the purposes of the Commission's jurisdiction under the Act.

3. The material facts surrounding the events occurring on or about the time of the alleged dismissal may be shortly stated as follows.

4. For some time, the applicant had complained to the general manager of the respondent, Mr King, that she was having considerable difficulties in her working relationship with another manager of the respondent, Mr Collett. The applicant expressed concerns to Mr King that Mr Collett was "playing power games" with her by utilising staff who reported to her without her approval; on at least one occasion being rude and aggressive towards her; and generally treating staff members of the respondent in a poor fashion. The applicant testified that Mr Collett was aggressive and over bearing, and seemed to have a difficulty in dealing with female employees.

5. The applicant testified that Mr King assured her that he would take steps to bring these matters to Mr Collett's attention. He would make Mr Collett aware of the sensitivities in dealing with other staff members, and in particular, ensuring that he consulted with the applicant, at least as a matter of courtesy, in the event that he required some assistance from any staff member who was accountable to the applicant. According to the applicant, these approaches had little effect, because Mr Collett's attitude and behaviour in the workplace did not change.

6. Matters came to a head on or about the Friday afternoon of 27 October 2000. On this day, Mr King was in Perth. Apparently, Mr Collett had made arrangements with Mr King, for him to utilise the services of the respondent's receptionist Ms Tranter, who reported to the applicant, in the employment services division of the respondent, for which Mr Collett was responsible. Mr Collett had never mentioned this to the applicant. Ms Tranter went to see the applicant to advise her of the arrangement. On being informed of this, the applicant testified that she "saw red". This was as a result of the prior incidents and the lack of any tangible change in Mr Collett's behaviour.

7. The applicant immediately went and saw Mr Collett and told him that until he had discussed it with her it was not acceptable for him to redeploy her staff. She also protested at him that it was unfair for him to have the employee in question, Ms Tranter, advise her of the arrangement. It was common ground that a verbal altercation then took place between the applicant and Mr Collett about this matter. Ms Tranter, who was close by, testified that there was "yelling from both Mark and Julia. It sounded like there were things been thrown in the office." The applicant then left Mr Collett's office, and returned to her own, followed by Mr Collett. The argument continued in the applicant's office, according to Ms Tranter.

8. Following this, the applicant testified that she rang Mr King and left a message on his voice mail, telling him that she was resigning and that she "could not continue to work with that animal anymore." Mr King testified that when he received the telephone message he could tell that the applicant was extremely upset from the tone of it. Mr King rang the applicant back approximately 15 minutes later. He testified that she was still very angry. Whilst there was some conflict in the evidence between the various witnesses as to the time that may have elapsed from the initial altercation between the applicant and Mr Collett and when she made the telephone call to Mr King, it was quite clear that from the evidence of Mr King, when he finally spoke with her, she was still extremely upset. In my view this is significant. It was the applicant's evidence that when Mr King spoke to her, he tried to calm her down and told her "not to do any thing silly" and he would meet with her on the following Monday morning when he was back in Albany, "to sort everything out."

9. Based on this position, the applicant said she waited to meet with Mr King the following Monday morning. That morning, the applicant outlined the events of the previous Friday afternoon, and told Mr King that she desperately did not want to resign. She testified that she said that she didn't see any choice because of the behaviour of Mr Collett in his domineering and bullying behaviour towards both her and other staff members. She testified that again Mr King said to her to not do any thing further and to give him some time to resolve the situation. I pause to observe that Mr King's version of this meeting was somewhat different. He testified that after discussing the incident and the working relationship between the applicant and Mr Collett, there was discussion between then as to a proper "handover" in relation to the traineeship work, the responsibility of the applicant. Mr King said that he told the applicant that he would advise the chairman of the respondent of the discussion and the applicant's resignation.

10. In relation to this matter, Mr King testified that during the conversation with the applicant, she requested her job back. He said that he would need to speak with the chairman of the respondent. In passing, I should observe that it was Mr King's evidence that he regarded the applicant as a very good employee. He had not in any way being critical of her work performance or conduct in the workplace, and indicated to the chairman of the respondent that he would have the applicant back in employment.

11. The following day, on Tuesday, the applicant testified that she again told Mr King that it was not her intention to resign and she had concerns about the trainees undertaking traineeship's arranged by the respondent, for which she was responsible. Whilst the evidence was far less than clear as to what occurred next, it appears on the evidence, that thereafter the applicant continued to work until on or about 10 November, when the applicant was notified by her husband that a substantial sum of money had been deposited into their joint bank account the previous day. The applicant queried this with Mr King, who advised her that this was her termination payment, given that she had resigned.

12. It was the applicant's evidence that this stunned her. She testified that until that point, she had been clearly under the impression that she had rescinded her resignation with the acquiescence of the respondent and that Mr King was taking steps to resolve the working relationship problem between her and Mr Collett. It was her evidence that as far as she had been led to believe, her resignation, (if there was a resignation), had not been "accepted" by the respondent. Again whilst it was not entirely clear on the evidence, it appeared that the applicant, after discovering the payment into her bank account, continued to do some further work for the respondent up until on or about 13 November 2000.

13. The applicant gave evidence as to other employment she had undertaken since leaving the respondent, which included part-time employment with a building company on and from 21 February 2001. The applicant continued to work in this position until about 4 May 2001, when she was retrenched because of a downturn in that industry. The applicant testified that she had earned some $3,364.53 in this employment.

Findings and Conclusions

14. I am satisfied and I find on the evidence, and indeed it was largely common ground, that there was a significant degree of conflict in the workplace between the applicant and Mr Collett. From all of the evidence, in particular that of Mr King, it appears to the Commission and I find, that predominantly the difficulties were caused by Mr Collett's manner and approach in dealing with the applicant and her staff. I am not persuaded however, that it was entirely a one-sided affair. Clearly on the evidence,

both the applicant and Mr Collett were strong willed individuals. Both expressed their opinions very assertively and as it was described by counsel for the applicant, she "called a spade a spade". I am therefore of the view that in addition to the obvious difficulties in some of Mr Collett's management style, there was clearly an underlying conflict of personalities between both of them.

15. As to the events of Friday 27 October 2000, I am well satisfied on the evidence that a substantial verbal altercation occurred between the applicant and Mr Collett over the proposed re-deployment of Ms Tranter to Mr Collett's area of responsibility. This altercation led to the applicant being in a highly emotional state, variously expressed as "very angry", "a screaming match", "uncontrollable rage" etc. However one describes it, it was manifestly clear on the evidence that the applicant was in an extremely emotionally charged state. I also find that in this state, she telephoned Mr King, who was then off the premises. She left a voice mail message for him saying that she was resigning. Her anger had clearly not receded at this time, given Mr King's evidence, and I find accordingly. Moreover, at least some 15 minutes later or thereabouts, on Mr King's evidence, the applicant was still in a highly charged emotional state when he returned her telephone call and discussed the incident with her.

16. I am also satisfied and I find that during this telephone discussion, Mr King indicated to her in words to the effect that she should do nothing further and he would discuss it further with her on his to return to Albany the following Monday. On the evidence, I find that there was no indication at that time, that there was any "acceptance" by Mr King of the applicant's resignation indeed on the contrary, I am satisfied that the indications were all the other way.

17. Following the events of the ensuing Monday, I am also satisfied on the evidence, that the applicant clearly further recanted in relation to her earlier intention to resign. She also did so on the following Tuesday. Despite these clear signs that the applicant was, firstly, in a highly charged emotional state on the Friday, had had a known personality clash with Mr Collett, and had clearly indicated her true intention, the applicant's final payments, in respect of termination of her employment, were deposited into her bank account on or about 9 November 2000.

18. This case throws up a not infrequent issue arising in proceedings of this kind, that being whether the applicant truly resigned voluntarily and of her own free will, or whether she was dismissed by the respondent. I dealt with this issue in *AFMEPKIU v G&G Steel Works* (1999) 79 WAIG 880 where at 883 I said—

> *"The law in relation to the requirements for a valid notice of termination of employment is reasonably well settled. A number of decisions of the English Employment Appeal Tribunal, adopted by various Australian courts and tribunals, have set out the position in this regard. In Sovereign House Security Services Ltd v Savage (1989) IRLR 115 it was said by May LJ at 116—*
>
> > *"In my opinion, generally speaking, where unambiguous words of resignation are used by an employee to the employer direct or by an intermediary, and are so understood by the employer, the proper conclusion of fact is that the employee has in truth resigned. In my view tribunals should not be astute to find otherwise…"*
> >
> > *However, in some cases there may be something in the context of the exchange between the employer and the employee or, in the circumstances of the employee him or himself, to entitle the tribunal a fact to conclude that notwithstanding the appearances there was no real resignation despite what it might appear to be at first sight."*
>
> *In the instant matter, it is not so much consideration of whether words of resignation are unambiguous or not, but rather the characterisation of the conduct of Mr Bonanno as a whole, arising from his actions in leaving the workplace and the various telephone conversations that took place, and preceding events. In this respect, in my view, whether one is considering whether words or conduct evince an intention of an employee to no longer remain employed by an employer, the principles have equal application. Indeed, this was considered in Kwik-Fit (GB) Ltd v Lineham (1992) ICR 183 where Wood J said at 191—*
>
> > *"If words of resignation are unambiguous then prima facie an employer is entitled to treat them as such, but in the field of employment personalities constitute an important consideration. Words may be spoken or actions expressed in temper or in the heat of the moment or under extreme pressure ("being jostled into a decision") and indeed the intellectual make up of an employee may be relevant: see Barclay v City of Glascow District Council (1983) IRLR 313. These we refer to as "special circumstances". Where "special circumstances" arise it may be unreasonable for an employer to assume a resignation and to accept it forthwith. A reasonable period of time should be allowed to lapse and if circumstances arise during that period which put the employer on notice that further enquiry is desirable to see whether the resignation was really intended and can properly be assumed, then such enquiry is ignored at the employer's risk. He runs the risk that ultimately evidence may be forthcoming which indicates that in the "special circumstances" the intention to resign was not the correct interpretation when the facts are judged objectively."*
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> *In Barclay v City of Glascow District Council (supra) the Employment Appeal Tribunal allowed an appeal from a majority decision of a Scottish industrial tribunal which dismissed an unfair dismissal application on the basis that the applicant had resigned. The applicant in that matter was acknowledged to be mentally defective and under the care of his sister. Events transpired were an altercation took place between the applicant and the respondent's foreman in the workplace, following which the applicant said "he wanted to collect his books" the next day. On that day, the applicant, when collecting his pay, was asked to and did sign a blank form that was subsequently drafted as his resignation. The applicant reported to work on the following Monday, but was sent home on the grounds that he had resigned. On appeal, the Employment Appeal Tribunal held that there were special circumstances to consider, by reason of the mental capacity of the applicant. Moreover, it was held that given the circumstances, the proper approach for the employer was to have regard not only to what was said on the day in question, but also to what happened the following day when the applicant reported for work. The Tribunal said the employer should have made enquiries as to the true intentions of the applicant."*

19. In my opinion, in the words of Wood J in *Kwik Fit* there were special circumstances arising at the time of the applicant's telephone call to Mr King on the afternoon of Friday 27 October 2000. Undoubtedly, the words used by the applicant were spoken in a state of emotional turmoil and the heat of the moment, following the altercation with Mr Collett. Given all of the circumstances in my view, it was clear that the applicant, in subsequent discussions with Mr King, did not truly wish to resign at all. I also accept that from the brief discussion with Mr King on the Friday afternoon, the applicant was left with the impression that she would not in fact be leaving the respondent's employment and that on the strength of this, there was no need to make any further contact with Mr King over the weekend. In these circumstances, the

respondent should have clearly been on notice that further inquiry would have revealed this intention. This is particularly so, in the context of the clear personality clash between the applicant and Mr Collett, which was well known to the respondent: *Kwik Fit*.

20. In all the circumstances of this case, I consider that the applicant did not truly resign from her employment but was dismissed by the respondent. As to precisely when the dismissal was effected, this is a matter that was not entirely clear on the evidence. It seems to me that the most likely date that the dismissal was effected, was the date upon which the applicant received her termination payments into her bank account, that being on or about 9 November 2000.

21. As to the allegation that the applicant was forced to resign by reason of Mr Collett's conduct, I do not find it necessary to determine this issue in light of my conclusions as to the purported resignation itself. However, it seems to me that on the evidence there may well be live issues as to whether in fact the conduct of Mr Collett was indeed so grave to lead to this result and moreover and in any event, even if so, whether his conduct could be imputed to the employer such that it could be said that it was the conduct of the employer that gave rise to the resignation of the employee.

