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INDUSTRIAL APPEAL COURT—

Editor's Note: Order published in Vol. 80—Part 2, Sub-part 7 at page 4581.

2000 WASC 259

JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA

CITATION : RE PETER JOHN SHARKEY & ORS; EX PARTE THE FOOD PRESERVERS UNION OF WESTERN AUSTRALIA, UNION OF WORKERS

[2000] WASC 259

CORAM : ANDERSON J

HEARD : 28 SEPTEMBER 2000

DELIVERED : 28 SEPTEMBER 2000

FILE NO/S : CIV 2297 of 2000

MATTER : Application for a Writ of Certiorari against Peter John Sharkey, Stephen John Kenner and Stephen Wood as Members of the Full Bench of the Western Australian Industrial Relations Commission constituted under the Industrial Relations Act 1979

EX PARTE

THE FOOD PRESERVERS UNION OF WESTERN AUSTRALIA, UNION OF WORKERS, Applicant

FILE NO/S : IAC 7 of 2000

BETWEEN : THE FOOD PRESERVERS UNION OF WESTERN AUSTRALIA, UNION OF WORKERS, Applicant

AND

THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS, WESTERN AUSTRALIA BRANCH, First Respondent

INGHAMS ENTERPRISES PTY LTD, Second Respondent

Catchwords—

Industrial law—Western Australia—Application for stay of proceedings before the Full Bench of Industrial Relations Commission—Discretionary order—Principles to be applied—Order only to be made in special or exceptional circumstances—Right of appeal rendered nugatory without stay is a special or exceptional circumstance—Test is not whether refusal of stay would disturb the status quo—Should not be granted unless strong appeal case can be shown.

Industrial law—Western Australia—Application for order *nisi*—Discretionary order—Principles to be applied—Generally granted if arguable case can be shown

Legislation—

Industrial Relations Act 1979 (WA), s 90

Result—

Application for stay refused

Application for order *nisi* adjourned *sine die*

Representation—

CIV2297 of 2000

Counsel—

Applicant: Mr R I Viner QC & Mr M D Cuerdon

Solicitors—

Applicant: Hammond Worthington

IAC 7 of 2000

Counsel—

Applicant: Mr R I Viner QC & Mr M D Cuerdon

First Respondent: Mr R D Farrell & Mr D H Schapper

Second Respondent: Mr D S Ellis & Ms J E Lee

Solicitors—

Applicant: Hammond Worthington

First Respondent: Derek Schapper

Second Respondent: Freehills

Case(s) referred to in judgment(s)—

Nil

Case(s) also cited—

Burswood Resort (Management) Limited v The Australian Liquor Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Branch & Anor (1996) 76 WAIG 1655

Burswood Resort (Management) Ltd v Australian Liquor Hospitality & Miscellaneous Workers' Union, Miscellaneous Workers' Division & Anor, unreported; FCt SCt of WA; Library No 940280; 2 June 1994

Re Griffin & Ors; Ex parte Professional Radio and Electronics Institute of Australia (1988) 167 CLR 37

Re Sharkey & Ors; Ex parte Burswood Resort (Management) Ltd; Federated Liquor and Allied Industries Employees' Union of Australia, Western Australian Branch, Union of Workers (Intervening) (1994) 55 IR 276

Re Sharkey & Ors; Ex parte Robe River Mining Company Pty Ltd (1992) 46 IR 72

Re the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers—Western Australian Branch [2000] WASCA 233

Re Western Australian Industrial Relations Commission; Ex parte Confederation of Western Australian Industry (Inc) (1992) 6 WAR 555

Stampalia v The Stewards of the Western Australian Trotting Association & Anor [1999] WASC 7

Stollery v The Greyhound Racing Control Board (1972) 128 CLR 509

West Australian Locomotive Engine Drivers' Firemen's and Cleaners' Union of workers v David Kimberley Hathaway (1995) 75 WAIG 1785

Western Australian Mint & Ors v The Australian Liquor Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Branch (1999) 79 WAIG 643

1 **ANDERSON J**: In my opinion, the application for the stay of proceedings before the Full Bench fails at the first hurdle. The effect of the orders made by the Full Bench is that the first respondent in the appeal, the Automotive, Food, Metals, Engineering, Printing, and Kindred Industries Union of Workers, has or will shortly obtain coverage of process workers employed by a poultry processing company, the second respondent Ingham Enterprises Pty Ltd, and the appellant The Food Preservers Union will lose that coverage.

2 That is perhaps an oversimplification, but that is what I understand to be the effect of the orders that have been made by the Full Bench or are about to be perfected by the making of orders by the President of the Commission.

3 What is sought from me is an order that the proceedings before the Full Bench be stayed. It perhaps does not matter very much whether, on a strict interpretation of the application before me, a stay of orders is sought or a stay of proceedings is sought. It has been made quite clear by counsel for the appellant, Mr Viner QC, that it is the proceedings themselves which are sought to be stayed so as to put a stop to the perfecting of the orders that have been made by the Full Bench thus far. I will take that to be an application to stay proceedings rather than an application to stay the effect of orders.

4 In my opinion, an order for a stay of proceedings should only be made in special or exceptional circumstances. It is a power which this Court undoubtedly has, but it is a power which should be sparingly and cautiously used. This is essentially because the party in whose favour the proceedings have gone below, the party in whose favour the orders have been made by the tribunal authorised to make them, is entitled to the fruits of the proceedings and the fruits of the orders. The judgment below, the determination below, cannot be treated as a provisional determination; it is a final determination.

5 If the failure to order a stay pending appeal will or may result in the right of appeal itself being rendered nugatory, that will usually be regarded as a special or exceptional circumstance sufficient to sustain an order for stay. It will be a powerful factor in support of the exercise of the discretion to stay the proceedings pending the appeal, but I am not persuaded that those circumstances exist in this case. It is true that, as Mr Viner has pointed out, the grant of a stay would maintain the *status quo* pending appeal but that cannot be the test. If the test was whether or not the refusal to grant a stay would disturb the *status quo*, then I think a stay must always be granted.

6 In this case, if the appeal is successful presumably the appellant, that is, The Food Preservers Union, will regain the coverage that it has lost by reason of the decision below, everything will be back to where it was and no irremediable loss or harm will have occurred. It certainly is not a case, therefore, in which, without a stay, the right of appeal will be rendered illusory or nugatory.

7 I am also of the view that a stay pending appeal should not be granted in industrial matters unless there is a strong appeal case. I put it no higher than that, recognising as I do that there may be controversy as to exactly how far that test goes. In my view, there must at least be a strong appeal case before the Court will entertain an application to exercise its discretion to order a stay. Now, this will be so whether the appeal is an appeal under s 90 of the *Industrial Relations Act* or whether it is an appeal by way of prerogative writ. In this case I do not say that the appellant in the appeal or the applicant in the prerogative writ proceedings has no arguable case, I do not say that at all, but I am not persuaded that the case is strong.

8 As to the appeal, it is, in my opinion, *prima facie*, incompetent. The appellant is not a party to the proceedings below, nor does it have, so far as I can tell from the papers, intervener status. On the face of it, the appellant is not a person or a body that is comprehended by s 90(2). That being so, it is not a person or body that is entitled to institute an appeal. That is the *prima facie* position. I state no concluded view about it, but it is sufficient to prevent me from reaching the state of satisfaction which I must reach before I would order a stay, that there is a strong appeal case.

9 As to the prerogative writ, I really cannot get to the stage of considering making an order that the order *nisi* operate as a stay of proceedings before granting the order *nisi*. So, before I could go on to decide whether or not the order *nisi* should operate as a stay, I would have to come to the conclusion that the circumstances are appropriate for an order *nisi* to be granted.

10 It is not difficult to get an order *nisi*. I do not go into the niceties of the test. Suffice it to say that one would ordinarily succeed in obtaining an order *nisi* by showing that there was an arguable case, and I will say no more than that. However, the granting of an order *nisi* is discretionary and I, for one, would not exercise a discretion to grant an order *nisi* while there was on foot an appeal covering the same matters, and that is the position in this case. Whilst I am of the opinion that the appeal, *prima facie*, is incompetent, there it is; the appeal is on foot, and that being so I could not consider actually granting an order *nisi* and therefore put those proceedings to one side.

11 The position in summary, therefore, is that I am not persuaded that the appellant has a strong appeal case because I am not persuaded that the appellant has a strong case to argue that its appeal is competent. On the contrary, my opinion is that there is a strong case to argue that the appeal is not competent. In any event, I would decline to exercise my discretion to order a stay because there are no special or exceptional circumstances warranting the making of the order. I do not go over the reasons I have already given for that.

12 For those inelegantly expressed reasons, the application for a stay in appeal IAC number 7 of 2000 must be refused. Concerning the application for the grant of an order *nisi*, I think that the proper course is to accede to Mr Viner's request and adjourn that application *sine die*.

FULL BENCH— Appeals against decision of Commission—

2001 WAIRC 03945

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	GEOFFREY STEPHEN HINCKS, APPELLANT
	v.
	DARRELL CROUCH AND ASSOCIATES PTY LTD, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	CHIEF COMMISSIONER W S COLEMAN
	COMMISSIONER S WOOD
DELIVERED	THURSDAY, 11 OCTOBER 2001
FILE NO/S	FBA 32 OF 2001
CITATION NO.	2001 WAIRC 03945

Decision	Appeal dismissed.
Appearances	
Appellant	Mr G S Hincks on his own behalf as appellant
Respondent	Mr D J Crouch on behalf of the respondent

Reasons for Decision.

THE PRESIDENT—

1 This is an appeal pursuant to s.49 of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "the Act") against the decision of the Commission, constituted by a single Commissioner, made on 18 May 2001 in matter No 1320 of 2000.

2 The appeal purports to be against paragraphs 11, 12 and 13, but that would appear to be of the reasons for decision and not the decision, which is contained in an order made on 22 May 2001, and deposited in the office of the Registrar on 23 May 2001 and which, formal parts omitted, reads as follows—

"(A) DECLARES that Geoffrey Stephen Hincks has been denied a benefit under his contract of employment; and

(B) ORDERS that Darrell Crouch and Associates Pty Ltd forthwith pay Geoffrey Stephen Hincks the sum of $600.70."

3 It is axiomatic that one can only appeal pursuant to s.49 of the Act against a decision and not the reasons therefor.

GROUNDS OF APPEAL

4 The grounds of appeal, as they appear at page 2 of the appeal book (hereinafter referred to as "AB"), are as follows—

"1. Advertising allowance

In relation to issues regarding advertising allowance, the Commissioner failed to consider the relevant evidence, and further considered evidence that was irrelevant to matters set out in paragraph 10 of the Commissioners (sic) further reasons for decisions (sic), delivered on 18th May 2001

The Commissioner further erred in law in failing to consider relavent (sic) evidence in relation to the commissioners (sic) findings in paragraph 11.

2. Sales commission in relation to Lot 13

In relation to paragraph 12, the Commissioner erred in failing to take into account relevant evidence establishing the existance (sic) of a sales transaction."

BACKGROUND AND EVIDENCE

5 Upon the hearing of the appeal, both parties represented themselves, as they had at first instance, the respondent being represented by its Managing Director, Mr Darrell John Crouch.

6 This was a claim whereby the appellant, Mr Geoffrey Stephen Hincks, a real estate salesman, alleged that he had been denied contractual benefits by the respondent company which, at all material times, carried on business as a real estate agent. His claim was expressed as follows—

"I was to receive a 3% over rider income for all sales generated by other company representatives net commission until further notice. This added benefit is also inclusive of superannuation."

and

"8% of the representative's net commission on settled transactions will be credited to the representative's advertising allowance based on the previous months settled sales transactions only."

(See page 3(AB)).

7 No amount was expressed in the particulars of claim as claimed for contractual benefits, except an amount (unspecified) which, Mr Hincks said, was owing under the first head and an amount under the second head.

8 Evidence was heard by the Commission on 22 January 2001. The evidence before the Commission on that occasion consisted of some documentary evidence and the oral evidence of Mr Hincks and of Mr Crouch.

9 Mr Hincks was employed without interruption for the period 17 December 1997 to 13 May 2000. Mr Hincks' evidence was that, pursuant to his Sales Representative Employment Agreement of 17 May 1999 (exhibit 1) (see pages 16-26(AB)), he was entitled to receive a 3% overrider income from all sales generated by other company representatives' nett commission until further notice. He had received no further notice and asserted that that provision of the agreement was still in force.

10 He received during the period of his employment only $300.00 in overrider payments. He received that amount in 1998-1999. That payment was prior to the date of the written agreement which commenced on 17 May 1999. His claim was for overrider commission from 17 May 1999 onwards.

11 Mr Hincks tendered a document (exhibit 2) (see pages 28-30(AB)) which is entitled "Schedule off (sic) Commissions and Advertising Expenses". This, he said, related as well to claims for advertising allowance and incentives because of an agreement to pay him "an initial advertising allowance of $400.00 and an added incentive of 8% of your nett commission on settled transactions". He did receive the initial advertising allowance of $400.00.

12 His claims were for—

(a) $102.83 underpayment in January 1999 (see page 7 of the transcript at first instance (hereinafter referred to as "TFI")).

(b) $71.20.

13 Mr Hincks also referred to records said to be the respondent's records where an entry of $1,168.50 should have been made but it was in fact $1,168.70. A sum of $1,239.70 was brought forward, he said. He was using his schedule (exhibit 2) to correct these company records.

14 He also claimed that, on 25 February 2000, he was underpaid commission on Lot 13 at Westdale, said to be part of a subdivision, where he was supposed to get 8% commission. He claimed that he should have been paid $5,125.00 commission in respect of the sale of that property. There was no evidence of why he was entitled, what part he played in any sale, and what was meant by the sale.

15 Mr Hincks contributed monies for advertising from his own pocket, he said. It would seem that this came from deductions from commissions (see page 10(TFI)).

16 The gist of the claim was, as the schedule prepared by him purported to evidence, that there had been deducted from commissions otherwise due to him advertising expenditure which should not have been deducted.

17 Although Mr Hincks submitted to the Full Bench that that evidence was untrue, there was no direct denial of that evidence.

18 In relation to the claim for commission for the alleged sale of Lot 13 Westdale, Mr Crouch said in evidence at first instance—

> "There was no sales transaction. It was annexed from the overall property by the previous owner before I bought it and did the actual transaction. It wasn't a sale. The next door neighbour bought it and annexed from the Westdale estate. It is not a transaction, not a sales transaction where a real estate agent was involved. It was a subdivision annexation."

(See page 77 (TFI)).

I would observe that this was not evidence on oath, but adduced apparently from the bar table. However, the Commissioner relied on that evidence.

19 Mr Hincks also claimed that he was not paid for fencing which he had done. This was not part of his real estate employment. He constructed exhibit 2 on the basis of previous months' settled transactions only. Exhibit 2, of course, goes back to January 1998 before the written agreement was entered into. He claimed, in relation to Lot 13 Westdale, commission of $5,125.00. His commission, he said, should have been at an 80% rate, not a 50% rate, and was not.

20 In cross-examination, Mr Hincks denied that he was dismissed in September 1999 or in December 1999. Much of the evidence given by Mr Hincks in cross-examination is incomprehensible. He said that the running total provided by him in exhibit 3 was the same as the respondent's, except that the credits allowed him for advertising were incorrect. The carried forward figure, he said, was incorrect.

21 Mr Crouch's evidence was that Mr Hincks was employed from 17 December 1997 to 13 May 2000, with two interruptions in between. In particular, he was dismissed as Sales Manager in September 1999 and re-employed two to five days later as a sales representative. In December 1999, he was dismissed and reinstated on 50% commission again. He produced correspondence about these matters. He denied that Mr Hincks' entitlement to overrider commission occurred five or six months before May 1999. Mr Crouch agreed that Mr Hincks' entitlement to the advertising allowance existed prior to 17 May 1999, i.e. 8% on the previous month's sales, but said in evidence that he was paid all of these amounts in full. He denied that Mr Hincks was owed anything for fencing. He denied that Mr Hincks was owed anything at all. He produced in evidence financial statements prepared from time to time in support of his oral evidence.

22 In cross-examination, Mr Crouch's evidence was that Mr Hincks was paid advertising commission when it was due.

23 The Commissioner at first instance advised that, without Mr Hincks taking him to entries on the document, Mr Crouch's evidence balanced Mr Hincks' and the Commissioner was none the wiser.

24 In re-examination, Mr Crouch denied any liability, reiterating what he had said earlier (see pages 60a-61 (TFI)).

Reasons for Decision of 31 January 2001

25 After that hearing, the Commissioner issued reasons for decision on 31 January 2001, together with Minutes of Proposed Order which, formal parts omitted, read as follows—

> "(1) DECLARES that Mr Hincks is not entitled to a 3% over rider income for all sales generated by other company representatives' net commission past 23 December 1999;
>
> (2) ORDERS that so much of application 1320 of 2000 claiming over rider commission past 23 December 1999 is hereby dismissed;
>
> (3) THAT the balance of the application remain adjourned pending the further advice of the parties;
>
> (4) THAT the balance of the application may be re-listed at the request of either party provided that 48 hours' notice of intention to do so is given by one party to the other."

26 The Commissioner found, and it was not challenged, that the benefits claimed by Mr Hincks were contained in writing in the Sales Representative Employment Agreement of 17 May 1999, which document contained the essential terms of the contract of employment between the parties.

27 What the Commissioner found was as follows, summarised—

(a) That Mr Hincks was dismissed on two occasions in September 1999 and December 1999. In September 1999, some two to three days after the dismissal, Mr Crouch relented and put Mr Hincks back on to carry on his employment.

(b) In December 1999, Mr Hincks was dismissed and reinstated, not as Sales and Investment Manager, but as a sales representative only. There were no further written conditions of employment.

(c) The Commissioner then concluded that Mr Hincks, even if he had been dismissed, was re-employed on the same terms and conditions of employment as applied previously.

(d) Thus, the Commissioner found that after September 1999 Mr Hincks remained entitled to the 8% advertising incentive due to a sales representative and also the 3% overrider commission due to his position as Sales and Investment Manager (Country).

(e) The Commissioner then went on to find that Mr Hincks was dismissed on 23 December 1999 and that the entitlement to the overrider commission claimed had not been established past 23 December 1999.

(f) The Commissioner then decided the calculations to be undertaken by the parties in those matters which were adjourned should be taken to 23 December 1999 in relation to the claim for overrider allowance.

28 The application was adjourned by the Commissioner on the understanding that the respondent would reconcile various exhibits tendered to the Commission to see whether or not they showed completed sales in any given month, for which an 8% advertising allowance was due and for which in the following month there was an advertising expense incurred. This, the Commissioner said, was to provide the parties with the opportunity to approach, on a purely arithmetical basis, the remaining differences between them, and calculate the entitlements "which may be due as a result of the evidence before the Commission". The matter remained adjourned then in accordance with directions given at the conclusion of the hearing. Various documents were filed and some required to be exchanged were not.

Reasons for Decision—18 May 2001

29 The Commissioner issued supplementary reasons for decision on 18 May 2001.

30 The Commissioner referred to the special agreement in relation to overrider commission, which reads as follows—

> "**SPECIAL AGREEMENTS—**
>
> The Representative is to receive a 3% over rider income for all sales generated by other Company Representatives net commission until further notice. This added benefit is also inclusive of Superannuation."

(See page 26 (AB)).

31 The agreement also contained this provision—

> "As well as an added incentive of 8% of the representative's net commission on settled transactions will be credited to the representative's advertising allowance based on the previous months settled transactions only."

(See page 22 (AB)).

32 The Commissioner found that there was a sum of $23,449.95 net sales commission made by country representatives of the respondent between 1 July 1999 and 23 December 1999. The Commissioner accepted the sum of $23,449.95. This was because Mr Hincks did not query that amount, but only whether it included sales for Mr Matthews and Mr Davidson and the Commissioner accepted the respondent's reply that it did. The Commissioner, therefore, made the finding that, for the 3% over rider commission, calculated in accordance with the contract of employment, amounted to $703.50.

33 The Commissioner then dealt with the question of advertising allowance. In particular, he found as follows—

> "The other two matters he refers to, they being a property sold to Vivian and settled in April 1999 and two properties sold in October 1999 for Miller, and land in Popanyinning were referred to in the evidence. Having considered Mr Crouch's evidence in relation to each of the two matters, I am simply not satisfied that Mr Hincks has shown that an error has occurred. Whilst I appreciate that Mr Hincks will not agree with this conclusion, the balance of the evidence does not show that the money was due to him as he has claimed. By way of illustration, at page 48 of the transcript Mr Hincks cross-examined Mr Crouch on the claim that there should be a credit for Vivians and Mr Crouch denied it was due. I expressly invited Mr Hincks to show me by question and answer that Mr Crouch's evidence was wrong otherwise the evidence is merely balanced and Mr Hincks would not have proven his claim. Mr Hincks stated that he understood, however, he did not return to the issue at all. I am entitled to conclude from that that he would be unable to show that Mr Crouch was wrong. Accordingly, the claim is simply not made out and it fails.
>
> Mr Hincks then refers to a commission of 80% for a property known as "Lot 13". This was raised in evidence on pages 76 and 77 of the transcript. Mr Crouch's evidence is that—
>
> > "…there was no sales transaction. It was annexed from the overall property by the previous owner before I bought it and did the actual transaction. It wasn't a sale. The next door neighbour bought it and annexed from the Westdale estate. It is not a transaction, not a sales transaction where a real estate agent was involved. It was a subdivision annexation."
>
> Mr Hincks did not pursue the matter. He bears the onus of proving his claim and there is simply no evidence that there was a sales transaction.
>
> Finally, in relation to the claim regarding the fencing between Lots 6 and 7 and Lot 8, I am not satisfied that this claim forms part of the application before the Commission. This claim does not, on the evidence before the Commission, relate to the respondent to this application. Mr Hincks informs the Commission that after he had left the respondent's employment Mr Crouch had asked him to do fencing on the property. Mr Hincks' evidence suggests that this understanding was "outside of the real estate side of it". This evidence is corroborated, in effect, by the evidence of Mr Crouch at page 40 of the transcript where Mr Crouch states that Mr Hincks was "commissioned" as a fencing contractor to him, directly. The amount of $158.40 which is claimed by Mr Hincks is denied by Mr Crouch and but even if the amount is due, I am not satisfied that it is due from this respondent."

Summary of Submissions by Mr Hincks to the Full Bench

34 The Full Bench were taken to the advertising allowances credited to Mr Hincks' account which was the subject of a schedule of sales transactions and advertising prepared by Mr Hincks. There was no evidence of what it was prepared from, in particular no evidence that it was prepared from accounts or contemporaneously compiled records (see pages 28-30(AB)).

35 Mr Hincks advised that page 1 was sent to him by the respondent. The last total on that page is $1,168.50 (see page 32(AB)). Then there was a page which he described as another version of page 32(AB) and, therefore, "Mark 2". Then there was Exhibit D, which he described as "Mark 3", i.e. a third version of the page appearing at page 32(AB). Although Mr Hincks said that he did not see that at the hearing at first instance, it was in evidence as Exhibit D. He then referred to page 42(AB) which he submitted revealed he was owed $108.80.

36 He then submitted that there were two properties sold in October (see pages 40 and 42(AB)). At page 40(AB), it is shown that he received a nett figure of $1,285.00. He also complained that the figure shown there, namely $961.00, was nett after superannuation and should not have been subject to that deduction.

37 His complaint was that he was not credited with $102.80 for that advertising which was 8% of that amount of commission in December.

38 He then submitted that, in April 1999, there was a conjunctional sale of a house at 51 Hunt Street, Beverley. His share of the commission he submitted was $688.75. He received commission of $688.75, so 8% of his share of that commission was $53.50, which should have been credited to him in May 1999. (It appears at page 29(AB) under the heading "Commission".) (See also page 40(AB).) The submission was that the Commissioner did not properly consider the schedule.

39 Mr Hincks' submission then was that there were three lots at Westdale, near Beverley, which were sold as part of the Westdale Estate. His submission was that he was to be paid 80% of the total commission payable on the sale of each of those three lots. On the sale of Lot 13, his submission was that he was paid at the rate of 51.8% only of the total commission.

40 Mr Hincks submitted that a summary prepared by him revealed that he had only been paid $2,000.00 in commission which therefore required a further payment of $1,444.25, making a total of $3,144.25, being 80% commission on the transaction.

41 In answer to questions from Commissioner Wood, Mr Hincks identified the amounts which he alleged to be owing as—

$108.80
$102.80
$ 53.50
$ 71.20
$ 86.49
$105.00

(See pages 19-20 of the transcript at appeal).

Summary of Submissions by Mr Crouch to the Full Bench

42 Mr Crouch's submission was that the Commissioner's discretion did not miscarry and that the decision of the Commissioner was based on 2 years of original records produced by the respondent. He submitted that pages 28 and 29 (AB) were documents which he disputed and that they were documents "made up by Mr Hincks himself and made to suite Mr Hincks".

43 The submission was that the figures relied on by Mr Hincks were totally in dispute. He said that pages 33, 34, 37 and 39 (AB) match the "original documentation". These were a professional record over a period of two years, not made up on a particular day as a self serving document, so the submission went, "just out of the file and presented to the Commission". The documents, it was submitted, were not made up but faxed to Mr Hincks over a period of time to show him his position.

44 It was submitted that Mr Hincks had added them all up and made his own figures up and, accordingly, that there was no Mark 1, 2 or 3 of page 1 of the statements. He submitted that, at pages 33 and 37 (AB), the closing balance on page 1 and the opening balance on page 2 were what were given to Mr Hincks. It was submitted that pages 29 and 30 (AB) revealed erroneous unaudited figures which were Mr Hincks' own. These, it was

submitted, the respondent disagreed with as being in conflict with the respondent's own progressive statements.

45 In relation to the claim for commission, the submission was that there was no such thing as Lot 13, because there were only 12 lots at Westdale. He submitted that Lot 13 was the land which was "annexed from the vacant land which I bought" and that there were only twelve lots. He drew attention to the evidence at page 77(TFI) that there was no real estate agent involved.

46 His submission was that the $2,000.00 paid to Mr Hincks was an advance to him (the sum of $2,000.00 is written in on exhibit B) (see page 46(AB)).

47 In reply, Mr Hincks submitted that Lot 13 did exist.

Conclusions

48 I have recounted what occurred in this matter from first instance to appeal in some detail because this was a matter involving two litigants in person who displayed a degree of animosity and because the factual situation was, in many respects, not at all clear. On appeal, both parties confused matters by attempting to adduce fresh evidence, and to raise new matters from the bar table in contravention of the Full Bench's directions. The Commission at first instance had a difficult task.

49 The onus was on the appellant to establish those facts on the balance of probabilities on which the Commissioner could find him.

