

# CUMULATIVE DIGEST HEADINGS

## Denotes New Heading

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





## CUMULATIVE DIGEST—continued

	Page
ACT - INTERPRETATION OF—continued	
Conference re alleged threat of prejudice in the employment of members of the union - Applicant Union argued that three employees had expressed their desire to improve their conditions of employment by carrying out their existing work under the Transport Workers' (General) Award rather than under a new workplace agreement - Further, Applicant Union argued that one of the employee's workplace agreement no longer have any effect because firstly, Respondent has cancelled the workplace agreement, secondly, by victimising that employee, Respondent has lost its right to any benefits arising from the workplace agreement and thirdly, the terms of "Expiry of Agreement" clause should not be read so as to continue the terms of the workplace agreement as to do so was unconscionable - Respondent raised a preliminary issue in respect of that employee, whereby the employee and the Respondent are parties to a registered workplace agreement and by operation of s.7A, s.7C and s.19(4)(b) of the Workplace Agreements Act, 1993, the Commission was prohibited from dealing with the matters in dispute in respect of that employees' employment - Further, Respondent argued that the workplace agreement has not expired - Commission reviewed authorities and various sections of the Workplace Agreements Act, 1993 and found that the Respondent's argument that the workplace agreement has not expired had not been made out - Further, for reasons set out in its Reasons for Decision, Commission found the matters in dispute between Respondent and the employee in question was not an industrial matter, therefore Commission lacked jurisdiction to enquire into and deal with these matters - Declaration and Order Issued - Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch -v- Down South Transport Pty Ltd - C 145 of 2001 - SMITH, C - 06/07/01 - Road Transport.....	2456
Conference referred re alleged harsh, unfair and unlawful dismissal - Applicant Union argued that the manner in which its member was terminated was harsh, unfair and unlawful and sought an interim order for reinstatement - Respondent opposed the claim - Commission reviewed authorities and relevant sections of the Act and found that it had power to issue the interim order sought - Commission found that Applicant's member was aware of her terms and conditions of employment at the time of making the statements and that the timing of the meeting with her employer before completion of her shift was not oppressive or unfair or engineered in anyway to disadvantage her - Further, pursuant to s.26 of the Act and having regard to "equity, good conscience and the substantial merits of the case", Commission found on balance that the dismissal of the Applicant's member was harsh and issued an order for reinstatement - Granted - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Burswood Resort (Management) Limited - CR 153 of 2001 - WOOD, C - 04/09/01 - Sport and Recreation.....	2639
<sup>2</sup> Appeal against Decision of Commission (81WAIG2478 & 2782) re granted application for stay of proceedings in Matter No. 37/2001 - Appellant appealed against the Commission's "finding" in above matter number - Full Bench heard full argument from the parties and applied various principles and found on a number of reasons that there was no miscarriage in the exercise of the Commissioner's discretion, that the Commissioner's decision was one made on well established authority and should not be lightly interfered with by the Full Bench and there was no question of such importance that, in the public interest, the appeal should lie, therefore dismissed the appeal as incompetent - Dismissed - Paulownia Saw Milling, Timber Supplies and Manufacturing Pty Ltd (ACN 081 463 452) -v- Mr WI Jones - FBA 43 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/WOOD, C - 11/10/01 - Other Manufacturing.....	2715
Application seeking interim order pursuant to s.80E and s.80F of the I.R. Act - Applicant Union sought an interim order to prohibit the Respondent from continuing disciplinary action against its member until the matter was determined - Public Service Arbitrator reviewed authorities, relevant sections of the I.R. Act and found that the dispute would not be resolved by conciliation and was now to be arbitrated, and that there was no power for the Arbitrator to make the interim order sought - Dismissed - Civil Service Association of Western Australia Incorporated -v- Director General/Chief Executive Officer, Family and Childrens Services - P 26 of 2001 - Public Service Arbitrator - SCOTT C. - 25/09/01 - Government Administration.....	2758
Appeal to Public Service Appeal Board re Decision to terminate employment - Appellant argued that that the dismissal should attract the provisions of Public Sector Management Act 1994 relating to substandard performance and to prevail over Workplace Agreements Act and thus, Public Service Appeal Board had jurisdiction to hear and determine matter - Respondent argued that PSAB did not have jurisdiction because Workplace Agreements Act resolved an inconsistency that arose and individual workplace agreement had primacy - Public Service Appeal Board found that Applicant had been dismissed and pursuant to the workplace agreement the recourse in respect to dismissal was dealt with by Workplace Agreements Act - One Member found that workplace agreement did not prevent the appeal being determined by Public Service Appeal Board and there seemed to be an injustice to appeal against decision to terminate - Dismissed for want of jurisdiction - Ms Thomas -v- Chief Executive Office, Ministry of Fair Trading - PSAB 1 of 2001 - Public Service Appeal Board - SCOTT C. - 29/10/01 - Government Administration.....	2957
<sup>2</sup> Appeal against Decision of Commission (81WAIG1660) re unfair dismissal and contractual entitlements - Appellant argued against the finding of the dismissal on the grounds that deal with alleged erroneous findings in relation to the evidence - Appellant argued that there was not sufficient evidence to establish that there was a dismissal - Full Bench found that this was a discretionary decision and had defined a dismissal as the termination of a contract of employment and in this matter there was too fragile a base in the evidence to support a finding of dismissal - Full Bench found that appeal should be upheld as there was no dismissal or no dismissal was established to have occurred and there was no jurisdiction to hear and determine the matter - Appeal Upheld and decision at first instance varied - Dr K Alexander -v- Ms JM Kirkham - FBA 44 of 2001 - Full Bench - SHARKEY P/GREGOR C/WOOD, C - 28/11/01 - Health Services.....	3017
Complaint re Breach of Building Trades (Construction) Award 1987 - Interlocutory application regarding jurisdiction - Complainant Union argued that the earlier proceedings were brought in order to achieve the production of time and wages records in identifying the precise nature of the alleged breaches - Defendant argued that the Industrial Magistrate's Court did not have jurisdiction to deal with complaint and that Claimant could not possibly prove the allegations made in the claim - Industrial Magistrate found that Defendant had not made out its claim and that the matter should proceed to hearing and interlocutory application be dismissed - Decision Issued - CONSTRUCTION, MINING, ENERGY -v- Kernaghan's Joinery & Cabinet - M 121 of 2001 - Industrial Magistrate - Cicchini IM - 31/10/01 - Cabinetmaker.....	3088
Appeal against Decision of the Chairman of Director of Apprenticeship Training - Appellant argued that there was a right of appeal against decision to refuse to suspend the apprenticeship due to downturn in business - Respondent argued that Commission did not have jurisdiction to deal with the matter because section of Industrial Training Act was not relevant for appeal - Commission determined the question of jurisdiction from the proper meaning of the relevant sections of the Industrial Training Act and found that Commission cannot assume for itself jurisdiction which had not been granted to it by statute and thus had no jurisdiction to determine the appeal - Dismissed for want of jurisdiction - The Apprentice and Traineeship Company - Midwest -v- Mr CM Mouncey - APA 1 of 2001; APPL 955 of 2001 - GREGOR C - 23/11/01.....	3105
ALLOWANCES	
Application to vary the Engine Drivers (Building & Steel Construction) Award No. 20 of 1973 by consent - Applicant sought amendments to various clauses in the award to incorporate the cost of living expenses and include provisions part of the safety net - Respondent consented to application - Commission ordered liberty to apply to insert projects which occur from time to time to be placed in the award - Order Issued - CONSTRUCTION, MINING, ENERGY -v- Master Builders' Association of Western Australia (Union of Employers) & Others - APPL 405 of 2001 - GREGOR C - 02/07/01 - Construction Trade Services.....	1592

## CUMULATIVE DIGEST—continued

## ALLOWANCES—continued

	Page
Conference re negotiations for a replacement agreement - Applicant argued that the basis for the urgent conference was the difficulties being experienced between the parties in resolving an enterprise bargaining agreement, which led to employees imposing overtime and other bans - Respondent Union argued that members had met and decided to take immediate industrial action by withdrawing their labour for 48 hours - Commission found that Applicant express its attitudes and provided information regarding a range of issues the subject of the dispute and the employees return to work, to continue to work in accordance with their contracts of employment and to not undertake further industrial action while conciliation or arbitration proceeded - Order Issued - Disability Services Commission -v- Civil Service Association of Western Australia Incorporated - PSAC 8 of 2001 - Public Service Arbitrator - SCOTT C. - 06/07/01 - Health and Community Services .....	1612
Application re site allowance - Applicant argued for an individual rate fixed for each hour that the employees worked in areas that are defined as confined space in Australian Standard 2865 - Respondent argued that the present site allowance contemplated all of the relevant disabilities present on the site - Commission referred to various authorities and was not persuaded on this occasion, that the circumstances of the claim warranted a departure from the existing rights and provisions such that it could conclude that there had been a change in workvalue, in terms of the conditions under which work was performed at the site, such that a new allowance was warranted, therefore in all circumstances of the case, Commission was compelled to conclude that the application be dismissed - Dismissed - Transfield Pty Ltd t/as Transfield Operations and Maintenance -v- AUTO, FOOD, METAL, ENGIN UNION - CR 188 of 2000 - KENNER C - 16/07/00 - Petroleum Coal Chemical Assoc .....	2466
Complaint re breaches of an award regarding the payment of allowances - Supplementary reasons for decision regarding the issue of penalties - Defendant sought to have the matter adjourned which was rejected by the Industrial Magistrate - The penalties awarded reflect the seriousness and the consequences of the Defendant's conduct - Industrial Magistrate awarded the penalties to the Complainant - Granted - Mr CL Peters -v- James Turner Roofing Pty Ltd - CP 226 of 1999 - Industrial Magistrate - Cicchini IM - 25/10/01 - Construction Trade Services .....	2893
Application by consent to vary the Supermarkets and Chain Stores (Western Australia) Warehouse Award 1982 - Applicant Union argued that it has been common practice to round the allowances to the nearest five cents - Agent for Respondent argued that to do so will artificially inflate the final payment made to employees if they work for example, a further significant number of hours on a Sunday - Commission found that the history of the amendment of these allowances had been that they have proceeded by consent and if the parties have adopted a consistent practice then that really ought remain until they reach an agreement to alter that practice - Further, Commission found that in all other respects, the application complied with the State Wage Fixing Principles therefore, application was approved - Granted - The Shop, Distributive and Allied Employees' Association of Western Australia -v- Coles Supermarkets Australia & Other - APPL 1612,1613,1678 of 2001 - BEECH C - 20/11/01 - Various .....	3082
Application re breach of award regarding payment of allowances - Complainant argued that he was not paid the correct entitlements during his employment - Defendant argued that Complainant was an independent contractor and denied that any award binds in relation to Complainant - Industrial Magistrate found that Complainant was an employee of the Defendant and that Complainant did establish award coverage binding the Defendant - Supplementary reasons for decision concerned the issue of penalties which the Industrial Magistrate awarded to the Complainant - Granted - Mr CL Peters -v- James Turner Roofing Pty Ltd - CP 226 of 1999 - Industrial Magistrate - Cicchini IM - 10/10/01 - Construction Trade Services .....	3093
<b>ANNUAL LEAVE</b>	
Application re unfair dismissal and contractual entitlements - Applicant argued that after she had been off sick for a number of weeks, she made an appointment to meet with the Respondent to discuss her return to work and the nature of her duties, and at the request of Respondent, she drew up an agenda of what was to be discussed at the meeting - Further, Applicant argued that she met with the Respondent and it was at that meeting that she was dismissed - Respondent argued that Applicant's duties had been taken over by other staff, that it would have had to create another job for her, that Applicant did not get along with other staff and that it was of the view that Applicant was unfit to come back to work - Commission reviewed authorities and found on a number of reasons that Applicant's dismissal was unfair, that reinstatement was impracticable and ordered that Applicant be paid compensation and denied contractual benefits - Granted in Part - Ms JM Kirkhams -v- Dr K Alexander - APPL 1366 of 2000 - BEECH C - 15/06/01 - Health Services .....	1660
Application re unfair dismissal and contractual entitlements - Applicant sought six months compensation and \$11,700 in unpaid contractual benefits - Respondent argued applicant was not employed by Metropolis Concert Club - Commission found that no employment relationship existed between Applicant and named Respondent - Dismissed for want of jurisdiction - Mr DF Hill -v- Metropolis Concert Club - APPL 301 of 2001 - WOOD,C - 13/07/01 - Accommodatn, Cafes&Restaurants.....	2443
Complaint re breach of award and the Minimum Conditions of Employment Act 1993 - Complainant argued that defendant terminated his employment without notice or pay in lieu of notice, failed to pay him overtime rates of pay, annual leave entitlements and wages - Further, Complainant sought to recover the sum of \$6016.71 and interest thereon pursuant to s.32 of the Supreme Court Act 1935, the imposition of a penalty with respect to each breach of the award and costs - Defendant argued that Complainant had abandoned his employment and lodged a counter claim for damages - Industrial Magistrate reviewed authorities and found on evidence that Complainant had been dismissed for misconduct and by his own actions disentitled himself to annual leave payments accrued during his employment and further, he had failed to prove that the award binds the employer - IM further found that he did not have jurisdiction and power to deal with Defendants counter claim for common law damages - Mr JS Strange -v- Moonstar Nominees Pty Ltd - CP 324 of 2000 - Industrial Magistrate - Cicchini IM - 16/08/01 - Accommodatn, Cafes&Restaurants.....	2568
Application re contractual entitlements - Applicants argued that they had been denied outstanding contractual entitlements not being covered by the award - There was no appearance on behalf of the Respondent - Commission found that based on the evidence presented the applicants had established their entitlements to outstanding benefits under their respective contracts of employment - Upheld - Mr JC Da Silva -v- Axis Information Systems Pty Ltd - APPL 267,272,278,279,300 of 2001 - COLEMAN CC - 02/08/01 - Communication Services.....	2576
Application re contractual entitlements - Applicant's agent argued that respondent had failed to meet obligations under the contract of employment - There was no appearance on behalf of the respondent - Commission was satisfied that applicant was employed by respondent and found that applicant had not been allowed benefits to which she was entitled under her contract of employment - Granted - Ms MAC Dignam -v- iNature Australia Pty Ltd - APPL 900 of 2001 - BEECH C - 10/08/01 .....	2578
Application re unfair dismissal and contractual entitlements - Applicant argued that he had unfairly dismissed and had not been paid his entitlements pursuant to the award regarding notice, annual leave or public holidays and superannuation - There was no appearance on behalf of the Respondent - Commission reviewed authorities and found that the applicant's claims were award benefits, that it cannot exercise a power under s.29 to give relief because the power for enforcement resides solely with the Industrial Magistrate pursuant to s.83 of the Act - Commission further found that applicant was unfairly dismissed, that reinstatement was unavailing and awarded compensation, and dismissed for want of jurisdiction the claims for benefits as set out in the application - Ordered Accordingly - Mr PR Moritz -v- Home Again Enterprises Pty Ltd - APPL 458 of 2001 - GREGOR C - 09/08/01 - Accommodatn, Cafes&Restaurants .....	2594

## CUMULATIVE DIGEST—continued

	Page
<b>ANNUAL LEAVE—continued</b>	
Application re unfair dismissal and contractual entitlements - Applicant argued that the dismissal was harsh, oppressive and unfair and sought annual leave entitlements - Respondent argued that the Applicant was dismissed by reason of a bona fide redundancy due to the installation of synthetic greens and the bowling club's financial situation - Industrial Magistrate found the redundancy was genuine and the Respondent had displayed procedural and substantive fairness, and the Applicant was not entitled to annual leave loading - Dismissed - Mr P Smith -v- Rockingham Bowling Club Inc - M 42 of 2001 - Industrial Magistrate - Cicchini IM - 25/10/01 - Sport and Recreation .....	2894
Application re contractual entitlements - Applicant argued that he has been denied a benefit under his contract of employment, namely that his accrued annual leave entitlement paid to him on termination of his employment should have been paid at the retainer and commission rate - Respondent denied the claim and argued that it had never on termination paid an average of earnings to vehicle sales employees - Commission found that the material before it did not show that it was a term, either expressly or by implication, of Applicant's contract of employment that he would be paid for untaken annual leave at the retainer plus commission rate and accordingly dismissed the application - Dismissed - Mr KJ Bobridge -v- Peel Automotive Group - APPL 790 of 2001 - BEECH C - 14/11/01 - Motor Vehicle Rtlg & Services.....	3111
<b>APPEAL</b>	
<sup>2</sup> Appeal against Decision of Commission (unreported) re contractual entitlements claim - Appellant argued that "it was a mis-exercise of the Commissioner's discretion to strike out Appellant's application for want of prosecution with no other reason than the non-attendance at the conference; that the Commissioner mis-exercise his discretion in striking out the Appellant's (sic) application for want of prosecution when the Respondent had failed to file and serve particulars of its response to the Appellant's application, and without contacting the Appellant to afford the Appellant an opportunity to provide some explanation as to the reason for his non-attendance at the conference" - Further, Appellant sought leave to adduce evidence on affidavit which was not evidence before the Commission at first instance - Full Bench reviewed authorities and found on evidence that Appellant's non-appearance was not so much his fault as an error caused by the strain or stress he was under - Full Bench further found that the justice of the matter, within the principles laid down in the authorities to which they have referred, and the facts as they have found properly led to that conclusion, therefore, for those reasons, agreed to uphold the appeal and made the order to remit the matter to the Commission, constituted by a single Commissioner - Upheld and Order at first instance varied - Mr AW McConkey -v- M & A's of Denmark - FBA 19 of 2001 - Full Bench - SHARKEY P/SCOTT C./WOOD,C - 12/07/01 .....	1561
<sup>3</sup> Application for joinder of Respondents to Award - Preliminary issue re further hearing and determination - Applicant Union argued that Respondent's should not be given a second go and that decision of the Commission in Court Session was not quashed - Respondents argued that the claim be remitted to Commission in Court Session to be heard afresh - Commission in Court Session found that application should be listed for further hearing and determination afresh - Preliminary issue determined - LIQUOR, HOSPITALITY & MISC -v- Airlite Cleaning Pty Ltd & Others - APPL 1431 of 1998 - Commission in Court Session - BEECH C/SCOTT C./KENNER C - 11/06/01 - Cleaning.....	1587
Application re appeal pursuant to s23B of the I.R. Act 1979 - Applicant Union sought to reverse a decision of the Respondent, finding the Applicant's member guilty of misconduct - Preliminary Issue - Respondent argued that appeal should be dismissed on the grounds that the appeal application was not filed within time specified in regulation 34(5) of the I.R.C. Regulations 1985 - Further, that notwithstanding the repeal of those provisions of the Act establishing and providing the jurisdiction and powers of the former Government School Teachers Tribunal, those parts of the Regulations previously having application to the Tribunal continue to apply to proceedings such as these - Commission reviewed authorities and observed that the intention of the legislature at the time of the repeal of these provisions in the Act relating to the Tribunal, was to enable teachers in government schools to fall within the general jurisdiction of the Commission - Further, Commission observed that had it been the intention of the legislature to limit the time within which such appeals under s23B could be brought, it could have easily done so at the time of that amendment, as is the case in relation to unfair dismissal applications, pursuant to ss29(1)(b)(i) and 29(2) of the Act - Commission, having regard to all of the circumstances and the evidence before it, was not persuaded that Applicant had made out the appeal such that it should disturb the conclusions reached by Respondent - Dismissed - The State School Teachers Union of W.A. (Incorporated) -v- The Minister for Education - APPL 1649 of 2000 - KENNER C - 29/06/01 - Education.....	1613
<sup>2</sup> Appeal against Decision of Commission (81WAIG1020) re unfair dismissal - Appellant argued on a number of grounds including that the Learned Commissioner erred in fact and in law in finding that the Appellant had not made out his case that there had been an abuse of the Respondent's right to terminate his employment on the grounds of poor performance - Full Bench observed that insofar as the appeal grounds challenged the exercise of discretion, that it had no warrant to interfere with the exercise of the discretion at first instance unless the Appellant established that the Commission at first instance erred in accordance with the well know principles laid down in "House v The King (1936) 55 CLR 499" - Further, regarding the questions raised on appeal, Full Bench reviewed various authorities and Acts and was of the opinion that there was no error of law or fact and no miscarriage of the exercise of discretion established, therefore dismissed the appeal - Dismissed - Mr IW Cannon -v- Linfox Transport (Australia) Pty Ltd - FBA 16 of 2001 - Full Bench - SHARKEY P/BEECH C/KENNER C - 07/08/01 - Other Transport.....	2419
<sup>2</sup> Appeals against Decision of Industrial Magistrate (unreported) re breach of award - Questions raised on these Appeals: Was the Application frivolously or vexatiously instituted, and Costs - Power to award and quantum - Full Bench reviewed various authorities and Acts and found on a number of reasons that His Worship did not err in finding that the claim was instituted frivolously or vexatiously and that he had jurisdiction and power to order costs - Appeal No. FBA 13/2001 upheld and decision at first instance varied and Appeal No. FBA 14/2001 dismissed - Falcon Investigations & Security Pty Ltd -v- Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch - FBA 13,14 of 2001 - Full Bench - SHARKEY P/KENNER C/SMITH, C - 19/07/01 - Business Services .....	2425
<sup>1</sup> Appeal against Decision of Full Bench (81WAIG990) re unfair dismissal and contractual entitlements - Appellant argued that the Full Bench erred in law in holding that Respondent (Applicant) was employed in an industry as defined in s.7 of the I.R. Act, 1979 and that the Commission thereby had jurisdiction to hear and determine the Respondent's (Applicant's) claim pursuant to s.29 of the Act - Appellant sought an order for the Full Bench Decision to be quashed - Industrial Appeal Court applied various legal principles and found that the factual circumstances alleged by the Appellant were not sustainable, that the evidence was to the contrary and that the Full Bench correctly found on the facts that there was a sufficient connection with Western Australia to found the jurisdiction of the Commission - Dismissed - Ray Douglas Parker -v- Mr MA Tranfield - IAC 2 of 2001 - Industrial Appeal Court - Kennedy J./Anderson J./Ipp J. - 07/08/01 - Business Services.....	2505
<sup>2</sup> Appeal against Decision of Commission (81WAIG1424) re unfair dismissal and orders pursuant to s.27 of the Act - Appellant argued that the Commission erred in law in that the order of the Commission to revoke an order of the Commission was beyond the Commission's jurisdiction and by finding that it had power to make the Revocation Order and exercising its discretion to make the Revocation Order, Commission erred in law and in fact - Respondent argued that there was no appealable error made by the Commission and no public interest raised by the appeal - Full Bench found there was no slip rule, the Commission was not correcting an error in substance or in form, and the order made at the first instance was made without jurisdiction or power - Upheld - Aussie Online Limited (ACN 004 160 927) -v- Mr J Lane - FBA 36 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/SCOTT C. - 10/08/01 .....	2511

CUMULATIVE DIGEST—*continued*APPEAL—*continued*

	Page
<sup>2</sup> Appeal against Decision of Commission (81WAIG1033) re unfair dismissal - Appellant's notice of appeal did not comply with regulations and although a notice of hearing was served there was no appearance by appellant at the hearing - Respondent sought orders that the appeal be dismissed for want of prosecution - Full Bench found no evidence of hardship by the appellant and the interests of the respondent outweighed those of the appellant as the liquidation of the company had been delayed by the appeal - Dismissed - Mr E Kapsanis -v- Goldspace Pty Ltd T/as Paraburdoo Inn - FBA 17 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/KENNER C - 27/08/01 - Accommodatn, Cafes&Restaurants.....	2515
<sup>2</sup> Appeal against Decision of Commission (81WAIG1238) re unfair dismissal - Appellant argued that the Learned Commission erred in law and in fact on various grounds including that it awarded excessive compensation to the Respondents - Further, Appellant sought an Order that the Decision of Commission in matters 1377 and 1378 of 2000 be quashed - Full Bench reviewed evidence and applying the principles in <i>House v. The King (HC)(op cit)</i> and <i>Gromark Packaging v. FMWU (IAC)(op cit)</i> , found on a number of reasons that there was no error as alleged in the grounds of appeal, and no error in the exercise of the Commissioner's discretion - Dismissed - Kingscape Holdings Pty Ltd -v- GK Smith & Other - FBA 20 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/GREGOR C - 17/08/01 - Construction Trade Services.....	2517
<sup>2</sup> Appeal against Decision of Commission (81WAIG1271) re unfair dismissal - Appellant Union argued that the Commissioner erred in law by finding the dismissal justified as a summary dismissal and the Commissioner's discretion miscarried in regard to procedural fairness of the investigation - Full Bench found that procedural fairness was not fully afforded in the investigation of the workplace fight, that the breach of conduct did not justify a summary dismissal, that dismissal was harsh, oppressive and unfair and remitted the matter back to the Commission - Upheld - AUST MEAT INDUSTRY EMPL UNION -v- Geraldton Meat Exports Pty Ltd - FBA 26 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/SCOTT C. - 21/08/01 - Food, Beverage and Tobacco Mfg.....	2523
<sup>2</sup> Appeal against Decision of Commission (81WAIG1046) re dismissed application for unfair dismissal - Appellant argued Commissioner erred in law by dismissing the application as not being necessary or desirable in the public interest, and that particulars did not raised new issues - Respondent sought an order for the appellant to pay costs - Full Bench found the late filing of particulars was a clear occasion of prejudice, that the Commissioner was correct in dismissing the application and dismissed the application for costs - Dismissed - Mr M Pietracatella -v- W.A. Italian Club (Inc) - FBA 18 of 2001 - Full Bench - SHARKEY P/GREGOR C/WOOD,C - 13/08/01 - Accommodatn, Cafes&Restaurants .....	2532
<sup>2</sup> Appeal against Decision of Commission (81WAIG1651) re unfair dismissal - Appellant argued that the Learned Commissioner erred on various grounds relating to the findings of loss and compensation - Further, Appellant sought orders that the appeal be allowed and the decision at first instance be quashed and that compensation be assessed to the respondent (applicant), but limited to the sum equivalent the wages entitlement for the "lost" period of service - Full Bench reviewed evidence and authorities and having considered all of the relevant material and submissions found that no grounds of appeal was made out and that the exercise of discretion at first instance (see <i>House v The King (HC)(op cit)</i> ), was not in error or established to be in error - Dismissed - Q-Vis Ltd -v- Mr SD Gordon - FBA 37 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/GREGOR C - 05/09/01 - Health Services.....	2537
<sup>2</sup> Appeal against Decision of Commission (80WAIG5658) re unfair dismissal and contractual entitlements - Appellant argued that Commission had mistaken the facts, allowed extraneous or irrelevant matters to guide it, had reached a result that was, on the facts, unreasonable or plainly unjust, had not taken into account some material consideration and had acted upon a wrong principle - Full Bench reviewed evidence and principles laid down in <i>House v. The King (HC)(op cit)</i> and found that the Commissioner at first instance miscarried its exercise of discretion and based on that findings, Full Bench found and declared that the Appellant was harshly, oppressively and unfairly dismissed - Further, Full Bench reviewed other principles and cases and granted the application to extend time within which to institute the appeal as it found that by granting an extension of time, no injustice would be occasioned to the Respondent - Upheld, Order at first instance suspended and matter remitted back to the Commission - Ms EJ Roast -v- Forx Pty Ltd (ACN 008 972 076) - FBA 54 of 2000 - Full Bench - SHARKEY P/COLEMAN CC/SCOTT C. - 14/08/01 - Property and Business Services.....	2541
<sup>2</sup> Appeal against Decision of Commission (81WAIG1418) re contractual entitlements claim - Appellant argued that in relation to issues regarding advertising allowance, the Commissioner erred in law and failed to consider the relevant evidence and in relation to sales commission, the Commissioner erred in failing to take into account relevant evidence establishing the existence (sic) of a sales transaction - Full Bench found on evidence that there was no evidence of a sales transaction, but a broad reference to it - Further, there was nothing of error in what the Commissioner did, that the burden was not discharged to establish what Appellant claimed and that there was no error in the exercise of the discretion (see <i>House v The King [1936] 55 CLR 499</i> ), therefore, the appeal was not made out - Dismissed - Mr GS Hincks -v- Darrell Crouch and Associates Pty Ltd - FBA 32 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/WOOD,C - 11/10/01 - Property Services.....	2701
<sup>2</sup> Appeal against Decision of Commission (81WAIG2478 & 2782) re granted application for stay of proceedings in Matter No. 37/2001 - Appellant appealed against the Commission's "finding" in above matter number - Full Bench heard full argument from the parties and applied various principles and found on a number of reasons that there was no miscarriage in the exercise of the Commissioner's discretion, that the Commissioner's decision was one made on well established authority and should not be lightly interfered with by the Full Bench and there was no question of such importance that, in the public interest, the appeal should lie, therefore dismissed the appeal as incompetent - Dismissed - Paulownia Saw Milling, Timber Supplies and Manufacturing Pty Ltd (ACN 081 463 452) -v- Mr WI Jones - FBA 43 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/WOOD,C - 11/10/01 - Other Manufacturing .....	2715
<sup>2</sup> Appeal against Decision of Commission (81WAIG1449) re unfair dismissal claim - Appellant argued that the Commission erred in determining the amount of compensation to be paid to the appellant and that the Commission ought to have awarded the equivalent of 6 months' remuneration, plus any associated employer superannuation contribution due, less any amount earned in the interim, being the maximum capable of being awarded within the Commission's jurisdiction - Full Bench found on evidence that the Commissioner erred only by reducing the amount claimed - Further, Full Bench were not satisfied that an allowance should be made for superannuation in this case, as it was not claimed at first instance - Upheld and decision at first instance varied - Mrs JM Temby -v- Albany and Districts Skills Training Committee Incorporated - FBA 39 of 2001 - Full Bench - SHARKEY P/SMITH, C/WOOD,C - 02/10/01 - Business Services .....	2719

## CUMULATIVE DIGEST—continued

Page

## APPEAL—continued

- <sup>2</sup>Appeal against Decision of Commission (81WAIG1198) re unfair dismissal and contractual entitlements - Three appeals were heard together by direction of Full Bench - Appellant (Applicant) argued that the learned Commissioner erred in finding that there were two claims, erred by failing to apply identified tests and making a finding of length of service to which entitlement of implied term of reasonable notice in contract was, erred in finding the factors for determining what constituted reasonable notice and entitlement to reasonable severance pay - Further Appellant (Applicant) argued that learned Commissioner erred in finding whether Appellant should have been retained in preference to another employee and erred in lieu of notice - Appellant (Respondent) argued that learned Commissioner erred in deciding that the terms of Individual Employment Agreement did not govern Applicant's employment and erred in not identifying all the terms of Applicant's contract of employment - erred in not deciding that Respondent's policy in relocation had been replace or modified, and that Applicant was entitled to be relocated or returned to Melbourne, erred in deciding that it was unfair for Respondent not to have given Applicant a further eight weeks pay of severance when Commissioner had decided that Applicant had no contractual entitlement to a severance payment at all and that Applicant had lost a fair redundancy payment when there was no entitlement to any redundancy payment and had erred in deciding that Respondent had breached an implied term of Minimum Condition of Employment Act 1993 - Full Bench found that decision was a discretionary decision and for appeals to succeed Appellant must establish that Commission at first instance erred in the exercise of discretion -Full Bench made a number of observations and conclusions and determined that appeal by Respondent was not made out as there was no miscarriage of discretion and dismissed - Full Bench found that Appeal by Applicant should be upheld as Commissioner's discretion had been miscarried having regards to the principles laid down and that the other appeal by Applicant should also be upheld in part in relation to the quantum of severance pay - Orders Issued - Dismissed and Upheld in part - AWI Administration Services Pty Ltd -v- Mr A Birnie - FBA 22,23,24 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/SMITH, C - 26/10/01 - Other Mining ..... 2849
- <sup>2</sup>Appeals against Decision of Commission (81 WAIG 895) - Appellant argued that the Learned Commissioner erred in law by failing to make sufficient findings of fact regarding allegations of dishonesty and impropriety - Cross appeal by the Respondent argued that the Learned Commissioner erred in law and fact by finding the dismissal although unlawful was not harsh, oppressive or unfair - Full Bench found the summary dismissal although not lawful was not unfair and the cross appeal was not made out - Full bench found there was insufficient evidence to establish the claim that the Respondent owed the Appellant money and the appeal was not made out - Dismissed - BGC (Australia) Pty Ltd -v- Mr I Phippard - FBA 7,12 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/WOOD,C - 22/10/01 - General Construction..... 2865
- Appeal to Public Service Appeal Board re Decision to terminate employment - Appellant argued that that the dismissal should attract the provisions of Public Sector Management Act 1994 relating to substandard performance and to prevail over Workplace Agreements Act and thus, Public Service Appeal Board had jurisdiction to hear and determine matter - Respondent argued that PSAB did not have jurisdiction because Workplace Agreements Act resolved an inconsistency that arose and individual workplace agreement had primacy - Public Service Appeal Board found that Applicant had been dismissed and pursuant to the workplace agreement the recourse in respect to dismissal was dealt with by Workplace Agreements Act - One Member found that workplace agreement did not prevent the appeal being determined by Public Service Appeal Board and there seemed to be an injustice to appeal against decision to terminate - Dismissed for want of jurisdiction - Ms Thomas -v- Chief Executive Office, Ministry of Fair Trading - PSAB 1 of 2001 - Public Service Appeal Board - SCOTT C. - 29/10/01 - Government Administration ..... 2957
- <sup>2</sup>Appeal against Decision of Commission (81WAIG1660) re unfair dismissal and contractual entitlements - Appellant argued against the finding of the dismissal on the grounds that deal with alleged erroneous findings in relation to the evidence - Appellant argued that there was not sufficient evidence to establish that there was a dismissal - Full Bench found that this was a discretionary decision and had defined a dismissal as the termination of a contract of employment and in this matter there was too fragile a base in the evidence to support a finding of dismissal - Full Bench found that appeal should be upheld as there was no dismissal or no dismissal was established to have occurred and there was no jurisdiction to hear and determine the matter - Appeal Upheld and decision at first instance varied - Dr K Alexander -v- Ms JM Kirkham - FBA 44 of 2001 - Full Bench - SHARKEY P/GREGOR C/WOOD,C - 28/11/01 - Health Services..... 3017
- <sup>2</sup>Appeal against Decision of Public Service Arbitrator (81 WAIG 2563) re jurisdiction and application for interim orders - Appellant argued that the Public Service Arbitrator had no jurisdiction as the matter was a temporary deployment and subject to Public Sector Standards - Respondent Union submitted that there was ostensible bias in the President - Application for the President to disqualify himself was dismissed - Full Bench found that the matter was within the Arbitrator's jurisdiction - Dismissed - Commissioner of Police -v- Civil Service Association of Western Australia Incorporated - FBA 51 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/GREGOR C - 09/11/01 - Government Administration ..... 3026
- <sup>2</sup>Appeal against Decision of Commission (81 WAIG 1393) re unfair dismissal - First appeal by the Appellant argued the Commissioner erred in law on a number of grounds, one being the dismissal was harsh, oppressive and unfair, and the finding that reinstatement was practicable - Second appeal by Respondent Union argued the Commissioner lacked jurisdiction to make order 3 regarding reinstatement - Full Bench found the dismissal was unfair and there was no error in the exercise of discretion established, and dismissed the appeal -Regarding the cross appeal the Full Bench found there was no power and no jurisdiction conferred and the appeal was upheld - Appeal No. FBA 34/2001 Dismissed and Appeal No. FBA 35/2001 Upheld - CONSTRUCTION, MINING, ENERGY -v- BHP Iron Ore Pty Ltd - FBA 34,35 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/SMITH, C - 19/11/01 - Metal Ore Mining..... 3031
- <sup>2</sup>Appeal against Decision of Commission (81 WAIG 1463) re unfair dismissal - Appellant argued Commissioner erred in law by failing to take into account the deliberate act of misconduct, and the finding that reinstatement or re -employment was impracticable - Full Bench found that dismissal was harsh and unfair, and that reinstatement was impracticable - Further, there was no error in the exercise of discretion at the first instance and no grounds of appeal were made out - Dismissed - Clifton Nominees Pty Ltd -v- Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch - FBA 29 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/SMITH, C - 08/11/01 - Accommodatn, Cafes&Restaurants ..... 3038
- <sup>2</sup>Appeal against Decision of Commission (81 WAIG 1668) re unfair dismissal by reason of redundancy - Appellant argued Commissioner erred in law on a number of grounds, one being the dismissal was not harsh, oppressive or unfair but the result of a genuine redundancy - Appellant sought leave to adduce fresh evidence in the form of an affidavit which was dismissed by the Full Bench - Full Bench found that Appellant was made redundant and the grounds of the appeal were not made out as there was no error in the exercise of discretion at the first instance - Dismissed - Mr A Morrison -v- Uniting Church of Australia, Trinity Parish - FBA 45 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/WOOD,C - 21/11/01 - Community Services..... 3042
- <sup>2</sup>Appeal against Decision of Industrial Magistrate (81 WAIG 1389) re breach of award - Appellant argued that the decision to dismiss the complaint be quashed and that the original complaint be referred to the Industrial Magistrates Court for determination, as His Worship erred on a number of grounds in his findings - Full Bench found that the Industrial Magistrate was correct in dismissing the application - Further, Full Bench found that Appellant was a junior employee and not an apprentice, or a casual employee and that he was not employed to work with the consent of the union - Dismissed - Mr A La Guidara -v- Antonino Tripolitano - FBA 30 of 2001 - Full Bench - SHARKEY P/BEECH C/SCOTT C. - 15/11/01 - Construction Trade Services ..... 3054

## CUMULATIVE DIGEST—continued

## APPEAL—continued

	Page
Appeal against Decision of the Chairman of Director of Apprenticeship Training - Appellant argued that there was a right of appeal against decision to refuse to suspend the apprenticeship due to downturn in business - Respondent argued that Commission did not have jurisdiction to deal with the matter because section of Industrial Training Act was not relevant for appeal - Commission determined the question of jurisdiction from the proper meaning of the relevant sections of the Industrial Training Act and found that Commission cannot assume for itself jurisdiction which had not been granted to it by statute and thus had no jurisdiction to determine the appeal - Dismissed for want of jurisdiction - The Apprentice and Traineeship Company - Midwest -v- Mr CM Mouncey - APA 1 of 2001;APPL 955 of 2001 - GREGOR C - 23/11/01 .....	3105
<b>APPRENTICES AND JUNIORS</b>	
Application re unfair dismissal and contractual entitlements - Applicant argued that on completion of his apprenticeship he was offered a permanent position of mechanic and accepted it - Respondent argued that Applicant was never offered or employed as a mechanic - Commission found that Applicant was never employed as a mechanic and application was without foundation - Dismissed for want of jurisdiction - Mr D Pestana -v- New Town Toyota - APPL 2005 of 2000 - BEECH C - 02/07/01 - Motor Vehicle Rtlg & Services.....	1673
<sup>2</sup> Appeal against Decision of Industrial Magistrate (81 WAIG 1389) re breach of award - Appellant argued that the decision to dismiss the complaint be quashed and that the original complaint be referred to the Industrial Magistrates Court for determination, as His Worship erred on a number of grounds in his findings - Full Bench found that the Industrial Magistrate was correct in dismissing the application - Further, Full Bench found that Appellant was a junior employee and not an apprentice, or a casual employee and that he was not employed to work with the consent of the union - Dismissed - Mr A La Guidara -v- Antonino Tripolitano - FBA 30 of 2001 - Full Bench - SHARKEY P/BEECH C/SCOTT C. - 15/11/01 - Construction Trade Services.....	3054
Appeal against Decision of the Chairman of Director of Apprenticeship Training - Appellant argued that there was a right of appeal against decision to refuse to suspend the apprenticeship due to downturn in business - Respondent argued that Commission did not have jurisdiction to deal with the matter because section of Industrial Training Act was not relevant for appeal - Commission determined the question of jurisdiction from the proper meaning of the relevant sections of the Industrial Training Act and found that Commission cannot assume for itself jurisdiction which had not been granted to it by statute and thus had no jurisdiction to determine the appeal - Dismissed for want of jurisdiction - The Apprentice and Traineeship Company - Midwest -v- Mr CM Mouncey - APA 1 of 2001;APPL 955 of 2001 - GREGOR C - 23/11/01 .....	3105
<b>AWARDS</b>	
<sup>3</sup> Application for joinder of Respondents to Award - Preliminary issue re further hearing and determination - Applicant Union argued that Respondent's should not be given a second go and that decision of the Commission in Court Session was not quashed - Respondents argued that the claim be remitted to Commission in Court Session to be heard afresh - Commission in Court Session found that application should be listed for further hearing and determination afresh - Preliminary issue determined - LIQUOR, HOSPITALITY & MISC -v- Airlite Cleaning Pty Ltd & Others - APPL 1431 of 1998 - Commission in Court Session - BEECH C/SCOTT C./KENNER C - 11/06/01 - Cleaning.....	1587
Application to vary the Engine Drivers (Building & Steel Construction) Award No. 20 of 1973 by consent - Applicant sought amendments to various clauses in the award to incorporate the cost of living expenses and include provisions part of the safety net - Respondent consented to application - Commission ordered liberty to apply to insert projects which occur from time to time be placed in the award - Order Issued - CONSTRUCTION, MINING, ENERGY -v- Master Builders' Association of Western Australia (Union of Employers) & Others - APPL 405 of 2001 - GREGOR C - 02/07/01 - Construction Trade Services.....	1592
Application to vary Grain Handling Salaried Officers' Consolidated Award No. 37 of 1965 - Applicant argued that the terms of Western Australian Grain Handling Salaried Officers' Enterprise Agreement 1996 be incorporated into the Award - Respondent Union consented to application - Commission found that the requirements of the Principles were met providing that the Arbitrated Safety Net Adjustments were accurately quantified separately in clause 31 - Salaries - Order Issued - Co-Operative Bulk Handling Limited -v- Western Australian Grain Handling Salaried Officers Association (Union of Workers) - APPL 29 of 2000 - SMITH, C - 22/06/01 - Grain, Sheep & Beef Cattle Frm.....	1594
Application by consent to vary the Metal Trades (General) Award 1966 re the Second Schedule - List of Respondents - Commission found that it was empowered under Section 47 of the I.R. Act to cancel defunct awards or delete employers from awards in certain cases but had difficulties where the deletion of named respondents to the award changed the scope of the award - Further, Commission found that variation did not change the scope of the award and award varied by consent - Order Issued - AUTO, FOOD, METAL, ENGIN UNION -v- Anodisers W.A. & Others - APPL 1785 of 2000 - GREGOR C - 03/07/01 .....	1598
Application to vary the Malting Industry Award 1993 and Conference Referred re Dispute over terms and conditions of employment of Union member - Applicant Union argued that the member be offered employment as a full time malt production operator under the terms of the Malt Industry award and any applicable industrial agreement between the parties - Further, the variation to award had jurisdiction to bind the parties to the award - Respondent opposed the claims and argued that the variation to the award would impose restrictions on the employer's rights to engage contractors and upon their rights to engage persons under terms and conditions determined by the employer - Further, Respondent argued that the employee was caught in the revised strategy to source new labour from external labour supplies to reduce costs - Commission found that the application to vary the award cut across some of the already established practices in the industry regarding engagement of contractors for shortfall work and that the application to vary be dismissed - Further, Commission found that the employee should have been provided with full time employment directly by Respondent as a Malt Processing Operator and that Respondent employ employee as agreed by the parties - Orders Issued - The Breweries and Bottleyards Employees' Industrial Union of Workers of Western Australia -v- Kirin Australia Pty Ltd - APPL 1394 of 2001;CR 169 of 2001 - WOOD,C - 19/10/01 - Brewing.....	3076
Application by consent to vary the Supermarkets and Chain Stores (Western Australia) Warehouse Award 1982 - Applicant Union argued that it has been common practice to round the allowances to the nearest five cents - Agent for Respondent argued that to do so will artificially inflate the final payment made to employees if they work for example, a further significant number of hours on a Sunday - Commission found that the history of the amendment of these allowances had been that they have proceeded by consent and if the parties have adopted a consistent practice then that really ought remain until they reach an agreement to alter that practice - Further, Commission found that in all other respects, the application complied with the State Wage Fixing Principles therefore, application was approved - Granted - The Shop, Distributive and Allied Employees' Association of Western Australia -v- Coles Supermarkets Australia & Other - APPL 1612,1613,1678 of 2001 - BEECH C - 20/11/01 - Various .....	3082
<b>BONUS</b>	
Application re contractual entitlements - Applicant argued that he had been denied contractual entitlements based on 1% of gross earnings and two weeks pay for the period of notice - Respondent argued that the entitlement ceased with a variation to the contract and that Applicant's services were summarily terminated the day after he had submitted his resignation when it became known that Applicant was offering alternate employment to two other employees of Respondent company with a competitor and thus no payment in lieu of the notice period payable - Commission found in favour of Applicant's claim of 1% of gross earnings and dismissed the claim for payment in lieu of notice - Upheld in part - Mr CO Danks -v- Derrol Crane Esperance General 'Daytona Investments' - APPL 104 of 2001 - COLEMAN CC - 24/05/01 - Road Transport.....	1631

## CUMULATIVE DIGEST—continued

Page

## BONUS—continued

- Conference referred re bonus payments - Applicant Union argued that its member was disadvantage because his base salary under the award was less than the base salary of employees who are designated as "staff employees" and that in the case of its member, he should be entitled to the same rule as the Respondent's designated "staff employees", that is, the bonus should be paid on his base salary including allowances - Further, Applicant Union argued that the all-up salary included the various allowances and that therefore the bonus actually paid to staff was to be seen as being paid on a notional base award wage plus allowances and sought the same basis of calculation for its member - Respondent opposed the claim and argued that the Commission should not regard the payment of the bonus in isolation, rather, the fact that some employees are paid by the award, and others are paid via a workplace agreement, will inevitably result in differences in employment conditions - Further, Respondent argued that the bonus was applied consistently throughout its operation and to grant the union's claim would introduce anomalies rather than remove them - Commission reviewed authorities and relevant sections of the I.R. Act and issued a Declaration that the manner in which the bonus was paid in the case of the union member was not fair and adjourned the application for one month during which time the parties were directed to meet in an endeavour to reach an agreement and report back to the Commission - Granted in principle - COMM, ELECTRIC, ELECT, ENERGY -v- Millennium Inorganic Chemicals - CR 279 of 2000 - BEECH C - 29/06/01 - Petroleum Coal Chemical Assoc..... 1692
- Application re contractual entitlements - Applicant argued he was entitled to annual bonus and deducted wages - Respondent argued applicant was not due annual bonus as his employment was casual in nature - Commission determined applicant was not employed as a casual and outstanding annual bonus granted - Claim for deducted wages was dismissed for want of jurisdiction - Granted in Part - Mr RC Whyte -v- Narrogin Brick - APPL 1869 of 2000; APPL 651 of 2001 - WOOD,C - 13/07/01 - Construction Trade Services..... 2450
- Application re contractual entitlement - Applicant argued that she was entitled to three quarters of a bonus for the period November 2000 to January 2001 - Respondent argued that the applicant had not worked the full trimester and was not entitled to the bonus - Commission reviewed authorities and based on the evidence presented, found that it was not legitimate to imply into the contract some part payment of the bonus - Dismissed - Mrs TA Kockernack -v- Abacus Calculators (WA) Pty Ltd - APPL 545 of 2001 - WOOD,C - 15/08/01 - Business Services..... 2588