22. Finally on these issues, throughout these proceedings the parties referred to whether or not the respondent had "accepted" the applicant's resignation. As Windeyer J said in *Marks v Commonwealth* (1964) 111 CLR 549 "expressions such as the tendering and acceptance of a resignation, although commonly used, are merely linguistic courtesies". On the basis that a notice of termination is validly given, any "refusal" or "acceptance" does not affect the legal result that the notice will operate according to its terms to bring the contract of employment to an end on its expiry: *Riordan v War Office* (1959) 1 WLR 1046 at 1054. The issue in this case was not a matter of the "acceptance" of any resignation, but rather, whether there was a resignation or a dismissal simpliciter.

23. I now turn to consider whether the dismissal was harsh, oppressive and unfair. As I have noted, it was not in controversy that the applicant was a very well regarded employee by the respondent and it had no cause to express concerns about either her work performance or her conduct and behaviour in the workplace, as made clear in the evidence of Mr King. That being so, and the applicant not in any way being on notice that her employment was, prior to its termination, in any sense in jeopardy, I find the dismissal to have been harsh, oppressive and unfair.

24. In terms of remedy, at the outset of the proceedings, counsel for the applicant sought and was granted leave by the Commission to amend the applicant's claim, such that she no longer sought reinstatement but rather sought an order of compensation. This was because of the breakdown in the relationship subsequently apparent on the evidence. In these circumstances, it seems to me that it would be impracticable to in any event, order the applicant to be reinstated by the respondent.

25. I now consider the question of compensation for loss. There was no claim for compensation for injury. I apply the principles outlined by the Full Bench in *Bogunovich v Bayside Western Australia Pty Ltd* (1998) 79 WAIG 8 as to the assessment of compensation. I am satisfied that the applicant has undertaken all reasonable steps to mitigate her loss, which in any event, was not challenged by the respondent. The applicant claims compensation in the order of some $18,762.12, representing six months income, less monies that she earned as noted above. There was evidence before the Commission that in approximately mid August 2000, the applicant advised Mr King that she was considering her future with the respondent and indeed in that month, had applied for alternative employment. Apparently at that time, she had expressed concern to Mr King, about the utilisation of Ms Tranter by Mr Collett, without her knowledge or consent. There was also considerable evidence before the Commission as to the animosity between the applicant and Mr Collett in the workplace.

26. In this case, based upon all of the evidence, I am not of the view that the applicant would have continued in the employment of the respondent indefinitely. The likelihood of ongoing employment is a relevant consideration in assessing compensation for loss: *Bogunovich*. Having regard to all of the circumstances, I find it more likely than not, that the employment of the applicant may not have continued more than about three months from when it actually terminated. I am therefore of the view that an appropriate order of compensation for loss, should reflect this finding and accordingly I order that the applicant be compensated for loss in the sum of $8,660 less the money earned in the interim, leading to an award of compensation in round terms of $6,000.

27. A minute of proposed order now issues.

2001 WAIRC 03007

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	JULIA MARY TEMBY, APPLICANT *v.* ALBANY AND DISTRICTS SKILLS TRAINING COMMITTEE INCORPORATED, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DELIVERED	TUESDAY, 12 JUNE 2001
FILE NO/S	APPLICATION 1927 OF 2000
CITATION NO.	2001 WAIRC 03007

Result	Application granted. Order issued.
Representation	
Applicant	Mr N Graham of counsel
Respondent	Mr E Rea as agent

Order.

HAVING heard Mr N Graham of counsel on behalf of the applicant and Mr E Rea as agent on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby—

1. DECLARES that Ms J Temby was harshly, oppressively and unfairly dismissed from her employment by the respondent on or about 9 November 2000;
2. DECLARES that the reinstatement of Ms Temby is impracticable;
3. ORDERS the respondent to pay to Ms Temby within 21 days of the date of this order the sum of $6,000.00 less any amount payable to the Commissioner of Taxation pursuant to the Income Tax Assessment Act 1936 and actually paid.

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

SECTION 29 (1)(b)—Notation of—

Applicant	Respondent	Number	Commissioner	Result
A'Court G	Airlite Cleaning Pty Ltd	760/2001	Scott C	Withdrawn by leave
Aitchison SJ	Right Marketing Australia Pty Ltd	613/2001	Wood C	Consent Order
Alex GA	Graphique Nominees Pty Ltd ACN 008 930 827 T/A Adlink	47/2001	Gregor C	Discontinued
Armstrong E	Airlite Cleaning	1620/2000	Smith C	Discontinued by leave
Baker LP	BBC Hardware House O'Connor	1603/2000	Gregor C	Discontinued
Bendall MR	Trustek Steel Roofing Systems	204/2001	Gregor C	Discontinued
Bernet SE	Etos Australia	218/2001	Beech C	Discontinued
BHP Iron Ore Pty Ltd	CMETU	747/2001	Kenner C	Discontinued
Blewett VA	ACN 061 839 852 Pty Ltd Trading as Ventura Homes	140/2001	Gregor C	Discontinued
Blewett VA	Ventura Homes Pty Ltd	141/2001	Gregor C	Discontinued
Bolton FR	Kaata-Koorliny Enterprise & Employment Development Aboriginal Corporation	1782/1999	Beech C	Discontinued
Bonnick KJ	Network Packaging Pty Ltd	511/2001	Scott C	Withdrawn by leave
Bordbar B	BSD Consultants Pty Ltd	302/2001	Scott C	Dismissed
Boyd DE	Allan Cheesman General Manager Geraldton Building Company	2018/2000	Scott C	Dismissed
Bradshaw JL	Active Realty WA Pty Ltd	1831/2000	Beech C	Discontinued
Brookes LM	Robinson Personnel Pty Ltd	549/2001	Scott C	Dismissed
Carr Stephen	Iama Agribusiness	1990/2000	Gregor C	Discontinued
Carroll DW	Jakovich Transport and Earthmoving Pty Ltd	112/2001	Gregor C	Discontinued
Champion RA	David Charles Turner	330/2001	Scott C	Dismissed
Clarke C	Perth Eye Centre Pty Ltd	341/2001	Scott C	Dismissed
CMETU	BHP Iron Ore Ltd	1393/2000	Kenner C	Discontinued
Coghlan FJ	River Resort	1752/2000	Kenner C	Discontinued
Collopy-Behan T	Jose Jalomelli & John Mason t/a Maximise	2155/2000	Kenner C	Discontinued
Conder SC	Northam Share & Care (Inc.)	1581/2000	Fielding C	Discontinued by leave
Coombes RC	Kawasaki Northside	289/2001	Scott C	Withdrawn by leave
Crawford JRE	Buccaneer Swimming Pools Pty Ltd	442/2001	Coleman CC	Discontinued
Crkovsky HP	Flight Centre Ltd	502/2001	Beech C	Discontinued
Culverwell KJ	Proud Holdings Pty Ltd T/A Proud Constructions	1515/2000	Gregor C	Discontinued
Cunningham MW	World Courier (Aust) P/L	762/2001	Coleman CC	Discontinued
Damcevska M	Prestige Property Services Pty Ltd	648/2001	Scott C	Withdrawn by leave
Davey S	Shire of Collie	1358/2000	Kenner C	Discontinued.
Davie P	Artifex Australia	64/2001	Wood C	Dismissed for want of prosecution
Day S	Northern Star Maintenance Services	591/2001	Beech C	Discontinued
Dennis MJ	Bardena Farms Pty Ltd	867/2001	Coleman CC	Discontinued
Dowding PS	Challenger Freights	353/2001	Kenner C	Discontinued
Drury HR	A Bouquet of Roses	1700/2000	Scott C	Dismissed
Ellis S	Rangerman Mechanical	450/2001	Kenner C	Discontinued
Ellis S	Rangerman Pty Ltd	451/2001	Kenner C	Discontinued
Enderbury CJ	BGC Construction A Division of Homestyle Pty Ltd Reg 3930 ACN 008783248	1881/2000	Gregor C	Discontinued
Ferrara P	NKH Technologies Pty Ltd	273/2001	Beech C	Discontinued
Fleming M	Strategic Computer Solutions	201/2001	Smith C	Discontinued by leave
Fouque D	Computer Science Corporation	322/2001	Kenner C	Dismissed for want of prosecution
Freeman JJ	E.F.F. Ltd, Environmental Forrest Farms Management Ltd, Powton Land Holdings Ltd and AIM Financial Solutions Group	489/2001	Beech C	Discontinued
Ghiradi KJ	West Coast Acceptances P/L T/As: Mobitow (1988)	461/2001	Scott C	Dismissed
Glorie R	Building Corporation WA Pty Ltd	374/2001	Kenner C	Discontinued

Applicant	Respondent	Number	Commissioner	Result
Gordon DH	Regal Workshop (Evolution R)	687/2001	Beech C	Discontinued
Grande LSM	Quebec Nominees T/A Thingz Gifts	552/2001	Coleman CC	Discontinued
Green J	Matchmaster Communications Pty Ltd	2011/2000	Scott C	Dismissed
Greenfield B	Melwire Pty Ltd	2095/2000	Beech C	Discontinued
Griffin WA	Kindale Pty Ltd Trading As "Baci Cafe"	295/2001	Gregor C	Discontinued
Hagdorn BE	Erinbush Pty Ltd	96/2001	Kenner C	Order Issued
Halligan RA	City Toyota	2141/2000	Gregor C	Discontinued
Hanna FEA	NGS Guards & Patrols	126/2001	Gregor C	Discontinued
Haroun A	Harrietts Café/Restaurant	32/2001	Scott C	Dismissed
Harrison J	RGD Corporation Pty Ltd	94/2001	Beech C	Discontinued
Hassan D	Riley Shelley (WA) Pty Ltd	842/2000	Kenner C	Discontinued
Henson DR	Denville Pty Ltd	60/2001	Smith C	Discontinued by leave
Higgins RM	Iluka Resources Limited	281/2001	Smith C	Discontinued by leave
Hill RC	J & E Hofmann Engineering Pty Ltd	499/2001	Scott C	Dismissed
Hill RR	Ming South West Pty Ltd	347/2001	Kenner C	Discontinued
Holl DE	Mulberry Cards & Gifts	557/2001	Coleman CC	Discontinued
Hunt CA	Youth South West A Division of Jobs South West Inc.	615/2001	Gregor C	Withdrawn
Hutchings K	Chambers Capital Group Ltd	160/2001	Beech C	Discontinued
Ioppolo J	International Cabinets Pty Ltd	688/2001	Beech C	Withdrawn by leave
Izydorski LM	Police and Nurses Credit Society Limited	206/2001	Gregor C	Withdrawn by leave
James RA	Australian Foods Co P/L	1646/2000	Scott C	Dismissed
James RC	Gwynne Pk Deli	233/2001	Kenner C	Discontinued
Jenner CJ	Rocket Transport Services Pty Ltd Rocket Couriers	443/2001	Gregor C	Withdrawn by leave
Johnstone K	Etos Australia Pty Ltd	189/2001	Beech C	Discontinued
Jones J	Airlite Cleaning	1619/2000	Smith C	Discontinued by leave
Kennedy JL	National Office Products Ltd T/As Boise Cascade/Supply West	245/2001	Gregor C	Withdrawn
Kivell SE	Bunbury Dolphin Trust Incorporated t/a Dolphin Discovery Centre	91/2001	Beech C	Discontinued
Lade SG	Rodney Arthur Howe	1803/2000	Gregor C	Consent Order
Lagana A	European Roods Wholesalers P/L	54/2001	Coleman CC	Discontinued
Latifi E	M T & J E Miller	1938/2000	Gregor C	Discontinued
Liness C	Western Master Furniture	1732/2000	Gregor C	Discontinued
Longthorne AB	York International Australia Pty Ltd T/A York Australia	183/2001	Gregor C	Discontinued
Mackey L	Hocking and Company Pty Ltd ACN 009 426 984 and/or Western Australia Newspapers Limited ACN 008 667 632 Proprietors of the Kalgoorlie Miner	69/2001	Smith C	Discontinued by leave
Maher D	Empathise Pty Ltd	2023/2000	Scott C	Dismissed
Mallet MH	Alphawest Pty Ltd	417/2001	Kenner C	Discontinued
Maloney BJ	Expro Group Australia Pty Ltd	2090/2000	Fielding C	Discontinued
McGuckin NA	Town & Country Café & Lunch Mart	1628/2000	Smith C	Discontinued by leave
Manhood V	Kitcher Property Investments Pty Ltd T/As Mulberry Farm	2044/2000	Scott C	Withdrawn by leave
Marshall PT	Bushpan Holdings Trading as Canning Traders	1504/2000	Smith C	Discontinued by leave
Martin J	Wavemaster International Pty Ltd	2046/2000	Kenner C	Discontinued
McGavin C	Nightlife Nominees Pty Ltd	509/2001	Beech C	Discontinued
Mellowship M	Austa Imports, Raymond Jurgens	1937/2001	Smith C	Discontinued by leave
Mihic Z	Fairlight on Air Pty Ltd	30/2001	Scott C	Dismissed
Miller GT	Geoff Slade Group t/a Lyncroft Consulting Group	4/2001	Beech C	Discontinued
Morgan SJ	Australian Huntingtons Disease Ass (Inc) WA	1968/2000	Gregor C	Discontinued
Myint TK	Messages on Hold & Linstorm Holdings Pty Ltd	1721/2000	Gregor C	Discontinued
Naven CP	Denso (Aust) P/L	877/2001	Coleman CC	Discontinued
Nazzari PJ	Mulberry Farm	424/2001	Beech C	Discontinued