50 The evidence in relation to Lot 13 Westdale (see pages 14-15(TFI)) was that Mr Crouch agreed to pay 80% of commission on the lots on the Westdale Estate. This 80% commission induced Mr Hincks, he said, to leave L J Hooker, York, and join Mr Crouch. Exhibit 4 purports to be a note of an agreement made by Mr Hincks in relation to the Westdale Project sales dated 8 December 1997 (see page 27(AB)), but it is no more than a note made by him of what he says orally was the agreement.

51 There is no evidence that a sale occurred in which he was instrumental in effecting. There was no evidence of a sales transaction, but a broad reference to it. The oral evidence by Mr Hincks from the bar table that there was a sale can be of no weight.

52 Nothing emerged from records before the Commission which might be properly acceptable to demonstrate, on the submissions made to the Full Bench that the amounts claimed by Mr Hincks were due to him as contractual entitlements, or that any amounts were due to him before 23 December 1999. Nothing was shown or submitted to the Full Bench that supported Mr Hincks' assertion that his claims which I have outlined above were correct.

53 Mr Hincks' records, on which he relied to establish the amount of the contractual entitlements, were not original notes or records maintained by Mr Hincks or kept by him, but attempts to reconstruct records provided by the respondent so as to point out what, in fact, his memory suggested he should disagree with.

54 Insofar as the Commissioner used his advantage to make findings following his seeing and hearing the witnesses give evidence, nothing was said by anyone or read by me in the transcript or other evidence to suggest that he misused his advantage. Even his placing incorrectly weight on Mr Crouch's denial of any sale at Lot 13 Westdale does not relieve Mr Hincks of an onus which, for the reasons which I have advanced above, he did not discharge.

55 On a fair reading of the Commissioner's reasons for decision, there was nothing of error in what he did. The burden was not discharged to establish what Mr Hincks claims. There was no error in the exercise of the discretion (see *House v The King* [1936] 55 CLR 499).

56 For those reasons, the appeal was not made out. I would dismiss the appeal.

CHIEF COMMISSIONER W S COLEMAN—

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

COMMISSIONER S WOOD—

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

THE PRESIDENT—

59 For those reasons, the appeal is dismissed.

Order accordingly.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	GEOFFREY STEPHEN HINCKS, APPELLANT
	v.
	DARRELL CROUCH AND ASSOCIATES PTY LTD, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	CHIEF COMMISSIONER W S COLEMAN
	COMMISSIONER S WOOD
DELIVERED	THURSDAY, 11 OCTOBER 2001
FILE NO/S	FBA 32 OF 2001
CITATION NO.	2001 WAIRC 03946

Decision	Appeal dismissed.
Appearances	
Appellant	Mr G S Hincks on his own behalf as appellant
Respondent	Mr D J Crouch on behalf of the respondent

Order.

THIS matter having come on for hearing before the Full Bench on the 17th day of September 2001, and having heard Mr G S Hincks on his own behalf as appellant, and Mr D J Crouch on behalf of the respondent, and the Full Bench having reserved its decision on the matter, and reasons for decision being delivered on the 11th day of October 2001 wherein it was found that the appeal should be dismissed, it is this day, the 11th day of October 2001, ordered that appeal No. FBA 32 of 2001 be and is hereby dismissed.

By the Full Bench.

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

2001 WAIRC 03827

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	HOTCOPPER AUSTRALIA LTD, APPELLANT
	v.
	DAVID SAAB, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	COMMISSIONER J H SMITH
	COMMISSIONER S WOOD
DELIVERED	FRIDAY, 21 SEPTEMBER 2001
FILE NO/S	FBA 15 OF 2001
CITATION NO.	2001 WAIRC 03827

Decision	Appeal dismissed.
Appearances	
Appellant	Mr R L Le Miere (of Queens Counsel), by leave
Respondent	Mr A D Lucev (of Counsel), by leave

Reasons for Decision.

THE PRESIDENT—

INTRODUCTION

1 This is an appeal against the whole of the decision of the Commission, constituted by a single Commissioner, given on 14 March 2001 in matter No 774A of 1999 and brought pursuant to s.49 of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "the Act"). The Commission at first instance declared that it had jurisdiction and power to deal with the applicant's claim and granted leave to appeal against that decision pursuant to s.24(2) of the Act.

2 The decision appealed against, therefore, is a decision made pursuant to s.24 of the Act and is final and conclusive, for the purposes of the proceedings before the Commission. It was not submitted to the Full Bench that the decision appealed against was a "finding", as defined in s.7 of the Act, and therefore requiring the leave of the Full Bench, as required by s.49(2a) of the Act. In this case, the decision as to jurisdiction became a decision, for the purposes of s.49 of the Act, when leave to appeal was granted by the Commission making the finding as to jurisdiction pursuant to s.24(2) of the Act.

GROUNDS OF APPEAL

3 It is against the decision as to jurisdiction that the appellant employer now appeals on the following grounds—

"1. The Commissioner erred in law in holding that the Commission has jurisdiction and power to deal with the claim.

Particulars

(a) The Commission does not have jurisdiction to hear and determine the matter because the respondent's application in the matter ("the application") is not a claim that the respondent has not been allowed by the applicant a benefit to which he is entitled under his contract of service and hence the matter may not be referred to the Commission by the respondent pursuant to section 29(1)(b)(ii) of the Industrial Relations Act 1979 ("the Act"); and

(b) The Commission does not have power to make the orders sought by the respondent because the application is not an industrial matter as defined in section 7(1) and section 7(1a) of the Act and hence is not within the jurisdiction of the Commission under section 23 of the Act.

2. The applicant has leave to appeal pursuant to section 24(2)(b) of the Act.

Particulars

(a) The Commissioner granted the applicant leave to appeal by order (2) of his decision made 14 March 2001 in the matter."

BACKGROUND

4 The respondent employee, Mr David Saab, applied for orders pursuant to s.29(1)(b)(i) of the Act, by an application for relief filed in the Commission on 8 June 1999. He claimed that he had been unfairly dismissed from his employment with the abovenamed appellant on 25 May 1999. He sought reinstatement to the position of Chief Executive Officer of the appellant and also claimed, pursuant to s.29(1)(b)(ii) of the Act, that he had been denied contractual benefits by his employer to which benefits he was entitled under his contract of employment and which were not benefits due under an award.

5 On 15 June 2000, the Commission, after a hearing, ordered that the abovenamed respondent be reinstated to his former employment, with effect of and from 6 June 2000 without loss of earnings and benefits as if he had not been dismissed, having found that he was harshly, oppressively or unfairly dismissed.

6 Further, the Commissioner directed in the order that application No 774 of 1999 be divided, and granted liberty to Mr Saab to apply in respect to shares and options to buy shares, the subject of a claim for contractual benefits against the appellant. This was then pursued by application No 774A of 1999.

7 The substantial background was that the relevant terms of Mr Saab's employment with the appellant were set out in a letter from the appellant to Mr Saab dated 9 March 1999, signed by Mr Saab and by Mr Ross Arancini on behalf of the appellant.

8 Clause 4 of that contract provided, inter alia, that, on commencement of Mr Saab's employment on 17 February 1999, he would be issued with 3.5 million fully paid ordinary shares in the capital of the appellant at an issue price of 0.0001 per share (the issue price). The shares were subject to a call option in favour of a Mr Ron Gully which was to expire on 16 February 2003. (That call option is not relevant to a determination of this appeal.)

9 Clause 4 provided further that, within five business days of the acceptance by Mr Saab of the terms of the contract, i.e. in fact by 16 March 1999, the appellant was to issue Mr Saab with options to purchase 6 million fully paid ordinary shares in the capital of the appellant, details of which are listed at page 5 of the appeal book (hereinafter referred to as "AB").

10 Mr Saab's claim is for a benefit it was alleged was denied to him, it being a sum of money equal to the value of the shares and options as set out in paragraphs 4 and 5 of the Particulars of Claim.

11 For convenience, I reproduce Clause 4.1 to 4.7 and paragraph 5 of the particulars hereunder—

4.1 The Applicant claims a sum of money equal to the loss of the benefit of the Shares based on their highest listing price amounting to a total of $2.24 million and calculated as follows—

3.5 million shares x $0.64 cents on 8 February 2000 = $2.24 million.

See paragraph 145(e) of the Witness Statement of the Applicant dated 29 February 2000 (**the Statement**).

4.2 Alternatively, the Applicant claims a sum of money equal to the loss of the benefit of the Shares based on their market value on 28 February 2000 (some 2 days prior to the resumption of the hearing of this matter on 1 March 2000) amounting to a total of $1.75 million and calculated as follows—

3.5 million shares x $0.50 cents as at 28/2/2000 = $1.75 million.

See paragraph 145(e) of the Statement.

4.3 Alternatively, the Applicant claims a sum of money equal to the loss of the benefit of the Shares based on their market value on 11 January 2000 (when trading in the shares was halted pending the announcement of the takeover) amounting to a total of $1.575 million and calculated as follows—

3.5 million shares x $0.45 cents as at 11/1/2000 = $1.575 million.

4.4 Alternatively, the Applicant claims a sum of money equal to the loss of the benefit of the Shares based on their market value on 12 January 2000 (on the first announcement of the takeover) amounting to a total of $1.645 million and calculated as follows—

3.5 million shares x $0.47 cents as at 12/1/2000 = $1.645 million.

4.5 Alternatively, the Applicant claims a sum of money equal to the loss of the benefit of the Shares based on their market value on 8 February 2000 (when St George's Bank increased its stake in Bourse Data) amounting to a total of $1.820 million and calculated as follows—

3.5 million shares x $0.52 cents as at 8/2/2000 = $1.820 million.

4.6 Alternatively, the Applicant claims a sum of money equal to the loss of the benefit of the Shares based on their market value on 27 April 2000 (when the takeover offer became unconditional) amounting to a total of $1.120 million and calculated as follows—

3.5 million shares x $0.32 cents as at 27/4/2000 = $1.120 million.

4.7 Alternatively, the Applicant claims a sum of money equal to the loss of the benefit of the Shares based on their market value on 15 June 2000 (the last day of trading) amounting to a total of $840 thousand and calculated as follows—

3.5 million shares x $0.24 cents as at 15/6/2000 = $840 thousand.

Particulars

The Applicant says that had the Respondent properly performed the terms of the Contract then the Applicant would have had the opportunity of realising the value of the Shares at their respective prices on the respective dates as set out in paragraphs 4.1—4.7 above and which was denied by the Respondent.

The Applicant says that he would have availed himself of that opportunity no later than 28 February 2000.

5. Quantum of the Options

5.1 The Applicant claims a sum of money equal to the lost opportunity to him of entering into the market, exercising his options and realising their value during the exercise period (from 9 March 1999 to 9 March 2003), further particulars of which will be provided by way of expert evidence, prior to and at the hearing of this matter."

(See pages 6-7 (AB).)

12 Clause 6.1 of the applicant's particulars, which contains particulars of the orders sought, reads as follows—

"6.1 The Applicant seeks an order for the benefit denied to him namely a sum of money equal to the value of the benefit of the Shares and the Options as set out in paragraphs 4 and 5 above."

(See page 8 (AB).)

13 This application was opposed by the respondent employer for various reasons. In particular, it was contended that there was no jurisdiction in that the claim was not an industrial matter and was, therefore, beyond the jurisdiction of this Commission. It was also contended that this Commission does not have the jurisdiction or power under s.29(1)(b)(ii) of the Act or otherwise to award Mr Saab a sum of money equal to the value of the benefit of the shares and options as set out in paragraphs 4 and 5 of Mr Saab's Particulars of Claim.

14 The Commissioner referred to the decision of the Full Bench in *Perth Finishing College Pty Ltd v Watts* 69 WAIG 2307 (FB). Based on that authority, the Commissioner found that what was claimed were benefits and that the Commission had jurisdiction and power to deal with the claim, saying that the circumstances in this case were so similar to the circumstances described to the Full Bench in *Perth Finishing College Pty Ltd v Watts* (FB) (op cit) that it was right to apply the ratio of the decision in that case.

15 The Commissioner held that he did have jurisdiction and power to deal with the claim in full, as particularised, as I have said.

16 In his written reasons for decision issued on 7 June 2000, the Commissioner found that—

(a) Mr Saab was entitled to a benefit of the contract with respect to the shares and options.

(b) He was unable to order specific performance of the shares and options.

(c) That he needed further submissions to—

(i) Determine whether the Commission has the power to make an award of "damages" if the specific terms of the contract cannot be ordered; and

(ii) Assess the benefit of the shares and options.

17 It was conceded by the applicant at first instance that the Commission was unable to order specific performance of the agreement to effect a transfer of shares and to enable the option to be exercised by Mr Saab. Further, the Commissioner accepted the applicant's submissions that "the Commission is unable to order that the shares and options provisions in the contract be issued" (see page 83(AB)).

18 The Commissioner then went on to make these observations as to the reason for the non availability of the remedy of specific performance as follows—

"Finally the evidence of a call option in favour of Mr Gully is irrelevant to whether the applicant is entitled to be awarded damages or other compensation as distinct from the quantum. The applicant says that by reason of Clause 3.5 of the respondent's Constitution and given that shareholder approval had not been obtained for share issues and options sought by the applicant, there are grounds that ought lead to a refusal to grant specific performance of the shares and options provisions in the employment contract. Not to do so would compel the respondent to issue shares and options in breach of it's Constitution and the Rules of the ASX. However, the applicable provisions of the contract were not at the relevant time in contravention of the respondent's constitution, Section 208 of the Corporations Law or the listing rules, but even if they were, they are not rendered void or otherwise unenforceable. This does not mean that there should not be an award of damages or other compensation made to the applicant. The other matter upon which comment should be made is the suggestion by Counsel for the respondent that the Commission is not a Court for the purposes of the Corporations Law. These matters have been discussed before the Industrial Appeal Court in *Helm v Hansley Holdings Pty Ltd in liquidation* (1999) 79 WAIG 1860, which concluded the Commission is a Court for those purposes."

(See pages 82-83(AB).)

19 That observation and Mr Saab's concession raises the question whether that term of the contract was unlawful, void or voidable as being beyond the power of the company to agree to or perform and the further question whether, if the contract was not able to be performed, there was any benefit to which Mr Saab was entitled, or to which he could be entitled under the contract of employment.

20 A further interesting question is then raised as to whether, because specific performance was conceded to be achievable, i.e. that transfers of the shares directly or following the exercise of an option was not within power or lawfully achievable, there was a denial of any benefit by the appellant; given that, in my opinion, a denial would constitute a refusal or omission by the appellant employer and not an inability to transfer arising from its constitution or some external rules by which it was bound. That question was not before us on appeal, but it may have some influence on how this Full Bench ought to view questions of jurisdiction and power in this appeal.

21 There is a further interesting question as to whether there are any conditions precedent, in time in particular, for the performance of the contract by Mr Saab, but again, that is not an issue on this appeal.

ISSUES AND CONCLUSIONS

22 The appellant's case on this appeal is that the Commissioner erred in finding that he had jurisdiction to hear the claim of Mr Saab for an order for a sum of money equal to the value of shares and options which the appellant was required, by the contract of employment, to issue to Mr Saab but which it failed to issue.

23 Second, it was submitted that there was no power in the Commission to order that the appellant to pay to Mr Saab a sum of money equal to the value of the shares and of the options.

24 The nature of the errors submitted to have been made were as follows—

(a) the Commission does not have jurisdiction to hear and determine the matter because the application is not a claim that the applicant has not been allowed by HotCopper a benefit to which he is entitled under his contract of service and hence the matter may not be referred to the Commission by the applicant pursuant to section 29(1)(b)(ii); and

(b) the Commission does not have power to make the orders sought by the applicant because the application is not an industrial matter as defined in section 7(1) and section 7(1a) and hence is not within the jurisdiction of the Commission under section 23."

25 S.23(1) of the Act confers jurisdiction on the Commission, in broad terms, in relation to any industrial matter, and reads as follows—

> "Subject to this Act, the Commission has cognizance of and authority to enquire into and deal with any industrial matter."

Some Authorities

26 Before I turn to the consideration of these issues, I wish to deal with some of the authorities which were cited, principally *RRIA v ADSTE* 68 WAIG 11 (IAC) (Pepler's Case) and *Sakal v T O'Connor & Sons Pty Ltd* 75 WAIG 1509 (IAC).

27 Pepler's Case is authority for the proposition that there is nothing in the Act to justify the exercise of jurisdiction to award a dismissed employee compensation or any other money payment, except as an incident to an order for reinstatement or re-employment. That ratio decidendi, identified by Kennedy J in *Sakal v T O'Connor & Sons Pty Ltd* (IAC)(op cit) at page 1509, was held to apply to claims for contractual benefits where the contract of employment was no longer afoot and there was no order sought for reinstatement. Of course, as I observed above, a claim for contractual benefits, which would once have been outside jurisdiction on that basis, is now within jurisdiction since the insertion in the Act of s.7(1a).

28 I would also observe, as Kennedy J observed in *Sakal v T O'Connor & Sons Pty Ltd* (IAC)(op cit) at page 1509, that "A rule enunciated by a judge as the rule upon which he has acted will be the best guide of all to the ratio."

Was there jurisdiction and power to make the orders sought?

29 This was an application brought under s.29(1)(b)(ii) of the Act whereby Mr Saab sought an order that he be paid the monetary value of shares and options to purchase shares which the appellant bound itself to provide, transfer and afford and did not, pursuant to the contract of employment.

30 There is also a claim for lost opportunity to realise the value of the shares at their respective prices, which is alleged to be a benefit denied to Mr Saab (see the particulars in the last two paragraphs of No 4 of the Particulars of Claim (page 7(AB))). Further, there is a claim, in paragraph 5.1 and in part in paragraph 6.1 of the Particulars of Claim, for a sum of money equal to the lost opportunity to Mr Saab of entering the market, exercising his options and realising their value during the exercise period.

31 The Commissioner found that Mr Saab was entitled, under his contract of service, to a benefit with respect to the shares and options. That benefit is the entitlement under paragraph 4 of the contract of employment (see pages 55-56 (AB)) to be issued with the shares and options.

The Nature of s.29(1)(b)(ii) Applications—This Claim

32 S.29(1)(b)(ii) of the Act reads as follows—

> "(1) An industrial matter may be referred to the Commission—
>
> ....
>
> (b) in the case of a claim by an employee —
>
> ....
>
> (ii) that he has not been allowed by his employer a benefit, not being a benefit under an award or order, to which he is entitled under his contract of service,
>
> by the employee."

33 I observe that a claim made under s.29(1)(b)(ii) of the Act is not a claim for breach of contract of employment, in the common law sense, because the ability to make the claim, the nature of the claim and the remedies available are limited by and also stem from the wording of the sub-section. S.29(1)(b)(ii) prescribes and defines a particular statutory breach of contract within those limitations.

34 The limitations (and/or conditions precedent to the exercise of jurisdiction and/or power) include the following—

(a) The claim must relate to an "industrial matter", as defined in s.7 of the Act.

(b) The claim must be made by an "employee", as defined in s.7 of the Act.

(c) The benefit claimed must be a contractual benefit, i.e. the claimant must be entitled to the claim under his/her contract of service.

(d) The subject contract must be a contract of service.

(e) The benefit must not arise under an award or order of the Commission.

(f) The benefit must have been denied by the employer.

(See also the discussion of the nature of s.29(1)(b)(ii) claims in *Ahern v AFTPI* 79 WAIG 1867 (FB).)

35 In this case, there were no issues concerning (a), (b), (c), (d), (e) and (f), it being common ground that the parties were employer and employee bound by a written contract of service and that, if there were "benefits" claimed, they had been denied. It was also not suggested that the "benefits" claimed and said to be denied arose under an award or order of this Commission. It is also clear that the denial of the benefits (if denial of benefits there were) is alleged to have been caused, to some extent at least, as it was, by Mr Saab's unfair dismissal.

36 It is true that Mr Saab did not seek an order that the appellant transfer to him the shares and options in accordance with paragraph 4 of the employment contract. It is also true that Mr Saab claims a sum of money equal to the value of the shares and options. (Clause 6.1 makes that clear.)

"Entitled"?

37 Whilst a discussion of the meaning of "entitled" or "entitlement" occurred in *Poulos v Walters* 72 ALR 136 (FCFC), in the context of an award, nonetheless, similar terminology is, in my opinion, applicable to rights and obligations under a contract of employment and I adopt that terminology. To be entitled to a benefit can be understood in the context of this principle, namely that, where there is a contract of employment, the rights and obligations created by that contract are "enforceable" between the parties (see also the discussion in *Perth Finishing College Pty Ltd v Watts* (FB) (op cit)).

38 In the case of contractual benefits (as rights and obligations) and which have been denied, these are "enforceable" under the Act and within the limitations which I have mentioned above, by proceedings under s.29(1)(b)(ii). I do not use the word "enforceable" here, in the sense in which it is used in relation to proceedings brought under s.83 and s.84A of the Act.

39 Mr Le Miere QC, on behalf of the appellant, submitted that the contract must be the immediate and direct source of the entitlement to the benefit (see *Elmslie v Federal Commissioner of Taxation* (1993) 118 ALR 357 per Wilcox J at 370-371 and 373).

40 The question of whether a claimant is entitled to a benefit under a contract depends on the benefit being a benefit, and also a benefit to which he is entitled under a contract.

41 In *Perth Finishing College Pty Ltd v Watts* (FB)(op cit), the Full Bench held at page 2315 that "under" is synonymous with "by virtue of" or "pursuant to" and that "pursuant to" means "in accordance with and consequent and conformable to". I apply those definitions.

42 If one is entitled to a benefit "under" a contract, therefore, one is entitled, by virtue of, pursuant to, or in accordance with and consequent upon and conformable to it (see also

Garbin v Wild (1965) WAR 72 at 75 (FC)). In this case, the "benefits" to which Mr Saab was entitled were the shares and the right to exercise the options to purchase. That was what was prescribed in the contract and what he was entitled to claim "specific performance" of under the contract, subject of course to the availability of that remedy and to what I have said above concerning actual entitlement.

43 Subject to the question of inability to transfer shares, as I have observed, there is no doubt, and it is quite clear that there was an entitlement in those terms in the employee, Mr Saab, contained in and existing because of, the contract of employment to the transfer of shares and the transfer of any shares which he exercised an option to acquire.

44 It is quite clear that, if the rights to acquire shares directly or by option were benefits then, as an employee, a party to a contract of employment conferring those "benefits", Mr Saab was entitled to them and could "enforce" that right pursuant to s.29(1)(b)(ii) of the Act. Since that was the case, he was "entitled", within the meaning of the sub-section and the contract was the direct source of the benefits.

Was a Benefit Claimed?

45 The first question raised by Mr Le Miere QC was whether what was claimed and what was sought to be ordered constituted a "benefit", within the meaning of s.29(1)(b)(ii) of the Act.

46 On a proper construction of the contract of service, which was in written form, or substantially in written form, and applying the ordinary natural meaning to the words, read in the context of the whole of the instrument, the benefit which the appellant agreed to confer was—

(a) 3,500,000 fully paid ordinary shares.

(b) Within five days of the compliance of the terms and conditions of employment, i.e. on or before 16 March 2000, Mr Saab would be issued with options to purchase shares as particularised in the agreement (see pages 55-56(AB)) over a period of four years at the values expressed and agreed.

Those are the "benefits" conferred, no more and no less.

47 The Commission's source of jurisdiction and power in relation to contractual benefits is, as was submitted, s.29(1)(b)(ii) of the Act. The section is also meant to provide a means, pursuant to s.23(1) and s.29(1)(b)(ii), to resolve disputes between employers and employees with a maximum of expedition and a minimum of legal form in relation to claims for contractual benefits (see s.7(1), s.7(1a), s.26(1)(a) and (c), s.26(2), and s.6(b) and (c) of the Act) (see also Kennedy J's observations as to the width of jurisdiction conferred by s.23 of the Act in *RRIA v ADSTE* 68 WAIG 11 (IAC) (Pepler's Case) at page 18).

48 In that context, in my opinion, the meaning of s.29(1)(b)(ii) of the Act must be ascertained by reading it in the context of the whole of the Act, having particular regard to s.6(b) and s.6(c) of the Act, which read as follows—

"The principal objects of this Act are —

.....

(b) to encourage, and provide means for, conciliation with a view to amicable agreement, thereby preventing and settling industrial disputes;

(c) to provide means for preventing and settling industrial disputes not resolved by amicable agreement, including threatened, impending and probable industrial disputes, with the maximum of expedition and the minimum of legal form and technicality;"

(See also s.26(1)(a) of the Act.)

49 Some emphasis should be laid on the following words in s.6(c) of the Act, "to provide means for preventing and settling disputes" and "the maximum of expedition and the minimum of legal form and technicality". Further, a generous or liberal interpretation should be applied to s.29(1)(b)(ii) which is, like s.29(1)(b)(i) of the Act, remedial legislation providing a remedy for that class of persons being employees who are denied contractual benefits to which they are entitled (see *Bogunovich v Bayside Western Australia Pty Ltd* 79 WAIG 8 (FB) and see *Bull and Others v Attorney-General for New South Wales* [1913] 17 CLR 370)).

50 I would also add that, in the interpretation of a provision of a written law, a contention that would promote the purpose or object, including the written law, (whether that purpose or object is expressly stated in the written law or not) shall be preferred to a construction that would not promote that purpose or object (see s.18 of the *Interpretation Act* 1984 (as amended)). The express relevant purpose of the Act, in this case, is evidenced by s.6(b) and (c), which are the two most relevant written objects.

51 First of all, what is claimed must be a benefit. The word "benefit" has not been defined in the Act.

52 However, the word "benefit" was defined by Johnson C in *Balfour v Travelstrength Ltd* (1980) 60 WAIG 1015 as follows—

> "Benefit ought to be wide enough to allow an employee to bring to the Commission a matter in which the employee believes that he/she has been deprived of an advantage, entitlement, right, superiority, favour, good or perquisite by the action of an employer in contravention of a provision of the contract of service."

This definition was approved and applied by the Full Bench in *Perth Finishing College Pty Ltd v Watts* (FB)(op cit) at page 2313, and I apply it here. The lack of limitation on the meaning of the word "benefit", or more accurately, the breadth of meaning permitted, is emphasised by the Full Bench in *Perth Finishing College Pty Ltd v Watts* (FB)(op cit) at pages 2313-2314 (see also *Welsh v Hills* (1982) 72 WAIG 2708 (FB)). That sort of liberality and breadth in interpretation is consonant with the approach required by s.6(b) and (c) of the Act, because the provisions are remedial and because such an interpretation, in terms of the above definition of the word by Johnson C (supra) in *Balfour v Travelstrength Ltd* (op cit), further promotes the objects of the Act.

53 In my opinion, the word "benefit" should be construed widely, having regard to s.23 of the Act and the power to "deal with" an "industrial matter", to s.29(1)(b)(ii) of the Act and to the objects of the Act, s.6(b) and (c) and s.26(1)(a) of the Act, to include not only a claim but an order for the value of the "benefit". S.23A of the Act also confers power in the Commission to "deal" with industrial matters—again words of breadth.