## BREACH OF ACTS/AWARDS/ORDERS

- Application re unfair dismissal and contractual entitlements - Applicant argued that he was summarily dismissed, his position was abolished, he was made redundant and paid one month's salary in lieu of notice which was not in accordance with the contract and that respondent breached the Minimum Conditions of Employment Act 1993, therefore sought either reinstatement or compensation - Respondent argued that with a restructure applicant's position was abolished and he was advised of the reasons for decision to terminate his services - Commission found that respondent had not discharged its onus to prove that this was a genuine redundancy, that the dismissal was both procedurally and substantively unfair, that applicant certainly did not receive a fair go all round and, as it would be impracticable for him to return to work with respondent, awarded compensation - Granted - Mr P Dellys -v- Elderslie Finance Corporation Limited - APPL 1185 of 2000 - WOOD,C - 20/06/01 - Finance..... 1632
- <sup>2</sup>Appeals against Decision of Industrial Magistrate (unreported) re breach of award - Questions raised on these Appeals: Was the Application frivolously or vexatiously instituted, and Costs - Power to award and quantum - Full Bench reviewed various authorities and Acts and found on a number of reasons that His Worship did not erred in finding that the claim was instituted frivolously or vexatiously and that he had jurisdiction and power to order costs - Appeal No. FBA 13/2001 upheld and decision at first instance varied and Appeal No. FBA 14/2001 dismissed - Falcon Investigations & Security Pty Ltd -v- Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch - FBA 13,14 of 2001 - Full Bench - SHARKEY P/KENNER C/SMITH, C - 19/07/01 - Business Services..... 2425
- Complaint re breach of Workplace Agreement Act 1993 - Complainants argued that the defendants had committed breaches under section 68 and 70 of the Workplace Agreement Act and sought payment of penalty and costs - Their claim for reinstatement was abandoned during the proceedings - Respondents denied that they had threatened or intimidated the complainants because of their refusal to sign their Workplace Agreements - Industrial Magistrate found the charges proved against the defendants on the evidence presented - Order Issued - Ms NM Stokoe -v- Mr DM Wimbridge - CP 12,15,16,17 of 2001 - Industrial Magistrate - Tarr IM - 25/07/01 - Other Transport..... 2565
- Complaint re breach of Workplace Agreement Act 1993 - Complainant argued he was a full time employee and his termination was unfair, harsh or oppressive contrary to the provisions of s.18 of the WAA Act, 1993 - Defendant refuted the allegation that there had been an unfair dismissal - Industrial Magistrate found on the evidence presented that Complainant was a casual employee, that after his operation, his employment status was left in the air and that had he, when he was ready to go back to work, did as he had done in the past, gone along to see the Defendant, it may well be that he would still be employed on a similar basis, therefore there was no dismissal - Dismissed - Mr RW McLeod -v- BRL Hardy Limited - CP 315 of 2000 - Industrial Magistrate - Tarr IM..... 2765
- <sup>2</sup>Appeal against Decision of Industrial Magistrate (81 WAIG 1389) re breach of award - Appellant argued that the decision to dismiss the complaint be quashed and that the original complaint be referred to the Industrial Magistrates Court for determination, as His Worship erred on a number of grounds in his findings - Full Bench found that the Industrial Magistrate was correct in dismissing the application - Further, Full Bench found that Appellant was a junior employee and not an apprentice, or a casual employee and that he was not employed to work with the consent of the union - Dismissed - Mr A La Guidara -v- Antonino Tripolitano - FBA 30 of 2001 - Full Bench - SHARKEY P/BEECH C/SCOTT C. - 15/11/01 - Construction Trade Services..... 3054
- Complaint re breach of award - Complainant Union argued that employee was an employee of the Respondent and subject to the award - Complainant Union further argued that employee was not paid for working overtime and meal allowances - Respondent argued that award had no relevance in proceedings as award was not applicable to Respondent and that subcontractors were only employed to carry out the manufacturing - Industrial Magistrate found that there was an employee/employer relationship as employee was only providing his services, that he was also given directions on a daily basis and his duties were supervised, therefore he was an employee - Further, IM found that award applied to him and Respondent - Award entitlements, costs and fines were ordered - Decision Issued - The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers -v- Mateko Holdings Pty Ltd - M 84 of 2001 - Industrial Magistrate - Tarr IM - 18/10/01 - Construction Trade Services..... 3085
- Complaint re breach of Building Trades (Construction) Award 1987 - Interlocutory application regarding jurisdiction - Complainant Union argued that the earlier proceedings were brought in order to achieve the production of time and wages records in identifying the precise nature of the alleged breaches - Defendant argued that the Industrial Magistrate's Court did not have jurisdiction to deal with complaint and that Claimant could not possibly prove the allegations made in the claim - Industrial Magistrate found that Defendant had not made out its claim and that the matter should proceed to hearing and interlocutory application be dismissed - Decision Issued - CONSTRUCTION, MINING, ENERGY -v- Kernaghan's Joinery & Cabinet - M 121 of 2001 - Industrial Magistrate - Cicchini IM - 31/10/01 - Cabinetmaker..... 3088
- Complaint re breach of Workplace Agreement - Complainant sought unpaid entitlements pursuant to the workplace agreement, including claims for pre-judgment interest, penalties pursuant to s83(6) of the I.R. Act, 1979 and costs - Defendant conceded that the Claimant was entitled to payment for normal working hours and holiday pay but denied liability for the payment of pay in lieu of notice, maintaining that the Claimant resigned, and in such circumstances was not entitled to pay in lieu of notice under the workplace agreement - Industrial Magistrate was not satisfied based on the evidence presented that the Claimant was dismissed, therefore his claim for one week's pay in lieu of notice was dismissed - Further, IM issued Orders by consent, that Respondent pay the Claimant the amount of \$1058.00 plus interest fixed at \$40.00, and reimburse the Claimant the amount of \$40.00 being the cost of making the claim - Reasons for Decision Issued - Mr P Maindok -v- Cabletech Electrical Pty Ltd - M 124 of 2001 - Industrial Magistrate - Tarr IM - 22/11/01 - Other Services..... 3091

CUMULATIVE DIGEST—*continued*

	Page
<b>BREACH OF ACTS/AWARDS/ORDERS—<i>continued</i></b>	
Complaint re breach of award regarding payment of allowances - Complainant argued that he was not paid the correct entitlements during his employment - Defendant argued that Complainant was an independent contractor and denied that any award binds in relation to Complainant - Industrial Magistrate found that Complainant was an employee of the Defendant and that Complainant did establish award coverage binding the Defendant - Supplementary reasons for decision concerned the issue of penalties which the Industrial Magistrate awarded to the Complainant - Granted - Mr CL Peters -v- James Turner Roofing Pty Ltd - CP 226 of 1999 - Industrial Magistrate - Cicchini IM - 10/10/01 - Construction Trade Services.....	3093
<b>CASUAL WORK</b>	
Application re unfair dismissal - Applicant argued that the foreman had dismissed him or he was constructively dismissed in that the foreman was aggressive, abusive and an attack that entitled Applicant to withdraw from contract - Respondent argued that Applicant was never dismissed and that he was employed on a casual basis - Further, Applicant's behaviour on the day in question was unacceptable as Applicant was upset and angry and behaved in an aggressive manner - Commission found that Applicant was not unfairly dismissed and that language used by Applicant should not be used in a way that was abusive of the employer or other such person and that Applicant was angry and his behaviour was unacceptable - Order Issued - Mr JT Wells -v- Carmelo Antonio Puglia t/as Tiltmasters Trailers - APPL 387 of 2001 - SMITH, C - 06/07/01 - Construction Trade Services.....	1681
Application re contractual entitlements - Applicant argued he was entitled to annual bonus and deducted wages - Respondent argued applicant was not due annual bonus as his employment was casual in nature - Commission determined applicant was not employed as a casual and outstanding annual bonus granted - Claim for deducted wages was dismissed for want of jurisdiction - Granted in Part - Mr RC Whyte -v- Narrogin Brick - APPL 1869 of 2000; APPL 651 of 2001 - WOOD, C - 13/07/01 - Construction Trade Services.....	2450
<b>CLASSIFICATION</b>	
Conference referred re reclassification of positions - Applicant Union sought on behalf of two of its members to have the Public Service Arbitrator hear and determine the matter - Respondent argued that the Union's members had agreed to a HR consultancy firm to provide a fair and reasonable process for a job evaluation and to accept such a process as the final determination of the matter - Public Service Arbitrator found that the Applicant's members entered into an agreement with the Respondent to resolve the issue of classification therefore, in accordance with s.27(1) of the I.R. Act, dismissed the matter as not necessary or desirable in the public interest - Dismissed - Civil Service Association of Western Australia Incorporated -v- Chief Executive Officer Water Corporation - PSACR 7 of 2001 - Public Service Arbitrator - SCOTT C. - 21/09/01 - Government Administration.....	2756
<b>COMMON RULE</b>	
<sup>3</sup> Application for joinder of Respondents to Award - Preliminary issue re further hearing and determination - Applicant Union argued that Respondent's should not be given a second go and that decision of the Commission in Court Session was not quashed - Respondents argued that the claim be remitted to Commission in Court Session to be heard afresh - Commission in Court Session found that application should be listed for further hearing and determination afresh - Preliminary issue determined - LIQUOR, HOSPITALITY & MISC -v- Airlite Cleaning Pty Ltd & Others - APPL 1431 of 1998 - Commission in Court Session - BEECH C/SCOTT C./KENNER C - 11/06/01 - Cleaning.....	1587
<b>COMPENSATION</b>	
Application re unfair dismissal - Applicant argued that he was harshly, oppressively and unfairly dismissed and sought a benefit arising out of his contract of employment - Respondent argued that prior to applicant's employment being terminated he told applicant that he had two weeks to demonstrate that he could do the job and demonstrate some real changes in his work or his employment would be terminated - Commission found that it was apparent from all of the evidence given in the proceedings that applicant's style of work was incompatible with the requirements of respondent's business, that applicant should have been given 3 months' notice to terminate or 3 months' salary in lieu of notice, and declared that applicant was unfairly dismissed - Order Issued - Mr MRS Barnes -v- Dayman Holdings Pty Ltd ABN 009 309 468 Trading as Reynolds & Associates - APPL 1792 of 2000 - SMITH, C - 01/06/01 - Advertising.....	1616
Application re unfair dismissal - Applicant argued that he was unfairly dismissed, did not consider reinstatement to be practicable and sought compensation for dismissal and payment in lieu of notice - Respondent argued that applicant was dismissed for continued poor performance and breach of trust and contract - Commission found from all the evidence that applicant's performance regarding attendance, sales figures and completion of daily sales records was inadequate, that he was terminated for failing to improve his performance levels, for a breakdown in trust and that applicant was dealt with fairly - Dismissed - Mr J Bradley -v- Lanier (Australia) Pty Ltd - APPL 1557 of 2000 - WOOD, C - 22/06/00 - Equipment.....	1621
Application re unfair dismissal - Applicant argued that his dismissal was unfair, he was not given a "fair go all round", that respondent failed to give appropriate notice of the possibility of redundancy and that his termination was carried out in a manner which breached the respondent's own policy and principles of natural justice - Respondent argued that applicant should have known that his employment was not secure and when the review was undertaken and decision made to make his position redundant he was advised as soon as practicable - Commission found that applicant was overseas and not shown the documents completed at the time decision was taken to make him redundant, he was unaware of any threat to his job security and had the expectation of continuing employment and becoming a permanent resident, and respondent's promoted initiatives to cut costs did not infer the possibility of redundancies - Further, Commission found that the decision to terminate applicant's employment was based on flawed information and this was unfair, that reinstatement was impractical and in the circumstances ordered compensation - Order Issued - Mr S Castles -v- Haliburton - APPL 1356 of 1999 - COLEMAN CC - 20/02/01 - Oil and Gas Extraction.....	1625
Application re unfair dismissal and contractual entitlements - Applicant argued that he was summarily dismissed, his position was abolished, he was made redundant and paid one month's salary in lieu of notice which was not in accordance with the contract and that respondent breached the Minimum Conditions of Employment Act 1993, therefore sought either reinstatement or compensation - Respondent argued that with a restructure applicant's position was abolished and he was advised of the reasons for decision to terminate his services - Commission found that respondent had not discharged its onus to prove that this was a genuine redundancy, that the dismissal was both procedurally and substantively unfair, that applicant certainly did not receive a fair go all round and, as it would be impracticable for him to return to work with respondent, awarded compensation - Granted - Mr P Dellys -v- Elderslie Finance Corporation Limited - APPL 1185 of 2000 - WOOD, C - 20/06/01 - Finance.....	1632
Application re unfair dismissal - Applicant argued that he was unfairly dismissed - Respondent argued that applicant failed to report for work, constituting abandonment of his employment, furthermore that his employment was subject to a term of 3 months' probation and by reason of federal award coverage the terms of Workplace Relations Regulations 1996 dealing with probationary employees rendered applicant's claim beyond the Commission's jurisdiction - Commission found that at material times applicant's employment was not subject to a probationary period, that the terms of the Workplace Relations Act did not conflict with the Australian Workplace Agreement and both were able to operate concurrently, that applicant's dismissal was preemptory and without good cause and in all the circumstances of the case dismissal was harsh, oppressive and unfair - Further Commission found that reinstatement was impracticable, that applicant had discharged his obligation to mitigate his loss and awarded him compensation for injury - Upheld and Order Issued - Mr T Doherty -v- Geraldton Building Company Pty Ltd ACN 008 637 103 - APPL 1527 of 2000 - KENNER C - 15/06/01 - Building Structure Services.....	1638

## CUMULATIVE DIGEST—continued

	Page
COMPENSATION—continued	
Application re unfair dismissal seeking compensation - Applicant argued that dismissal was unfair because no option but to resign was offered to him and with the opportunity would have improved his performance - Respondent argued that options were offered to Applicant in relation to Applicant's performance and opportunities were given to rectify the situation and Applicant had agreed to four weeks pay and resigning - Commission found that Applicant negotiated terms to resign and that he had other options to resignation, thus, Applicant jumped rather than being pushed - Dismissed - Mr AR Ferraris -v- Linstorm Holdings Pty Ltd as trustee for the TAG Family Trust ACN 067 398 403 - APPL 1862 of 2000 - SCOTT C. - 03/07/2001.....	1643
Application re unfair dismissal - Applicant argued that dismissal was harsh, oppressive or unfair - Respondent argued that this matter was a "precise parallel" with circumstances where an employee was dismissed summarily for misconduct and that in this case it alleged "conduct that may detrimentally affect the respondent" on the part of applicant - Commission found that respondent's decision to dismiss applicant was not based upon applicant committing some act of "serious misconduct" which had detrimentally affected respondent but because of his assessment of applicant's attitude - Further, Commission found that dismissal was an unfair exercise of respondent's right to dismiss, that reinstatement was impracticable and awarded compensation for the loss or injury caused by dismissal - Granted - Mr SD Gordon -v- Q-Vis Limited (ACN 009 234 173) - APPL 885 of 2000 - BEECH C - 31/05/01 - Health.....	1651
Application re unfair dismissal - Applicant argued that dismissal was unfair because no fair go was given into the allegations to gross misconduct and no opportunity to respond to allegations - Respondent argued that Applicant was dismissed for misconduct in that she had used physical force on a seven month old child and that her attitude was not appreciated - Commission found that dismissal was unfair because there was no investigation into the matter concerned and had just accepted the report from the parent thus Applicant was not awarded a fair go and dismissed unfairly - Commission further found that no loss or injury was incurred and no compensation was awarded - Order Issued - Ms CP Houareau -v- Tiny Turtle Belmont Childcare Centre - APPL 312 of 2001 - WOOD,C - Community Services.....	1659
Application re unfair dismissal and contractual entitlements - Applicant argued that after she had been off sick for a number of weeks, she made an appointment to meet with the Respondent to discuss her return to work and the nature of her duties, and at the request of Respondent, she drew up an agenda of what was to be discussed at the meeting - Further, Applicant argued that she met with the Respondent and it was at that meeting that she was dismissed - Respondent argued that Applicant's duties had been taken over by other staff, that it would have had to create another job for her, that Applicant did not get along with other staff and that it was of the view that Applicant was unfit to come back to work - Commission reviewed authorities and found on a number of reasons that Applicant's dismissal was unfair, that reinstatement was impracticable and ordered that Applicant be paid compensation and denied contractual benefits - Granted in Part - Ms JM Kirkham -v- Dr K Alexander - APPL 1366 of 2000 - BEECH C - 15/06/01 - Health Services.....	1660
Application re unfair dismissal - Applicant argued he was harshly, oppressively or unfairly dismissed and sought compensation for loss and injury, and in addition or alternatively a reasonable period of notice and a redundancy payment as outstanding contractual entitlements - Further, Applicant argued that in the absence of re-employment or reinstatement being practical, he claimed that his loss and injury arising from the dismissal exhausts the statutory limit of compensation under the I.R. Act 1979 as amended - Respondent argued that Applicant's services were terminated in the circumstances of a genuine redundancy, the genesis of which was discussed with him and so too was the restructuring of the organisation, therefore, in the circumstances of the bona fide redundancy the dismissal was not harsh, oppressive or unfair - Further, Respondent argued that even if it was to be found to have been unfair, Applicant failed to mitigate his loss not seeking employment in the local market, and that any compensation for loss should be minimal on the basis that Applicant would have become redundant in any event within a very short period to time - Commission reviewed authorities and found that the termination was a summarily dismissal, that Respondent had not discharged the onus of establishing that the summary dismissal was justified, that in all circumstances the right to dismiss was exercised in a harsh and oppressive manner, therefore, compensation for loss equivalent to six months salary was awarded and all other claims dismissed - Ordered Accordingly - Mr MM Quartermaine -v- Anson Management Services Pty Ltd - APPL 1155 of 2000 - COLEMAN CC - 21/06/01 - Business Services .....	1675
Application re unfair dismissal - Applicant argued that he was harshly, oppressively or unfairly dismissed - Respondent argued that applicant had stored inappropriate and pornographic cartoons in his Lotus Notes mailbox and was in breach of the bank's policy - Commission concluded after having considered all of the evidence, that breach of the policy by applicant was in all circumstances trivial, that applicant was harshly dismissed and that reinstatement was not practicable as applicant had left Western Australia to seek work in the United Kingdom - Further, Commission ordered that respondent pay applicant the difference in salary between 14 November 2000 and 2 March 2001, and made a declaration that termination was harsh - Ordered Accordingly - Mr AV Wilmott -v- Bank of Western Australia Ltd - APPL 1888 of 2000 - SMITH, C - 13/06/01 - Consultancy .....	1684
Conference referred re unfair dismissal - Applicant Union argued that having regard to all the circumstances that arose, the punishment of dismissal did not "fit the crime" and sought that its member be reinstated - Respondent opposed the claim - Commission reviewed authorities and found, having regard to all the circumstances of the case, in the context of equity and good conscience, that the dismissal of the Union's member was harsh, oppressive and unfair - Further, Commission found that reinstatement was impracticable, that the Union's member should be compensated and directed the parties to confer as to quantum of compensation, within seven days, to an agreed sum which was incorporated in the final order - Upheld and Order Issued - The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- BHP HBI - CR 128 of 2000 - KENNER C - 15/06/01 - Metal Product Manufacturing .....	2460
<sup>2</sup> Appeal against Decision of Commission (81WAIG1651) re unfair dismissal - Appellant argued that the Learned Commissioner erred on various grounds relating to the findings of loss and compensation - Further, Appellant sought orders that the appeal be allowed and the decision at first instance be quashed and that compensation be assessed to the respondent (applicant), but limited to the sum equivalent the wages entitlement for the "lost" period of service - Full Bench reviewed evidence and authorities and having considered all of the relevant material and submissions found that no grounds of appeal was made out and that the exercise of discretion at first instance (see House v The King (HC)(op cit)), was not in error or established to be in error - Dismissed - Q-Vis Ltd -v- Mr SD Gordon - FBA 37 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/GREGOR C - 05/09/01 - Health Services .....	2537
Complaint re breach of Workplace Agreement Act 1993 - Complainants argued that the defendants had committed breaches under section 68 and 70 of the Workplace Agreement Act and sought payment of penalty and costs - Their claim for reinstatement was abandoned during the proceedings - Respondents denied that they had threatened or intimidated the complainants because of their refusal to sign their Workplace Agreements - Industrial Magistrate found the charges proved against the defendants on the evidence presented - Order Issued - Ms NM Stokoe -v- Mandurah Taxis Pty Ltd - CP 12,15,16,17 of 2001 - Industrial Magistrate - Tarr IM - 25/07/01 - Other Transport.....	2565
Application re unfair dismissal and contractual entitlements - Applicant argued that he had unfairly dismissed and had not been paid his entitlements pursuant to the award regarding notice, annual leave or public holidays and superannuation - There was no appearance on behalf of the Respondent - Commission reviewed authorities and found that the applicant's claims were award benefits, that it cannot exercise a power under s.29 to give relief because the power for enforcement resides solely with the Industrial Magistrate pursuant to s.83 of the Act - Commission further found that applicant was unfairly dismissed, that reinstatement was unavailing and awarded compensation, and dismissed for want of jurisdiction the claims for benefits as set out in the application - Ordered Accordingly - Mr PR Moritz -v- Home Again Enterprises Pty Ltd - APPL 458 of 2001 - GREGOR C - 09/08/01 - Accommodatn, Cafes&Restaurants.....	2594

## CUMULATIVE DIGEST—continued

## COMPENSATION—continued

	Page
Application re unfair dismissal and contractual entitlements - Applicant argued that her dismissal was harsh, oppressive and unfair - Additionally the applicant also claimed severance pay which was not pressed when the matter was heard before the Commission - Respondent opposed the applicant's claim in its entirety - Commission reviewed authorities and found that applicant had been unfairly dismissed, that reinstatement was impracticable and ordered compensation in the sum equivalent to the loss of 6 months remuneration - Upheld and Order Issued - Mrs M Muggeridge -v- Penrhos College (Inc) - APPL 1502 of 2000 - KENNER C - 31/08/01 - Education .....	2596
Application re unfair dismissal - Applicant argued he had been unfairly dismissed, that the relationship between the parties was not capable of being restored, therefore he sought compensation - Respondent denied that Applicant had been unfairly dismissed on the contrary Respondent argued that Applicant was the architect of his own misfortune in that he abandoned his contract of employment - Commission found on evidence that Applicant had been unfairly dismissed, that reinstatement was impracticable and having reviewed authorities concluded that Applicant had sought to mitigate his loss as best as he could and ordered that Applicant be paid by Respondent the sum of six months remuneration as compensation - Granted - Mr M Wiseman -v- Hills Industries Limited - APPL 65 of 2001 - GREGOR C - 21/08/01 - Personal Services .....	2622
Conference referred re unfair dismissal - Applicant Union argued that the dismissal of its member was unfair and sought compensation - Respondent opposed the applicant's claim and said that in all the circumstances his dismissal was not unfair - Commission reviewed authorities and found on evidence presented that the dismissal of the applicant's member was indeed harsh, oppressive and unfair and directed the parties to confer as to an appropriate order for compensation for loss - Further, Commission was satisfied that applicant's member took all reasonable steps to mitigate his loss - Subsequently the parties advised the Commission that they have agreed on an amount of compensation to be reflected in the Commission's decision - Upheld - The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- Henry Walker Eltin - CR 282 of 2000 - KENNER C - 20/08/01 .....	2637
<sup>2</sup> Appeal against Decision of Commission (81WAIG1449) re unfair dismissal claim - Appellant argued that the Commission erred in determining the amount of compensation to be paid to the appellant and that the Commission ought to have awarded the equivalent of 6 months' remuneration, plus any associated employer superannuation contribution due, less any amount earned in the interim, being the maximum capable of being awarded within the Commission's jurisdiction - Full Bench found on evidence that the Commissioner erred only by reducing the amount claimed - Further, Full Bench were not satisfied that an allowance should be made for superannuation in this case, as it was not claimed at first instance - Upheld and decision at first instance varied - Mrs JM Temby -v- Albany and Districts Skills Training Committee Incorporated - FBA 39 of 2001 - Full Bench - SHARKEY P/SMITH, C/WOOD, C - 02/10/01 - Business Services .....	2719
Application re unfair dismissal and contractual entitlements - Applicant argued that he was harshly, oppressively and unfairly dismissed and denied benefits under his contract of employment - Respondent agreed that the applicant was unfairly dismissed and the only substantial issue in dispute is the quantum of compensation the Commission should order - Commission reviewed authorities and concluded that the applicant had been unfairly dismissed, that reinstatement was impracticable and ordered the respondent to pay the applicant compensation within 10 days of the date of the order - Order Issued - Mr J Barrett -v- 6PR Southern Cross Radio Pty Limited - APPL 190 of 2001 - SMITH, C - 14/09/01 - Printg, Publishg & Rcd Media .....	2768
Application re unfair dismissal and contractual entitlement - Counsel for applicant argued that the dismissal was harsh, oppressive or unfair and arising from that compensation for loss and injury should be awarded to the statutory limit - Counsel further argued that the applicant claimed an outstanding contractual entitlement to bring payment in lieu of notice up to one month's salary - Respondent objected to and opposed these claims - Commission reviewed authorities and found that on the balance of probabilities applicant would have remained in employment for an extended period save for the unfair dismissal - Further, Commission found that reinstatement was impracticable and ordered that applicant be paid compensation - Upheld and claim for contractual entitlements dismissed - Mr JW Hartwig -v- W A Bluemetal - APPL 1930 of 2000 - COLEMAN CC - 06/09/01 - Other Mining .....	2776
Applications re unfair dismissal and contractual entitlements - Applicant argued his contract of employment, signed by the parties was for a three years fixed term and that he was summarily dismissed whilst on annual leave - Applicant sought payment of the balance of the fixed term contract by way of denied contractual benefits inclusive of salary, superannuation, motor vehicle, mobile phone and six months compensation for loss of earnings and injury - Respondent argued on a number of grounds and denied that the dismissal was unfair but says it was imposed by lack of operating funds and failure to fulfil the planting program - Commission found based on the evidence presented that in all circumstances, Applicant's dismissal whilst on annual leave was unfair and amounted to a summary dismissal - Commission further found that Applicant's contract was fixed for a three years duration, that reinstatement was impracticable, that Applicant had not sought to properly mitigate his loss and awarded compensation and discontinued the claim for contractual entitlements - Ordered Accordingly - Mr GR Shuttleworth -v- Silviculture Management Pty Ltd - APPL 169,170 of 2001 - WOOD, C - 21/09/01 .....	2784
Application re unfair dismissal and contractual entitlements - Applicant argued that she was unfairly dismissed and also sought entitlements of a fuel allowance - There was no appearance on behalf of the respondent - Commission found that the applicant had been harshly, oppressively and unfairly dismissed from her employment, that reinstatement was impracticable and awarded compensation - Upheld and Order Issued - Ms A Wellington -v- Bucks Cleaning & Property Services - APPL 2157 of 2000 - KENNER C - 10/09/01 - Personal and Other Services .....	2790
Application re unfair dismissal and contractual entitlements - Applicant argued that he had been unfairly dismissed - There was no appearance on behalf of the respondent - Commission reviewed authorities and based on the evidence presented concluded that the applicant had been unfairly dismissed and awarded compensation accordingly - Order Issued - Mr HJA VanTobruk II -v- Burymore Pty Ltd (ABN/ACN 720 855 490 060) - APPL 483 of 2001 - WOOD, C - 03/09/01 - Accommodatn, Cafes&Restaurants .....	2790
<sup>2</sup> Appeal against Decision of Commission (81WAIG1198) re unfair dismissal and contractual entitlements - Three appeals were heard together by direction of Full Bench - Appellant (Applicant) argued that the learned Commissioner erred in finding that there were two claims, erred by failing to apply identified tests and making a finding of length of service to which entitlement of implied term of reasonable notice in contract was, erred in finding the factors for determining what constituted reasonable notice and entitlement to reasonable severance pay - Further Appellant (Applicant) argued that learned Commissioner erred in finding whether Appellant should have been retained in preference to another employee and erred in lieu of notice - Appellant (Respondent) argued that learned Commissioner erred in deciding that the terms of Individual Employment Agreement did not govern Applicant's employment and erred in not identifying all the terms of Applicant's contract of employment - erred in not deciding that Respondent's policy in relocation had been replaced or modified, and that Applicant was entitled to be relocated or returned to Melbourne, erred in deciding that it was unfair for Respondent not to have given Applicant a further eight weeks pay of severance when Commissioner had decided that Applicant had no contractual entitlement to a severance payment at all and that Applicant had lost a fair redundancy payment when there was no entitlement to any redundancy payment and had erred in deciding that Respondent had breached an implied term of Minimum Condition of Employment Act 1993 - Full Bench found that decision was a discretionary decision and for appeals to succeed Appellant must establish that Commission at first instance erred in the exercise of discretion - Full Bench made a number of observations and conclusions and determined that appeal by Respondent was not made out as there was no miscarriage of discretion and dismissed - Full Bench found that Appeal by Applicant should be upheld as Commissioner's discretion had been miscarried having regards to the principles laid down and that the other appeal by Applicant should also be upheld in part in relation to the quantum of severance pay - Orders Issued - Dismissed and Upheld in part - Mr A Birnie -v- AWI Administration Services Pty Ltd - FBA 22,23,24 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/SMITH, C - 26/10/01 - Other Mining .....	2849

## CUMULATIVE DIGEST—continued

	Page
COMPENSATION—continued	
Application re unfair dismissal and contractual entitlements - Applicant argued that he was unfairly dismissed - Respondent opposed the claim and argued that he had given the applicant the maximum notice possible - Commission reviewed authorities and concluded that the applicant was unfairly dismissed and awarded compensation accordingly - Further the claim for outstanding contractual entitlements was dismissed - Mr PJ Johnston -v- Tyre Power Esperance - APPL 895 of 2001 - WOOD, C - 16/10/01 - Other Services .....	2909
Application re unfair dismissal and contractual entitlements - Applicant argued that dismissal was unfair as his position's classification was reduced without notice and the Respondent's conduct amounted to political and religious discrimination - Matter was heard in the absence of the Respondent who received a transcript of proceedings and was given time to provide a written submission - Respondent argued the Applicant was never employed to sell carpets and took leave with no authority and in doing so abandoned his job - Commission found the Applicant's dismissal was harsh, unfair and oppressive, and awarded compensation for injury - Granted - Mr MH Manteghi -v- Peter Faeghi Group Pty Ltd (ACN 068 434 168) t/a Persian Carpet Gallery - APPL 107,448 of 2001 - GREGOR C - 11/10/01 - Personal & Household Good Rtlg.....	2918
Application re unfair dismissal - Applicant argued dismissal was unfair and the only reason given to him was that his style of management was not nasty enough - Respondent argued that Applicant was dismissed by reason of redundancy - Commission found that Respondent failed to have discussions with Applicant after the decision was made to make his position redundant and Applicant was given an incorrect reason for his dismissal - Commission further found that Applicant was not even paid the proper termination payments to which he was entitled to and Respondent abused its right to dismiss Applicant oppressively - Awarded compensation as reinstatement was not impracticable - Granted - Mr M Stark -v- C.O.C. Pty Ltd - APPL 893 of 2001 - BEECH C - 17/10/01 - Construction Trade Services .....	2934
<sup>2</sup> Appeal against Decision of Commission (81WAIG1660) re unfair dismissal and contractual entitlements - Appellant argued against the finding of the dismissal on the grounds that deal with alleged erroneous findings in relation to the evidence - Appellant argued that there was not sufficient evidence to establish that there was a dismissal - Full Bench found that this was a discretionary decision and had defined a dismissal as the termination of a contract of employment and in this matter there was too fragile a base in the evidence to support a finding of dismissal - Full Bench found that appeal should be upheld as there was no dismissal or no dismissal was established to have occurred and there was no jurisdiction to hear and determine the matter - Appeal Upheld and decision at first instance varied - Dr K Alexander -v- Ms JM Kirkham - FBA 44 of 2001 - Full Bench - SHARKEY P/GREGOR C/WOOD,C - 28/11/01 - Health Services.....	3017
Applications re unfair dismissal - Applicants argued that dismissal was unfair because they were constructively dismissed and they were not given a fair go - Respondent argued that Applicants had tendered their resignations and were given the opportunity to clarify their intentions of resignation which had not changed - Commission found that Respondent had given Applicants a fair go and their resignation intention had not changed - Dismissed - Mr WJ Cochrane -v- Tempo Facility Services Pty Limited - APPL 938,939 of 2001 - WOOD,C - 13/11/01 - Cleaning .....	3123
Application re unfair dismissal and contractual entitlements - Applicant argued that he was unfairly dismissed and denied contractual benefits arising from his employment as a Director - Respondent argued that Applicant was employed as a sales person and his employment was terminated as a result of a redundancy, and the need to restructure the business - Commission reviewed authorities and concluded that Respondent had a genuine need to reduce its manning levels, however, there was no discussion with Applicant about the redundancy and its effect on him, and that by reason of Part 5 of the Minimum Conditions of Employment Act 1993, Applicant's dismissal was harsh, oppressive and unfair - Further, Commission found that reinstatement was impracticable, that there was an oral term to the Applicant's contract of employment, and awarded compensation and denied contractual benefit - Upheld and Order Issued - Mr FP Manna -v- Markhill Holdings Pty Ltd as Trustee for The Midnight Printing Unit Trust t/as "Midnight Printing" - APPL 1751 of 2000 - KENNER C - 29/10/01 - Printg, Publishg & Rcd Media .....	3138
Application re contractual entitlements - Applicant argued that he had been denied contractual entitlements including lost wages, fuel re-imburement and lost earnings - Respondent opposed application in it's entirety and argued that all entitlements were paid out even though there was considerable difficulty due to the lack of or inaccurate recording on work cards - Commission found that the onus was on Applicant to prove that money claimed was due under the contract of service and Applicant failed entirely to discharge that onus - Dismissed - Mr AW McConkey -v- M & A's of Denmark - APPL 1951 of 2000 - WOOD,C - 08/11/01 - Computers.....	3142
Application re unfair dismissal - Applicant argued that her dismissal was harsh, oppressive and unfair - Respondent opposed the application on a number of grounds, including that Commission had no jurisdiction to hear the application because Applicant was not an employee within the meaning of the I.R. Act 1979 - Commission reviewed authorities and found on evidence that Applicant was an employee within the definition of "employee", that Applicant's dismissal summarily by Respondent was harsh, oppressive and unfair and ordered that she be paid compensation - Granted - Ms R Thomson -v- Brunel Energy Pty Ltd - APPL 1742 of 2000 - BEECH C - 07/11/01 - Electricity and Gas Supply.....	3155
CONFERENCE	
Conference re negotiations for a replacement agreement - Applicant argued that the basis for the urgent conference was the difficulties being experienced between the parties in resolving an enterprise bargaining agreement, which led to employees imposing overtime and other bans - Respondent Union argued that members had met and decided to take immediate industrial action by withdrawing their labour for 48 hours - Commission found that Applicant express its attitudes and provided information regarding a range of issues the subject of the dispute and the employees return to work, to continue to work in accordance with their contracts of employment and to not undertake further industrial action while conciliation or arbitration proceeded - Order Issued - Disability Services Commission -v- Civil Service Association of Western Australia Incorporated - PSAC 8 of 2001 - Public Service Arbitrator - SCOTT C. - 06/07/01 - Health and Community Services.....	1612
Application re unfair dismissal listed to show cause why it should not be struck out for want of prosecution - Applicant argued that she wished to continue with her application and that lack of communication was due to the fact that she had been working at Lake Mason and only contactable by phone outside of working hours - Respondent argued that a considerable time had elapsed and that Respondent was interested in finalising matter - Commission found that Applicant provided little explanation and interest in application since she lodged it and that Respondent had experienced stress and that the application should not continue - Dismissed for want of prosecution - Ms M Fissioli -v- Kids Corner Edu-Care Centre - APPL 247 of 2001 - BEECH C - 27/06/01 - Child.....	1645
Conference referred re bonus payments - Applicant Union argued that its member was disadvantaged because his base salary under the award was less than the base salary of employees who are designated as "staff employees" and that in the case of its member, he should be entitled to the same rule as the Respondent's designated "staff employees", that is, the bonus should be paid on his base salary including allowances - Further, Applicant Union argued that the all-up salary included the various allowances and that therefore the bonus actually paid to staff was to be seen as being paid on a notional base award wage plus allowances and sought the same basis of calculation for its member - Respondent opposed the claim and argued that the Commission should not regard the payment of the bonus in isolation, rather, the fact that some employees are paid by the award, and others are paid via a workplace agreement, will inevitably result in differences in employment conditions - Further, Respondent argued that the bonus was applied consistently throughout its operation and to grant the union's claim would introduce anomalies rather than remove them - Commission reviewed authorities and relevant sections of the I.R. Act and issued a Declaration that the manner in which the bonus was paid in the case of the union member was not fair and adjourned the application for one month during which time the parties were directed to meet in an endeavour to reach an agreement and report back to the Commission - Granted in principle - COMM, ELECTRIC, ELECT, ENERGY -v- Millennium Inorganic Chemicals - CR 279 of 2000 - BEECH C - 29/06/01 - Petroleum Coal Chemical Assoc.....	1692

## CUMULATIVE DIGEST—continued

## CONFERENCE—continued

	Page
Conference referred re unfair dismissal - Applicant Union argued that two members were unfairly dismissed from their employment and were seeking reinstatement without loss of earnings - Applicant Union argued that dismissal were unfair because both members were given approval to engage in an arrangement whereby they gave away cheese off-cuts and that the giving away of the cheese off-cuts did not constitute conversion or have any negative effect on Respondent in any event and that the investigation undertaken by Respondent was flawed and biased - Respondent argued that employees were dismissed because no approval was given to give Respondent's product away of substantial amount of cheese - Commission found that no approval was given and that there were deficiencies in the process of the decision making - Further, Commission found that one employee's situation was somewhat different and did not justify dismissal and Commission ordered that employee be reinstatement - Upheld in Part and Order Issued - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Mundella Foods Pty Ltd - CR 2 of 2001 - SCOTT C. - Dairy Product Manufacturing.....	1694
Conference referred re dispute in relation to agreement negotiations - Applicant union sought renewal of agreement and parity with employees employed under a Australian Workplace Agreement - Respondent argued jurisdictional issues with Commission in Court Session - Commission in Court Session found that it had no power to make an order under s.44 which purports to be in substitution for an existing industrial agreement, as neither party had retired from the 2000 Agreement - Dismissed for want of jurisdiction - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Burswood Resort (Management) Ltd - CR 326 of 2000 - Commission in Court Session - GREGOR C/SMITH, C/WOOD, C - 27/07/01 .....	2432
Conference re alleged threat of prejudice in the employment of members of the union - Applicant Union argued that three employees had expressed their desire to improve their conditions of employment by carrying out their existing work under the Transport Workers' (General) Award rather than under a new workplace agreement - Further, Applicant Union argued that one of the employee's workplace agreement no longer have any effect because firstly, Respondent has cancelled the workplace agreement, secondly, by victimising that employee, Respondent has lost its right to any benefits arising from the workplace agreement and thirdly, the terms of "Expiry of Agreement" clause should not be read so as to continue the terms of the workplace agreement as to do so was unconscionable - Respondent raised a preliminary issue in respect of that employee, whereby the employee and the Respondent are parties to a registered workplace agreement and by operation of s.7A, s.7C and s.19(4)(b) of the Workplace Agreements Act, 1993, the Commission was prohibited from dealing with the matters in dispute in respect of that employees' employment - Further, Respondent argued that the workplace agreement has not expired - Commission reviewed authorities and various sections of the Workplace Agreements Act, 1993 and found that the Respondent's argument that the workplace agreement has not expired had not been made out - Further, for reasons set out in its Reasons for Decision, Commission found the matters in dispute between Respondent and the employee in question was not an industrial matter, therefore Commission lacked jurisdiction to enquire into and deal with these matters - Declaration and Order Issued - Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch -v- Down South Transport Pty Ltd - C 145 of 2001 - SMITH, C - 06/07/01 - Road Transport.....	2456
Conference re dispute over the appropriate level of staffing at Hakea Prison - Parties sought Commission's assistance to determine the matter - Commission issued an order dated 21/7/2001 regarding the filling of rosters and to prevent further deterioration of industrial relations until the hearing of the matter, Commission issued a further interim order regarding the filling of vacant positions - Ordered Accordingly - Attorney General -v- Western Australian Prison Officers Union of Workers - C 177 of 2001 - BEECH C - 26/07/01 - Other Services.....	2459
Conference referred re unfair dismissal - Applicant Union argued that having regard to all the circumstances that arose, the punishment of dismissal did not "fit the crime" and sought that its member be reinstated - Respondent opposed the claim - Commission reviewed authorities and found, having regard to all the circumstances of the case, in the context of equity and good conscience, that the dismissal of the Union's member was harsh, oppressive and unfair - Further, Commission found that reinstatement was impracticable, that the Union's member should be compensated and directed the parties to confer as to quantum of compensation, within seven days, to an agreed sum which was incorporated in the final order - Upheld and Order Issued - The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- BHP HBI - CR 128 of 2000 - KENNER C - 15/06/01 - Metal Product Manufacturing.....	2460
Application re site allowance - Applicant argued for an individual rate fixed for each hour that the employees worked in areas that are defined as confined space in Australian Standard 2865 - Respondent argued that the present site allowance contemplated all of the relevant disabilities present on the site - Commission referred to various authorities and was not persuaded on this occasion, that the circumstances of the claim warranted a departure from the existing rights and provisions such that it could conclude that there had been a change in workvalue, in terms of the conditions under which work was performed at the site, such that a new allowance was warranted, therefore in all circumstances of the case, Commission was compelled to conclude that the application be dismissed - Dismissed - Transfield Pty Ltd t/as Transfield Operations and Maintenance -v- AUTO, FOOD, METAL, ENGIN UNION - CR 188 of 2000 - KENNER C - 16/07/00 - Petroleum Coal Chemical Assoc .....	2466
Conference referred re transfer of an employee - Applicant Union argued that Respondent had unfairly transferred its member from her position and sought a declaration that the transfer was unfair and an order that the Respondent reinstate its member - Respondent denied the claim and opposed the orders sought - Commission was of the view for a number of reasons that the conduct of the Applicant Union's member was not unreasonable and concluded that her transfer was unfair - Declaration and Order Issued - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Quirk Corporate Pty Ltd - CR 331 of 2000 - SMITH, C - 29/06/01 - Business Services .....	2470
Conference referred re dismissal - Applicant Union argued that dismissal was unfair and sought reinstatement - Further, at the hearing, Applicant Union sought leave to amend the claim by seeking orders for compensation in lieu of reinstatement and the amendment was granted - Respondent argued that Applicant was made redundant due to diminution of work available - Commission found that Respondent had discharged the onus of establishing the fact of the redundancy - Further, Commission found that there was no casual link between the determination for redundancy and the Applicant's safety issue report and that Applicant was unable to prove that dismissal was unfair - Dismissed - PLUMBERS & GASFITTERS UNION -v- Jako Industries Pty Ltd - CR 303 of 2000 - GREGOR C - 20/07/01 - General Construction .....	2474
Application to vary interim orders - Applicant Union sought to vary interim order to require the Department to replace 8 vacant staff positions on the Hakea Prison roster as the interim order had not changed the situation - Respondent argued that the movement of staff to fill vacant positions as required resulted in positions being covered, that there was a safe environment and that there had been disruptions but the position was not "intolerable" - Commission found that the interim order had generally operated to ensure the number of shifts remaining vacant had been kept low, and application to vary interim order was not granted - Dismissed - Attorney General -v- Western Australian Prison Officers Union of Workers - C 177 of 2001 - BEECH C - 30/08/01 - Other Services.....	2632
Conference referred re site access - Applicant Union argued that its member was a full time official because he was validly appointed as an employee organiser by the branch executive of the applicant's counterpart federal body, The Australian Workers Union ("the federal union") on or about 17 November 2000 - Respondent argued that neither the federal rules nor the state rules supported the Applicant member's employment as an organiser - Commission reviewed authorities and found that Applicant member was employed by the Applicant in a full time capacity as reflected in the instrument of appointment and the Applicant's own records - Declaration Issued - The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- BHP Iron Ore Ltd - CR 46 of 2001 - KENNER C - 02/08/01.....	2633

## CUMULATIVE DIGEST—continued

	Page
CONFERENCE—continued	
Conference referred re unfair dismissal - Applicant Union argued that the dismissal of its member was unfair and sought compensation - Respondent opposed the applicant's claim and said that in all the circumstances his dismissal was not unfair - Commission reviewed authorities and found on evidence presented that the dismissal of the applicant's member was indeed harsh, oppressive and unfair and directed the parties to confer as to an appropriate order for compensation for loss - Further, Commission was satisfied that applicant's member took all reasonable steps to mitigate his loss - Subsequently the parties advised the Commission that they have agreed on an amount of compensation to be reflected in the Commission's decision - Upheld - The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- Henry Walker Eltin - CR 282 of 2000 - KENNER C - 20/08/01 .....	2637
Conference referred re alleged harsh, unfair and unlawful dismissal - Applicant Union argued that the manner in which its member was terminated was harsh, unfair and unlawful and sought an interim order for reinstatement - Respondent opposed the claim - Commission reviewed authorities and relevant sections of the Act and found that it had power to issue the interim order sought - Commission found that Applicant's member was aware of her terms and conditions of employment at the time of making the statements and that the timing of the meeting with her employer before completion of her shift was not oppressive or unfair or engineered in anyway to disadvantage her - Further, pursuant to s.26 of the Act and having regard to "equity, good conscience and the substantial merits of the case", Commission found on balance that the dismissal of the Applicant's member was harsh and issued an order for reinstatement - Granted - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Burswood Resort (Management) Limited - CR 153 of 2001 - WOOD,C - 04/09/01 - Sport and Recreation .....	2639
Conference referred re reclassification of positions - Applicant Union sought on behalf of two of its members to have the Public Service Arbitrator hear and determine the matter - Respondent argued that the Union's members had agreed to a HR consultancy firm to provide a fair and reasonable process for a job evaluation and to accept such a process as the final determination of the matter - Public Service Arbitrator found that the Applicant's members entered into an agreement with the Respondent to resolve the issue of classification therefore, in accordance with s.27(1) of the I.R. Act, dismissed the matter as not necessary or desirable in the public interest - Dismissed - Civil Service Association of Western Australia Incorporated -v- Chief Executive Officer Water Corporation - PSACR 7 of 2001 - Public Service Arbitrator - SCOTT C. - 21/09/01 - Government Administration .....	2756
Conference re transmission of business - Applicant Unions sought an order that the previous award had application due to a transmission of business Further, Applicant Unions argued that there was no genuine redundancy and that the differences between the awards was detrimental to employees - Respondent argued that there was no substantial case to be determined as employees were aware of the new working conditions and had taken advantage of redundancy payments, and the claim for interim relief would be detrimental to the Respondent and would outweigh any detriment to the Applicants - Commission, having considered all of the submissions and materials before it, was not persuaded on balance, that Applicants had established a case for interim relief of the kind sought, therefore the claim for interim orders was refused - Order Issued - The Australian Workers' Union, West Australian Branch, Industrial Union of Workers & Other -v- Dampier Salt Pty Ltd - C 190 of 2001 - KENNER C - 11/09/01 - Other Mining .....	2792
Conference referred re termination of an employee - Applicant argued that there was an argument between him and the Respondent over work issues and his back problem at which time he was dismissed - Respondent argued that Applicant was abusive and showed no respect for him in front of other employees - Commission found based on the evidence presented, that there was a heated argument between the parties and that the language Applicant used towards his employer was wrong, but in a context where the employer had not set a standard in the workplace, that incident did not warrant Applicant's dismissal, therefore, Commission ordered that Respondent pay the Applicant a sum of money equivalent to the wages he would have earned for that period of time as compensation for the dismissal - Granted - The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- Proscage - CR 265 of 2000 - BEECH C - 03/10/01 - Construction Trade Services .....	2795
Conference Referred re payments to employees - Applicant Union argued that the respondent had unfairly treated those employees covered by an Industrial Agreement of the Commission - Respondent argued that the employees previously covered by the workplace agreement have had their salaries maintained at the existing rate as a consequence of Government policy and further the affected employees had not had their salaries and conditions reduced in any way - Commission reviewed authorities and on the preliminary issue of jurisdiction concluded that the matter be dismissed for want of jurisdiction - Civil Service Association of Western Australia Incorporated -v- Chief Executive Officer Western Australian ("WA") Tourism Commission - PSACR 5 of 2001 - Commission in Court Session - SCOTT C./KENNER C/SMITH, C - 06/11/01 - Government Administration .....	2885
Conference Referred re employment conditions - Applicant Union argued that the requirement to sign a workplace agreement and refusal to employ its members was harsh oppressive and/or unfair and sought employment or compensation - Respondent denied the allegations and opposed the relief sought - Commission reviewed authorities and concluded that there was a clear distinction between a matter involving a refusal to employ and a matter concerning dismissal and the appropriate remedy in such a matter would be employment not compensation - Accordingly the matter was dismissed - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Prestige Property Services - CR 24 of 2001 - WOOD,C - 05/11/01 - Other Services .....	2942
Conference referred re safe working and rostering practises at Hakea Prison Complex - Applicant Union argued that additional officers be employed on nightshift to those positions already on the roster and that all vacant positions on the roster be filled daily as this was creating disruptions and frustration to the routines due to being short staffed and that staff were not fulfilling their normal duties - Respondent argued and opposed the claim in its entirety stating that the current staffing of the prison was appropriate and that it was normal for staff to be re-allocated to other duties to accommodate absences on the roster on a daily basis - Commission found that Applicant Union's claim was made out to the extent that provision be made for additional internal escort functions to reduce the need for officers to be taken away from units for that purpose and Commission also took into account the effects of increased costs and its impact - Granted in part - Western Australian Prison Officers' Union of Workers -v- Ministry of Justice - CR 26 of 2001 - BEECH C - 30/10/01 - Other Services .....	2945
Application to vary the Malting Industry Award 1993 and Conference Referred re Dispute over terms and conditions of employment of Union member - Applicant Union argued that the member be offered employment as a full time malt production operator under the terms of the Malt Industry award and any applicable industrial agreement between the parties - Further, the variation to award had jurisdiction to bind the parties to the award - Respondent opposed the claims and argued that the variation to the award would impose restrictions on the employer's rights to engage contractors and upon their rights to engage persons under terms and conditions determined by the employer - Further, Respondent argued that the employee was caught in the revised strategy to source new labour from external labour supplies to reduce costs - Commission found that the application to vary the award cut across some of the already established practices in the industry regarding engagement of contractors for shortfall work and that the application to vary be dismissed - Further, Commission found that the employee should have been provided with full time employment directly by Respondent as a Malt Processing Operator and that Respondent employ employee as agreed by the parties - Orders Issued - The Breweries and Bottleyards Employees' Industrial Union of Workers of Western Australia -v- Kirin Australia Pty Ltd & Other - APPL 1394 of 2001;CR 169 of 2001 - WOOD,C - 19/10/01 - Brewing .....	3076