Applicant	Respondent	Number	Commissioner	Result
Newett LD	MacMahon Underground Pty Ltd	103/2001	Beech C	Discontinued
O'Connor KD	Settlers Roadhouse	217/2001	Smith C	Discontinued by leave
Oliver LF	Coolgardie Community Care Incorporated	1075/2000	Kenner C	Discontinued
Parker SL	Jeff Marsh, Risk Management Technologies	1083/2001	Coleman CC	Discontinued
Philp S	Mandurah Bowling Club Inc	116/2001	Scott C	Dismissed
Pomfret RL	Bank of Western Australia Ltd	253/2001	Gregor C	Withdrawn
Possingham LE	Westfield Limited	592/2001	Scott C	Withdrawn by leave
Roberts TM	Milreece Pty Ltd	97/2001	Scott C	Dismissed
Rollings SP	Ram Paper & Office Products P/L	344/2001	Scott C	Dismissed
Rupe JA	Crabtree Engineering Software	604/2001	Kenner C	Discontinued
Saunders BC	Action Super Market F.A.L.	215/2001	Gregor C	Order Issued
Schulze SL	Industrial Personnel Pty Ltd ACN 337 391 63	1716/1999	Smith C	Discontinued by leave
Scott DL	Wollaston Realty Pty Ltd T/A Roy Weston	776/2001	Gregor C	Concluded
Smallbone M	Presbyterian Ladies College	2079/2000	Kenner C	Discontinued
Smith MW	Airlite Cleaning	1618/2001	Smith C	Discontinued by leave
Smith R	Collie Veterinary Hospital	1418/2000	Kenner C	Discontinued
Smith RL	Aboriginal Development of Manguri Corporation (Manguri)	425/2001	Scott C	Dismissed
Spencer JK	Kissing Frogs Publications Pty Ltd	1160/2000	Beech C	Discontinued
Stewart GE	Kontrol-Teq Industrial Pty Ltd ACN 009 289 070	176/2000	Kenner C	Discontinued by leave
Sunjich MS	Turntek Machining Pty Ltd ACN 074492032 T/A Turntek Machining Wear Plate Drilling	8/2001	Gregor C	Discontinued
Tapscott GW	Orion Laboratories Pty Ltd	268/2001	Beech C	Discontinued
Tarbotton BE	Lord Forrest Nominees T/As the Lord Forrest Hotel	1763/2000	Scott C	Dismissed
Tarbotton TA	Lord Forrest Nominees T/As the Lord Forrest Hotel	1765/2000	Scott C	Dismissed
Tasovac A	RHT Supa Crew Constructions Pty Ltd ACN 091 408 945	609/2001	Gregor C	Discontinued
Towle LJ	Australand Holdings Ltd	2111/2000	Scott C	Dismissed
Turrell M	Airlite Cleaning	1621/2001	Smith C	Discontinued by leave
Vandborg D	Shire of Brome	75/2001	Smith C	Discontinued by leave
Van De Weerd A	The Dugan Family Trust T/A Docker Electrics	1232/2000	Scott C	Dismissed
Verga JL	Pulsat Communications Ltd	228/2001	Gregor C	Discontinued
Wainohu R	Novek Pty Ltd T/A Shell Combined	500/2001	Scott C	Dismissed
Walters-Neil GA	The Albion Hotel (Ogdens)	441/2001	Beech C	Discontinued
Wardley RG	Shack & Kerr Motors Pty Ltd Shacks Holden	383/2001	Gregor C	Discontinued
Webb SJ	Tangent Nominees Pty Ltd (ACN 008 865 585) as Trustees for Summit Homes Group Unit Trust T/As Summit Homes	161/2001	Smith C	Dismissed for want of prosecution
Wells NS	Lost Lake Winery	1920/2000	Smith C	Discontinued by leave
Weir J	Thorlock International Ltd	350/2001	Gregor C	Discontinued
Whanga SA	Lamead Holdings Pty Ltd	1917/2000	Beech C	Discontinued
Wheatcroft K	John's Engineering and Cranes	690/2001	Beech C	Discontinued
White JA	Lincoln Coffee Shop	630/2001	Beech C	Discontinued
White NA	BRL Hardy Limited	1997/2000	Gregor C	Discontinued
Wilkinson D	General & Civil Pty Ltd	465/2001	Kenner C	Discontinued
Woods J	Lordly View Pty Ltd T/A Property Solutions	484/2001	Scott C	Dismissed
Wright JF	Alti Lighting	365/2001	Gregor C	Withdrawn by leave
Zinni MT	Coventry's A Division of Coventry Group Ltd	599/2000	Scott C	Dismissed

CONFERENCES—
Matters arising out of—

2001 WAIRC 02792

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS — WESTERN AUSTRALIAN BRANCH, APPLICANT *v.* BHP IRON ORE PTY LTD, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DELIVERED	FRIDAY, 11 MAY 2001
FILE NO/S	C 86 OF 2001
CITATION NO.	2001 WAIRC 02792

Result	Recommendation issued.
Representation	
Applicant	Mr T Kucera of counsel
Respondent	Mr R Lilburne of counsel

Recommendation.

WHEREAS on 9 April 2001 the applicant applied to the Commission for a conference pursuant to s 44 of the Industrial Relations Act, 1979;

AND WHEREAS on 4 May 2001 the Commission convened a conference between the parties pursuant to s 44 of the Industrial Relations Act, 1979;

AND WHEREAS at the conference the Commission was informed that the applicant and the respondent were in dispute as to the manner and circumstances under which the respondent engages contractors to perform maintenance work at the respondent's Nelson Point operations;

AND WHEREAS the Commission, after having heard the parties and having endeavoured to assist the parties to reach agreement on the matters in dispute and recognising past practices, was of the view that in all the circumstances, it would issue a recommendation to the parties in order to endeavour to expeditiously resolve the dispute;

NOW THEREFORE the Commission, having regard for the interests of the parties directly involved and to prevent the deterioration of industrial relations in respect of the matters in question, in accordance with the provisions of the Industrial Relations Act, 1979 hereby recommends—

1 THAT the engagement of contractors by the respondent is to be discussed at the workgroup level following the publication by the respondent of the weekly work plan on each Friday or thereabouts.

2 THAT a copy of the weekly work plan is to be given to the relevant union representative(s) to facilitate the discussions referred to in para 1.

3 THAT the respondent, to further facilitate the discussions in para 2, provide to the relevant union representative(s) particulars of the contractor engagement including but not limited to matters such as the scope of the works and the anticipated duration of the contract and the like.

4 THAT any issues raised in the course of discussions referred to in para 2 be as far as possible resolved at the work group level.

5. THAT when unscheduled overtime is required to be worked at the respondent's Nelson Point operations to complete a job and maintain production, it will be offered to the employees on shift who are fit and competent to do that work.

6. THAT if there is no, or no sufficient acceptance of that offer of overtime then the Company may engage a contractor to perform that work.

7. THAT any grievances arising from this process be resolved in accordance with the Industrial Relations Agreement 1997 (as amended).

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

2001 WAIRC 02844

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	CONSTRUCTION, MINING, ENERGY, TIMBERYARDS, SAWMILLS AND WOODWORKERS UNION OF AUSTRALIA—WESTERN AUSTRALIAN BRANCH AND ANOTHER, APPLICANTS *v.* CITY OF STIRLING, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DELIVERED	FRIDAY, 18 MAY 2001
FILE NO	C 78 OF 2001
CITATION NO.	2001 WAIRC 02844

Result

Direction and Order.

WHEREAS on 27th March 2001 the Construction, Mining, Energy, Timberyards, Sawmills & Woodworkers Union of Australia, West Australian Branch (CMETU) applied to the Commission for a compulsory conference pursuant to s.44 of the *Industrial Relations Act, 1979* on the grounds that the union was in dispute with the City of Stirling over disciplinary proceedings against certain employees of the City of Stirling arising from warning letters relating to the wearing of uniforms; and

WHEREAS the Commission conducted a conference on the matter on 4th April 2001 at which from the parties were directed to have further discussions in an attempt to resolve the matter; and

WHEREAS the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering Electrical Division, WA Branch (CEPU) was made party to the proceedings; and

WHEREAS the Commission was requested to conduct another conference on the matter, that conference was listed for 17th May 2001; and

WHEREAS at the conference the Commission received a report concerning the progress in the dispute, that report indicated that the matters had not been resolved but were subject to continuing discussions; and

WHEREAS the Commission was told that Christopher Evans, Shop Steward of the CEPU, had been dismissed unfairly because of his conduct relating to the wearing of uniforms; and

WHEREAS the City of Stirling said that the dismissal related to matters not associated with the wearing of uniforms but included inter alia failure to report for duty, failure to work as directed and importantly an allegation of a threat to do physical harm to a supervisor; and

WHEREAS the City of Stirling was not prepared to reinstate Mr Evans and the CEPU requested that the matter be referred as an unfair dismissal; and

WHEREAS the Commission decided that the dismissal of Mr Evans would become subject of a reference of matter for hearing and determination subject to s.44 of the *Industrial Relations Act, 1979*; and

WHEREAS the Commission having considered the industrial circumstances which are in the background of the dispute over the dismissal of Mr Evans and having in mind its duty to ensure that by conciliation the parties can continue to have

discussions to resolve the dispute between them and having concluded that process would be assisted if Mr Evans was reinstated but placed on suspension with pay the Commission decided to order accordingly; and

WHEREAS the Commission told the parties that the order for reinstatement on suspension of pay will have a life of 28 days with the CEPU having liberty to apply to extend such order.

NOW THEREFORE pursuant to the powers vested in it by the *Industrial Relations Act, 1979*, the Commission, hereby orders that—

1. The City of Stirling reinstate Christopher Evans to a position of suspension on pay until the Commission determines by arbitration whether his dismissal on 21st May 2000 was unfair.
2. This Order shall expire at completion of 28 days from the date hereof.

(Sgd.) J. F. GREGOR,
[L.S.] Commissioner.

CONFERENCES—
Matters referred—

2001 WAIRC 02924

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS — WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	BHP IRON ORE PTY LTD, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DELIVERED	THURSDAY, 31 MAY 2001
FILE NO/S	CR 117 OF 2000
CITATION NO.	2001 WAIRC 02924

Result	Application dismissed.
Representation	
Applicant	Mr D Schapper of counsel
Respondent	Mr T Lucev of counsel and with him Mr H Downes of counsel

Reasons for Decision.

1. In its reasons for decision dated 21 March 2000, the Commission upheld the substantive application in this matter and ordered that the respondent reinstate Mr Jones. By further reasons for decision dated 17 April 2001, the Commission refused an application by the respondent to pay compensation instead of reinstating the Mr Jones, pursuant to s 23A(1a)(b) of the Industrial Relations Act 1979 ("the Act"). An appeal against that latter order was dismissed by a unanimous decision of the Full Bench on 21 May 2001: *BHP Iron Ore Pty Ltd v AFMEPKIU* (Unreported FB 21 May 2001 WAIRC 028).
2. By further application filed on 1 May 2001, as amended during the proceedings by leave, the respondent has applied to the Commission for orders in the following terms—
   (1) "Revoking paragraph 2 of the order of the Commission dated 10 April 2001 in matter No CR 117 of 2000; and
   (2) An order that BHP pay to Mr Steven Jones, a member of the AFMEPKIU, compensation for loss or injury caused by his dismissal by BHP.
   (3) Further, and in the alternative, if the revocation of the order for reinstatement is discretionary, that discretion ought be exercised on the basis that—
      (a) the respondent has failed to comply with the order—
      (b) the respondent has their reasons, alternatively good reasons, for its failure to comply, namely—
         (i) the inability of the applicant's member to work with the respondent's employees, and in particular, Mr Hirini.
         (ii) the pressure on the respondent's employees arising from the tension in the workplace between Mr Hirini and the applicant's member.
         (iii) the likelihood that the tension in the workplace will lead to physical confrontation involving the applicant's member.
         (iv) that the applicant's member's misconduct makes it inappropriate to reinstate him.
         (v) that the applicant's member's conduct has, and will continue to, lead to a polarisation of the EBA and the non-EBA employees.
         (vi) that the respondent does not want the applicant's member to return to any of its site under any circumstances in any event."
3. Both counsel for the respondent (as applicant in this application) and counsel for the applicant (as the respondent in this application) made a number of submissions in support of and in opposition to the application, going in particular to the construction of s 23A(3) of the Act. I deal with those submissions as follows.