54 It is noteworthy that, even in contracts of employment, where remedies are sought within the narrower confines of the common law, amounts equivalent to the period required to terminate a contract, equivalent to the loss of tips, a share of profits or bonuses above the amount of salary, use of a car, relocation expenses and pension or superannuation entitlements, are accounted as recoverable benefits. (See Macken, McCarry and Sappideen, "The Law of Employment", 4th Edition at pages 299-306.)

55 The contention for the appellant was that Mr Saab did not seek an order that the appellant issue to him the shares and options which it was bound to do pursuant to the contract of employment. It was submitted that what was sought was not a benefit entitlement which arose from the contract.

56 It was conceded, as I have observed above, that the benefits claimed could not be obtained by an effective order for "specific performance". (In fact, the reason for such a remedy not being available may also be because it is not available as a matter of law.) If that concession had not been made, of course, such an order would plainly be competent and would be the order which, subject to the merits, was required to be made to confer the benefits denied to Mr Saab and to which he was entitled. The remedies which Mr Saab now seeks are sought because the prime and arguably most apposite remedy was conceded not to be and held not to be available.

57 It is, however, a little misleading to refer to an order that a contractual benefit claimed pursuant to s.29(1)(b)(ii) of the Act as an order for specific performance, although that phrase is sometimes used as convenient shorthand in this jurisdiction. An order for "specific performance" in this context would plainly be an order relating to rights conferred on an employer by an employee pursuant to a contract of employment and the obligations of the employee thereunder, and thus an order providing to the employee the benefit to which he was entitled and which he claimed. However, such an order is not to be read as or treated as an order for specific performance made in the civil courts in the exercise of their equitable jurisdiction. It is an order made within power, pursuant to s.29(1)(b)(ii) of the Act, to confer upon an applicant a benefit to which he or she was entitled and which he or she was denied.

58 The claim of Mr Saab is for a benefit denied him, namely a sum of money equal to the value of the shares and also the value of the shares, the subject of options, in the absence of a conceded inability to order the performance of the contract so as to confer the benefits. The claim was for that sum of money to be assessed in a number of specified ways. Mr Saab also claimed, as I have observed, an order that there be paid to him a sum of money equal to the lost opportunity to him of entering into the market, exercising his options and realising their value during the period within which he was entitled to exercise the option, namely 9 March 1999 to 9 March 2003 (see pages 6-7(AB)).

59 The rights which the contract conferred upon Mr Saab which he could enforce at law and in equity, and obligations in respect of the provision of such entitlements to him were placed upon the appellant by the contract were rights to property in shares by direct transfer of shares and by the exercise of an option to acquire shares. Such entitlements and obligations were also clearly "enforceable" by virtue of s.29(1)(b)(ii) of the Act. What was claimed, subject to the exceptions referred to hereinafter, was a "benefit".

60 The right given to the employee to obtain property in shares and the right to do the same upon the exercise of an option to purchase shares were rights (and benefits) expressly conferred, and benefits existing pursuant to, or in accordance with, and consequent upon, and conformable to, the contract of employment. The direct source of the right to property in the shares directly, or by option and the obligation to effect this was conferred on Mr Saab, by virtue of and conferrable with the contract of service. Put shortly, Mr Saab was thereby entitled to shares and to shares by exercise of an option to purchase them at the prescribed dates or within prescribed times.

61 To interpret the word "benefit" to exclude the monetary value of the "benefit" would be to deny the intention of the legislature and to torture the word "benefit". It would lead to absurdity and be quite inconsonant with the letter and/or the purpose of the Act (see s.6(b) and (c) in particular). In many cases, the benefit sought, such as the use of a car or the provision of a house, would be unrecoverable as a benefit, if its value could not be ordered to be paid. Nothing in the statute forbids this approach. The section, read in the context of the whole of the Act, leads inexorably to such an approach.

62 Further, such a construction effects no absurdity, ambiguity and leads to consonance with the Act as a whole, or furthers the objects of the Act and is consistent with the clear purpose of the Act, as expressed in s.29(1)(b)(ii) and in the objects and tenor thereof (see Pearce and Geddes, in their book "Statutory Interpretation in Australia" (4th edition) Chapter 2; and s.18 of the *Interpretation Act* 1984 (as amended)) (see also per Higgins J in *The Australian Boot Trade Employés' Federation v Whybrow & Co and Others* 11 CLR 311 at 341-342; and *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 35 ALR 151 at 169-170 per Mason and Wilson JJ).

63 It was submitted by the appellant that a civil court may award damages but the Commission, under s.29(1)(b)(ii) of the Act, may not, i.e. in relation to the claim for breach of contract for failing to issue shares and options, but that this is not a benefit to which Mr Saab is entitled under his contract of employment. Indeed, he was claiming part of his "remuneration", as that is defined in *Capewell v Cadbury Schweppes Australia Ltd* 78 WAIG 299 (FB). The Act recognises and clearly marks the distinction between a benefit under an employee's contract of service, i.e. a benefit which has its genesis in the contract and is identified by the contract in an express or implied term thereof or a collateral agreement thereto and an amount to which a claimant is entitled on the one hand, and a claim for compensation for loss or injury caused by the wrongful act of unfair dismissal which is, in fact, a statutory tort and attracts a remedy in compensation akin to but not to be characterised as damages on the other.

64 Therefore, s.29(1)(b)(ii) of the Act does not confer a "right of action" in damages for loss occasioned by a denial of contractual benefits. The section creates a limited right of action to apply for a limited remedy for statutory breach of contract. It is not limited, though, to an action to be taken after the contract has ended. One can claim a benefit during the course of the contract.

65 However, the "cause of action" and the remedy are limited to a claim of benefit denied. Further, there is a distinct difference between the value of the shares for the purposes of determining the amount of the benefit and for the assessment of damages. Mr Saab was entitled to the transfer of shares or their value under s.29(1)(b)(ii) of the Act.

66 Otherwise, he was entitled to their value as quantification of a benefit (but not to damages), if Mr Saab is able to establish the value. If the shares were not, by option or otherwise, transferable because they were unable at law to be so transferred, that goes to the question of entitlement and whether there was any and not to the quantum or nature of the benefit.

67 However, I emphasise that the establishment of the value of the benefit is not to be confused with the question of whether jurisdiction or powers to make the orders sought exists. The two questions are entirely separate, of course. If there is power and jurisdiction, the Commission decides the quantum value of the benefit for the purposes of any order.

68 It might, of course, have been contended, but it was not, that the benefit to which Mr Saab was entitled and which he was denied was not merely the shares and the shares transferable after the exercise of the option, but the profit derivable from them, too, upon sale and as is claimed in the alternative and also outright. (Incidentally, it is not clear, of course, interestingly, how one would describe a "loss" incurred upon the sale of the shares so acquired.)

69 I think that such a contention, were it made, could be answered in the following way. First, that is not what the agreement says and it is unambiguous. Second, any loss of profit upon sale is and was not part of the benefit conferred by the contract. All that the employer could do and did do was to provide a benefit in the form of chattels, namely shares of a certain value and an option to acquire other shares. The end result is that he would acquire shares at particular times and because he was an employee. Whether the shares were sold by Mr Saab, or retained by him, sold at a profit or at a loss were matters dependent upon his acts. Such a change in the ownership of the shares was not part of the nature, quality or substance of the benefit conferred on him, but depended on a transaction between him and third parties.

70 A claim for loss of opportunity or for damages for the inability to realise the value of the shares is not a claim for a benefit (see *Commonwealth of Australia v Amann Aviation Pty Ltd* 104 ALR 1 (HC)).

71 The nature of the claim and of claims for damages for breach of contract at common law and the difference of such claims and remedies for claims under s.29(1)(b)(ii) of the Act was well illustrated.

72 The expressions "expectation damages", "damages for loss of profits", "reliance damages" and "damages for

wasted expenditure", are simply manifestations of the principle that a person who has sustained loss by reason of a breach of contract is entitled to be placed in the same position, so far as money can do it, as if the contract had been performed. An award of reliance damages or damages for wasted expenditure does not represent direct recovery of the wasted nett expenditure (see per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

73 Where it is not possible for a plaintiff to demonstrate to what extent the performance of a contract would have resulted in a profit, he/she can seek to recover expenses reasonably incurred.

74 The claim for the shares, insofar as it relates to the loss of opportunity to realise their value at various prices on the dates in question, is a claim for damages, as *Commonwealth of Australia v Amann Aviation Pty Ltd* (HC) (op cit) makes them. Insofar, however, as the claim is a claim equal to the market value of the shares property which was denied Mr Saab at the date when he would have obtained property in the shares, it is not but a claim for the value of the benefit, i.e. property in the shares, which was denied Mr Saab. In my opinion, Pepler's Case (op cit) is authority for the proposition that compensation, as such, cannot be claimed.

75 What the sub-section does do is to confer on an employee, entitled to contractual benefits under a contract of employment and denied them, to seek and obtain orders to obtain those benefits. It is right to say that s.29(1)(b)(ii) of the Act gives no power to order compensation at large; or , if it does, I am not persuaded upon the submissions made on this appeal.

76 The claim for benefits cannot be a claim for compensation nor can the order sought be one for compensation (see *Belo Fisheries v Froggett* 63 WAIG 2394 (IAC) per Olney J).

77 As to the claim in respect of the option, the benefit to be conferred was the right to acquire shares which should have been transferred to Mr Saab had he exercised an option at particular times; the denial occurred when the contract was terminated by the employer before the date for transfer, because of the termination of the contract of employment, so that it was no longer open to Mr Saab to exercise the option so that property would pass in the shares before 2003. He was, therefore, denied the opportunity to exercise the option and denied the benefit of property in the shares, had he exercised the option, which was the benefit of which the contract was the direct source. A claim in that respect and orders to pay the value of the shares so assessed were also within power and jurisdiction.

78 The contract cannot be read as conferring a benefit manifested in an opportunity to sell the shares for profit, for those reasons.

79 The profit allegedly denied on the putative sale of any of the shares was not a benefit denied. The only benefit was a right to take property in shares by transfer, or by transfer following the exercise of an option, which benefit was denied by the termination of the contract of employment. Those benefits were quantifiable in money terms and within power and jurisdiction for the reasons which I have outlined above.

80 Further, a claim for the loss of opportunity to sell the shares at a profit was and is a claim for damages at large or compensation, which is not a claim within jurisdiction or power within s.29(1)(b)(ii) of the Act (see per Kennedy J in Pepler's Case (op cit) at page 18). (See also the characteristics of a claim for damages for lost opportunity referred to in *Commonwealth of Australia v Amann Aviation Pty Ltd* (HC)(op cit).)

81 The only benefits which the contracts purported to confer were a right to property in shares, directly by transfer or indirectly by the exercise of an option. These are the benefits which had their source in the contract. The benefit did not include a right of action based on their profitability or otherwise. The only entitlement relevant to the claim under the contract was to the remuneration, of which those benefits were part. They were, and I would find, benefits within the meaning of s.29(1)(b)(ii) of the Act and they were claimed as such.

82 Accordingly, for those reasons, I hold that this was a claim for a benefit to which Mr Saab was entitled under his/her contract of employment and which he was denied and that an order that he be paid the value of the shares required to be transferred to him be made, whether by option, if it is able to be established, is within power and jurisdiction, pursuant to s.29(1)(b)(ii) of the Act. (I refer again to the question whether there was a benefit under the contract because of the conceded inability to effect a transfer of shares.)

83 I would add that it may be necessary to pray in aid s.26(2) of the Act if there is no need to provide relief, other than that sought, but that is a matter for the Commission constituted to hear and determine the matter. Further, I do agree and it should always be borne in mind that s.26(2) of the Act is procedural and cannot confer jurisdiction or power where jurisdiction or power does not exist (see Pepler's Case (op cit) and the comments therein in relation to s.26(1)(a) of the Act, which, in my opinion, are applicable to the whole of s.26).

84 However, the matter before the Commission, save and except for the claim for and the orders sought in relation to the loss of opportunity to sell the shares at a profit, or any claim for lost profit, however expressed, was within jurisdiction and power.

Jurisdiction—Industrial Matter or Not?

85 Was the application within jurisdiction, as relating to an "industrial matter" and was the remedy sought within jurisdiction for the same reason?

86 The second head of argument was that the claim for "damages", as it was characterised in submissions, is not an "industrial matter", as defined in s.7(1) of the Act. Most appositely, s.7(1) of the Act defines an industrial matter, most relevantly for the purposes of this appeal, as follows—

> "**"industrial matter"** means, subject to section 7C, any matter affecting or relating to the work, privileges, rights, or duties of employers or employees in any industry or of any employer or employee therein and, without limiting the generality of that meaning, includes any matter relating to —
>
> (a) the wages, salaries, allowances, or other remuneration of employees or the prices to be paid in respect of their employment;"

87 S.7(1a) of the Act expressly provides that an industrial matter is, inter alia, a matter relating to the failure of an employer to allow an employee a benefit under his contract of service (employment). It does not provide that an industrial matter includes a claim for compensation or damages for failure to allow an employee a benefit under his contract of service.

88 Olney J in Pepler's Case (op cit) held that the Act does not empower the award of compensation at large. Kennedy J held that s.29(1)(b) of the Act, now s.29(1)b)(ii), is restricted to the employee's contractual rights and does not empower the award of compensation at large.

89 In *Sakal v T O'Connor & Sons Pty Ltd* (IAC)(op cit), the appellant sought compensation for the balance of a fixed term employment and a redundancy payment pursuant to s.29(b)(ii), now s.29(1)(b)(ii) of the Act. The Industrial Appeal Court held that the Commission did not have jurisdiction or power to make an order awarding compensation or any other monetary payment, and that this principle applied to cases concerned with existing contractual entitlements.

90 It was submitted that this was not a claim for a sum of money equal to the value of Mr Saab's benefit under his contract of service. It is a claim for a sum of money equal to the value of the benefit he was entitled to under the contract of service. Further, the orders the Commission may make are restricted to the industrial matter, which gives it jurisdiction if the application was a claim that he had not been allowed a benefit to which he was entitled under his contract of service.

91 I have already given reasons why those authorities are not apposite. I would add that, for the reasons which I have expressed above, the claim, insofar as it was restricted to a claim for the value of the shares to be transferred direct or after exercise of an option, was not a claim for compensation, but a claim for benefits as a claim in lieu of specific performance, or for the value of the benefits.

92 This case, too, it was submitted by the appellant, was different from *Welsh v Hills* (FB) (op cit) and *Perth Finishing College Pty Ltd v Watts* (FB)(op cit) because those cases were concerned with claims for wages to which the employees were entitled under their contracts of employment. I am not persuaded that those cases were materially distinguishable. The claims, except for the claims for lost profit, were claims for benefits, too, arising from and pursuant to the contract of employment, and expressly prescribed by it.

93 An order in lieu of performance is an "industrial matter", as defined, it was submitted by Mr Lucev on behalf of the respondent.

94 Properly, of course, it was submitted, too, following the approach of Parker J in *RGC Mineral Sands Ltd and Another v CMETSWU* 80 WAIG 2437 (IAC), when one looks at the language of the definition of "industrial matter"; an order in lieu of "specific performance", made within the definition of industrial matter, is an "industrial matter".

95 Further, it was submitted by the respondent that the shares and options are a contractual right vested in Mr Saab and that therefore a right for the purposes of the definition of "industrial matter" under the Act. I do not think that it is accurate to describe the shares and options as a contractual right vested in Mr Saab. However, as I have observed, there was a duty or obligation imposed by the contract of employment on the appellant (and it was a condition of the contract) to transfer shares in the appellant to Mr Saab and to transfer other shares upon his exercise of his option to purchase them, by certain dates. That might have formed part of his remuneration. Accordingly, there is a right in Mr Saab to those shares and options by virtue of the contract of employment. They are the subject of an employer's obligation and an employee's right under the contract of employment. An obligation is a duty, too, in terms of the definition of "industrial matter" in s.7 of the Act.

96 Further, as Mr Lucev submitted, the shares and options are part of the "remuneration" provided for by the contract of employment (see *Capewell v Cadbury Schweppes Australia Ltd* (FB)(op cit).

97 Further, they are "prices to be paid in respect of [their] employment", within the meaning of the definition of "industrial matter" in s.7 of the Act.

98 This claim for a sum of money "in lieu of specific performance" is a claim relating to the rights of Mr Saab and the duties of the employer, for remuneration, and for the price to be paid in respect of employment, as defined. Thus, the subject matter of the claim is a matter relating to the right or duties of an employer and an employee in an "industry", as defined, and to the remuneration of an employee or the price to be paid in respect of his employment, and expressly under his contract of employment. All of these, too, were directly contained in a contract of employment which provided the relevant mutuality between employer and employee, insofar as that was a requirement.

99 In my opinion, *Rosser v Donges* [1990] 1 Qd R 490 treats the phrase "relating to", as it appears in the definition of "industrial matter" in s.7 of the Act, too narrowly. The term "industrial matter" is and always has been interpreted to confer a wide jurisdiction on the Commission to enable it, inter alia, to expeditiously resolve disputes, in accordance with the Act, read as a whole and the objects contained in s.6(a), (b) and (c) of the Act. I agree with and respectfully apply the dicta in *R v Deputy Public Service Arbitrator and Others; Ex parte Administrative and Clerical Officers' Association and Another* (1978) 19 ALR 464 and in *Fountain and Another v Alexander and Another* 150 CLR 615; and *Commissioner of Inland Revenue v Maple & Co (Paris) Limited* [1908] AC 22, that the phrase "relating to" requires no more than a connection with the subject matter which is not remote or tenuous and also that the phrase signifies great width of association and ought not to be read down without a compelling reason.

100 In this case, even if "relating to" were given a restricted meaning, the claim in this matter clearly, unequivocally and directly "relates to" the rights, duties, remuneration and the price of employment "in an industry" of an "employer" and an "employee", as defined in s.7 of the Act. The claim and the matter before the Commission at first instance plainly and without doubt relates to an "industrial matter", as defined, pursuant to Mr Saab's contract of employment and as part of his remuneration. Mr Saab was entitled as a right to the shares derived directly or by option, and the appellant employer was required to transfer property in them as an obligation under the contract.

101 Further, this was, for the reasons which I have expressed, an industrial matter because it was a matter within s.7(1a) and s.29(1)(b)(ii) of the Act, relating to the refusal or failure of an employer to allow an employee a benefit under his contract of service.

102 It was submitted, however, by Mr Le Miere QC on behalf of the appellant, that this was not a matter relating to an industrial matter because the claim was one for compensation or damages for failure to allow an employee a benefit under the contract of service. Thus, characterised, the matter is not and was not an industrial matter, because s.7(1a) of the Act does not provide that an industrial matter includes a claim for compensation or damages. It is restricted to the employee's rights and does not empower the award of compensation at large.

103 I am not of opinion that either Pepler's Case or *Sakal v T O'Connor & Sons Pty Ltd* (IAC)(op cit) supports that proposition. Both cases were authority for the proposition that compensation is not awardable in claims of unfair dismissals and, in particular, where no reinstatement was ordered after the contract of employment had ended. They are not authority for the proposition that a claim for a contractual benefit, to which the claimant was entitled and which entitlement was denied, cannot be met by an order that the contract be performed or that the value of the benefit be paid, if an order for performance is not made.

104 This was not a claim for compensation, but a claim for a benefit. It was an "industrial matter".

105 Insofar as the denial of the benefit occurred as at the termination of the employment, and subject to unequivocal credible evidence that the option would have been exercised but for that act, the value of the shares transferable pursuant to that option at the times prescribed is a proper expression of the benefit and its value; and there is jurisdiction to so order.

106 The claim, however, for a lost opportunity in not being able to sell the shares, whether the subject of the option or not, was not a claim for a contractual benefit, nor was it a claim in relation to an industrial matter, as I have said. Such a claim is properly characterised as a claim for damages for breach of contract. Such a claim relates to a matter which does not relate to rights, privileges or duties, etc. arising out of the contract of employment and employment relationship, as such, within the meaning of the definition of "industrial matter" in s.7 of the Act (see *RGC Mineral Sands Ltd and Another v CMETSWU* 80 WAIG 2437 (IAC)). It was a claim for damages based on a breach of contract.

CONCLUSION

107 The claim made and the orders sought, save and except the claim for lost opportunity to realise the value of the shares or otherwise or dispose of them at a profit, were an industrial matter and were a claim for contractual benefits, within the power conferred by s.29(1)(b)(ii) of the Act. They were also within jurisdiction.

108 I would emphasise that the case is now one to be determined on the evidence and it is for the appellant to establish the value of the shares as a benefit denied. Particular 4, the last two paragraphs, Particular 5 and Particular 6, in part, of the Particulars of Claim offend in this respect and will require amendment in compliance with these reasons.

109 I would uphold the appeal, insofar as it relates to the claim for compensation or damages for lost opportunity, or damages at all, or for inability to realise the value of the shares, and vary the order accordingly. I would otherwise dismiss the appeal.

COMMISSIONER J H SMITH—

110 The relevant facts and the grounds of appeal are set out in the President's reasons for decision.

The contractual obligations

111 Clause 4 of Mr Saab's contract of employment is set out in the Commissioner's reasons for decision as follows—

> "On commencement of your employment, you will be issued with 3,500,000 fully paid ordinary shares in the capital of HotCopper at an issue price of $0.0001 per share. These shares will be the subject of a call option in favour of Mr Ron Mr Gully (sic). The option will expire 16 February 2003. The option may only be exercised if there is a unanimous resolution of the Board that, in the reasonable opinion of the Board, you have been negligent and incompetent in your employment as Chief Executive Officer of HotCopper.
>
> Within 5 business days of your acceptance of the terms and conditions of this letter you will also be issued with the following options to purchase fully paid ordinary shares in the capital of HotCopper.

Number of Options	Exercise Price	Exercise Period
1,000,000	$0.75	4 years
1,000,000	$0.75	4 years
1,000,000	$1.50	4 years
1,000,000	$1.50	4 years
1,000,000	$2.00	4 years
1,000,000	$2.00	4 years"

The nature of the remedy sought

112 The central issue in this appeal is whether the Commission has jurisdiction to make an order that the HotCopper Australia Ltd pay Mr Saab a sum of money equal to the value of the shares and options, in circumstances where the Commission was unable to make an order that shares be transferred and the options be issued to Mr Saab. The Commissioner had earlier determined in reasons for decision given on 7 June 2000, that to order the shares be transferred and the options be granted would compel HotCopper Australia Ltd to breach its constitution and the rules of the Australian Stock Exchange.

113 The matter raises the issue whether the relief sought in paragraphs 4, 5 and 6 of the particulars filed on behalf of Mr Saab on 3 November 2000 is within the jurisdiction of the Commission. The relevant paragraphs of the particulars are set out in the President's reasons. When regard is had to those particulars it is apparent that the claims made on behalf of Mr Saab can in each case be characterised as a loss of a chance that results from the failure to transfer the shares and grant the options. Clauses 4 of the particulars claims a sum of money equal to the "loss of the benefit" of the shares based on the highest listing price or market value of the shares of HotCopper Australia Ltd on specified dates. Clause 5 of the particulars claims a sum of money equal to the opportunity lost by Mr Saab of entering the market, exercising the options and realising the value (presumably by selling the shares) during the exercise period (from 9 March 1999 to 9 March 2003). Accordingly Mr Saab seeks an order requiring HotCopper Australia Ltd to pay him a sum of money for the shares and another sum for the options after the Commission has assessed the value of the shares and options. In assessing the value of the shares and options the Commission is required to apply the common law principles of assessment of damages by assessing the value of the lost opportunity or commercial advantage to sell the shares at specified dates.

114 Where a contract provides a chance and a breach of contract results in the loss of a chance, the common law does not permit difficulties of estimating the loss in money to defeat an award in damages. The damages are ascertained by reference to the degree of probabilities, or possibilities, inherent in the claimant succeeding had the claimant been given the chance which the contract promised (*Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 per Mason CJ, Dawson, Toohey and Gaudron JJ at 349).

115 The process of assessing damages for lost opportunities was explained by Brennan J in *The Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 102-103—

> "In evaluating a plaintiff's benefits under a contract, the court does not look solely at the express terms of the contract but evaluates the plaintiff's rights to benefits of any kind, whether those benefits are expressed by the terms of the contract or are ascertainable by reference to circumstances extrinsic to those terms. Thus a hairdresser's assistant who was wrongfully dismissed was held entitled to recover not only damages for lost wages but also a sum representing the tips which he would have received (87), and an artist's opportunity of gaining fame and reputation by performing a theatrical engagement must be evaluated in assessing damages when the engagement is wrongfully terminated (88). In cases of this kind, the contract is found to contain by implication a promise to give the plaintiff an opportunity to acquire the unexpressed benefit (89), and damages are awarded for breach of that promise. They are not awarded in respect of benefits which the plaintiff has no contractual right to receive (90).
>
> Unexpressed benefits are frequently of an intangible kind or are otherwise of uncertain value but difficulty in evaluating a contractual benefit is no barrier to recovery of damages where the defendant is bound to provide the benefit but has failed to do so (91). Their Honours observed that "if the contract had been performed, the plaintiff would have had a real chance of winning the prize, and it seems proper enough to say that that chance was worth something". In *Fink v Fink* (92), Dixon and McTiernan JJ said—
>
> > "Where there has been an actual loss of some sort, the common law does not permit difficulties of estimating the loss in money to defeat the only remedy it provided for breach of contract, an award of damages."
> >
> > When a commercial contract is breached, it would be erroneous to evaluate the benefits which a plaintiff would have been entitled to receive had the contract been performed by reference solely to the stipulated remuneration for performance if the plaintiff is entitled to acquire, by performance of the contract, other commercial advantages. The hairdresser's assistant in *Manubens v Leon* was contractually entitled to be employed and it would not have been full compensation for his loss of employment to give him his wages without giving him his tips. An evaluation limited to benefits expressly stipulated would not truly reflect the situation in which the plaintiff would have been if the contract had been performed, nor would it lead to an award of damages which would place the plaintiff in that situation. The other commercial advantages must be evaluated, and evaluation may require consideration of the nature of the plaintiff's business, the opportunities available to the plaintiff to exploit the advantage and, if there be a market for a particular advantage, that market."

Whether the claims are within jurisdiction

116 In the decision the subject of this appeal, the Commissioner held that Mr Saab's claim that he has been denied a sum of money equal to the value of the benefit of shares and option is a matter the Commission has jurisdiction and power to deal with as an industrial matter under s.29(1)(b)(ii) of the *Industrial Relations Act 1979* ("the Act").

117 Section 29(1)(b)(ii) of the Act provides—

> "(1) An industrial matter may be referred to the Commission
>
> …
>
> (b) in the case of a claim by an employee —
>
> …
>
> (ii) that he has not been allowed by his employer a benefit, not being a benefit under an award or order, to which he is entitled under his contract of service,
>
> by the employee."