## CUMULATIVE DIGEST—continued

	Page
CONFINED SPACE	
Application re site allowance - Applicant argued for an individual rate fixed for each hour that the employees worked in areas that are defined as confined space in Australian Standard 2865 - Respondent argued that the present site allowance contemplated all of the relevant disabilities present on the site - Commission referred to various authorities and was not persuaded on this occasion, that the circumstances of the claim warranted a departure from the existing rights and provisions such that it could conclude that there had been a change in workvalue, in terms of the conditions under which work was performed at the site, such that a new allowance was warranted, therefore in all circumstances of the case, Commission was compelled to conclude that the application be dismissed - Dismissed - Transfield Pty Ltd t/as Transfield Operations and Maintenance -v- AUTO, FOOD, METAL, ENGIN UNION - CR 188 of 2000 - KENNER C - 16/07/00 - Petroleum Coal Chemical Assoc.....	2466
CONTRACT OF SERVICE	
<sup>2</sup> Appeal against Decision of Commission (unreported) re contractual entitlements claim - Appellant argued that "it was a mis-exercise of the Commissioner's discretion to strike out Appellant's application for want of prosecution with no other reason than the non-attendance at the conference; that the Commissioner mis-exercise his discretion in striking out the Appellant's (sic) application for want of prosecution when the Respondent had failed to file and serve particulars of its response to the Appellant's application, and without contacting the Appellant to afford the Appellant an opportunity to provide some explanation as to the reason for his non-attendance at the conference" - Further, Appellant sought leave to adduce evidence on affidavit which was not evidence before the Commission at first instance - Full Bench reviewed authorities and found on evidence that Appellant's non-appearance was not so much his fault as an error caused by the strain or stress he was under - Full Bench further found that the justice of the matter, within the principles laid down in the authorities to which they have referred, and the facts as they have found properly led to that conclusion, therefore, for those reasons, agreed to uphold the appeal and made the order to remit the matter to the Commission, constituted by a single Commissioner - Upheld and Order at first instance varied - Mr AW McConkey -v- M & A's of Denmark - FBA 19 of 2001 - Full Bench - SHARKEY P/SCOTT C./WOOD,C - 12/07/01.....	1561
Application re unfair dismissal - Applicant argued that he was harshly, oppressively and unfairly dismissed and sought a benefit arising out of his contract of employment - Respondent argued that prior to applicant's employment being terminated he told applicant that he had two weeks to demonstrate that he could do the job and demonstrate some real changes in his work or his employment would be terminated - Commission found that it was apparent from all of the evidence given in the proceedings that applicant's style of work was incompatible with the requirements of respondent's business, that applicant should have been given 3 months' notice to terminate or 3 months' salary in lieu of notice, and declared that applicant was unfairly dismissed - Order Issued - Mr MRS Barnes -v- Dayman Holdings Pty Ltd ABN 009 309 468 Trading as Reynolds & Associates - APPL 1792 of 2000 - SMITH, C - 01/06/01 - Advertising.....	1616
Application re unfair dismissal - Applicant argued that he was unfairly dismissed, did not consider reinstatement to be practicable and sought compensation for dismissal and payment in lieu of notice - Respondent argued that applicant was dismissed for continued poor performance and breach of trust and contract - Commission found from all the evidence that applicant's performance regarding attendance, sales figures and completion of daily sales records was inadequate, that he was terminated for failing to improve his performance levels, for a breakdown in trust and that applicant was dealt with fairly - Dismissed - Mr J Bradley -v- Lanier (Australia) Pty Ltd - APPL 1557 of 2000 - WOOD,C - 22/06/00 - Equipment.....	1621
Application re contractual entitlements - Applicant argued that he had been denied contractual entitlements based on 1% of gross earnings and two weeks pay for the period of notice - Respondent argued that the entitlement ceased with a variation to the contract and that Applicant's services were summarily terminated the day after he had submitted his resignation when it became known that Applicant was offering alternate employment to two other employees of Respondent company with a competitor and thus no payment in lieu of the notice period payable - Commission found in favour of Applicant's claim of 1% of gross earnings and dismissed the claim for payment in lieu of notice - Upheld in part - Mr CO Danks -v- Derrol Crane Esperance General 'Daytona Investments' - APPL 104 of 2001 - COLEMAN CC - 24/05/01 - Road Transport.....	1631
Application re unfair dismissal and contractual entitlements - Applicant argued that he was summarily dismissed, his position was abolished, he was made redundant and paid one month's salary in lieu of notice which was not in accordance with the contract and that respondent breached the Minimum Conditions of Employment Act 1993, therefore sought either reinstatement or compensation - Respondent argued that with a restructure applicant's position was abolished and he was advised of the reasons for decision to terminate his services - Commission found that respondent had not discharged its onus to prove that this was a genuine redundancy, that the dismissal was both procedurally and substantively unfair, that applicant certainly did not receive a fair go all round and, as it would be impracticable for him to return to work with respondent, awarded compensation - Granted - Mr P Dellys -v- Elderslie Finance Corporation Limited - APPL 1185 of 2000 - WOOD,C - 20/06/01 - Finance.....	1632
Application re unfair dismissal seeking compensation - Applicant argued that dismissal was unfair because no option but to resign was offered to him and with the opportunity would have improved his performance - Respondent argued that options were offered to Applicant in relation to Applicant's performance and opportunities were given to rectify the situation and Applicant had agreed to four weeks pay and resigning - Commission found that Applicant negotiated terms to resign and that he had other options to resignation, thus, Applicant jumped rather than being pushed - Dismissed - Mr AR Ferraris -v- Linstorm Holdings Pty Ltd as trustee for the TAG Family Trust ACN 067 398 403 - APPL 1862 of 2000 - SCOTT C. - 03/07/2001.....	1643
Applicant argued that dismissal was a constructive dismissal in that he had no other choice but to resign and that he was not paid the remuneration package that was offered - Respondent argued that they did not coerce Applicant to resign and did not want to get rid of Applicant because a lot of effort had been put into his training and did not want to lose the value of that training - Commission found that Applicant had decided he did not want to continue and was not prepared to do as required to obtain the remuneration package and there was no evidence that Respondent wanted to get rid of Applicant or coerced him to resign, thus, there was no dismissal - Dismissed - Mr CJ Fox -v- News Illustrated Pty Ltd - APPL 1492 of 2000 - GREGOR C - 11/07/01 - Printg, Publishg & Redd Media.....	1646
Application re unfair dismissal - Applicant argued that dismissal was harsh, oppressive or unfair - Respondent argued that this matter was a "precise parallel" with circumstances where an employee was dismissed summarily for misconduct and that in this case it alleged "conduct that may detrimentally affect the respondent" on the part of applicant - Commission found that respondent's decision to dismiss applicant was not based upon applicant committing some act of "serious misconduct" which had detrimentally affected respondent but because of his assessment of applicant's attitude - Further, Commission found that dismissal was an unfair exercise of respondent's right to dismiss, that reinstatement was impracticable and awarded compensation for the loss or injury caused by dismissal - Granted - Mr SD Gordon -v- Q-Vis Limited (ACN 009 234 173) - APPL 885 of 2000 - BEECH C - 31/05/01 - Health.....	1651
Application re unfair dismissal and contractual entitlements - Preliminary Issue re jurisdiction - Applicant argued he was unfairly dismissed from Respondent and is owed monies by way of outstanding contractual entitlements - Respondent argued that pursuant to s83 of the Act, the monies claimed by way of denied contractual benefits were a matter for the Industrial Magistrate as they arose from an award benefit - Further, Respondent argued that the superannuation monies were subject of the Superannuation Guarantee Legislation and like wise not within the Commission's jurisdiction - Commission reviewed authorities and found that the benefits claimed were award benefits, and that the application was lodged out of time, therefore Commission was without jurisdiction to hear the application - Dismissed for want of jurisdiction - Mr LJ Govan -v- Roche Excavating Pty Ltd - APPL 644 of 2001 - WOOD,C - 09/07/01 - Construction Trade Services.....	1658

## CUMULATIVE DIGEST—continued

	Page
CONTRACT OF SERVICE—continued	
Application re unfair dismissal and contractual entitlements - Applicant argued that after she had been off sick for a number of weeks, she made an appointment to meet with the Respondent to discuss her return to work and the nature of her duties, and at the request of Respondent, she drew up an agenda of what was to be discussed at the meeting - Further, Applicant argued that she met with the Respondent and it was at that meeting that she was dismissed - Respondent argued that Applicant's duties had been taken over by other staff, that it would have had to create another job for her, that Applicant did not get along with other staff and that it was of the view that Applicant was unfit to come back to work - Commission reviewed authorities and found on a number of reasons that Applicant's dismissal was unfair, that reinstatement was impracticable and ordered that Applicant be paid compensation and denied contractual benefits - Granted in Part - Ms JM Kirkham -v- Dr K Alexander - APPL 1366 of 2000 - BEECH C - 15/06/01 - Health Services.....	1660
Application re unfair dismissal and contractual entitlements - Applicant argued that Respondent's conduct was misleading in the letter written and that as a matter of equity, Respondent should be estopped from recanting on the terms of the letter - Respondent argued that application was lodged in Commission out of time and that Commission, thus, had no jurisdiction - Commission found that application was made out of time and dismissed matter - Dismissed - Mr IB Percival -v- Claddah Properties Pty Ltd - APPL 1834 of 2000 - SCOTT C. - Horticulture & Fruit Growing.....	1671
Application re unfair dismissal and contractual entitlements - Applicant argued that on completion of his apprenticeship he was offered a permanent position of mechanic and accepted it - Respondent argued that Applicant was never offered or employed as a mechanic - Commission found that Applicant was never employed as a mechanic and application was without foundation - Dismissed for want of jurisdiction - Mr D Pestana -v- New Town Toyota - APPL 2005 of 2000 - BEECH C - 02/07/01 - Motor Vehicle Rtlg & Services.....	1673
Application re unfair dismissal - Applicant argued he was harshly, oppressively or unfair dismissed and sought compensation for loss and injury, and in addition or alternatively a reasonable period of notice and a redundancy payment as outstanding contractual entitlements - Further, Applicant argued that in the absence of re-employment or reinstatement being practical, he claimed that his loss and injury arising from the dismissal exhausts the statutory limit of compensation under the I.R. Act 1979 as amended - Respondent argued that Applicant's services were terminated in the circumstances of a genuine redundancy, the genesis of which was discussed with him and so too was the restructuring of the organisation, therefore, in the circumstances of the bona fide redundancy the dismissal was not harsh, oppressive or unfair - Further, Respondent argued that even if it was to be found to have been unfair, Applicant failed to mitigate his loss not seeking employment in the local market, and that any compensation for loss should be minimal on the basis that Applicant would have become redundant in any event within a very short period of time - Commission reviewed authorities and found that the termination was a summarily dismissal, that Respondent had not discharged the onus of establishing that the summary dismissal was justified, that in all circumstances the right to dismiss was exercised in a harsh and oppressive manner, therefore, compensation for loss equivalent to six months salary was awarded and all other claims dismissed - Ordered Accordingly - Mr MM Quartermaine -v- Anson Management Services Pty Ltd - APPL 1155 of 2000 - COLEMAN CC - 21/06/01 - Business Services.....	1675
Application re unfair dismissal - Applicant argued that he was dismissed unfairly because he was unhappy with the contract and the superannuation clause in the contract - Respondent argued that Commission did not have jurisdiction to deal with the application as Respondent did not employ Applicant during his period of engagement as Applicant was engaged as a sub-contractor - Further, Applicant's contract was terminated by operation of law in that the contract was subject to a condition which was not satisfied by Applicant - Commission found that it had no jurisdiction to deal with a contract that is not one of employment and found Applicant was not an employee of Respondent but had a contract to supply services to Respondent as an independent contractor - Dismissed for want of jurisdiction - Mr MS Simpkins -v- Mr GB Robson - APPL 2100 of 2000 - SMITH, C - 05/07/01 - Transport and Services.....	1679
Application re unfair dismissal - Applicant argued that the foreman had dismissed him or he was constructively dismissed in that the foreman was aggressive, abusive and an attack that entitled Applicant to withdraw from contract - Respondent argued that Applicant was never dismissed and that he was employed on a casual basis - Further, Applicant's behaviour on the day in question was unacceptable as Applicant was upset and angry and behaved in an aggressive manner - Commission found that Applicant was not unfairly dismissed and that language used by Applicant should not be used in a way that was abusive of the employer or other such person and that Applicant was angry and his behaviour was unacceptable - Order Issued - Mr JT Wells -v- Carmelo Antonio Puglia t/as Tiltmasters Trailers - APPL 387 of 2001 - SMITH, C - 06/07/01 - Construction Trade Services.....	1681
Application re unfair dismissal and contractual entitlements - Applicant argued that his dismissal was harsh, oppressive or unfair and sought outstanding benefits - Respondent argued that at the time of application there had been no dismissal and that remedy sought being 6 weeks notice and paid leave had been received by Applicant - Commission reviewed various authorities and concluded that a broad interpretation should be applied to the term "dismissed" and this period should include the period of notice therefore, Commission allowed the application on that basis - Further, Commission concluded that Applicant had been paid during the notice period in accordance with the workers compensation regime, that in the application before it the remedies were clear and had been met and that pursuant to s.27(1)(a)(ii) and (iv) of the Act, further proceedings were not necessary or desirable in the public interest - Dismissed - Mr CG Hywood -v- Subiaco Wine Room - APPL 1950 of 2000 - SCOTT C. - 31/07/01 - Accommodatn, Cafes&Restaurants.....	2443
Application re unfair dismissal and contractual entitlements - Applicant argued he was unfairly dismissed and denied contractual benefits and sought an extension of time - Respondent argued that Applicant's application was lodged out of time - Commission determined that application was lodged out of time and that it was without jurisdiction to extend the 28 day period and to deal with the claim for entitlements - Dismissed for want of jurisdiction - Mr MW MacGregor -v- Star Surf Shop Pty Ltd - APPL 934 of 2001 - BEECH C - 12/07/01 - Textile, Clothing, Footwear.....	2448
Application re contractual entitlements - Applicant argued he was entitled to annual bonus and deducted wages - Respondent argued applicant was not due annual bonus as his employment was casual in nature - Commission determined applicant was not employed as a casual and outstanding annual bonus granted - Claim for deducted wages was dismissed for want of jurisdiction - Granted in Part - Mr RC Whyte -v- Narrogin Brick - APPL 1869 of 2000;APPL 651 of 2001 - WOOD,C - 13/07/01 - Construction Trade Services.....	2450
<sup>1</sup> Appeal against Decision of Full Bench (81WAIG990) re unfair dismissal and contractual entitlements - Appellant argued that the Full Bench erred in law in holding that Respondent (Applicant) was employed in an industry as defined in s.7 of the I.R. Act, 1979 and that the Commission thereby had jurisdiction to hear and determine the Respondent's (Applicant's) claim pursuant to s.29 of the Act - Appellant sought an order for the Full Bench Decision to be quashed - Industrial Appeal Court applied various legal principles and found that the factual circumstances alleged by the Appellant were not sustainable, that the evidence was to the contrary and that the Full Bench correctly found on the facts that there was a sufficient connection with Western Australia to found the jurisdiction of the Commission - Dismissed - Ray Douglas Parker -v- Mr MA Tranfield - IAC 2 of 2001 - Industrial Appeal Court - Kennedy J./Anderson J./Ipp J. - 07/08/01 - Business Services.....	2505
<sup>2</sup> Appeal against Decision of Commission (81WAIG1238) re unfair dismissal - Appellant argued that the Learned Commission erred in law and in fact on various grounds including that it awarded excessive compensation to the Respondents - Further, Appellant sought an Order that the Decision of Commission in matters 1377 and 1378 of 2000 be quashed - Full Bench reviewed evidence and applying the principles in House v. The King (HC)(op cit) and Gromark Packaging v. FMWU (IAC)(op cit), found on a number of reasons that there was no error as alleged in the grounds of appeal, and no error in the exercise of the Commissioner's discretion - Dismissed - Kingscape Holdings Pty Ltd -v- GK Smith & Other - FBA 20 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/GREGOR C - 17/08/01 - Construction Trade Services.....	2517

CUMULATIVE DIGEST—*continued*CONTRACT OF SERVICE—*continued*

	Page
<sup>2</sup> Appeal against Decision of Commission (80WAIG5658) re unfair dismissal and contractual entitlements - Appellant argued that Commission had mistaken the facts, allowed extraneous or irrelevant matters to guide it, had reached a result that was, on the facts, unreasonable or plainly unjust, had not taken into account some material consideration and had acted upon a wrong principle - Full Bench reviewed evidence and principles laid down in <i>House v. The King (HC)(op cit)</i> and found that the Commissioner at first instance miscarried its exercise of discretion and based on that findings, Full Bench found and declared that the Appellant was harshly, oppressively and unfairly dismissed - Further, Full Bench reviewed other principles and cases and granted the application to extend time within which to institute the appeal as it found that by granting an extension of time, no injustice would be occasioned to the Respondent - Upheld, Order at first instance suspended and matter remitted back to the Commission - Ms EJ Roast -v- Forx Pty Ltd (ACN 008 972 076) - FBA 54 of 2000 - Full Bench - SHARKEY P/COLEMAN CC/SCOTT C. - 14/08/01 - Property and Business Services.....	2541
Application re contractual entitlements - Applicants argued that they had been denied outstanding contractual entitlements not being covered by the award - There was no appearance on behalf of the Respondent - Commission found that based on the evidence presented the applicants had established their entitlements to outstanding benefits under their respective contracts of employment - Upheld - Mr JC Da Silva -v- Axis Information Systems Pty Ltd - APPL 267,272,278,279,300 of 2001 - COLEMAN CC - 02/08/01 - Communication Services.....	2576
Application re contractual entitlements - Applicant's agent argued that respondent had failed to meet obligations under the contract of employment - There was no appearance on behalf of the respondent - Commission was satisfied that applicant was employed by respondent and found that applicant had not been allowed benefits to which she was entitled under her contract of employment - Granted - Ms MAC Dignam -v- iNature Australia Pty Ltd - APPL 900 of 2001 - BEECH C - 10/08/01.....	2578
Application re unfair dismissal and contractual entitlements - Applicant argued she had been unfairly dismissed and sought denied contractual entitlements - Respondent argued that Applicant was demoted until she was ultimately dismissed, that her demotion related in part to Applicant's own action, as there were conflict of hours between Applicant's two jobs, that her performance in regard to communication was poor and that she attended work for another employer whilst she was on sick leave - Commission found on evidence that Applicant engineered her hours of work to her own advantage against the expressed concerns and directions of her employer, that it was on this basis alone, leaving aside the other history of conflicts at the workplace and the concerns about communication with clients, that the dismissal was fair ( <i>Undercliffe Nursing Home -v- FMWU</i> ) - Further, Commission was not convinced that there was an absence of procedural fairness arising from the management committee's decision - Dismissed - Mrs A Niblett -v- Koolkuna Eastern Region Domestic Violence Services Network - APPL 2072 of 2000 - WOOD,C - 30/08/01 - Personal Services.....	2601
Application re unfair dismissal and contractual entitlements - Applicant argued she had been the subject of a harsh, oppressive and unfair dismissal and was entitled to outstanding contractual entitlements - Commission reviewed authorities and found on the evidence that there was no dismissal and the jurisdiction under s.29 therefore does not arise - Further, Commission concluded that Applicant was not tripped or pushed, that there was no deliberate and dominant purpose of coercing her to resign, that she terminated her own contract because what the Respondent was offering her eventually did not meet her financial requirements, therefore, she decided to end the relationship by resignation - Dismissed - Ms R Powell -v- Ronin Security Pty Ltd - APPL 1844 of 2000 - GREGOR C - 07/09/01 - Personal and Other Services.....	2605
Application re unfair dismissal and contractual entitlements - Applicant argued his dismissal was unfair and sought bonus payments, reimbursement of travelling expenses and outstanding benefits due to him under his contract of employment - Respondent opposed the claim - Commission reviewed evidence and authorities and found that Applicant's dismissal was unfair because Applicant's action in the circumstances of his employment overall was not so seriously in breach of the contract as to justify dismissal - Further, Commission was not persuaded that Applicant had shown that his employment was a long term proposition such that he had suffered loss of job security for which compensation should now be ordered - Claim for contractual entitlements dismissed, order for costs not awarded and claims relating to reimbursement of travel expenses adjourned - Granted in Part - Mr GG Wells -v- Mr John Reyburn trading as Nicholson Clement Solicitors - APPL 226 of 2001 - BEECH C - 27/08/01 - Other Services.....	2618
<sup>2</sup> Appeal against Decision of Commission (81WAIG1418) re contractual entitlements claim - Appellant argued that in relation to issues regarding advertising allowance, the Commissioner erred in law and failed to consider the relevant evidence and in relation to sales commission, the Commissioner erred in failing to take into account relevant evidence establishing the existence (sic) of a sales transaction - Full Bench found on evidence that there was no evidence of a sales transaction, but a broad reference to it - Further, there was nothing of error in what the Commissioner did, that the burden was not discharged to establish what Appellant claimed and that there was no error in the exercise of the discretion (see <i>House v The King [1936] 55 CLR 499</i> ), therefore, the appeal was not made out - Dismissed - Mr GS Hincks -v- Darrell Crouch and Associates Pty Ltd - FBA 32 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/WOOD,C - 11/10/01 - Property Services.....	2701
Application re contractual entitlements - Applicant argued that he had not been paid benefits due to him under his contract of employment, being commission for a sale made prior to the date of termination of his employment - There was no appearance on behalf of the Respondent - Commission found that applicant had established a claim for outstanding commissions in the absence of any contradictory evidence from the respondent - Granted - Mr AF Finch -v- Modular Metals Australia Pty Ltd - APPL 631 of 2001 - BEECH C - 19/09/01 - Other Services.....	2775
Application re contractual entitlements - Applicant sought payment of accrued annual leave and one week's pay in lieu of notice - Commission was satisfied based on the evidence presented that Applicant was employed by Respondent, that he had not been paid his entitlements of annual leave, that Respondent was required to give seven day's notice in writing or the payment of an equivalent amount of salary in lieu and that in Applicant's case that had not occurred - Further, Commission ordered that Respondent pay Applicant the sum of \$8,166.25 gross by way of annual leave entitlements and the sum of \$1,000.00 being one week's salary in lieu of notice upon the termination of his employment - Granted - Mr PJ Jeffrey -v- IPF Finance Ltd - APPL 1420 of 2001 - BEECH C - 02/10/01 - Finance.....	2779
Application re contractual entitlements - Applicant argued that he had not been paid the full value of commissions that were otherwise due - Agent for the respondent argued that at no stage was there any agreement that full commission would be paid in the event of a settlement occurring after termination of the applicant's employment - Commission concluded based on the evidence presented, that no agreement or contract existed between the parties for the payment of a full commission and accordingly dismissed the application - Dismissed - Mr NA Jones -v- Dry Creek Enterprises Pty Ltd - APPL 422 of 2001 - BEECH C - 25/09/01 - Business Services.....	2780
Application re contractual entitlements - Agent for the applicant argued that he had not been paid contractual entitlements due to him under his contract of employment - Respondent objected to and opposed the claim - Commission concluded that in all circumstances, after having read the contract of employment, that the amount claimed by the applicant was made out and was due and payable, less any normal taxation payable to the Commissioner of Taxation - Granted - Mr J Kuret -v- Medical Resources Pty Ltd - APPL 816 of 2001 - WOOD,C - 31/08/01 - Health Services.....	2783

## CUMULATIVE DIGEST—continued

Page

## CONTRACT OF SERVICE—continued

- Applications re unfair dismissal and contractual entitlements - Applicant argued his contract of employment, signed by the parties was for a three years fixed term and that he was summarily dismissed whilst on annual leave - Applicant sought payment of the balance of the fixed term contract by way of denied contractual benefits inclusive of salary, superannuation, motor vehicle, mobile phone and six months compensation for loss of earnings and injury - Respondent argued on a number of grounds and denied that the dismissal was unfair but says it was imposed by lack of operating funds and failure to fulfil the planting program - Commission found based on the evidence presented that in all circumstances, Applicant's dismissal whilst on annual leave was unfair and amounted to a summary dismissal - Commission further found that Applicant's contract was fixed for a three years duration, that reinstatement was impracticable, that Applicant had not sought to properly mitigate his loss and awarded compensation and discontinued the claim for contractual entitlements - Ordered Accordingly - Mr GR Shuttleworth -v- Silviculture Management Pty Ltd - APPL 169,170 of 2001 - WOOD,C - 21/09/01 ..... 2784
- <sup>2</sup>Appeal against Decision of Commission (81WAIG1198) re unfair dismissal and contractual entitlements - Three appeals were heard together by direction of Full Bench - Appellant (Applicant) argued that the learned Commissioner erred in finding that there were two claims, erred by failing to apply identified tests and making a finding of length of service to which entitlement of implied term of reasonable notice in contract was, erred in finding the factors for determining what constituted reasonable notice and entitlement to reasonable severance pay - Further Appellant (Applicant) argued that learned Commissioner erred in finding whether Appellant should have been retained in preference to another employee and erred in lieu of notice - Appellant (Respondent) argued that learned Commissioner erred in deciding that the terms of Individual Employment Agreement did not govern Applicant's employment and erred in not identifying all the terms of Applicant's contract of employment - erred in not deciding that Respondent's policy in relocation had been replace or modified, and that Applicant was entitled to be relocated or returned to Melbourne, erred in deciding that it was unfair for Respondent not to have given Applicant a further eight weeks pay of severance when Commissioner had decided that Applicant had no contractual entitlement to a severance payment at all and that Applicant had lost a fair redundancy payment when there was no entitlement to any redundancy payment and had erred in deciding that Respondent had breached an implied term of Minimum Condition of Employment Act 1993 - Full Bench found that decision was a discretionary decision and for appeals to succeed Appellant must establish that Commission at first instance erred in the exercise of discretion -Full Bench made a number of observations and conclusions and determined that appeal by Respondent was not made out as there was no miscarriage of discretion and dismissed - Full Bench found that Appeal by Applicant should be upheld as Commissioner's discretion had been miscarried having regards to the principles laid down and that the other appeal by Applicant should also be upheld in part in relation to the quantum of severance pay - Orders Issued - Dismissed and Upheld in part - Mr A Birnie -v- AWI Administration Services Pty Ltd - FBA 22,23,24 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/SMITH, C - 26/10/01 - Other Mining ..... 2849
- Application re unfair dismissal - Applicant argued dismissal was harsh, oppressive and unfair and denied that his position was made redundant because it was replaced by another person as there were incomplete tasks under the job description - Applicant further argued that salary increases were unfairly withheld as proper procedure was not followed and claimed denied contractual benefits - Respondent argued that although there were some issues it believed that Applicant had been treated fairly and the reason for termination was the economic slow down and that it could not carry a person whose position did not need to be performed - Commission considered all of the evidence and submissions and found that the redundancy of the position was indeed genuine and the loss suffered by the Applicant was the delay in receiving the redundancy pay and ordered that interest on the amount to be paid - Dismissed - Mr S Crockett -v- Hire Intelligence Pty Ltd - APPL 1441 of 2000 - SCOTT C. - 19/09/01 - Business Services ..... 2899
- <sup>2</sup>Appeal against Decision of Commission (81WAIG1660) re unfair dismissal and contractual entitlements - Appellant argued against the finding of the dismissal on the grounds that deal with alleged erroneous findings in relation to the evidence - Appellant argued that there was not sufficient evidence to establish that there was a dismissal - Full Bench found that this was a discretionary decision and had defined a dismissal as the termination of a contract of employment and in this matter there was too fragile a base in the evidence to support a finding of dismissal - Full Bench found that appeal should be upheld as there was no dismissal or no dismissal was established to have occurred and there was no jurisdiction to hear and determine the matter - Appeal Upheld and decision at first instance varied - Dr K Alexander -v- Ms JM Kirkham - FBA 44 of 2001 - Full Bench - SHARKEY P/GREGOR C/WOOD,C - 28/11/01 - Health Services ..... 3017
- Complaint re breach of award - Complainant Union argued that employee was an employee of the Respondent and subject to the award - Complainant Union further argued that employee was not paid for working overtime and meal allowances - Respondent argued that award had no relevance in proceedings as award was not applicable to Respondent and that subcontractors were only employed to carry out the manufacturing - Industrial Magistrate found that there was an employee/employer relationship as employee was only providing his services, that he was also given directions on a daily basis and his duties were supervised, therefore he was an employee - Further, IM found that award applied to him and Respondent - Award entitlements, costs and fines were ordered - Decision Issued - The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers -v- Mateko Holdings Pty Ltd - M 84 of 2001 - Industrial Magistrate - Tarr IM - 18/10/01 - Construction Trade Services ..... 3085
- Application re unfair dismissal and contractual entitlements - Applicant argued that she was an employee, unfairly dismissed and her employment terminated without notice - Respondent argued the relationship was not one of employer and employee but a domestic relationship - Commission found that the relationship was a domestic relationship and not an employment relationship - Dismissed - Ms JE Augustyn -v- Vistadale Pty Ltd As Trading For The Ranger Family Trust Trading As Ranger Contracting - APPL 679 of 2001 - WOOD,C - 03/12/01 - Machinery & Equipment Mfg ..... 3107
- Application re contractual entitlements - Applicant argued that he has been denied a benefit under his contract of employment, namely that his accrued annual leave entitlement paid to him on termination of his employment should have been paid at the retainer and commission rate - Respondent denied the claim and argued that it had never on termination paid an average of earnings to vehicle sales employees - Commission found that the material before it did not show that it was a term, either expressly or by implication, of Applicant's contract of employment that he would be paid for untaken annual leave at the retainer plus commission rate and accordingly dismissed the application - Dismissed - Mr KJ Bobridge -v- Peel Automotive Group - APPL 790 of 2001 - BEECH C - 14/11/01 - Motor Vehicle Rtlg & Services ..... 3111
- Application re unfair dismissal and contractual entitlements - Applicant lodged an amended Notice of Application whereby she sought outstanding benefits due under her contract of employment - Respondent responded to the proceedings by way of a Notice of Answer and Counter Proposal and an affidavit - Commission listed the matter For Mention Only and found the facts to be, that at no stage was the Applicant employed by the Respondent, therefore there was no dismissal - Further, there was no evidence from which it could be concluded that a contract of service existed between Applicant and Respondent and that Applicant was entitled to the "benefits" claimed - Struck out for want of jurisdiction - Ms SL Dean -v- Edward Beale Salon - APPL 1204 of 2001 - BEECH C - Other Services ..... 3125
- Application re unfair dismissal - Applicant argued that he was employed as a fisherman on fishing trawlers and that the skipper hired and fired all the fishermen - Further, the skipper had control of the vessel and method of work, in that the skipper determined when the vessel was to go to sea and where the boat would fish and how long the boat would be at sea - Respondent argued that the Commission did not have jurisdiction to deal with the matter because it did not employ Applicant - Further, Respondent argued that Applicant entered into an Agreement that did not create an employee-employer relationship and that in the fishing industry, companies entered into share fishing agreements because that was the way industry operated and that Respondent did not engage employees - Commission found that it was for Applicant to show, on the balance of probabilities that he was an employee - Further, the relationship of employer and employee was a contract of service where an employee contracted to provide his or her work and skill whereas an independent contractor worked in his or her own business on his or her own account - Commission declared that Applicant was an employee of Respondent working under a contract of service - Order Issued - Mr AJ Greig -v- Kraus Fishing Company Pty Ltd - APPL 2028 of 2000 - SMITH, C - 15/11/01 - Commercial Fishing ..... 3128

## CUMULATIVE DIGEST—continued

	Page
<b>CONTRACT OF SERVICE—continued</b>	
Application re unfair dismissal - Applicant argued that dismissal was unfair because no notice or prior warning was given and that she was not afforded procedural fairness or give a fair go - Further, Applicant sought redundancy payment - Respondent argued that he kept staff fully informed that Respondent was financially untenable and was being wound up and he had intended to speak to Applicant regarding various options available - Commission found that the business was in financial difficulty and Respondent had intended to discuss matter with Applicant - Further, Commission found that Applicant was a part time employee not a casual and thus entitled to payment in lieu of notice - Applicant awarded notice payment - Order Issued - Mrs DE Harley -v- Jasgold Holdings T/A Ringcraft Jewellers - APPL 1150 of 2001 - WOOD,C - 19/11/01 - Jewellery .....	3135
Application re unfair dismissal and contractual entitlements - Applicant argued that he was unfairly dismissed and denied contractual benefits arising from his employment as a Director - Respondent argued that Applicant was employed as a sales person and his employment was terminated as a result of a redundancy, and the need to restructure the business - Commission reviewed authorities and concluded that Respondent had a genuine need to reduce its manning levels, however, there was no discussion with Applicant about the redundancy and its effect on him, and that by reason of Part 5 of the Minimum Conditions of Employment Act 1993, Applicant's dismissal was harsh, oppressive and unfair - Further, Commission found that reinstatement was impracticable, that there was an oral term to the Applicant's contract of employment, and awarded compensation and denied contractual benefit - Upheld and Order Issued - Mr FP Manna -v- Markhill Holdings Pty Ltd as Trustee for The Midnight Printing Unit Trust t/as "Midnight Printing" - APPL 1751 of 2000 - KENNER C - 29/10/01 - Printg, Publishg & Rcd Media .....	3138
Application re contractual entitlements - Applicant argued that he had been denied contractual entitlements including lost wages, fuel re-imburement and lost earnings - Respondent opposed application in it's entirety and argued that all entitlements were paid out even though there was considerable difficulty due to the lack of or inaccurate recording on work cards - Commission found that the onus was on Applicant to prove that money claimed was due under the contract of service and Applicant failed entirely to discharge that onus - Dismissed - Mr AW McConkey -v- M & A's of Denmark - APPL 1951 of 2000 - WOOD,C - 08/11/01 - Computers .....	3142
Application re contractual entitlements - Applicant sought the payment of commission arising out of his contract of employment which he argued has been withheld by Respondent - Respondent rejected the claims and argued that the regularity of payment is not part of the contract and that no such agreement was made with senior management to cover the effect of the product sale on commission - Commission was not satisfied on the balance of probabilities that Applicant had discharged the onus to prove his claim - Dismissed - Mr DO Norton -v- Hanimex Pty Ltd - APPL 824 of 2001 - WOOD,C - 16/11/01 - Business Services .....	3144
<b>CONTRACT OUT OF AWARD</b>	
Complaint re breach of award - Complainant Union argued that employee was an employee of the Respondent and subject to the award - Complainant Union further argued that employee was not paid for working overtime and meal allowances - Respondent argued that award had no relevance in proceedings as award was not applicable to Respondent and that subcontractors were only employed to carry out the manufacturing - Industrial Magistrate found that there was an employee/employer relationship as employee was only providing his services, that he was also given directions on a daily basis and his duties were supervised, therefore he was an employee - Further, IM found that award applied to him and Respondent - Award entitlements, costs and fines were ordered - Decision Issued - The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers -v- Mateko Holdings Pty Ltd - M 84 of 2001 - Industrial Magistrate - Tarr IM - 18/10/01 - Construction Trade Services .....	3085
<b>COSTS</b>	
Application re unfair dismissal seeking costs - Applicant disagreed with the amount claimed - Parties sought the assistance of the Commission to decide the matter on the basis of the written material provided - Commission found that Applicant's response to the issue of costs was not reasonable, that the costs properly incurred by Respondent which were wasted due to Applicant's non-attendance exceed the minimum \$200.00 which Respondent was prepared to accept and ordered that Applicant pay \$200.00 by way of costs to Respondent within 7 days of the date of the Order - Order Issued - Mr DA Amoroso -v- Bellvale Nominees Pty Ltd - APPL 7 of 2001 - BEECH C - 13/09/01 - Services to Transport .....	2767
Complaint re breach of award - Complainant Union argued that employee was an employee of the Respondent and subject to the award - Complainant Union further argued that employee was not paid for working overtime and meal allowances - Respondent argued that award had no relevance in proceedings as award was not applicable to Respondent and that subcontractors were only employed to carry out the manufacturing - Industrial Magistrate found that there was an employee/employer relationship as employee was only providing his services, that he was also given directions on a daily basis and his duties were supervised, therefore he was an employee - Further, IM found that award applied to him and Respondent - Award entitlements, costs and fines were ordered - Decision Issued - The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers -v- Mateko Holdings Pty Ltd - M 84 of 2001 - Industrial Magistrate - Tarr IM - 18/10/01 - Construction Trade Services .....	3085
Complaint re breach of Workplace Agreement - Claimant sought unpaid entitlements pursuant to the workplace agreement, including claims for pre-judgment interest, penalties pursuant to s83(6) of the I.R. Act, 1979 and costs - Defendant conceded that the Claimant was entitled to payment for normal working hours and holiday pay but denied liability for the payment of pay in lieu of notice, maintaining that the Claimant resigned, and in such circumstances was not entitled to pay in lieu of notice under the workplace agreement - Industrial Magistrate was not satisfied based on the evidence presented that the Claimant was dismissed, therefore his claim for one week's pay in lieu of notice was dismissed - Further, IM issued Orders by consent, that Respondent pay the Claimant the amount of \$1058.00 plus interest fixed at \$40.00, and reimburse the Claimant the amount of \$40.00 being the cost of making the claim - Reasons for Decision Issued - Mr P Mankindok -v- Cabletech Electrical Pty Ltd - M 124 of 2001 - Industrial Magistrate - Tarr IM - 22/11/01 - Other Services .....	3091
<b>DISABILITIES</b>	
Application re site allowance - Applicant argued for an individual rate fixed for each hour that the employees worked in areas that are defined as confined space in Australian Standard 2865 - Respondent argued that the present site allowance contemplated all of the relevant disabilities present on the site - Commission referred to various authorities and was not persuaded on this occasion, that the circumstances of the claim warranted a departure from the existing rights and provisions such that it could conclude that there had been a change in workvalue, in terms of the conditions under which work was performed at the site, such that a new allowance was warranted, therefore in all circumstances of the case, Commission was compelled to conclude that the application be dismissed - Dismissed - Transfield Pty Ltd t/as Transfield Operations and Maintenance -v- AUTO, FOOD, METAL, ENGIN UNION - CR 188 of 2000 - KENNER C - 16/07/00 - Petroleum Coal Chemical Assoc .....	2466
<b>EMPLOYEE</b>	
Application re unfair dismissal - Applicant argued that he was dismissed unfairly because he was unhappy with the contract and the superannuation clause in the contract - Respondent argued that Commission did not have jurisdiction to deal with the application as Respondent did not employ Applicant during his period of engagement as Applicant was engaged as a sub-contractor - Further, Applicant's contract was terminated by operation of law in that the contract was subject to a condition which was not satisfied by Applicant - Commission found that it had no jurisdiction to deal with a contract that is not one of employment and found Applicant was not an employee of Respondent but had a contract to supply services to Respondent as an independent contractor - Dismissed for want of jurisdiction - Mr MS Simpkins -v- Mr GB Robson - APPL 2100 of 2000 - SMITH, C - 05/07/01 - Transport and Services .....	1679

## CUMULATIVE DIGEST—continued

	Page
<b>EMPLOYEE—continued</b>	
Application re unfair dismissal - Preliminary issues re jurisdiction and whether employment relationship existed - Applicant Agent argued that although Applicant was initially appointed to the position of part time cleaner, she was subsequently promoted to the position of supervisor by Respondent - Respondent argued that Applicant was an independent contractor - Commission found based on the evidence presented that in all circumstances of the relationship, the work practices followed by Applicant were those imposed by Respondent - Further, Commission was satisfied that the totality of the relationship was one of a contract of service between Applicant and Respondent, therefore, Commission had jurisdiction to consider the substantive claim - Reasons for Decision Issued - Ms JK Spencer -v- Ausclean - Natalio Sica - APPL 931 of 2001 - COLEMAN CC - 05/10/01 - Business Services.....	2788
Application to vary the Malting Industry Award 1993 and Conference Referred re Dispute over terms and conditions of employment of Union member - Applicant Union argued that the member be offered employment as a full time malt production operator under the terms of the Malt Industry award and any applicable industrial agreement between the parties - Further, the variation to award had jurisdiction to bind the parties to the award - Respondent opposed the claims and argued that the variation to the award would impose restrictions on the employer's rights to engage contractors and upon their rights to engage persons under terms and conditions determined by the employer - Further, Respondent argued that the employee was caught in the revised strategy to source new labour from external labour supplies to reduce costs - Commission found that the application to vary the award cut across some of the already established practices in the industry regarding engagement of contractors for shortfall work and that the application to vary be dismissed - Further, Commission found that the employee should have been provided with full time employment directly by Respondent as a Malt Processing Operator and that Respondent employ employee as agreed by the parties - Orders Issued - The Breweries and Bottleyards Employees' Industrial Union of Workers of Western Australia -v- Kirin Australia Pty Ltd & Other - APPL 1394 of 2001;CR 169 of 2001 - WOOD,C - 19/10/01 - Brewing.....	3076
Complaint re breach of award - Complainant Union argued that employee was an employee of the Respondent and subject to the award - Complainant Union further argued that employee was not paid for working overtime and meal allowances - Respondent argued that award had no relevance in proceedings as award was not applicable to Respondent and that subcontractors were only employed to carry out the manufacturing - Industrial Magistrate found that there was an employee/employer relationship as employee was only providing his services, that he was also given directions on a daily basis and his duties were supervised, therefore he was an employee - Further, IM found that award applied to him and Respondent - Award entitlements, costs and fines were ordered - Decision Issued - The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers -v- Mateko Holdings Pty Ltd - M 84 of 2001 - Industrial Magistrate - Tarr IM - 18/10/01 - Construction Trade Services.....	3085
Application re breach of award regarding payment of allowances - Complainant argued that he was not paid the correct entitlements during his employment - Defendant argued that Complainant was an independent contractor and denied that any award binds in relation to Complainant - Industrial Magistrate found that Complainant was an employee of the Defendant and that Complainant did establish award coverage binding the Defendant - Supplementary reasons for decision concerned the issue of penalties which the Industrial Magistrate awarded to the Complainant - Granted - Mr CL Peters -v- James Turner Roofing Pty Ltd - CP 226 of 1999 - Industrial Magistrate - Cicchini IM - 10/10/01 - Construction Trade Services.....	3093
Application re unfair dismissal and contractual entitlements - Applicant argued that she was an employee, unfairly dismissed and her employment terminated without notice - Respondent argued the relationship was not one of employer and employee but a domestic relationship - Commission found that the relationship was a domestic relationship and not an employment relationship - Dismissed - Ms JE Augustyn -v- Vistadale Pty Ltd As Trading For The Ranger Family Trust Trading As Ranger Contracting - APPL 679 of 2001 - WOOD,C - 03/12/01 - Machinery & Equipment Mfg.....	3107
Application re unfair dismissal - Applicant argued that he was employed as a fisherman on fishing trawlers and that the skipper hired and fired all the fishermen - Further, the skipper had control of the vessel and method of work, in that the skipper determined when the vessel was to go to sea and where the boat would fish and how long the boat would be at sea - Respondent argued that the Commission did not have jurisdiction to deal with the matter because it did not employ Applicant - Further, Respondent argued that Applicant entered into an Agreement that did not create an employee-employer relationship and that in the fishing industry, companies entered into share fishing agreements because that was the way industry operated and that Respondent did not engage employees - Commission found that it was for Applicant to show, on the balance of probabilities that he was an employee - Further, the relationship of employer and employee was a contract of service where an employee contracted to provide his or her work and skill whereas an independent contractor worked in his or her own business on his or her own account - Commission declared that Applicant was an employee of Respondent working under a contract of service - Order Issued - Mr AJ Greig -v- Kraus Fishing Company Pty Ltd - APPL 2028 of 2000 - SMITH, C - 15/11/01 - Commercial Fishing.....	3128
Application re unfair dismissal - Applicant argued that her dismissal was harsh, oppressive and unfair - Respondent opposed the application on a number of grounds, including that Commission had no jurisdiction to hear the application because Applicant was not an employee within the meaning of the I.R. Act 1979 - Commission reviewed authorities and found on evidence that Applicant was an employee within the definition of "employee", that Applicant's dismissal summarily by Respondent was harsh, oppressive and unfair and ordered that she be paid compensation - Granted - Ms R Thomson -v- Brunel Energy Pty Ltd - APPL 1742 of 2000 - BEECH C - 07/11/01 - Electricity and Gas Supply.....	3155
<b>ENFORCEMENT OF ACTS/AWARDS/ORDERS</b>	
Complaint re breach of award - Complainant Union argued that employee was an employee of the Respondent and subject to the award - Complainant Union further argued that employee was not paid for working overtime and meal allowances - Respondent argued that award had no relevance in proceedings as award was not applicable to Respondent and that subcontractors were only employed to carry out the manufacturing - Industrial Magistrate found that there was an employee/employer relationship as employee was only providing his services, that he was also given directions on a daily basis and his duties were supervised, therefore he was an employee - Further, IM found that award applied to him and Respondent - Award entitlements, costs and fines were ordered - Decision Issued - The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers -v- Mateko Holdings Pty Ltd - M 84 of 2001 - Industrial Magistrate - Tarr IM - 18/10/01 - Construction Trade Services.....	3085
<b>HOURS OF WORK</b>	
Application re unfair dismissal and contractual entitlements - Applicant argued she had been unfairly dismissed and sought denied contractual entitlements - Respondent argued that Applicant was demoted until she was ultimately dismissed, that the demotion related in part to Applicant's own action, as there were conflict of hours between Applicant's two jobs, that her performance in regard to communication was poor and that she attended work for another employer whilst she was on sick leave - Commission found on evidence that Applicant engineered her hours of work to her own advantage against the expressed concerns and directions of her employer, that it was on this basis alone, leaving aside the other history of conflicts at the workplace and the concerns about communication with clients, that the dismissal was fair (Undercliffe Nursing Home -v- FMWU) - Further, Commission was not convinced that there was an absence of procedural fairness arising from the management committee's decision - Dismissed - Mrs A Niblett -v- Koolkuna Eastern Region Domestic Violence Services Network - APPL 2072 of 2000 - WOOD,C - 30/08/01 - Personal Services.....	2601