Contentions

4. Counsel for the respondent submitted that on its proper construction, the reference to "may" in s 23A(3), although expressed in directory terms, should be interpreted in a mandatory sense. That is, once it has been established that there has been a failure by an employer to comply with an order under s 23A(1)(b) as a matter of fact and an application is duly made to revoke that order, the Commission must, not may, make an order for the payment of compensation for loss or injury caused by the dismissal. It was submitted by the respondent that such an application for revocation pursuant to s 23A(3), could be made by either party to the substantive proceedings, leading to the issuance of the order.
5. In the alternative, counsel for the respondent submitted that if s 23A(3) is to be interpreted such that "may" means the Commission has a discretion to issue a further order on revocation, then that discretion may be exercised on three bases. Firstly, it was submitted that the discretion could be exercised simply as a consequence of the employer's failure to comply with the reinstatement order. Secondly and in the alternative, it was said by the respondent that the test could be simply a good reason for the employer's refusal to comply with the order, other than the test of impracticability. Further alternatively, it was submitted that if the test was one of impracticability, then having regard to all of the evidence, including that led in this application, that test was satisfied.
6. Counsel for the applicant made a number of submissions. Firstly, it was submitted that the respondent employer did not have standing to bring the application to revoke the reinstatement order. He submitted that the reference to "further application" in s 23A(3) of the Act should be interpreted to mean that the only party who can make such an application is the dismissed employee or Union as the case may be who or which commenced the original proceedings. It was submitted that this interpretation is reinforced by the fact that an order for reinstatement is solely for the benefit of the unfairly dismissed employee.

A party in default of an order, should not, as the submission went, be able to bring as a matter of right, an application to set aside such an order, arising from their own default.

7. In the alternative, counsel for the applicant submitted that the power open to the Commission pursuant to s 23A(3) confers a discretion upon the Commission as to whether the original order should be revoked: s 56 Interpretation Act 1984. It was submitted that parliament could not have intended that a failure to comply with an order of the Commission creates a right in that same party, to have the order, which order was made for the benefit of another, set aside. The submission was that as the scheme of the Act is that orders of the Commission are to be complied with, all s 23A(3) does is to create an alternative means of dealing with a failure to comply with such an order, which in terms does not create a right to fail to comply. This is particularly so on the applicant's submission, given that the alleged right arises from a default by the party seeking to exercise it.

Consideration

8. Section 23A(3) relevantly provides as follows—

> *"If an employer fails to comply with an order under subsection (1)(b) the Commission may, upon further application, revoke that order and, subject to subsection (4), make an order for the payment of compensation for loss or injury caused by the dismissal."*

Standing to Bring Application

9. I deal firstly with the question of standing to bring an application such as this. I am not persuaded by Mr Schapper's argument that it is not open for a respondent employer to bring such an application. The words used in s 23A(3), upon their plain and ordinary meaning, in my view, are to be construed so as to enable either party to the substantive proceedings leading to the issuance of a reinstatement order, to apply to have that order revoked. There is nothing in the language of the section that indicates any intention by the legislature to qualify by whom such an application can be made. I would have thought that if this was the intention of the parliament, then this could have been easily made clear. The absence of such words of qualification lead me to conclude that on its ordinary and natural meaning, there is simply required an application to be made to revoke a reinstatement order.

Does May mean Must?

10. What then is meant by reference to "may" in s 23A(3)? Whether words used in a statute are mandatory or directory is a difficult question. It would appear that the preponderance of authority in relation to this matter suggests that two broad issues are relevant they being firstly, what are the consequences of interpreting a provision as mandatory or directory and secondly, would the purpose or object of the statute be furthered by adopting either interpretation: *Statutory Interpretation in Australia 4th Edition* Pearce and Geddes at para 11.2. This necessarily involves a court or tribunal imputing an intention to the parliament as to what it meant in each particular case.

11. In the case where a statute refers to the word "may", it is for the party who asserts that it should be interpreted in a mandatory sense to establish this: *Ex parte Gleeson* (1907) CLR 368 at 373; *Ward v Williams* (1995) 92 CLR 496 at 505; *Finance Facilities Pty Ltd v FCT* (1971) 127 CLR 106 at 138. This is supported by the terms of s 56 of the Interpretation Act 1984, which provides that where in a written law the word "may" is used, it shall be interpreted to mean any power to which it refers is discretionary. This provision is however, subject to s 3 of the Interpretation Act 1984, which qualifies the application of s 56 in cases where the intent or object of the Act would be inconsistent with the application of s 56.

12. In the case of courts or tribunals, an expression conferring authority to exercise jurisdiction is usually interpreted to be mandatory, whereas the exercise of general powers and a power to grant relief are usually, it seems, interpreted as being discretionary: *Ex parte McGavin; Re Berne* (1945) 46 SR (NSW) 58; *Newmarch v Atkinson* (1918) 25 CLR 381; *Lamb v Moss* (1983) 49 ALR 533 at 549.

13. A classic statement of the law in this area are the observations of Earl Cairns LC in *Julius v Bishop of Oxford* (1880) 5 App Cas 214 where in dealing with the words "it shall be lawful" he said at 222-223—

> *"They are words merely making that legal and possible which there would otherwise be no right or authority to do. They confer faculty or power and they do not of themselves do more than confer a faculty or a power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so."*

14. These observations were further considered by the High Court in *Metropolitan Coal Co of Sydney Ltd v Australian Coal and Shale Employees' Federation* (1917) 24 CLR 85 where Isaacs and Rich JJ said at 96-97—

> *"The rule in Julius v Bishop of Oxford is not that wherever the word "may" is used in connection with a public office it means "shall". Nor, if the Legislature confers a right by the same word and states certain conditions, does it necessarily follow that the word imposes a duty on the proper officer, irrespective of all other considerations. The true rule is thus stated by Lindley MR in Southwark & Vauxhall Water Co v Wandsworth District Board of Works (1898) 2 Ch 603 at 607 speaking of the words "it shall be lawful": "These words may, no doubt, under certain circumstances impose a duty as well as confer a power, but is for those who contend that they do both to make good their contention"*

15. Before looking at the two issues referred to above, I first turn to consider the nature of s 23A(3). The starting point in terms of this issue would seem to be analysing the steps by which the parties before the Commission presently, arrived at the positions they are now in.

16. As noted above, the Commission determined that the applicant's member, Mr Jones, had been unfairly dismissed and ordered that he be reinstated. Other proceedings then took place, not relevant for the purposes of determining this matter. The Commission's decision was in the form required by and perfected pursuant to ss 34, 35 and 36 of the Act. That being so, the Commission as presently constituted, was then functus officio in relation to the substantive proceedings.

17. It is clear that by s 23A(3) of the Act, the power now sought to be exercised is one requiring an application to the Commission. That is, it is a fresh proceeding requiring, by the terms of reg 8 of the Industrial Relations Commission Regulations 1985, to be commenced by notice of application. It cannot be regarded as a part of the earlier proceedings leading to the issuance of the final order and the Commission, being functus in relation to those proceedings, cannot regard it as such. This is so despite the heading to s 23A of the Act referring to "Powers of Commission on claims of unfair dismissal". The Commission has already exercised its jurisdiction and powers in relation to the substantive application and granted a remedy available to it under s 23A(1) of the Act, in favour of the applicant, on the unfair dismissal claim. The claim of unfair dismissal has been dealt with and determined by the Commission. The Commission has no further work to do and indeed, can do nothing further in relation to that claim. The Commission has neither jurisdiction nor power to further deal with the claim itself matter once the order is perfected under the Act.

18. In this regard, s 23A(3) is to be contrasted with the other heads of power in s 23A, which clearly deal with what the Commission is empowered to do "on a claim of" harsh, oppressive or unfair dismissal. Those provisions deal with

the orders that the Commission may make and the terms of any such orders. This construction of s 23A(3) is reinforced by the terms of s 23A(1), which expressly provides what remedies the Commission may grant "on a claim of harsh, oppressive or unfair dismissal".

19. In terms of an application pursuant to s 23A(3), it would appear that the jurisdictional fact to be found necessary to the exercise of the Commission's power to revoke a reinstatement order is a failure to comply by the employer. Without this, because the Commission has already determined the primary claim and is functus officio in relation to it, there would be no jurisdictional foundation for the Commission to consider the matter further. On the above basis therefore, on an application to revoke being properly before it, once the Commission is satisfied that there has been a failure to comply as a matter of jurisdictional fact, the Commission is then obliged to consider whether to revoke the original order.

20. I turn then to consider the consequences of holding the word "may" in s 23A(3) as being either mandatory or directory, in the context of the purposes and object s 23A and of the Act as a whole.

21. If "may" in the sub-section is to be interpreted as directory or discretionary only, which must be the presumption to be displaced by those arguing to the contrary, clearly there would be no obligation on the Commission in a given case, upon application and being satisfied that a failure to comply has occurred, to revoke a reinstatement order and make an order for the payment of compensation for loss or injury caused by a dismissal. That is, there will remain an obligation on the employer to reinstate the unfairly dismissed employee under the order, consistent with the Commission's finding of unfairness and the conclusion that reinstatement was not impracticable. This must be the presumed intention of the parliament in the absence of a contrary intention within the scheme of the legislation as a whole.

22. In this regard, it is clear that the parliament has provided the Commission, by ss 23A, 29(1)(b) and 44, with the jurisdiction and power to remedy an injustice arising from the unfair dismissal of an employee. Thus, the provisions of the Act dealing with the Commission's unfair dismissal jurisdiction must be construed beneficially: *Bull v A-G (NSW)* (1913) 17 CLR 370. The provisions of s 23A as a whole need to be interpreted consistent with the grant of relief to unfairly dismissed employees.

23. The history of and the present terms of s 23A of the Act make it plain that the intention of the parliament has been to provide reinstatement as the primary remedy to an unfairly dismissed employee. Section 23A(3) as it is presently, was inserted into the Act by the Industrial Relations Amendment Act 15 of 1993, at the same time as the powers of the Commission in relation to such matters were codified for the first time and introduced as s 23A(1) of the Act. Immediately prior to that time, the Commission's only power on finding a dismissal to have been unfair was to order the reinstatement or the re-employment of the unfairly dismissed employee. This was so as a consequence of the decision of the Industrial Appeal Court some years earlier in *Robe River Iron Associates v ADSTE (WA Branch) (Pepler´s case) (1987) 68 WAIG 11* to the effect that the power to award compensation was not at large as an alternative to the reinstatement remedy. Thus at this time, the intention of parliament seemed to be that the Commission should order the reinstatement of an unfairly dismissed employee unless there was a good reason not to do so, with the onus of establishing that reason falling on the respondent employer: *FCU v George Moss Limited* (1991) 71 WAIG 318; *Gawooleng Dawang Inc v Lupton and Ors* (1993) 73 WAIG 39; *Management Committee of the Geraldton Sexual Assault Referral Centre v Marshall* (1994) 74 WAIG 1889.

24. It would seem therefore that the power conferred on the Commission by s 23A(3) of the Act at this point in time was by way of a safeguard to an unfairly dismissed employee to the effect that if the employer did not comply with the order, the employee would not be left without a remedy, in light of the absence of power in the Commission at that time to order the payment of compensation at large (See Hansard 11 November 1993 pp 6800-6806). Furthermore, the provision would also no doubt, have encompassed a change in circumstances of either the employer or the employee, following the reinstatement order being made. It may be that the former employee no longer wished to return to the employment of the employer. There would be nothing preventing the parties in that case from reaching such an agreement and making application to revoke the original order and seeking instead, an order of compensation. Likewise, there could have been a change in circumstances of the employer such as financial exigency, so that a return to employment was not feasible. Again, application could have been made to revoke the reinstatement order and for the Commission to consider making an order of compensation.