118 Section 7(1) of the Act defines an "industrial matter" to mean *inter alia*—

> "… subject to Section 7C, any matter affecting or relating to the work, privileges, rights, or duties of employers or employees in any industry or of any employer or employee therein and, without limiting the generality of that meaning, includes any matter relating to —
>
> (a) the wages, salaries, allowances, or other remuneration of employees or the prices to be paid in respect of their employment;"

119 Whether the orders sought are within jurisdiction depends upon the construction of the terms of the specific contract. The question whether Mr Saab's claim for a sum of money equal to the value of the shares and options can be dealt with by the Commission, turns on whether the claim can be characterised as an entitlement to a benefit under a contract of service, that is whether the nature of the contractual obligations invoke the Commission's jurisdiction to make the orders sought. *Prima facie*, the benefits to which Mr Saab was expressly entitled to, were the shares and the right to be issued with the options to purchase shares.

120 For the reasons expressed by the President, when regard is had to the principal objects of the Act in s.6(b) and s.6(c), and to the definition of industrial matter in s.7(1), s.7(1a), s.23(1), s.26(1)(a), s.26(1)(c) and s.26(2) of the Act, I agree that a generous or liberal interpretation should be applied to s.29(1)(b)(ii) of the Act. Claims under s.29(1)(b) of the Act do not extend to all contractual obligations but to a "benefit". The word "benefit" is very wide. In *Balfour v Travelstrength Limited* (1980) 60 WAIG 1015 at 1015 Johnson C observed—

> "… the word "benefit" ought to be wide enough to allow an employee to bring to the Commission a matter in which the employee believes he has been deprived of some advantage, entitlement, right, superiority, favour, good or perquisite by the action of the employer in contravention of a provision of the contract of service."

121 The nature of shares and options to purchase shares is that shares are a form of property, which are accompanied by a bundle of rights and obligations. To acquire the shares in HotCopper Australia Ltd is a right to a specified amount of the share capital of the company which carries certain rights and liabilities, including the right to sell the shares. In my view, part and parcel of the "benefit" in is the right to not only have the property transferred, namely the shares and exercise the options to purchase shares, but also any advantage that accrues from the shares and options. This includes the right to sell the shares, as that advantage is part of the entire bundle of rights that accrue to the property. In this case the benefit to which Mr Saab is entitled under his contract of service includes not only a claim for an order for shares to be transferred and for options to be granted but also includes an order for the value of the shares and options that are valued as lost opportunities to sell.

122 Alternatively, it is my view that the Commission having found that Mr Saab was entitled to benefits of the contract with respect to the shares and options but that to make an order for specific performance would be unlawful, the matter is within the jurisdiction of the Commission, as the Commission has a matter before it which can be characterised as benefits to which Mr Saab is entitled. As the matter is within jurisdiction, the Commission is empowered to exercise its discretion to make the orders sought under s.26(1)(a) and s.26(2)of the Act. Section 26(1)(a) provides—

> "(1) In the exercise of its jurisdiction under this Act the Commission —
>
> (a) shall act according to equity, good conscience, and the substantial merits of the case without regard to technicalities or legal forms;"

123 Section 26(2) provides—

> "(2) In granting relief or redress under this Act the Commission is not restricted to the specific claim made or to the subject matter of the claim."

124 The nature and extent of the Commission's jurisdiction under s.29(1)(b)(ii) and s.26 of the Act was considered by the Full Bench in *Welsh v Hills* (1982) 62 WAIG 2708 where the Commission observed at 2709 that—

> "… where a claim under s.29(2)(b) is established the Commission is empowered by s.23 to enquire into and make an order relating to such matter, in the exercise of its discretionary judgement, in accordance with the provisions of s.26 and in granting relief or redress the Commission is not restricted to the specific claim made or to the subject matter of the claim but of course without going to anything that an individual may not bring to the Commission. This follows because the matter with which the Commission is dealing in such a case is an industrial matter and where such a matter is referred to the Commission, whether under s.29(1) or by an individual employee, the Commission is empowered to act so as to resolve conflict in respect of the matter referred. I think therefore there is no reason to doubt that, in a given case the Commission could order an employer to make compensation to an employee in money terms for a benefit to which he was entitled under his contract of service and has not been allowed. … Were that done its purpose and its limitation would be to redress the matter by resolving the conflict in relation to the industrial matter."

125 The Commission's duty to act according to equity, good conscience and the substantial merits of the case pursuant to s.26(1)(a) of the Act was considered by the Industrial Appeal Court in *Belo Fisheries v Froggett* (1983) 63 WAIG 2394. In that matter, the Commission at first instance found that an employee was entitled to recover a reasonable sum for work done in respect of which payment was not made on the basis of *quantum meruit*. Olney J, with whom Brinsden J agreed, held the Commission had not erred in applying the principles that apply to the doctrine of *quantum meruit* to a claim by an employee that he had been denied a contractual benefit. At page 2396 Olney J observed—

> "Although the Commissioner purported to assess the respondent's entitlement on the basis of *quantum meruit* his obligation under the Act was of course to "act according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms" (see section 26(1)(a)) which is not necessarily the same as awarding the respondent payment calculated on the basis of *quantum meruit*. In my opinion the Commissioner did in fact observe the statutory direction I have quoted and this is evidenced by his setting off against the amount that would otherwise have been the respondent's entitlement of the air fare and a further amount which can only be classified as damages for negligence."

126 A claim for *quantum meruit* may be made where a contractual provision is unenforceable. The basis of a claim for *quantum meruit* is the concept of unjust enrichment and a claim for restitution (*Pavey & Matthews Pty Ltd v Paul* (1986) 162 CLR 221). Whilst the common law principles applying to *quantum meruit* have no application to this matter, when regard is had to the reasoning applied by the court in *Belo Fisheries v Froggett*, it follows that—

(i) The Commission in making an order that an employee has been denied a benefit to which he is entitled under a contract of service may have regard to the fact that the parties entered into a contract to transfer shares and grant options to Mr Saab (that is within jurisdiction as benefit under a contract of employment) but cannot be the subject of an order in the nature of specific performance; and

(ii) Having made that finding it is to the Commission to exercise its discretion under s.26(1)(a) and s.26(2) of the Act to make an order requiring HotCopper Australia Ltd to pay a sum or sums of money to Mr Saab, whereby the sums are calculated by the Commission after applying the principles that apply at common law for assessment of damages which would include an assessment of the loss of an opportunity to sell shares at specified dates.

127 For these reasons I would dismiss the appeal. I observe however that although I have concluded that the Commissioner has not erred in declaring that the Commission has jurisdiction and power to deal with the claim, whether the Commission should make any order sought by Mr Saab in respect of the 3,500,000 shares referred to in the first paragraph of clause 4 of the contract of employment in light of the call option in favour of Mr Ron Gully is a matter that may require consideration by the Commission.

COMMISSIONER S WOOD:

128 I have kindly had the benefit of reading the reasons for decision of his Honour, the President and Commissioner Smith. I agree that the appeal should be dismissed for the following reasons.

129 I adopt the reasoning of Commissioner Smith and in doing so would say the following. I concur with the reasoning expressed by the President that the term "benefit" within s.29(1)(b)(ii) should be given a generous interpretation. The shares and options claimed are clearly expressed in the contract and Mr Saab is entitled to these under his contract of service. The shares and options not being a benefit under an award or order. Similarly, as expressed by the President, to not be able to convert the benefit to a monetary value, as specific performance was conceded to be not possible, would be against the intent of the Act and would lead to the absurdity of a proven but unrecoverable, denied contractual benefit.

130 Likewise I agree with the reasoning of the President, that there is an interesting question, not before the Full Bench, as to whether there was a denial of any benefit by the appellant as opposed to an inability to transfer the shares due to the employer's constitution or some external rules.

131 The Particulars of Claim as expressed in clauses 4.1 to 4.7, 5 and 6 are all, in my view, best described as a claim for a lost opportunity or lost chance. However, once the "benefit" that is due under the contract, namely the shares and options, has crossed the jurisdictional threshold then a method for assessing value in accordance with the Commission's duty under s.26(1)(a) should be determined and exercised. The remedy sought is no more than a valuation of the benefit. I observe in particular the reasoning of the Full Bench in *Tony Welsh v Laurence Hills* (1982) 62 WAIG 2708 @ 2709 that—

> "…where a claim under s.29(2)(b) is established the Commission is empowered by s.23 to enquire into and make an order relating to such matter, in the exercise of its discretionary judgement, in accordance with the provisions of s.26 and in granting relief or redress the Commission is not restricted to the specific claim made or to the subject matter of the claim but of course without going to anything that an individual may not bring to the Commission."

132 Commissioner Smith in her reasoning refers to the decisions in *The Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 102-103; and *Belo Fisheries v Dennis Terence Froggett (1983)* 63 WAIG 2394. Without reciting again those passages referred to, I follow that approach and adopt her reasoning.

133 Mr Saab is entitled to the monetary value of the benefit if he can establish the value. Whether Mr Saab can establish a value on the 3,500,000 shares conditioned by a callback option by Mr Ron Gully by 16 February 2003 is another issue, not for the Full Bench. The difficulty in this matter appears, in part, to relate to the time of transfer of the benefit and hence whether any profit may be derived. With respect to the options, if the exercise price allows for no profit then there would be no value, and there is no buyback by the employer specified in the contract. That is a matter for further evidence before the Commission. It is not a matter for this appeal.

THE PRESIDENT—

134 For those reasons, the appeal is dismissed.

Order accordingly

2001 WAIRC 3828

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	HOTCOPPER AUSTRALIA LTD, APPELLANT
	v.
	DAVID SAAB, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	COMMISSIONER J H SMITH
	COMMISSIONER S WOOD
DELIVERED	FRIDAY, 21 SEPTEMBER 2001
FILE NO/S	FBA 15 OF 2001
CITATION NO.	2001 WAIRC 03828

Decision	Appeal dismissed.
Appearances	
Appellant	Mr R L Le Miere (of Queens Counsel), by leave
Respondent	Mr A D Lucev (of Counsel), by leave

Order.

This matter having come on for hearing before the Full Bench on the 3rd day of August 2001, and having heard Mr R L Le Miere (of Queens Counsel), by leave, on behalf of the appellant, and Mr A D Lucev (of Counsel), by leave, on behalf of the respondent, and the Full Bench having reserved its decision on the matter, and reasons for decision being delivered on the 21st day of September 2001 wherein it was found that the appeal should be dismissed, it is this day, the 21st day of September 2001, ordered that appeal No. FBA 15 of 2001 be and is hereby dismissed.

By the Full Bench

(Sgd.) P.J. SHARKEY,
President.

[L.S.]

2001 WAIRC 03948

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	PAULOWNIA SAW MILLING, TIMBER SUPPLIES AND MANUFACTURING PTY LTD (ACN 081 463 452), APPELLANT
	v.
	WARREN IAN JONES, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	CHIEF COMMISSIONER W S COLEMAN
	COMMISSIONER S WOOD
DELIVERED	THURSDAY, 11 OCTOBER 2001
FILE NO/S	FBA 43 OF 2001
CITATION NO.	2001 WAIRC 03948

Decision	Appeal dismissed.
Appearances	
Appellant	Mr I A Morison (of Counsel), by leave
Respondent	Mr S R Sirett (of Counsel), by leave

Reasons for Decision.

THE PRESIDENT—

1 This is an appeal by the abovenamed appellant employer, brought pursuant to s.49 of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "the Act"), against the decision by the Commission to stay proceedings until the resolution of criminal proceedings against the abovenamed respondent, Mr Warren Ian Jones, the applicant at first instance, are resolved.

2 The decision, formal parts omitted, reads as follows—

> "THAT the application to stay proceedings until the resolution of the criminal proceedings against the Applicant is granted."

GROUNDS OF APPEAL

3 The appeal was brought on the following grounds—

> "1. The learned Commissioner failed to follow, and was error in distinguishing, the Federal Court decision in *State of Western Australia v Bond Corporation Holdings Ltd* [1992] 114 ALR 275 and failed to give due weight to the considerations that prima facie a plaintiff (and therefore a fortiori a defendant) is entitled to have the action tried in the ordinary course of the business and procedure of the Court, and that it is a grave matter to interfere with that entitlement by a stay of proceedings and that an accused in criminal proceedings is not entitled as of right to have a civil proceeding stayed because of the possible or pending criminal proceeding.
>
> 2. The learned Commissioner failed to give due weight to the detriment to the Respondent in that an operating business will be subject to a contingent liability of an indeterminate amount for an indeterminate period.
>
> 3. The learned Commissioner was wrong in law in taking into account the Applicant's statement that he may discontinue the application of (sic) found guilty in the criminal proceedings, because the statement was no more than a statement of intention and was not binding on the Applicant.
>
> 4. If the decision was a finding (which is denied) the matter is of such public importance that in the public interest an appeal should lie, because on the precedent of this decision any employee dismissed for theft or dishonesty and prosecuted over that conduct is entitled to lodge an unfair dismissal application with the Commission and leave the proceedings in limbo for an indefinite period while the criminal proceedings run their course, with the result that the employer is saddled with a contingent liability of an unknown but potentially large sum of money for an indefinite period of time creating financial uncertainty for the employer and upset and worry for its principals. Every employer in Western Australia is affected by the decision because no employer is exempt from the risk of an employee acting dishonestly and having to be summarily dismissed.
>
> 5. The appellant seeks the following decision in lieu of that decision appealed from, namely, that the application to stay proceedings is dismissed."

BACKGROUND

4 The abovenamed respondent, Mr Jones, alleged by an application filed in the Commission on 8 January 2001 pursuant to 29(1)(b)(i) of the Act, that he had been harshly, oppressively or unfairly dismissed from his employment by the abovenamed appellant on 12 December 2000. He claimed reinstatement or compensation. He was, of course, required by s.29(2) of the Act to file his application within 28 days from the date which he was terminated, or he would be denied any remedy. (That is according to current thinking. Whether an extension can be granted remains an open question in my opinion.)

5 The appellant opposed the application at first instance and filed an answer to that effect.

6 The Commission convened a conference for the purposes of conciliating between the parties, at which no agreement was reached. The applicant indicated his intention to have the matter proceed to formal hearing and determination. However, he asked that the matter be adjourned until criminal proceedings which related to the circumstances of the termination of his employment were dealt with by the District Court.

7 The appellant, submitted that the matter should proceed to hearing and that there would be detriment to the appellant should it be required to await the outcome of District Court proceedings. (It should be added that it was common ground and Counsel for Mr Jones, Mr Morison, informed the Full Bench that Mr Jones had, since the decision appealed against was made, been indicted on a charge of stealing from his employer.)

8 Mr Jones dealt with the matter on the basis that it was an application to stay the proceedings of the Commission and the Commissioner was referred to *Myers v Myers* [1969] WAR 19 at 21. Mr Jones informed the Commission at first instance that he had not yet received an indictment or brief from the prosecution in the matter before the District Court. He said, however, that the police witnesses in the matter included the Managing Director of the appellant, who had dismissed him (but he now has been indicted (see supra)).

9 Mr Jones said that circumstances of the dismissal arose from exactly the same factors that gave rise to criminal proceedings. He said that there would be a requirement in pursuing his claim to give evidence and put his case to the Commission. To do this before putting his defence in a court of criminal jurisdiction would have the effect of eroding his right to silence. None of these facts were in dispute before the Commission at first instance.

10 He referred to *Civil Service Association of Western Australia (Incorporated) v Director General, Department of Transport* 80 WAIG 2855 (FB).

11 Mr Jones admitted to the Commission at first instance that reinstatement was potentially not an option and therefore, if the application was successful, then the only remedy to be considered would be for compensation. Therefore, in dealing with issues before the Commission, this matter could be readily accommodated. He said that, if the criminal proceedings took their course and he was found guilty, then he would, in all probability, discontinue the matter before the Commission and that this would, therefore, minimise any potential prejudice to the appellant.

12 The appellant referred to the reasons for judgment of French J in *State of Western Australia v Bond Corporation Holdings Ltd* (1992) 114 ALR 275 at 296 to 297, where

a number of considerations in cases similar to this were referred to, as follows—

"(a) Prima facie a plaintiff is entitled to have his action tried in the ordinary course of the procedure and business of the Court.

(b) It is a grave matter to interfere with this entitlement by a stay of proceedings, which requires justification on proper grounds.

(c) The burden is on the defendant in a civil action to show that it is just and convenient that the plaintiff's ordinary rights should be interfered with.

(d) Neither an accused nor the Crown is entitled as of right to have a civil proceeding stayed because of a pending or possible criminal proceeding.

(e) The Court's task is one of "the balancing of justice between the parties", taking account of all relevant factors.

(f) Each case must be judged on its own merits, and it would be wrong and undesirable to attempt to define in the abstract what are the relevant factors.

(g) One factor to take into account where there are pending or possible criminal proceedings is what is sometimes referred to as the accused's "right of silence", and the reasons why that right, under the law as it stands, is a right of a defendant in a criminal proceeding.

(h) However the so called "right of silence" does not extend to give such a defendant as a matter of right the same protection in contemporaneous civil proceedings. The plaintiff in a civil action is not debarred from pursuing action in accordance with normal rules merely because to do so would or might, result in the defendant, if he wished to defend the action, having to disclose, in resisting an application for summary judgment in the pleading of his defence, or by way of discovery or otherwise, what his defence is likely to be in the criminal proceedings.

(i) The Court should consider whether there is a real and not merely notional danger of injustice in the criminal proceedings.

(j) In this respect factors which may be relevant include—

I. The possibility of publicity that might reach and influence jurors in the civil proceedings;

II. The proximity of the criminal hearing;

III. The possibility of miscarriage of justice e.g. by disclosure of a defence enabling the fabrication of evidence by prosecution witnesses, or interference with defence witnesses;

IV. The burden on the defendant of preparing for both sets or proceedings concurrently;

V. Whether the defendant has already disclosed his defence to the allegations;

VI. The conduct of the defendant including his own prior invocation of civil process when it suited him.

(k) The effect on the plaintiff must also be considered and weighed against the effect on the defendant in which regard it may be relevant to consider the nature of the defendant's obligation to the plaintiff: and

(l) In an appropriate case the proceedings may be allowed to proceed to a certain stage e.g. setting down for trail (sic) and then stay it."

13 The Commissioner applied the test set out by the Commission, constituted by the President, in *Civil Service Association of Western Australia (Incorporated) v Director General, Department of Transport* (op cit) at page 2856. In that case, I referred to and applied the dicta of Steytler J in *Martins and Others v Racing Penalties Appeal Tribunal of Western Australia* (unreported) (No 1190 of 1997) delivered 10 October 1997 (Supreme Court of WA)(FC) (hereinafter referred to as "Martins Case") (Kennedy J agreeing), where His Honour said at pages 9-10—

> "In ***Edelsten v Richmond*** (1987) 11 NSWLR 51 Hope JA (with whom Priestley and Clarke JJA were relevantly in agreement), at p58, stressed the principle that the general law protects the right to silence "most jealously". It is for that reason that the privilege against self incrimination "can only be abrogated by the manifestation of a clear legislative intention" (***Hamilton v Oades*** (1989) 166 CLR 486 at 495, per Mason CJ). In ***Hamilton v Oades*** Deane and Gaudron JJ said, at 502-3—
>
> > "The public examination on oath or affirmation of a person charged with an indictable offence on matters with which the charge is concerned will ordinarily be viewed as seriously and unfairly burdensome, prejudicial or damaging if for no reason other than that it will ordinarily be viewed as constituting a real risk to the fairness and integrity of the trial of that charge. That is so whether or not the examination involves questions the answers to which have a tendency to incriminate."
>
> It seems to me that the same holds true in a case such as this, in which the evidence is not on oath or affirmation but in which access to the transcript could readily be obtained by the prosecuting authority. Nor does it seem to me to matter, for present purposes, whether the offence charged or, as in this case, having the potential to be charged, is or is not indictable (although a different view appears to have been taken, in this respect, by Southwell J in ***Lee v Naismith & Ors*** [1990] VR 235 at 239).
>
> In ***Edelston v Richmond***, supra, at 59, Hope JA said—
>
> > "Views have been expressed and implemented that so long as related criminal proceedings may be instituted or are pending, it is generally undesirable that disciplinary proceedings should be dealt with: *Re a Solicitor* (1938) 55 WN (NSW) 110; *Re Levy; Ex parte Incorporated Law Institute of New South Wales* (1887) 8 LR (NSW) 347. A possibly stronger view was expressed by McHugh JA in *Herron v McGregor* (1986) 6 NSWLR 246 at 266 that, while criminal proceedings are pending, it was only proper that disciplinary proceedings should not be brought on for hearing."
>
> Hope JA went on to say (*ibid*) that the views to which he referred did not appear to have been based on any power to compel witnesses to give incriminating answers."

14 The Commissioner then decided to stay the matter until the criminal proceedings against Mr Jones had been "resolved".

ISSUES AND CONCLUSIONS

15 Mr Morison, who appeared for the appellant, quite correctly conceded that this was an appeal against a decision of the Commission at first instance, as defined in s.7 of the Act, which was a "finding", as that is defined also in s.7 as follows—

> "**"finding"** means a decision, determination or ruling made in the course of proceedings that does not finally decide, determine or dispose of the matter to which the proceedings relate"

16 Accordingly, the appeal simply could not lie under s.49 of the Act unless, in the opinion of the Full Bench, the matter was of such importance that, in the public interest, an appeal should lie (see s.49(2a) of the Act).

17 The Full Bench heard full arguments.

18 If the appeal were competent, a question to which I will return later in these reasons, then it was an appeal against a discretionary decision, as that is defined in *Norbis v Norbis* (1986) 161 CLR 513 (see also *Coal and Allied Operations Pty Ltd v AIRC* (2000) 74 ALJR 1348 (HC)). The Commission at first instance exercised a discretion, purportedly pursuant to s.27 of the Act, to stay proceedings.

19 I doubt that the Commission, constituted by a single Commissioner, has power under s.27 to stay proceedings.

The power conferred is a power to adjourn, pursuant to s.27(1)(f) of the Act. Whether there is a power to stay pursuant to s.27(1)(v) of the Act, which I rather think there might be, was not a question before the Full Bench on this appeal. However, that point was not in issue. It is unnecessary to decide it and, however the order could be categorised, it had the effect of staying the proceedings instituted by Mr Jones until the resolution of criminal proceedings against him, which, on all of the evidence, were being put in train.

20 I would observe at the outset that the Full Bench is not bound, with respect, by what was decided by French J in *State of Western Australia v Bond Corporation Holdings Ltd* (op cit). It is bound, however, by the reasons for judgment of the Full Court in Martins Case, if this case is not distinguishable.

21 There are a number of matters to consider—

(a) First, this is a case where the applicant himself sought to have his action delayed.

(b) This is not a case where a "plaintiff" is being denied his/her right to proceed. This is a case where the plaintiff says that detrimental circumstances presently deny him his right to proceed and that the Commission should recognise that.

(c) There was little likelihood that reinstatement would be sought as a remedy, particularly when the delaying of that remedy being granted, if it were to be granted, makes the granting of such a remedy even less likely.

(e) The payment of a remedy in compensation is not such a serious problem to contemplate or budget for, for the employer, as providing for a possible reinstatement or re-employment would be. That detriment was far less than any which might be suffered by Mr Jones.

(f) If this case were required to be prosecuted before criminal proceedings were completed, there would inevitably be an issue as to the justification of the dismissal and a crucial issue was the question of whether there was stealing or not and/or the nature of the acts complained about. Mr Jones would be cross-examined, most probably, in these matters, even if he were not required to meet them in evidence-in-chief, which, in my opinion, is also probable. He would probably be required to give answers which might incriminate him or, at least, no assurance was given to the Full Bench that he would not.

(g) It would not affect matters merely because the offence had the potential to be charged (see Martins Case (op cit) at pages 9-10 per Steytler J (Kennedy J agreeing)). In any event, the Full Bench was informed, by consent, that Mr Jones had now been indicted on a stealing charge or charges.

(h) The law protects the right to silence most jealously (see Martins Case (op cit) and *Hamilton v Oades* (1989) 166 CLR 486 at 495 per Mason CJ and at 502-503 per Deane and Gaudron JJ).

(i) (i) I refer to the passage cited by Steytler J from the judgment of Deane and Gaudron JJ in *Hamilton v Oades* (HC)(op cit). The examination, by oath or affirmation, of a person charged with an indictable offence (or, in my opinion, of a person at risk of being so charged) is ordinarily to be viewed as seriously and unfairly burdensome, prejudicial or damaging. That patently was a vital consideration in this case.

(ii) It quite clearly presents a real risk to the fairness and integrity of the trial of that charge.

(iii) That is clearly the case whether incriminating questions are asked or not. In this case, vitally too, that such questions would be asked was probable, in my judgement.

(iv) That was clearly going to be the case here, where there would be examination at the hearing on oath or affirmation in the Commission (see s.33(1)(e) of the Act). It was manifestly open to so find.

(j) The consideration, as it was laid down in Martins Case (op cit) and followed in *Civil Service Association of Western Australia (Incorporated) v Director General, Department of Transport* (FB)(op cit), was the paramount consideration for the Commission, namely to preserve the integrity and fairness of the trial process and not permit self incrimination or the risk thereof or invade the right to silence.

(k) It mattered not that these were not disciplinary proceedings, as was the case in Martins Case (op cit) or *Civil Service Association of Western Australia (Incorporated) v Director General, Department of Transport* (FB)(op cit). That is simply irrelevant. These would be proceedings on oath or affirmation.

(l) Presently, if comparative detriment were a consideration, which it is not, Mr Jones is already suffering the detriment of pursuing his remedy in compensation. To not grant the stay would add to the detriment of risking the fairness and integrity of his trial and/or requiring him to incriminate himself.

(m) I would emphasise that that risk and requirement is enough, in any event, to justify the order made, on the authority of Martins Case (op cit). Insofar as the judgment in *State of Western Australia v Bond Corporation Holdings Ltd* (op cit) differs, as it does, I do not follow it.

(p) I would also add, insofar as it might be relevant (which it is not), given the ratio in Martins Case (op cit), it remained and remains open to the appellant to vary or discharge the order at first instance at any time, if it can establish that that ought to be done.

22 For all of those reasons, it was open to find as the Commissioner did. There was no miscarriage in the exercise of her discretion established, as the appellant was required to do, on the principles laid down in *House v The King* [1936] 55 CLR 499 (see also *Gromark Packaging v FMWU* 73 WAIG 220 (IAC)).

23 In any event, I would make the following further findings—

(a) This was a decision which was open to variation or discharge by either party, that not having been excluded by the Commission in its order.

(b) The matter was stayed only and the Commission was not functus officio.

(c) The Commissioner at first instance applied an authority of this Commission, which authority relied on well established binding authority of the High Court, the Full Court of the Supreme Court of this State and very persuasive authority from the New South Wales Court of Appeal.