CUMULATIVE DIGEST—*continued*

	Page
<b>HOURS OF WORK—<i>continued</i></b>	
Application re unfair dismissal and contractual entitlements - Applicant argued she had been the subject of a harsh, oppressive and unfair dismissal and was entitled to outstanding contractual entitlements - Commission reviewed authorities and found on the evidence that there was no dismissal and the jurisdiction under s.29 therefore does not arise - Further, Commission concluded that Applicant was not tripped or pushed, that there was no deliberate and dominant purpose of coercing her to resign, that she terminated her own contract because what the Respondent was offering her eventually did not meet her financial requirements, therefore, she decided to end the relationship by resignation - Dismissed - Ms R Powell -v- Ronin Security Pty Ltd - APPL 1844 of 2000 - GREGOR C - 07/09/01 - Personal and Other Services.....	2605
<b>INDUSTRIAL ACTION</b>	
Application by consent to vary the Metal Trades (General) Award 1966 re the Second Schedule - List of Respondents - Commission found that it was empowered under Section 47 of the I.R. Act to cancel defunct awards or delete employers from awards in certain cases but had difficulties where the deletion of named respondents to the award changed the scope of the award - Further, Commission found that variation did not change the scope of the award and award varied by consent - Order Issued - AUTO, FOOD, METAL, ENGIN UNION -v- Anodisers W.A. & Others - APPL 1785 of 2000 - GREGOR C - 03/07/01 .....	1598
Conference re negotiations for a replacement agreement - Applicant argued that the basis for the urgent conference was the difficulties being experienced between the parties in resolving an enterprise bargaining agreement, which led to employees imposing overtime and other bans - Respondent Union argued that members had met and decided to take immediate industrial action by withdrawing their labour for 48 hours - Commission found that Applicant express its attitudes and provided information regarding a range of issues the subject of the dispute and the employees return to work, to continue to work in accordance with their contracts of employment and to not undertake further industrial action while conciliation or arbitration proceeded - Order Issued - Disability Services Commission -v- Civil Service Association of Western Australia Incorporated - PSAC 8 of 2001 - Public Service Arbitrator - SCOTT C. - 06/07/01 - Health and Community Services .....	1612
Conference re dispute over the appropriate level of staffing at Hakea Prison - Parties sought Commission's assistance to determine the matter - Commission issued an order dated 21/7/2001 regarding the filling of rosters and to prevent further deterioration of industrial relations until the hearing of the matter, Commission issued a further interim order regarding the filling of vacant positions - Ordered Accordingly - Attorney General -v- Western Australian Prison Officers Union of Workers - C 177 of 2001 - BEECH C - 26/07/01 - Other Services.....	2459
Application to vary interim orders - Applicant Union sought to vary interim order to require the Department to replace 8 vacant staff positions on the Hakea Prison roster as the interim order had not changed the situation - Respondent argued that the movement of staff to fill vacant positions as required resulted in positions being covered, that there was a safe environment and that there had been disruptions but the position was not "intolerable" - Commission found that the interim order had generally operated to ensure the number of shifts remaining vacant had been kept low, and application to vary interim order was not granted - Dismissed - Attorney General -v- Western Australian Prison Officers Union of Workers - C 177 of 2001 - BEECH C - 30/08/01 - Other Services.....	2632
Conference referred re safe working and rostering practises at Hakea Prison Complex - Applicant Union argued that additional officers be employed on nightshift to those positions already on the roster and that all vacant positions on the roster be filled daily as this was creating disruptions and frustration to the routines due to being short staffed and that staff were not fulfilling their normal duties - Respondent argued and opposed the claim in its entirety stating that the current staffing of the prison was appropriate and that it was normal for staff to be re-allocated to other duties to accommodate absences on the roster on a daily basis - Commission found that Applicant Union's claim was made out to the extent that provision be made for additional internal escort functions to reduce the need for officers to be taken away from units for that purpose and Commission also took into account the effects of increased costs and its impact - Granted in part - Western Australian Prison Officers' Union of Workers -v- Ministry of Justice - CR 26 of 2001 - BEECH C - 30/10/01 - Other Services.....	2945
<b>INDUSTRIAL MATTER</b>	
Conference re alleged threat of prejudice in the employment of members of the union - Applicant Union argued that three employees had expressed their desire to improve their conditions of employment by carrying out their existing work under the Transport Workers' (General) Award rather than under a new workplace agreement - Further, Applicant Union argued that one of the employee's workplace agreement no longer have any effect because firstly, Respondent has cancelled the workplace agreement, secondly, by victimising that employee, Respondent has lost its right to any benefits arising from the workplace agreement and thirdly, the terms of "Expiry of Agreement" clause should not be read so as to continue the terms of the workplace agreement as to do so was unconscionable - Respondent raised a preliminary issue in respect of that employee, whereby the employee and the Respondent are parties to a registered workplace agreement and by operation of s.7A, s.7C and s.19(4)(b) of the Workplace Agreements Act, 1993, the Commission was prohibited from dealing with the matters in dispute in respect of that employees' employment - Further, Respondent argued that the workplace agreement has not expired - Commission reviewed authorities and various sections of the Workplace Agreements Act, 1993 and found that the Respondent's argument that the workplace agreement has not expired had not been made out - Further, for reasons set out in its Reasons for Decision, Commission found the matters in dispute between Respondent and the employee in question was not an industrial matter, therefore Commission lacked jurisdiction to enquire into and deal with these matters - Declaration and Order Issued - Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch -v- Down South Transport Pty Ltd - C 145 of 2001 - SMITH, C - 06/07/01 - Road Transport.....	2456
<sup>2</sup> Appeal against Decision of Commission (81WAIG1050) re shares and option in an unfair dismissal and contractual entitlements claim - Appellant argued that the Commission erred in holding that the claim was an industrial matter and that it had jurisdiction to hear a claim for an order for a sum of money equal to the value of shares or options - Full Bench reviewed authorities and found that the claim was for a benefit and not compensation, and an industrial matter within its jurisdiction - Dismissed - HotCopper Australia Ltd -v- Mr D Saab - FBA 15 of 2001 - Full Bench - SHARKEY P/SMITH, C/WOOD, C - 21/09/01 - Technology.....	2704
Application to vary the Malting Industry Award 1993 and Conference Referred re Dispute over terms and conditions of employment of Union member - Applicant Union argued that the member be offered employment as a full time malt production operator under the terms of the Malt Industry award and any applicable industrial agreement between the parties - Further, the variation to award had jurisdiction to bind the parties to the award - Respondent opposed the claims and argued that the variation to the award would impose restrictions on the employer's rights to engage contractors and upon their rights to engage persons under terms and conditions determined by the employer - Further, Respondent argued that the employee was caught in the revised strategy to source new labour from external labour supplies to reduce costs - Commission found that the application to vary the award cut across some of the already established practices in the industry regarding engagement of contractors for shortfall work and that the application to vary be dismissed - Further, Commission found that the employee should have been provided with full time employment directly by Respondent as a Malt Processing Operator and that Respondent employ employee as agreed by the parties - Orders Issued - The Breweries and Bottleyards Employees' Industrial Union of Workers of Western Australia -v- Kirin Australia Pty Ltd - APPL 1394 of 2001; CR 169 of 2001 - WOOD, C - 19/10/01 - Brewing.....	3076

## CUMULATIVE DIGEST—continued

Page

## INDUSTRY

- <sup>1</sup>Appeal against Decision of Full Bench (81WAIG990) re unfair dismissal and contractual entitlements - Appellant argued that the Full Bench erred in law in holding that Respondent (Applicant) was employed in an industry as defined in s.7 of the I.R. Act, 1979 and that the Commission thereby had jurisdiction to hear and determine the Respondent's (Applicant's) claim pursuant to s.29 of the Act - Appellant sought an order for the Full Bench Decision to be quashed - Industrial Appeal Court applied various legal principles and found that the factual circumstances alleged by the Appellant were not sustainable, that the evidence was to the contrary and that the Full Bench correctly found on the facts that there was a sufficient connection with Western Australia to found the jurisdiction of the Commission - Dismissed - Ray Douglas Parker -v- Mr MA Tranfield - IAC 2 of 2001 - Industrial Appeal Court - Kennedy J./Anderson J./Ipp J. - 07/08/01 - Business Services..... 2505

## INTERPRETATION-WORDS &amp; PHRASES

- <sup>2</sup>Appeal against Decision of Commission (unreported) re contractual entitlements claim - Appellant argued that "it was a mis-exercise of the Commissioner's discretion to strike out Appellant's application for want of prosecution with no other reason than the non-attendance at the conference; that the Commissioner mis-exercise his discretion in striking out the Appellant's (sic) application for want of prosecution when the Respondent had failed to file and serve particulars of its response to the Appellant's application, and without contacting the Appellant to afford the Appellant an opportunity to provide some explanation as to the reason for his non-attendance at the conference" - Further, Appellant sought leave to adduce evidence on affidavit which was not evidence before the Commission at first instance - Full Bench reviewed authorities and found on evidence that Appellant's non-appearance was not so much his fault as an error caused by the strain or stress he was under - Full Bench further found that the justice of the matter, within the principles laid down in the authorities to which they have referred, and the facts as they have found properly led to that conclusion, therefore, for those reasons, agreed to uphold the appeal and made the order to remit the matter to the Commission, constituted by a single Commissioner - Upheld and Order at first instance varied - Mr AW McConkey -v- M & A's of Denmark - FBA 19 of 2001 - Full Bench - SHARKEY P/SCOTT C./WOOD,C - 12/07/01..... 1561

- <sup>3</sup>Application for joinder of Respondents to Award - Preliminary issue re further hearing and determination - Applicant Union argued that Respondent's should not be given a second go and that decision of the Commission in Court Session was not quashed - Respondents argued that the claim be remitted to Commission in Court Session to be heard afresh - Commission in Court Session found that application should be listed for further hearing and determination afresh - Preliminary issue determined - LIQUOR, HOSPITALITY & MISC -v- Airlite Cleaning Pty Ltd & Others - APPL 1431 of 1998 - Commission in Court Session - BEECH C/SCOTT C./KENNER C - 11/06/01 - Cleaning..... 1587

- Application re appeal pursuant to s23B of the I.R. Act 1979 - Applicant Union sought to reverse a decision of the Respondent, finding the Applicant's member guilty of misconduct - Preliminary Issue - Respondent argued that appeal should be dismissed on the grounds that the appeal application was not filed within time specified in regulation 34(5) of the I.R.C. Regulations 1985 - Further, that notwithstanding the repeal of those provisions of the Act establishing and providing the jurisdiction and powers of the former Government School Teachers Tribunal, those parts of the Regulations previously having application to the Tribunal continue to apply to proceedings such as these - Commission reviewed authorities and observed that the intention of the legislature at the time of the repeal of these provisions in the Act relating to the Tribunal, was to enable teachers in government schools to fall within the general jurisdiction of the Commission - Further, Commission observed that had it been the intention of the legislature to limit the time within which such appeals under s23B could be brought, it could have easily done so at the time of that amendment, as is the case in relation to unfair dismissal applications, pursuant to ss29(1)(b)(i) and 29(2) of the Act - Commission, having regard to all of the circumstances and the evidence before it, was not persuaded that Applicant had made out the appeal such that it should disturb the conclusions reached by Respondent - Dismissed - The State School Teachers Union of W.A. (Incorporated) -v- The Minister for Education - APPL 1649 of 2000 - KENNER C - 29/06/01 - Education..... 1613

- Application re unfair dismissal - Applicant argued that he was unfairly dismissed - Respondent argued that applicant failed to report for work, constituting abandonment of his employment, furthermore that his employment was subject to a term of 3 months' probation and by reason of federal award coverage the terms of Workplace Relations Regulations 1996 dealing with probationary employees rendered applicant's claim beyond the Commission's jurisdiction - Commission found that at material times applicant's employment was not subject to a probationary period, that the terms of the Workplace Relations Act did not conflict with the Australian Workplace Agreement and both were able to operate concurrently, that applicant's dismissal was peremptory and without good cause and in all the circumstances of the case dismissal was harsh, oppressive and unfair - Further Commission found that reinstatement was impracticable, that applicant had discharged his obligation to mitigate his loss and awarded him compensation for injury - Upheld and Order Issued - Mr T Doherty -v- Geraldton Building Company Pty Ltd ACN 008 637 103 - APPL 1527 of 2000 - KENNER C - 15/06/01 - Building Structure Services..... 1638

- Application re unfair dismissal and contractual entitlements - Preliminary Issue re jurisdiction - Applicant argued he was unfairly dismissed from Respondent and is owed monies by way of outstanding contractual entitlements - Respondent argued that pursuant to s83 of the Act, the monies claimed by way of denied contractual benefits were a matter for the Industrial Magistrate as they arose from an award benefit - Further, Respondent argued that the superannuation monies were subject of the Superannuation Guarantee Legislation and like wise not within the Commission's jurisdiction - Commission reviewed authorities and found that the benefits claimed were award benefits, and that the application was lodged out of time, therefore Commission was without jurisdiction to hear the application - Dismissed for want of jurisdiction - Mr LJ Govan -v- Roche Excavating Pty Ltd - APPL 644 of 2001 - WOOD,C - 09/07/01 - Construction Trade Services..... 1658

- Application re unfair dismissal and contractual entitlements - Applicant argued that after she had been off sick for a number of weeks, she made an appointment to meet with the Respondent to discuss her return to work and the nature of her duties, and at the request of Respondent, she drew up an agenda of what was to be discussed at the meeting - Further, Applicant argued that she met with the Respondent and it was at that meeting that she was dismissed - Respondent argued that Applicant's duties had been taken over by other staff, that it would have had to create another job for her, that Applicant did not get along with other staff and that it was of the view that Applicant was unfit to come back to work - Commission reviewed authorities and found on a number of reasons that Applicant's dismissal was unfair, that reinstatement was impracticable and ordered that Applicant be paid compensation and denied contractual benefits - Granted in Part - Ms JM Kirkham -v- Dr K Alexander - APPL 1366 of 2000 - BEECH C - 15/06/01 - Health Services..... 1660

- Application re unfair dismissal - Preliminary Issue re jurisdiction - Applicant argued that he was harshly, oppressively and unfairly dismissed - Respondent argued that applicant was dismissed by the Ministry of Education pursuant to the terms of the then Education Act 1928 and the application was one that can only be properly brought pursuant to the now repealed s23B of the Act - Further, that the Act in s23B, contained a specific power to deal with matters of this kind, which should be read as excluding the general jurisdiction and power of the Commission to inquire into and deal with industrial matters such as this, pursuant to s29(1)(b)(i) of the Act, in relation to an unfair dismissal - Commission reviewed authorities and relevant sections of the Act and was of the view that the legislature intended that claims of this kind be brought pursuant to the specific power contained in s23B of the Act and not the general unfair dismissal jurisdiction of the Commission as provided for in ss23A and 29(1)(b)(i) of the Act - Further, Commission concluded that this matter could not proceed by way of an application pursuant to s29(1)(b)(i) of the Act - Dismissed for want of jurisdiction - Mr BM Puls -v- The Honourable Minister for Education - APPL 1567,2088 of 2000;AG 99 of 2001 - KENNER C - 21/06/01 - Education..... 1673

## CUMULATIVE DIGEST—continued

Page

## INTERPRETATION-WORDS &amp; PHRASES—continued

- Application re unfair dismissal - Applicant argued he was harshly, oppressively or unfair dismissed and sought compensation for loss and injury, and in addition or alternatively a reasonable period of notice and a redundancy payment as outstanding contractual entitlements - Further, Applicant argued that in the absence of re-employment or reinstatement being practical, he claimed that his loss and injury arising from the dismissal exhausts the statutory limit of compensation under the I.R. Act 1979 as amended - Respondent argued that Applicant's services were terminated in the circumstances of a genuine redundancy, the genesis of which was discussed with him and so too was the restructuring of the organisation, therefore, in the circumstances of the bona fide redundancy the dismissal was not harsh, oppressive or unfair - Further, Respondent argued that even if it was to be found to have been unfair, Applicant failed to mitigate his loss not seeking employment in the local market, and that any compensation for loss should be minimal on the basis that Applicant would have become redundant in any event within a very short period to time - Commission reviewed authorities and found that the termination was a summarily dismissal, that Respondent had not discharged the onus of establishing that the summary dismissal was justified, that in all circumstances the right to dismiss was exercised in a harsh and oppressive manner, therefore, compensation for loss equivalent to six months salary was awarded and all other claims dismissed - Ordered Accordingly - Mr MM Quartermaine -v- Anson Management Services Pty Ltd - APPL 1155 of 2000 - COLEMAN CC - 21/06/01 - Business Services..... 1675
- Conference referred re bonus payments - Applicant Union argued that its member was disadvantage because his base salary under the award was less than the base salary of employees who are designated as "staff employees" and that in the case of its member, he should be entitled to the same rule as the Respondent's designated "staff employees", that is, the bonus should be paid on his base salary including allowances - Further, Applicant Union argued that the all-up salary included the various allowances and that therefore the bonus actually paid to staff was to be seen as being paid on a notional base award wage plus allowances and sought the same basis of calculation for its member - Respondent opposed the claim and argued that the Commission should not regard the payment of the bonus in isolation, rather, the fact that some employees are paid by the award, and others are paid via a workplace agreement, will inevitably result in differences in employment conditions - Further, Respondent argued that the bonus was applied consistently throughout its operation and to grant the union's claim would introduce anomalies rather than remove them - Commission reviewed authorities and relevant sections of the I.R. Act and issued a Declaration that the manner in which the bonus was paid in the case of the union member was not fair and adjourned the application for one month during which time the parties were directed to meet in an endeavour to reach an agreement and report back to the Commission - Granted in principle - COMM, ELECTRIC, ELECT, ENERGY -v- Millennium Inorganic Chemicals - CR 279 of 2000 - BEECH C - 29/06/01 - Petroleum Coal Chemical Assoc..... 1692
- <sup>2</sup>Appeal against Decision of Commission (81WAIG1020) re unfair dismissal - Appellant argued on a number of grounds including that the Learned Commissioner erred in fact and in law in finding that the Appellant had not made out his case that there had been an abuse of the Respondent's right to terminate his employment on the grounds of poor performance - Full Bench observed that insofar as the appeal grounds challenged the exercise of discretion, that it had no warrant to interfere with the exercise of the discretion at first instance unless the Appellant established that the Commission at first instance erred in accordance with the well know principles laid down in "House v The King (1936) 55 CLR 499" - Further, regarding the questions raised on appeal, Full Bench reviewed various authorities and Acts and was of the opinion that there was no error of law or fact and no miscarriage of the exercise of discretion established, therefore dismissed the appeal - Dismissed - Mr IW Cannon -v- Linfox Transport (Australia) Pty Ltd - FBA 16 of 2001 - Full Bench - SHARKEY P/BEECH C/KENNER C - 07/08/01 - Other Transport..... 2419
- <sup>2</sup>Appeals against Decision of Industrial Magistrate (unreported) re breach of award - Questions raised on these Appeals: Was the Application frivolously or vexatiously instituted, and Costs - Power to award and quantum - Full Bench reviewed various authorities and Acts and found on a number of reasons that His Worship did not err in finding that the claim was instituted frivolously or vexatiously and that he had jurisdiction and power to order costs - Appeal No. FBA 13/2001 upheld and decision at first instance varied and Appeal No. FBA 14/2001 dismissed - Falcon Investigations & Security Pty Ltd -v- Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch - FBA 13,14 of 2001 - Full Bench - SHARKEY P/KENNER C/SMITH, C - 19/07/01 - Business Services..... 2425
- Application re unfair dismissal and contractual entitlements - Applicant argued that his dismissal was harsh, oppressive or unfair and sought outstanding benefits - Respondent argued that at the time of application there had been no dismissal and that remedy sought being 6 weeks notice and paid leave had been received by Applicant - Commission reviewed various authorities and concluded that a broad interpretation should be applied to the term "dismissed" and this period should include the period of notice therefore, Commission allowed the application on that basis - Further, Commission concluded that Applicant had been paid during the notice period in accordance with the workers compensation regime, that in the application before it the remedies were clear and had been met and that pursuant to s.27(1)(a)(ii) and (iv) of the Act, further proceedings were not necessary or desirable in the public interest - Dismissed - Mr CG Hywood -v- Subiaco Wine Room - APPL 1950 of 2000 - SCOTT C. - 31/07/01 - Accommodatn, Cafes&Restaurants..... 2443
- Application re unfair dismissal - Applicant argued that he was unfairly dismissed and was not afforded a right of hearing or an opportunity to put his case and sought compensation for lost income - Respondent argued that Applicant was terminated on the basis of a breakdown of trust arising from a conversation concerning an alleged intention to steal company property - Commission found that Applicant was not summarily dismissed and that the discussion about the intention to steal company property led to a breakdown in trust between the employer and the employee sufficient to warrant dismissal - Dismissed - Mr S LaRose -v- Kiam Corporation Pty Ltd - APPL 1552 of 2000 - WOOD,C - 13/07/00 - Other Services..... 2446
- Conference re alleged threat of prejudice in the employment of members of the union - Applicant Union argued that three employees had expressed their desire to improve their conditions of employment by carrying out their existing work under the Transport Workers' (General) Award rather than under a new workplace agreement - Further, Applicant Union argued that one of the employee's workplace agreement no longer have any effect because firstly, Respondent has cancelled the workplace agreement, secondly, by victimising that employee, Respondent has lost its right to any benefits arising from the workplace agreement and thirdly, the terms of "Expiry of Agreement" clause should not be read so as to continue the terms of the workplace agreement as to do so was unconscionable - Respondent raised a preliminary issue in respect of that employee, whereby the employee and the Respondent are parties to a registered workplace agreement and by operation of s.7A, s.7C and s.19(4)(b) of the Workplace Agreements Act, 1993, the Commission was prohibited from dealing with the matters in dispute in respect of that employees' employment - Further, Respondent argued that the workplace agreement has not expired - Commission reviewed authorities and various sections of the Workplace Agreements Act, 1993 and found that the Respondent's argument that the workplace agreement has not expired had not been made out - Further, for reasons set out in its Reasons for Decision, Commission found the matters in dispute between Respondent and the employee in question was not an industrial matter, therefore Commission lacked jurisdiction to enquire into and deal with these matters - Declaration and Order Issued - Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch -v- Down South Transport Pty Ltd - C 145 of 2001 - SMITH, C - 06/07/01 - Road Transport..... 2456
- Conference referred re unfair dismissal - Applicant Union argued that having regard to all the circumstances that arose, the punishment of dismissal did not "fit the crime" and sought that its member be reinstated - Respondent opposed the claim - Commission reviewed authorities and found, having regard to all the circumstances of the case, in the context of equity and good conscience, that the dismissal of the Union's member was harsh, oppressive and unfair - Further, Commission found that reinstatement was impracticable, that the Union's member should be compensated and directed the parties to confer as to quantum of compensation, within seven days, to an agreed sum which was incorporated in the final order - Upheld and Order Issued - The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- BHP HBI - CR 128 of 2000 - KENNER C - 15/06/01 - Metal Product Manufacturing..... 2460

## CUMULATIVE DIGEST—continued

	Page
INTERPRETATION-WORDS & PHRASES—continued	
Application re site allowance - Applicant argued for an individual rate fixed for each hour that the employees worked in areas that are defined as confined space in Australian Standard 2865 - Respondent argued that the present site allowance contemplated all of the relevant disabilities present on the site - Commission referred to various authorities and was not persuaded on this occasion, that the circumstances of the claim warranted a departure from the existing rights and provisions such that it could conclude that there had been a change in workvalue, in terms of the conditions under which work was performed at the site, such that a new allowance was warranted, therefore in all circumstances of the case, Commission was compelled to conclude that the application be dismissed - Dismissed - Transfield Pty Ltd t/as Transfield Operations and Maintenance -v- AUTO, FOOD, METAL, ENGIN UNION - CR 188 of 2000 - KENNER C - 16/07/00 - Petroleum Coal Chemical Assoc.....	2466
<sup>1</sup> Appeal against Decision of Full Bench (81WAIG990) re unfair dismissal and contractual entitlements - Appellant argued that the Full Bench erred in law in holding that Respondent (Applicant) was employed in an industry as defined in s.7 of the I.R. Act, 1979 and that the Commission thereby had jurisdiction to hear and determine the Respondent's (Applicant's) claim pursuant to s.29 of the Act - Appellant sought an order for the Full Bench Decision to be quashed - Industrial Appeal Court applied various legal principles and found that the factual circumstances alleged by the Appellant were not sustainable, that the evidence was to the contrary and that the Full Bench correctly found on the facts that there was a sufficient connection with Western Australia to found the jurisdiction of the Commission - Dismissed - Ray Douglas Parker -v- Mr MA Tranfield - IAC 2 of 2001 - Industrial Appeal Court - Kennedy J./Anderson J./Ipp J. - 07/08/01 - Business Services.....	2505
<sup>2</sup> Appeal against Decision of Commission (81WAIG1424) re unfair dismissal and orders pursuant to s.27 of the Act - Appellant argued that the Commission erred in law in that the order of the Commission to revoke an order of the Commission was beyond the Commission's jurisdiction and by finding that it had power to make the Revocation Order and exercising its discretion to make the Revocation Order, Commission erred in law and in fact - Respondent argued that there was no appealable error made by the Commission and no public interest raised by the appeal - Full Bench found there was no slip rule, the Commission was not correcting an error in substance or in form, and the order made at the first instance was made without jurisdiction or power - Upheld - Aussie Online Limited (ACN 004 160 927) -v- Mr J Lane - FBA 36 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/SCOTT C. - 10/08/01.....	2511
<sup>2</sup> Appeal against Decision of Commission (81WAIG1238) re unfair dismissal - Appellant argued that the Learned Commission erred in law and in fact on various grounds including that it awarded excessive compensation to the Respondents - Further, Appellant sought an Order that the Decision of Commission in matters 1377 and 1378 of 2000 be quashed - Full Bench reviewed evidence and applying the principles in House v. The King (HC)(op cit) and Gromark Packaging v. FMWU (IAC)(op cit), found on a number of reasons that there was no error as alleged in the grounds of appeal, and no error in the exercise of the Commissioner's discretion - Dismissed - Kingscape Holdings Pty Ltd -v- GK Smith & Other - FBA 20 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/GREGOR C - 17/08/01 - Construction Trade Services.....	2517
<sup>2</sup> Appeal against Decision of Commission (81WAIG1651) re unfair dismissal - Appellant argued that the Learned Commissioner erred on various grounds relating to the findings of loss and compensation - Further, Appellant sought orders that the appeal be allowed and the decision at first instance be quashed and that compensation be assessed to the respondent (applicant), but limited to the sum equivalent the wages entitlement for the "lost" period of service - Full Bench reviewed evidence and authorities and having considered all of the relevant material and submissions found that no grounds of appeal was made out and that the exercise of discretion at first instance (see House v The King (HC)(op cit)), was not in error or established to be in error - Dismissed - Q-Vis Ltd -v- Mr SD Gordon - FBA 37 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/GREGOR C - 05/09/01 - Health Services.....	2537
<sup>2</sup> Appeal against Decision of Commission (80WAIG5658) re unfair dismissal and contractual entitlements - Appellant argued that Commission had mistaken the facts, allowed extraneous or irrelevant matters to guide it, had reached a result that was, on the facts, unreasonable or plainly unjust, had not taken into account some material consideration and had acted upon a wrong principle - Full Bench reviewed evidence and principles laid down in House v. The King (HC)(op cit) and found that the Commissioner at first instance miscarried its exercise of discretion and based on that findings, Full Bench found and declared that the Appellant was harshly, oppressively and unfairly dismissed - Further, Full Bench reviewed other principles and cases and granted the application to extend time within which to institute the appeal as it found that by granting an extension of time, no injustice would be occasioned to the Respondent - Upheld, Order at first instance suspended and matter remitted back to the Commission - Ms EJ Roast -v- Forx Pty Ltd (ACN 008 972 076) - FBA 54 of 2000 - Full Bench - SHARKEY P/COLEMAN CC/SCOTT C. - 14/08/01 - Property and Business Services.....	2541
Application re unfair dismissal and contractual entitlements - Applicant argued that he had unfairly dismissed and had not been paid his entitlements pursuant to the award regarding notice, annual leave or public holidays and superannuation - There was no appearance on behalf of the Respondent - Commission reviewed authorities and found that the applicant's claims were award benefits, that it cannot exercise a power under s.29 to give relief because the power for enforcement resides solely with the Industrial Magistrate pursuant to s.83 of the Act - Commission further found that applicant was unfairly dismissed, that reinstatement was unavailing and awarded compensation, and dismissed for want of jurisdiction the claims for benefits as set out in the application - Ordered Accordingly - Mr PR Moritz -v- Home Again Enterprises Pty Ltd - APPL 458 of 2001 - GREGOR C - 09/08/01 - Accommodatn, Cafes&Restaurants.....	2594
Application re unfair dismissal and contractual entitlements - Applicant argued that her dismissal was harsh, oppressive and unfair - Additionally the applicant also claimed severance pay which was not pressed when the matter was heard before the Commission - Respondent opposed the applicant's claim in it's entirety - Commission reviewed authorities and found that applicant had been unfairly dismissed, that reinstatement was impracticable and ordered compensation in the sum equivalent to the loss of 6 months remuneration - Upheld and Order Issued - Mrs M Muggeridge -v- Penrhos College (Inc) - APPL 1502 of 2000 - KENNER C - 31/08/01 - Education.....	2596
Application re unfair dismissal and contractual entitlements - Applicant argued she had been the subject of a harsh, oppressive and unfair dismissal and was entitled to outstanding contractual entitlements - Commission reviewed authorities and found on the evidence that there was no dismissal and the jurisdiction under s.29 therefore does not arise - Further, Commission concluded that Applicant was not tripped or pushed, that there was no deliberate and dominant purpose of coercing her to resign, that she terminated her own contract because what the Respondent was offering her eventually did not meet her financial requirements, therefore, she decided to end the relationship by resignation - Dismissed - Ms R Powell -v- Ronin Security Pty Ltd - APPL 1844 of 2000 - GREGOR C - 07/09/01 - Personal and Other Services.....	2605
Application re unfair dismissal and contractual entitlements - Applicant argued his dismissal was unfair and sought bonus payments, reimbursement of travelling expenses and outstanding benefits due to him under his contract of employment - Respondent opposed the claim - Commission reviewed evidence and authorities and found that Applicant's dismissal was unfair because Applicant's action in the circumstances of his employment overall was not so seriously in breach of the contract as to justify dismissal - Further, Commission was not persuaded that Applicant had shown that his employment was a long term proposition such that he had suffered loss of job security for which compensation should now be ordered - Claim for contractual entitlements dismissed, order for costs not awarded and claims relating to reimbursement of travel expenses adjourned - Granted in Part - Mr GG Wells -v- Mr John Reyburn trading as Nicholson Clement Solicitors - APPL 226 of 2001 - BEECH C - 27/08/01 - Other Services.....	2618

## CUMULATIVE DIGEST—continued

## INTERPRETATION-WORDS &amp; PHRASES—continued

	Page
Application re unfair dismissal - Applicant argued he had been unfairly dismissed, that the relationship between the parties was not capable of being restored, therefore he sought compensation - Respondent denied that Applicant had been unfairly dismissed on the contrary Respondent argued that Applicant was the architect of his own misfortune in that he abandoned his contract of employment - Commission found on evidence that Applicant had been unfairly dismissed, that reinstatement was impracticable and having reviewed authorities concluded that Applicant had sought to mitigate his loss as best as he could and ordered that Applicant be paid by Respondent the sum of six months remuneration as compensation - Granted - Mr M Wiseman -v- Hills Industries Limited - APPL 65 of 2001 - GREGOR C - 21/08/01 - Personal Services.....	2622
Conference referred re alleged harsh, unfair and unlawful dismissal - Applicant Union argued that the manner in which its member was terminated was harsh, unfair and unlawful and sought an interim order for reinstatement - Respondent opposed the claim - Commission reviewed authorities and relevant sections of the Act and found that it had power to issue the interim order sought - Commission found that Applicant's member was aware of her terms and conditions of employment at the time of making the statements and that the timing of the meeting with her employer before completion of her shift was not oppressive or unfair or engineered in anyway to disadvantage her - Further, pursuant to s.26 of the Act and having regard to "equity, good conscience and the substantial merits of the case", Commission found on balance that the dismissal of the Applicant's member was harsh and issued an order for reinstatement - Granted - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Burswood Resort (Management) Limited - CR 153 of 2001 - WOOD,C - 04/09/01 - Sport and Recreation.....	2639
Application re appeal by Teacher pursuant to s.23B - Commission reviewed authorities and submissions by counsel for the respondent and concluded that in all of the circumstances it would be just for an order to issue to the effect that the documents be made available for inspection - Granted - Mr BM Puls -v- Hon Minister for Education - APPL 1162 of 2001 - KENNER C - 14/08/01 - Education.....	2655
<sup>1</sup> Application for stay of proceedings before the Full Bench - IAC applied principles and it was not persuaded that Appellant had a strong appeal case, therefore, IAC declined to exercise its discretion to order a stay because there was no special or exceptional circumstances warranting the making of the order - Refused - The Food Preservers' Union of Western Australia, Union of Workers -v- AUTO, FOOD, METAL, ENGIN UNION & Other - IAC 7 of 2000 - Industrial Appeal Court - Kennedy J./Scott J./Parker J. - 28/09/00 - Food, Beverage and Tobacco Mfg .....	2699
<sup>2</sup> Appeal against Decision of Commission (81WAIG1050) re shares and option in an unfair dismissal and contractual entitlements claim - Appellant argued that the Commission erred in holding that the claim was an industrial matter and that it had jurisdiction to hear a claim for an order for a sum of money equal to the value of shares or options - Full Bench reviewed authorities and found that the claim was for a benefit and not compensation, and an industrial matter within its jurisdiction - Dismissed - HotCopper Australia Ltd -v- Mr D Saab - FBA 15 of 2001 - Full Bench - SHARKEY P/SMITH, C/WOOD,C - 21/09/01 - Technology.....	2704
<sup>2</sup> Appeal against Decision of Commission (81WAIG2478 & 2782) re granted application for stay of proceedings in Matter No. 37/2001 - Appellant appealed against the Commission's "finding" in above matter number - Full Bench heard full argument from the parties and applied various principles and found on a number of reasons that there was no miscarriage in the exercise of the Commissioner's discretion, that the Commissioner's decision was one made on well established authority and should not be lightly interfered with by the Full Bench and there was no question of such importance that, in the public interest, the appeal should lie, therefore dismissed the appeal as incompetent - Dismissed - Paulownia Saw Milling, Timber Supplies and Manufacturing Pty Ltd (ACN 081 463 452) -v- Mr WI Jones - FBA 43 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/WOOD,C - 11/10/01 - Other Manufacturing.....	2715
<sup>2</sup> Application for registration of new Organisation by amalgamation of two unions - Application was made by the Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia - Western Australian Branch and the Australian Builders' Labourers, Painters & Plasterers Union of Workers - Full Bench reviewed authorities and relevant sections of the I.R. Act and was satisfied that all statutory requirements of law had been complied with, therefore, authorised the registration of the organisation sought - Granted - The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers & Other -v- (Not applicable) - FBM 3 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/KENNER C - 09/10/01 - Unions .....	2722
Application seeking interim order pursuant to s.80E and s.80F of the I.R. Act - Applicant Union sought an interim order to prohibit the Respondent from continuing disciplinary action against its member until the matter was determined - Public Service Arbitrator reviewed authorities, relevant sections of the I.R. Act and found that the dispute would not be resolved by conciliation and was now to be arbitrated, and that there was no power for the Arbitrator to make the interim order sought - Dismissed - Civil Service Association of Western Australia Incorporated -v- Director General/Chief Executive Officer, Family and Childrens Services - P 26 of 2001 - Public Service Arbitrator - SCOTT C. - 25/09/01 - Government Administration.....	2758
Application seeking interim order pursuant to s.80E and s.80F of the I.R. Act - Public Service Arbitrator dealt with the matter on 25/9/2001 whereby it found that there was no power to issue the interim order sought on the basis that s.32(2) conditioned the provisions of s.32(3) - Following that decision, Applicant wrote to the PSA indicating that a decision of the Full Bench in Minister for Education v State School Teachers Union of WA Inc., number 116/1995 (75 WAIG 2684 at 2687) held to the contrary and asked that the matter be re-opened - PSA re-opened the matter and heard submissions from the parties - PSA was satisfied that there was the potential for injustice to Applicant's member should the allegations raised by the Applicant have foundation - Further, PSA accepted the submissions made by the Applicant that should the investigation process continue in those circumstances, it may well cause a deterioration in industrial relations between the parties and this was because there was serious prospect that faith and confidence in the employment relationships of the Applicant's member and other employees with their employer may be damaged - Granted - Civil Service Association of Western Australia Incorporated -v- Director General/Chief Executive Officer, Family and Childrens Services - P 26 of 2001 - Public Service Arbitrator - SCOTT C. - 04/10/01 - Government Administration.....	2761
Application re unfair dismissal and contractual entitlements - Applicant argued that he was harshly, oppressively and unfairly dismissed and denied benefits under his contract of employment - Respondent agreed that the applicant was unfairly dismissed and the only substantial issue in dispute is the quantum of compensation the Commission should order - Commission reviewed authorities and concluded that the applicant had been unfairly dismissed, that reinstatement was impracticable and ordered the respondent to pay the applicant compensation within 10 days of the date of the order - Order Issued - Mr J Barrett -v- 6PR Southern Cross Radio Pty Limited - APPL 190 of 2001 - SMITH, C - 14/09/01 - Printg, Publishg & Redd Media .....	2768
<sup>2</sup> Appeal against Decision of Commission (81WAIG1660) re unfair dismissal and contractual entitlements - Appellant argued against the finding of the dismissal on the grounds that deal with alleged erroneous findings in relation to the evidence - Appellant argued that there was not sufficient evidence to establish that there was a dismissal - Full Bench found that this was a discretionary decision and had defined a dismissal as the termination of a contract of employment and in this matter there was too fragile a base in the evidence to support a finding of dismissal - Full Bench found that appeal should be upheld as there was no dismissal or no dismissal was established to have occurred and there was no jurisdiction to hear and determine the matter - Appeal Upheld and decision at first instance varied - Dr K. Alexander -v- Ms JM Kirkham - FBA 44 of 2001 - Full Bench - SHARKEY P/GREGOR C/WOOD,C - 28/11/01 - Health Services.....	3017

## CUMULATIVE DIGEST—continued

	Page
<b>INTERPRETATION-WORDS &amp; PHRASES—continued</b>	
Application re unfair dismissal - Applicant argued dismissal was harsh oppressive or unfair - Respondent challenged the Commission's jurisdiction on the basis that Applicant's employment was subject of a Federal Award - Respondent further argued that this creates a conflict between the award and the Act, that conflict was to be resolved by the Federal award taking precedence, that the Applicant was the subject of a 12 month probationary period, and while the Applicant challenges the reasonableness of that probationary period that would be a matter able to be referred to the AIRC for determination - Commission reviewed award and various authorities and concluded that there was a direct conflict between the provisions of the State law and the Award, and accordingly, in the terms of s.152(1A) of the WR Act the provisions of the Award are not able to operate concurrently with the terms of the Act and thereby an inconsistency arises and the Federal award applied to the exclusion of the State Act, therefore Applicant was unable to proceed with this application before this Commission - Dismissed - Mr G Burley -v- LAC Loss Adjustors, A Division of LAC Operations Pty Ltd ABN 33071714 068 - APPL 798 of 2001 - SCOTT C. - 06/12/01 - Construction Trade Services .....	3120
Application re unfair dismissal - Applicant argued that her dismissal was harsh, oppressive and unfair - Respondent opposed the application on a number of grounds, including that Commission had no jurisdiction to hear the application because Applicant was not an employee within the meaning of the I.R. Act 1979 - Commission reviewed authorities and found on evidence that Applicant was an employee within the definition of "employee", that Applicant's dismissal summarily by Respondent was harsh, oppressive and unfair and ordered that she be paid compensation - Granted - Ms R Thomson -v- Brunel Energy Pty Ltd - APPL 1742 of 2000 - BEECH C - 07/11/01 - Electricity and Gas Supply.....	3155
<b>INTERVENTION</b>	
<sup>2</sup> Appeals against Decision of Industrial Magistrate (unreported) re breach of award - Questions raised on these Appeals: Was the Application frivolously or vexatiously instituted, and Costs - Power to award and quantum - Full Bench reviewed various authorities and Acts and found on a number of reasons that His Worship did not erred in finding that the claim was instituted frivolously or vexatiously and that he had jurisdiction and power to order costs - Appeal No. FBA 13/2001 upheld and decision at first instance varied and Appeal No. FBA 14/2001 dismissed - Falcon Investigations & Security Pty Ltd -v- Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch - FBA 13,14 of 2001 - Full Bench - SHARKEY P/KENNER C/SMITH, C - 19/07/01 - Business Services .....	2425
<b>JURISDICTION</b>	
Application re unfair dismissal - Applicant argued that he was unfairly dismissed - Respondent argued that applicant failed to report for work, constituting abandonment of his employment, furthermore that his employment was subject to a term of 3 months' probation and by reason of federal award coverage the terms of Workplace Relations Regulations 1996 dealing with probationary employees rendered applicant's claim beyond the Commission's jurisdiction - Commission found that at material times applicant's employment was not subject to a probationary period, that the terms of the Workplace Relations Act did not conflict with the Australian Workplace Agreement and both were able to operate concurrently, that applicant's dismissal was peremptory and without good cause and in all the circumstances of the case dismissal was harsh, oppressive and unfair - Further Commission found that reinstatement was impracticable, that applicant had discharged his obligation to mitigate his loss and awarded him compensation for injury - Upheld and Order Issued - Mr T Doherty -v- Geraldton Building Company Pty Ltd ACN 008 637 103 - APPL 1527 of 2000 - KENNER C - 15/06/01 - Building Structure Services.....	1638
Applicant argued that dismissal was a constructive dismissal in that he had no other choice but to resign and that he was not paid the remuneration package that was offered - Respondent argued that they did not coerce Applicant to resign and did not want to get rid of Applicant because a lot of effort had been put into his training and did not want to lose the value of that training - Commission found that Applicant had decided he did not want to continue and was not prepared to do as required to obtain the remuneration package and there was no evidence that Respondent wanted to get rid of Applicant or coerced him to resign, thus, there was no dismissal - Dismissed - Mr CJ Fox -v- News Illustrated Pty Ltd - APPL 1492 of 2000 - GREGOR C - 11/07/01 - Printg, Publishing & Redd Media .....	1646
Application re unfair dismissal and contractual entitlements - Preliminary Issue re jurisdiction - Applicant argued he was unfairly dismissed from Respondent and is owed monies by way of outstanding contractual entitlements - Respondent argued that pursuant to s83 of the Act, the monies claimed by way of denied contractual benefits were a matter for the Industrial Magistrate as they arose from an award benefit - Further, Respondent argued that the superannuation monies were subject of the Superannuation Guarantee Legislation and like wise not within the Commission's jurisdiction - Commission reviewed authorities and found that the benefits claimed were award benefits, and that the application was lodged out of time, therefore Commission was without jurisdiction to hear the application - Dismissed for want of jurisdiction - Mr LJ Govan -v- Roche Excavating Pty Ltd - APPL 644 of 2001 - WOOD,C - 09/07/01 - Construction Trade Services .....	1658
Application re unfair dismissal and contractual entitlements - Applicant argued that Respondent's conduct was misleading in the letter written and that as a matter of equity, Respondent should be estopped from recanting on the terms of the letter - Respondent argued that application was lodged in Commission out of time and that Commission, thus, had no jurisdiction - Commission found that application was made out of time and dismissed matter - Dismissed - Mr IB Percival -v- Claddah Properties Pty Ltd - APPL 1834 of 2000 - SCOTT C. - Horticulture & Fruit Growing.....	1671
Application re unfair dismissal - Preliminary Issue re jurisdiction - Applicant argued that he was harshly, oppressively and unfairly dismissed - Respondent argued that applicant was dismissed by the Ministry of Education pursuant to the terms of the then Education Act 1928 and the application was one that can only be properly brought pursuant to the now repealed s23B of the Act - Further, that the Act in s23B, contained a specific power to deal with matters of this kind, which should be read as excluding the general jurisdiction and power of the Commission to inquire into and deal with industrial matters such as this, pursuant to s29(1)(b)(i) of the Act, in relation to an unfair dismissal - Commission reviewed authorities and relevant sections of the Act and was of the view that the legislature intended that claims of this kind be brought pursuant to the specific power contained in s23B of the Act and not the general unfair dismissal jurisdiction of the Commission as provided for in ss23A and 29(1)(b)(i) of the Act - Further, Commission concluded that this matter could not proceed by way of an application pursuant to s29(1)(b)(i) of the Act - Dismissed for want of jurisdiction - Mr BM Puls -v- The Honourable Minister for Education - APPL 1567,2088 of 2000;AG 99 of 2001 - KENNER C - 21/06/01 - Education .....	1673
Application re unfair dismissal - Applicant argued that he was dismissed unfairly because he was unhappy with the contract and the superannuation clause in the contract - Respondent argued that Commission did not have jurisdiction to deal with the application as Respondent did not employ Applicant during his period of engagement as Applicant was engaged as a sub-contractor - Further, Applicant's contract was terminated by operation of law in that the contract was subject to a condition which was not satisfied by Applicant - Commission found that it had no jurisdiction to deal with a contract that is not one of employment and found Applicant was not an employee of Respondent but had a contract to supply services to Respondent as an independent contractor - Dismissed for want of jurisdiction - Mr MS Simpkins -v- Mr GB Robson - APPL 2100 of 2000 - SMITH, C - 05/07/01 - Transport and Services.....	1679
<sup>2</sup> Appeals against Decision of Industrial Magistrate (unreported) re breach of award - Questions raised on these Appeals: Was the Application frivolously or vexatiously instituted, and Costs - Power to award and quantum - Full Bench reviewed various authorities and Acts and found on a number of reasons that His Worship did not erred in finding that the claim was instituted frivolously or vexatiously and that he had jurisdiction and power to order costs - Appeal No. FBA 13/2001 upheld and decision at first instance varied and Appeal No. FBA 14/2001 dismissed - Falcon Investigations & Security Pty Ltd -v- Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch - FBA 13,14 of 2001 - Full Bench - SHARKEY P/KENNER C/SMITH, C - 19/07/01 - Business Services .....	2425

## CUMULATIVE DIGEST—continued

## JURISDICTION—continued

Page

Conference referred re dispute in relation to agreement negotiations - Applicant union sought renewal of agreement and parity with employees employed under a Australian Workplace Agreement - Respondent argued jurisdictional issues with Commission in Court Session - Commission in Court Session found that it had no power to make an order under s.44 which purports to be in substitution for an existing industrial agreement, as neither party had retired from the 2000 Agreement - Dismissed for want of jurisdiction - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Burswood Resort (Management) Ltd - CR 326 of 2000 - Commission in Court Session - GREGOR C/SMITH, C/WOOD,C - 27/07/01 .....	2432
Application re fairness and equity - Applicant Union sought interim order that its member be paid at Level 3 until matter was resolved, and a finding that the Respondent had treated its member unfairly and inequitably, and that its member's standing in the position be formalised - Respondent argued that Public Service Arbitrator had no jurisdiction to deal with the matter - Public Service Arbitrator found that there was no jurisdictional impediment to the Arbitrator dealing with that matter and that the matter would be arbitrated at a later time, therefore application for interim orders was dismissed - Granted In Part - Civil Service Association of Western Australia Incorporated -v- Commissioner of Police - P 6 of 2001 - Public Service Arbitrator - SCOTT C. - 17/07/01 - Government Administration.....	2439
Application re unfair dismissal - Applicant argued dismissal was harsh, oppressive and unfair - Respondent argued applicant was party to workplace agreement, that application was not an industrial matter and should be struck out for want of jurisdiction - Commission determined employee's status at time of making the unfair dismissal claim was not relevant and that it had no jurisdiction to hear the matter - Dismissed - Mr R Allen -v- St John Ambulance Australia - APPL 646 of 2001 - SCOTT C. - 18/07/01 - Community Services.....	2441
Application re unfair dismissal and contractual entitlements - Applicant sought six months compensation and \$11,700 in unpaid contractual benefits - Respondent argued applicant was not employed by Metropolis Concert Club - Commission found that no employment relationship existed between Applicant and named Respondent - Dismissed for want of jurisdiction - Mr DF Hill -v- Metropolis Concert Club - APPL 301 of 2001 - WOOD,C - 13/07/01 - Accommodatn, Cafes&Restaurants.....	2443
Application re unfair dismissal and contractual entitlements - Applicant argued he was unfairly dismissed and denied contractual benefits and sought an extension of time - Respondent argued that Applicant's application was lodged out of time - Commission determined that application was lodged out of time and that it was without jurisdiction to extend the 28 day period and to deal with the claim for entitlements - Dismissed for want of jurisdiction - Mr MW MacGregor -v- Star Surf Shop Pty Ltd - APPL 934 of 2001 - BEECH C - 12/07/01 - Textile, Clothing, Footwear .....	2448
<sup>1</sup> Appeal against Decision of Full Bench (81WAIG990) re unfair dismissal and contractual entitlements - Appellant argued that the Full Bench erred in law in holding that Respondent (Applicant) was employed in an industry as defined in s.7 of the I.R. Act, 1979 and that the Commission thereby had jurisdiction to hear and determine the Respondent's (Applicant's) claim pursuant to s.29 of the Act - Appellant sought an order for the Full Bench Decision to be quashed - Industrial Appeal Court applied various legal principles and found that the factual circumstances alleged by the Appellant were not sustainable, that the evidence was to the contrary and that the Full Bench correctly found on the facts that there was a sufficient connection with Western Australia to found the jurisdiction of the Commission - Dismissed - Ray Douglas Parker -v- Mr MA Tranfield - IAC 2 of 2001 - Industrial Appeal Court - Kennedy J./Anderson J./Ipp J. - 07/08/01 - Business Services.....	2505
<sup>2</sup> Appeal against Decision of Commission (81WAIG1424) re unfair dismissal and orders pursuant to s.27 of the Act - Appellant argued that the Commission erred in law in that the order of the Commission to revoke an order of the Commission was beyond the Commission's jurisdiction and by finding that it had power to make the Revocation Order and exercising its discretion to make the Revocation Order, Commission erred in law and in fact - Respondent argued that there was no appealable error made by the Commission and no public interest raised by the appeal - Full Bench found there was no slip rule, the Commission was not correcting an error in substance or in form, and the order made at the first instance was made without jurisdiction or power - Upheld - Aussie Online Limited (ACN 004 160 927) -v- Mr J Lane - FBA 36 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/SCOTT C. - 10/08/01.....	2511
<sup>4</sup> Application for stay of operation of Decision of the Public Service Arbitrator in Matter No. P6 of 2001 (81WAIG2439) pending appeal to Full Bench - Applicant was appealing the issue of jurisdiction of the Commission to deal with matters covered by public sector standards - President found there was a serious issue to be tried, that the balance of convenience lay with the applicant and that there were exceptional circumstances justifying the making of the orders sought - Granted - Commissioner of Police -v- Civil Service Association of Western Australia Incorporated - PRES 12 of 2001 - President - SHARKEY P - 29/08/01 - Government Administration .....	2553
Complaint re breach of award and the Minimum Conditions of Employment Act 1993 - Complainant argued that defendant terminated his employment without notice or pay in lieu of notice, failed to pay him overtime rates of pay, annual leave entitlements and wages - Further, Complainant sought to recover the sum of \$6016.71 and interest thereon pursuant to s.32 of the Supreme Court Act 1935, the imposition of a penalty with respect to each breach of the award and costs - Defendant argued that Complainant had abandoned his employment and lodged a counter claim for damages - Industrial Magistrate reviewed authorities and found on evidence that Complainant had been dismissed for misconduct and by his own actions disentitled himself to annual leave payments accrued during his employment and further, he had failed to prove that the award binds the employer - IM further found that he did not have jurisdiction and power to deal with Defendants counter claim for common law damages - Mr JS Strange -v- Moonstar Nominees Pty Ltd - CP 324 of 2000 - Industrial Magistrate - Cicchini IM - 16/08/01 - Accommodatn, Cafes&Restaurants.....	2568
Application re unfair dismissal - Applicant argued that she was unfairly dismissed - Counsel for respondent raised a preliminary issue of jurisdiction on the basis that the applicant had resigned from her position - Commission reviewed authorities and having found that it had jurisdiction, concluded that the dismissal was in all circumstances not harsh, oppressive and unfair - Further, Commission was not persuaded that applicant had been denied procedural fairness - Dismissed - Ms JA Harding -v- Phoenix Pharmacy - APPL 363 of 2001 - KENNER C - 05/09/01 - Personal & Household Good Rtlg.....	2584
Application re unfair dismissal - Applicant argued that he had been dismissed unfairly - Respondent denied that the applicant was an employee - Commission reviewed authorities and on the basis of the evidence presented found that the applicant was not an employee for the purposes of the Industrial Relations Act 1979, and on that basis the applicant's claim was not valid, nor does the Commission have jurisdiction to deal with the matter - Dismissed for want of jurisdiction - Mr FA Lockley -v- Beurteaux (Australia) Pty Ltd - APPL 1114 of 2000 - BEECH C - 08/08/01 - Other Manufacturing.....	2589
Application re unfair dismissal and contractual entitlements - Applicant argued that he had unfairly dismissed and had not been paid his entitlements pursuant to the award regarding notice, annual leave or public holidays and superannuation - There was no appearance on behalf of the Respondent - Commission reviewed authorities and found that the applicant's claims were award benefits, that it cannot exercise a power under s.29 to give relief because the power for enforcement resides solely with the Industrial Magistrate pursuant to s.83 of the Act - Commission further found that applicant was unfairly dismissed, that reinstatement was unavailing and awarded compensation, and dismissed for want of jurisdiction the claims for benefits as set out in the application - Ordered Accordingly - Mr PR Moritz -v- Home Again Enterprises Pty Ltd - APPL 458 of 2001 - GREGOR C - 09/08/01 - Accommodatn, Cafes&Restaurants .....	2594
Application re unfair dismissal and contractual entitlements - Applicant argued she had been the subject of a harsh, oppressive and unfair dismissal and was entitled to outstanding contractual entitlements - Commission reviewed authorities and found on the evidence that there was no dismissal and the jurisdiction under s.29 therefore does not arise - Further, Commission concluded that Applicant was not tripped or pushed, that there was no deliberate and dominant purpose of coercing her to resign, that she terminated her own contract because what the Respondent was offering her eventually did not meet her financial requirements, therefore, she decided to end the relationship by resignation - Dismissed - Ms R Powell -v- Ronin Security Pty Ltd - APPL 1844 of 2000 - GREGOR C - 07/09/01 - Personal and Other Services.....	2605