25. Given the terms of s 23A as a whole at that time, it could not be said in my view, that s 23A(3) as it then was, conferred on the employer a "right" to not comply with a reinstatement order, as counsel for the respondent seemed to submit. Such a construction would have been totally at odds with the statutory scheme as it then was and the parliament could not be taken to have intended to enact a provision in the legislation encouraging a breach of the law that itself had made. On the contrary, it seems open to conclude that the parliament, by providing for the possibility of a compensation order being made against an employer, which order would not otherwise have been within power at the time the Commission came to consider the remedy having found unfairness, provided an incentive to compliance with the reinstatement order.

26. By the Industrial Relations Amendment Acts 1 of 1995 and 3 of 1997, the provisions of ss 23A(1)(ba) and 23A(1a) were inserted into the Act in their present form. By these amendments, the parliament empowered the Commission to award compensation to an unfairly dismissed employee. These require the Commission to find that reinstatement is impracticable before an award of compensation can be made alternatively, if the employer agrees to pay compensation the power is also conferred. Thus compensation is only available by way of an order of the Commission on a claim of unfair dismissal in prescribed circumstances.

27. The objects provision of the Act in s 6 and the machinery for the enforcement of orders of the Commission make it clear that orders of the Commission are to be complied with. The Industrial Magistrates Court or the Full Bench, as the case may be, may impose sanctions in the case of an established breach. This is entirely consistent with the parliament clothing the Commission with jurisdiction and power to ensure that the Commission is able to uphold the laws it has charged the Commission to apply. Against this is the respondent's submission that the reference to "may" in s 23A(3) must mean "shall" because the effect of s 23A(3) is to provide an employer with a "right" to refuse to comply with or a "veto" on the Commission's reinstatement power, as the submission went.

28. As I have already noted, I am unable to agree with these submissions. In my opinion to construe the legislation in this way would be contrary to the fundamental principle that prima facie, orders made by the Commission are to be satisfied. I consider that for the terms of s 23A(3) to be held to be mandatory would require it to be plain that this was the intention of the parliament, which would require the use of the word "shall" instead of "may", as is used.

29. Furthermore, to adopt the interpretation urged upon the Commission by the respondent would be contrary to the remedial nature of s 23A of the Act, when read within the scheme of the Act as a whole. I can see nothing within these provisions to warrant the adoption of other than the presumption that where it is used in s 23A(3), the parliament meant that the word "may" be interpreted in its ordinary and natural sense, as supported by the provisions of the Interpretation Act 1984 to which I have referred. Additionally, this construction of the Act leads

to no repugnance or absurdity when considered in the context of the Act as a whole: *Cooper Brookes (Wollongong) Pty Ltd v FCT* (1981) 35 ALR 151.

30. I therefore reject the respondent's submissions that the provisions of s 23A(3) are mandatory such that on proof of the failure by an employer to comply with an order, the Commission is required to revoke it.

31. In the alternative, if the word "may" is to be construed as truly directory and not mandatory, then in the circumstances it would appear to me that the fact of a failure to comply with a reinstatement order having been established, this of itself would be insufficient to trigger the exercise of the discretion to revoke that order, and make a further order for the payment of compensation. This appears to me to be so because of the purpose and object of s 23A taken as a whole, that I have dealt with above. Additionally, I do not consider that the "test" in relation to when a reinstatement order will be revoked involves any consideration of impracticability. This is the test for the purposes of s 23A(1a) of the Act, which test would already have been dealt with leading to the making of the reinstatement order in the first place. In my opinion therefore, the Commission cannot be invited to re-determine an issue already considered and decided by it on the evidence, as in effect the respondent has invited the Commission to do in this application. This is all the more so in light of the fact that none of the Commission's findings or conclusions on this issue were challenged on appeal.

32. In my view, something more is required to move the Commission to revoke an order that it has made after hearing the evidence and submissions fully, as in this case. In my view, the introduction of the power to order compensation, only on a finding of the impracticability of reinstatement in s 23A(1a), reinforces the proposition that having concluded that reinstatement is not impracticable, and an order to reinstate and not compensate should be made, the Commission should be slow to revoke such an order and make a further order of compensation without very good reason being shown, particularly in the present circumstances where the application to revoke is vigorously opposed and the unfairly dismissed employee wants to return to the workplace.

33. The Commission would not wish to delineate what those circumstances may be but there would need to be, in my opinion, a compelling reason to grant an application to revoke an order, in the face of strong opposition to the course as is the case in this matter. I am not persuaded that there are any circumstances warranting such a course on this occasion.

34. For these reasons, I am of the view that the respondent's application to revoke the Commission's order of 10 April 2001 should be dismissed.

2001 WAIRC 02927

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS — WESTERN AUSTRALIAN BRANCH, APPLICANT *v.* BHP IRON ORE PTY LTD, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DELIVERED	THURSDAY, 31 MAY 2001
FILE NO/S	CR 117 OF 2000
CITATION NO.	2001 WAIRC 02927

Result	Application dismissed.
Representation	
Applicant	Mr D Schapper of counsel
Respondent	Mr T Lucev of counsel and with him Mr H Downes of counsel

Order.

HAVING heard Mr D Schapper of counsel on behalf of the applicant and Mr T Lucev of counsel and with him Mr H Downes of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby—

THAT the application be and is hereby dismissed.

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

ALLEGED UNFAIR DEALINGS WITH REDUNDANCY PAYMENTS

2001 WAIRC 02888

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGIN & ELECT DIV, WA BRANCH, APPLICANT *v.* WESTRAIL — WESTERN AUSTRALIAN GOVERNMENT RAILWAYS COMMISSION, RESPONDENT
CORAM	COMMISSIONER J H SMITH
DELIVERED	FRIDAY, 25 MAY 2001
FILE NO	CR 348 OF 2000
CITATION NO.	2001 WAIRC 02888

Result	Application dismissed
Representation	
Applicant	Mr G Halliwell and Mr W Game
Respondent	Ms J Hayman

Reasons for Decision.

1 The Applicant alleges that Regulation 20(7)(a) of the Public Sector Management (Redeployment and Redundancy) Regulations 1994 ("the Regulations") have been unfairly and improperly applied to one of its members. The schedule to the application states—

> "Robert Majewski is a member of the Applicant Union. The Applicant claims that Mr Majewski has been unfairly dealt with in relation to his redundancy payment. The payment was calculated on the basis of his substantive position of Signals Technician instead of the correct rate of Regional Signal Superintendent South."

2 On 1 February 2001, pursuant to s.44 (9) of the Industrial Relations Act 1979 ("the Act") the Commission referred the matter for hearing. The Schedule of the Matters for Hearing and Determination are as follows—

> "1. The Applicant claims that one of its members Mr Robert Majewski has been unfairly dealt with by the Respondent in relation to his redundancy payment.
>
> 2. Mr Majewski was employed by the Respondent. His position formed part of the Respondent's Freight Rail Service which, by Government tender, was sold to Westrail Freight Employment

Company Pty Ltd ("WFE"). The sale was complete by 16 December 2000. As part of the sale, the Respondent made an offer that if he accepted a position with WFE and resign his position with the Respondent he would be paid a severance payment ("the offer").

3. Mr Majewski accepted the offer on 6 September 2000.
4. Mr Majewski was paid a severance payment calculated on the basis of the rate of pay of his substantive position of Signalling Technician and not the acting rate for Regional Signal Superintendent South.
5. The Applicant claims that Mr Majewski acted in the position of Regional Signal Superintendent South from 30 March 1998 until 3 October 2000.
6. The Applicant says that Mr Majewski's severance payment should have been calculated at the rate of pay for a Regional Signal Superintendent.
7. The Applicant seeks a declaration that the Respondent unfairly calculated Mr Majewski's severance payment and an order that the Respondent recalculate the severance payment and pay Mr Majewski a payment being the difference between the rate of pay applicable to his substantive position and the acting position.
8. The Respondent rejects the Applicants claim and says the application should be dismissed on the grounds that—
   (a) The Commission does not have jurisdiction to hear and determine the application under s.44 of the Industrial Relations Act 1979 ("the Act") because of the operation of s.95(3) of the Public Sector Management Act 1994.
   (b) In the alternative, in the event that the Commission determines the application pursuant to s.44 of the Act, or s.95(3) of the Public Sector Management Act, the Commission must take account of s.95(1) and s.95(4) of the Public Sector Management Act.
   (c) Although Mr Majewski acted in the position of Regional Signal Superintendent South from 30 March 1998 until 3 October 2000, this period of acting was not continuous.
   (d) The severance payment paid to Mr Majewski was calculated in accordance with the provisions of the Public Sector Management (Redeployment and Redundancy) Regulations 1994 ("the Regulations").
   (e) Regulation 20(7)(a) provides that an acting allowance is only to be taken into account in calculating severance pay where at the time of acceptance of the offer, the allowance has been paid continuously for the preceding 12 months.
   (f) At the time of calculating severance payments in accordance with Regulation 20(7)(a), or in the alternative, the date which Mr Majewski accepted the offer he had not been paid an allowance to act as a Regional Signal Superintendent continuously for the preceding 12 months."

3 At the outset of the hearing, Ms Hayman on behalf of the Respondent advised the Commission that the Respondent had reviewed its position in relation to the jurisdictional issue raised in 8(a) of the Schedule and that the Respondent conceded the Commission has jurisdiction to hear the matters in dispute, pursuant to s.44 of the Act.

4 Mr Robert Christopher John Majewski testified that he was employed by the Respondent as a Signalling Technician. He said from 22 December 1997 until 3 October 2000 he regularly acted in the position of Regional Signal Superintendent South. In particular he says that apart from two short periods after he had resumed work following annual leave or when the substantive occupant of the position remained for a short handover period, he acted in the position continuously from 30 March 1998 until 3 October 2000.

5 The Respondent tendered a summary of payments made to Mr Majewski which record the periods of time he was paid as a Regional Signal Superintendent South and as a Signal Technician. The document was produced to Mr Majewski who agreed that it correctly reflected the payments made to him in the periods of time set out in the summary. The summary states—

22 December 1997—12 January 1998	Higher duties allowance—District Signal Supervisor
13 January 1998—30 January 1998	Annual Leave—paid at substantive rate of pay
2 February 1998—27 March 1998	Substantive position—Signalling Technician
30 March 1998—29 April 1998	Higher duties allowance—District Signal Supervisor
30 April 1998—8 May 1998	Annual Leave—paid at substantive rate of pay
11 May 1998—12 May 1998	Paid at substantive rate of pay
13 May 1998—6 July 1998	Higher duties allowance—District Signal Supervisor
7 July 1998—8 July 1998	Annual Leave—paid at substantive rate of pay
9 July 1998—24 September 1998	Higher duties allowance—Regional Signal Superintendent
25 September 1998	Annual Leave—paid at substantive rate of pay
28 September 1998—8 January 1999	Higher duties allowance—Regional Signal Superintendent
11 January 1999—22 January 1999	Annual Leave—paid at substantive rate of pay
25 January 1999—19 March 1999	Higher duties allowance—Regional Signal Superintendent
22 March 1999—26 March 1999	Annual Leave—paid at substantive rate of pay
29 March 1999—18 February 2000	Higher duties allowance—Regional Signal Superintendent
7 October 1999—8 October 1999	Annual Leave—paid higher duties allowance
31 January 2000—18 February 2000	Annual leave—paid higher duties allowance
21 February 2000—24 February 2000	Paid at substantive rate of pay—Signal Technician
25 February 2000—9 May 2000	Higher duties allowance—Regional Signal Superintendent
10 May 2000—11 May 2000	Paid at substantive rate of pay—Signal Technician
12 May 2000—19 May 2000	Annual Leave—paid at substantive rate of pay
22 May 2000—2 June 2000	Paid at substantive rate of pay—Signal Technician
5 June 2000—2 October 2000	Higher duties allowance—Regional Signal Superintendent
3 October 2000	Ceased acting in Regional Signal Superintendent position

6 The Respondent also tendered into evidence a copy of part of Mr Majewski's terms and conditions of employment. Term 10 provides—

"10.1 In line with Westrail policy, where it is agreed between you and the Head of Division that you undertake, on a temporary basis for more than 5 consecutive working days, some or all of the responsibilities of a position which has a base rate of pay higher than your new base rate of pay, you will be paid from the time you assume the additional responsibilities at a rate of pay as agreed between you and Westrail, which is proportionate to the level of additional responsibility.