24 The decision was a decision akin to an interlocutory decision (one which was variable and dischargeable) which should not be lightly interfered with by the Full Bench and, in any event, one made on well established authority. There was no question of such importance that, in the public interest, the appeal should lie, for those reasons (see *Hamersley Iron Pty Ltd v ASMWU* (1989) 69 WAIG 1024 (FB); *Mt Newman Mining Co Pty Ltd v* AWU (1986) 66 WAIG 1925 (FB); and *RRIA v AMWSU* (1989) 69 WAIG 1873 (FB)). That, in my opinion, should be the opinion of the Full Bench.

25 Accordingly, I would dismiss the appeal as incompetent. Alternatively, the appeal is not made out, the Commissioner not having erred in the exercise of her discretion. For those reasons, I agreed to dismiss the appeal.

CHIEF COMMISSIONER W S COLEMAN—

26 I have had the benefit of reading the reasons for decision of His Honour the President with which I agree.

27 The Commissioner's order in the first instance did not dispose of the application alleging unfair dismissal. The decision not to proceed further to hear the matter until "resolution of the criminal proceedings against the

applicant" (the respondent before the Full Bench) amounted to a finding as defined in Section 7 of the Act. As such it was incumbent on the appellant to show that the decision not to hear the substantive application was of such importance that in the public interest an appeal should lie.

28 In this respect the appellant submitted initially that the decision was a decision of law. However, it was subsequently conceded that the order gave effect to a finding. It was submitted that the matter was of such public importance that in the public interest an appeal should lie "because on the precedent of this decision any employee dismissed for theft or dishonesty and prosecuted over that conduct is entitled to lodge an unfair dismissal application and leave the proceedings in limbo for an indefinite period while the criminal proceedings run their course, with the result that the employer is saddled with a contingent liability of an unknown but potentially large sum of money for an indefinite period of time creating financial uncertainty for the employer and upset and worry for its principals."

29 In the first place, an application pursuant to Section 29(1)(b)(i) of the Act does not leave a matter "in limbo". Once lodged in compliance with the Regulations a course of action is set in train for the disposition of the matter. Second the Act specifies the limit to which compensation can be awarded by the Commission upon the determination that a dismissal has been harsh, oppressive or unfair in circumstance and where reemployment or reinstatement is impracticable. Any contingent liability is not unlimited.

30 The prospect of criminal as well as civil proceedings are not infrequently associated with matters before the Commission under Sections 29(1)(b)(i) and (ii) of the Act. The Full Bench in *Hamersley Iron Pty Ltd v Amalgamated Metal Workers and Shipwrights Union of Western Australia and Others* (1989) 69 WAIG 1024 at 1025 noted what had been said by the High Court in *Contender 1 Limited v LEP International Pty Ltd* (1988) 63 ALJR 26. An appellant Court will exercise particular caution in undertaking to review a decision on a matter of practice or procedure. In this respect the Full Bench in the Hamersley Case (op cit) noted that "the common and ordinary sense of 'practice' is the rules that make or guide the cursus curiae and regulate the proceedings of a cause within the walls of the Court itself. As to 'procedure' this has a wider meaning; it "includes the whole course of practice, from the issuing of the first process by which the suitors are brought before the Court to the execution of the last process on the judgement"—per Erle CJ in *Attorney General v Sillem* (1863) 2 H & C 431, at 627." The Full Bench went on to note what was stated in *White v White* (1947) ALR 342 at 344.

> "In the appropriate context it comprehends all steps necessary to be taken in litigation for the establishment of a right in order that the right may be judicially recognised and declared in such manner as well as enable the party asserting the right legally to enjoy it; it covers not only the acts of the Judges of the Court, but also the acts of officers of the Court which are necessary to give effect to judicial pronouncements."

31 The issue as to whether an application should or should not proceed before proceedings are a possibility or have commenced or are finalised in another jurisdiction comes within the practice and procedures of the Commission constituted in the first instance.

32 There is nothing to excite the public interest and the appeal should not lie.

33 In the alternative if the appeal should lie I agree for the reasons expressed by the Honourable President that it should be dismissed. The Commission addressed the issue on the basis of authority which has been set down by the Honourable President in *Civil Service Association of Western Australia Inc v Director General Department of Transport* [2000] 80 WAIG 2855. The Commission was satisfied that for the respondent to have been required to pursue the matter before the Commission at this stage would have the potential to seriously undermine his rights in respect of criminal proceedings. In reaching this conclusion the Commission took into account the inconvenience and detriment to the appellant that may result from proceedings being delayed.

34 The Commissioners discretion was not shown to have miscarried.

COMMISSIONER S WOOD—

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

THE PRESIDENT:

36 For those reasons, the appeal was dismissed.

2001 WAIRC 03862

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	PAULOWNIA SAW MILLING, TIMBER SUPPLIES AND MANUFACTURING PTY LTD (ACN 081 463 452), APPELLANT
	v.
	WARREN IAN JONES, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	CHIEF COMMISSIONER W S COLEMAN
	COMMISSIONER S WOOD
DELIVERED	TUESDAY, 25 SEPTEMBER 2001
FILE NO/S	FBA 43 OF 2001
CITATION NO.	2001 WAIRC 03862

Decision	Appeal dismissed.
Appearances	
Appellant	Mr I A Morison (of Counsel), by leave
Respondent	Mr S R Sirett (of Counsel), by leave

Order.

THIS matter having come on for hearing before the Full Bench on the 25th day of September 2001, and having heard Mr I A Morison (of Counsel), by leave, on behalf of appellant and Mr S R Sirett (of Counsel), by leave, on behalf of the respondent, and the Full Bench having determined that the appeal should be dismissed, and reasons for decision will issue at a future date, it is this day, the 25th day of September 2001, ordered that appeal No. FBA 43 of 2001 be and is hereby dismissed.

By the Full Bench.

(Sgd.) P. J. SHARKEY,
President.

[L.S.]

2001 WAIRC 03900

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JULIA MARY TEMBY, APPELLANT
	-v-
	ALBANY AND DISTRICTS SKILLS TRAINING COMMITTEE INCORPORATED, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	COMMISSIONER J H SMITH
	COMMISSIONER S WOOD
DELIVERED	TUESDAY, 2 OCTOBER 2001
FILE NO/S	FBA 39 OF 2001
CITATION NO.	2001 WAIRC 03900

Decision	Appeal upheld and decision at first instance varied.
Appearances	
Appellant	Ms J M Temby on her own behalf
Respondent	Mr E P Rea, as agent

Reasons for Decision.

THE PRESIDENT—

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

2 This is an appeal brought by the abovenamed appellant, Ms Julia Mary Temby, against the decision of the Commission, constituted by a single Commissioner, in matter No 1927 of 2000 and is an appeal against part of that decision only.

GROUNDS OF APPEAL

3 The grounds of the appeal appear at page 2 of the appeal book (hereinafter referred to as "AB") and are as follows—

> "In determining the amount of compensation to be paid to the appellant the Commission erred in that it—
>
> 1. failed to adopt a proper approach to the assessment of compensation, namely, by first assessing the loss suffered by the appellant in consequence of the wrongful termination of her employment and then taking into account the appellant's efforts to find employment and then exercising its discretion to award the appellant an amount of compensation which, as far as possible, compensated the appellant for her actual loss.
>
> 2.1 assessed compensation on a wrong basis, namely, by reference to his view that the appellant would not have continued indefinitely in the employment of the respondent;
>
> 2.2 held that the probability was that employment may not have continued more than about three months from when it actually terminated, when in actuality, and in line with normal and reasonable practice it would have continued until the appellant was able to secure alternative commensurate employment;
>
> 2.3 awarded the sum of $6,000.00, in the Commissioner's calculation 3 months' salary totalling $8,660.00, less the amount earned in the interim, which was in actuality non-existent in that 3-month period.
>
> RELIEF
>
> The appellant claims that the Commission ought to have awarded the equivalent of 6 months' remuneration, plus any associated employer superannuation contribution due for that period of time, less any amount earned in the interim, being the maximum capable of being awarded within the Commission's jurisdiction."

4 The order appealed against, formal parts omitted, reads as follows—

> "1. DECLARES that Ms J Temby was harshly, oppressively and unfairly dismissed from her employment by the respondent on or about 9 November 2000;
>
> 2. DECLARES that the reinstatement of Ms Temby is impracticable;
>
> 3. ORDERS the respondent to pay to Ms Temby within 21 days of the date of this order the sum of $6,000.00 less any amount payable to the Commissioner of Taxation pursuant to the Income Tax Assessment Act 1936 and actually paid."

BACKGROUND

5 At all material times, the abovenamed appellant, Ms Temby was employed by the respondent as its Administration/Training Manager and IT Network Administrator. Her employment commenced with the respondent on or about 18 June 1998 and came to an end on or about 7 November 2000.

6 Ms Temby brought an application to the Commission pursuant to s.29(1)(b)(i) of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "the Act") alleging that she had been harshly, oppressively or unfairly dismissed by the respondent at or about 7 November 2000. The respondent denied that Ms Temby had been unfairly dismissed and, indeed, denied that there was a dismissal at all, for the purposes of the Commission's jurisdiction under the Act.

7 For some time, Ms Temby had complained to the General Manager of the respondent, Mr Ian King, that she was having considerable difficulties in her working relationship with another manager of the respondent, Mr Mark Collett. She expressed concerns to Mr King that Mr Collett was "playing power games" with her by utilising staff who reported to her without her approval; on at least one occasion being rude and aggressive towards her, and generally treating staff members of the respondent in a poor fashion.

8 Ms Temby gave evidence that Mr Collett was aggressive and overbearing and seemed to have difficulty dealing with female employees. She said that Mr King assured her that he would take steps to bring these matters to Mr Collett's attention and that he would make Mr Collett aware of sensitivities in dealing with other staff members. In particular, Mr King would tell Mr Collett that he should ensure that he would consult with Ms Temby, at least as a matter of courtesy, in the event that he required some assistance from any staff member who was accountable to Ms Temby. According to Ms Temby, these approaches to Mr Collett had little effect because of his attitude and behaviour in the workplace, which did not change.

9 On or about Friday, 27 October 2000, Mr King was in Perth. Mr Collett had made arrangements with Mr King for him to utilise the services of the respondent's receptionist, Ms Marion Tranter, who reported to Ms Temby in the Employment Services division of the respondent, for which Mr Collett was responsible. Mr Collett had never mentioned this to Ms Temby. Ms Tranter went to see Ms Temby to advise her of the arrangement.

10 Ms Temby said that she "saw red" when she was told this and as a result of the prior incidents and the lack of any tangible change in Mr Collett's behaviour. Ms Temby immediately went to see Mr Collett and told him that, until he had discussed it with her, it was not acceptable for him to redeploy her staff. She also protested to him that it was unfair for him to have the employee in question, Ms Tranter, advise her of the arrangement.

11 It was common ground that a verbal altercation then took place between Ms Temby and Mr Collett about this matter. Ms Tranter, who was close by, gave evidence that there was "yelling from both Mark and Julia. It sounded like there were things being thrown in the office." Ms Temby then left Mr Collett's office and returned to her own, followed by Mr Collett. The argument continued in that office, according to Ms Tranter.

12 Following this, Ms Temby gave evidence that she rang Mr King and left a message on his voicemail, telling him that she was resigning and that she "could not continue to work with that animal anymore".

13 Mr King gave evidence that, when he received the telephone message from Ms Temby, he could tell that she was extremely upset from the tone of it and he rang her back approximately fifteen minutes later. He said that she was still very angry.

14 Whilst there was some conflict in the evidence between the various witnesses as to the time which may have elapsed from the initial altercation between Ms Temby and Mr Collett and when she made the telephone call to Mr King, it was quite clear that, from the evidence of Mr King, when he finally spoke to Ms Temby, she was still extremely upset.

15 The Commissioner at first instance regarded this as significant. It was Ms Temby's evidence that, when Mr King spoke to her, he tried to calm her down and told her "not to do anything silly". He said that he would meet her on the following Monday when he was back in Albany "to sort everything out".

16 On the Monday morning, Mr King and Ms Temby met and she outlined the events of the previous Friday afternoon. She told Mr King that she desperately did not want to resign. She said that she did not see any choice because of the behaviour of Mr Collett in his domineering and bullying behaviour to her and other staff members. She said that again Mr King said to her not to do anything further and give him some time to resolve the situation.

17 Mr King's evidence was that, after discussing the incident and the working relationship between Ms Temby and Mr Collett, there was discussion between them as to a proper handover in relation to the traineeship work, the responsibility of Ms Temby. Mr King said that he told Ms Temby that he would advise the Chairman of the respondent of the discussion and her resignation. Mr King gave evidence that, during the conversation with Ms Temby, she requested her job back. He said that he would need to speak with the Chairman of the respondent. It was also Mr King's evidence that he regarded Ms Temby as a very good employee. He was not in any way critical of her performance or conduct in the workplace and told the Chairman of the respondent that he would have Ms Temby back in employment.

18 Ms Temby gave evidence that, on the next day, Tuesday, she again told Mr King that it was not her intention to resign and she had concerns about the trainees undertaking traineeships arranged by the respondent and for which she was responsible.

19 The evidence, according to the Commissioner at first instance, was not clear about what occurred next, but it appeared that thereafter, Ms Temby continued to work until on or about 10 November 2000 when she was notified by her husband that a substantial sum of money had been deposited into their joint account on the previous day. Ms Temby queried this with Mr King who advised her that this was her termination payment, given that she had resigned.

20 Ms Temby said that this stunned her as she was clearly under the impression that she had rescinded her resignation with the acquiescence of the respondent and that Mr King had taken steps to resolve the working relationship between her and Mr Collett. It was also her evidence that, as far as she had been led to believe, her resignation, if there was a resignation, had not been "accepted" by the respondent.

21 It appeared, too, on the evidence, that Ms Temby, after discovering the payment into her bank account, continued to do some further work for the respondent up until on or about 13 November 2000.

22 Ms Temby gave evidence as to other employment she had undertaken since leaving the respondent, which included part-time employment with a building company on and from 21 February 2001. She continued to work in this position until about 4 May 2001, when she was retrenched because of a downturn in the industry. She had earned, she said, $3,364.53 in this employment.

FINDINGS AT FIRST INSTANCE

23 The Commissioner found on the evidence that there was a significant degree of conflict in the workplace between Ms Temby and Mr Collett.

24 From all of the evidence and, in particular, that of Mr King, the Commissioner found that, predominantly (our emphasis), the difficulties were caused by Mr Collett's manner and approach in dealing with Ms Temby and her staff. The Commissioner was not persuaded that this was an entirely one-sided affair, observing that, on the evidence, both Ms Temby and Mr Collett were both strong willed individuals. Both expressed their opinions very assertively and Ms Temby "called a spade a spade". There was an underlying conflict of personalities between both of them.

25 As to the events of Friday, 27 October 2000, the Commissioner was satisfied, on the evidence, that a substantial verbal altercation occurred between Ms Temby and Mr Collett because of the proposed redeployment of Ms Tranter to Mr Collett's area of responsibility. This altercation led to Ms Temby being in a highly emotional state, variously expressed as "very angry", "a screaming match", "uncontrollable rage", etc. It was manifestly clear, on the evidence, that Ms Temby was in an extremely emotionally charged state and that, in this state, she telephoned Mr King who was then off the premises.

26 The Commissioner found that Ms Temby's anger had not receded at that time when she left a voice message for Mr King, saying that she was resigning. Ms Temby, some fifteen minutes later, was still in a highly charged emotional state when Mr King returned her telephone call and discussed the incident with her. The Commissioner also was satisfied and found that Mr King, during the telephone conversation, told her to do nothing further until he returned to Albany on the following Monday and discussed these matters with her.

27 The Commissioner found that there was no indication at the time that there was any acceptance by Mr King of Ms Temby's resignation and, indeed, on the contrary, he was satisfied that indications were all the other way. He was also satisfied, on the evidence, that Ms Temby clearly further recanted in relation to her earlier intention to resign on the following Tuesday.

28 This case threw up the not infrequent question arising in proceedings of this kind, namely, whether the applicant truly resigned voluntarily and of her own free will or whether she was dismissed.

29 The Commissioner considered that Ms Temby did not truly resign but was dismissed. As to precisely when the dismissal was effected, this is a matter which was not entirely clear on the evidence. It seemed to the Commissioner that the most likely date that the dismissal was effected was the date upon which Ms Temby received her termination payments into her bank account, namely 9 November 2000.

30 The Commissioner then turned to consider whether the dismissal was harsh, oppressive and unfair and found that it was. He then ordered compensation in the amount set out in the order.

ISSUES AND CONCLUSIONS

31 This appeal raised a short point dealing with the quantum of compensation assessed and ordered to be paid by the Commissioner at first instance. Relevantly, the Commissioner applied the principles outlined by the Full Bench in *Bogunovich v Bayside Western Australia Pty Ltd* 79 WAIG 8 (FB) in assessing compensation. He was satisfied and found that Ms Temby had mitigated her loss. Ms Temby claimed compensation in the order of some $18,762.12, being an amount equal to six months' loss of salary, less the monies which she was found to have earned, which amount appears above.

32 In approximately mid August 2000, as the Commissioner found, Ms Temby advised Mr King that she was considering her future as an employee of the respondent and had applied for employment elsewhere. At that time, she had complained to Mr King about difficulties which she was having with Mr Collett (see page 22(AB)).

33 There was, as the Commissioner also correctly found, considerable evidence of the substantial animosity between Ms Temby and Mr Collett which culminated in the angry altercation between them on 27 October 2000, which, in turn, was the direct cause of Ms Temby's dismissal.

34 As a result, the Commissioner found, based on all of the evidence, first, that Ms Temby would not have continued indefinitely in the employ of the respondent. The likelihood of ongoing employment, the Commissioner found, is a relevant consideration in assessing compensation for loss. Whilst the error is not fatal, that, in our view, expresses the nature of the likelihood of ongoing employment erroneously. The likelihood of the employment continuing or not is not a matter relevant to compensation, but to the necessary finding as to loss and the quantification thereof. In making a finding as to loss, if there is a claim for future loss, then the appellant must establish as a fact, on the balance of probabilities, that loss.

35 In our opinion, there were ample facts from which an inference might be drawn that it was more probable than not that Ms Temby would not remain in the respondent's employ. What was clear was this. As far back as August 2000, Ms Temby was seeking other employment and, as the Commissioner properly found, was complaining about Mr Collett's conduct, namely that he was aggressive and overbearing and seemed to have difficulty dealing with fellow employees. This clearly remained a problem until the angry altercation of 27 October 2000. At that time, she fully intended to resign.

36 Subsequently, of course, Ms Temby, on 30 and 31 October 2000, affirmed that she would not resign. It is a reasonable inference that, had she not been dismissed, she may well not have remained beyond three months, on the balance of probabilities. It is a fair inference that, because of their attitude to each other, it could not be said that she would not resign if there were another contretemps between her and Mr Collett, particularly given her reaction on and after 27 October 2000 when she had to be persuaded not to resign and, given that, there was no evidence of a change in her attitude to Mr Collett or to his attitude.

37 The effect of Mr Collett's conduct and what was the employer's duty to restrain him was not raised and, if it had, was probably more relevant to the question of unfairness. We would observe that, in particular, bullying in the workplace might be regarded, if it has the potential to cause psychological injury as it so often does, as creating an unsafe system of work.

38 The Commissioner erred only by reducing the amount claimed.

39 We are not satisfied that an allowance should be made for superannuation in this case, and, in any event, it was not claimed at first instance.

40 We note that the Commissioner reduced the amount he found as the loss suffered as a result of the unfair dismissal by the amount of the earnings of Ms Temby in post dismissal employment. However, as Mr Rea, for the respondent, virtually conceded, the amount should not have been deducted. We agree. Once the Commission found, and found correctly, that Ms Temby would have been employed for three months before any unfair dismissal was effected, then she would have earned an extra three months' salary. In any event, what she earned after termination was not earned during the three month period during which the contract would have remained on foot had she not been dismissed. Accordingly, what she earned after should not be set off against an amount of the proven loss.

41 Accordingly, the amount of $2,660.00, although it differs from an earlier finding of the Commission, reflects a final finding and was not challenged by either party, and should be included as part of the finding of loss and of the amount of compensation to be awarded.

42 In our opinion, the figure properly established as a loss and properly awarded as compensation is $8,660.00. We therefore upheld the appeal to that extent, but otherwise dismiss it.

COMMISSIONER S WOOD—

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

THE PRESIDENT—

44 For those reasons, the appeal was upheld and the decision at first instance varied.

2001 WAIRC 03790

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JULIA MARY TEMBY, APPELLANT
	-v-
	ALBANY AND DISTRICTS SKILLS TRAINING COMMITTEE INCORPORATED, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	COMMISSIONER J H SMITH
	COMMISSIONER S WOOD
DELIVERED	THURSDAY, 13 SEPTEMBER 2001
FILE NO/S	FBA 39 OF 2001
CITATION NO.	2001 WAIRC 03790

Decision	Appeal upheld and decision at first instance varied.
Appearances	
Appellant	Ms J M Temby on her own behalf
Respondent	Mr E P Rea, as agent

Order.

This matter having come on for hearing before the Full Bench on the 13th day of September 2001, and having heard Ms J M Temby on her own behalf as appellant, and Mr E P Rea, as agent, on behalf of the respondent, and the Full Bench having determined the matter, and reasons for decision to issue at a future date, it is this day, the 13th day of September 2001, ordered as follows—

(1) THAT appeal No. FBA 39 of 2001 be and is hereby upheld.

(2) THAT the decision of the Commission in matter No. 1927 of 2000 made on the 12th day of June 2001 be and is hereby varied by deleting the figure "$6,000.00" in Order (3), and substituting therefor the figure "8,660.00".

(3) THAT appeal No. FBA 39 of 2001 be and is otherwise dismissed.

By the Full Bench,

(Sgd.) P.J. SHARKEY,

[L.S.] President.

FULL BENCH— Unions—Application for Registration—

2001 WAIRC 03912

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	THE WESTERN AUSTRALIAN BUILDERS' LABOURERS, PAINTERS & PLASTERERS UNION OF WORKERS
	AND
	CONSTRUCTION, MINING, ENERGY, TIMBERYARDS, SAWMILLS AND WOODWORKERS UNION OF AUSTRALIA—WESTERN AUSTRALIAN BRANCH, APPLICANTS
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	CHIEF COMMISSIONER W S COLEMAN
	COMMISSIONER S J KENNER
DELIVERED	TUESDAY, 9 OCTOBER 2001
FILE NO/S	FBM 3 OF 2001
CITATION NO.	2001 WAIRC 03912

Decision	Application granted.
Appearances	
Applicants	Mr A L Drake-Brockman (of Counsel), by leave
Persons seeking leave to intervene	Ms R Cosentino (of Counsel), by leave

Reasons for Decision.

THE PRESIDENT—

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

2 This was an application by two organisations, The Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia—Western Australian Branch (hereinafter referred to as "the CMETSWU") and The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers (hereinafter referred to as "the BLPPU").

3 The application, which was filed on 20 July 2001 in this Commission, was an application which sought authority to register, pursuant to s.72 of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "the Act"), a new organisation, "The Construction, Forestry, Mining and Energy Union of Workers". Such an application is often referred to in shorthand as an application for amalgamation.

4 The applicants are both organisations registered in this State pursuant to the Act. Both are organisations, therefore, as that word is defined in s.7 of the Act.

Application for Leave to Intervene and/or Object

5 Substantially out of time, three persons sought, pursuant to a Notice of Intention to seek leave to Intervene which was handed to the Commission by their Counsel on 26 September 2001, the day of the hearing of the abovementioned application, to intervene in the matter and/or object to the application. The applicants concerned were Mr Douglas Ashcroft, Mr John Rudge and Mr Tony Lovett. We were not advised of, nor does their application bear, their full names.

6 It was common ground that all of those gentlemen are officers in the Forest and Forest Products Division of the Construction, Forestry, Mining and Energy Union (hereinafter referred to as "the CFMEU"), which is a federally registered organisation. Mr Ashcroft and Mr Rudge are office bearers in that body and Mr Lovett is a national organiser with that body. It was also common ground that none of those gentlemen is a member of the applicant CMETSWU.

7 The facts of the matter were these. The CFMEU (the Federal body) is not, by any order of this Commission, the counterpart Federal body of the CMETSWU. Its links, therefore, are informal. Further, as was undenied, this was therefore an application to intervene in an application pursuant to s.72 of the Act by officers of a Federal body, purporting to represent members of a State body whom they asserted were not being properly represented; and whom they have or had no right to represent.

8 The fact of the matter is, of course, as Mr Drake-Brockman, on behalf of the applicant organisations, uncontradictedly informed us, by reference to the rules of the CMETSWU, that divisions, whether Forest and Forest Products Division or other, in the State organisation, were abolished by amendments to the rules in 1995. In any event, if there is difficulty with the application to amalgamate in the minds of members of the applicant CMETSWU, then they had the opportunity to object and none did.

9 Applying the principles laid down in *Gairns and Dempsey v RANF* 69 WAIG 2343 and in *R v Ludeke and Others; Ex parte Custom Officers' Association of Australia, Fourth Division* 155 CLR 513, the Full Bench decided that there was insufficient interest to support either an objection or an intervention, assuming that both were competent, which it was not necessary to decide on this occasion.

10 Officers of a Federal body which have no connection under this Act to the members of the applicant organisation and no right to purport to represent them in this Commission have no interest in this case at all in being heard and certainly insufficient interest. The application, therefore, to be heard as objectors or interveners was quite out of time, had no merit and was dismissed.

Statutory Requirements

(a) Under s.72 of the Act, two or more organisations may apply for the registration of a new organisation. That is what occurred here.

(b) The rules of the proposed new organisation must be such that the only persons eligible for membership of the new organisation will be persons who, if the amalgamating organisations had remained in being, would have been eligible for membership of at least one of the amalgamating organisations. The Full Bench is satisfied, on a careful scrutiny of the rules of the applicants, the proposed new rules, and on the submission of Counsel for the applicants, that that is the case and that s.72(1) of the Act is thereby complied with in that respect.

(c) The application bears the signatures of the President of both applicant organisations and the Secretary Principal Executive Officer of both, with the Common Seals of both organisations affixed. The application complies, therefore, in that respect, with s.72(2) of the Act.

(d) The provisions of Part II Division 4 of the Act apply, with modifications, such as are necessary to and in relation to the registration of an organisation under this section.

(e) S.53 and s.54 of the Act do not apply because the organisations applying for registration are not unregistered. However, the total number of members who will form part of the new organisation, according to the affidavit of Ms Peta Anne Arnold, sworn 24 September 2001 and filed herein (exhibit 5), totalled 8,382.

(f) Pursuant to and in compliance with s.55(1) of the Act, the applicant organisations have filed a list of officers of the new organisation with their addresses, three copies of the rules and the prescribed form of application.