## CUMULATIVE DIGEST—continued

	Page
JURISDICTION—continued	
Application re unfair dismissal - Commission summarised that fundamentally two issues needed to be determined - The first related to the nature of the applicant's employment and secondly if there was a dismissal was that dismissal unfair - Having determined the nature of the of employment based on evidence presented, Commission concluded that the applicant had not been dismissed as such and dismissed the claim for want of jurisdiction - Dismissed for want of jurisdiction - Mr CA Smith -v- TAB Transport Pty Ltd - APPL 558 of 2001 - BEECH C - 04/09/01 - Road Transport .....	2617
Conference referred re alleged harsh, unfair and unlawful dismissal - Applicant Union argued that the manner in which its member was terminated was harsh, unfair and unlawful and sought an interim order for reinstatement - Respondent opposed the claim - Commission reviewed authorities and relevant sections of the Act and found that it had power to issue the interim order sought - Commission found that Applicant's member was aware of her terms and conditions of employment at the time of making the statements and that the timing of the meeting with her employer before completion of her shift was not oppressive or unfair or engineered in anyway to disadvantage her - Further, pursuant to s.26 of the Act and having regard to "equity, good conscience and the substantial merits of the case", Commission found on balance that the dismissal of the Applicant's member was harsh and issued an order for reinstatement - Granted - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Burswood Resort (Management) Limited - CR 153 of 2001 - WOOD,C - 04/09/01 - Sport and Recreation .....	2639
<sup>2</sup> Appeal against Decision of Commission (81WAIG1050) re shares and option in an unfair dismissal and contractual entitlements claim - Appellant argued that the Commission erred in holding that the claim was an industrial matter and that it had jurisdiction to hear a claim for an order for a sum of money equal to the value of shares or options - Full Bench reviewed authorities and found that the claim was for a benefit and not compensation, and an industrial matter within its jurisdiction - Dismissed - HotCopper Australia Ltd -v- Mr D Saab - FBA 15 of 2001 - Full Bench - SHARKEY P/SMITH, C/WOOD,C - 21/09/01 - Technology .....	2704
Application seeking interim order pursuant to s.80E and s.80F of the I.R. Act - Applicant Union sought an interim order to prohibit the Respondent from continuing disciplinary action against its member until the matter was determined - Public Service Arbitrator reviewed authorities, relevant sections of the I.R. Act and found that the dispute would not be resolved by conciliation and was now to be arbitrated, and that there was no power for the Arbitrator to make the interim order sought - Dismissed - Civil Service Association of Western Australia Incorporated -v- Director General/Chief Executive Officer, Family and Childrens Services - P 26 of 2001 - Public Service Arbitrator - SCOTT C. - 25/09/01 - Government Administration .....	2758
Application seeking interim order pursuant to s.80E and s.80F of the I.R. Act - Public Service Arbitrator dealt with the matter on 25/9/2001 whereby it found that there was no power to issue the interim order sought on the basis that s.32(2) conditioned the provisions of s.32(3) - Following that decision, Applicant wrote to the PSA indicating that a decision of the Full Bench in Minister for Education v State School Teachers Union of WA Inc., number 116/1995 (75 WAIG 2684 at 2687) held to the contrary and asked that the matter be re-opened - PSA re-opened the matter and heard submissions from the parties - PSA was satisfied that there was the potential for injustice to Applicant's member should the allegations raised by the Applicant have foundation - Further, PSA accepted the submissions made by the Applicant that should the investigation process continue in those circumstances, it may well cause a deterioration in industrial relations between the parties and this was because there was serious prospect that faith and confidence in the employment relationships of the Applicant's member and other employees with their employer may be damaged - Granted - Civil Service Association of Western Australia Incorporated -v- Director General/Chief Executive Officer, Family and Childrens Services - P 26 of 2001 - Public Service Arbitrator - SCOTT C. - 04/10/01 - Government Administration .....	2761
Application re unfair dismissal - Preliminary issues re jurisdiction and whether employment relationship existed - Applicant Agent argued that although Applicant was initially appointed to the position of part time cleaner, she was subsequently promoted to the position of supervisor by Respondent - Respondent argued that Applicant was an independent contractor - Commission found based on the evidence presented that in all circumstances of the relationship, the work practices followed by Applicant were those imposed by Respondent - Further, Commission was satisfied that the totality of the relationship was one of a contract of service between Applicant and Respondent, therefore, Commission had jurisdiction to consider the substantive claim - Reasons for Decision Issued - Ms JK Spencer -v- Ausclean - Natalio Sica - APPL 931 of 2001 - COLEMAN CC - 05/10/01 - Business Services .....	2788
Conference Referred re payments to employees - Applicant Union argued that the respondent had unfairly treated those employees covered by an Industrial Agreement of the Commission - Respondent argued that the employees previously covered by the workplace agreement have had their salaries maintained at the existing rate as a consequence of Government policy and further the affected employees had not had their salaries and conditions reduced in any way - Commission reviewed authorities and on the preliminary issue of jurisdiction concluded that the matter be dismissed for want of jurisdiction - Civil Service Association of Western Australia Incorporated -v- Chief Executive Officer Western Australian ("WA") Tourism Commission - PSACR 5 of 2001 - Commission in Court Session - SCOTT C./KENNER C/SMITH, C - 06/11/01 - Government Administration .....	2885
Application seeking an interim order pursuant to s80E of the IR Act - Applicant Union sought an application for discovery - Respondent challenged the jurisdiction of the Arbitrator to deal with the substantive matter - Commission considered authorities and found nothing to establish that the application for discovery related to the issue of the Commission's jurisdiction, but related more to the substantive matter and dismissed the application for discovery accordingly - Civil Service Association of Western Australia Incorporated -v- Director General, Ministry of Justice - P 27 of 2001 - Public Service Arbitrator - SCOTT C. - 23/10/01 - Government Administration .....	2892
Application re unfair dismissal - Preliminary issue re jurisdiction - Applicant argued he had been dismissed following the suspension of her apprenticeship agreement - Commission reviewed authorities and dealt with the issue of jurisdiction on the basis of written submissions from the parties and concluded that the apprenticeship had been suspended in accordance with the Industrial Training Act 1975 and under those circumstances cannot give rise to an industrial matter for the purposes of the Commission's jurisdiction - Accordingly the matter was dismissed for want of jurisdiction - Ms SM Leipold -v- Alessia Beccegato t/a Salon Express - APPL 1124 of 2001 - BEECH C - 19/10/01 - Other Services .....	2911
Appeal to Public Service Appeal Board re Decision to terminate employment - Appellant argued that that the dismissal should attract the provisions of Public Sector Management Act 1994 relating to substandard performance and to prevail over Workplace Agreements Act and thus, Public Service Appeal Board had jurisdiction to hear and determine matter - Respondent argued that PSAB did not have jurisdiction because Workplace Agreements Act resolved an inconsistency that arose and individual workplace agreement had primacy - Public Service Appeal Board found that Applicant had been dismissed and pursuant to the workplace agreement the recourse in respect to dismissal was dealt with by Workplace Agreements Act - One Member found that workplace agreement did not prevent the appeal being determined by Public Service Appeal Board and there seemed to be an injustice to appeal against decision to terminate - Dismissed for want of jurisdiction - Ms Thomas -v- Chief Executive Office, Ministry of Fair Trading - PSAB 1 of 2001 - Public Service Appeal Board - SCOTT C. - 29/10/01 - Government Administration .....	2957
<sup>2</sup> Appeal against Decision of Commission (81WAIG1660) re unfair dismissal and contractual entitlements - Appellant argued against the finding of the dismissal on the grounds that deal with alleged erroneous findings in relation to the evidence - Appellant argued that there was not sufficient evidence to establish that there was a dismissal - Full Bench found that this was a discretionary decision and had defined a dismissal as the termination of a contract of employment and in this matter there was too fragile a base in the evidence to support a finding of dismissal - Full Bench found that appeal should be upheld as there was no dismissal or no dismissal was established to have occurred and there was no jurisdiction to hear and determine the matter - Appeal Upheld and decision at first instance varied - Dr K Alexander -v- Ms JM Kirkham - FBA 44 of 2001 - Full Bench - SHARKEY P/GREGOR C/WOOD,C - 28/11/01 - Health Services .....	3017

## CUMULATIVE DIGEST—continued

	Page
JURISDICTION—continued	
<sup>2</sup> Appeal against Decision of Public Service Arbitrator (81 WAIG 2563) re jurisdiction and application for interim orders - Appellant argued that the Public Service Arbitrator had no jurisdiction as the matter was a temporary deployment and subject to Public Sector Standards - Respondent Union submitted that there was ostensible bias in the President - Application for the President to disqualify himself was dismissed - Full Bench found that the matter was within the Arbitrator's jurisdiction - Dismissed - Commissioner of Police -v- Civil Service Association of Western Australia Incorporated - FBA 51 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/GREGOR C - 09/11/01 - Government Administration.....	3026
<sup>2</sup> Appeal against Decision of Commission (81 WAIG 1393) re unfair dismissal - First appeal by the Appellant argued the Commissioner erred in law on a number of grounds, one being the dismissal was harsh, oppressive and unfair, and the finding that reinstatement was practicable - Second appeal by Respondent Union argued the Commissioner lacked jurisdiction to make order 3 regarding reinstatement - Full Bench found the dismissal was unfair and there was no error in the exercise of discretion established, and dismissed the appeal -Regarding the cross appeal the Full Bench found there was no power and no jurisdiction conferred and the appeal was upheld - Appeal No. FBA 34/2001 Dismissed and Appeal No. FBA 35/2001 Upheld - CONSTRUCTION, MINING, ENERGY -v- BHP Iron Ore Pty Ltd - FBA 34,35 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/SMITH, C - 19/11/01 - Metal Ore Mining.....	3031
Application to vary the Malting Industry Award 1993 and Conference Referred re Dispute over terms and conditions of employment of Union member - Applicant Union argued that the member be offered employment as a full time malt production operator under the terms of the Malt Industry award and any applicable industrial agreement between the parties - Further, the variation to award had jurisdiction to bind the parties to the award - Respondent opposed the claims and argued that the variation to the award would impose restrictions on the employer's rights to engage contractors and upon their rights to engage persons under terms and conditions determined by the employer - Further, Respondent argued that the employee was caught in the revised strategy to source new labour from external labour supplies to reduce costs - Commission found that the application to vary the award cut across some of the already established practices in the industry regarding engagement of contractors for shortfall work and that the application to vary be dismissed - Further, Commission found that the employee should have been provided with full time employment directly by Respondent as a Malt Processing Operator and that Respondent employ employee as agreed by the parties - Orders Issued - The Breweries and Bottleyards Employees' Industrial Union of Workers of Western Australia -v- Kirin Australia Pty Ltd & Other - APPL 1394 of 2001;CR 169 of 2001 - WOOD,C - 19/10/01 - Brewing.....	3076
Complaint re Breach of Building Trades (Construction) Award 1987 - Interlocutory application regarding jurisdiction - Complainant Union argued that the earlier proceedings were brought in order to achieve the production of time and wages records in identifying the precise nature of the alleged breaches - Defendant argued that the Industrial Magistrate's Court did not have jurisdiction to deal with complaint and that Claimant could not possibly prove the allegations made in the claim - Industrial Magistrate found that Defendant had not made out its claim and that the matter should proceed to hearing and interlocutory application be dismissed - Decision Issued - CONSTRUCTION, MINING, ENERGY -v- Kernaghan's Joinery & Cabinet - M 121 of 2001 - Industrial Magistrate - Cicchini IM - 31/10/01 - Cabinetmaker.....	3088
Appeal against Decision of the Chairman of Director of Apprenticeship Training - Appellant argued that there was a right of appeal against decision to refuse to suspend the apprenticeship due to downturn in business - Respondent argued that Commission did not have jurisdiction to deal with the matter because section of Industrial Training Act was not relevant for appeal - Commission determined the question of jurisdiction from the proper meaning of the relevant sections of the Industrial Training Act and found that Commission cannot assume for itself jurisdiction which had not been granted to it by statute and thus had no jurisdiction to determine the appeal - Dismissed for want of jurisdiction - The Apprentice and Traineeship Company - Midwest -v- Mr CM Mouncey - APA 1 of 2001;APPL 955 of 2001 - GREGOR C - 23/11/01.....	3105
Application re unfair dismissal - Applicant argued dismissal was harsh oppressive or unfair - Respondent challenged the Commission's jurisdiction on the basis that Applicant's employment was subject of a Federal Award - Respondent further argued that this creates a conflict between the award and the Act, that conflict was to be resolved by the Federal award taking precedence, that the Applicant was the subject of a 12 month probationary period, and while the Applicant challenges the reasonableness of that probationary period that would be a matter able to be referred to the AIRC for determination - Commission reviewed award and various authorities and concluded that there was a direct conflict between the provisions of the State law and the Award, and accordingly, in the terms of s.152(1A) of the WR Act the provisions of the Award are not able to operate concurrently with the terms of the Act and thereby an inconsistency arises and the Federal award applied to the exclusion of the State Act, therefore Applicant was unable to proceed with this application before this Commission - Dismissed - Mr G Burley -v- LAC Loss Adjustors, A Division of LAC Operations Pty Ltd ABN 33071714 068 - APPL 798 of 2001 - SCOTT C. - 06/12/01 - Construction Trade Services.....	3120
Application re unfair dismissal - Applicant argued that he was employed as a fisherman on fishing trawlers and that the skipper hired and fired all the fishermen - Further, the skipper had control of the vessel and method of work, in that the skipper determined when the vessel was to go to sea and where the boat would fish and how long the boat would be at sea - Respondent argued that the Commission did not have jurisdiction to deal with the matter because it did not employ Applicant - Further, Respondent argued that Applicant entered into an Agreement that did not create an employee-employer relationship and that in the fishing industry, companies entered into share fishing agreements because that was the way industry operated and that Respondent did not engage employees - Commission found that it was for Applicant to show, on the balance of probabilities that he was an employee - Further, the relationship of employer and employee was a contract of service where an employee contracted to provide his or her work and skill whereas an independent contractor worked in his or her own business on his or her own account - Commission declared that Applicant was an employee of Respondent working under a contract of service - Order Issued - Mr AJ Greig -v- Kraus Fishing Company Pty Ltd - APPL 2028 of 2000 - SMITH, C - 15/11/01 - Commercial Fishing.....	3128
Application re unfair dismissal - Applicant argued that her dismissal was harsh, oppressive and unfair - Respondent opposed the application on a number of grounds, including that Commission had no jurisdiction to hear the application because Applicant was not an employee within the meaning of the I.R. Act 1979 - Commission reviewed authorities and found on evidence that Applicant was an employee within the definition of "employee", that Applicant's dismissal summarily by Respondent was harsh, oppressive and unfair and ordered that she be paid compensation - Granted - Ms R Thomson -v- Brunel Energy Pty Ltd - APPL 1742 of 2000 - BEECH C - 07/11/01 - Electricity and Gas Supply.....	3155
MISCONDUCT	
Application re appeal pursuant to s23B of the I.R. Act 1979 - Applicant Union sought to reverse a decision of the Respondent, finding the Applicant's member guilty of misconduct - Preliminary Issue - Respondent argued that appeal should be dismissed on the grounds that the appeal application was not filed within time specified in regulation 34(5) of the I.R.C. Regulations 1985 - Further, that notwithstanding the repeal of those provisions of the Act establishing and providing the jurisdiction and powers of the former Government School Teachers Tribunal, those parts of the Regulations previously having application to the Tribunal continue to apply to proceedings such as these - Commission reviewed authorities and observed that the intention of the legislature at the time of the repeal of these provisions in the Act relating to the Tribunal, was to enable teachers in government schools to fall within the general jurisdiction of the Commission - Further, Commission observed that had it been the intention of the legislature to limit the time within which such appeals under s23B could be brought, it could have easily done so at the time of that amendment, as is the case in relation to unfair dismissal applications, pursuant to ss29(1)(b)(i) and 29(2) of the Act - Commission, having regard to all of the circumstances and the evidence before it, was not persuaded that Applicant had made out the appeal such that it should disturb the conclusions reached by Respondent - Dismissed - The State School Teachers Union of W.A. (Incorporated) -v- The Minister for Education - APPL 1649 of 2000 - KENNER C - 29/06/01 - Education.....	1613

## CUMULATIVE DIGEST—continued

	Page
MISCONDUCT—continued	
Application re unfair dismissal listed to show cause why it should not be struck out for want of prosecution - Applicant argued that she wished to continue with her application and that lack of communication was due to the fact that she had been working at Lake Mason and only contactable by phone outside of working hours - Respondent argued that a considerable time had elapsed and that Respondent was interested in finalising matter - Commission found that Applicant provided little explanation and interest in application since she lodged it and that Respondent had experienced stress and that the application should not continue - Dismissed for want of prosecution - Ms M Fissoli -v- Kids Corner Edu-Care Centre - APPL 247 of 2001 - BEECH C - 27/06/01 - Child.....	1645
Application re unfair dismissal - Applicant argued that dismissal was harsh, oppressive or unfair - Respondent argued that this matter was a "precise parallel" with circumstances where an employee was dismissed summarily for misconduct and that in this case it alleged "conduct that may detrimentally affect the respondent" on the part of applicant - Commission found that respondent's decision to dismiss applicant was not based upon applicant committing some act of "serious misconduct" which had detrimentally affected respondent but because of his assessment of applicant's attitude - Further, Commission found that dismissal was an unfair exercise of respondent's right to dismiss, that reinstatement was impracticable and awarded compensation for the loss or injury caused by dismissal - Granted - Mr SD Gordon -v- Q-Vis Limited (ACN 009 234 173) - APPL 885 of 2000 - BEECH C - 31/05/01 - Health.....	1651
Application re unfair dismissal - Applicant argued that dismissal was unfair because no fair go was given into the allegations to gross misconduct and no opportunity to respond to allegations - Respondent argued that Applicant was dismissed for misconduct in that she had used physical force on a seven month old child and that her attitude was not appreciated - Commission found that dismissal was unfair because there was no investigation into the matter concerned and had just accepted the report from the parent thus Applicant was not awarded a fair go and dismissed unfairly - Commission further found that no loss or injury was incurred and no compensation was awarded - Order Issued - Ms CP Houareau -v- Tiny Turtle Belmont Childcare Centre - APPL 312 of 2001 - WOOD,C - Community Services.....	1659
Application re unfair dismissal - Preliminary Issue re jurisdiction - Applicant argued that he was harshly, oppressively and unfairly dismissed - Respondent argued that applicant was dismissed by the Ministry of Education pursuant to the terms of the then Education Act 1928 and the application was one that can only be properly brought pursuant to the now repealed s23B of the Act - Further, that the Act in s23B, contained a specific power to deal with matters of this kind, which should be read as excluding the general jurisdiction and power of the Commission to inquire into and deal with industrial matters such as this, pursuant to s29(1)(b)(i) of the Act, in relation to an unfair dismissal - Commission reviewed authorities and relevant sections of the Act and was of the view that the legislature intended that claims of this kind be brought pursuant to the specific power contained in s23B of the Act and not the general unfair dismissal jurisdiction of the Commission as provided for in ss23A and 29(1)(b)(i) of the Act - Further, Commission concluded that this matter could not proceed by way of an application pursuant to s29(1)(b)(i) of the Act - Dismissed for want of jurisdiction - Mr BM Puls -v- The Honourable Minister for Education - APPL 1567,2088 of 2000;AG 99 of 2001 - KENNER C - 21/06/01 - Education.....	1673
Application re unfair dismissal - Applicant argued that he was harshly, oppressively or unfairly dismissed - Respondent argued that applicant had stored inappropriate and pornographic cartoons in his Lotus Notes mailbox and was in breach of the bank's policy - Commission concluded after having considered all of the evidence, that breach of the policy by applicant was in all circumstances trivial, that applicant was harshly dismissed and that reinstatement was not practicable as applicant had left Western Australia to seek work in the United Kingdom - Further, Commission ordered that respondent pay applicant the difference in salary between 14 November 2000 and 2 March 2001, and made a declaration that termination was harsh - Ordered Accordingly - Mr AV Wilmott -v- Bank of Western Australia Ltd - APPL 1888 of 2000 - SMITH, C - 13/06/01 - Consultancy.....	1684
Conference referred re unfair dismissal - Applicant Union argued that two members were unfairly dismissed from their employment and were seeking reinstatement without loss of earnings - Applicant Union argued that dismissal was unfair because both members were given approval to engage in an arrangement whereby they gave away cheese off-cuts and that the giving away of the cheese off-cuts did not constitute conversion or have any negative effect on Respondent in any event and that the investigation undertaken by Respondent was flawed and biased - Respondent argued that employees were dismissed because no approval was given to give Respondent's product away of substantial amount of cheese - Commission found that no approval was given and that there were deficiencies in the process of the decision making - Further, Commission found that one employee's situation was somewhat different and did not justify dismissal and Commission ordered that employee be reinstatement - Upheld in Part and Order Issued - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Mundella Foods Pty Ltd - CR 2 of 2001 - SCOTT C. - Dairy Product Manufacturing.....	1694
<sup>2</sup> Appeal against Decision of Commission (81WAIG1271) re unfair dismissal - Appellant Union argued that the Commissioner erred in law by finding the dismissal justified as a summary dismissal and the Commissioner's discretion miscarried in regard to procedural fairness of the investigation - Full Bench found that the procedural fairness was not fully afforded in the investigation of the workplace fight, that the breach of conduct did not justify a summary dismissal, that dismissal was harsh, oppressive and unfair and remitted the matter back to the Commission - Upheld - AUST MEAT INDUSTRY EMPL UNION -v- Geraldton Meat Exports Pty Ltd - FBA 26 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/SCOTT C. - 21/08/01 - Food, Beverage and Tobacco Mfg.....	2523
Complaint re breach of award and the Minimum Conditions of Employment Act 1993 - Complainant argued that defendant terminated his employment without notice or pay in lieu of notice, failed to pay him overtime rates of pay, annual leave entitlements and wages - Further, Complainant sought to recover the sum of \$6016.71 and interest thereon pursuant to s.32 of the Supreme Court Act 1935, the imposition of a penalty with respect to each breach of the award and costs - Defendant argued that Complainant had abandoned his employment and lodged a counter claim for damages - Industrial Magistrate reviewed authorities and found on evidence that Complainant had been dismissed for misconduct and by his own actions disintitiled himself to annual leave payments accrued during his employment and further, he had failed to prove that the award binds the employer - IM further found that he did not have jurisdiction and power to deal with Defendants counter claim for common law damages - Mr JS Strange -v- Moonstar Nominees Pty Ltd - CP 324 of 2000 - Industrial Magistrate - Cicchini IM - 16/08/01 - Accommodatn, Cafes&Restaurants.....	2568
<sup>2</sup> Appeal against Decision of Commission (81 WAIG 895) - Appellant argued that the Learned Commissioner erred in law by failing to make sufficient findings of fact regarding allegations of dishonesty and impropriety - Cross appeal by the Respondent argued that the Learned Commissioner erred in law and fact by finding the dismissal although unlawful was not harsh, oppressive or unfair - Full Bench found the summary dismissal although not lawful was not unfair and the cross appeal was not made out - Full bench found that there was insufficient evidence to establish the claim that the Respondent owed the Appellant money and the appeal was not made out - Dismissed - Mr I Phippard -v- BCG Australia - FBA 7,12 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/WOOD,C - 22/10/01 - General Construction.....	2865
Application for orders re a disciplinary investigation - Applicant Union argued the investigation of breaches of discipline conducted under the Public Sector Management Act was unlawful and beyond power - Respondent argued that the Applicant's alleged conduct related to the performance of his duties - Public Sector Arbitrator found that the alleged conduct did not touch the employment in circumstances which would allow the employer to enquire into that conduct and ordered the removal of the investigation documentation from the Applicant's personal file - Granted - Civil Service Association of Western Australia Incorporated -v- Director General/Chief Executive Officer, Family and Childrens Services - P 26 of 2001 - Public Service Arbitrator - SCOTT C. - 22/10/01 - Government Administration.....	2887

## CUMULATIVE DIGEST—continued

	Page
<i>MISCONDUCT—continued</i>	
Application re unfair dismissal and seeking reinstatement - Applicant argued that dismissal was harsh, oppressive and unfair - Respondent argued that the Applicant was terminated summarily for misconduct and breaches of the code of conduct - Commission found the Applicant was unfairly dismissed - Applicant seeks reinstatement only but the viability of reinstatement as a remedy is unclear and is to be listed for further submissions - Mr DL Moylan -v- Chairman of Commissioners City of South Perth Council - APPL 622 of 2001 - GREGOR C - 19/10/01 - Government Administration .....	2925
<sup>2</sup> Appeal against Decision of Commission (81 WAIG 1463) re unfair dismissal - Appellant argued Commissioner erred in law by failing to take into account the deliberate act of misconduct, and the finding that reinstatement or re-employment was impracticable - Full Bench found that dismissal was harsh and unfair, and that reinstatement was impracticable - Further, there was no error in the exercise of discretion at the first instance and no grounds of appeal were made out - Dismissed - Clifton Nominees Pty Ltd -v- Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch - FBA 29 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/SMITH, C - 08/11/01 - Accommodatn, Cafes&Restaurants .....	3038
Applications re unfair dismissal - Applicants argued that dismissal was unfair because they were constructively dismissed and they were not given a fair go - Respondent argued that Applicants had tendered their resignations and were given the opportunity to clarify their intentions of resignation which had not changed - Commission found that Respondent had given Applicants a fair go and their resignation intention had not changed - Dismissed - Mr WJ Cochrane -v- Tempo Facility Services Pty Limited - APPL 938,939 of 2001 - WOOD,C - 13/11/01 - Cleaning .....	3123
Application re unfair dismissal - Applicant argued that he was harshly, oppressively or unfairly dismissed and sought compensation - Respondent argued that Applicant clearly breached his duty as an employee to act in good faith, that his failure to act as a diligent manager by failing to ensure that all monies were accounted for in accordance with the accounting procedures and that his action in attempting to induce staff to lie on his behalf constituted serious and wilful misconduct - Commission reviewed authorities and having considered all of the evidence, found that Applicant breached his fiduciary duty to his employer and that his conduct was of a nature that he repudiated the terms of his contract of employment or one of its essential conditions by failing to act honestly and in good faith - Dismissed - Mr BJ O'Loughlin - v- Wesfarmers Kleenheat Gas Pty Ltd - APPL 873 of 2001 - SMITH, C - 23/11/01 - Petroleum Coal Chemical Assoc.....	3147
<i>NATURAL JUSTICE</i>	
Application re contractual entitlements - Application for adjournment by Respondent - Applicant argued he would be prejudiced by a delay in having his claim heard and determined and would incur costs in maintaining a counter-claim and defending a matter that has no merit in the District Court - Further, Applicant argued that principles enunciated by the High Court in respect to 'forum non conveniens' should be applied - Respondent argued that adjournment should be granted until litigation matter allocated in the District Court of Western Australia has been resolved by final judgment - Further, Respondent argued that on the application of principles that if an adjournment was not granted Respondent would be caused serious prejudice - Commission found that to grant or refuse an adjournment was a matter for the discretion of the Commission and must be considered on its merits as required by s.26 of the IR Act - Commission found that if adjournment was granted there would be a delay in having claim heard and determined and Applicant had a statutory right to have his claim heard and determined by this Commission and thus, adjournment was refused - Refused - Mr J Calhoun - v- Gembush Pty Ltd - APPL 154 of 2001 - SMITH, C - 05/07/01 .....	1623
Application re unfair dismissal - Applicant argued that his dismissal was unfair, he was not given a "fair go all round", that respondent failed to give appropriate notice of the possibility of redundancy and that his termination was carried out in a manner which breached the respondent's own policy and principles of natural justice - Respondent argued that applicant should have known that his employment was not secure and when the review was undertaken and decision made to make his position redundant he was advised as soon as practicable - Commission found that applicant was overseas and not shown the documents completed at the time decision was taken to make him redundant, he was unaware of any threat to his job security and had the expectation of continuing employment and becoming a permanent resident, and respondent's promoted initiatives to cut costs did not infer the possibility of redundancies - Further, Commission found that the decision to terminate applicant's employment was based on flawed information and this was unfair, that reinstatement was impractical and in the circumstances ordered compensation - Order Issued - Mr S Castles -v- Haliburton - APPL 1356 of 1999 - COLEMAN CC - 20/02/01 - Oil and Gas Extraction .....	1625
Application re fairness and equity - Applicant Union sought interim order that its member be paid at Level 3 until matter was resolved, and a finding that the Respondent had treated its member unfairly and inequitably, and that its member's standing in the position be formalised - Respondent argued that Public Service Arbitrator had no jurisdiction to deal with the matter - Public Service Arbitrator found that there was no jurisdictional impediment to the Arbitrator dealing with that matter and that the matter would be arbitrated at a later time, therefore application for interim orders was dismissed - Granted In Part - Civil Service Association of Western Australia Incorporated -v- Commissioner of Police - P 6 of 2001 - Public Service Arbitrator - SCOTT C. - 17/07/01 - Government Administration.....	2439
<sup>2</sup> Appeal against Decision of Commission (81WAIG1238) re unfair dismissal - Appellant argued that the Learned Commission erred in law and in fact on various grounds including that it awarded excessive compensation to the Respondents - Further, Appellant sought an Order that the Decision of Commission in matters 1377 and 1378 of 2000 be quashed - Full Bench reviewed evidence and applying the principles in House v. The King (HC)(op cit) and Gromark Packaging v. FMWU (IAC)(op cit), found on a number of reasons that there was no error as alleged in the grounds of appeal, and no error in the exercise of the Commissioner's discretion - Dismissed - Kingscape Holdings Pty Ltd -v- GK Smith & Other - FBA 20 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/GREGOR C - 17/08/01 - Construction Trade Services.....	2517
Application re unfair dismissal - Applicant argued that he had been harshly, oppressively and unfairly dismissed - Respondent argued that Applicant's work performance was unsatisfactory and that he was given opportunity to improve himself after numerous warnings - Commission found, based on the evidence presented, that Applicant was provided with natural justice, that he was given opportunity to know and respond to issues knowing that his employment was in jeopardy, that he was given an opportunity to demonstrate improvement, and dismissed his claim for harsh, oppressive or unfair dismissal - Dismissed - Mr AD Tasker -v- Sinogal Pty Ltd Trading as Rockingham Auto Electrics & Mechanical Services - APPL 339 of 2001 - SCOTT C. - 12/11/01 - Electricity and Gas Supply.....	3151
<i>ORDER</i>	
Conference re dispute over the appropriate level of staffing at Hakea Prison - Parties sought Commission's assistance to determine the matter - Commission issued an order dated 21/7/2001 regarding the filling of rosters and to prevent further deterioration of industrial relations until the hearing of the matter, Commission issued a further interim order regarding the filling of vacant positions - Ordered Accordingly - Attorney General -v- Western Australian Prison Officers Union of Workers - C 177 of 2001 - BEECH C - 26/07/01 - Other Services.....	2459
<sup>2</sup> Appeal against Decision of Commission (81WAIG1424) re unfair dismissal and orders pursuant to s.27 of the Act - Appellant argued that the Commission erred in law in that the order of the Commission to revoke an order of the Commission was beyond the Commission's jurisdiction and by finding that it had power to make the Revocation Order and exercising its discretion to make the Revocation Order, Commission erred in law and in fact - Respondent argued that there was no appealable error made by the Commission and no public interest raised by the appeal - Full Bench found there was no slip rule, the Commission was not correcting an error in substance or in form, and the order made at the first instance was made without jurisdiction or power - Upheld - Aussie Online Limited (ACN 004 160 927) -v- Mr J Lane - FBA 36 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/SCOTT C. - 10/08/01 .....	2511

## CUMULATIVE DIGEST—continued

	Page
ORDER—continued	
Application re transfer of an employee seeking for an Order for Discovery - Applicant sought order for discovery relating to issues likely to be necessary for fairly disposing of the case - Respondent agreed to provide some documents but not others - Commission reviewed parties' submission and agreed that the order should be granted in part - Granted in Part - Civil Service Association of Western Australia Incorporated -v- Director General, Ministry of Justice - P 2 of 2001 - BEECH C - 06/09/01 .....	2563
Applications re unfair dismissal seeking Orders for further discovery of documents and adjournment - Commission having reviewed the Applicant's submissions ordered that application be dismissed on the basis that no sufficient ground had been made out that the orders sought ought to be issued - Dismissed - Mr GM Cann -v- Blackburne Properties Limited - APPL 936,937 of 2000 - GREGOR C - 31/08/01 - Property and Business Services .....	2572
Application re unfair dismissal and contractual entitlements - Applicant argued his dismissal was unfair and sought bonus payments, reimbursement of travelling expenses and outstanding benefits due to him under his contract of employment - Respondent opposed the claim - Commission reviewed evidence and authorities and found that Applicant's dismissal was unfair because Applicant's action in the circumstances of his employment overall was not so seriously in breach of the contract as to justify dismissal - Further, Commission was not persuaded that Applicant had shown that his employment was a long term proposition such that he had suffered loss of job security for which compensation should now be ordered - Claim for contractual entitlements dismissed, order for costs not awarded and claims relating to reimbursement of travel expenses adjourned - Granted in Part - Mr GG Wells -v- Mr John Reyburn trading as Nicholson Clement Solicitors - APPL 226 of 2001 - BEECH C - 27/08/01 - Other Services .....	2618
Application to vary interim orders - Applicant Union sought to vary interim order to require the Department to replace 8 vacant staff positions on the Hakea Prison roster as the interim order had not changed the situation - Respondent argued that the movement of staff to fill vacant positions as required resulted in positions being covered, that there was a safe environment and that there had been disruptions but the position was not "intolerable" - Commission found that the interim order had generally operated to ensure the number of shifts remaining vacant had been kept low, and application to vary interim order was not granted - Dismissed - Attorney General -v- Western Australian Prison Officers Union of Workers - C 177 of 2001 - BEECH C - 30/08/01 - Other Services .....	2632
Application re unfair dismissal seeking Interlocutory Orders for production of documents - Commission having considered the application, the objection and the submission in reply to the objection, granted the Orders sought - Granted in Part - Ms ND Walsh -v- Peter John & Madeleine Marie Cochrane t/as "Ray White (Maddington)" - APPL 2055 of 2000 - BEECH C - 24/08/01 - Property Services .....	2651
Application re contractual entitlements seeking for an Interlocutory Order for production of documents- Applicant argued that she had not been paid her March retainer and commissions and sought access to relevant documentation held by the respondent that supported her claim - Respondent disputed the calculations of commissions claimed - Commission found the applicant's request for the production of the documentation to which she referred as being entirely reasonable and appropriate - Granted - Mrs JAL Hurst -v- House of Stuart - APPL 773 of 2001 - BEECH C - 24/08/01 - Other Services .....	2654
<sup>4</sup> Application for stay of operation of Decision (81 WAIG 1660) pending appeal to Full Bench - Applicant was required to establish that the balance of convenience favoured the applicant and that there was a serious issue to be tried, namely, that should the applicant's appeal succeed the result would be nugatory by its ability to recover monies paid to the Respondent - President found that there was no serious issue to be tried and that the balance of convenience was held by the Respondent, and that there was no basis to find that the appeal would be rendered nugatory - Dismissed - Dr K Alexander -v- Ms JM Kirkham - PRES 13 of 2001 - President - SHARKEY P - 21/09/01 - Health Services .....	2724
Application seeking interim order pursuant to s.80E and s.80F of the I.R. Act - Applicant Union sought an interim order to prohibit the Respondent from continuing disciplinary action against its member until the matter was determined - Public Service Arbitrator reviewed authorities, relevant sections of the I.R. Act and found that the dispute would not be resolved by conciliation and was now to be arbitrated, and that there was no power for the Arbitrator to make the interim order sought - Dismissed - Civil Service Association of Western Australia Incorporated -v- Director General/Chief Executive Officer, Family and Childrens Services - P 26 of 2001 - Public Service Arbitrator - SCOTT C. - 25/09/01 - Government Administration .....	2758
Application seeking interim order pursuant to s.80E and s.80F of the I.R. Act - Public Service Arbitrator dealt with the matter on 25/9/2001 whereby it found that there was no power to issue the interim order sought on the basis that s.32(2) conditioned the provisions of s.32(3) - Following that decision, Applicant wrote to the PSA indicating that a decision of the Full Bench in Minister for Education v State School Teachers Union of WA Inc., number 116/1995 (75 WAIG 2684 at 2687) held to the contrary and asked that the matter be re-opened - PSA re-opened the matter and heard submissions from the parties - PSA was satisfied that there was the potential for injustice to Applicant's member should the allegations raised by the Applicant have foundation - Further, PSA accepted the submissions made by the Applicant that should the investigation process continue in those circumstances, it may well cause a deterioration in industrial relations between the parties and this was because there was serious prospect that faith and confidence in the employment relationships of the Applicant's member and other employees with their employer may be damaged - Granted - Civil Service Association of Western Australia Incorporated -v- Director General/Chief Executive Officer, Family and Childrens Services - P 26 of 2001 - Public Service Arbitrator - SCOTT C. - 04/10/01 - Government Administration .....	2761
Conference re transmission of business - Applicant Unions sought an order that the previous award had application due to a transmission of business Further, Applicant Unions argued that there was no genuine redundancy and that the differences between the awards was detrimental to employees - Respondent argued that there was no substantial case to be determined as employees were aware of the new working conditions and had taken advantage of redundancy payments, and the claim for interim relief would be detrimental to the Respondent and would outweigh any detriment to the Applicants - Commission, having considered all of the submissions and materials before it, was not persuaded on balance, that Applicants had established a case for interim relief of the kind sought, therefore the claim for interim orders was refused - Order Issued - The Australian Workers' Union, West Australian Branch, Industrial Union of Workers & Other -v- Dampier Salt Pty Ltd - C 190 of 2001 - KENNER C - 11/09/01 - Other Mining .....	2792
Application for orders re a disciplinary investigation - Applicant Union argued the investigation of breaches of discipline conducted under the Public Sector Management Act was unlawful and beyond power - Respondent argued that the Applicant's alleged conduct related to the performance of his duties - Public Sector Arbitrator found that the alleged conduct did not touch the employment in circumstances which would allow the employer to enquire into that conduct and ordered the removal of the investigation documentation from the Applicant's personal file - Granted - Civil Service Association of Western Australia Incorporated -v- Director General/Chief Executive Officer, Family and Childrens Services - P 26 of 2001 - Public Service Arbitrator - SCOTT C. - 22/10/01 - Government Administration .....	2887
Conference referred re safe working and rostering practises at Hakea Prison Complex - Applicant Union argued that additional officers be employed on nightshift to those positions already on the roster and that all vacant positions on the roster be filled daily as this was creating disruptions and frustration to the routines due to being short staffed and that staff were not fulfilling their normal duties - Respondent argued and opposed the claim in its entirety stating that the current staffing of the prison was appropriate and that it was normal for staff to be re-allocated to other duties to accommodate absences on the roster on a daily basis - Commission found that Applicant Union's claim was made out to the extent that provision be made for additional internal escort functions to reduce the need for officers to be taken away from units for that purpose and Commission also took into account the effects of increased costs and its impact - Granted in part - Western Australian Prison Officers' Union of Workers -v- Ministry of Justice - CR 26 of 2001 - BEECH C - 30/10/01 - Other Services .....	2945

## CUMULATIVE DIGEST—continued

	Page
<b>OVERTIME</b>	
Complaint re breach of award and the Minimum Conditions of Employment Act 1993 - Complainant argued that defendant terminated his employment without notice or pay in lieu of notice, failed to pay him overtime rates of pay, annual leave entitlements and wages - Further, Complainant sought to recover the sum of \$6016.71 and interest thereon pursuant to s.32 of the Supreme Court Act 1935, the imposition of a penalty with respect to each breach of the award and costs - Defendant argued that Complainant had abandoned his employment and lodged a counter claim for damages - Industrial Magistrate reviewed authorities and found on evidence that Complainant had been dismissed for misconduct and by his own actions disintitiled himself to annual leave payments accrued during his employment and further, he had failed to prove that the award binds the employer - IM further found that he did not have jurisdiction and power to deal with Defendants counter claim for common law damages - Mr JS Strange -v- Moonstar Nominees Pty Ltd - CP 324 of 2000 - Industrial Magistrate - Cicchini IM - 16/08/01 - Accommodatn, Cafes&Restaurants.....	2568
<b>PART-TIME</b>	
Application re unfair dismissal - Applicant argued that dismissal was unfair because no notice or prior warning was given and that she was not afforded procedural fairness or give a fair go - Further, Applicant sought redundancy payment - Respondent argued that he kept staff fully informed that Respondent was financially untenable and was being wound up and he had intended to speak to Applicant regarding various options available - Commission found that the business was in financial difficulty and Respondent had intended to discuss matter with Applicant - Further, Commission found that Applicant was a part time employee not a casual and thus entitled to payment in lieu of notice - Applicant awarded notice payment - Order Issued - Mrs DE Harley -v- Jasgold Holdings T/A Ringercraft Jewellers - APPL 1150 of 2001 - WOOD,C - 19/11/01 - Jewellery .....	3135
<b>PENALTY RATES</b>	
Application re site allowance - Applicant argued for an individual rate fixed for each hour that the employees worked in areas that are defined as confined space in Australian Standard 2865 - Respondent argued that the present site allowance contemplated all of the relevant disabilities present on the site - Commission referred to various authorities and was not persuaded on this occasion, that the circumstances of the claim warranted a departure from the existing rights and provisions such that it could conclude that there had been a change in workvalue, in terms of the conditions under which work was performed at the site, such that a new allowance was warranted, therefore in all circumstances of the case, Commission was compelled to conclude that the application be dismissed - Dismissed - Transfield Pty Ltd t/as Transfield Operations and Maintenance -v- AUTO, FOOD, METAL, ENGIN UNION - CR 188 of 2000 - KENNER C - 16/07/00 - Petroleum Coal Chemical Assoc .....	2466
<b>PRINCIPLES</b>	
Application re contractual entitlements - Application for adjournment by Respondent - Applicant argued he would be prejudiced by a delay in having his claim heard and determined and would incur costs in maintaining a counter -claim and defending a matter that has no merit in the District Court - Further, Applicant argued that principles enunciated by the High Court in respect to 'forum non conveniens' should be applied - Respondent argued that adjournment should be granted until litigation matter allocated in the District Court of Western Australia has been resolved by final judgment - Further, Respondent argued that on the application of principles that if an adjournment was not granted Respondent would be caused serious prejudice - Commission found that to grant or refuse an adjournment was a matter for the discretion of the Commission and must be considered on its merits as required by s.26 of the IR Act - Commission found that if adjournment was granted there would be a delay in having claim heard and determined and Applicant had a statutory right to have his claim heard and determined by this Commission and thus, adjournment was refused - Refused - Mr J Calhoun -v- Gembush Pty Ltd - APPL 154 of 2001 - SMITH, C - 05/07/01 .....	1623
Application to vary Grain Handling Salaried Officers' Consolidated Award No. 37 of 1965 - Applicant argued that the terms of Western Australian Grain Handling Salaried Officers' Enterprise Agreement 1996 be incorporated into the Award - Respondent Union consented to application - Commission found that the requirements of the Principles were met providing that the Arbitrated Safety Net Adjustments were accurately quantified separately in clause 31 - Salaries - Order Issued - Co-Operative Bulk Handling Limited -v- Western Australian Grain Handling Salaried Officers Association (Union of Workers) - APPL 29 of 2000 - SMITH, C - 22/06/01 - Grain, Sheep & Beef Cattle Frm .....	1594
Application re unfair dismissal and contractual entitlements - Applicant argued that on completion of his apprenticeship he was offered a permanent position of mechanic and accepted it - Respondent argued that Applicant was never offered or employed as a mechanic - Commission found that Applicant was never employed as a mechanic and application was without foundation - Dismissed for want of jurisdiction - Mr D Pestana -v- New Town Toyota - APPL 2005 of 2000 - BEECH C - 02/07/01 - Motor Vehicle Rtlg & Services.....	1673
Application re unfair dismissal - Applicant argued that he was dismissed unfairly because he was unhappy with the contract and the superannuation clause in the contract - Respondent argued that Commission did not have jurisdiction to deal with the application as Respondent did not employ Applicant during his period of engagement as Applicant was engaged as a sub-contractor - Further, Applicant's contract was terminated by operation of law in that the contract was subject to a condition which was not satisfied by Applicant - Commission found that it had no jurisdiction to deal with a contract that is not one of employment and found Applicant was not an employee of Respondent but had a contract to supply services to Respondent as an independent contractor - Dismissed for want of jurisdiction - Mr MS Simpkins -v- Mr GB Robson - APPL 2100 of 2000 - SMITH, C - 05/07/01 - Transport and Services .....	1679
<sup>2</sup> Appeal against Decision of Commission (81WAIG1660) re unfair dismissal and contractual entitlements - Appellant argued against the finding of the dismissal on the grounds that deal with alleged erroneous findings in relation to the evidence - Appellant argued that there was not sufficient evidence to establish that there was a dismissal - Full Bench found that this was a discretionary decision and had defined a dismissal as the termination of a contract of employment and in this matter there was too fragile a base in the evidence to support a finding of dismissal - Full Bench found that appeal should be upheld as there was no dismissal or no dismissal was established to have occurred and there was no jurisdiction to hear and determine the matter - Appeal Upheld and decision at first instance varied - Dr K Alexander -v- Ms JM Kirkham - FBA 44 of 2001 - Full Bench - SHARKEY P/GREGOR C/WOOD,C - 28/11/01 - Health Services .....	3017
Application to vary the Malting Industry Award 1993 and Conference Referred re Dispute over terms and conditions of employment of Union member - Applicant Union argued that the member be offered employment as a full time malt production operator under the terms of the Malt Industry award and any applicable industrial agreement between the parties - Further, the variation to award had jurisdiction to bind the parties to the award - Respondent opposed the claims and argued that the variation to the award would impose restrictions on the employer's rights to engage contractors and upon their rights to engage persons under terms and conditions determined by the employer - Further, Respondent argued that the employee was caught in the revised strategy to source new labour from external labour supplies to reduce costs - Commission found that the application to vary the award cut across some of the already established practices in the industry regarding engagement of contractors for shortfall work and that the application to vary be dismissed - Further, Commission found that the employee should have been provided with full time employment directly by Respondent as a Malt Processing Operator and that Respondent employ employee as agreed by the parties - Orders Issued - The Breweries and Bottleyards Employees' Industrial Union of Workers of Western Australia -v- Kirin Australia Pty Ltd - APPL 1394 of 2001;CR 169 of 2001 - WOOD,C - 19/10/01 - Brewing.....	3076