10.2 The Head of Division may, where it is considered that the additional responsibilities are

essential to Westrail's ongoing operational requirements, approve payment at the agreed rate of pay for the additional responsibilities for periods of 5 consecutive working days of or less."

7 As set out in paragraph 2 of the matters referred for hearing and determination, Mr Majewski was made and accepted an offer of voluntary severance. The Respondent says its made a severance payment to Mr Majewski that was calculated according to the criteria set out in regulation 20 and 4A of the Regulations. Mr Majewski was paid a severance payment calculated at the rate that he was paid as a Signal Technician and not as a Regional Signal Superintendent South as the Respondent says he was not paid as a Regional Signal Superintendent continuously for the 12 months that preceded the acceptance of the offer.

8 "Pay" is defined in Regulation 3 to mean—

"(a) the award rate of pay, excluding allowances, applicable to the substantive classification of the recipient of the pay or, where the recipient does not have a substantive classification, the rate of pay, excluding allowances, under his or her contract of employment;

(aa) an allowance—

(i) that is always paid with the award rate of pay applicable to the substantive classification of the recipient of the pay or, where the recipient does not have a substantive classification, with the rate or pay under his or her contract of employment; and

(ii) the payment of which is not subject to any condition relating to the time, place or circumstances at or in which the recipient of the pay is employed, or to any other condition;

(b) an enterprise bargaining allowance;

(c) an allowance for an employee being in charge of other employees; and

(d) a tally or piece rate,

but does not include an allowance of any other kind unless the Minister has approved the allowance for the purposes of this definition;"

9 Further regulation 20 (7) provides—

""pay" means pay, as defined in regulation 3 (1), at the time of acceptance of the offer of voluntary severance, except that it also includes —

(a) any allowance of the following kinds that has been paid continuously for the preceding 12 months—

(i) an allowance for temporarily undertaking duties other than those of the substantive office, post or position of the relevant employee; and

(ii) a higher duties allowance;

and

(b) a shift allowance which is paid on a regular basis including during periods of annual leave."

10 It is not in dispute that Mr Majewski's substantive position was at all material times the position of Signalling Technician.

11 The Applicant argues that the Regulations have not been fairly and properly applied to Mr Majewski for the reasons given in the schedule. In particular the Applicant contends that given the length of time that Mr Majewski acted in the position of Regional Signal Superintendent South it was unfair to calculate his severance payment at the Signalling Technician's rate. The Applicant also contends that the periods of time that Mr Majewski was paid as Regional Signal Superintendent South do not constitute an allowance within the meaning of Regulation 20(7) of the Regulations.

12 The purpose of the definition of "pay" in Regulation 3 and Regulation 20(7) when read in their statutory context is to require government agencies to calculate a severance payment by having regard to completed years of continuous service and to the rate of pay paid to an employee at the time of acceptance of an offer of voluntary severance. "Pay" however is defined as the rate of pay excluding allowances applicable to the substantive classification of the recipient of the pay. Regulation 20(7) authorises a severance payment to be calculated at a rate higher than the rate applicable to substantive classification only where the employee is in receipt of a payment that can be characterised as an allowance that has been paid continuously for the preceding 12 months that is for temporarily undertaking duties other than those of the substantive position, or a higher duties allowance that has been paid continuously for the preceding 12 months.

13 Having considered Mr Majewski's evidence and in light of the concession that Mr Majewski's substantive position was the position of Signalling Technician, in my opinion, the difference in the rate of pay between the two positions can be characterised as an "allowance for temporarily undertaking duties" within the meaning of Regulation 20(7).

14 The crucial point is whether Mr Majewski was paid an "allowance" for temporarily undertaking duties continuously for 12 months (preceding the date of acceptance of the offer of voluntary severance), not whether he carried out duties (other than his substantive position) continuously for the preceding 12 months. Whilst periods of annual leave would not break a period of continuous service, the pre-condition to a severance payment at a rate higher than the substantive rate of pay is not continuous service, but continuous payment of the allowance.

15 The payroll records establish that Mr Majewski was not paid the allowance from 21 February 2001 to 24 February 2000 and from 10 May 2000 to 2 June 2000. Consequently the criteria for calculating Mr Majewski's severance payment at the higher rate of pay has not been met and in all the circumstances it has not been demonstrated that the Regulations have been unfairly or improperly applied. The application will be dismissed.

2001 WAIRC 02889

ALLEGED UNFAIR DEALINGS WITH REDUNDANCY PAYMENTS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION.

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGIN & ELECT DIV, WA BRANCH, APPLICANT
	v.
	WESTRAIL — WESTERN AUSTRALIAN GOVERNMENT RAILWAYS COMMISSION, RESPONDENT
CORAM	COMMISSIONER J H SMITH
DELIVERED	FRIDAY, 25 MAY 2001
FILE NO	CR 348 OF 2000
CITATION NO.	2001 WAIRC 02889

Result	Application dismissed
Representation	
Applicant	Mr G Halliwell and Mr W Game
Respondent	Ms J Hayman

Order.

HAVING heard Mr G Halliwell and Mr W Game on behalf of the Applicant and Ms J Hayman on behalf of the respondent,

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

THAT the application be and is hereby dismissed.

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

2001 WAIRC 02862

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT *v.* CLIFTON NOMINEES PTY LTD, RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	THURSDAY, 17 MAY 2001
FILE NO	CR 310 OF 2000
CITATION NO.	2001 WAIRC 02862

Result	Applicant dismissed unfairly; compensation awarded
Representation	
Applicant	Mr J Rosales-Castaneda of Counsel
Respondent	Mr D Clarke as agent

Reasons for Decision.

1 This is an application pursuant to section 44 of the *Industrial Relations Act, 1979* (the Act). The Australian Liquor, Hospitality and Miscellaneous Workers' Union, Western Australian Branch (the applicant) contends that their member, Ms Beryl Bowen, had been working on a continuous basis at Gingers Roadhouse since July 1989. The applicant further contends that their member was dismissed on 30 October 2000 in a harsh, oppressive and/or unfair manner and seeks reinstatement as the appropriate remedy. At hearing, on discovery that the respondent no longer operated the business, this was amended to seek compensation. The respondent Clifton Nominees Pty Ltd opposes these claims. The principal of the respondent company, Mr Trevor Edwards operated the Gull Service Station trading as Gingers Roadhouse and located at 1383 Great Northern Highway, Upper Swan. The applicant's member Ms Bowen worked as a cook at the roadhouse since January 1989. Mr Edwards took over the lease of the business in January 1996 and retained Ms Bowen as an employee. The applicant seeks a finding of unfair dismissal and a finding that the length of her employment dates from 1989 and not from 1996 when Mr Edwards took over the business.

2 The applicant says that at the time of her dismissal she was earning $603.13 gross per week and was working six days a week including night shifts and weekend work. She says she worked a total of 45.6 hours per week.

3 It is common ground that on Thursday, 26 October 2000 a truck owned by Mr Duane deTurt was parked at the back of the premises, close to the back exit and over a drain used for disposal of liquid waste. As part of her duties Ms Bowen regularly cleaned out the deep fryers in the kitchen and disposed off the waste down this drain. There is some dispute between the parties as to what the waste composed. The applicant says the waste contained soapy water with some kitchen oil. The respondent says it also included caustic substances and food scraps. Ms Bowen says, "I got annoyed and threw it (*ie the waste*) between the cab, the trailer and the drain. I couldn't get to the drain direct, and I felt frustrated. I returned with the other three buckets of soapy water, and tipped them under the truck. The frustration had subsided by then and I realised I had done wrong."

4 On Monday, 30 October 2000 at about 6am in the morning at the conclusion of Ms Bowen's shift, Mr Edwards called Ms Bowen and another employee Ms Lynette Crane into his office. He advised that he had received a complaint from a customer who had said that he had waste thrown over his $150,000 truck which had caused a huge mess. Mr Edwards asked who had done this and Ms Bowen admitted to the offence. Mr Edwards then advised he was conducting a record of termination interview and asked Ms Crane and Ms Bowen to stay. Ms Crane was to be a witness to the interview. There is some difference between the parties as to what was said at this interview. But in essence Mr Edwards indicated to Ms Bowen she should apologise and pay for the cleaning costs of the truck and secondly, that he was considering dismissing her summarily for gross misconduct. Mr Edwards then left the premises and shortly after rang Ms Bowen to notify her that he was dismissing her with immediate effect. The reason given for her termination was her gross misconduct in damaging a customer's property by throwing waste over the vehicle. Ms Bowen was paid up for the time worked. She was not paid any notice or accrued annual leave.

5 Evidence for the respondent was given by Mr Trevor Edwards, the owner, Ms Lynette Crane, a co-worker and Mr Duane deTurt, the owner of the vehicle. Evidence for the applicant was given by Mrs Patricia McCoy, the previous owner of the business, Ms Jillian Hall, a former employee of Gingers Roadhouse and Ms Bowen.

6 There is little difference between the parties in the evidence as to what took place. The real difference is whether the penalty fits the crime. Separate to that Mr Edwards says that Ms Bowen did not express any remorse for her act and in fact declared the customer's truck should not have been parked where it was. He says that she indicated that was the reason why she had thrown the waste over the truck. The applicant says that she offered to clean the truck or pay for the cleaning of the truck.

7 The evidence of Ms Bowen is that when cleaning the fryer she typically emptied five buckets of waste. The first bucket was the oil from the fryer and went to the bin. The second bucket she says was mainly water but concedes that it could contain some oil and food. This is the bucket that she tipped over or splashed the truck with. The other three buckets she tipped down the drain. She says she was sorry for what she did. She says she was not sorry straightaway, however during the night she was remorseful but did not see a reason to telephone Mr Edwards to alert him to her actions. She said she did not clean the truck as it was dark and there were no hoses outside. Likewise she did not attempt to clean the truck in the morning prior to leaving as she was tired and it was the end of her shift. She says that the waste splashed the truck about two to three feet above ground. Mr deTurt's evidence is that the waste covered more extensively the truck.

8 On Monday she was called in to the office by Mr Edwards with Ms Crane present. She admitted to throwing waste over the truck. She says that Mr Edwards outlined two options. Ms Bowen should apologise and pay for any cleaning involved with the truck, or, Ms Bowen should face dismissal for gross misconduct. He stated that he preferred option 2. She says that she agreed to wash the truck or pay for its cleaning. The record of termination interview which is [Exhibit TE2] states—

> "DATE; 30-10-2000
>
> TIME; 6.10 am
>
> EMPLOYEE NAME; Beryl BOWEN
>
> You have attended a termination interview in relation to the following—
>
> 1) Customer complaint re. Throwing waste over his vehicle
>
> Management has decided to proceed with your termination because;
>
> 1) GROSS MISCONDUCT

2) Customer complaint ie. Going public
3) Threat to business

As a result of the interview you have been informed that your employment will be terminated immediately."

9 Ms Bowen says that she came in on Wednesday, 1 November 2000, at the request of Mr Edwards but refused to sign the record of termination interview [Exhibit TE 2] and that the respondent wrote on the interview record that she had refused to sign the record and another employee Mr Paul Sharp signed the record of termination. She said that she had two verbal warnings previously. One warning was for starting work early and shifting food prior to another employee commencing. This had caused friction with the other employee. She cannot remember the reason for the second verbal warning.

10 She says she was not given a bill or indication of the cost of cleaning the truck nor an opportunity to pay for cleaning the truck.

11 Mrs Patricia McCoy gave evidence that she was Ms Bowen's previous employer and that Mr Edwards took over the business as a commercial agent and paid for stock. She says that she gave him a cheque for $1416 [Exhibit PM2] as requested by Mr Edwards to cover long service leave liability for Ms Bowen.

12 The evidence of Ms Hall, a previous employee of Gingers Roadhouse was that the respondent had told her that delivery drivers had to go round the front door to deliver goods they could not get in the back. She says most of the deliveries were through the back door and trucks sometimes blocked the path or were about a metre away from back door. She says you could get out the back door however you had to walk around the trucks. She says she raised her concerns regarding the parking of trucks once or twice with the employer but he had other things to deal with.

13 Ms Lynette Crane, console operator with the respondent, gave evidence that she attended the meeting of 30 October 2000 at which Ms Bowen admitted that she had thrown waste over the truck. She says Mr Edwards indicated that he was conducting a record of termination interview and gave two options as outlined in [Exhibit TE2]. She says the respondent indicated he preferred the second option, that is instant dismissal. She says that Ms Bowen did not give a reason for her actions and cannot remember whether she was allowed to. She says that Paul Sharp and herself signed the record of interview [Exhibit TE2] on Wednesday, 1 November 2000.