(g) The Registrar has published in the Western Australian Industrial Gazette (hereinafter referred to as "the

Gazette") a notice of the application and a copy of such rules as relate to the qualifications of persons for membership and a notice that any person who wishes to object should file a Notice of Objection.

(h) The requisite notice was published in the Gazette 81 WAIG 2479 on 22 August 2001 (exhibit 7).

(i) This application was listed for hearing on 26 September 2001, which was the date notified in the Gazette and is therefore listed after the expiration of thirty days from the date of issue of the Gazette in which the notice required to be published was published (see s.55(3) of the Act).

(j) The Full Bench was satisfied, on a careful consideration of the evidence, which included affidavits by Ms Peta Anne Arnold, Mr Kevin Noel Reynolds, the Secretary of the applicant BLPPU (exhibit 6B), and Mr Joseph McDonald, the Secretary of the applicant CMETSWU (exhibit 6A), that—

(i) The application had been authorised in accordance with the rules of both organisations.

(ii) That reasonable steps had been taken to adequately inform the members—

(1) Of the intention of the organisation to apply for registration.

(2) Of the proposed rules of the organisation.

(3) That the members or any of them might object to the making of the application or to those rules or any of them by forwarding a written objection to the Registrar.

(l) The Full Bench was satisfied, too, on the evidence, that, having regard to the structure of the organisation and many other relevant circumstances, the members had been afforded a reasonable opportunity to make such an objection (see s.55(4)(a), (b) and (c) of the Act).

(m) The Full Bench was satisfied, in particular, on the evidence—

(i) That the Executive Committee of the applicant CMETSWU convened a Special General Meeting of the CMETSWU;

(ii) That such meeting was properly advertised in the West Australian newspaper;

(iii) That, at a quorate Special General Meeting held on 2 July 2001, the amalgamation resolutions were carried unanimously;

(iv) That, on 3 July 2001, a notice was sent by mail to every member of the CMETSWU at his address (save and except for a few members whose addresses were incomplete or not ascertainable) which gave notice of the passing of the resolution, advised those provisions in sufficient detail for the amalgamation, and gave notice of the ability of members to object by sending a requisite objection in writing to the Registrar.

(v) That exactly the same steps were followed, according to the affidavit of Mr Kevin Noel Reynolds, by the applicant BLPPU on the same dates.

(vi) That, in fact, no members have objected to the making of the application and, therefore, there is an objection by less than 5% of the members.

There is, therefore, no impediment on that basis (see s.55(4)(d) of the Act) to the granting of the application.

(n) S.55(5) of the Act does not apply.

(o) The Full Bench was also satisfied, upon a consideration of the proposed new organisation's rules, and upon the submissions of Mr Drake-Brockman in answer to questions from the Full Bench, that, insofar as s.55(4)(b) and (e), s.56, s.56A, s.57 and s.64A of the Act are required to be complied with, they have been.

(p) Further, there is no suggestion that the name of the new organisation should not be permitted because of the provisions of s.59 of the Act. The name does not, on the face of it, contravene s.59 and no objection was lodged on that basis.

11 The Full Bench was, therefore, satisfied that the applicants complied with all of the statutory requirements of the *Industrial Relations Commission Regulations* 1985 (as amended) pertaining to this application.

S.26 Matters (see also s.6 of the Act)

12 It was asserted from the bar table and without opposition that this was an application by two voluntary organisations of persons who had joined together for specific purposes and that, therefore, as they decided to organise themselves in such a manner, they should be allowed to do so in the absence of good reasons to the contrary. It was also asserted that it is an object of the Act (s.6(e)) to encourage the formation of representative organisations of employers and employees under the Act and that, by granting the application, that object would be fulfilled.

13 Further, the application, notwithstanding the recent good relations between the two applicants, would eliminate the fact and risk of demarcation disputes between those organisations which had existed prior to amalgamation. We accept that submission and would so find.

14 Further, it was submitted and asserted that these organisations operate in the building industry and have a community of interest and, by combining their resources, they can operate efficiently (avoiding duplication of services) and enhance services to the membership. This, it was submitted, was particularly important in light of reduced union membership due to an economic downturn in the building industry, business cycles, industry restructuring and technological change. We would accept that submission and would so find.

15 Further, as Mr Reynolds and Mr McDonald both deposed in their affidavits and as was submitted to the Full Bench, there had been a long history of disputes up until the last two years or so between these two organisations, usually as to whether a particular work activity should be done by a builder's labourer and/or tradesperson or another particular tradesperson. It was not denied, and we found, therefore, in accordance with those assertions.

16 Further, there will, of course, be only one organisation for employers to deal with and one organisation for eligible employees to join. There will be no scope for disputation between the two unions in the building industry when only one exists as we so found.

17 Therefore, as the Full Bench found, the reduction of the number of organisations by one organisation and the elimination of any scope for disputation because there are not two organisations any more will assist the advancement of the objects contained in s.6(a), (b) and (c) of the Act, and s.6(e) will be advanced by the creation of a new organisation formed by the two applicant organisations.

18 There will also be only one organisation party to awards or agreements and only one to negotiate with employers and to be or seek to be a party to relevant proceedings in the Commission, we so find.

Conclusion

19 For all of those reasons, the equity, good conscience and the substantial merits of the case (having regard, as well, to the interests of the organisations, employers, employees and union members (see s.26(1)(c) and (d) of the Act) and the community (because the objects of the Act are advanced) unequivocally lay with the making of the order authorising the registration of the new organisation which was sought to be registered.

20 For that reason, the Full Bench unanimously so ordered.

2001 WAIRC 03874

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	THE WESTERN AUSTRALIAN BUILDERS' LABOURERS, PAINTERS & PLASTERERS UNION OF WORKERS
	AND
	CONSTRUCTION, MINING, ENERGY, TIMBERYARDS, SAWMILLS AND WOODWORKERS UNION OF AUSTRALIA—WESTERN AUSTRALIAN BRANCH, APPLICANTS
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	CHIEF COMMISSIONER W S COLEMAN
	COMMISSIONER S J KENNER
DELIVERED	WEDNESDAY, 26 SEPTEMBER 2001
FILE NO/S	FBM 3 OF 2001
CITATION NO.	2001 WAIRC 03874

Decision	Application granted.
Representation	
Applicants	Mr A L Drake-Brockman (of Counsel), by leave
Persons seeking leave to intervene	Ms R Cosentino (of Counsel), by leave

Order.

This matter having come on for hearing before the Full Bench on the 26th day of September 2001, and having heard Mr A L Drake-Brockman (of Counsel), by leave on behalf of the applicants, and Ms R Cosentino (of Counsel), by leave on behalf of Mr Douglas Ashcroft, Mr John Rudge and Mr T Lovett seeking leave to intervene in the hearing of and object to the application herein, and the applicants herein having consented to waive the requirements of s.35 of the *Industrial Relations Act* 1979 (as amended), and the Full Bench having determined the matter and that its reasons for decision will issue at a future date, it is this day the 26th day of September 2001, ordered and declared as follows—

(1) THAT the application by Mr Ashcroft, Mr Rudge and Mr Lovett for leave to intervene and to object be and is hereby dismissed.

(2) THAT the Registrar be and is hereby authorised to register a new organisation to be known as "The Construction, Forestry, Mining and Energy Union of Workers".

(3) THAT the rules of the said organisation filed herein are declared to be the rules of the said organisation "The Construction, Forestry, Mining and Energy Union of Workers".

By the Full Bench

(Sgd.) P. J. SHARKEY,
President.

[L.S.]

PRESIDENT—
Matters dealt with—

2001 WAIRC 03830

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	KATRINA ALEXANDER, APPLICANT
	v.
	JEAN MATILDA KIRKHAM, RESPONDENT
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DELIVERED	FRIDAY, 21 SEPTEMBER 2001
FILE NO/S	PRES 13 OF 2001
CITATION NO.	2001 WAIRC 03830

Decision	Application dismissed.
Appearances	
Applicant	Dr K Alexander on her own behalf
Respondent	Ms Y D Henderson (of Counsel), by leave

Reasons for Decision.

1 This is an application by Dr Katrina Alexander, brought under s.49(11) of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "the Act"), whereby she seeks an order that the operation of the decision of Commissioner Beech made on 9 July 2001 in matter No 1366 of 2000 be stayed wholly, pending the hearing and determination of appeal No FBA 44 of 2001.

2 The decision appealed against was perfected by being deposited in the Registry of this Commission on 11 July 2001. The appeal bears the stamp of the Commission evidencing filing on 26 July 2001.

3 The order appealed against was, formal parts omitted, expressed in the following terms—

"(A) DECLARES—

1. That Jean Matilda Kirkham was dismissed by Katrina Alexander on 8 August 2000.
2. That the dismissal of Jean Matilda Kirkham was unfair.
3. That re-instatement is impracticable.

(B) ORDERS that Katrina Alexander forthwith pay Jean Matilda Kirkham the sum of $5,952.00 by way of compensation for the dismissal which occurred.

(C) DECLARES—

1. That Jean Matilda Kirkham has been denied a benefit to which she was entitled under her contract of employment, being an entitlement to be paid from her accrued sick leave for her absence from work between 7 June 2000 and 8 August 2000 due to ill-health.
2. That Jean Matilda Kirkham has been denied a benefit to which she was entitled under her contract of employment, being untaken annual leave payable upon the termination of her employment.

(D) ORDERS—

That Katrina Alexander forthwith pay Jean Matilda Kirkham the sum of $1762.95 being benefits due to her under her contract of employment."

4 It is quite clear and open to be found that the appeal was properly instituted, within the meaning of s.49(11) of the Act, and that the appellant, as the respondent in the proceedings at first instance, is a party interested and I so find.

GROUNDS OF APPLICATION FOR A STAY

5 The application for a stay is made on the following grounds—

1. Urgent, because the legal representative for the respondent has already filed a claim in the Magistrates Court (claim no 247 of 2001) with a hearing date for the claim of 10th October 2001) As the applicant no longer has a legal or industrial representative she was not aware of the availability of making an application to have the order stayed pending the hearing and determination of the appeal. As she is attempting to represent herself she is at a disadvantage in knowledge and application of legal process.
2. Financial hardship: as a sole trader general medical practitioner (GP) the applicant employs 4 part time reception staff and 4 part time doctors who are now considered to be subcontractors. She is now disadvantaged by the GST as she is required to pay GST and the BAS to the ATO. Due to the disarray of the surgery accounts payable, partly due to the incapacity of the previous practice manager (the respondent) to cope with her duties after her car accident in February 2000, and then due to her position not being replaced while it was held open for her return prior to her abandoning her employment in August 2000. Her present book keeper, is only now just calling in the bad debts from this period (as a GP/Obstetrician she earns a large proportion of her income from hospital and outside procedural work which is billed both privately and publicly) The practice expenses are currently being paid through an overdraft.

   The applicant has already spent several thousand dollars on legal and industrial representation and is continuing without representation as a matter of principle.
3. Commissioner Beech, in his supplementary reasons has agreed that a mistake may have been made in the calculation of the claimed loss of $5,900. The applicant believes that even if she is unsuccessful in her appeal it is likely that the disputed amount will be much less than that which has been claimed. This will put the applicant at a financial disadvantage as she will be paying interest on the total claim of nearly $8000.
4. As the respondent's incapacity for work was due to a motor vehicle accident and she has made a claim from ICWA which has been accepted, she was successful in applying for an advance payment of her losses (with the assistance of the applicant in June 2000), she has not been financially disadvantaged."

BACKGROUND

6 I summarise some material aspects of the facts found by the Commissioner and some findings of the Commissioner at first instance hereunder.

7 The abovenamed respondent employee, Ms Jean Matilda Kirkham, was employed in the Geddes Street Family Practice, a medical practice of which the abovenamed applicant (the respondent at first instance), Dr Alexander, described herself as the principal. Ms Kirkham complained at first instance that she was unfairly dismissed by Dr Alexander at a meeting between them on 8 August 2000. Only the two of them were present at that meeting.

8 Ms Kirkham was employed by Dr Alexander from June 1995 as a receptionist and, then, in and after 1996, as the bookkeeper and practice manager.

9 After a motor vehicle accident in February 2000, Ms Kirkham was off work for a week. Thereafter, she returned to work on 15 hours per week, 3 half days per week, instead of 32 to 40 hours per week as a full time employee. There was a reduction in her workload accordingly and she performed only bookkeeping duties, with which she agreed.

10 At the end of April 2000, Dr Alexander decided to employ a bookkeeper and Ms Kirkham agreed with the decision, however reluctantly.

11 A consultant, Ms Csallie Drake-Brockman, who had previously assisted Dr Alexander to set up the practice, met Ms Kirkham and all of the staff individually. Ms Drake-Brockman, it was found, thought that Ms Kirkham looked very unwell and that she ought to go on sick leave, recover, and then come back and carry out her normal range of duties, except for bookkeeping. Ms Kirkham understood that she would remain as office manager, look after the treatment room, and also perform some back up work at the front desk. She then took sick leave, commencing on 11 May 2000 and remaining on leave until 6 June 2000.

12 Ms Kirkham saw her regular medical practitioner and also a clinical psychologist, Dr Power.

13 On 13 June 2000, Ms Kirkham and Dr Alexander met to discuss her returning to work. Dr Alexander suggested to her that she could perform a number of duties to do with work in the treatment room for four hours one afternoon per week. It did not include any bookkeeping or practice management duties, but some reception duties.

14 This upset Ms Kirkham and caused her distress. Her psychologist said that she was not able to return to work yet. Dr Power wrote to Dr Alexander informing her that Ms Kirkham should remain off work and that, depending on her progress over the next one to two weeks, she should remain off work until the end of July 2000.

15 On 6 August 2000, Ms Kirkham rang Dr Alexander to make an appointment to see her because she had made up her mind to return to work, as she was feeling a lot better. The appointment was made for 8 August 2000 in order to discuss the nature of her duties and her return to work. They met that day and Ms Kirkham claimed that Dr Alexander dismissed her at that meeting.

16 There was a conflict of evidence, Ms Kirkham being adamant that she had no intention of resigning at that meeting and, saying that she regarded herself as having been dismissed. Dr Alexander said that Ms Kirkham told her at that meeting that she, Ms Kirkham, did not wish to do any reception duties, nor any relief work and asked whether the duties in the treatment room previously offered would still be available. Dr Alexander said that some two months had elapsed since that offer and those duties had been allocated to other staff.

17 When Ms Kirkham asked whether it would be easier for the practice if she did not return to work, Dr Alexander said that she was quite surprised by the question, but replied that a return to work on reduced hours and duties is never an easy thing to cope with and it might be better for Ms Kirkham not to return to work in any capacity until her depressive turns had been completely resolved.

18 Dr Alexander, in cross-examination, admitted that she said that the previous treatment room duties were being done by others and that she would have to create a position for Ms Kirkham for her to be able to return to work. However, as the Commissioner found, Dr Alexander believed on 8 August 2000 that Ms Kirkham was not well enough to return to work at that stage.

19 There was a conflict between Ms Kirkham's view that she wanted to return to work, that she would return to work and that she could work, even with the assistance of a psychologist (the letter from Dr Power excused her from work only until the end of July 2000); whereas Dr Alexander's evidence was, however, that she was of the opinion that Ms Kirkham was not fit to return to work. There was no medical clearance for her. Ms Kirkham had removed the permission she had given to Dr Power to discuss her case with Dr Alexander. Dr Alexander, therefore, did not have access to Dr Power. She therefore made her own observation of Ms Kirkham and decided that she was not well enough to return to work at that time.

20 The Commissioner found that Dr Alexander's opinion and evidence was not correct. The evidence was that Ms Kirkham had found alternative employment and was

currently employed at the time of the hearing. Thus, Dr Alexander's subjective opinion on 8 August 2000 was in error. Ms Kirkham was, the Commissioner found, ready to return to work as set out in the agenda for 8 August 2000.

21 The Commissioner found that, whilst there were no clear words of dismissal, the Commission ought to look at the circumstances of the case. To constitute a breach of the implied terms that the parties not conduct themselves in a manner likely to destroy confidence between them, the whole of the conduct should be looked at, the Commissioner found.

22 The Commissioner found that Dr Alexander did not intend Ms Kirkham to return to work as at 8 August 2000, notwithstanding Ms Kirkham's preparedness to do so, for the additional reason of potential problems between Ms Kirkham and other members of the staff, and also that Ms Kirkham was distressed after the meeting.

23 Ms Kirkham was intending to return to work on the basis of no more than one day, four hours per week. This was consistent with a gradual return to work, yet there was nothing in Dr Alexander's position on 8 August 2000 which would allow Ms Kirkham the opportunity to return to work, even on that basis at that time.

24 The Commissioner found that the dismissal was unfair, ordered compensation to be paid and, as to the contractual benefits claim, the Commissioner found that Ms Kirkham was entitled to contractual benefits which he quantified and ordered to be paid (see above).

PRINCIPLES

25 The principles to be applied in deciding whether to make an order staying the operation of a decision at first instance pending the hearing and determination of an appeal have been canvassed in this Commission in many cases. In *AWU v BHP Iron Ore Ltd* 81 WAIG 406, paragraph 25, these principles were expressed again and appear. Paragraph 29 of that decision is also of importance and I reproduce both those paragraphs hereunder—

> "The principles which apply to applications made pursuant to s.49(11) of the Act are well settled. I reproduce hereunder the relevant extract from *CSA v Director General, Department of Transport* 80 WAIG 2855 at 2856—
>
> > "These principles have been laid down in a number of cases, including *Gawooleng Dawang Inc v Lupton and Others* 72 WAIG 1310, *Director General of the Ministry for Culture and the Arts v CSA and Others* 79 WAIG 670 and *City of Geraldton v Cooling* 80 WAIG 1751.
> >
> > It is for the applicant to establish that the stay should be granted. It is, of course, an underlying principle that the successful party is entitled to the fruits of her/his/its order, award or declaration.
> >
> > For the applicant to succeed, it must be established that there is a serious issue to be tried, that the balance of convenience favours the applicant and that other factors consistent with the application of s.26(1)(a), s.26(1)(b) and/or s.26(1)(c) of the Act, if they exist, require that the application be granted.
> >
> > If these ingredients exist, then exceptional circumstances exist which warrant the granting of the application as a matter of equity, good conscience and the substantial merits of the case. (I say that to further explain the principles.)"
> >
> > .....
> >
> > "However, there may be necessarily some difference in the required strength of case when the Commission, constituted by the President, considers an application for a stay. When a decision is the subject of an appeal to an intermediate tribunal such as the Full Bench, then, whilst the President may not be required to apply the principle that the case must be strong, the strength of the case may not be required to be equal to that required to be established in the Industrial Appeal Court which is the final court of appeal. However, in the context of the strength of the case, the case must raise a serious issue to be tried. In any event, there is the fact that exceptional circumstances must be established by the applicant for a stay to be granted."

(See also the other cases cited therein.)

ISSUES AND CONCLUSIONS

26 A number of factors require to be considered.

27 First, the grounds of this application do not assert that the balance of convenience favours the applicant or that there is a serious issue to be determined on appeal (the strong case referred to by Anderson J in *Re Peter John Sharkey & Others; Ex parte The Food Preservers Union of Western Australia, Union of Workers* [2000] WASC 259 (unreported) delivered 28 September 2000 (IAC 7 of 2000).

28 Notwithstanding that, I endeavoured to put those matters to Dr Alexander so that she could make submissions on those points.

Balance of Convenience

29 The allegations in Ground 2 of the grounds of this application of economic loss are simply not relevant to the question whether the order should be stayed. If Dr Alexander is alleging negligence against Ms Kirkham, she has her remedies. However, there is an order in existence for compensation and contractual benefits and the current financial state of the practice and its alleged causes is not relevant to the question of whether the order should be stayed or not.

30 As a matter of fact, touching the question of the balance of convenience, Ms Kirkham was found to have been dismissed on 8 August 2000. She made the application, the subject of the hearing at first instance, on 1 September 2000. The order at first instance was made on 9 July 2001.

31 The application herein was not made until 13 September 2001, which was more than two months after the date on which the order was perfected, namely, 11 July 2001. Thus, Ms Kirkham has still not received her remedy over thirteen months after the cause of action arose.

32 Further, there is no adequate explanation for the two month delay in making this application which has caused unnecessary delay. Additionally, there is no evidence that Ms Kirkham is unable or unwilling to refund the amount of the order. I so find.

33 Next, there is nothing on which to base a finding that the appeal would be rendered nugatory, not the least because of the last finding which I have made.

34 I would also add that the claim that the matter is urgent because there are enforcement proceedings in the Industrial Magistrate's Court on 10 October 2001 is not a matter of merit relevant to the balance of convenience. I have decided this matter on the relevant facts and factors, in good time for the parties to properly deal with the enforcement proceedings in the Industrial Magistrate's Court.

35 As a result and for those reasons, I find that the balance of convenience clearly favours Ms Kirkham retaining the fruits of her judgment.

Serious Issue to be Tried

36 I now turn to the question of the seriousness of the issue to be tried. This was a matter where the grounds of appeal, insofar as they referred to matters raised at first instance, alleged a number of errors in findings of fact. There was not sufficient submitted to me to establish that there were serious issues to be tried in that context.

37 For myself, it is not clear to me from the grounds of appeal or the submissions put to me that the Commissioner, in making the findings of fact, dependent on his hearing and seeing the witnesses (which was clearly the case), palpably misused his advantage (see *Devries and Another v Australian National Railways Commission and Another* [1992-1993] 177 CLR 472 and *State Rail Authority of*

New South Wales v Earthline Constructions Pty Ltd (in liq) (1999) 73 ALJR 306). The finding that there was a dismissal, not a resignation, depended on the Commissioner's assessment of the witnesses and their evidence.

38 Having observed the witnesses and having heard their evidence, he found quite clearly that what occurred on 8 August 2000 was that Dr Alexander dismissed Ms Kirkham. This included the finding that there was, at that time, no work (and no job) for Ms Kirkham, even though she was ready, willing and able to work.

39 I was not persuaded by any cogent argument that there was a serious issue to be tried on the basis that the Commissioner had erred in making findings depending on his views of the credibility of the witnesses.

40 As to Ground 3, I do not read the Commissioner as having agreed that a mistake was made in the calculation of the loss claimed and it is not clear, on what was submitted to me, that the loss might be found to be less than that claimed or ordered. In any event, the grounds of appeal do not clearly enough reflect that the question of contractual benefits or compensation ordered to be paid is to be attacked on appeal.

41 In any event, too, the relevant findings as to denial of contractual benefits were made without challenge or serious question at first instance (see, for example, paragraph 2 on page 36, page 39 and page 40 of the appeal book (hereinafter referred to as "AB")).

42 The question of any alleged future double payment to Ms Kirkham was, as the Commissioner observed, not relevant or, if it were, I am not so persuaded (see page 39(AB)).

43 As to the question of the nature of Dr Alexander's representation at first instance, the grounds of appeal do not allege that her defence failed because of her advocate's negligence or inability, nor do they allege reasons why that should have been found. I am not able to say that that ground raises a serious issue to be tried.

44 I therefore find that it has not been established that there is a serious issue to be tried.

FINALLY

45 It has not been established to my satisfaction that there is a serious issue to be tried or that the balance of convenience lies with Dr Alexander, for those reasons. It follows that the interest of Dr Alexander in staying the operation of the decision is overcome by the opposing interest of Ms Kirkham.

46 For those reasons, I would find that there are no exceptional circumstances requiring that Ms Kirkham be deprived of the fruits of her order.

47 The equity, good conscience and the substantial merits of the case lie with a dismissal of this application, for those reasons.

2001 WAIRC 03809

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	DR KATRINA ALEXANDER, APPLICANT *v.* JEAN MATILDA KIRKHAM, RESPONDENT
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DELIVERED	THURSDAY, 20 SEPTEMBER 2001
FILE NO/S	PRES 13 OF 2001
CITATION NO.	2001 WAIRC 03809

Decision	Application dismissed.
Appearances	
Applicant	Dr K Alexander on her own behalf
Respondent	Ms Y D Henderson (of Counsel), by leave

Order.

This matter having come on for hearing before me on the 20th day of September 2001, and having heard Dr K Alexander on her own behalf as applicant and Ms Y D Henderson (of Counsel), by leave, on behalf of the respondent, and I having determined that the application should be dismissed and that my reasons for decision will issue at a future date, it is this day, the 20th day of September 2001, ordered that application No PRES 13 of 2001 be and is hereby dismissed.

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

PRESIDENT—
Unions—Matters dealt with under Section 66—

2001 WAIRC 03591

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	PETER DELANEY AND KIM YOUNG, APPLICANTS v. THE WESTERN AUSTRALIAN BUILDERS' LABOURERS, PAINTERS & PLASTERERS UNION OF WORKERS, RESPONDENT
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DELIVERED	FRIDAY, 3 AUGUST 2001
FILE NO/S	PRES 11 OF 2001
CITATION NO.	2001 WAIRC 03591

Decision	Application granted in part.
Appearances	
Applicants	Mr A D Gill (of Counsel), by leave
Respondent	Mr A L Drake-Brockman (of Counsel), by leave

Reasons for Decision.

THE PRESIDENT—

INTRODUCTION

1 This is an application, brought pursuant to s.66 of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "the Act"), by Mr Peter Delaney and Mr Kim Young.

2 The respondent is and has been for some years an "organisation", as that is defined in s.7 of the Act.

3 By the application, the applicants applied for an order in the following terms—

> "... that until the Full Bench of the Western Australian Industrial Relations Commission has had an opportunity to hear and determine the application for amalgamation by the Western Australian Builder's Labourers, Painters & Plasterers Union of workers ('BLPPU') and the Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia—Western Australian Branch ("CMETSWU") to create a new organisation, the Construction, Forestry, Mining and Energy Union of Workers ("CFMEU") ("the new organisation") or until further order that the returning officer of the BLPPU will not be required to take any further steps in the election process pursuant to the provisions and requirements of Rule 23 of the BLPPU's Rules."

4 The respondent organisation, through Mr Drake-Brockman of Counsel, consents to the Commission making the order sought.

5 Since the applicant, Mr Delaney, is a member of the respondent organisation and the applicant seeks an order relating to the rules of the organisation, their observance or non-observance or the manner of their observance, it is clear that there is jurisdiction in the Commission to hear and determine this application.

6 It is not clear, since there is no evidence that Mr Young is or was a member of or was refused membership of the respondent, that I have jurisdiction to hear and determine Mr Young's application.

7 The grounds are a summary of most of the facts in the matter, which were not in dispute.

FACTS

8 Mr Delaney is the duly appointed Returning Officer of the respondent pursuant to Rule 23(5) of the respondent's rules. He has duties prescribed by Rule 23 of the rules to which I will refer hereinafter. Mr Young is the duly elected Assistant Secretary of the respondent.