## CUMULATIVE DIGEST—continued

	Page
<b>PRINCIPLES—continued</b>	
Application re unfair dismissal - Applicant argued that he was employed as a fisherman on fishing trawlers and that the skipper hired and fired all the fishermen - Further, the skipper had control of the vessel and method of work, in that the skipper determined when the vessel was to go to sea and where the boat would fish and how long the boat would be at sea - Respondent argued that the Commission did not have jurisdiction to deal with the matter because it did not employ Applicant - Further, Respondent argued that Applicant entered into an Agreement that did not create an employee-employer relationship and that in the fishing industry, companies entered into share fishing agreements because that was the way industry operated and that Respondent did not engage employees - Commission found that it was for Applicant to show, on the balance of probabilities that he was an employee - Further, the relationship of employer and employee was a contract of service where an employee contracted to provide his or her work and skill whereas an independent contractor worked in his or her own business on his or her own account - Commission declared that Applicant was an employee of Respondent working under a contract of service - Order Issued - Mr AJ Greig -v- Kraus Fishing Company Pty Ltd - APPL 2028 of 2000 - SMITH, C - 15/11/01 - Commercial Fishing .....	3128
<b>PROCEDURAL MATTERS</b>	
Application re appeal pursuant to s23B of the I.R. Act 1979 - Applicant Union sought to reverse a decision of the Respondent, finding the Applicant's member guilty of misconduct - Preliminary Issue - Respondent argued that appeal should be dismissed on the grounds that the appeal application was not filed within time specified in regulation 34(5) of the I.R.C. Regulations 1985 - Further, that notwithstanding the repeal of those provisions of the Act establishing and providing the jurisdiction and powers of the former Government School Teachers Tribunal, those parts of the Regulations previously having application to the Tribunal continue to apply to proceedings such as these - Commission reviewed authorities and observed that the intention of the legislature at the time of the repeal of these provisions in the Act relating to the Tribunal, was to enable teachers in government schools to fall within the general jurisdiction of the Commission - Further, Commission observed that had it been the intention of the legislature to limit the time within which such appeals under s23B could be brought, it could have easily done so at the time of that amendment, as is the case in relation to unfair dismissal applications, pursuant to ss29(1)(b)(i) and 29(2) of the Act - Commission, having regard to all of the circumstances and the evidence before it, was not persuaded that Applicant had made out the appeal such that it should disturb the conclusions reached by Respondent - Dismissed - The State School Teachers Union of W.A. (Incorporated) -v- The Minister for Education - APPL 1649 of 2000 - KENNER C - 29/06/01 - Education .....	1613
Application re contractual entitlements - Application for adjournment by Respondent - Applicant argued he would be prejudiced by a delay in having his claim heard and determined and would incur costs in maintaining a counter-claim and defending a matter that has no merit in the District Court - Further, Applicant argued that principles enunciated by the High Court in respect to 'forum non conveniens' should be applied - Respondent argued that adjournment should be granted until litigation matter allocated in the District Court of Western Australia has been resolved by final judgment - Further, Respondent argued that on the application of principles that if an adjournment was not granted Respondent would be caused serious prejudice - Commission found that to grant or refuse an adjournment was a matter for the discretion of the Commission and must be considered on its merits as required by s.26 of the IR Act - Commission found that if adjournment was granted there would be a delay in having claim heard and determined and Applicant had a statutory right to have his claim heard and determined by this Commission and thus, adjournment was refused - Refused - Mr J Calhoun -v- Gembush Pty Ltd - APPL 154 of 2001 - SMITH, C - 05/07/01 .....	1623
<sup>2</sup> Appeals against Decision of Industrial Magistrate (unreported) re breach of award - Questions raised on these Appeals: Was the Application frivolously or vexatiously instituted, and Costs - Power to award and quantum - Full Bench reviewed various authorities and Acts and found on a number of reasons that His Worship did not err in finding that the claim was instituted frivolously or vexatiously and that he had jurisdiction and power to order costs - Appeal No. FBA 13/2001 upheld and decision at first instance varied and Appeal No. FBA 14/2001 dismissed - Falcon Investigations & Security Pty Ltd -v- Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch - FBA 13,14 of 2001 - Full Bench - SHARKEY P/KENNER C/SMITH, C - 19/07/01 - Business Services .....	2425
Conference referred re transfer of an employee - Applicant Union argued that Respondent had unfairly transferred its member from her position and sought a declaration that the transfer was unfair and an order that the Respondent reinstate its member - Respondent denied the claim and opposed the orders sought - Commission was of the view for a number of reasons that the conduct of the Applicant Union's member was not unreasonable and concluded that her transfer was unfair - Declaration and Order Issued - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Quirk Corporate Pty Ltd - CR 331 of 2000 - SMITH, C - 29/06/01 - Business Services .....	2470
<sup>2</sup> Appeal against Decision of Commission (81WAIG1238) re unfair dismissal - Appellant argued that the Learned Commission erred in law and in fact on various grounds including that it awarded excessive compensation to the Respondents - Further, Appellant sought an Order that the Decision of Commission in matters 1377 and 1378 of 2000 be quashed - Full Bench reviewed evidence and applying the principles in House v. The King (HC)(op cit) and Gromark Packaging v. FMWU (IAC)(op cit), found on a number of reasons that there was no error as alleged in the grounds of appeal, and no error in the exercise of the Commissioner's discretion - Dismissed - Kingscape Holdings Pty Ltd -v- GK Smith & Other - FBA 20 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/GREGOR C - 17/08/01 - Construction Trade Services .....	2517
<sup>2</sup> Appeal against Decision of Commission (81WAIG1271) re unfair dismissal - Appellant Union argued that the Commissioner erred in law by finding the dismissal justified as a summary dismissal and the Commissioner's discretion miscarried in regard to procedural fairness of the investigation - Full Bench found that procedural fairness was not fully afforded in the investigation of the workplace fight, that the breach of conduct did not justify a summary dismissal, that dismissal was harsh, oppressive and unfair and remitted the matter back to the Commission - Upheld - AUST MEAT INDUSTRY EMPL UNION -v- Geraldton Meat Exports Pty Ltd - FBA 26 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/SCOTT C. - 21/08/01 - Food, Beverage and Tobacco Mfg .....	2523
Complaint re breach of award and the Minimum Conditions of Employment Act 1993 - Complainant argued that defendant terminated his employment without notice or pay in lieu of notice, failed to pay him overtime rates of pay, annual leave entitlements and wages - Further, Complainant sought to recover the sum of \$6016.71 and interest thereon pursuant to s.32 of the Supreme Court Act 1935, the imposition of a penalty with respect to each breach of the award and costs - Defendant argued that Complainant had abandoned his employment and lodged a counter claim for damages - Industrial Magistrate reviewed authorities and found on evidence that Complainant had been dismissed for misconduct and by his own actions disentitled himself to annual leave payments accrued during his employment and further, he had failed to prove that the award binds the employer - IM further found that he did not have jurisdiction and power to deal with Defendants counter claim for common law damages - Mr JS Strange -v- Moonstar Nominees Pty Ltd - CP 324 of 2000 - Industrial Magistrate - Cicchini IM - 16/08/01 - Accommodatn, Cafes&Restaurants .....	2568
Applications re unfair dismissal seeking Orders for further discovery of documents and adjournment - Commission having reviewed the Applicant's submissions ordered that application be dismissed on the basis that no sufficient ground had been made out that the orders sought ought to be issued - Dismissed - Mr GM Cann -v- Blackburne Properties Limited - APPL 936,937 of 2000 - GREGOR C - 31/08/01 - Property and Business Services .....	2572
Application re unfair dismissal and contractual entitlements - Application for adjournment by Respondent - Commission, having considered the submissions from the parties concluded that in the absence of any details regarding the precise issue upon which the request for an adjournment was made the request should not be granted - Dismissed - Ms JA Morrison -v- Suzanne Grae Corporation Pty Ltd - APPL 467 of 2001 - BEECH C - 11/09/01 - Personal & Household Good Rtlg .....	2593

## CUMULATIVE DIGEST—continued

Page

## PROCEDURAL MATTERS—continued

- Application re unfair dismissal and contractual entitlements - Applicant argued she had been unfairly dismissed and sought denied contractual entitlements - Respondent argued that Applicant was demoted until she was ultimately dismissed, that the demotion related in part to Applicant's own action, as there were conflict of hours between Applicant's two jobs, that her performance in regard to communication was poor and that she attended work for another employer whilst she was on sick leave - Commission found on evidence that Applicant engineered her hours of work to her own advantage against the expressed concerns and directions of her employer, that it was on this basis alone, leaving aside the other history of conflicts at the workplace and the concerns about communication with clients, that the dismissal was fair (Undercliffe Nursing Home -v- FMWU) - Further, Commission was not convinced that there was an absence of procedural fairness arising from the management committee's decision - Dismissed - Mrs A Niblett -v- Koolkuna Eastern Region Domestic Violence Services Network - APPL 2072 of 2000 - WOOD,C - 30/08/01 - Personal Services..... 2601
- Application re unfair dismissal - Commission summarised that fundamentally two issues needed to be determined - The first related to the nature of the applicant's employment and secondly if there was a dismissal was that dismissal unfair - Having determined the nature of the of employment based on evidence presented, Commission concluded that the applicant had not been dismissed as such and dismissed the claim for want of jurisdiction - Dismissed for want of jurisdiction - Mr CA Smith -v- TAB Transport Pty Ltd - APPL 558 of 2001 - BEECH C - 04/09/01 - Road Transport..... 2617
- Application re unfair dismissal seeking Interlocutory Orders for production of documents - Commission having considered the application, the objection and the submission in reply to the objection, granted the Orders sought - Granted in Part - Ms ND Walsh -v- Peter John & Madeleine Marie Cochrane t/as "Ray White (Maddington) - APPL 2055 of 2000 - BEECH C - 24/08/01 - Property Services..... 2651
- Application re contractual entitlements seeking for an Interlocutory Order for production of documents- Applicant argued that she had not been paid her March retainer and commissions and sought access to relevant documentation held by the respondent that supported her claim - Respondent disputed the calculations of commissions claimed - Commission found the applicant's request for the production of the documentation to which she referred as being entirely reasonable and appropriate - Granted - Mrs JAL Hurst -v- House of Stuart - APPL 773 of 2001 - BEECH C - 24/08/01 - Other Services..... 2654
- Complaint re breach of Workplace Agreement Act 1993 - Complainant argued he was a full time employee and his termination was unfair, harsh or oppressive contrary to the provisions of s.18 of the WAA Act, 1993 - Defendant refuted the allegation that there had been an unfair dismissal - Industrial Magistrate found on the evidence presented that Complainant was a casual employee, that after his operation, his employment status was left in the air and that had he, when he was ready to go back to work, did as he had done in the past, gone along to see the Defendant, it may well be that he would still be employed on a similar basis, therefore there was no dismissal - Dismissed - Mr RW McLeod -v- BRL Hardy Limited - CP 315 of 2000 - Industrial Magistrate - Tarr IM..... 2765
- Application re unfair dismissal - Applicant argued he had been unfairly dismissed - Respondent requested that Commission refrain from dealing with the application until the outcome of its claim against Applicant in the Local Court - Commission raised Respondent's request with Applicant's Solicitor who after consultation with Applicant, advised Commission that Applicant had agreed to an adjournment until he returned from overseas on 19/7/2001 - After several attempts to communicate to Applicant and its Solicitor after the 19/7/2001, Commission listed the application for Mention Only - There was no appearance on behalf of Applicant at the hearing - Commission was satisfied that it had taken appropriate steps to request advice from Applicant and there was no obligation upon it to do more (McConkey v M&A's of Denmark (2001) 81WAIG1561), struck out the application for want of jurisdiction - Order Issued jurisdiction - Mr AA Cheesman -v- Jamco Nominees Pty Ltd - APPL 628 of 2001 - BEECH C - 04/10/01 - Other Services..... 2772
- Conference referred re termination of an employee - Applicant argued that there was an argument between him and the Respondent over work issues and his back problem at which time he was dismissed - Respondent argued that Applicant was abusive and showed no respect for him in front of other employees - Commission found based on the evidence presented, that there was a heated argument between the parties and that the language Applicant used towards his employer was wrong, but in a context where the employer had not set a standard in the workplace, that incident did not warrant Applicant's dismissal, therefore, Commission ordered that Respondent pay the Applicant a sum of money equivalent to the wages he would have earned for that period of time as compensation for the dismissal - Granted - The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- Proscope - CR 265 of 2000 - BEECH C - 03/10/01 - Construction Trade Services..... 2795
- Application seeking an interim order pursuant to s80E of the IR Act - Applicant Union sought an application for discovery - Respondent challenged the jurisdiction of the Arbitrator to deal with the substantive matter - Commission considered authorities and found nothing to establish that the application for discovery related to the issue of the Commission's jurisdiction, but related more to the substantive matter and dismissed the application for discovery accordingly - Civil Service Association of Western Australia Incorporated -v- Director General, Ministry of Justice - P 27 of 2001 - Public Service Arbitrator - SCOTT C. - 23/10/01 - Government Administration..... 2892

## PUBLIC HOLIDAYS

- Application re unfair dismissal and contractual entitlements - Applicant argued that he had unfairly dismissed and had not been paid his entitlements pursuant to the award regarding notice, annual leave or public holidays and superannuation - There was no appearance on behalf of the Respondent - Commission reviewed authorities and found that the applicant's claims were award benefits, that it cannot exercise a power under s.29 to give relief because the power for enforcement resides solely with the Industrial Magistrate pursuant to s.83 of the Act - Commission further found that applicant was unfairly dismissed, that reinstatement was unavailing and awarded compensation, and dismissed for want of jurisdiction the claims for benefits as set out in the application - Ordered Accordingly - Mr PR Moritz -v- Home Again Enterprises Pty Ltd - APPL 458 of 2001 - GREGOR C - 09/08/01 - Accommodatn, Cafes&Restaurants..... 2594

## PUBLIC INTEREST

- Application re unfair dismissal and contractual entitlements - Applicant argued that his dismissal was harsh, oppressive or unfair and sought outstanding benefits - Respondent argued that at the time of application there had been no dismissal and that remedy sought being 6 weeks notice and paid leave had been received by Applicant - Commission reviewed various authorities and concluded that a broad interpretation should be applied to the term "dismissed" and this period should include the period of notice therefore, Commission allowed the application on that basis - Further, Commission concluded that Applicant had been paid during the notice period in accordance with the workers compensation regime, that in the application before it the remedies were clear and had been met and that pursuant to s.27(1)(a)(ii) and (iv) of the Act, further proceedings were not necessary or desirable in the public interest - Dismissed - Mr CG Hywood -v- Subiaco Wine Room - APPL 1950 of 2000 - SCOTT C. - 31/07/01 - Accommodatn, Cafes&Restaurants..... 2443
- <sup>2</sup>Appeal against Decision of Commission (81WAIG1046) re dismissed application for unfair dismissal - Appellant argued Commissioner erred in law by dismissing the application as not being necessary or desirable in the public interest, and that particulars did not raise new issues - Respondent sought an order for the appellant to pay costs - Full Bench found the late filing of particulars was a clear occasion of prejudice, that the Commissioner was correct in dismissing the application and dismissed the application for costs - Dismissed - Mr M Pietracatella -v- W.A. Italian Club (Inc) - FBA 18 of 2001 - Full Bench - SHARKEY P/GREGOR C/WOOD,C - 13/08/01 - Accommodatn, Cafes&Restaurants..... 2532

## CUMULATIVE DIGEST—continued

	Page
PUBLIC INTEREST—continued	
Application re unfair dismissal - Applicant argued that he was constructively dismissed from his position as Health Worker - Respondent argued that applicant had resigned from his position and not dismissed as claimed - Commission found that the matter had suffered considerable delay for varying reasons and given the circumstances would refrain from further hearing the application in the Public Interest - Further, Commission thought it would be unreasonable in the circumstances to make the employer await an indefinite time for the matter to be determined with the prospect live at all times that the applicant might achieve reinstatement as claimed - Dismissed - Mr PH Woods -v- East Kimberley Aboriginal Medical Service - APPL 1290 of 2000 - WOOD,C - 28/08/01 - Health Services .....	2627
Conference referred re reclassification of positions - Applicant Union sought on behalf of two of its members to have the Public Service Arbitrator hear and determine the matter - Respondent argued that the Union's members had agreed to a HR consultancy firm to provide a fair and reasonable process for a job evaluation and to accept such a process as the final determination of the matter - Public Service Arbitrator found that the Applicant's members entered into an agreement with the Respondent to resolve the issue of classification therefore, in accordance with s.27(1) of the I.R. Act, dismissed the matter as not necessary or desirable in the public interest - Dismissed - Civil Service Association of Western Australia Incorporated -v- Chief Executive Officer Water Corporation - PSACR 7 of 2001 - Public Service Arbitrator - SCOTT C. - 21/09/01 - Government Administration .....	2756
REDUNDANCY/RETRENCHMENT	
Application re unfair dismissal - Applicant argued that his dismissal was unfair, he was not given a "fair go all round", that respondent failed to give appropriate notice of the possibility of redundancy and that his termination was carried out in a manner which breached the respondent's own policy and principles of natural justice - Respondent argued that applicant should have known that his employment was not secure and when the review was undertaken and decision made to make his position redundant he was advised as soon as practicable - Commission found that applicant was overseas and not shown the documents completed at the time decision was taken to make him redundant, he was unaware of any threat to his job security and had the expectation of continuing employment and becoming a permanent resident, and respondent's promoted initiatives to cut costs did not infer the possibility of redundancies - Further, Commission found that the decision to terminate applicant's employment was based on flawed information and this was unfair, that reinstatement was impractical and in the circumstances ordered compensation - Order Issued - Mr S Castles -v- Haliburton - APPL 1356 of 1999 - COLEMAN CC - 20/02/01 - Oil and Gas Extraction .....	1625
Application re unfair dismissal and contractual entitlements - Applicant argued that he was summarily dismissed, his position was abolished, he was made redundant and paid one month's salary in lieu of notice which was not in accordance with the contract and that respondent breached the Minimum Conditions of Employment Act 1993, therefore sought either reinstatement or compensation - Respondent argued that with a restructure applicant's position was abolished and he was advised of the reasons for decision to terminate his services - Commission found that respondent had not discharged its onus to prove that this was a genuine redundancy, that the dismissal was both procedurally and substantively unfair, that applicant certainly did not receive a fair go all round and, as it would be impracticable for him to return to work with respondent, awarded compensation - Granted - Mr P Dellys -v- Elderslie Finance Corporation Limited - APPL 1185 of 2000 - WOOD,C - 20/06/01 - Finance .....	1632
Application re unfair dismissal - Applicant argued amongst a number of reasons that in the months between when he suffered the injury, and the dismissal there were instances of conflict between him and his supervisors which contributed to him being selected for dismissal, and that his contract ended because of that conflict and not for reasons advanced by the Respondent - Respondent argued that the industry had been suffering its worse downturn for many years and that the staff were advised that there had been a poor start to the financial year with actual performance well below budget, therefore, various cutting measures were put into place for saving money and a number of employees were made redundant - Further, Respondent argued the fact of the matter was that if Applicant had not been in the rehabilitation program his services would have been terminated on 20/5/2000 - Commission reviewed authorities and found that the Respondent's rehabilitation policy was a significant factor in maintaining the Applicant in employment during a period in which the business was in a severe decline - Further, Commission was not convinced that the supervisors acted in any prejudicial way to the Applicant, that Applicant's conduct was without doubt an argumentative person and that Respondent was faced with a critical shortage of work, so much so that its future as an operation was for some time in question - Commission found on balance, Respondent was entitled to deal with Applicant in the way that it did and that in all circumstances it cannot be said that there had not been a fair go all round in this case - Dismissed - Mr KW Endersby -v- Bains Harding Industries Pty Ltd - APPL 1691 of 2000 - GREGOR C - 28/06/01 - Wood and Paper Product Mfg. ....	1641
Application re unfair dismissal seeking reinstatement - Applicant argued that his dismissal by reason of redundancy was a sham, that Respondent made his position as the Director of Outreach Services redundant, then created and advertised another position of Manager, Outreach Services, and there were no differences of substance between the position in which he had been employed and the new position that was created - Respondent opposed the claim and argued that in 1998 the National Assembly proclaimed a major change which affected the Respondent, therefore, Respondent took the opportunity to also restructure internally - Further, in relation to Applicant's position, a number of functions in his job description/duty statement were no longer being performed, that it was appropriate to make the position redundant and after consulting interested persons, decided to create a new position - Commission found that the evidence showed that the redundancy of the position was indeed genuine, that Commission was not persuaded by Applicant's evidence that the restructure of the Trinity Parish, which provided the background to the redundancy of his position, the creation of the new position, and the decision of the Respondent to advertise that position, was a sham, therefore, his claim of unfair dismissal was not made out - Dismissed - Mr A Morrison -v- Uniting Church of Australia, Trinity Parish - APPL 2098 of 2000 - BEECH C - 10/07/01 - Community Services .....	1668
Application re unfair dismissal - Applicant argued he was harshly, oppressively or unfair dismissed and sought compensation for loss and injury, and in addition or alternatively a reasonable period of notice and a redundancy payment as outstanding contractual entitlements - Further, Applicant argued that in the absence of re-employment or reinstatement being practical, he claimed that his loss and injury arising from the dismissal exhausts the statutory limit of compensation under the I.R. Act 1979 as amended - Respondent argued that Applicant's services were terminated in the circumstances of a genuine redundancy, the genesis of which was discussed with him and so too was the restructuring of the organisation, therefore, in the circumstances of the bona fide redundancy the dismissal was not harsh, oppressive or unfair - Further, Respondent argued that even if it was to be found to have been unfair, Applicant failed to mitigate his loss not seeking employment in the local market, and that any compensation for loss should be minimal on the basis that Applicant would have become redundant in any event within a very short period of time - Commission reviewed authorities and found that the termination was a summarily dismissal, that Respondent had not discharged the onus of establishing that the summary dismissal was justified, that in all circumstances the right to dismiss was exercised in a harsh and oppressive manner, therefore, compensation for loss equivalent to six months salary was awarded and all other claims dismissed - Ordered Accordingly - Mr MM Quartermaine -v- Anson Management Services Pty Ltd - APPL 1155 of 2000 - COLEMAN CC - 21/06/01 - Business Services .....	1675
Conference referred re dismissal - Applicant Union argued that dismissal was unfair and sought reinstatement - Further, at the hearing, Applicant Union sought leave to amend the claim by seeking orders for compensation in lieu of reinstatement and the amendment was granted - Respondent argued that Applicant was made redundant due to diminution of work available - Commission found that Respondent had discharged the onus of establishing the fact of the redundancy - Further, Commission found that there was no casual link between the determination for redundancy and the Applicant's safety issue report and that Applicant was unable to prove that dismissal was unfair - Dismissed - PLUMBERS & GASFITTERS UNION -v- Jako Industries Pty Ltd - CR 303 of 2000 - GREGOR C - 20/07/01 - General Construction .....	2474

## CUMULATIVE DIGEST—continued

## REDUNDANCY/RETRENCHMENT—continued

	Page
Application re unfair dismissal and contractual entitlements - Applicant argued that he was unfairly dismissed, but withdrew his claim for denied contractual entitlements as this aspect of the claim had been settled - Commission reviewed authorities and having considered the evidence submitted by the respondent found that the applicant had been unfairly dismissed due to the failure to pay him a redundancy payment - Further, Commission ordered that the respondent shall pay the applicant the sum of \$2,063.00 as a redundancy payment - Ordered Accordingly - Mr JL Cabrera -v- Classic Fashion Accessories - APPL 571 of 2000; APPL 393 of 2001 - WOOD, C - 17/08/01 - Other Services.....	2574
Conference re transmission of business - Applicant Unions sought an order that the previous award had application due to a transmission of business Further, Applicant Unions argued that there was no genuine redundancy and that the differences between the awards was detrimental to employees - Respondent argued that there was no substantial case to be determined as employees were aware of the new working conditions and had taken advantage of redundancy payments, and the claim for interim relief would be detrimental to the Respondent and would outweigh any detriment to the Applicants - Commission, having considered all of the submissions and materials before it, was not persuaded on balance, that Applicants had established a case for interim relief of the kind sought, therefore the claim for interim orders was refused - Order Issued - The Australian Workers' Union, West Australian Branch, Industrial Union of Workers & Other -v- Dampier Salt Pty Ltd - C 190 of 2001 - KENNER C - 11/09/01 - Other Mining.....	2792
<sup>2</sup> Appeal against Decision of Commission (81WAIG1198) re unfair dismissal and contractual entitlements - Three appeals were heard together by direction of Full Bench - Appellant (Applicant) argued that the learned Commissioner erred in finding that there were two claims, erred by failing to apply identified tests and making a finding of length of service to which entitlement of implied term of reasonable notice in contract was, erred in finding the factors for determining what constituted reasonable notice and entitlement to reasonable severance pay - Further Appellant (Applicant) argued that learned Commissioner erred in finding whether Appellant should have been retained in preference to another employee and erred in lieu of notice - Appellant (Respondent) argued that learned Commissioner erred in deciding that the terms of Individual Employment Agreement did not govern Applicant's employment and erred in not identifying all the terms of Applicant's contract of employment - erred in not deciding that Respondent's policy in relocation had been replace or modified, and that Applicant was entitled to be relocated or returned to Melbourne, erred in deciding that it was unfair for Respondent not to have given Applicant a further eight weeks pay of severance when Commissioner had decided that Applicant had no contractual entitlement to a severance payment at all and that Applicant had lost a fair redundancy payment when there was no entitlement to any redundancy payment and had erred in deciding that Respondent had breached an implied term of Minimum Condition of Employment Act 1993 - Full Bench found that decision was a discretionary decision and for appeals to succeed Appellant must establish that Commission at first instance erred in the exercise of discretion - Full Bench made a number of observations and conclusions and determined that appeal by Respondent was not made out as there was no miscarriage of discretion and dismissed - Full Bench found that Appeal by Applicant should be upheld as Commissioner's discretion had been miscarried having regards to the principles laid down and that the other appeal by Applicant should also be upheld in part in relation to the quantum of severance pay - Orders Issued - Dismissed and Upheld in part - Mr A Birnie -v- AWI Administration Services Pty Ltd - FBA 22,23,24 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/SMITH, C - 26/10/01 - Other Mining.....	2849
Application re unfair dismissal and contractual entitlements - Applicant argued that the dismissal was harsh, oppressive and unfair and sought annual leave entitlements - Respondent argued that the Applicant was dismissed by reason of a bona fide redundancy due to the installation of synthetic greens and the bowling club's financial situation - Industrial Magistrate found the redundancy was genuine and the Respondent had displayed procedural and substantive fairness, and the Applicant was not entitled to annual leave loading - Dismissed - Mr P Smith -v- Rockingham Bowling Club Inc - M 42 of 2001 - Industrial Magistrate - Cicchini IM - 25/10/01 - Sport and Recreation.....	2894
Application re unfair dismissal - Applicant argued dismissal was harsh, oppressive and unfair and denied that his position was made redundant because it was replaced by another person as there were incomplete tasks under the job description - Applicant further argued that salary increases were unfairly withheld as proper procedure was not followed and claimed denied contractual benefits - Respondent argued that although there were some issues it believed that Applicant had been treated fairly and the reason for termination was the economic slow down and that it could not carry a person whose position did not need to be performed - Commission considered all of the evidence and submissions and found that the redundancy of the position was indeed genuine and the loss suffered by the Applicant was the delay in receiving the redundancy pay and ordered that interest on the amount to be paid - Dismissed - Mr S Crockett -v- Hire Intelligence Pty Ltd - APPL 1441 of 2000 - SCOTT C - 19/09/01 - Business Services.....	2899
Application re unfair dismissal - Applicant argued dismissal was unfair and the only reason given to him was that his style of management was not nasty enough - Respondent argued that Applicant was dismissed by reason of redundancy - Commission found that Respondent failed to have discussions with Applicant after the decision was made to make his position redundant and Applicant was given an incorrect reason for his dismissal - Commission further found that Applicant was not even paid the proper termination payments to which he was entitled to and Respondent abused its right to dismiss Applicant oppressively - Awarded compensation as reinstatement was not impracticable - Granted - Mr M Stark -v- C.O.C. Pty Ltd - APPL 893 of 2001 - BEECH C - 17/10/01 - Construction Trade Services.....	2934
<sup>2</sup> Appeal against Decision of Commission (81 WAIG 1668) re unfair dismissal by reason of redundancy - Appellant argued Commissioner erred in law on a number of grounds, one being the dismissal was not harsh, oppressive or unfair but the result of a genuine redundancy - Appellant sought leave to adduce fresh evidence in the form of an affidavit which was dismissed by the Full Bench - Full Bench found that Appellant was made redundant and the grounds of the appeal were not made out as there was no error in the exercise of discretion at the first instance - Dismissed - Mr A Morrison -v- Uniting Church of Australia, Trinity Parish - FBA 45 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/WOOD, C - 21/11/01 - Community Services.....	3042
Complaint re breach of Workplace Agreement - Complainant argued that his termination was unfair and that he had not been provided with any prior warning or the selection criteria for redundancy - Respondent argued that the termination was based on a commercial decision to reduce the workforce in consultation with the Workplace Representative Committee - Industrial Magistrate found that the dismissal was caused by a downturn in the industry and that there was no unfairness which would support a claim for compensation - Dismissed - Mr RA Giddings -v- Austal Ships Pty Ltd - M 65 of 2001 - Industrial Magistrate - Tarr IM - 17/10/01 - Other Manufacturing.....	3089
Application re unfair dismissal - Applicants argued that dismissal was unfair, that there was no consultation regarding redundancy prior to termination and that there was no real redundancy at the workshop - Further, Applicants sought reinstatement or compensation - Respondent argued the terminations were redundancies as a result of a review of the main workshop and the decision to close the workshop - Commission found that Applicants had been made redundant when the workshop closed down and that contractors have not taken over their jobs - Dismissed - Mr AK Haynes -v- Midland Brick Company Pty Ltd - APPL 789,790,817,849 of 2000 - WOOD, C - 07/07/01 - Non-Metallic Min Product Mfg.....	3112
Application re unfair dismissal and contractual entitlements - Applicant argued that he was unfairly dismissed and denied contractual benefits arising from his employment as a Director - Respondent argued that Applicant was employed as a sales person and his employment was terminated as a result of a redundancy, and the need to restructure the business - Commission reviewed authorities and concluded that Respondent had a genuine need to reduce its manning levels, however, there was no discussion with Applicant about the redundancy and its effect on him, and that by reason of Part 5 of the Minimum Conditions of Employment Act 1993, Applicant's dismissal was harsh, oppressive and unfair - Further, Commission found that reinstatement was impracticable, that there was an oral term to the Applicant's contract of employment, and awarded compensation and denied contractual benefit - Upheld and Order Issued - Mr FP Manna -v- Markhill Holdings Pty Ltd as Trustee for The Midnight Printing Unit Trust t/as "Midnight Printing" - APPL 1751 of 2000 - KENNER C - 29/10/01 - Printg, Publishg & Recdd Media.....	3138

## CUMULATIVE DIGEST—continued

	Page
<b>REDUNDANCY/RETRENCHMENT—continued</b>	
Application re unfair dismissal - Applicant argued that he was allegedly made redundant, but that another employee took over his responsibilities - Further, Applicant argued that reinstatement was impracticable and sought six months compensation - Respondent argued that as a result of a review the company decided to abolish Applicant's position and made him redundant - Respondent sought that Commission dismiss the matter pursuant to s27 of the Act on the basis that it should not proceed in the public interest - Commission reviewed authorities and based on the evidence presented, found that the employee's position was properly made redundant, and that Applicant had not proven his case for unfairness in his selection for redundancy instead of the other employee - Dismissed - Mr AA Turner -v- Homewrap Packaging Pty Ltd - APPL 409 of 2001 - WOOD,C - 28/11/01 - Other Services.....	3162
<b>REGISTRATION</b>	
<sup>2</sup> Application for registration of new Organisation by amalgamation of two unions - Application was made by the Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia - Western Australian Branch and the Australian Builders' Labourers, Painters & Plasterers Union of Workers - Full Bench reviewed authorities and relevant sections of the I.R. Act and was satisfied that all statutory requirements of law had been complied with, therefore, authorised the registration of the organisation sought - Granted - The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers & Other -v- (Not applicable) - FBM 3 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/KENNER C - 09/10/01 - Unions.....	2722
<b>REINSTATEMENT</b>	
Application re unfair dismissal seeking reinstatement - Applicant argued that his dismissal by reason of redundancy was a sham, that Respondent made his position as the Director of Outreach Services redundant, then created and advertised another position of Manager, Outreach Services, and there were no differences of substance between the position in which he had been employed and the new position that was created - Respondent opposed the claim and argued that in 1998 the National Assembly proclaimed a major change which affected the Respondent, therefore, Respondent took the opportunity to also restructure internally - Further, in relation to Applicant's position, a number of functions in his job description/duty statement were no longer being performed, that it was appropriate to make the position redundant and after consulting interested persons, decided to create a new position - Commission found that the evidence showed that the redundancy of the position was indeed genuine, that Commission was not persuaded by Applicant's evidence that the restructure of the Trinity Parish, which provided the background to the redundancy of his position, the creation of the new position, and the decision of the Respondent to advertise that position, was a sham, therefore, his claim of unfair dismissal was not made out - Dismissed - Mr A Morrison -v- Uniting Church of Australia, Trinity Parish - APPL 2098 of 2000 - BEECH C - 10/07/01 - Community Services .....	1668
Conference referred re alleged harsh, unfair and unlawful dismissal - Applicant Union argued that the manner in which its member was terminated was harsh, unfair and unlawful and sought an interim order for reinstatement - Respondent opposed the claim - Commission reviewed authorities and relevant sections of the Act and found that it had power to issue the interim order sought - Commission found that Applicant's member was aware of her terms and conditions of employment at the time of making the statements and that the timing of the meeting with her employer before completion of her shift was not oppressive or unfair or engineered in anyway to disadvantage her - Further, pursuant to s.26 of the Act and having regard to "equity, good conscience and the substantial merits of the case", Commission found on balance that the dismissal of the Applicant's member was harsh and issued an order for reinstatement - Granted - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Burswood Resort (Management) Limited - CR 153 of 2001 - WOOD,C - 04/09/01 - Sport and Recreation .....	2639
Application re unfair dismissal and seeking reinstatement - Applicant argued that dismissal was harsh, oppressive and unfair - Respondent argued that the Applicant was terminated summarily for misconduct and breaches of the code of conduct - Commission found the Applicant was unfairly dismissed - Applicant seeks reinstatement only but the viability of reinstatement as a remedy is unclear and is to be listed for further submissions - Mr DL Moylan -v- Chairman of Commissioners City of South Perth Council - APPL 622 of 2001 - GREGOR C - 19/10/01 - Government Administration.....	2925
<b>SAFETY</b>	
Conference referred re dismissal - Applicant Union argued that dismissal was unfair and sought reinstatement - Further, at the hearing, Applicant Union sought leave to amend the claim by seeking orders for compensation in lieu of reinstatement and the amendment was granted - Respondent argued that Applicant was made redundant due to diminution of work available - Commission found that Respondent had discharged the onus of establishing the fact of the redundancy - Further, Commission found that there was no casual link between the determination for redundancy and the Applicant's safety issue report and that Applicant was unable to prove that dismissal was unfair - Dismissed - PLUMBERS & GASFITTERS UNION -v- Jako Industries Pty Ltd - CR 303 of 2000 - GREGOR C - 20/07/01 - General Construction .....	2474
Application re unfair dismissal - Applicant argued that his dismissal was harsh and unfair and sought compensation to cover an outstanding loan taken to undertake a dump truck training course and four weeks wages - Respondent argued that Applicant's performance was unsatisfactory in that he failed to take instructions to comply with safety requirements and absent himself from work without notice - Commission found based on the evidence presented that Applicant's termination, in all of the circumstances, was not harsh, oppressive nor unfair and that the Respondent gave Applicant an opportunity to secure a skill and a position but all Respondent got were complaints, aggravation and insolence, therefore Respondent exercised its legal right to terminate the contract - Dismissed - Mr MSG Fitzgerald -v- Cooks Construction Pty Ltd - APPL 606 of 2001 - COLEMAN CC - 09/11/01 - Other Mining.....	3127
<b>SICK LEAVE</b>	
Application re unfair dismissal and contractual entitlements - Applicant argued that after she had been off sick for a number of weeks, she made an appointment to meet with the Respondent to discuss her return to work and the nature of her duties, and at the request of Respondent, she drew up an agenda of what was to be discussed at the meeting - Further, Applicant argued that she met with the Respondent and it was at that meeting that she was dismissed - Respondent argued that Applicant's duties had been taken over by other staff, that it would have had to create another job for her, that Applicant did not get along with other staff and that it was of the view that Applicant was unfit to come back to work - Commission reviewed authorities and found on a number of reasons that Applicant's dismissal was unfair, that reinstatement was impracticable and ordered that Applicant be paid compensation and denied contractual benefits - Granted in Part - Ms JM Kirkham -v- Dr K Alexander - APPL 1366 of 2000 - BEECH C - 15/06/01 - Health Services.....	1660
Application re unfair dismissal and contractual entitlements - Applicant argued she had been unfairly dismissed and sought denied contractual entitlements - Respondent argued that Applicant was demoted until she was ultimately dismissed, that the demotion related in part to Applicant's own action, as there were conflict of hours between Applicant's two jobs, that her performance in regard to communication was poor and that she attended work for another employer whilst she was on sick leave - Commission found on evidence that Applicant engineered her hours of work to her own advantage against the expressed concerns and directions of her employer, that it was on this basis alone, leaving aside the other history of conflicts at the workplace and the concerns about communication with clients, that the dismissal was fair (Undercliffe Nursing Home -v- FMWU) - Further, Commission was not convinced that there was an absence of procedural fairness arising from the management committee's decision - Dismissed - Mrs A Niblett -v- Koolkuna Eastern Region Domestic Violence Services Network - APPL 2072 of 2000 - WOOD,C - 30/08/01 - Personal Services.....	2601

## CUMULATIVE DIGEST—continued

	Page
<i>SICK LEAVE—continued</i>	
<sup>2</sup> Appeal against Decision of Commission (81WAIG1660) re unfair dismissal and contractual entitlements - Appellant argued against the finding of the dismissal on the grounds that deal with alleged erroneous findings in relation to the evidence - Appellant argued that there was not sufficient evidence to establish that there was a dismissal - Full Bench found that this was a discretionary decision and had defined a dismissal as the termination of a contract of employment and in this matter there was too fragile a base in the evidence to support a finding of dismissal - Full Bench found that appeal should be upheld as there was no dismissal or no dismissal was established to have occurred and there was no jurisdiction to hear and determine the matter - Appeal Upheld and decision at first instance varied - Dr K Alexander -v- Ms JM Kirkham - FBA 44 of 2001 - Full Bench - SHARKEY P/GREGOR C/WOOD, C - 28/11/01 - Health Services .....	3017
<i>STAY OF PROCEEDINGS</i>	
<sup>4</sup> Application for stay of operation of Decision of the Public Service Arbitrator in Matter No. P6 of 2001 (81WAIG2439) pending appeal to Full Bench - Applicant was appealing the issue of jurisdiction of the Commission to deal with matters covered by public sector standards - President found there was a serious issue to be tried, that the balance of convenience lay with the applicant and that there were exceptional circumstances justifying the making of the orders sought - Granted - Commissioner of Police -v- Civil Service Association of Western Australia Incorporated - PRES 12 of 2001 - President - SHARKEY P - 29/08/01 - Government Administration .....	2553
<sup>1</sup> Application for stay of proceedings before the Full Bench - IAC applied principles and it was not persuaded that Appellant had a strong appeal case, therefore, IAC declined to exercise its discretion to order a stay because there was no special or exceptional circumstances warranting the making of the order - Refused - The Food Preservers' Union of Western Australia, Union of Workers -v- AUTO, FOOD, METAL, ENGIN UNION & Other - IAC 7 of 2000 - Industrial Appeal Court - Kennedy J/Scott J./Parker J. - 28/09/00 - Food, Beverage and Tobacco Mfg .....	2699
<sup>2</sup> Appeal against Decision of Commission (81WAIG2478 & 2782) re granted application for stay of proceedings in Matter No. 37/2001 - Appellant appealed against the Commission's "finding" in above matter number - Full Bench heard full argument from the parties and applied various principles and found on a number of reasons that there was no miscarriage in the exercise of the Commissioner's discretion, that the Commissioner's decision was one made on well established authority and should not be lightly interfered with by the Full Bench and there was no question of such importance that, in the public interest, the appeal should lie, therefore dismissed the appeal as incompetent - Dismissed - Paulownia Saw Milling, Timber Supplies and Manufacturing Pty Ltd (ACN 081 463 452) -v- Mr WI Jones - FBA 43 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/WOOD, C - 11/10/01 - Other Manufacturing .....	2715
<sup>4</sup> Application for stay of operation of Decision (81 WAIG 1660) pending appeal to Full Bench - Applicant was required to establish that the balance of convenience favoured the applicant and that there was a serious issue to be tried, namely, that should the applicant's appeal succeed the result would be nugatory by its ability to recover monies paid to the Respondent - President found that there was no serious issue to be tried and that the balance of convenience was held by the Respondent, and that there was no basis to find that the appeal would be rendered nugatory - Dismissed - Dr K Alexander -v- Ms JM Kirkham - PRES 13 of 2001 - President - SHARKEY P - 21/09/01 - Health Services .....	2724
Application re unfair dismissal - Applicant argued that he was harshly, oppressively or unfairly dismissed, however, wished his application to be held in abeyance until criminal proceedings relating to circumstances of the termination were dealt with by the District Court - Respondent argued that the matter should proceed to hearing and that there would be detriment to the respondent should it be required to await the outcome of the District Court proceedings - Commission having considered the parties' submission, applied principles and found that while these are matters of difficulty and inconvenience for the respondent, they do not outweigh the harm which could potentially be done to the applicant in respect of criminal proceedings against him should he be required to proceed with this matter at this point, therefore a stay of proceedings was order until the resolution of the criminal proceedings - Granted - Mr WI Jones -v- Paulownia Saw Milling, Timber Supplies and Manufacturing Pty Ltd (ACN 081 463 452) - APPL 37 of 2001 - SCOTT C. - 12/06/01 - Other Manufacturing .....	2782
<i>SUPERANNUATION</i>	
Application re contractual entitlements - Applicant's agent argued that respondent had failed to meet obligations under the contract of employment - There was no appearance on behalf of the respondent - Commission was satisfied that applicant was employed by respondent and found that applicant had not been allowed benefits to which she was entitled under her contract of employment - Granted - Ms MAC Dignam -v- iNature Australia Pty Ltd - APPL 900 of 2001 - BEECH C - 10/08/01 .....	2578
Application re unfair dismissal and contractual entitlements - Applicant argued that he had unfairly dismissed and had not been paid his entitlements pursuant to the award regarding notice, annual leave or public holidays and superannuation - There was no appearance on behalf of the Respondent - Commission reviewed authorities and found that the applicant's claims were award benefits, that it cannot exercise a power under s.29 to give relief because the power for enforcement resides solely with the Industrial Magistrate pursuant to s.83 of the Act - Commission further found that applicant was unfairly dismissed, that reinstatement was unavailing and awarded compensation, and dismissed for want of jurisdiction the claims for benefits as set out in the application - Ordered Accordingly - Mr PR Moritz -v- Home Again Enterprises Pty Ltd - APPL 458 of 2001 - GREGOR C - 09/08/01 - Accommodatn, Cafes&Restaurants .....	2594
Applications re unfair dismissal and contractual entitlements - Applicant argued his contract of employment, signed by the parties was for a three years fixed term and that he was summarily dismissed whilst on annual leave - Applicant sought payment of the balance of the fixed term contract by way of denied contractual benefits inclusive of salary, superannuation, motor vehicle, mobile phone and six months compensation for loss of earnings and injury - Respondent argued on a number of grounds and denied that the dismissal was unfair but says it was imposed by lack of operating funds and failure to fulfil the planting program - Commission found based on the evidence presented that in all circumstances, Applicant's dismissal whilst on annual leave was unfair and amounted to a summary dismissal - Commission further found that Applicant's contract was fixed for a three years duration, that reinstatement was impracticable, that Applicant had not sought to properly mitigate his loss and awarded compensation and discontinued the claim for contractual entitlements - Ordered Accordingly - Mr GR Shuttleworth -v- Silviculture Management Pty Ltd - APPL 169,170 of 2001 - WOOD, C - 21/09/01 .....	2784
<i>TERMINATION</i>	
Application re unfair dismissal - There was no appearance on behalf of the Applicant - Respondent argued that Applicant had not genuinely intended to have his application heard as Commission had adjourned the hearing after reconvening twice at Applicant's request, and therefore sought costs incurred in attending for the morning of the hearing - Commission found that while it will endeavour to make allowances for an Applicant who had every intention of attending the Commission, it was not satisfied in this case that Applicant genuinely intended to be present on the day of the hearing - Dismissed for want of Jurisdiction - Mr DA Amoroso -v- Bellvale Nominees Pty Ltd - APPL 7 of 2001 - BEECH C - 28/06/01 .....	1615
Application re unfair dismissal - Applicant argued that he was harshly, oppressively and unfairly dismissed and sought a benefit arising out of his contract of employment - Respondent argued that prior to applicant's employment being terminated he told applicant that he had two weeks to demonstrate that he could do the job and demonstrate some real changes in his work or his employment would be terminated - Commission found that it was apparent from all of the evidence given in the proceedings that applicant's style of work was incompatible with the requirements of respondent's business, that applicant should have been given 3 months' notice to terminate or 3 months' salary in lieu of notice, and declared that applicant was unfairly dismissed - Order Issued - Mr MRS Barnes -v- Dayman Holdings Pty Ltd ABN 009 309 468 Trading as Reynolds & Associates - APPL 1792 of 2000 - SMITH, C - 01/06/01 - Advertising .....	1616