14 Ms Crane in response to questions from Commission indicated that the meeting lasted for about 10 minutes and that the applicant had indicated that she would clean the truck or pay for the cleaning. Ms Crane also says that she did not see the truck. She says she was pretty sure that Ms Bowen offered to clean the truck only after Mr Edwards indicated that he preferred the second option, ie. instant dismissal.

15 Mr Trevor Edwards confirmed the evidence of Mrs McCoy that he had been paid $1416 by her to cover long service leave liability for Ms Bowen. He says he was approached by Ms Bowen about two weeks before the dismissal incident and asked about her entitlement to long service leave. He says he checked this with Mr Clarke, his agent, however events overtook giving a reply and Ms Bowen was dismissed before he could reply to her. At this time Mr Clarke advised that due to dismissal for misconduct, Ms Bowen was not due the entitlement.

16 Mr Edwards says he was phoned on Friday, 27 October 2000 by Ms Patricia Power and was told the applicant had thrown waste over the truck. He says he did not contact Ms Bowen that day or over the weekend because he wanted to see her face to face on the Monday. He says he considered the issue at length over the weekend and made a decision to terminate her. The reasoning for this is because his business is customer oriented and he could not allow Ms Bowen to do this to a customer. He says he typed the record of termination letter during the course of the meeting with Ms Crane and Ms Bowen on the Monday morning and following the meeting he spoke to Mr deTurt. However, he says his discussion with Mr deTurt had no bearing on his decision to terminate Ms Bowen. He then telephoned Ms Bowen and told her she was dismissed instantly. He says Ms Bowen had been an excellent worker for the last 4 ½ years. She did receive two verbal warnings. It is clear from his evidence these were not really a factor in the dismissal. He says that Ms Bowen only offered to wash the truck or pay for the cleaning after he had badgered her. He says she was not remorseful in any way. He says the business has been taken over by another person since 25 February 2001.

17 The evidence of Mr deTurt who owned the truck was that his truck was covered by oil, sausage and bacon bits to above waist height on the cab and to over head height on the trailer. He says he walked back into the roadhouse and asked who had done this to his truck. At that time he spoke to Ms Crane and she indicated that he should not have parked his truck where he did. Mr deTurt spoke to Mr Edwards that morning to advise him how upset he was that his $150,000 truck had been abused like this. Mr deTurt says he had to clean his own truck and that the applicant to this date has made no attempt to ring him or to apologise. He does not know how much it cost him to clean the truck but he had to hire a steam cleaner and buy degreasing fluids.

FINDINGS—

1. I find that Ms Bowen deliberately threw waste over Mr deTurt's truck on the night of 27 October 2000. The waste contained mostly water, some oil and food scraps.
2. Ms Bowen's actions were due to her frustration caused by the truck being parked at the back door and obstructing the drain.
3. At the interview on 30 October 2000, Ms Bowen offered, after prompting, to clean the truck or to pay for the cleaning of the truck.
4. Mr Edwards had determined prior to the meeting of 30 October 2000 that he was to dismiss Ms Bowen for gross misconduct.
5. Ms Bowen whilst not indicating remorse at the time, knew her actions were wrong and was later sorry for them.
6. Mr Edwards summarily dismissed Ms Bowen on 30 October 2000 for deliberately throwing waste over Mr deTurt's truck.

18 I refer to the decision of the Industrial Commission of South Australia in Full Commission *Bi-Lo Pty Ltd v Hooper* 53 IR 224 @ 229 "Where the dismissal is based upon the alleged misconduct of the employee, the employer will satisfy the evidentiary onus which is cast upon it if it demonstrates that insofar as was within its power, before dismissing the employee, it conducted as full and extensive investigation into all of the relevant matters surrounding the alleged misconduct as was reasonable in the circumstances; it gave the employee every reasonable opportunity and sufficient time to answer all allegations and respond thereto; and that having done those things the employer honestly and genuinely believed and had reasonable grounds for believing on the information available at that time that the employee was guilty of the misconduct alleged; and that, taking into account any mitigating circumstances either associated with misconduct or the employee's work record, such misconduct justified dismissal. A failure to satisfactorily establish any of those matters will probably render the dismissal harsh, unjust or unreasonable"

19 Mr Edwards in his evidence stated the following—

(Page 52)Can the witness be shown then exhibit TE2?—Oh, right, yeah. Sorry, I thought it was the one—- yep.

That's your signature at the bottom on the right-hand side, isn't it?—Yes, sir.

And it's dated the 30th of October 2000?—That's right.

That's the date when you signed it?—Yes, sir.

When did you type this document?—I typed it out on the Monday morning when Beryl and Lyn were in my office.

In 5 minutes when you called Beryl and Lyn you typed this on your computer?—I certainly did, sir.

And you had already made a decision?—In my mind I had, yes.

And Again: When I first heard about this instance I deliberated on it all weekend. I didn't sleep. I thought about it because Beryl Bowen had been in my employ for 4½ to 5 years. She was an excellent employee, worked very, very hard, and I didn't make this decision very easily. Does that answer your question?

And I asked you whether you had communicated that decision immediately to Mrs Bowen then at the meeting at 5 past 6?

—I communicated the two options. Then I said, "I will speak to the truck driver."

Yeah, and you advised her of the decision after you talked to the owner of the truck?—That's right.

Yes. But what I'm saying is that that decision had already been made because according to your evidence you typed it at that very same time when you were talking to Mrs Bowen and yet you didn't tell her at that point in time?—That's right, yeah.

20 The evidence is clear. Mr Edwards had made up his mind over the weekend to dismiss Ms Bowen because of her action in spoiling the truck. He fronted her on Monday, she admitted her actions and he sacked her. He did not dismiss her then and there, but he did so shortly afterwards. He did not properly consider any alternative or any conversation he had with Ms Bowen.

21 *Laws v London Chronicle (Indicator Newspapers)* Ltd 2 ALL ER 285 @ 287 " … since a contract of service is but an example of contracts in general, so that the general law of contract will be applicable, it follows that, if summary dismissal is claimed to be justifiable, the question must be whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service… I… think…that one act of disobedience or misconduct can justify dismissal only if it is of a nature which goes to show (in effect) that the servant is repudiating the contract, or one of its essential conditions, and.. therefore… the disobedience must at least have the quality that it is "wilful" ; it does (in other words) connote a deliberate flouting of the essential contractual conditions".

22 Ms Bowen was not acting so as to repudiate her contract. Certainly, her actions were serious and intentional. Mr Edwards operated a roadhouse that is dependent on truck drivers for his business. However, Ms Bowen's complaint was that he should not have parked over the drain. Whereas that was not for her to determine, and she knew her actions were wrong, she was not repudiating an essential component of her contractual conditions.

23 Mr Clarke for the respondent refers to the *Undercliffe Nursing Home—v- Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* 65 WAIG 385 case and says there was no abuse of the employers right to terminate Ms Bowen. He refers to the matter of *Shire of Esperance v Peter Maxwell Mouritz* 71 WAIG 891 as authority for the proposition that procedural flaws in a dismissal are but one element in determining the fairness or otherwise of the dismissal. However, he says there was no denial of procedural fairness. In that sense he refers to a decision of Gregor C in *Metals and Engineering Workers Union—Western Australian Branch v.Arcus Refrigeration Service Pty Ltd* 74 WAIG 1800 and says there was no ambush by Mr Edwards. He inquired into the matter and made his decision. As stated, I find otherwise, and I do not construe Mr Edwards' discussion with Ms Bowen as proper inquiry. Mr Clarke uses the decision of Gregor C to quote the decision of the High Court of Australia in *Blyth Chemicals Limited -v- Bushnell* 49 CLR 66 as follows—

> "The mere apprehension that an employee will act in a manner incompatible with the due and faithful performance of his duty affords no ground for dismissing him; he must be guilty of some conduct in itself incompatible with his duty and the confidential relationship between himself and his employer".

He says Ms Bowen was guilty of the misconduct and further he quotes the decision of Gregor C—

> " Conduct which in respect of important matters is incompatible with the fulfilment of the employee's duty, or involves an opposition, or conflict between his interest and his duty to his employer, or impedes the faithful performance of his obligations, or is destructive of the necessary confidence between employer and employee, is a ground of dismissal".

24 He says that by her wilful, destructive misconduct she destroyed the confidence of the employer. He also says that Ms Bowen showed no remorse and did not apologize to Mr deTurt for the damage. He says her actions struck at the heart of the business being reliant on truck drivers for custom and at the heart of the relationship. In that regard Mr Clarke refers to a decision of Cawley C in *Andrew Kittle—v- Alan J Marshall Pty Ltd* 78 WAIG 749 In which the Commission stated @ 750—

> " A significant and deliberate breach of such a duty of care would, in my view, amount to a serious matter and could give rise to misconduct such as to strike at the heart of any contract of employment involved and give rise to a right to summarily dismiss".

25 In contrast Mr Rosales-Castaneda for the applicant says that in accordance with section 26 and the obligation of the Commission to act on the basis of equity, good conscience and the substantial merits of the case, that the whole circumstance must be looked at. He says Ms Bowen was an excellent worker, 53 years old and had worked there since 1989. She had an ongoing issue with trucks being parked at the back exit and the employer knew of this. She did not hide her actions and she was willing to apologize and pay for washing the truck. He says that Mr Edwards had made up his mind to terminate Ms Bowen's services and Ms Bowen could not have changed his mind, and he did not consider the alternatives to dismissing her.

26 Put simply Mr Edwards had already made up his mind and that was to dismiss Ms Bowen as he could not tolerate her actions. He ran a business which relied on the goodwill and patronage of truck drivers and he could not condone an employee deliberately causing damage to a truck. Ms Bowen when challenged freely admitted what she did.

27 I should make it clear that I have no issue with the credibility of the witnesses. All witnesses gave clear and honest accounts of what they consider happened. Any difference of view as to the actual contents of the bucket is one of degree and not greatly relevant. The issue is not so much a conflict as to what actually occurred but a conflict about whether the punishment was appropriate and whether there was a proper consideration in deriving the punishment.

28 I have no doubt that Ms Bowen's dismissal was harsh and unfair and I would so find. Ms Bowen admitted to her actions when challenged. She did not advise the employer immediately even though she knew her actions were wrong. She did not show remorse at the time even though she did offer to apologise and when threatened with dismissal to pay for the cleaning. All of these actions were wrong on the part of an employee who knows that damaging a truck at a roadhouse goes against the duty she owes to her employer to not damage his business. My finding that Ms Bowen's dismissal was harsh and unfair does not condone her actions.

29 However, she admitted that she threw the contents of the bucket over the truck. The evidence is clear that her actions were taken in a sense of frustration and antagonism at that time. These were not actions that she had ever done before or I would consider would do in the future. The evidence is also clear from Mr Edwards that he was going to dismiss her for her actions. So there was little if anything she could do to persuade him to the contrary. Before he met with her he had formed a view that the punishment for her crime was instant dismissal. The fact that he did not dismiss her at the meeting but by telephone

shortly after does not in my view mean that he in anyway considered Ms Bowen's views or any alternatives to dismissing her.

30 The next issue that I have is that Ms Bowen had worked at Gingers Roadhouse for 11 years and for the respondent for 4 ½ years. Mr Edwards rated her as an excellent worker. But for this one incident she may still be working there. Added to that she is 53 years of age. Whereas the employer has a right to terminate an employee and the Commission should not interfere with that unless the right is abused, as Mr Clarke has submitted; I consider the harshness of the punishment and the unfairness of the process was an abuse of that right. An "excellent" employee was given no real chance to save her job following an isolated incident in many years of employment. The evidence at its highest is that the truck required a very thorough wash after being spoiled deliberately. It required the application of a steam cleaner and degreasing fluids. Mr deTurt was vague in his evidence about the cost of this, yet he did not suggest any extensive or expensive damage. The truck required a very good clean. I can understand Mr deTurt's outright annoyance and also Mr Edwards annoyance, given an angry customer and a deliberate act by an employee. However, the punishment is harsh and excessive. Ms Bowen was also deprived of any notice and her accrued leave. She was in all the circumstances not given a fair go (*the Undercliffe Case*).

31 The applicant had sought reinstatement but at hearing sought compensation as the respondent declared that he no longer operated the business. The respondent initially opposed reinstatement but changed his submission, in the event of a finding of harsh, oppressive or unfair dismissal, and suggested that the applicant could be placed in another unspecified business run by the respondent. I do not take that submission seriously. Firstly, because the respondent no longer operates the roadhouse. Secondly, the respondent's animosity at hearing to the applicant's actions and her application was very evident and in my view there would be little chance that the necessary trust between employer and employee could now be re-established. Accordingly, I would find that reinstatement of Ms Bowen is impracticable.