9 The respondent is required, by Rule 23, to hold an election for offices in the Executive and for the six offices of Organiser, with nominations to close by 14 August 2001. Rule 16(1) provides, inter alia, that the Executive of the organisation shall consist of a President, Secretary, two Assistant Secretaries, a Senior Vice President, a Vice President, a Treasurer, two Trustees and two Ordinary Executive Members. Rule 16(2) creates the elected offices of six Organisers.

10 Rule 23(4), with Rule 16(1), requires that 1997 and every fourth year thereafter shall be known in the rules as an election year, i.e. a year in which, by Rule 23, such an election to fill the offices I have referred to, is required to be held.

11 Whilst the evidence is that the respondent is in the course of conducting such an election, there is no evidence as to what steps have been taken, if any.

12 There is, relevantly, another organisation, namely The Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia—Western Australian Branch (hereinafter referred to as the "CMETSWU"), also an organisation as defined in s.7 of the Act.

13 According to the uncontradicted affidavit evidence of Mr Young (exhibit 1), the Executive Committee of the respondent resolved that a Special General Meeting be held on 2 July 2001 to consider the following resolutions—

> "(a) that the BLPPU hereby resolves to amalgamate with the CMETSWU in accordance with the provisions of the Industrial Relations Act 1979 (WA) to create a new organisation, being the Construction, Forestry, Mining and Energy Union of Workers ("CFMEU") the ("the Amalgamated Union");
>
> (b) that this meeting hereby authorises the officers of the BLPPU to apply to the Western Australian Industrial Relations Commission for the registration of a new organisation, the Construction, Forestry, Mining and Energy Union of Workers being the amalgamation of the BLPPU and the CMETSWU, and further that the meeting hereby authorises the officers of the BLPPU to do all things necessary in relation to the application for the registration of the amalgamated union.
>
> (c) that the proposed rules of the amalgamated Union including the rules setting out the transitional executive and organisers, are approved by the Meeting and that the Meeting authorises the officers of the BLPPU to make any necessary application to the Western Australian Industrial Relations Commission seeking registration of the amalgamated Union's rules."

14 The Special General Meeting was held, following a Notice published in the West Australian, on 2 July 2001 and those resolutions were passed.

15 The application pursuant to s.72 of the Act, made on behalf of the CMETSWU and the respondent organisation, with other documents including the proposed rules of the new organisation, was filed on 20 July 2001 and is exhibit 4.

16 The names of those who would, on a transitional basis, occupy offices on the executive and the offices of organisers of the new union were approved at that meeting, and, so I was informed, at a meeting held on the same date by the CMETSWU.

17 The copy rules which were filed with the s.72 application include, at pages 31 to 32, a list of the names of the proposed organisers and Executive office holders of the new organisation from the current officers in both applicant organisations, designating their current positions and their transitional positions in the new organisation.

18 Rule 39 prescribes a transitional period which enables the Executive officers and organisers, named at page 31 of the proposed rules, to hold office from "the date of amalgamation" until "the date when the Returning Officer declares the result of the election" in 2004, prescribed in Rule 23. I so find.

19 As I understood what was put to me, those officers and organisers (also officers) elected in 1997 will remain, without election in 2001 as required, in office in the respondent organisation and will, as a result, become and remain officers of the new organisation, if it is authorised to be registered, until 2004. That means, if it occurs, that they will hold office in two organisations, without being elected, for seven years as a result of an election held in 1997.

20 Notice of the intention to apply pursuant to s.72 of the Act has been given to all members by post at their registered addresses by ordinary mail on 3 July 2001 (see the copy affidavit of Mr Kevin Noel Reynolds (exhibit 5)).

21 It should be added that the uncontested evidence from the bar table and from the copy affidavit of Mr Reynolds was that all members had been given notice of the abovementioned Special General Meeting, via the West Australian newspaper dated 22 June 2001, had been given notice of the proposed new rules, and, therefore, had an opportunity to object to the rules of the new organisation, which included the names of those persons whom it was said would be office holders, both as organisers and/or as the holders of offices in the Executive of the new organisation if registration were authorised and effected.

22 It was not in issue that the basis of the proposed amalgamation is to combine the resources of the two organisations and to enhance, by such amalgamation, the services able to be provided to members by the two organisations. It was submitted that all of the members of the two organisations would be eligible to be members of the new organisation (were the application pursuant to s.72 of the Act granted by the Full Bench, of course).

23 Until recently, the amalgamation was not possible because the CMETSWU was a defendant in an action in the Supreme Court of this State in which the plaintiff, Hamersley Iron Limited, claimed damages of about $50 million from a number of defendant organisations of employees.

24 It was the evidence of Mr Reynolds and Mr Joseph McDonald (see exhibit 6) of the CMETWSU that, whilst the CMETSWU and the respondent have enjoyed a co-operative relationship in recent times, there has been the potential for demarcation disputes which will be removed by registration of the new organisation.

25 Mr Young's evidence was that (whilst he was aware) this was an "election year" for the positions of executive and organisers within the respondent, he opined that, given the resolutions passed by the Special General Meeting, the election should not proceed until the outcome of the application for amalgamation is known. He asserted that it would be a waste of the respondent's resources to continue with the election process if the amalgamation were approved and the positions of the Executive and organisers were in accordance with the rules of the new amalgamated organisation.

26 It was, therefore, said that an opportunity to object to the s.72 application and the proposed rules existed. So far, no objection has been received by the Executive.

27 That was the evidence given. It was uncontradicted and those are the facts as I find them, save and except for matters of opinion and argument, such as paragraph 25 consists of.

ISSUES AND CONCLUSIONS

28 It is necessary to consider a number of relevant matters.

29 First and very importantly, the members of the organisation will be deprived, if I make the order sought, of their right to elect their officers and organisers.

30 Second, s.6(e) of the Act, which is relevant, reads as follows—

> "(e) to encourage the formation of representative organizations of employers and employees and their registration under this Act and to discourage, so far as practicable, overlapping of eligibility for membership of such organizations;"

31 Third, s.6(f) of the Act is relevant to this application, and reads as follows—

> "(f) to encourage the democratic control of organizations so registered and the full participation by members of such an organization in the affairs of the organization;"

32 Fourth, s.6(g) of the Act is not relevant to this application.

33 In *Hathaway v WALEDFCU* 78 WAIG 3419, I considered a similar application. However, that was the case of an organisation which had been unable to hold an election for some time and was, as I said, dying by degrees. It was somewhat different from this case.

34 It was submitted that s.6(e) of the Act would be reflected in my making the orders sought, since this would, as I understood the submission, enable the application by the two organisations to amalgamate and form a new organisation to proceed. S.72 of the Act is consonant with that object of the Act and enables the formation of new organisations by the amalgamation of existing organisations.

35 Mr Drake-Brockman submitted that this amalgamation would put an end to the rivalry between the CMETSWU and the respondent of which he cited examples, but, in fairness to the two organisations, examples some years old.

36 Mr Drake-Brockman also submitted that I should make the order so as to enable the respondent and the CMETSWU to bring its application to amalgamate to the Full Bench. I do not see that my making such an order or not making such an order will either prevent or assist the making of the application under s.72 of the Act by the Full Bench.

37 The crux of the matter raised by the application is this. The applicants, the respondent consenting, seeks that the Commission order that no election for the office of Executive member or organiser take place pending the hearing and determination of the application pursuant to s.72 of the Act. That means that no election will have taken place in an election year, which falls every four years, and as the rules require. That means that those persons who occupy the offices on the Executive and the offices of organiser currently will, having served for four years in the respondent organisation, become office holders in the new organisation, if it is registered, with transitional rules enabling them to hold office until 2004, they not having to face an election before that.

38 Such a proposal has to be viewed against s.6(e) of the Act which specifically prescribes, as an object of the Act, the encouraging of the democratic control of organisations and the full participation by members of such an organisation in the affairs of the organisation.

39 Further, if I make the order sought, it prevents the membership electing not only their officers and organisers, as the rules enable them to do in an election year, but prevents them thereby electing those persons who, for about three years, will be the officers and organisers who will go from their organisation to the new organisation as officers and organisers. That does not, on the face of it, reflect s.6(e) of the Act.

40 Further, it prevents other persons who might wish to do so from standing for office in this organisation and, if the rules are approved and a new organisation is registered, holding office in the new organisation.

41 Put simply, the membership is prevented if the order sought is made, from exercising a fundamental right as members to elect their officers in the year when they are entitled to do so and members, not officers, are prevented from standing for office.

42 It is also relevant to consider that there will be a cost in money and resources in holding an election when the respondent organisation may no longer exist. Further, there is no evidence, so close to the deadline for holding an election, that any step has been taken to hold such an election.

43 It is also noteworthy that it is a statutory requirement that the rules of an organisation shall not permit a person to be elected to hold an office within an organisation for a period of four years without being re-elected (see s.56(1)(e) of the Act). That is an express recognition of the importance of Rule 23. The rule exists by virtue of a mandatory statutory requirement.

44 Against that, too, as Mr Drake-Brockman asserted and submitted, the proposed amalgamation was the result of long and deliberate negotiation against the background of competing interests in the organisations. Those competing interests derived, in part, from the fact that the respondent presently is the successor to three unions and the CMETSWU is the successor to more than one union. I infer from that that, as one would expect, the proposed membership of Executive and of organiser positions has been agreed, so that officers and officials representing competing interests have a place in the new order.

45 It was submitted and asserted that the members had all received copies of the proposed rules and the schedule of proposed officials and none have objected, and, further, if they do object to those persons being officers or officials of any new organisation, they can object upon the s.72 application to the Full Bench.

46 It was submitted that, because the eligibility clause of the proposed new organisation's rules would reflect that of an existing federally registered organisation, the object prescribed by s.6(g) of the Act would be advanced by my making the orders sought.

47 It must be remembered that I am not considering an application pursuant to s.72 of the Act, nor can I. I am considering an application to postpone an election of officers which the rules, reflecting a statutory requirement, require to be held this month, this application having been filed on 20 July 2001.

48 For all of those reasons, having regard to the interests of the organisation and its members and s.6(e) of the Act, it is open to argue that, to make the order would be an unwarranted invasion of the right of members to participate in and control their organisation, the respondent.

49 Ultimately, however, there are a number of considerations. These are that the application and the proposal to amalgamate has been approved in accordance with the rules of a Special General Meeting of which notice was given in accordance with the rules, as I am satisfied and I find.

50 Further, notice of the proposal and a copy of the rules giving an opportunity to object to the s.72 application has, on the evidence and as I find, been forwarded to all members. That affords them an opportunity to object, having read the proposed new rules. Further, in that context, the application will be required to be advertised in the Western Australian Industrial Gazette. Those proposed new rules contain the transitional rule, Rule 39, and the names of the officers of the respondent organisation who will, without election, hold office in the proposed new organisation.

51 Further, it is clear that an election, if it were held, would mean expense and time.

52 However, given that there is a right to object to the proposed rules, and that the amalgamation ought to be dealt with by the Full Bench in the near future, and that objections can be made to the Full Bench, and that an election at present might occasion unnecessary expense, I would hold that the balance of the matter falls just on the side of granting the application, or the substantial merits of the case, and having regard to the interests of the organisation and its members.

53 There is one matter which, however, will be reflected in the order which I will make. That is that the members' right to be specifically informed, which they have not, that there will be no election, as there otherwise would have been, and of the terms of this order, that they ought also to be advised that they, or any of them, have the right to be heard as intervener or a party in the proceedings, and seek to discharge or vary the orders which I will make, or to seek other related orders. There is a danger in an application like this, in which those before the court, through an organisation, are effectively those who have an interest in retaining office. That is why I propose to order as I have just indicated. I would otherwise grant the application.

54 I will issue a minute accordingly.

2001 WAIRC 03444

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	PETER DELANEY AND KIM YOUNG, APPLICANTS v. THE WESTERN AUSTRALIAN BUILDERS' LABOURERS, PAINTERS & PLASTERERS UNION OF WORKERS, RESPONDENT
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DELIVERED	FRIDAY, 3 AUGUST 2001
FILE NO/S	PRES 11 OF 2001
CITATION NO.	2001 WAIRC 03444

Decision	Application granted in part.
Appearances	
Applicants	Mr A D Gill (of Counsel), by leave
Respondent	Mr A L Drake-Brockman (of Counsel), by leave

Order.

This matter having come on for a directions hearing before me on the 31st day of July 2001, and having heard Mr A D Gill (of Counsel), by leave, on behalf of the applicants, and Mr A L Drake-Brockman (of Counsel), by leave, on behalf of the respondent organisation, and I, having directed that application No PRES 11 of 2001 now be heard and determined forthwith, and having determined the matter, it is this day, the 3rd day of August 2001, ordered and directed as follows—

(1) THAT until the 31st day of October 2001 or until further order, provided that such order is made before such date, the respondent shall not be required to conduct any election to fill the offices of Executive member or organiser, as required otherwise by Rule 16 and Rule 23 of the rules of the respondent, but subject to Order 3 hereof.

(2) THAT the current holders of such offices in accordance with the rules of the respondent organisation shall continue to hold office until the said 31st day of October 2001 or until further order in accordance with Order 1 hereof.

(3) THAT, in the event that the Full Bench makes an order pursuant to s.72 of the Act in application No FBM 3 of 2001 filed in the Commission on the 20th day of July 2001, then upon the registration of any new organisation as a result of such order prior to the 31st day of October 2001, this order shall be extinguished if such registration occurs on or before the 31st day of October 2001.

(4) THAT there be liberty to apply generally or to vary or discharge this order, to any member of the respondent organisation who gives written notice to the Commission and the parties hereto.

(5) THAT, subject to orders 1 to 3 hereof, after the 31st day of October 2001, the respondent organisation, unless it is otherwise ordered, shall conduct forthwith an election for the offices of Executive members and organisers as required by Rule 16 and Rule 23 of the respondent's rules, and subject to the orders and directions of the Commission as to time.

(6) THAT, notwithstanding the preceding orders, unless within twenty-one days of the date hereof the respondent organisation advises its members, by inserting a notice in the Public Notices section of the "West Australian" newspaper, that the said election has been postponed by the Commission, that the current office holders will retain office until the 31st day of October 2001 or further order, that any member who objects or otherwise wishes to make application to the Commission in relation to such order, may do so; and that such step is taken and that such notice is adequate is proven to the satisfaction of the Commission by affidavit filed herein and served on the applicant, Mr Peter Delaney, then this order will be immediately extinguished and discharged.

(7) THAT the Commission may, of its own motion, on notice of hearing to the parties and/or any other person, re-list the matter for further hearing, orders or directions.

(8) THAT the application of the second applicant, Mr Kim Young, be and is hereby dismissed.

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

2001 WAIRC 03883

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	PETER DELANEY AND KIM YOUNG, APPLICANTS v. THE WESTERN AUSTRALIAN BUILDERS' LABOURERS, PAINTERS & PLASTERERS UNION OF WORKERS, RESPONDENT
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DELIVERED	THURSDAY, 27 SEPTEMBER 2001
FILE NO/S	PRES 11 OF 2001
CITATION NO.	2001 WAIRC 03883

Decision	Order dated 3 August 2001 varied.
Appearances	
Applicants	Mr A D Gill (of Counsel), by leave
Respondent	Mr A L Drake-Brockman (of Counsel), by leave

Further Reasons for Decision.

1 This matter was listed by direction and upon the motion of the Commission, constituted by the President, on 21 September 2001 pursuant Order 7 of orders made by me on 3 August 2001.

2 The hearing was directed to Order 6 of those same orders, which reads as follows—

> "THAT, notwithstanding the preceding orders, unless within twenty-one days of the date hereof the respondent organisation advises its members, by inserting a notice in the Public Notices section of the "West Australian" newspaper, that the said election has been postponed by the Commission, that the current office holders will retain office until the 31st day of October 2001 or further order, that any member who objects or otherwise wishes to make application to the Commission in relation to such order, may do so; and that such step is taken and that such notice is adequate is proven to the satisfaction of the Commission by affidavit filed herein and served on the applicant, Mr Peter Delaney, then this order will be immediately extinguished and discharged."

3 Significantly, no affidavit had been filed by or on behalf of the respondent organisation within 21 days of the date of that order, verifying that a notice had been placed in the "West Australian" newspaper, as ordered. Further, no affidavit was filed to establish that a notice had been published which was adequate.

4 The notice was an important one, since it was required to be inserted so that members could be advised that the Commission had postponed this year's elections pending the hearing and determination of an application by the respondent organisation to amalgamate with The Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia—Western Australian Branch to form a new organisation. The importance of the notice is reflected in my reasons for decision delivered in this matter on 3 August 2001 and, in particular, paragraph 53, where I said—

> "There is one matter which, however, will be reflected in the order which I will make. That is that the members' right to be specifically informed, which they have not, that there will be no election, as there otherwise would have been, and of the terms of this order, that they ought also to be advised that they, or any of them, have the right to be heard as intervener or a party in the proceedings, and seek to discharge or vary the orders which I will make, or to seek other related orders. There is a danger in an application like this, in which those before the court, through an organisation, are effectively those who have an interest in retaining office. That is why I propose to order as I have just indicated. I would otherwise grant the application."

5 By 7 September 2001, no affidavit, as ordered, had been filed. The Notice of Hearing issued on 7 September 2001. On 14 September 2001, after the Notice of Hearing issued, the affidavit of Ms Peta Anne Arnold, the Office Manager of the respondent, was filed, which purported to be sworn on 23 August 2001. That affidavit exhibited a copy of a page of the West Australian dated 14 August 2001, on which was a copy of a notice in terms as directed by me in my order of 3 August 2001, although it could hardly be described as conspicuous.

6 At the hearing of 21 September 2001, no person with direct evidence of what occurred was called to give evidence. Ms Elizabeth Peak, an industrial officer of the respondent organisation, gave evidence that, whilst the affidavit had been sworn on 23 August 2001 and a copy of it served on the applicants on 27 August 2001, by an oversight, it was not filed by the requisite officer until 14 September 2001. In other words, nothing was done in that respect until I listed the matter for hearing again.

7 In the meantime, of course, the officers of the respondent organisation were not validly in office and the respondent organisation, contrary to its rules, had not held an election of officers as it was required to do this year.

8 Notwithstanding that the explanation was scarcely adequate, there was evidence of compliance with the order by the placing of the notice in the newspaper in time, even if it were not proven in time that this was done by the respondent organisation.

9 Since I did not wish to jeopardise the hearing of the application to amalgamate with another organisation by the Full Bench, which had been listed for hearing on 26 September 2001, I accepted the adequacy of the notice (which was adequate), extended time within which to file the affidavit and maintained the continuity of the relevant order of 3 August 2001.

10 I observe, however, that the failure to comply with the order by not filing the affidavit was very careless, and might have adversely affected an important matter proceeding in the Full Bench.

11 For those reasons, I made the order which I made.

2001 WAIRC 03826

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	PETER DELANEY AND KIM YOUNG, APPLICANTS v. THE WESTERN AUSTRALIAN BUILDERS' LABOURERS, PAINTERS & PLASTERERS UNION OF WORKERS, RESPONDENT
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DELIVERED	FRIDAY, 21 SEPTEMBER 2001
FILE NO/S	PRES 11 OF 2001
CITATION NO.	2001 WAIRC 03826

Decision	Order dated 3 August 2001 varied.
Appearances	
Applicants	Mr A D Gill (of Counsel), by leave
Respondent	Mr A L Drake-Brockman (of Counsel), by leave

Order.

This matter having come on for mention before me on the 21st day of September 2001, and having heard Mr A D Gill (of Counsel), by leave, on behalf of the applicants, and Mr A L Drake-Brockman (of Counsel), by leave, on behalf of the respondent organisation, and I, having determined the matter, and the parties herein having consented to waive the requirements of s.35 of the *Industrial Relations Act* 1979 (as amended), it is this day, the 21st day of September 2001, ordered and declared by consent as follows—

(1) THAT leave be and is hereby granted to extend the time to file and serve, in accordance with Order (6) of the orders issued on the 3rd day of August 2001, the Affidavit of Peta Anne Arnold sworn on the 23rd day of August 2001, to the 14th day of September 2001.

(2) THAT the Order issued on the 3rd day of August 2001 be and is hereby varied by deleting Order (6) thereof.

(3) THAT Orders (1) to (5) inclusive and Order (7) of the Order issued on the 3rd day of August 2001 continue and continued to be in force and effect in accordance with their terms, as and from the 3rd day of August 2001.

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

AWARDS/AGREEMENTS— Variation of—

ARTWORKERS AWARD.

No. A30 of 1987.

2001 WAIRC 03803

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	THE WESTERN AUSTRALIAN BUILDERS' LABOURERS, PAINTERS & PLASTERERS UNION OF WORKERS, APPLICANT
	v.
	TOWN OF NARROGIN, AVON VALLEY ARTS SOCIETY INC, RESPONDENTS
CORAM	COMMISSIONER J F GREGOR
DELIVERED	THURSDAY, 20 SEPTEMBER 2001
FILE NO	APPLICATION 1359 OF 2001
CITATION NO.	2001 WAIRC 03803

Result Award Varied

Order.

HAVING heard Ms J. Harrison on behalf of the Applicant and there being no appearance on behalf of the Respondents, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders—

THAT the Artworkers Award be varied in accordance with the following Schedule and that such variation shall have effect from the first pay period on and from 17th September 2001.

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

Schedule.

1. Clause 6.—Wages: Delete paragraph (c) of subclause (3) of this clause and insert in lieu the following—

(c) Construction Allowance 16.90

An employee shall not be entitled to this construction allowance except when required to work "on site" or any work in connection with the erection of a building or to carry out work which the employer and the union agree is construction work or in default of agreement, that is so declared by a Board of Reference.

2. Clause 7.—Special Rates and Provisions: Deletethis clause and insert in lieu the following—

(1) Confined Space

An employee required to work in a confined space, being a place the dimensions or nature of which necessitates working in a cramped position or without sufficient ventilation, shall be paid 50 cents per hour or part thereof in addition to the rates otherwise prescribed in this award.

(2) Toxic Substances

(a) An employee required to use toxic substances or materials of a like nature shall be informed by the employer of the health hazards involved and instructed in the correct and necessary safeguards which must be observed in the use of such materials.

(b) An employee using such materials will be provided with and shall use all safeguards as are required by the appropriate government Authority or in the absence of such requirement such safeguards as are determined by a competent authority or person chosen by the union and the employer.

(c) An employee using toxic substances or materials of a like nature shall be paid 50 cents per hour extra. Employees working in close proximity to employees so engaged shall be paid 39 cents per hour extra.

(d) For the purpose of this subclause all materials which include or require the addition of a catalyst hardener and reactive additives or two pack catalyst system shall be deemed to be materials of a like nature.

(3) Wet Work

An employee required to work in a place where water is continually dripping on him/her so that his/her clothing and boots become wet or where there is water underfoot shall be paid 41 cents per hour or part thereof in addition to the rates otherwise prescribed in this award.

(4) Dirty Work

An employee engaged on dirty work shall be paid 41 cents per hour or part thereof in addition to the rates otherwise prescribed in this award.

(5) Spray Application—Painters

A painter engaged on all spray applications carried out in other than a properly constructed booth, approved by the Department of Labour and Industry, shall be paid 41 cents per hour or part thereof in addition to the rates otherwise prescribed in this award.

(6) Height Money

An employee required to work on a chimney stack, spire, tower, radio or television mast or tower, air shaft, cooling tower, water tower or silo, where the construction exceeds fifteen metres in height shall be paid for all work above fifteen metres, 41 cents per hour or part thereof, with an additional 41 cents per hour or part thereof for work above each further fifteen metres in addition to the rates otherwise prescribed in this award.

(7) Swing Scaffold

(a) An employee employed—

(i) on any type of swing scaffold or any scaffold suspended by rope or cable, or bosun's chair or cantilever scaffold; or

(ii) on a suspended scaffold requiring the use of steel or iron hooks or angle irons at a height twenty feet or more above the nearest horizontal plane,

shall be paid $2.94 for the first four hours or part thereof and 60 cents for each hour thereafter on any day in addition to the rates otherwise prescribed in this award.

(b) A solid plasterer when working off a swing scaffold shall be paid an additional 9 cents per hour.

(8) Site Allowances

Where an employee is engaged on a construction site where the parties have agreed to a site allowance to compensate for all special factors and/or disabilities on a project, he/she shall be paid such site allowance. Provided that where it has been agreed that such site allowance shall be paid in lieu of any of the special rates above, such rates shall not be paid.

(9) Travel Allowance

A fares allowance of $12.60 per day shall be paid to employees required to work away from their usual place of employment.

BUILDING TRADES AWARD 1968.

No. 31 of 1966.

2001 WAIRC 03810

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	CONSTRUCTION, MINING, ENERGY, TIMBERYARDS, SAWMILLS AND WOODWORKERS UNION OF AUSTRALIA—WESTERN AUSTRALIAN BRANCH, THE WESTERN AUSTRALIAN BUILDERS' LABOURERS, PAINTERS & PLASTERERS UNION OF WORKERS, APPLICANTS *v.* CRYSTAL SOFTDRINKS, ROYAL AGRICULTURAL SOCIETY OF WESTERN AUSTRALIA INC, CHRIST CHURCH GRAMMAR SCHOOL, RESPONDENTS
CORAM	COMMISSIONER J F GREGOR
DELIVERED	THURSDAY, 20 SEPTEMBER 2001
FILE NO	APPLICATION 1355 OF 2001
CITATION NO.	2001 WAIRC 03810

Result Award Varied

Order.

HAVING heard Ms J. Harrison on behalf of the Applicants and Mr K. Dwyer on behalf of the Respondents, and by consent, Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby orders—

THAT the Building Trades Award 1968 be varied in accordance with the following Schedule and that such variation shall have effect from the first pay period on and from 17th September 2001.

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

Schedule.

1. Clause 10.—Wages: Delete subclause (5) of this clause and insert in lieu the following—

(5) Construction Allowance: (per week) $19.00. An employee shall not be entitled to this construction allowance except when required to work "on site" on any work in connection with the erection or demolition of a building or to carry out work which the employer and the union agree is construction work or in default of agreement, that is so declared by the Board of Reference.

2. Clause 12.—Leading Hands: Delete subclause (1) of this clause and insert in lieu the following—

(1) An employee specifically appointed to be a leading hand who is placed in charge of—

	Per Week $
(a) not more than one employee, other than an apprentice, shall be paid	$12.19
(b) more than one and not more than five other employees shall be paid	$27.20
(c) more than five and not more than ten other employees shall be paid	$34.51
(d) more than ten other employees shall be paid	$45.97

In each case, in addition to the rate prescribed for the highest classification or employee supervised, or his/her own rate, whichever is the highest.

3. Clause 13.—Special Rates and Provisions: Delete this clause and insert in lieu the following—

(1) General conditions under which special rate is payable—

(a) The special rates prescribed in this clause shall be paid irrespective of the times at which work is performed and shall not be subject to any premium or penalty condition.