## CUMULATIVE DIGEST—continued

	Page
TERMINATION—continued	
Application re unfair dismissal - Applicant argued that he was unfairly dismissed, did not consider reinstatement to be practicable and sought compensation for dismissal and payment in lieu of notice - Respondent argued that applicant was dismissed for continued poor performance and breach of trust and contract - Commission found from all the evidence that applicant's performance regarding attendance, sales figures and completion of daily sales records was inadequate, that he was terminated for failing to improve his performance levels, for a breakdown in trust and that applicant was dealt with fairly - Dismissed - Mr J Bradley -v- Lanier (Australia) Pty Ltd - APPL 1557 of 2000 - WOOD,C - 22/06/00 - Equipment.....	1621
Application re unfair dismissal - Applicant argued that his dismissal was unfair, he was not given a "fair go all round", that respondent failed to give appropriate notice of the possibility of redundancy and that his termination was carried out in a manner which breached the respondent's own policy and principles of natural justice - Respondent argued that applicant should have known that his employment was not secure and when the review was undertaken and decision made to make his position redundant he was advised as soon as practicable - Commission found that applicant was overseas and not shown the documents completed at the time decision was taken to make him redundant, he was unaware of any threat to his job security and had the expectation of continuing employment and becoming a permanent resident, and respondent's promoted initiatives to cut costs did not infer the possibility of redundancies - Further, Commission found that the decision to terminate applicant's employment was based on flawed information and this was unfair, that reinstatement was impractical and in the circumstances ordered compensation - Order Issued - Mr S Castles -v- Haliburton - APPL 1356 of 1999 - COLEMAN CC - 20/02/01 - Oil and Gas Extraction.....	1625
Application re contractual entitlements - Applicant argued that he had been denied contractual entitlements based on 1% of gross earnings and two weeks pay for the period of notice - Respondent argued that the entitlement ceased with a variation to the contract and that Applicant's services were summarily terminated the day after he had submitted his resignation when it became known that Applicant was offering alternate employment to two other employees of Respondent company with a competitor and thus no payment in lieu of the notice period payable - Commission found in favour of Applicant's claim of 1% of gross earnings and dismissed the claim for payment in lieu of notice - Upheld in part - Mr CO Danks -v- Derrol Crane Esperance General 'Daytona Investments' - APPL 104 of 2001 - COLEMAN CC - 24/05/01 - Road Transport.....	1631
Application re unfair dismissal and contractual entitlements - Applicant argued that he was summarily dismissed, his position was abolished, he was made redundant and paid one month's salary in lieu of notice which was not in accordance with the contract and that respondent breached the Minimum Conditions of Employment Act 1993, therefore sought either reinstatement or compensation - Respondent argued that with a restructure applicant's position was abolished and he was advised of the reasons for decision to terminate his services - Commission found that respondent had not discharged its onus to prove that this was a genuine redundancy, that the dismissal was both procedurally and substantively unfair, that applicant certainly did not receive a fair go all round and, as it would be impracticable for him to return to work with respondent, awarded compensation - Granted - Mr P Dellys -v- Elderslie Finance Corporation Limited - APPL 1185 of 2000 - WOOD,C - 20/06/01 - Finance.....	1632
Application re unfair dismissal - Applicant argued that he was unfairly dismissed - Respondent argued that applicant failed to report for work, constituting abandonment of his employment, furthermore that his employment was subject to a term of 3 months' probation and by reason of federal award coverage the terms of Workplace Relations Regulations 1996 dealing with probationary employees rendered applicant's claim beyond the Commission's jurisdiction - Commission found that at material times applicant's employment was not subject to a probationary period, that the terms of the Workplace Relations Act did not conflict with the Australian Workplace Agreement and both were able to operate concurrently, that applicant's dismissal was peremptory and without good cause and in all the circumstances of the case dismissal was harsh, oppressive and unfair - Further Commission found that reinstatement was impracticable, that applicant had discharged his obligation to mitigate his loss and awarded him compensation for injury - Upheld and Order Issued - Mr T Doherty -v- Geraldton Building Company Pty Ltd ACN 008 637 103 - APPL 1527 of 2000 - KENNER C - 15/06/01 - Building Structure Services.....	1638
Application re unfair dismissal - Applicant argued amongst a number of reasons that in the months between when he suffered the injury, and the dismissal there were instances of conflict between him and his supervisors which contributed to him being selected for dismissal, and that his contract ended because of that conflict and not for reasons advanced by the Respondent - Respondent argued that the industry had been suffering its worse downturn for many years and that the staff were advised that there had been a poor start to the financial year with actual performance well below budget, therefore, various cutting measures were put into place for saving money and a number of employees were made redundant - Further, Respondent argued the fact of the matter was that if Applicant had not been in the rehabilitation program his services would have been terminated on 20/5/2000 - Commission reviewed authorities and found that the Respondent's rehabilitation policy was a significant factor in maintaining the Applicant in employment during a period in which the business was in a severe decline - Further, Commission was not convinced that the supervisors acted in any prejudicial way to the Applicant, that Applicant's conduct was without doubt an argumentative person and that Respondent was faced with a critical shortage of work, so much so that its future as an operation was for some time in question - Commission found on balance, Respondent was entitled to deal with Applicant in the way that it did and that in all circumstances it cannot be said that there had not been a fair go all round in this case - Dismissed - Mr KW Endersby -v- Bains Harding Industries Pty Ltd - APPL 1691 of 2000 - GREGOR C - 28/06/01 - Wood and Paper Product Mfg.....	1641
Application re unfair dismissal seeking compensation - Applicant argued that dismissal was unfair because no option but to resign was offered to him and with the opportunity would have improved his performance - Respondent argued that options were offered to Applicant in relation to Applicant's performance and opportunities were given to rectify the situation and Applicant had agreed to four weeks pay and resigning - Commission found that Applicant negotiated terms to resign and that he had other options to resignation, thus, Applicant jumped rather than being pushed - Dismissed - Mr AR Ferraris -v- Linstorm Holdings Pty Ltd as trustee for the TAG Family Trust ACN 067 398 403 - APPL 1862 of 2000 - SCOTT C. - 03/07/2001.....	1643
Application re unfair dismissal listed to show cause why it should not be struck out for want of prosecution - Applicant argued that she wished to continue with her application and that lack of communication was due to the fact that she had been working at Lake Mason and only contactable by phone outside of working hours - Respondent argued that a considerable time had elapsed and that Respondent was interested in finalising matter - Commission found that Applicant provided little explanation and interest in application since she lodged it and that Respondent had experienced stress and that the application should not continue - Dismissed for want of prosecution - Ms M Fissioli -v- Kids Corner Edu-Care Centre - APPL 247 of 2001 - BEECH C - 27/06/01 - Child.....	1645
Applicant argued that dismissal was a constructive dismissal in that he had no other choice but to resign and that he was not paid the remuneration package that was offered - Respondent argued that they did not coerce Applicant to resign and did not want to get rid of Applicant because a lot of effort had been put into his training and did not want to lose the value of that training - Commission found that Applicant had decided he did not want to continue and was not prepared to do as required to obtain the remuneration package and there was no evidence that Respondent wanted to get rid of Applicant or coerced him to resign, thus, there was no dismissal - Dismissed - Mr CJ Fox -v- News Illustrated Pty Ltd - APPL 1492 of 2000 - GREGOR C - 11/07/01 - Printg, Publishg & Rcd Media.....	1646
Application re unfair dismissal - Applicant argued that dismissal was harsh, oppressive or unfair - Respondent argued that this matter was a "precise parallel" with circumstances where an employee was dismissed summarily for misconduct and that in this case it alleged "conduct that may detrimentally affect the respondent" on the part of applicant - Commission found that respondent's decision to dismiss applicant was not based upon applicant committing some act of "serious misconduct" which had detrimentally affected respondent but because of his assessment of applicant's attitude - Further, Commission found that dismissal was an unfair exercise of respondent's right to dismiss, that reinstatement was impracticable and awarded compensation for the loss or injury caused by dismissal - Granted - Mr SD Gordon -v- Q-Vis Limited (ACN 009 234 173) - APPL 885 of 2000 - BEECH C - 31/05/01 - Health.....	1651

## CUMULATIVE DIGEST—continued

## TERMINATION—continued

	Page
Application re unfair dismissal and contractual entitlements - Preliminary Issue re jurisdiction - Applicant argued he was unfairly dismissed from Respondent and is owed monies by way of outstanding contractual entitlements - Respondent argued that pursuant to s83 of the Act, the monies claimed by way of denied contractual benefits were a matter for the Industrial Magistrate as they arose from an award benefit - Further, Respondent argued that the superannuation monies were subject of the Superannuation Guarantee Legislation and like wise not within the Commission's jurisdiction - Commission reviewed authorities and found that the benefits claimed were award benefits, and that the application was lodged out of time, therefore Commission was without jurisdiction to hear the application - Dismissed for want of jurisdiction - Mr LJ Govan -v- Roche Excavating Pty Ltd - APPL 644 of 2001 - WOOD,C - 09/07/01 - Construction Trade Services.....	1658
Application re unfair dismissal - Applicant argued that dismissal was unfair because no fair go was given into the allegations to gross misconduct and no opportunity to respond to allegations - Respondent argued that Applicant was dismissed for misconduct in that she had used physical force on a seven month old child and that her attitude was not appreciated - Commission found that dismissal was unfair because there was no investigation into the matter concerned and had just accepted the report from the parent thus Applicant was not awarded a fair go and dismissed unfairly - Commission further found that no loss or injury was incurred and no compensation was awarded - Order Issued - Ms CP Houareau -v- Tiny Turtle Belmont Childcare Centre - APPL 312 of 2001 - WOOD,C - Community Services.....	1659
Application re unfair dismissal and contractual entitlements - Applicant argued that after she had been off sick for a number of weeks, she made an appointment to meet with the Respondent to discuss her return to work and the nature of her duties, and at the request of Respondent, she drew up an agenda of what was to be discussed at the meeting - Further, Applicant argued that she met with the Respondent and it was at that meeting that she was dismissed - Respondent argued that Applicant's duties had been taken over by other staff, that it would have had to create another job for her, that Applicant did not get along with other staff and that it was of the view that Applicant was unfit to come back to work - Commission reviewed authorities and found on a number of reasons that Applicant's dismissal was unfair, that reinstatement was impracticable and ordered that Applicant be paid compensation and denied contractual benefits - Granted in Part - Ms JM Kirkham -v- Dr K Alexander - APPL 1366 of 2000 - BEECH C - 15/06/01 - Health Services.....	1660
Application re unfair dismissal seeking reinstatement - Applicant argued that his dismissal by reason of redundancy was a sham, that Respondent made his position as the Director of Outreach Services redundant, then created and advertised another position of Manager, Outreach Services, and there were no differences of substance between the position in which he had been employed and the new position that was created - Respondent opposed the claim and argued that in 1998 the National Assembly proclaimed a major change which affected the Respondent, therefore, Respondent took the opportunity to also restructure internally - Further, in relation to Applicant's position, a number of functions in his job description/duty statement were no longer being performed, that it was appropriate to make the position redundant and after consulting interested persons, decided to create a new position - Commission found that the evidence showed that the redundancy of the position was indeed genuine, that Commission was not persuaded by Applicant's evidence that the restructure of the Trinity Parish, which provided the background to the redundancy of his position, the creation of the new position, and the decision of the Respondent to advertise that position, was a sham, therefore, his claim of unfair dismissal was not made out - Dismissed - Mr A Morrison -v- Uniting Church of Australia, Trinity Parish - APPL 2098 of 2000 - BEECH C - 10/07/01 - Community Services.....	1668
Application re unfair dismissal and contractual entitlements - Applicant argued that Respondent's conduct was misleading in the letter written and that as a matter of equity, Respondent should be estopped from recanting on the terms of the letter - Respondent argued that application was lodged in Commission out of time and that Commission, thus, had no jurisdiction - Commission found that application was made out of time and dismissed matter - Dismissed - Mr IB Percival -v- Claddah Properties Pty Ltd - APPL 1834 of 2000 - SCOTT C - Horticulture & Fruit Growing.....	1671
Application re unfair dismissal - Preliminary Issue re jurisdiction - Applicant argued that he was harshly, oppressively and unfairly dismissed - Respondent argued that applicant was dismissed by the Ministry of Education pursuant to the terms of the then Education Act 1928 and the application was one that can only be properly brought pursuant to the now repealed s23B of the Act - Further, that the Act in s23B, contained a specific power to deal with matters of this kind, which should be read as excluding the general jurisdiction and power of the Commission to inquire into and deal with industrial matters such as this, pursuant to s29(1)(b)(i) of the Act, in relation to an unfair dismissal - Commission reviewed authorities and relevant sections of the Act and was of the view that the legislature intended that claims of this kind be brought pursuant to the specific power contained in s23B of the Act and not the general unfair dismissal jurisdiction of the Commission as provided for in ss23A and 29(1)(b)(i) of the Act - Further, Commission concluded that this matter could not proceed by way of an application pursuant to s29(1)(b)(i) of the Act - Dismissed for want of jurisdiction - Mr BM Puls -v- The Honourable Minister for Education - APPL 1567,2088 of 2000;AG 99 of 2001 - KENNER C - 21/06/01 - Education.....	1673
Application re unfair dismissal and contractual entitlements - Applicant argued that on completion of his apprenticeship he was offered a permanent position of mechanic and accepted it - Respondent argued that Applicant was never offered or employed as a mechanic - Commission found that Applicant was never employed as a mechanic and application was without foundation - Dismissed for want of jurisdiction - Mr D Pestana -v- New Town Toyota - APPL 2005 of 2000 - BEECH C - 02/07/01 - Motor Vehicle Rtlg & Services.....	1673
Application re unfair dismissal - Applicant argued he was harshly, oppressively or unfair dismissed and sought compensation for loss and injury, and in addition or alternatively a reasonable period of notice and a redundancy payment as outstanding contractual entitlements - Further, Applicant argued that in the absence of re-employment or reinstatement being practical, he claimed that his loss and injury arising from the dismissal exhausts the statutory limit of compensation under the I.R. Act 1979 as amended - Respondent argued that Applicant's services were terminated in the circumstances of a genuine redundancy, the genesis of which was discussed with him and so too was the restructuring of the organisation, therefore, in the circumstances of the bona fide redundancy the dismissal was not harsh, oppressive or unfair - Further, Respondent argued that even if it was to be found to have been unfair, Applicant failed to mitigate his loss not seeking employment in the local market, and that any compensation for loss should be minimal on the basis that Applicant would have become redundant in any event within a very short period to time - Commission reviewed authorities and found that the termination was a summarily dismissal, that Respondent had not discharged the onus of establishing that the summary dismissal was justified, that in all circumstances the right to dismiss was exercised in a harsh and oppressive manner, therefore, compensation for loss equivalent to six months salary was awarded and all other claims dismissed - Ordered Accordingly - Mr MM Quartermaine -v- Anson Management Services Pty Ltd - APPL 1155 of 2000 - COLEMAN CC - 21/06/01 - Business Services.....	1675
Application re unfair dismissal - Applicant argued that he was dismissed unfairly because he was unhappy with the contract and the superannuation clause in the contract - Respondent argued that Commission did not have jurisdiction to deal with the application as Respondent did not employ Applicant during his period of engagement as Applicant was engaged as a sub-contractor - Further, Applicant's contract was terminated by operation of law in that the contract was subject to a condition which was not satisfied by Applicant - Commission found that it had no jurisdiction to deal with a contract that is not one of employment and found Applicant was not an employee of Respondent but had a contract to supply services to Respondent as an independent contractor - Dismissed for want of jurisdiction - Mr MS Simpkins -v- Mr GB Robson - APPL 2100 of 2000 - SMITH, C - 05/07/01 - Transport and Services.....	1679

## CUMULATIVE DIGEST—continued

	Page
TERMINATION—continued	
Application re unfair dismissal - Applicant argued that the foreman had dismissed him or he was constructively dismissed in that the foreman was aggressive, abusive and an attack that entitled Applicant to withdraw from contract - Respondent argued that Applicant was never dismissed and that he was employed on a casual basis - Further, Applicant's behaviour on the day in question was unacceptable as Applicant was upset and angry and behaved in an aggressive manner - Commission found that Applicant was not unfairly dismissed and that language used by Applicant should not be used in a way that was abusive of the employer or other such person and that Applicant was angry and his behaviour was unacceptable - Order Issued - Mr JT Wells -v- Carmelo Antonio Puglia t/as Tiltmasters Trailers - APPL 387 of 2001 - SMITH, C - 06/07/01 - Construction Trade Services .....	1681
Application re unfair dismissal - Applicant argued that he was harshly, oppressively or unfairly dismissed - Respondent argued that applicant had stored inappropriate and pornographic cartoons in his Lotus Notes mailbox and was in breach of the bank's policy - Commission concluded after having considered all of the evidence, that breach of the policy by applicant was in all circumstances trivial, that applicant was harshly dismissed and that reinstatement was not practicable as applicant had left Western Australia to seek work in the United Kingdom - Further, Commission ordered that respondent pay applicant the difference in salary between 14 November 2000 and 2 March 2001, and made a declaration that termination was harsh - Ordered Accordingly - Mr AV Wilmott -v- Bank of Western Australia Ltd - APPL 1888 of 2000 - SMITH, C - 13/06/01 - Consultancy .....	1684
Conference referred re unfair dismissal - Applicant Union argued that two members were unfairly dismissed from their employment and were seeking reinstatement without loss of earnings - Applicant Union argued that dismissal were unfair because both members were given approval to engage in an arrangement whereby they gave away cheese off-cuts and that the giving away of the cheese off-cuts did not constitute conversion or have any negative effect on Respondent in any event and that the investigation undertaken by Respondent was flawed and biased - Respondent argued that employees were dismissed because no approval was given to give Respondent's product away of substantial amount of cheese - Commission found that no approval was given and that there were deficiencies in the process of the decision making - Further, Commission found that one employee's situation was somewhat different and did not justify dismissal and Commission ordered that employee be reinstatement - Upheld in Part and Order Issued - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Mundella Foods Pty Ltd - CR 2 of 2001 - SCOTT C. - Dairy Product Manufacturing .....	1694
<sup>2</sup> Appeal against Decision of Commission (81WAIG1020) re unfair dismissal - Appellant argued on a number of grounds including that the Learned Commissioner erred in fact and in law in finding that the Appellant had not made out his case that there had been an abuse of the Respondent's right to terminate his employment on the grounds of poor performance - Full Bench observed that insofar as the appeal grounds challenged the exercise of discretion, that it had no warrant to interfere with the exercise of the discretion at first instance unless the Appellant established that the Commission at first instance erred in accordance with the well know principles laid down in "House v The King (1936) 55 CLR 499" - Further, regarding the questions raised on appeal, Full Bench reviewed various authorities and Acts and was of the opinion that there was no error of law or fact and no miscarriage of the exercise of discretion established, therefore dismissed the appeal - Dismissed - Mr IW Cannon -v- Linfox Transport (Australia) Pty Ltd - FBA 16 of 2001 - Full Bench - SHARKEY P/BEECH C/KENNER C - 07/08/01 - Other Transport.....	2419
Application re unfair dismissal - Applicant argued dismissal was harsh, oppressive and unfair - Respondent argued applicant was party to workplace agreement, that application was not an industrial matter and should be struck out for want of jurisdiction - Commission determined employee's status at time of making the unfair dismissal claim was not relevant and that it had no jurisdiction to hear the matter - Dismissed - Mr R Allen -v- St John Ambulance Australia - APPL 646 of 2001 - SCOTT C. - 18/07/01 - Community Services .....	2441
Application re unfair dismissal and contractual entitlements - Applicant sought six months compensation and \$11,700 in unpaid contractual benefits - Respondent argued applicant was not employed by Metropolis Concert Club - Commission found that no employment relationship existed between Applicant and named Respondent - Dismissed for want of jurisdiction - Mr DF Hill -v- Metropolis Concert Club - APPL 301 of 2001 - WOOD, C - 13/07/01 - Accommodatn, Cafes&Restaurants .....	2443
Application re unfair dismissal and contractual entitlements - Applicant argued that his dismissal was harsh, oppressive or unfair and sought outstanding benefits - Respondent argued that at the time of application there had been no dismissal and that remedy sought being 6 weeks notice and paid leave had been received by Applicant - Commission reviewed various authorities and concluded that a broad interpretation should be applied to the term "dismissed" and this period should include the period of notice therefore, Commission allowed the application on that basis - Further, Commission concluded that Applicant had been paid during the notice period in accordance with the workers compensation regime, that in the application before it the remedies were clear and had been met and that pursuant to s.27(1)(a)(ii) and (iv) of the Act, further proceedings were not necessary or desirable in the public interest - Dismissed - Mr CG Hywood -v- Subiaco Wine Room - APPL 1950 of 2000 - SCOTT C. - 31/07/01 - Accommodatn, Cafes&Restaurants.....	2443
Application re unfair dismissal - Applicant argued that he was unfairly dismissed and was not afforded a right of hearing or an opportunity to put his case and sought compensation for lost income - Respondent argued that Applicant was terminated on the basis of a breakdown of trust arising from a conversation concerning an alleged intention to steal company property - Commission found that Applicant was not summarily dismissed and that the discussion about the intention to steal company property led to a breakdown in trust between the employer and the employee sufficient to warrant dismissal - Dismissed - Mr S LaRose -v- Kiam Corporation Pty Ltd - APPL 1552 of 2000 - WOOD, C - 13/07/00 - Other Services.....	2446
Application re unfair dismissal and contractual entitlements - Applicant argued he was unfairly dismissed and denied contractual benefits and sought an extension of time - Respondent argued that Applicant's application was lodged out of time - Commission determined that application was lodged out of time and that it was without jurisdiction to extend the 28 day period and to deal with the claim for entitlements - Dismissed for want of jurisdiction - Mr MW MacGregor -v- Star Surf Shop Pty Ltd - APPL 934 of 2001 - BEECH C - 12/07/01 - Textile, Clothing, Footwear.....	2448
Application re unfair dismissal and contractual entitlements - Applicant argued that he was harshly, oppressively or unfairly dismissed from his employment having injured himself - Respondent argued that he told applicant that he did not have to quit but should seek medical attention and perform light duties - Commission found that there had been no dismissal of applicant and no unfair dismissal such as to enable or warrant intervention of the Commission - Further if there had been a dismissal, and an unfair one, applicant had not sought to mitigate his loss such as to warrant a claim for compensation - Dismissed - Mr J Stone -v- Mr Maurice Randrup - APPL 2136 of 2000 - SCOTT C. - 31/07/01 - Commercial Fishing.....	2449
Conference referred re unfair dismissal - Applicant Union argued that having regard to all the circumstances that arose, the punishment of dismissal did not "fit the crime" and sought that its member be reinstated - Respondent opposed the claim - Commission reviewed authorities and found, having regard to all the circumstances of the case, in the context of equity and good conscience, that the dismissal of the Union's member was harsh, oppressive and unfair - Further, Commission found that reinstatement was impracticable, that the Union's member should be compensated and directed the parties to confer as to quantum of compensation, within seven days, to an agreed sum which was incorporated in the final order - Upheld and Order Issued - The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- BHP HBI - CR 128 of 2000 - KENNER C - 15/06/01 - Metal Product Manufacturing .....	2460

## CUMULATIVE DIGEST—continued

## TERMINATION—continued

	Page
Conference referred re dismissal - Applicant Union argued that dismissal was unfair and sought reinstatement - Further, at the hearing, Applicant Union sought leave to amend the claim by seeking orders for compensation in lieu of reinstatement and the amendment was granted - Respondent argued that Applicant was made redundant due to diminution of work available - Commission found that Respondent had discharged the onus of establishing the fact of the redundancy - Further, Commission found that there was no casual link between the determination for redundancy and the Applicant's safety issue report and that Applicant was unable to prove that dismissal was unfair - Dismissed - PLUMBERS & GASFITTERS UNION -v- Jako Industries Pty Ltd - CR 303 of 2000 - GREGOR C - 20/07/01 - General Construction.....	2474
<sup>1</sup> Appeal against Decision of Full Bench (81WAIG990) re unfair dismissal and contractual entitlements - Appellant argued that the Full Bench erred in law in holding that Respondent (Applicant) was employed in an industry as defined in s.7 of the I.R. Act, 1979 and that the Commission thereby had jurisdiction to hear and determine the Respondent's (Applicant's) claim pursuant to s.29 of the Act - Appellant sought an order for the Full Bench Decision to be quashed - Industrial Appeal Court applied various legal principles and found that the factual circumstances alleged by the Appellant were not sustainable, that the evidence was to the contrary and that the Full Bench correctly found on the facts that there was a sufficient connection with Western Australia to found the jurisdiction of the Commission - Dismissed - Ray Douglas Parker -v- Mr MA Tranfield - IAC 2 of 2001 - Industrial Appeal Court - Kennedy J./Anderson J./Ipp J. - 07/08/01 - Business Services.....	2505
<sup>2</sup> Appeal against Decision of Commission (81WAIG1424) re unfair dismissal and orders pursuant to s.27 of the Act - Appellant argued that the Commission erred in law in that the order of the Commission to revoke an order of the Commission was beyond the Commission's jurisdiction and by finding that it had power to make the Revocation Order and exercising its discretion to make the Revocation Order, Commission erred in law and in fact - Respondent argued that there was no appealable error made by the Commission and no public interest raised by the appeal - Full Bench found there was no slip rule, the Commission was not correcting an error in substance or in form, and the order made at the first instance was made without jurisdiction or power - Upheld - Aussie Online Limited (ACN 004 160 927) -v- Mr J Lane - FBA 36 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/SCOTT C. - 10/08/01.....	2511
<sup>2</sup> Appeal against Decision of Commission (81WAIG1033) re unfair dismissal - Appellant's notice of appeal did not comply with regulations and although a notice of hearing was served there was no appearance by appellant at the hearing - Respondent sought orders that the appeal be dismissed for want of prosecution - Full Bench found no evidence of hardship by the appellant and the interests of the respondent outweighed those of the appellant as the liquidation of the company had been delayed by the appeal - Dismissed - Mr E Kapsanis -v- Goldspace Pty Ltd T/as Paraburdoo Inn - FBA 17 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/KENNER C - 27/08/01 - Accommodatn, Cafes&Restaurants.....	2515
<sup>2</sup> Appeal against Decision of Commission (81WAIG1238) re unfair dismissal - Appellant argued that the Learned Commission erred in law and in fact on various grounds including that it awarded excessive compensation to the Respondents - Further, Appellant sought an Order that the Decision of Commission in matters 1377 and 1378 of 2000 be quashed - Full Bench reviewed evidence and applying the principles in House v. The King (HC)(op cit) and Gromark Packaging v. FMWU (IAC)(op cit), found on a number of reasons that there was no error as alleged in the grounds of appeal, and no error in the exercise of the Commissioner's discretion - Dismissed - Kingscape Holdings Pty Ltd -v- GK Smith & Other - FBA 20 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/GREGOR C - 17/08/01 - Construction Trade Services.....	2517
<sup>2</sup> Appeal against Decision of Commission (81WAIG1271) re unfair dismissal - Appellant Union argued that the Commissioner erred in law by finding the dismissal justified as a summary dismissal and the Commissioner's discretion miscarried in regard to procedural fairness of the investigation - Full Bench found that procedural fairness was not fully afforded in the investigation of the workplace fight, that the breach of conduct did not justify a summary dismissal, that dismissal was harsh, oppressive and unfair and remitted the matter back to the Commission - Upheld - AUST MEAT INDUSTRY EMPL UNION -v- Geraldton Meat Exports Pty Ltd - FBA 26 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/SCOTT C. - 21/08/01 - Food, Beverage and Tobacco Mfg.....	2523
<sup>2</sup> Appeal against Decision of Commission (81WAIG1046) re dismissed application for unfair dismissal - Appellant argued Commissioner erred in law by dismissing the application as not being necessary or desirable in the public interest, and that particulars did not raise new issues - Respondent sought an order for the appellant to pay costs - Full Bench found the late filing of particulars was a clear occasion of prejudice, that the Commissioner was correct in dismissing the application and dismissed the application for costs - Dismissed - Mr M Pietracatella -v- W.A. Italian Club (Inc) - FBA 18 of 2001 - Full Bench - SHARKEY P/GREGOR C/WOOD, C - 13/08/01 - Accommodatn, Cafes&Restaurants.....	2532
<sup>2</sup> Appeal against Decision of Commission (81WAIG1651) re unfair dismissal - Appellant argued that the Learned Commissioner erred on various grounds relating to the findings of loss and compensation - Further, Appellant sought orders that the appeal be allowed and the decision at first instance be quashed and that compensation be assessed to the respondent (applicant), but limited to the sum equivalent to the wages entitlement for the "lost" period of service - Full Bench reviewed evidence and authorities and having considered all of the relevant material and submissions found that no grounds of appeal was made out and that the exercise of discretion at first instance (see House v The King (HC)(op cit)), was not in error or established to be in error - Dismissed - Q-Vis Ltd -v- Mr SD Gordon - FBA 37 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/GREGOR C - 05/09/01 - Health Services.....	2537
<sup>2</sup> Appeal against Decision of Commission (80WAIG5658) re unfair dismissal and contractual entitlements - Appellant argued that Commission had mistaken the facts, allowed extraneous or irrelevant matters to guide it, had reached a result that was, on the facts, unreasonable or plainly unjust, had not taken into account some material consideration and had acted upon a wrong principle - Full Bench reviewed evidence and principles laid down in House v. The King (HC)(op cit) and found that the Commissioner at first instance miscarried its exercise of discretion and based on that findings, Full Bench found and declared that the Appellant was harshly, oppressively and unfairly dismissed - Further, Full Bench reviewed other principles and cases and granted the application to extend time within which to institute the appeal as it found that by granting an extension of time, no injustice would be occasioned to the Respondent - Upheld, Order at first instance suspended and matter remitted back to the Commission - Ms EJ Roast -v- Forx Pty Ltd (ACN 008 972 076) - FBA 54 of 2000 - Full Bench - SHARKEY P/COLEMAN CC/SCOTT C. - 14/08/01 - Property and Business Services.....	2541
Complaint re breach of award and the Minimum Conditions of Employment Act 1993 - Complainant argued that defendant terminated his employment without notice or pay in lieu of notice, failed to pay him overtime rates of pay, annual leave entitlements and wages - Further, Complainant sought to recover the sum of \$6016.71 and interest thereon pursuant to s.32 of the Supreme Court Act 1935, the imposition of a penalty with respect to each breach of the award and costs - Defendant argued that Complainant had abandoned his employment and lodged a counter claim for damages - Industrial Magistrate reviewed authorities and found on evidence that Complainant had been dismissed for misconduct and by his own actions disentitled himself to annual leave payments accrued during his employment and further, he had failed to prove that the award binds the employer - IM further found that he did not have jurisdiction and power to deal with Defendants counter claim for common law damages - Mr JS Strange -v- Moonstar Nominees Pty Ltd - CP 324 of 2000 - Industrial Magistrate - Cicchini IM - 16/08/01 - Accommodatn, Cafes&Restaurants.....	2568
Applications re unfair dismissal seeking Orders for further discovery of documents and adjournment - Commission having reviewed the Applicant's submissions ordered that application be dismissed on the basis that no sufficient ground had been made out that the orders sought ought to be issued - Dismissed - Mr GM Cann -v- Blackburne Properties Limited - APPL 936,937 of 2000 - GREGOR C - 31/08/01 - Property and Business Services.....	2572

## CUMULATIVE DIGEST—continued

	Page
TERMINATION—continued	
Application re unfair dismissal and contractual entitlements - Applicant argued that he was unfairly dismissed, but withdrew his claim for denied contractual entitlements as this aspect of the claim had been settled - Commission reviewed authorities and having considered the evidence submitted by the respondent found that the applicant had been unfairly dismissed due to the failure to pay him a redundancy payment - Further, Commission ordered that the respondent shall pay the applicant the sum of \$2,063.00 as a redundancy payment - Ordered Accordingly - Mr JL Cabrera -v- Classic Fashion Accessories - APPL 571 of 2000; APPL 393 of 2001 - WOOD,C - 17/08/01 - Other Services .....	2574
Application re contractual entitlements - Applicant's agent argued that respondent had failed to meet obligations under the contract of employment - There was no appearance on behalf of the respondent - Commission was satisfied that applicant was employed by respondent and found that applicant had not been allowed benefits to which she was entitled under her contract of employment - Granted - Ms MAC Dignam -v- iNature Australia Pty Ltd - APPL 900 of 2001 - BEECH C - 10/08/01 .....	2578
Application re unfair dismissal - Applicant argued that he had been harshly, oppressively and unfairly dismissed and sought reinstatement to a clerical position within the distribution centre of the Respondent - Further, applicant sought the remedy of payment of a contractual benefits in the form of a redundancy payment if Commission found that reinstatement was impracticable - Respondent denied the claim and any obligation to provide him with a clerical position - Commission, having reviewed authorities, s.84AA of the Workers' Compensation and Rehabilitation Act 1981 and the evidence presented, concluded that applicant had not been harshly, oppressively or unfairly dismissed, that there had not been any procedural flaw in the process adopted in bringing about the termination of employment and that in all circumstances the application ought to be dismissed - Dismissed - Mr KR Gentry -v- Coles Myer Logistics Pty Ltd - APPL 1300 of 2000 - SCOTT C - 16/08/01 - Personal & Household Good W/sg .....	2580
Application re unfair dismissal - Applicant argued that she was unfairly dismissed - Counsel for respondent raised a preliminary issue of jurisdiction on the basis that the applicant had resigned from her position - Commission reviewed authorities and having found that it had jurisdiction, concluded that the dismissal was in all circumstances not harsh, oppressive and unfair - Further, Commission was not persuaded that applicant had been denied procedural fairness - Dismissed - Ms JA Harding -v- Phoenix Pharmacy - APPL 363 of 2001 - KENNER C - 05/09/01 - Personal & Household Good Rtlg .....	2584
Application re unfair dismissal - Applicant argued that she had been unfairly dismissed - Respondent denied applicant's allegations and argued that her employment had been on a casual basis - Commission reviewed authorities and concluded that applicant had been employed on a casual basis for the flowering season and the cataloguing task and that in all sense her employment came to a natural conclusion, therefore there was no unfairness in the termination - Dismissed - Mrs C Jamieson -v- Kevin Butler EZI-GRO Orchids - APPL 117 of 2001 - WOOD,C - 15/08/01 - Agriculture .....	2586
Application re unfair dismissal - Applicant argued that he had been dismissed unfairly - Respondent denied that the applicant was an employee - Commission reviewed authorities and on the basis of the evidence presented found that the applicant was not an employee for the purposes of the Industrial Relations Act 1979, and on that basis the applicant's claim was not valid, nor does the Commission have jurisdiction to deal with the matter - Dismissed for want of jurisdiction - Mr FA Lockley -v- Beurteaux (Australia) Pty Ltd - APPL 1114 of 2000 - BEECH C - 08/08/01 - Other Manufacturing .....	2589
Application re unfair dismissal and contractual entitlements - Application for adjournment by Respondent - Commission, having considered the submissions from the parties concluded that in the absence of any details regarding the precise issue upon which the request for an adjournment was made the request should not be granted - Dismissed - Ms JA Morrison -v- Suzanne Grae Corporation Pty Ltd - APPL 467 of 2001 - BEECH C - 11/09/01 - Personal & Household Good Rtlg .....	2593
Application re unfair dismissal and contractual entitlements - Applicant argued that he had unfairly dismissed and had not been paid his entitlements pursuant to the award regarding notice, annual leave or public holidays and superannuation - There was no appearance on behalf of the Respondent - Commission reviewed authorities and found that the applicant's claims were award benefits, that it cannot exercise a power under s.29 to give relief because the power for enforcement resides solely with the Industrial Magistrate pursuant to s.83 of the Act - Commission further found that applicant was unfairly dismissed, that reinstatement was unavailing and awarded compensation, and dismissed for want of jurisdiction the claims for benefits as set out in the application - Ordered Accordingly - Mr PR Moritz -v- Home Again Enterprises Pty Ltd - APPL 458 of 2001 - GREGOR C - 09/08/01 - Accommodatn, Cafes&Restaurants .....	2594
Application re unfair dismissal and contractual entitlements - Applicant argued that her dismissal was harsh, oppressive and unfair - Additionally the applicant also claimed severance pay which was not pressed when the matter was heard before the Commission - Respondent opposed the applicant's claim in it's entirety - Commission reviewed authorities and found that applicant had been unfairly dismissed, that reinstatement was impracticable and ordered compensation in the sum equivalent to the loss of 6 months remuneration - Upheld and Order Issued - Mrs M Muggerridge -v- Penrhos College (Inc) - APPL 1502 of 2000 - KENNER C - 31/08/01 - Education .....	2596
Application re unfair dismissal and contractual entitlements - Applicant argued she had been unfairly dismissed and sought denied contractual entitlements - Respondent argued that Applicant was demoted until she was ultimately dismissed, that the demotion related in part to Applicant's own action, as there were conflict of hours between Applicant's two jobs, that her performance in regard to communication was poor and that she attended work for another employer whilst she was on sick leave - Commission found on evidence that Applicant engineered her hours of work to her own advantage against the expressed concerns and directions of her employer, that it was on this basis alone, leaving aside the other history of conflicts at the workplace and the concerns about communication with clients, that the dismissal was fair (Undercliffe Nursing Home -v- FMWU) - Further, Commission was not convinced that there was an absence of procedural fairness arising from the management committee's decision - Dismissed - Mrs A Niblett -v- Koolkuna Eastern Region Domestic Violence Services Network - APPL 2072 of 2000 - WOOD,C - 30/08/01 - Personal Services .....	2601
Application re unfair dismissal and contractual entitlements - Applicant argued she had been the subject of a harsh, oppressive and unfair dismissal and was entitled to outstanding contractual entitlements - Commission reviewed authorities and found on the evidence that there was no dismissal and the jurisdiction under s.29 therefore does not arise - Further, Commission concluded that Applicant was not tripped or pushed, that there was no deliberate and dominant purpose of coercing her to resign, that she terminated her own contract because what the Respondent was offering her eventually did not meet her financial requirements, therefore, she decided to end the relationship by resignation - Dismissed - Ms R Powell -v- Ronin Security Pty Ltd - APPL 1844 of 2000 - GREGOR C - 07/09/01 - Personal and Other Services .....	2605
Application re unfair dismissal - Applicant argued that the three positive alcohol readings which he received were not valid - Commission reviewed authorities and having considered the evidence submitted by witnesses for the respondent, did not find the applicant's dismissal to be unfair - Dismissed - Mr G McDonald -v- Brierty Contractors - APPL 571 of 2001 - SMITH, C - 17/08/01 - Construction Trade Services .....	2612
Application re unfair dismissal - Commission summarised that fundamentally two issues needed to be determined - The first related to the nature of the applicant's employment and secondly if there was a dismissal was that dismissal unfair - Having determined the nature of the of employment based on evidence presented, Commission concluded that the applicant had not been dismissed as such and dismissed the claim for want of jurisdiction - Dismissed for want of jurisdiction - Mr CA Smith -v- TAB Transport Pty Ltd - APPL 558 of 2001 - BEECH C - 04/09/01 - Road Transport .....	2617

## CUMULATIVE DIGEST—continued

## TERMINATION—continued

	Page
Application re unfair dismissal and contractual entitlements - Applicant argued his dismissal was unfair and sought bonus payments, reimbursement of travelling expenses and outstanding benefits due to him under his contract of employment - Respondent opposed the claim - Commission reviewed evidence and authorities and found that Applicant's dismissal was unfair because Applicant's action in the circumstances of his employment overall was not so seriously in breach of the contract as to justify dismissal - Further, Commission was not persuaded that Applicant had shown that his employment was a long term proposition such that he had suffered loss of job security for which compensation should now be ordered - Claim for contractual entitlements dismissed, order for costs not awarded and claims relating to reimbursement of travel expenses adjourned - Granted in Part - Mr GG Wells -v- Mr John Reyburn trading as Nicholson Clement Solicitors - APPL 226 of 2001 - BEECH C - 27/08/01 - Other Services .....	2618
Application re unfair dismissal - Applicant argued he had been unfairly dismissed, that the relationship between the parties was not capable of being restored, therefore he sought compensation - Respondent denied that Applicant had been unfairly dismissed on the contrary Respondent argued that Applicant was the architect of his own misfortune in that he abandoned his contract of employment - Commission found on evidence that Applicant had been unfairly dismissed, that reinstatement was impracticable and having reviewed authorities concluded that Applicant had sought to mitigate his loss as best as he could and ordered that Applicant be paid by Respondent the sum of six months remuneration as compensation - Granted - Mr M Wiseman -v- Hills Industries Limited - APPL 65 of 2001 - GREGOR C - 21/08/01 - Personal Services .....	2622
Application re unfair dismissal - Applicant argued that he was constructively dismissed from his position as Health Worker - Respondent argued that applicant had resigned from his position and not dismissed as claimed - Commission found that the matter had suffered considerable delay for varying reasons and given the circumstances would refrain from further hearing the application in the Public Interest - Further, Commission thought it would be unreasonable in the circumstances to make the employer await an indefinite time for the matter to be determined with the prospect live at all times that the applicant might achieve reinstatement as claimed - Dismissed - Mr PH Woods -v- East Kimberley Aboriginal Medical Service - APPL 1290 of 2000 - WOOD,C - 28/08/01 - Health Services .....	2627
Conference referred re unfair dismissal - Applicant Union argued that the dismissal of its member was unfair and sought compensation - Respondent opposed the applicant's claim and said that in all the circumstances his dismissal was not unfair - Commission reviewed authorities and found on evidence presented that the dismissal of the applicant's member was indeed harsh, oppressive and unfair and directed the parties to confer as to an appropriate order for compensation for loss - Further, Commission was satisfied that applicant's member took all reasonable steps to mitigate his loss - Subsequently the parties advised the Commission that they have agreed on an amount of compensation to be reflected in the Commission's decision - Upheld - The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- Henry Walker Eltin - CR 282 of 2000 - KENNER C - 20/08/01 .....	2637
Conference referred re alleged harsh, unfair and unlawful dismissal - Applicant Union argued that the manner in which its member was terminated was harsh, unfair and unlawful and sought an interim order for reinstatement - Respondent opposed the claim - Commission reviewed authorities and relevant sections of the Act and found that it had power to issue the interim order sought - Commission found that Applicant's member was aware of her terms and conditions of employment at the time of making the statements and that the timing of the meeting with her employer before completion of her shift was not oppressive or unfair or engineered in anyway to disadvantage her - Further, pursuant to s.26 of the Act and having regard to "equity, good conscience and the substantial merits of the case", Commission found on balance that the dismissal of the Applicant's member was harsh and issued an order for reinstatement - Granted - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Burswood Resort (Management) Limited - CR 153 of 2001 - WOOD,C - 04/09/01 - Sport and Recreation .....	2639
Application re unfair dismissal seeking Interlocutory Orders for production of documents - Commission having considered the application, the objection and the submission in reply to the objection, granted the Orders sought - Granted in Part - Ms ND Walsh -v- Peter John & Madeleine Marie Cochrane t/as "Ray White (Maddington)" - APPL 2055 of 2000 - BEECH C - 24/08/01 - Property Services .....	2651
<sup>2</sup> Appeal against Decision of Commission (81WAIG1050) re shares and option in an unfair dismissal and contractual entitlements claim - Appellant argued that the Commission erred in holding that the claim was an industrial matter and that it had jurisdiction to hear a claim for an order for a sum of money equal to the value of shares or options - Full Bench reviewed authorities and found that the claim was for a benefit and not compensation, and an industrial matter within its jurisdiction - Dismissed - HotCopper Australia Ltd -v- Mr D Saab - FBA 15 of 2001 - Full Bench - SHARKEY P/SMITH, C/WOOD,C - 21/09/01 - Technology .....	2704
<sup>2</sup> Appeal against Decision of Commission (81WAIG1449) re unfair dismissal claim - Appellant argued that the Commission erred in determining the amount of compensation to be paid to the appellant and that the Commission ought to have awarded the equivalent of 6 months' remuneration, plus any associated employer superannuation contribution due, less any amount earned in the interim, being the maximum capable of being awarded within the Commission's jurisdiction - Full Bench found on evidence that the Commissioner erred only by reducing the amount claimed - Further, Full Bench were not satisfied that an allowance should be made for superannuation in this case, as it was not claimed at first instance - Upheld and decision at first instance varied - Mrs JM Temby -v- Albany and Districts Skills Training Committee Incorporated - FBA 39 of 2001 - Full Bench - SHARKEY P/SMITH, C/WOOD,C - 02/10/01 - Business Services .....	2719
<sup>4</sup> Application for stay of operation of Decision (81 WAIG 1660) pending appeal to Full Bench - Applicant was required to establish that the balance of convenience favoured the applicant and that there was a serious issue to be tried, namely, that should the applicant's appeal succeed the result would be nugatory by its ability to recover monies paid to the Respondent - President found that there was no serious issue to be tried and that the balance of convenience was held by the Respondent, and that there was no basis to find that the appeal would be rendered nugatory - Dismissed - Dr K Alexander -v- Ms JM Kirkham - PRES 13 of 2001 - President - SHARKEY P - 21/09/01 - Health Services .....	2724
Complaint re breach of Workplace Agreement Act 1993 - Complainant argued he was a full time employee and his termination was unfair, harsh or oppressive contrary to the provisions of s.18 of the WAA Act, 1993 - Defendant refuted the allegation that there had been an unfair dismissal - Industrial Magistrate found on the evidence presented that Complainant was a casual employee, that after his operation, his employment status was left in the air and that had he, when he was ready to go back to work, did as he had done in the past, gone along to see the Defendant, it may well be that he would still be employed on a similar basis, therefore there was no dismissal - Dismissed - Mr RW McLeod -v- BRL Hardy Limited - CP 315 of 2000 - Industrial Magistrate - Tarr IM .....	2765
Application re unfair dismissal seeking costs - Applicant disagreed with the amount claimed - Parties sought the assistance of the Commission to decide the matter on the basis of the written material provided - Commission found that Applicant's response to the issue of costs was not reasonable, that the costs properly incurred by Respondent which were wasted due to Applicant's non-attendance exceed the minimum \$200.00 which Respondent was prepared to accept and ordered that Applicant pay \$200.00 by way of costs to Respondent within 7 days of the date of the Order - Order Issued - Mr DA Amoroso -v- Bellvale Nominees Pty Ltd - APPL 7 of 2001 - BEECH C - 13/09/01 - Services to Transport .....	2767

## CUMULATIVE DIGEST—continued

	Page
TERMINATION—continued	
Application re unfair dismissal and contractual entitlements - Applicant argued that he was harshly, oppressively and unfairly dismissed and denied benefits under his contract of employment - Respondent agreed that the applicant was unfairly dismissed and the only substantial issue in dispute is the quantum of compensation the Commission should order - Commission reviewed authorities and concluded that the applicant had been unfairly dismissed, that reinstatement was impracticable and ordered the respondent to pay the applicant compensation within 10 days of the date of the order - Order Issued - Mr J Barrett -v- 6PR Southern Cross Radio Pty Limited - APPL 190 of 2001 - SMITH, C - 14/09/01 - Printg, Publishg & Redd Media.....	2768
Application re unfair dismissal and contractual entitlements - Applicant argued that she had been harshly, oppressively and unfairly dismissed - Applicant further indicated that she no longer sought reinstatement but compensation - Respondent argued that applicant terminated her employment as opposed to being dismissed - Commission found on the evidence presented that applicant had walked out of her employment then claimed that she had been dismissed, yet nothing said or done on behalf of the respondent brought the employment to an end - Dismissed - Mrs JA Christian -v- Emerald Colonial Lodge - APPL 208 of 2001 - SCOTT C. - 17/09/01 - Business Services.....	2772
Application re unfair dismissal - Applicant argued he had been unfairly dismissed - Respondent requested that Commission refrain from dealing with the application until the outcome of its claim against Applicant in the Local Court - Commission raised Respondent's request with Applicant's Solicitor who after consultation with Applicant, advised Commission that Applicant had agreed to an adjournment until he returned from overseas on 19/7/2001 - After several attempts to communicate to Applicant and its Solicitor after the 19/7/2001, Commission listed the application for Mention Only - There was no appearance on behalf of Applicant at the hearing - Commission was satisfied that it had taken appropriate steps to request advice from Applicant and there was no obligation upon it to do more (McConkey v M&A's of Denmark (2001) 81WAIG1561), struck out the application for want of jurisdiction - Order Issued jurisdiction - Mr AA Cheesman -v- Jamco Nominees Pty Ltd - APPL 628 of 2001 - BEECH C - 04/10/01 - Other Services.....	2772
Application re unfair dismissal and contractual entitlement - Counsel for applicant argued that the dismissal was harsh, oppressive or unfair and arising from that compensation for loss and injury should be awarded to the statutory limit - Counsel further argued that the applicant claimed an outstanding contractual entitlement to bring payment in lieu of notice up to one month's salary - Respondent objected to and opposed these claims - Commission reviewed authorities and found that on the balance of probabilities applicant would have remained in employment for an extended period save for the unfair dismissal - Further, Commission found that reinstatement was impracticable and ordered that applicant be paid compensation - Upheld and claim for contractual entitlements dismissed - Mr JW Hartwig -v- W A Bluemetal - APPL 1930 of 2000 - COLEMAN CC - 06/09/01 - Other Mining.....	2776
Application re unfair dismissal - Applicant argued that he was harshly, oppressively or unfairly dismissed, however, wished his application to be held in abeyance until criminal proceedings relating to circumstances of the termination were dealt with by the District Court - Respondent argued that the matter should proceed to hearing and that there would be detriment to the respondent should it be required to await the outcome of the District Court proceedings - Commission having considered the parties' submission, applied principles and found that while these are matters of difficulty and inconvenience for the respondent, they do not outweigh the harm which could potentially be done to the applicant in respect of criminal proceedings against him should he be required to proceed with this matter at this point, therefore a stay of proceedings was order until the resolution of the criminal proceedings - Granted - Mr WI Jones -v- Paulownia Saw Milling, Timber Supplies and Manufacturing Pty Ltd (ACN 081 463 452) - APPL 37 of 2001 - SCOTT C. - 12/06/01 - Other Manufacturing.....	2782
Applications re unfair dismissal and contractual entitlements - Applicant argued his contract of employment, signed by the parties was for a three years fixed term and that he was summarily dismissed whilst on annual leave - Applicant sought payment of the balance of the fixed term contract by way of denied contractual benefits inclusive of salary, superannuation, motor vehicle, mobile phone and six months compensation for loss of earnings and injury - Respondent argued on a number of grounds and denied that the dismissal was unfair but says it was imposed by lack of operating funds and failure to fulfil the planting program - Commission found based on the evidence presented that in all circumstances, Applicant's dismissal whilst on annual leave was unfair and amounted to a summary dismissal - Commission further found that Applicant's contract was fixed for a three years duration, that reinstatement was impracticable, that Applicant had not sought to properly mitigate his loss and awarded compensation and discontinued the claim for contractual entitlements - Ordered Accordingly - Mr GR Shuttleworth -v- Silviculture Management Pty Ltd - APPL 169,170 of 2001 - WOOD,C - 21/09/01.....	2784
Application re unfair dismissal - Preliminary issues re jurisdiction and whether employment relationship existed - Applicant Agent argued that although Applicant was initially appointed to the position of part time cleaner, she was subsequently promoted to the position of supervisor by Respondent - Respondent argued that Applicant was an independent contractor - Commission found based on the evidence presented that in all circumstances of the relationship, the work practices followed by Applicant were those imposed by Respondent - Further, Commission was satisfied that the totality of the relationship was one of a contract of service between Applicant and Respondent, therefore, Commission had jurisdiction to consider the substantive claim - Reasons for Decision Issued - Ms JK Spencer -v- Ausclean - Natalio Sica - APPL 931 of 2001 - COLEMAN CC - 05/10/01 - Business Services.....	2788
Application re unfair dismissal and contractual entitlements - Applicant argued that she was unfairly dismissed and also sought entitlements of a fuel allowance - There was no appearance on behalf of the respondent - Commission found that the applicant had been harshly, oppressively and unfairly dismissed from her employment, that reinstatement was impracticable and awarded compensation - Upheld and Order Issued - Ms A Wellington -v- Bucks Cleaning & Property Services - APPL 2157 of 2000 - KENNER C - 10/09/01 - Personal and Other Services.....	2790
Application re unfair dismissal and contractual entitlements - Applicant argued that he had been unfairly dismissed - There was no appearance on behalf of the respondent - Commission reviewed authorities and based on the evidence presented concluded that the applicant had been unfairly dismissed and awarded compensation accordingly - Order Issued - Mr HJA VanTobruk II -v- Burymore Pty Ltd (ABN/ACN 720 855 490 060) - APPL 483 of 2001 - WOOD,C - 03/09/01 - Accommodatn, Cafes&Restaurants.....	2790
Conference referred re termination of an employee - Applicant argued that there was an argument between him and the Respondent over work issues and his back problem at which time he was dismissed - Respondent argued that Applicant was abusive and showed no respect for him in front of other employees - Commission found based on the evidence presented, that there was a heated argument between the parties and that the language Applicant used towards his employer was wrong, but in a context where the employer had not set a standard in the workplace, that incident did not warrant Applicant's dismissal, therefore, Commission ordered that Respondent pay the Applicant a sum of money equivalent to the wages he would have earned for that period of time as compensation for the dismissal - Granted - The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- Proscap - CR 265 of 2000 - BEECH C - 03/10/01 - Construction Trade Services.....	2795