32 Ms Bowen has sought to mitigate her loss and this point was not really challenged [Exhibit BB2].

33 Ms Bowen seeks a finding that her service for long service leave purposes was continuous. The evidence unchallenged is that Mrs McCoy paid Mr Edwards, on the transfer of the business, an amount of money to cover Ms Bowen's long service leave entitlement. On that basis, and on her unchallenged evidence that she worked at Gingers Roadhouse since January 1989, I find her employment was continuous since January 1989.

34 The unchallenged record of her earnings [Exhibit BB2] from date of dismissal to date of hearing show earnings of $929.87. With the exception of this she has been out of work for 21 weeks and 2 days. Her unchallenged evidence is that at the time of her dismissal she earned $603.13 gross per week. The total loss would then be $12,906.98 less $929.87, being $11,977.11 (*Ramsay Bogunovich—v- Bayside Western Australia Pty Ltd* 79 WAIG 8 *& James A Capewell—v- Cadbury Schweppes Australia Ltd* 78 WAIG 299).

35 This is the amount I will award in compensation.

2001 WAIRC 02916

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT *v.* CLIFTON NOMINEES PTY LTD, RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	WEDNESDAY, 30 MAY 2001
FILE NO	CR 310 OF 2000
CITATION NO.	2001 WAIRC 02916

Result	Applicant dismissed unfairly; compensation awarded
Representation	
Applicant	Mr J Rosales Castaneda of Counsel
Respondent	Mr D Clarke as agent

Order.

HAVING heard Mr J Rosales Castaneda of counsel on behalf of the applicant and Mr D Clarke for the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby—

(1) DECLARES that Beryl Bowen was harshly and unfairly dismissed by the above named respondent.

(2) ORDERS that the said respondent do hereby pay within seven days of the date of this order, as and by way of compensation, the amount of $11,977.11 to Beryl Bowen, less any taxation that may be payable to the Commissioner of Taxation.

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

CONFERENCES—Notation of—

Parties		Commissioner /Conference Number	Date	Matter	Result
Australian Workers' Union	BHP Iron Ore Ltd	Kenner C C62/2001	07/03/01	Failure to comply with proceedings relating to CR 264 of 200	Discontinued
Australian Workers' Union	Ready Workforce Pty Ltd & Adeco Industrial Pty Ltd T/A Fisher Cartwright Berriman Lawyers and Consultants	Kenner C C51/2001	16/03/01	Strike of alleged air contamination	Discontinued
Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union	Fluor Daniel Diversified Plant Services Pty Ltd	Gregor C CR281/2000	14/05/01	Use of Contractors	Discontinued

Parties		Commissioner /Conference Number	Date	Matter	Result
Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union	Maxi Metals (1992) Pty Ltd	Gregor C C121/2001	—	Rates of Pay	Concluded
Builders' Labourers, Painters and Plasterers Union	Arrow Holdings Pty Ltd	Gregor C C125/2001	13/6/01	Time and wages records	Concluded
Builders' Labourers, Painters and Plasterers Union	Quarry Homes	Gregor C C111/2001	24/5/01	Alleged harassment of former employee	Concluded
Builders' Labourers, Painters and Plasterers Union	Windsor Ceilings and Partitions	Gregor C C112/2001	—	Time and Wages Records	Concluded
Communications, Electrical, Electronic, Energy, Information, Postal, Plummbing and Allied Workers Union	Water Corporation	Gregor C C92/2001	—	Conference pursuant to s.44	Concluded
Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union	Bulls Bricklaying Services	Gregor C C113/2001	—	Time and Wages Records	Concluded
Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union	Dalewest Corporation Pty Ltd t/a Soils Aint Soils	Gregor C C103/2001	—	Time and Wages Records	Concluded
Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union	Vyso Pty Ltd t/a Lownway Engineering	Gregor C C118/2001	—	Time and Wages Records	Concluded
Forest Products, Furnishing and Allied Industries Industrial Union	Wesfi Manufacturing Pty Ltd	Gregor C C95/2001	15/05/01	Warning	Concluded
Independent Schools Salaried Officers' Association	Roman Catholic Archbishop of Perth	Coleman CC C290/2000	11/12/00	Conference Pursuant to S.44	Discontinued
Liquor, Hospitality & Miscellaneous Workers Union	Avon Health Service	Scott C C91/2001	—	Procedurally and Substantively Unfair Dismissal	Concluded
Liquor, Hospitality & Miscellaneous Workers Union	Burswood Resort (Management) Ltd	Wood C C316/2001	2/12/00	Alleged Unfair Dismissal	Discontinued
Liquor, Hospitality & Miscellaneous Workers Union	Burswood Resort (Management) Ltd	Beech C CR89/2001	N/A	Alleged Unfair Dismissal	Discontinued
Liquor, Hospitality & Miscellaneous Workers Union	Nightlife Nomineer Pty Ltd	Wood C C77/2001	16/05/01	Signing a Workplace Agreement	Concluded
Liquor, Hospitality & Miscellaneous Workers Union	Quirk Corporate Cleaning Australia Pty Ltd	Beech C C110/2001	11/04/01 & 23/04/01	Alleged unfair dismissal	Discontinued
Liquor, Hospitality & Miscellaneous Workers Union	Swanleigh Hostel	Kenner C C105/2001	23/05/01	Alleged unjustified redundancy	Discontinued

PROCEDURAL DIRECTIONS AND ORDERS—

2001 WAIRC 02939

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION.

PARTIES	KEITH ROSS GENTRY, APPLICANT
	v.
	COLES MYER LOGISTICS PTY LTD, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DELIVERED	FRIDAY, 1 JUNE 2001
FILE NO	APPLICATION 1300 OF 2000
CITATION NO.	2001 WAIRC 02939

Result Application for discovery

Order.

WHEREAS this is an application pursuant to Section 27(1)(o) of the Industrial Relations Act 1979 filed on the 17th day of May 2001; and

WHEREAS on the 28th day of May 2001 the Commission convened a conference for the purpose of conciliating between the parties in respect of the application; and

WHEREAS at that conference the parties agreed to the Commission issuing orders in respect of the of the application;

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

1. THAT within 7 days of the 28th day of May 2001 the parties shall provide each other with a list of discoverable documents.

2. THAT within 3 days of the provision of the list referred to in Order 1. the parties shall produce to one another those documents referred to therein which each party seeks of the other.
3. THAT the application be otherwise dismissed.

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

2001 WAIRC 02943

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	KEITH ROSS GENTRY, APPLICANT
	v.
	COLES MYER LOGISTICS PTY LTD, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DELIVERED	FRIDAY, 1 JUNE 2001
FILE NO	APPLICATION 1300 OF 2000
CITATION NO.	2001 WAIRC 02943

Result Application Amended

Order.

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

WHEREAS on the 28th day of May 2001 the Commission convened a conference for the purpose of conciliating between the parties in respect of an interlocutory application; and

WHEREAS at that conference the Applicant sought leave to amend the application. The Respondent consented to the amendment as sought;

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

THAT the application be amended as follows—

That the Applicant claims to have been—

(a) unfairly dismissed from his employment with the Respondent and seeks compensation; and

(b) denied contractual benefits being redundancy pay in accordance with an unregistered agreement between the employer and the SDA dated August 1996.

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

2001 WAIRC 02818

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	JULIA MARY TEMBY, APPLICANT
	v.
	ALBANY AND DISTRICTS SKILLS TRAINING COMMITTEE INCORPORATED, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DELIVERED	FRIDAY, 11 MAY 2001
FILE NO/S	APPLICATION 1927 OF 2000
CITATION NO.	2001 WAIRC 02818

Result Direction issued.
Representation
Applicant Mr N Graham of counsel
Respondent Mr B Walker as agent

Direction.

HAVING heard Mr N Graham of counsel for the applicant and Mr B Walker as agent for the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, and by consent hereby directs—

1. THAT each party shall give an informal discovery by serving its list of documents by 16 May 2001.
2. THAT evidence in chief in this matter be adduced by way of signed witness statements which will stand as the evidence in chief of the maker. Evidence in chief other than that contained in the witness statements may only be adduced by leave of the Commission.
3. THAT the parties file and serve upon one another any signed witness statements upon which they intend to rely no later than 25 May 2001.
4. THAT the matter be listed for hearing for 2 days.
5. THAT the parties have liberty to apply on short notice.

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

2001 WAIRC 02973

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	STEVEN CHARLES WEBSTER, APPLICANT
	v.
	UQUON PTY LTD T/A LAURIE KELLY REAL ESTATE, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DELIVERED	TUESDAY, 5 JUNE 2001
FILE NO/S	APPLICATION 2025 OF 2000
CITATION NO.	2001 WAIRC 02973

Result Direction issued.
Representation
Applicant Mr K Trainer as agent
Respondent Ms F Stanton of counsel

Direction.

HAVING heard Mr K Trainer as agent for the applicant and Ms F Stanton of counsel for the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby directs—

(1) THAT the applicant file and serve further and better particulars in relation to requests R1-R4 inclusive as outlined in the respondent's notice of application for further particulars of claim by 19 June 2001.
(2) THAT each party shall give an informal discovery by serving its list of documents by 26 June 2001.
(3) THAT inspection of documents shall be competed by 3 July 2001.
(4) THAT the matter be listed for hearing for 1 day.
(5) THAT the parties have liberty to apply on short notice.

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

2001 WAIRC 02812

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	PETA KALAITZIS, APPLICANT *v.* SAUSAGE SOFTWARE, RESPONDENT
CORAM	COMMISSIONER J H SMITH
DELIVERED	MONDAY, 14 MAY 2001
FILE NO/S	APPLICATION 83 OF 2001
CITATION NO.	2001 WAIRC 02812

Order.

HAVING heard Ms P Kalaitzis on her own behalf and Mr A Posniak on behalf of the Respondent and by consent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

(1) The name of the Respondent be amended to METHOD AND MADNESS PTY LTD.

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

2001 WAIRC 02819

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	BRETT EDGAR HAGDORN, APPLICANT *v.* ERINBUSH PTY LTD, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DELIVERED	FRIDAY, 11 MAY 2001
FILE NO/S	APPLICATION 96 OF 2001
CITATION NO.	2001 WAIRC 02819

Result	Direction issued.
Representation	
Applicant	Mr B Hagdorn
Respondent	Mr E W Nielson of counsel

Direction.

HAVING heard Mr B Hagdorn on his own behalf and Mr E W Nielson of counsel for the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby directs—

1. THAT the respondent provide a copy of the time and wages records for annual leave in respect of the applicant's period of employment by 10 May 2001.
2. THAT the applicant provide further and better particulars of his overtime claim to the respondent by 17 May 2001.

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

2001 WAIRC 02864

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	TIMOTHY WILLIAM DEARLE, APPLICANT *v.* GAMES R US AUSTRALIA, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DELIVERED	TUESDAY, 22 MAY 2001
FILE NO/S	APPLICATION 394 OF 2001
CITATION NO.	2001 WAIRC 02864

Result	Order issued.
Representation	
Applicant	Mr T Dearle
Respondent	Mr M Wylie

Order.

HAVING heard Mr T Dearle on his own behalf and Mr M Wylie on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the application be and is hereby stayed.

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

2001 WAIRC 02972

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	MICHAEL ROBERT WARDROP, APPLICANT *v.* COOK'S CONSTRUCTION PTY LTD, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DELIVERED	TUESDAY, 5 JUNE 2001
FILE NO/S	APPLICATION 577 OF 2001
CITATION NO.	2001 WAIRC 02972

Result	Direction issued.
Representation	
Applicant	Ms V Reynolds of counsel
Respondent	Mr P O'Sullivan

Direction.

HAVING heard Ms V Reynolds of counsel for the applicant and Mr P O'Sullivan for the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby directs—

(1) THAT each party shall give an informal discovery by serving its list of documents by 26 June 2001.
(2) THAT inspection of documents shall be competed by 10 July 2001.
(3) THAT evidence in chief in this matter be adduced by way of signed witness statements which will stand as the evidence in chief of the maker. Evidence in chief other than that contained in the witness statements may only be adduced by leave of the Commission.
(4) THAT the parties file and serve upon one another any signed witness statements upon which they intend to rely no later than 10 July 2001.
(5) THAT the matter be listed for hearing for 2 days.
(6) THAT the parties have liberty to apply on short notice.

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