## CUMULATIVE DIGEST—continued

Page

## TERMINATION—continued

- <sup>2</sup>Appeal against Decision of Commission (81WAIG1198) re unfair dismissal and contractual entitlements - Three appeals were heard together by direction of Full Bench - Appellant (Applicant) argued that the learned Commissioner erred in finding that there were two claims, erred by failing to apply identified tests and making a finding of length of service to which entitlement of implied term of reasonable notice in contract was, erred in finding the factors for determining what constituted reasonable notice and entitlement to reasonable severance pay - Further Appellant (Applicant) argued that learned Commissioner erred in finding whether Appellant should have been retained in preference to another employee and erred in lieu of notice - Appellant (Respondent) argued that learned Commissioner erred in deciding that the terms of Individual Employment Agreement did not govern Applicant's employment and erred in not identifying all the terms of Applicant's contract of employment - erred in not deciding that Respondent's policy in relocation had been replaced or modified, and that Applicant was entitled to be relocated or returned to Melbourne, erred in deciding that it was unfair for Respondent not to have given Applicant a further eight weeks pay of severance when Commissioner had decided that Applicant had no contractual entitlement to a severance payment at all and that Applicant had lost a fair redundancy payment when there was no entitlement to any redundancy payment and had erred in deciding that Respondent had breached an implied term of Minimum Condition of Employment Act 1993 - Full Bench found that decision was a discretionary decision and for appeals to succeed Appellant must establish that Commission at first instance erred in the exercise of discretion - Full Bench made a number of observations and conclusions and determined that appeal by Respondent was not made out as there was no miscarriage of discretion and dismissed - Full Bench found that Appeal by Applicant should be upheld as Commissioner's discretion had been miscarried having regards to the principles laid down and that the other appeal by Applicant should also be upheld in part in relation to the quantum of severance pay - Orders Issued - Dismissed and Upheld in part - AWI Administration Services Pty Ltd -v- Mr A Birnie - FBA 22,23,24 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/SMITH, C - 26/10/01 - Other Mining ..... 2849
- <sup>2</sup>Appeals against Decision of Commission (81 WAIG 895) - Appellant argued that the Learned Commissioner erred in law by failing to make sufficient findings of fact regarding allegations of dishonesty and impropriety - Cross appeal by the Respondent argued that the Learned Commissioner erred in law and fact by finding the dismissal although unlawful was not harsh, oppressive or unfair - Full Bench found the summary dismissal although not lawful was not unfair and the cross appeal was not made out - Full bench found there was insufficient evidence to establish the claim that the Respondent owed the Appellant money and the appeal was not made out - Dismissed - BGC (Australia) Pty Ltd -v- Mr I Phippard - FBA 7,12 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/WOOD,C - 22/10/01 - General Construction ..... 2865
- Application re unfair dismissal and contractual entitlements - Applicant argued that the dismissal was harsh, oppressive and unfair and sought annual leave entitlements - Respondent argued that the Applicant was dismissed by reason of a bona fide redundancy due to the installation of synthetic greens and the bowling club's financial situation - Industrial Magistrate found the redundancy was genuine and the Respondent had displayed procedural and substantive fairness, and the Applicant was not entitled to annual leave loading - Dismissed - Mr P Smith -v- Rockingham Bowling Club Inc - M 42 of 2001 - Industrial Magistrate - Cicchini IM - 25/10/01 - Sport and Recreation ..... 2894
- Application re unfair dismissal - There was no appearance on behalf of the applicant - Respondent argued that the applicant did not appear serious in progressing the matter and requested that the matter be dismissed - Commission found that the applicant had not taken an active interest in matters brought to the Commission and dismissed the matter accordingly - Mr MJ Clark -v- Industrial Galvanizers WA - APPL 802 of 2001 - BEECH C - 16/10/01 - Other Services ..... 2898
- Application re unfair dismissal - Applicant argued dismissal was harsh, oppressive and unfair and denied that his position was made redundant because it was replaced by another person as there were incomplete tasks under the job description - Applicant further argued that salary increases were unfairly withheld as proper procedure was not followed and claimed denied contractual benefits - Respondent argued that although there were some issues it believed that Applicant had been treated fairly and the reason for termination was the economic slow down and that it could not carry a person whose position did not need to be performed - Commission considered all of the evidence and submissions and found that the redundancy of the position was indeed genuine and the loss suffered by the Applicant was the delay in receiving the redundancy pay and ordered that interest on the amount to be paid - Dismissed - Mr S Crockett -v- Hire Intelligence Pty Ltd - APPL 1441 of 2000 - SCOTT C. - 19/09/01 - Business Services ..... 2899
- Application re unfair dismissal and contractual entitlements - Applicant argued that he was unfairly dismissed - Respondent opposed the claim and argued that he had given the applicant the maximum notice possible - Commission reviewed authorities and concluded that the applicant was unfairly dismissed and awarded compensation accordingly - Further the claim for outstanding contractual entitlements was dismissed - Mr PJ Johnston -v- Tyre Power Esperance - APPL 895 of 2001 - WOOD, C - 16/10/01 - Other Services ..... 2909
- Application re unfair dismissal - Preliminary issue re jurisdiction - Applicant argued he had been dismissed following the suspension of her apprenticeship agreement - Commission reviewed authorities and dealt with the issue of jurisdiction on the basis of written submissions from the parties and concluded that the apprenticeship had been suspended in accordance with the Industrial Training Act 1975 and under those circumstances cannot give rise to an industrial matter for the purposes of the Commission's jurisdiction - Accordingly the matter was dismissed for want of jurisdiction - Ms SM Leopold -v- Alessia Beccegato t/a Salon Express - APPL 1124 of 2001 - BEECH C - 19/10/01 - Other Services ..... 2911
- Application re unfair dismissal - Applicant argued that he had been unfairly dismissed - Respondent argued that the applicant had breached company policy and was dismissed accordingly - Commission reviewed authorities and based on the evidence presented concluded that the decision to dismiss the applicant summarily was not unfair and dismissed the matter accordingly - Mr D Main -v- BBC Hardware Limited - APPL 2003 of 2000 - GREGOR C - 26/10/01 - Personal & Household Good Rtlg ..... 2913
- Application re unfair dismissal and contractual entitlements - Applicant argued that dismissal was unfair as his position's classification was reduced without notice and the Respondent's conduct amounted to political and religious discrimination - Matter was heard in the absence of the Respondent who received a transcript of proceedings and was given time to provide a written submission - Respondent argued the Applicant was never employed to sell carpets and took leave with no authority and in doing so abandoned his job - Commission found the Applicant's dismissal was harsh, unfair and oppressive, and awarded compensation for injury - Granted - Mr MH Manteghi -v- Peter Faeghi Group Pty Ltd (ACN 068 434 168) t/a Persian Carpet Gallery - APPL 107,448 of 2001 - GREGOR C - 11/10/01 - Personal & Household Good Rtlg ..... 2918
- Application re contractual entitlements - Applicant argued that the respondent failed to pay her contractual entitlements - There was no appearance or argument on behalf of the respondent - Commission considered the evidence presented and concluded that the respondent denied the applicant a benefit under her contract of employment in respect of three months salary and issued an order accordingly - Ms SL McKeating -v- Bernadette Bertogna, Aldo Bert - APPL 508 of 2001 - KENNER C - 22/10/01 - Health Services ..... 2923
- Application re unfair dismissal and seeking reinstatement - Applicant argued that dismissal was harsh, oppressive and unfair - Respondent argued that the Applicant was terminated summarily for misconduct and breaches of the code of conduct - Commission found the Applicant was unfairly dismissed - Applicant seeks reinstatement only but the viability of reinstatement as a remedy is unclear and is to be listed for further submissions - Mr DL Moylan -v- Chairman of Commissioners City of South Perth Council - APPL 622 of 2001 - GREGOR C - 19/10/01 - Government Administration ..... 2925

## CUMULATIVE DIGEST—continued

	Page
TERMINATION—continued	
Application re unfair dismissal and contractual entitlements - Applicant argued that he had been harshly, oppressively and unfairly dismissed from his employment and claimed a number of contractual entitlements had been denied - Respondent denied the applicant was harshly, oppressively or unfairly dismissed and claimed the applicants conduct justified summary dismissal for misconduct - Respondent further denied the amount claimed as contractual entitlements - Commission reviewed authorities and found the applicant was not harshly, oppressively or unfairly dismissed from his employment and concluded there were no outstanding contractual entitlements owed to the applicant and dismissed the application accordingly - Mr D Petkovic -v- Kroko Nominees P/L - APPL 1692 of 2000 - SCOTT C. - 23/10/01 - Other Services.....	2929
Application re unfair dismissal - Applicant argued dismissal was unfair and the only reason given to him was that his style of management was not nasty enough - Respondent argued that Applicant was dismissed by reason of redundancy - Commission found that Respondent failed to have discussions with Applicant after the decision was made to make his position redundant and Applicant was given an incorrect reason for his dismissal - Commission further found that Applicant was not even paid the proper termination payments to which he was entitled to and Respondent abused its right to dismiss Applicant oppressively - Awarded compensation as reinstatement was not impracticable - Granted - Mr M Stark -v- C.O.C. Pty Ltd - APPL 893 of 2001 - BEECH C - 17/10/01 - Construction Trade Services .....	2934
Application re unfair dismissal and contractual entitlements - Applicant argued that his dismissal was unfair and sought outstanding contractual entitlements - Respondent opposed the claim - Commission found that the applicant was not unfairly dismissed and that all contractual entitlements claimed by the applicant had been paid and dismissed the application accordingly - Mr KB Tyrrell -v- Mungerabar Holdings - APPL 102 of 2001 - BEECH C - 22/10/01 - Services to Mining .....	2936
Appeal to Public Service Appeal Board re Decision to terminate employment - Appellant argued that that the dismissal should attract the provisions of Public Sector Management Act 1994 relating to substandard performance and to prevail over Workplace Agreements Act and thus, Public Service Appeal Board had jurisdiction to hear and determine matter - Respondent argued that PSAB did not have jurisdiction because Workplace Agreements Act resolved an inconsistency that arose and individual workplace agreement had primacy - Public Service Appeal Board found that Applicant had been dismissed and pursuant to the workplace agreement the recourse in respect to dismissal was dealt with by Workplace Agreements Act - One Member found that workplace agreement did not prevent the appeal being determined by Public Service Appeal Board and there seemed to be an injustice to appeal against decision to terminate - Dismissed for want of jurisdiction - Ms Thomas -v- Chief Executive Office, Ministry of Fair Trading - PSAB 1 of 2001 - Public Service Appeal Board - SCOTT C. - 29/10/01 - Government Administration .....	2957
<sup>2</sup> Appeal against Decision of Commission (81WAIG1660) re unfair dismissal and contractual entitlements - Appellant argued against the finding of the dismissal on the grounds that deal with alleged erroneous findings in relation to the evidence - Appellant argued that there was not sufficient evidence to establish that there was a dismissal - Full Bench found that this was a discretionary decision and had defined a dismissal as the termination of a contract of employment and in this matter there was too fragile a base in the evidence to support a finding of dismissal - Full Bench found that appeal should be upheld as there was no dismissal or no dismissal was established to have occurred and there was no jurisdiction to hear and determine the matter - Appeal Upheld and decision at first instance varied - Dr K Alexander -v- Ms JM Kirkham - FBA 44 of 2001 - Full Bench - SHARKEY P/GREGOR C/WOOD,C - 28/11/01 - Health Services.....	3017
<sup>2</sup> Appeal against Decision of Commission (81 WAIG 1393) re unfair dismissal - First appeal by the Appellant argued the Commissioner erred in law on a number of grounds, one being the dismissal was harsh, oppressive and unfair, and the finding that reinstatement was practicable - Second appeal by Respondent Union argued the Commissioner lacked jurisdiction to make order 3 regarding reinstatement - Full Bench found the dismissal was unfair and there was no error in the exercise of discretion established, and dismissed the appeal -Regarding the cross appeal the Full Bench found there was no power and no jurisdiction conferred and the appeal was upheld - Appeal No. FBA 34/2001 Dismissed and Appeal No. FBA 35/2001 Upheld - BHP Iron Ore Pty Ltd -v- CONSTRUCTION, MINING, ENERGY - FBA 34,35 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/SMITH, C - 19/11/01 - Metal Ore Mining.....	3031
<sup>2</sup> Appeal against Decision of Commission (81 WAIG 1463) re unfair dismissal - Appellant argued Commissioner erred in law by failing to take into account the deliberate act of misconduct, and the finding that reinstatement or re -employment was impracticable - Full Bench found that dismissal was harsh and unfair, and that reinstatement was impracticable - Further, there was no error in the exercise of discretion at the first instance and no grounds of appeal were made out - Dismissed - Clifton Nominees Pty Ltd -v- Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch - FBA 29 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/SMITH, C - 08/11/01 - Accommodatn, Cafes&Restaurants .....	3038
<sup>2</sup> Appeal against Decision of Commission (81 WAIG 1668) re unfair dismissal by reason of redundancy - Appellant argued Commissioner erred in law on a number of grounds, one being the dismissal was not harsh, oppressive or unfair but the result of a genuine redundancy - Appellant sought leave to adduce fresh evidence in the form of an affidavit which was dismissed by the Full Bench - Full Bench found that Appellant was made redundant and the grounds of the appeal were not made out as there was no error in the exercise of discretion at the first instance - Dismissed - Mr A Morrison -v- Uniting Church of Australia, Trinity Parish - FBA 45 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/WOOD,C - 21/11/01 - Community Services.....	3042
Complaint re breach of Workplace Agreement - Complainant argued that his termination was unfair and that he had not been provided with any prior warning or the selection criteria for redundancy - Respondent argued that the termination was based on a commercial decision to reduce the workforce in consultation with the Workplace Representative Committee - Industrial Magistrate found that the dismissal was caused by a downturn in the industry and that there was no unfairness which would support a claim for compensation - Dismissed - Mr RA Giddings -v- Austal Ships Pty Ltd - M 65 of 2001 - Industrial Magistrate - Tarr IM - 17/10/01 - Other Manufacturing.....	3089
Complaint re breach of Workplace Agreement - Claimant sought unpaid entitlements pursuant to the workplace agreement, including claims for pre-judgment interest, penalties pursuant to s83(6) of the I.R. Act, 1979 and costs - Defendant conceded that the Claimant was entitled to payment for normal working hours and holiday pay but denied liability for the payment of pay in lieu of notice, maintaining that the Claimant resigned, and in such circumstances was not entitled to pay in lieu of notice under the workplace agreement - Industrial Magistrate was not satisfied based on the evidence presented that the Claimant was dismissed, therefore his claim for one week's pay in lieu of notice was dismissed - Further, IM issued Orders by consent, that Respondent pay the Claimant the amount of \$1058.00 plus interest fixed at \$40.00, and reimburse the Claimant the amount of \$40.00 being the cost of making the claim - Reasons for Decision Issued - Mr P Maindok -v- Cabletech Electrical Pty Ltd - M 124 of 2001 - Industrial Magistrate - Tarr IM - 22/11/01 - Other Services.....	3091
Application re unfair dismissal and contractual entitlements - Applicant argued that she was an employee, unfairly dismissed and her employment terminated without notice - Respondent argued the relationship was not one of employer and employee but a domestic relationship - Commission found that the relationship was a domestic relationship and not an employment relationship - Dismissed - Ms JE Augustyn -v- Vistadale Pty Ltd As Trading For The Ranger Family Trust Trading As Ranger Contracting - APPL 679 of 2001 - WOOD,C - 03/12/01 - Machinery & Equipment Mfg .....	3107

## CUMULATIVE DIGEST—continued

## TERMINATION—continued

	Page
Application re unfair dismissal - Applicants argued that dismissal was unfair, that there was no consultation regarding redundancy prior to termination and that there was no real redundancy at the workshop - Further, Applicants sought reinstatement or compensation - Respondent argued the terminations were redundancies as a result of a review of the main workshop and the decision to close the workshop - Commission found that Applicants had been made redundant when the workshop closed down and that contractors have not taken over their jobs - Dismissed - Mr AK Haynes -v- Midland Brick Company Pty Ltd - APPL 789,790,817,849 of 2000 - WOOD,C - 07/07/01 - Non-Metallic Min Product Mfg.....	3112
Application re unfair dismissal - Applicant argued dismissal was harsh oppressive or unfair - Respondent challenged the Commission's jurisdiction on the basis that Applicant's employment was subject of a Federal Award - Respondent further argued that this creates a conflict between the award and the Act, that conflict was to be resolved by the Federal award taking precedence, that the Applicant was the subject of a 12 month probationary period, and while the Applicant challenges the reasonableness of that probationary period that would be a matter able to be referred to the AIRC for determination - Commission reviewed award and various authorities and concluded that there was a direct conflict between the provisions of the State law and the Award, and accordingly, in the terms of s.152(1A) of the WR Act the provisions of the Award are not able to operate concurrently with the terms of the Act and thereby an inconsistency arises and the Federal award applied to the exclusion of the State Act, therefore Applicant was unable to proceed with this application before this Commission - Dismissed - Mr G Burley -v- LAC Loss Adjustors, A Division of LAC Operations Pty Ltd ABN 33071714 068 - APPL 798 of 2001 - SCOTT C. - 06/12/01 - Construction Trade Services.....	3120
Applications re unfair dismissal - Applicants argued that dismissal was unfair because they were constructively dismissed and they were not given a fair go - Respondent argued that Applicants had tendered their resignations and were given the opportunity to clarify their intentions of resignation which had not changed - Commission found that Respondent had given Applicants a fair go and their resignation intention had not changed - Dismissed - Mr WJ Cochrane -v- Tempo Facility Services Pty Limited - APPL 938,939 of 2001 - WOOD,C - 13/11/01 - Cleaning.....	3123
Application re unfair dismissal and contractual entitlements - Applicant lodged an amended Notice of Application whereby she sought outstanding benefits due under her contract of employment - Respondent responded to the proceedings by way of a Notice of Answer and Counter Proposal and an affidavit - Commission listed the matter For Mention Only and found the facts to be, that at no stage was the Applicant employed by the Respondent, therefore there was no dismissal - Further, there was no evidence from which it could be concluded that a contract of service existed between Applicant and Respondent and that Applicant was entitled to the "benefits" claimed - Struck out for want of jurisdiction - Ms SL Dean -v- Edward Beale Salon - APPL 1204 of 2001 - BEECH C - Other Services.....	3125
Application re unfair dismissal - Applicant argued that his dismissal was harsh and unfair and sought compensation to cover an outstanding loan taken to undertake a dump truck training course and four weeks wages - Respondent argued that Applicant's performance was unsatisfactory in that he failed to take instructions to comply with safety requirements and absent himself from work without notice - Commission found based on the evidence presented that Applicant's termination, in all of the circumstances, was not harsh, oppressive nor unfair and that the Respondent gave Applicant an opportunity to secure a skill and a position but all Respondent got were complaints, aggravation and insolence, therefore Respondent exercised its legal right to terminate the contract - Dismissed - Mr MSG Fitzgerald -v- Cooks Construction Pty Ltd - APPL 606 of 2001 - COLEMAN CC - 09/11/01 - Other Mining.....	3127
Application re unfair dismissal - Applicant argued that he was employed as a fisherman on fishing trawlers and that the skipper hired and fired all the fishermen - Further, the skipper had control of the vessel and method of work, in that the skipper determined when the vessel was to go to sea and where the boat would fish and how long the boat would be at sea - Respondent argued that the Commission did not have jurisdiction to deal with the matter because it did not employ Applicant - Further, Respondent argued that Applicant entered into an Agreement that did not create an employee-employer relationship and that in the fishing industry, companies entered into share fishing agreements because that was the way industry operated and that Respondent did not engage employees - Commission found that it was for Applicant to show, on the balance of probabilities that he was an employee - Further, the relationship of employer and employee was a contract of service where an employee contracted to provide his or her work and skill whereas an independent contractor worked in his or her own business on his or her own account - Commission declared that Applicant was an employee of Respondent working under a contract of service - Order Issued - Mr AJ Greig -v- Kraus Fishing Company Pty Ltd - APPL 2028 of 2000 - SMITH, C - 15/11/01 - Commercial Fishing.....	3128
Application re unfair dismissal - Applicant argued that dismissal was unfair because no notice or prior warning was given and that she was not afforded procedural fairness or give a fair go - Further, Applicant sought redundancy payment - Respondent argued that he kept staff fully informed that Respondent was financially untenable and was being wound up and he had intended to speak to Applicant regarding various options available - Commission found that the business was in financial difficulty and Respondent had intended to discuss matter with Applicant - Further, Commission found that Applicant was a part time employee not a casual and thus entitled to payment in lieu of notice - Applicant awarded notice payment - Order Issued - Mrs DE Harley -v- Jasgold Holdings T/A Ringeraft Jewellers - APPL 1150 of 2001 - WOOD,C - 19/11/01 - Jewellery.....	3135
Application re unfair dismissal and contractual entitlements - Applicant argued that he was unfairly dismissed and denied contractual benefits arising from his employment as a Director - Respondent argued that Applicant was employed as a sales person and his employment was terminated as a result of a redundancy, and the need to restructure the business - Commission reviewed authorities and concluded that Respondent had a genuine need to reduce its manning levels, however, there was no discussion with Applicant about the redundancy and its effect on him, and that by reason of Part 5 of the Minimum Conditions of Employment Act 1993, Applicant's dismissal was harsh, oppressive and unfair - Further, Commission found that reinstatement was impracticable, that there was an oral term to the Applicant's contract of employment, and awarded compensation and denied contractual benefit - Upheld and Order Issued - Mr FP Manna -v- Markhill Holdings Pty Ltd as Trustee for The Midnight Printing Unit Trust t/as "Midnight Printing" - APPL 1751 of 2000 - KENNER C - 29/10/01 - Printg, Publishg & Redd Media.....	3138
Application re unfair dismissal - Applicant argued that he was harshly, oppressively or unfairly dismissed and sought compensation - Respondent argued that Applicant clearly breached his duty as an employee to act in good faith, that his failure to act as a diligent manager by failing to ensure that all monies were accounted for in accordance with the accounting procedures and that his action in attempting to induce staff to lie on his behalf constituted serious and wilful misconduct - Commission reviewed authorities and having considered all of the evidence, found that Applicant breached his fiduciary duty to his employer and that his conduct was of a nature that he repudiated the terms of his contract of employment or one of its essential conditions by failing to act honestly and in good faith - Dismissed - Mr BJ O'Loughlin -v- Wesfarmers Kleenheat Gas Pty Ltd - APPL 873 of 2001 - SMITH, C - 23/11/01 - Petroleum Coal Chemical Assoc.....	3147
Application re unfair dismissal - Applicant argued that he had been harshly, oppressively and unfairly dismissed - Respondent argued that Applicant's work performance was unsatisfactory and that he was given opportunity to improve himself after numerous warnings - Commission found, based on the evidence presented, that Applicant was provided with natural justice, that he was given opportunity to know and respond to issues knowing that his employment was in jeopardy, that he was given an opportunity to demonstrate improvement, and dismissed his claim for harsh, oppressive or unfair dismissal - Dismissed - Mr AD Tasker -v- Sinogal Pty Ltd Trading as Rockingham Auto Electrics & Mechanical Services - APPL 339 of 2001 - SCOTT C. - 12/11/01 - Electricity and Gas Supply.....	3151

## CUMULATIVE DIGEST—continued

	Page
<b>TERMINATION—continued</b>	
Application re unfair dismissal - Applicant argued that her dismissal was harsh, oppressive and unfair - Respondent opposed the application on a number of grounds, including that Commission had no jurisdiction to hear the application because Applicant was not an employee within the meaning of the I.R. Act 1979 - Commission reviewed authorities and found on evidence that Applicant was an employee within the definition of "employee", that Applicant's dismissal summarily by Respondent was harsh, oppressive and unfair and ordered that she be paid compensation - Granted - Ms R Thomson -v- Brunel Energy Pty Ltd - APPL 1742 of 2000 - BEECH C - 07/11/01 - Electricity and Gas Supply.....	3155
Application re unfair dismissal - Applicant argued that he was allegedly made redundant, but that another employee took over his responsibilities - Further, Applicant argued that reinstatement was impracticable and sought six months compensation - Respondent argued that as a result of a review the company decided to abolish Applicant's position and made him redundant - Respondent sought that Commission dismiss the matter pursuant to s27 of the Act on the basis that it should not proceed in the public interest - Commission reviewed authorities and based on the evidence presented, found that the employee's position was properly made redundant, and that Applicant had not proven his case for unfairness in his selection for redundancy instead of the other employee - Dismissed - Mr AA Turner -v- Homewrap Packaging Pty Ltd - APPL 409 of 2001 - WOOD,C - 28/11/01 - Other Services.....	3162
<b>TRANSFER</b>	
Conference referred re transfer of an employee - Applicant Union argued that Respondent had unfairly transferred its member from her position and sought a declaration that the transfer was unfair and an order that the Respondent reinstate its member - Respondent denied the claim and opposed the orders sought - Commission was of the view for a number of reasons that the conduct of the Applicant Union's member was not unreasonable and concluded that her transfer was unfair - Declaration and Order Issued - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Quirk Corporate Pty Ltd - CR 331 of 2000 - SMITH, C - 29/06/01 - Business Services .....	2470
Application re transfer of an employee seeking for an Order for Discovery - Applicant sought order for discovery relating to issues likely to be necessary for fairly disposing of the case - Respondent agreed to provide some documents but not others - Commission reviewed parties' submission and agreed that the order should be granted in part - Granted in Part - Civil Service Association of Western Australia Incorporated -v- Director General, Ministry of Justice - P 2 of 2001 - BEECH C - 06/09/01.....	2563
<b>UNFAIR DISCREPANCY</b>	
Conference referred re transfer of an employee - Applicant Union argued that Respondent had unfairly transferred its member from her position and sought a declaration that the transfer was unfair and an order that the Respondent reinstate its member - Respondent denied the claim and opposed the orders sought - Commission was of the view for a number of reasons that the conduct of the Applicant Union's member was not unreasonable and concluded that her transfer was unfair - Declaration and Order Issued - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Quirk Corporate Pty Ltd - CR 331 of 2000 - SMITH, C - 29/06/01 - Business Services.....	2470
<b>UNIONS</b>	
Application to vary the Engine Drivers (Building & Steel Construction) Award No. 20 of 1973 by consent - Applicant sought amendments to various clauses in the award to incorporate the cost of living expenses and include provisions part of the safety net - Respondent consented to application - Commission ordered liberty to apply to insert projects which occur from time to time to be placed in the award - Order Issued - CONSTRUCTION, MINING, ENERGY -v- Master Builders' Association of Western Australia (Union of Employers) & Others - APPL 405 of 2001 - GREGOR C - 02/07/01 - Construction Trade Services .....	1592
Application by consent to vary the Metal Trades (General) Award 1966 re the Second Schedule - List of Respondents - Commission found that it was empowered under Section 47 of the I.R. Act to cancel defunct awards or delete employers from awards in certain cases but had difficulties where the deletion of named respondents to the award changed the scope of the award - Further, Commission found that variation did not change the scope of the award and award varied by consent - Order Issued - AUTO, FOOD, METAL, ENGIN UNION -v- Anodisers W.A. & Others - APPL 1785 of 2000 - GREGOR C - 03/07/01.....	1598
Conference re negotiations for a replacement agreement - Applicant argued that the basis for the urgent conference was the difficulties being experienced between the parties in resolving an enterprise bargaining agreement, which led to employees imposing overtime and other bans - Respondent Union argued that members had met and decided to take immediate industrial action by withdrawing their labour for 48 hours - Commission found that Applicant express its attitudes and provided information regarding a range of issues the subject of the dispute and the employees return to work, to continue to work in accordance with their contracts of employment and to not undertake further industrial action while conciliation or arbitration proceeded - Order Issued - Disability Services Commission -v- Civil Service Association of Western Australia Incorporated - PSAC 8 of 2001 - Public Service Arbitrator - SCOTT C. - 06/07/01 - Health and Community Services.....	1612
Conference referred re site access - Applicant Union argued that its member was a full time official because he was validly appointed as an employee organiser by the branch executive of the applicant's counterpart federal body, The Australian Workers Union ("the federal union") on or about 17 November 2000 - Respondent argued that neither the federal rules nor the state rules supported the Applicant member's employment as an organiser - Commission reviewed authorities and found that Applicant member was employed by the Applicant in a full time capacity as reflected in the instrument of appointment and the Applicant's own records - Declaration Issued - The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- BHP Iron Ore Ltd - CR 46 of 2001 - KENNER C - 02/08/01.....	2633
<sup>2</sup> Application for registration of new Organisation by amalgamation of two unions - Application was made by the Construction, Mining, Energy, Timbryards, Sawmills and Woodworkers Union of Australia - Western Australian Branch and the Australian Builders' Labourers, Painters & Plasterers Union of Workers - Full Bench reviewed authorities and relevant sections of the I.R. Act and was satisfied that all statutory requirements of law had been complied with, therefore, authorised the registration of the organisation sought - Granted - The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers & Other -v- (Not applicable) - FBM 3 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/KENNER C - 09/10/01 - Unions.....	2722
<sup>4</sup> Application by consent for an Order pursuant to s.66 of the I.R. Act - Parties consenting, sought an order to postpone a union election pending the hearing and determination of an application to amalgamate two unions - President found that the proposal to amalgamate had been approved by the members who had the opportunity to object to the application, therefore President granted the application to postpone the election with the condition that a public notice regarding the election be issued - Granted in Part - Mr P Delaney & Other -v- The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers - PRES 11 of 2001 - President - SHARKEY P - 03/08/01 - Unions.....	2727
Applications re a breach of a certified agreement - Union argued the Respondent breached the agreement by refusing to allow without loss of pay, a union delegate the necessary time during work hours to confer with the employer on matters affecting employees they represented - Industrial Magistrate found that written notification to recognise union delegates was required by the agreement and that there was no evidence of the appointment of the union delegates and therefore dismissed the claims - Dismissed - COMM, ELECTRIC, ELECT, ENERGY -v- AlintaGas Networks Pty Ltd - M 91,98 of 2001 - Industrial Magistrate - Cicchini IM - 29/08/01.....	2764

## CUMULATIVE DIGEST—continued

## UNIONS—continued

- Conference referred re safe working and rostering practises at Hakea Prison Complex - Applicant Union argued that additional officers be employed on nightshift to those positions already on the roster and that all vacant positions on the roster be filled daily as this was creating disruptions and frustration to the routines due to being short staffed and that staff were not fulfilling their normal duties - Respondent argued and opposed the claim in its entirety stating that the current staffing of the prison was appropriate and that it was normal for staff to be re-allocated to other duties to accommodate absences on the roster on a daily basis - Commission found that Applicant Union's claim was made out to the extent that provision be made for additional internal escort functions to reduce the need for officers to be taken away from units for that purpose and Commission also took into account the effects of increased costs and its impact - Granted in part - Western Australian Prison Officers' Union of Workers -v- Ministry of Justice - CR 26 of 2001 - BEECH C - 30/10/01 - Other Services ..... 2945

## VICTIMISATION

- Conference referred re unfair dismissal - Applicant Union argued that two members were unfairly dismissed from their employment and were seeking reinstatement without loss of earnings - Applicant Union argued that dismissal were unfair because both members were given approval to engage in an arrangement whereby they gave away cheese off-cuts and that the giving away of the cheese off-cuts did not constitute conversion or have any negative effect on Respondent in any event and that the investigation undertaken by Respondent was flawed and biased - Respondent argued that employees were dismissed because no approval was given to give Respondent's product away of substantial amount of cheese - Commission found that no approval was given and that there were deficiencies in the process of the decision making - Further, Commission found that one employee's situation was somewhat different and did not justify dismissal and Commission ordered that employee be reinstatement - Upheld in Part and Order Issued - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Mundella Foods Pty Ltd - CR 2 of 2001 - SCOTT C. - Dairy Product Manufacturing ..... 1694
- <sup>2</sup>Appeal against Decision of Commission (81WAIG1238) re unfair dismissal - Appellant argued that the Learned Commissioner erred in law and in fact on various grounds including that it awarded excessive compensation to the Respondents - Further, Appellant sought an Order that the Decision of Commission in matters 1377 and 1378 of 2000 be quashed - Full Bench reviewed evidence and applying the principles in *House v. The King (HC)(op cit)* and *Gromark Packaging v. FMWU (IAC)(op cit)*, found on a number of reasons that there was no error as alleged in the grounds of appeal, and no error in the exercise of the Commissioner's discretion - Dismissed - Kingscape Holdings Pty Ltd -v- GK Smith & Other - FBA 20 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/GREGOR C - 17/08/01 - Construction Trade Services ..... 2517
- Complaint re breach of Workplace Agreement Act 1993 - Complainants argued that the defendants had committed breaches under section 68 and 70 of the Workplace Agreement Act and sought payment of penalty and costs - Their claim for reinstatement was abandoned during the proceedings - Respondents denied that they had threatened or intimidated the complainants because of their refusal to sign their Workplace Agreements - Industrial Magistrate found the charges proved against the defendants on the evidence presented - Order Issued - Mr FE Hughes -v- Mandurah Taxis Pty Ltd - CP 12,15,16,17 of 2001 - Industrial Magistrate - Tarr IM - 25/07/01 - Other Transport ..... 2565

## WAGES

- Application to vary Grain Handling Salaried Officers' Consolidated Award No. 37 of 1965 - Applicant argued that the terms of Western Australian Grain Handling Salaried Officers' Enterprise Agreement 1996 be incorporated into the Award - Respondent Union consented to application - Commission found that the requirements of the Principles were met providing that the Arbitrated Safety Net Adjustments were accurately quantified separately in clause 31 - Salaries - Order Issued - Co-Operative Bulk Handling Limited -v- Western Australian Grain Handling Salaried Officers Association (Union of Workers) - APPL 29 of 2000 - SMITH, C - 22/06/01 - Grain, Sheep & Beef Cattle Frm ..... 1594
- Application re unfair dismissal - Applicant argued that dismissal was unfair because no fair go was given into the allegations to gross misconduct and no opportunity to respond to allegations - Respondent argued that Applicant was dismissed for misconduct in that she had used physical force on a seven month old child and that her attitude was not appreciated - Commission found that dismissal was unfair because there was no investigation into the matter concerned and had just accepted the report from the parent thus Applicant was not awarded a fair go and dismissed unfairly - Commission further found that no loss or injury was incurred and no compensation was awarded - Order Issued - Ms CP Houareau -v- Tiny Turtle Belmont Childcare Centre - APPL 312 of 2001 - WOOD,C - Community Services ..... 1659
- Application re contractual entitlements - Applicant argued he was entitled to annual bonus and deducted wages - Respondent argued applicant was not due annual bonus as his employment was casual in nature - Commission determined applicant was not employed as a casual and outstanding annual bonus granted - Claim for deducted wages was dismissed for want of jurisdiction - Granted in Part - Mr RC Whyte -v- Narrogin Brick - APPL 1869 of 2000; APPL 651 of 2001 - WOOD,C - 13/07/01 - Construction Trade Services ..... 2450
- <sup>2</sup>Appeal against Decision of Commission (81WAIG1651) re unfair dismissal - Appellant argued that the Learned Commissioner erred on various grounds relating to the findings of loss and compensation - Further, Appellant sought orders that the appeal be allowed and the decision at first instance be quashed and that compensation be assessed to the respondent (applicant), but limited to the sum equivalent the wages entitlement for the "lost" period of service - Full Bench reviewed evidence and authorities and having considered all of the relevant material and submissions found that no grounds of appeal was made out and that the exercise of discretion at first instance (see *House v The King (HC)(op cit)*), was not in error or established to be in error - Dismissed - Q-Vis Ltd -v- Mr SD Gordon - FBA 37 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/GREGOR C - 05/09/01 - Health Services ..... 2537
- Complaint re breach of award and the Minimum Conditions of Employment Act 1993 - Complainant argued that defendant terminated his employment without notice or pay in lieu of notice, failed to pay him overtime rates of pay, annual leave entitlements and wages - Further, Complainant sought to recover the sum of \$6016.71 and interest thereon pursuant to s.32 of the Supreme Court Act 1935, the imposition of a penalty with respect to each breach of the award and costs - Defendant argued that Complainant had abandoned his employment and lodged a counter claim for damages - Industrial Magistrate reviewed authorities and found on evidence that Complainant had been dismissed for misconduct and by his own actions disintitiled himself to annual leave payments accrued during his employment and further, he had failed to prove that the award binds the employer - IM further found that he did not have jurisdiction and power to deal with Defendants counter claim for common law damages - Mr JS Strange -v- Moonstar Nominees Pty Ltd - CP 324 of 2000 - Industrial Magistrate - Cicchini IM - 16/08/01 - Accommodatn, Cafes&Restaurants ..... 2568
- Application re contractual entitlements - Applicants argued that they had been denied outstanding contractual entitlements not being covered by the award - There was no appearance on behalf of the Respondent - Commission found that based on the evidence presented the applicants had established their entitlements to outstanding benefits under their respective contracts of employment - Upheld - Mr JC Da Silva -v- Axis Information Systems Pty Ltd - APPL 267,272,278,279,300 of 2001 - COLEMAN CC - 02/08/01 - Communication Services ..... 2576

## CUMULATIVE DIGEST—continued

	Page
<b>WAGES—continued</b>	
Applications re unfair dismissal and contractual entitlements - Applicant argued his contract of employment, signed by the parties was for a three years fixed term and that he was summarily dismissed whilst on annual leave - Applicant sought payment of the balance of the fixed term contract by way of denied contractual benefits inclusive of salary, superannuation, motor vehicle, mobile phone and six months compensation for loss of earnings and injury - Respondent argued on a number of grounds and denied that the dismissal was unfair but says it was imposed by lack of operating funds and failure to fulfil the planting program - Commission found based on the evidence presented that in all circumstances, Applicant's dismissal whilst on annual leave was unfair and amounted to a summary dismissal - Commission further found that Applicant's contract was fixed for a three years duration, that reinstatement was impracticable, that Applicant had not sought to properly mitigate his loss and awarded compensation and discontinued the claim for contractual entitlements - Ordered Accordingly - Mr GR Shuttleworth -v- Silviculture Management Pty Ltd - APPL 169,170 of 2001 - WOOD,C - 21/09/01 .....	2784
Conference referred re termination of an employee - Applicant argued that there was an argument between him and the Respondent over work issues and his back problem at which time he was dismissed - Respondent argued that Applicant was abusive and showed no respect for him in front of other employees - Commission found based on the evidence presented, that there was a heated argument between the parties and that the language Applicant used towards his employer was wrong, but in a context where the employer had not set a standard in the workplace, that incident did not warrant Applicant's dismissal, therefore, Commission ordered that Respondent pay the Applicant a sum of money equivalent to the wages he would have earned for that period of time as compensation for the dismissal - Granted - The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- Proscap - CR 265 of 2000 - BEECH C - 03/10/01 - Construction Trade Services .....	2795
Application re contractual entitlements - Applicant argued that he had been denied contractual entitlements including lost wages, fuel re-imbursment and lost earnings - Respondent opposed application in it's entirety and argued that all entitlements were paid out even though there was considerable difficulty due to the lack of or inaccurate recording on work cards - Commission found that the onus was on Applicant to prove that money claimed was due under the contract of service and Applicant failed entirely to discharge that onus - Dismissed - Mr AW McConkey -v- M & A's of Denmark - APPL 1951 of 2000 - WOOD,C - 08/11/01 - Computers .....	3142
<b>WORKERS COMPENSATION</b>	
Application re unfair dismissal and contractual entitlements - Applicant argued that his dismissal was harsh, oppressive or unfair and sought outstanding benefits - Respondent argued that at the time of application there had been no dismissal and that remedy sought being 6 weeks notice and paid leave had been received by Applicant - Commission reviewed various authorities and concluded that a broad interpretation should be applied to the term "dismissed" and this period should include the period of notice therefore, Commission allowed the application on that basis - Further, Commission concluded that Applicant had been paid during the notice period in accordance with the workers compensation regime, that in the application before it the remedies were clear and had been met and that pursuant to s.27(1)(a)(ii) and (iv) of the Act, further proceedings were not necessary or desirable in the public interest - Dismissed - Mr CG Hywood -v- Subiaco Wine Room - APPL 1950 of 2000 - SCOTT C. - 31/07/01 - Accommodatn, Cafes&Restaurants .....	2443
<b>WORKPLACE AGREEMENTS</b>	
Conference referred re dispute in relation to agreement negotiations - Applicant union sought renewal of agreement and parity with employees employed under a Australian Workplace Agreement - Respondent argued jurisdictional issues with Commission in Court Session - Commission in Court Session found that it had no power to make an order under s.44 which purports to be in substitution for an existing industrial agreement, as neither party had retired from the 2000 Agreement - Dismissed for want of jurisdiction - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Burswood Resort (Management) Ltd - CR 326 of 2000 - Commission in Court Session - GREGOR C/SMITH, C/WOOD,C - 27/07/01 .....	2432
Application re unfair dismissal - Applicant argued dismissal was harsh, oppressive and unfair - Respondent argued applicant was party to workplace agreement, that application was not an industrial matter and should be struck out for want of jurisdiction - Commission determined employee's status at time of making the unfair dismissal claim was not relevant and that it had no jurisdiction to hear the matter - Dismissed - Mr R Allen -v- St John Ambulance Australia - APPL 646 of 2001 - SCOTT C. - 18/07/01 - Community Services .....	2441
Conference re alleged threat of prejudice in the employment of members of the union - Applicant Union argued that three employees had expressed their desire to improve their conditions of employment by carrying out their existing work under the Transport Workers' (General) Award rather than under a new workplace agreement - Further, Applicant Union argued that one of the employee's workplace agreement no longer have any effect because firstly, Respondent has cancelled the workplace agreement, secondly, by victimising that employee, Respondent has lost its right to any benefits arising from the workplace agreement and thirdly, the terms of "Expiry of Agreement" clause should not be read so as to continue the terms of the workplace agreement as to do so was unconscionable - Respondent raised a preliminary issue in respect of that employee, whereby the employee and the Respondent are parties to a registered workplace agreement and by operation of s.7A, s.7C and s.19(4)(b) of the Workplace Agreements Act, 1993, the Commission was prohibited from dealing with the matters in dispute in respect of that employees' employment - Further, Respondent argued that the workplace agreement has not expired - Commission reviewed authorities and various sections of the Workplace Agreements Act, 1993 and found that the Respondent's argument that the workplace agreement has not expired had not been made out - Further, for reasons set out in its Reasons for Decision, Commission found the matters in dispute between Respondent and the employee in question was not an industrial matter, therefore Commission lacked jurisdiction to enquire into and deal with these matters - Declaration and Order Issued - Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch -v- Down South Transport Pty Ltd - C 145 of 2001 - SMITH, C - 06/07/01 - Road Transport .....	2456
Complaint re breach of Workplace Agreement Act 1993 - Complainants argued that the defendants had committed breaches under section 68 and 70 of the Workplace Agreement Act and sought payment of penalty and costs - Their claim for reinstatement was abandoned during the proceedings - Respondents denied that they had threatened or intimidated the complainants because of their refusal to sign their Workplace Agreements - Industrial Magistrate found the charges proved against the defendants on the evidence presented - Order Issued - Mr FE Hughes -v- Mandurah Taxis Pty Ltd - CP 12,15,16,17 of 2001 - Industrial Magistrate - Tarr IM - 25/07/01 - Other Transport .....	2565
Appeal to Public Service Appeal Board re Decision to terminate employment - Appellant argued that that the dismissal should attract the provisions of Public Sector Management Act 1994 relating to substandard performance and to prevail over Workplace Agreements Act and thus, Public Service Appeal Board had jurisdiction to hear and determine matter - Respondent argued that PSAB did not have jurisdiction because Workplace Agreements Act resolved an inconsistency that arose and individual workplace agreement had primacy - Public Service Appeal Board found that Applicant had been dismissed and pursuant to the workplace agreement the recourse in respect to dismissal was dealt with by Workplace Agreements Act - One Member found that workplace agreement did not prevent the appeal being determined by Public Service Appeal Board and there seemed to be an injustice to appeal against decision to terminate - Dismissed for want of jurisdiction - Ms Thomas -v- Chief Executive Office, Ministry of Fair Trading - PSAB 1 of 2001 - Public Service Appeal Board - SCOTT C. - 29/10/01 - Government Administration .....	2957

CUMULATIVE DIGEST—*continued*

	Page
<i>WORKPLACE AGREEMENTS—continued</i>	
Complaint re breach of Workplace Agreement - Complainant argued that his termination was unfair and that he had not been provided with any prior warning or the selection criteria for redundancy - Respondent argued that the termination was based on a commercial decision to reduce the workforce in consultation with the Workplace Representative Committee - Industrial Magistrate found that the dismissal was caused by a downturn in the industry and that there was no unfairness which would support a claim for compensation - Dismissed - Mr RA Giddings -v- Austal Ships Pty Ltd - M 65 of 2001 - Industrial Magistrate - Tarr IM - 17/10/01 - Other Manufacturing .....	3089
Complaint re breach of Workplace Agreement - Claimant sought unpaid entitlements pursuant to the workplace agreement, including claims for pre-judgment interest, penalties pursuant to s83(6) of the I.R. Act, 1979 and costs - Defendant conceded that the Claimant was entitled to payment for normal working hours and holiday pay but denied liability for the payment of pay in lieu of notice, maintaining that the Claimant resigned, and in such circumstances was not entitled to pay in lieu of notice under the workplace agreement - Industrial Magistrate was not satisfied based on the evidence presented that the Claimant was dismissed, therefore his claim for one week's pay in lieu of notice was dismissed - Further, IM issued Orders by consent, that Respondent pay the Claimant the amount of \$1058.00 plus interest fixed at \$40.00, and reimburse the Claimant the amount of \$40.00 being the cost of making the claim - Reasons for Decision Issued - Mr P Maindok -v- Cabletech Electrical Pty Ltd - M 124 of 2001 - Industrial Magistrate - Tarr IM - 22/11/01 - Other Services .....	3091