(b) Where more than one of the following rates provide a payment for disabilities of substantially the same nature then only the highest of such rates shall be payable.

(2) Insulation: An employee handling charcoal, pumice, granulated cork, silicate of cotton, insulwool, slag wool or other recognised insulating material of a like nature or working in the immediate vicinity so as to be affected by the use thereof shall be paid $0.54 per hour or part thereof in addition to the rates otherwise prescribed in this award.

(3) Hot Work—

(a) An employee required to work in a place where the temperature has been raised by artificial means to between 46 degrees and 54 degrees Celsius shall be paid $0.42 per hour or part thereof in addition to the rates otherwise prescribed in this Award or in excess of 54 degrees Celsius shall be paid $0.54 per hour or part thereof in addition to the said rates.

(b) Where such work continues for more than two hours the employee shall be entitled to a rest period of 20 minutes after every two hours work without loss of pay, not including the special rate prescribed in paragraph (a) hereof.

(4) Cold Work—

(a) An employee required to work in a place where the temperature is lowered by artificial means to less than zero degrees Celsius shall be paid $0.43 per hour or part thereof in addition to the rates otherwise prescribed in this award.

(b) Where such work continues for more than two hours the employee shall be entitled to a rest period of 20 minutes after every two hours' work without loss of pay, not including the special rate prescribed in paragraph (a) hereof.

(5) Confined Space: An employee required to work in a confined space, being a place the dimensions or nature of which necessitates working in a cramped position or without sufficient ventilation shall be paid $0.54 per hour or part thereof in addition to the rates otherwise prescribed in this award.

(6) Toxic Substances—

(a) An employee required to use toxic substances or materials of a like nature shall be informed by the employer of the health hazards involved and instructed in the correct and necessary safeguards which must be observed in the use of such materials.

(b) An employee using such materials will be provided with and shall use all safeguards as are required by the appropriate Government Authority or in the absence of such requirement such safeguards as are determined by a competent authority or person chosen by the Union and the employer.

(c) An employee using toxic substances or materials of a like nature shall be paid $0.54 per hour extra. Employees working in close proximity to employees so engaged shall be paid $0.43 per hour extra.

(d) For the purpose of this subclause all materials which include or require the addition of a catalyst hardener and reactive additives or two pack catalyst system shall be deemed to be materials of a like nature.

(7) Asbestos: Employees required to use materials containing asbestos or to work in close proximity to employees using such materials shall be provided with and shall use all necessary safeguards as required by the appropriate occupational health authority and where such safeguards include the mandatory wearing of protective equipment (i.e. combination overalls and breathing equipment or similar apparatus) such employees shall be paid $0.54 per hour extra whilst so engaged.

(8) Dry Polishing or Cutting of Tiles: An employee required to dry polish tiles with a machine or to cut tiles with an electric saw shall be paid $0.54 per hour or part thereof in addition to the rates otherwise prescribed in this award.

(9) Bitumen Work: An employee handling hot bitumen or asphalt or dipping materials in creosote shall be paid $0.54 per hour or part thereof in addition to the rates otherwise prescribed in this award.

(10) Roof Repairs: An employee engaged on repairs to roofs shall be paid $0.54 per hour or part thereof in addition to the rates otherwise provided in this award.

(11) Wet Work: An employee required to work in a place where water is continually dripping on him/her so that his/her clothing and boots become wet or where there is water underfoot shall be paid $0.43 per hour or part thereof in addition to the rates otherwise prescribed in this award.

(12) Dirty Work: An employee engaged on dirty work shall be paid $0.43 per hour or part thereof in addition to the rates otherwise prescribed in this award.

(13) An employee engaged in repairs to sewers shall be paid at the rate of $0.43 per hour or part thereof in addition to the rates otherwise prescribed in this award.

(14) An employee working in a dust-laden atmosphere in a joiners' shop where dust extractors are not provided or in such atmosphere caused by the use of materials for insulating, deafening or pugging work (as, for instance, pumice, charcoal, silicate of cotton or any other substitute), shall be paid at the rate of $0.43 per hour or part thereof in addition to the rates otherwise prescribed in this award.

(15) Scaffolding Certificate Allowance: A tradesperson who is the holder of a scaffolding certificate or rigging certificate issued by the Department of Occupational Health, Safety and Welfare and is required to act on that certificate whilst engaged on work requiring a certificated person shall be paid $0.43 per hour or part thereof in addition to the rates otherwise prescribed in this award but this allowance shall not be payable cumulative on the allowance for swing scaffolds.

(16) Spray Application—Painters: A painter engaged on all spray applications carried out in other than a properly constructed booth, approved by the Department of Occupational Health, Safety and Welfare, shall be paid $0.43 per hour or part thereof in addition to the rates otherwise prescribed in this award.

(17) Cleaning Down Brickwork: An employee required to clean down bricks using acids or other corrosive substances shall be supplied with gloves and be paid $0.40 per hour or part thereof in addition to the rates otherwise prescribed in this award.

(18) Bagging: An employee engaged upon bagging brick or concrete structures shall be paid $0.40 per hour thereof in addition to the rates otherwise prescribed in this award.

(19) Furnace Work: An employee engaged in the construction or alternation or repairs to boilers, flues, furnaces, retorts, kilns, ovens, ladles and similar refractory work shall be paid $1.16 per hour or part thereof in addition to the rates otherwise prescribed in this award.

(20) Acid Work: An employee required to work on acid furnaces, acid stills, acid towers and all other acid resisting brickwork shall be paid $1.16 per hour or part thereof in addition to the rates otherwise prescribed in this award.

(21) Plasterers using flintcote shall be paid $0.29 per hour extra except where flintcote is applied by hawk and trowel to walls and ceilings when the rate shall be $0.54 per hour extra.

(22) Chemical and Manure Works and Oil Refineries: Journeymen and builders' labourers working on chemical and manure works or oil refineries shall receive $0.19 per hour in addition to the prescribed rate.

(23) Height Money: An employee required to work on a chimney stack, spire, tower, radio or television mast or tower, air shaft, cooling tower, water tower or silo, where the construction exceeds 15 metres in height shall be paid for all work above 15 metres, $0.43 per hour or part thereof, with an additional $0.43 per hour or part thereof for work above each further 15 metres in addition to the rates otherwise prescribed in this award.

(24) Swing Scaffold—

(a) An employee employed—

(i) on any type of swing scaffold or any scaffold suspended by rope or cable, or bosun's chair cantilever scaffold; or

(ii) on a suspended scaffold requiring the use of steel or iron hooks or angle irons at a height of 20 feet or more above the nearest horizontal plane.

shall be paid $3.15 for the first four hours or part thereof and $0.64 for each hour thereafter on any day in addition to the rates otherwise prescribed in this award.

(b) A solid plasterer when working off a swing scaffold shall be paid an additional $0.11 per hour.

(c) No apprentice with less than two years' experience shall use a swing scaffold or bosun's chair.

(25) Plumbing—

(a) A plumber doing sanitary plumbing work on repairs to sewer drainage or wastepipe services in any of the following places—

(i) Infectious and contagious diseases hospitals or any block or portion of a hospital used for the care of or treatment of patients suffering from any infectious or contagious disease.

(ii) Morgues, shall be paid $0.43 per hour or part thereof in addition to the rates otherwise prescribed in this award.

(b) A plumber doing work on a ship of any class—

(i) whilst under way; or

(ii) in a wet place, being one in which the clothing of an employee necessarily becomes wet to an uncomfortable degree or one in which water accumulates underfoot; or

(iii) in a confined space; or

(iv) in a ship which has done one trip or more in a fume or dust-laden atmosphere, in bilges, or when cleaning blockages in soil pipes or waste pipes or repairing brine pipes; shall be paid $0.54 per hour or part thereof in addition to the rates otherwise prescribed in this award.

(c) A plumber carrying out pipework in a ship of any class under the plates in the engine and boiler rooms and oil fuel tanks shall be paid $1.13 per hour or part thereof in addition to the rates otherwise prescribed in this award.

(d) A plumber required to enter a well nine metres or more in depth for the purpose in the first place of examining the pump, pipe or any

other work connected therewith, shall be paid $2.24 for such examination and $0.80 per hour thereafter for fixing renewing or repairing such work.

(e) Permit Work: Any licenced plumber called upon by his/her employer to use the licence issued to him/her by the Metropolitan Water Supply, Sewerage and Drainage Board for a period in any one week shall be paid $29.64 for that week, in addition to the rates otherwise prescribed in this award.

(f) Plumbers on Sewerage Work: Plumbers or apprentices in their third, fourth or fifth year, on work involving the opening up on house drains or wastepipes for the purpose of clearing blockages or for any other purpose, or work involving the cleaning out of septic tanks or dry wells, shall be paid a minimum of $2.34 per day in addition to the prescribed rate whilst so employed.

(26) Explosive Powered Tools: An operator of explosive powered tools, being an employee qualified in accord with the laws and regulations of the State of Western Australia to operate explosive powered tools is required to use an explosive powered tool shall be paid $1.02 for each day on which he uses such tool in addition to the rates otherwise prescribed in this award.

(27) Secondhand Timber: Where whilst working with secondhand timber, an employee's tools are damaged by nails, dumps or other foreign matter on the timber, shall be entitled to an allowance of $1.70 per day on each day upon which his tools are so damaged provided that no allowance shall be payable under this clause unless it is reported immediately to the employer's representative on the job in order that the claim may be proved.

(28) Computing Quantities: An employee, other than a leading hand, who is regularly required to compute or estimate quantities of materials in respect of the work performed by others shall be paid $3.15 per day or part thereof in addition to the rates otherwise prescribed in this award.

(29) Setter Out: A setter out in a joiner's shop shall be paid $4.64 per day in addition to the rates otherwise prescribed by this award but where an employee qualifies for this allowance and is appointed leading hand he/she shall be paid whichever amount is the higher but not both.

(30) Detail Worker: A detail worker shall be paid $4.64 per day in addition to the rates otherwise prescribed in this award but where an employee qualifies for this allowance and is appointed leading hand he/she shall be paid whichever amount is the higher but not both.

(31) Spray Painting—Painters—

(a) Lead paint shall not be applied by a spray to the interior of any building.

(b) All employees (including apprentices) applying paint by spraying shall be provided with full overalls and head covering and respirators by the employer.

(c) Where from the nature of the paint or substance used in spraying a respirator would be of little or no practical use in preventing the absorption of fumes or materials from substances used by an employee in spray painting, the employee shall be paid a special allowance of $1.29 per day.

(32) Brewery Cylinders—Painters—

(a) A painter required to work in brewery cylinders or stout tuns shall be allowed 15 minutes spell in the fresh air at the end of each hour worked by him. Such fifteen minutes shall be counted as working time and paid for accordingly.

(b) A painter working in a brewery cylinder or a stout tun shall be paid at the rate of time and one half. When working overtime on such work a painter shall, in addition to the overtime rate payable, be paid one half of his ordinary rate.

(33) Fumes—

An employee required to work in a place where fumes of sulphur or other acid or other offensive fumes are present shall be paid such rates as are agreed upon between him/her and the employer.

(34) (a) Lead Paint Surfaces: No surface painted with lead paint shall be rubbed down or scraped by a dry process.

(b) Width of Brushes: All paint brushes shall not exceed 125mm in width and no kalsomine brush shall be more than 175mm in width.

(c) Meals not to be taken in paint shop. No employee shall be permitted to have a meal in any paint shop or place where paint is stored or used.

(35) Loads—

Where bricks are being used the employee shall not be required to carry—

(a) more than 40 bricks each load in a wheelbarrow (on a scaffold) to a height of 4.5 metres from the ground;

(b) more than 36 bricks each load in a wheelbarrow over and above a height of 4.5 metres on a scaffold.

The type of wheelbarrow shall be agreed upon with the Union.

(36) Grinding Facilities—

The employer shall provide adequate facilities for the employees to grind tools and employees shall be allowed time to use the same whenever reasonably necessary.

(37) First Aid Outfit—

The employer shall provide a sufficient supply of bandages and antiseptic dressings for use in cases of accident.

(38) Water and Soap—

Water and soap shall be provided at each shop or on each job by the employer for use by the employees.

(39) Provision of Boiling Water—

The employer shall provide boiling water at each shop for the use of his/her employees at lunch time.

(40) (a) The employer shall supply a safety helmet for each of his/her employees requesting one on any job where, pursuant to the regulations made under the Occupational Health, Safety and Welfare Act 1984, a employee is required to wear such helmet.

(b) Any helmet so supplied shall remain the property of the employer and during the time it is on issue, the employee shall be responsible for any loss or damage thereto, fair wear and tear attributable to ordinary use excepted.

(41) Electrical Sanding Machines—

The use of electrical sanding machines for sanding down paint work shall be governed by the following provisions—

(a) The weight of each such machine shall not exceed 5.9 kilograms.

(b) Every employer operating any such machine shall endeavour to ensure that each such machine, together with all electrical leads and associated equipment, is kept in a safe condition and shall if requested so to do by any employee but not more often than once in any four weeks cause the same to be inspected under the provisions of the

Electricity Act and the regulations made thereunder.

(c) Employers shall provide and supply respirators of a suitable type, to each employee and shall maintain same in an effective and clean state at all times. Where respirators are used by more than one employee, each such respirator shall be sterilised or a new pad inserted after use by each such employee.

(d) Employers shall also provide and supply goggles of suitable type provided that the goggles with celluloid lenses shall not be regarded as suitable.

(e) All employees shall use the protective equipment supplied when using electrical sanding machines of any type.

(42) Protective clothing for bricklayers and bricklayers' labourers engaged on construction or repair of refractory brickwork—

(a) Gloves shall be supplied when employees are engaged on repair work and shall be replaced as required, subject to employees handing in the used gloves.

(b) Boots shall be supplied upon request of the employees after six weeks' employment, the cost of such boots to be assessed at $20.00 and employees to accrue credit at the rate of $1.00 per week.

Employees leaving or being dismissed before 20 weeks' employment shall pay the difference between the credit accrued and the $20.00. The right to accrue credit shall commence from the date of request for the boots.

In the event of boots being supplied and the employee not wearing them whilst at work, the employer shall be entitled to deduct the cost of the boots if the failure to wear them continues after one warning by the employer.

Upon issue of the boots, employees may be required to sign the authority form in or to the effect of the Annexure to the clause. Boots shall be replaced each six months, dating from the first issue.

(c) Where necessary when bricklayers are engaged on work covered by subclauses (19) and (20) of this clause, overalls will be supplied upon the request of the employee and on the condition that they are worn while performing the work.

BUILDING TRADES (CONSTRUCTION) AWARD 1987.

No. R 14 of 1978.

2001 WAIRC 03854

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION.

PARTIES	CONSTRUCTION, MINING, ENERGY, TIMBERYARDS, SAWMILLS AND WOODWORKERS UNION OF AUSTRALIA—WESTERN AUSTRALIAN BRANCH, THE WESTERN AUSTRALIAN BUILDERS' LABOURERS, PAINTERS & PLASTERERS UNION OF WORKERS, APPLICANTS
	v.
	ADSIGNS PTY LTD, APOLLO CONSTRUCTION, ASSOCIATED SHOPFITTERS PTY LTD, RESPONDENTS
CORAM	COMMISSIONER J F GREGOR
DELIVERED	TUESDAY, 25 SEPTEMBER 2001
FILE NO	APPLICATION 1357 OF 2001
CITATION NO.	2001 WAIRC 03854
Result	Award Varied

Order.

HAVING heard Ms J. Harrison on behalf of the Applicants and Mr K. Dwyer on behalf of the Respondents, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders—

THAT the Building Trades (Construction) Award 1987, No. R14 of 1978 be varied in accordance with the following Schedule and that such variation shall have effect from the first pay period on and from 17th September 2001.

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

Schedule.

1. Clause 8.—Rates of Pay: Delete this clause and insert in lieu the following—

(1) Except as elsewhere provided in this Award the rates of pay payable to an employee (other than an apprentice) shall be that prescribed herein calculated as an hourly rate in accordance with subclause (4) of this clause.

(2) Weekly Rate: The following amounts shall be applied for the purpose of the calculation in subclause (4) of this clause of the hourly rate to apply under this Award.

			Base Rate	Supplementary Payment	Arbitrated Safety Adjustment	Weekly Rate
			$	$	$	$
(a)	(i)	Bricklayers, stoneworkers, stonemasons, carpenters, joiners, painters, signwriters, glaziers, and plasterers roof tile fixers	365.20	52.10	90.00	507.30
	(ii)	Plumber and/or gasfitter	368.00	52.10	90.00	510.10
	(iii)	Plumber holding registration in accordance with the Metropolitan Water Supply, Sewerage and Drainage Act:				
		Base Rate	368.00			
		Reg. Allowance $ 17.30	385.30	52.10	90.00	527.40
	(iv)	Marker/Setter Out	378.60	52.10	90.00	520.70
	(v)	Special Class Tradesman	385.00	52.10	90.00	527.10
(b)	(i)	Group 1				
		Rigger	362.30	52.10	88.00	502.40
		Drainer	362.30	52.10	88.00	502.40
		Dogman	362.30	52.10	88.00	502.40
	(ii)	Group 2				
		Scaffolder	346.70	52.10	88.00	486.80
		Powder Monkey	346.70	52.10	88.00	486.80
		Hoist or Winch Driver	346.70	52.10	88.00	486.80
		Concrete Finisher	346.70	52.10	88.00	486.80
		Steel Fixer including Tack Welder	346.70	52.10	88.00	486.80
		Concrete Pump Operator	346.70	52.10	88.00	486.80
	(iii)	Group 3				
		Bricklayer's Labourer	335.10	52.10	88.00	475.20
		Plasterer's Labourer	335.10	52.10	88.00	475.20
		Assistant Powder Monkey	335.10	52.10	88.00	475.20
		Assistant Rigger	335.10	52.10	88.00	475.20
		Demolition Worker (after three months' experience)	335.10	52.10	88.00	475.20
		Gear Hand	335.10	52.10	88.00	475.20
		Cement Gun Operator	335.10	52.10	88.00	475.20
		Concrete Cutting or Drilling Machine Operator	335.10	52.10	88.00	475.20
		Pile Driver	335.10	52.10	88.00	475.20
		Tackle Hand	335.10	52.10	88.00	475.20
		Jackhammer Hand	335.10	52.10	88.00	475.20
		Mixer Driver (Concrete)	335.10	52.10	88.00	475.20
		Steel Erector	335.10	52.10	88.00	475.20
		Aluminium Alloy Structural Erector	335.10	52.10	88.00	475.20
		Gantry Hand or Crane Hand	335.10	52.10	88.00	475.20
		Concrete Gang Including Concrete Floater	335.10	52.10	88.00	475.20

	Base Rate $	Supplementary Payment $	Arbitrated Safety Adjustment $	Weekly Rate $
Steel or Bar Bender to Pattern or Plan	335.10	52.10	88.00	475.20
Concrete Formwork Stripper	335.10	52.10	88.00	475.20
Concrete Pump Hose Hand	335.10	52.10	88.00	475.20
Trades Labourer	335.10	52.10	88.00	475.20
Brick Paver Labourer	335.10	52.10	88.00	475.20
Brick Cleaner/Labourer	335.10	52.10	88.00	475.20
(iv) Group 4 Builders' Labourers Employed on Work Other Than Specified in Classifications (i) to (iii)	306.60	52.10	88.00	446.70

(c) Supplementary Payments

Supplementary payments set out in this clause represent payments in lieu of equivalent overaward payments.

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

These arbitrated safety net adjustments shall be offset against any equivalent amount in the rate of pay received by employees since 1 November 1991 above the rate prescribed in the Award. For these purposes over award rates of pay in any industrial agreement affecting employees whose terms of employment are also regulated by the award shall likewise be liable to absorption unless contrary to the terms of the industrial agreement.

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

(3) Industry Allowance

The industry allowance at the rate of $19.10 per week to be paid to each employee is to compensate for the following disabilities associated with construction work—

(a) Climate conditions when working in the open on all types of work.

(b) The physical disadvantage of having to climb stairs or ladders.

(c) The disability of dust blowing in the wind, brick dust and drippings from concrete.

(d) Sloppy and muddy conditions associated with the initial stages of the erection of a building.

(e) The disability of working on all types of scaffolding or ladders other than a swing scaffold, suspended scaffold, or a bosun's chair.

(f) The lack of the usual amenities associated with factory work (e.g. meal rooms, change rooms, lockers).

(4) Hourly Rate Calculation—Follow the Job Loading

(a) The hourly rate of pay to be paid to an adult employee (other than an apprentice) shall be calculated to the nearest cent (less than half a cent to be disregarded) by multiplying the sum of the amounts prescribed in subclause (2) and the amount prescribed in subclause (3) and where applicable in subclauses (6), (7), (8) and (9) of this clause by 52 and dividing the result by 50.4 by adding to that the amount prescribed in subclause (5) of this clause and by dividing the total by 38.

(b) The aforementioned calculation shall take into account a factor of eight days in respect of the incidence of loss of wages for periods of unemployment between jobs.

(5) Special Allowance

The special allowance at the rate of $7.70 per week to be paid to each employee is to compensate for the following—

(a) Excess travelling time incurred by employees in the building industry;

(b) The removal of loadings from the various building awards consequent upon the introduction of this paid rates award in the industry.

(6) Tool Allowance

Tool allowances shall be paid to tradesmen as prescribed hereunder—

	Per Week $
Carpenters, Joiners, Plumbers, Stonemasons, Stoneworkers	19.70
Plasterers, Fixers	16.20
Bricklayers	14.00
Roof Tile Fixers	10.30
Signwriters, Painters, Glaziers	4.90

(7) Location Allowance

Where applicable location allowances in accordance with Appendix A will be paid.

(8) Underground Allowance

(a) (i) Subject to paragraph (b) hereof, an employee required to work underground shall be paid an allowance of $9.33 per week in addition to the allowance prescribed in subclause (3) of this clause and any other amount prescribed for such employee elsewhere in this award.

(ii) Where a shaft is to be sunk to a depth greater than six metres the payment of the underground allowance shall commence from the surface.

(iii) This allowance shall not be payable to an employee engaged upon "pot and drive" work at a depth of 3.5 metres or less.

(b) Where an employee is required to work underground for no more than four days or shifts in any ordinary week he/she shall be paid an underground allowance in accordance with the provisions of paragraph (t) of subclause (1) of Clause 9.—Special Rates and Provisions in lieu of the allowance prescribed in paragraph (a) hereof.

(9) Plumbing Trade Allowance

Plumbers shall be paid an allowance at the rate of $15.20 per week to compensate for the following classes of work and in lieu of the relevant amounts in Clause 9.—Special Rates and Provisions whether or not such work is performed in any one week. When working outside the categories listed hereunder, a plumber shall receive the appropriate rates provided for in the said Clause 9.—Special Rates and Provisions.

(a) General Plumber

(i) Clearing stoppages in soil or waste pipes, or sewer drain pipes, also repairing and putting same in proper order;

(ii) Work in wet places;

(iii) Work requiring a swing scaffold, swing seat or rope;

(iv) Dirty or offensive work;

(v) Work in any confined space;

(vi) Work on a ladder exceeding eight metres in height.

(b) Mechanical Services Plumber

(i) Handling charcoal, pumice, granulated cork, silicate of cotton, insulwool, slag wool, or other recognised insulation material of a like nature or working in the immediate vicinity so as to be affected by the use thereof;

(ii) Work in a place where the temperature has been raised by artificial means to between 46 and 54 degrees celsius or exceeding 54 degrees celsius;

(iii) Work in a place where fumes of sulphur or other acid or other offensive fumes are present;

(iv) Dirty or offensive work;

(v) Work in any confined space;

(vi) Work on a ladder exceeding eight metres in height.

(c) Roof Plumber

(i) Work on the fixing of aluminium foil insulation on roofs or walls prior to the sheeting thereof;

(ii) Use of explosive powered tools;

(iii) Work requiring use of materials containing asbestos or to work in close proximity to employees using such materials shall be provided with and shall use

all necessary safeguards as required by the appropriate occupational health authority including the mandatory wearing of protective equipment (i.e. combination overalls and breathing equipment or similar apparatus);

(iv) Dirty or offensive work;

(v) Work requiring a swing scaffold, swing seat or rope;

(vi) Work on a ladder exceeding eight metres in height.

(10) Leading Hands

(a) A person specifically appointed to be a leading hand shall be paid at the rate of the undermentioned additional amounts above the rate of the highest classification supervised, or his/her own rate, whichever is the highest, in accordance with the number of persons in his/her charge—

	Weekly Base Only $	Rate Per Hour $
(i) In charge of not more than one person	12.20	0.33
(ii) In charge of two and not more than five persons	26.90	0.73
(iii) In charge of six and not more than ten persons	34.30	0.93
(iv) In charge of more than ten persons	45.70	1.25

(b) The hourly rate prescribed in paragraph (a) hereof is calculated to the nearest cent (less than half a cent to be disregarded) by multiplying the weekly base amount by 52 and dividing the result by 50.4 and by dividing the amount by 38.

(11) Licensed Plumbers Accepting Responsibility

Any licensed plumber called upon by his/her employer to use the licence issued to him/her by the Metropolitan Water Supply, Sewerage and Drainage Board for a period in any week—$29.66 for that week.

(12) Plumber Acting on Welding Certificate

A plumber who is requested by his/her employer to hold the relevant qualifications and has obtained a certificate of competency pursuant to procedures as set out by the Standards Association of Australia or other relevant recognised codes, or, who may have to carry out work which is subject to other special tests but not a normal trade test, and is required by his/her employer to act on such qualifications, shall be paid an additional 40 cents per hour for oxyacetylene welding and 40 cents per hour for electric welding for every hour of his/her employment whether or not he/she has in any hour performed work relevant to those qualifications held.

(13) Lead Work

A plumber engaged in leadburning or lead work in connection therewith shall be paid an additional $1.34 per hour.

(14) Ship's Plumbing

A plumber engaged on plumbing work in connection with ships shall be paid an additional 94 cents per hour.

(15) Casual Hands

In addition to the rate appropriate for the type of work, a casual hand shall be paid an additional 20 per cent of the rate per hour with a minimum payment as for three hours employment. The penalty rate herein prescribed shall be deemed to include, inter alia, compensation for annual leave.

(16) Site Allowances

The Union on behalf of its members may request an employer to consider a site allowance to compensate for all special factors and/or disabilities on a project.

Where the parties have considered the merit of the claim and have agreed on a proposed rate, it shall be referred to the Commission for ratification.

Where agreement cannot be reached, the parties shall refer the matter to the Commission which shall determine an appropriate rate, if any, to compensate for such special factors and/or disabilities: Provided, however, that the Commission may determine that such site allowance shall be paid in lieu of any of the special rates related to conditions on the site as prescribed in Clause 9 subclause (1).

The Commission shall ratify or determine such matters on the criteria outlined in the Full Bench Decision of the Conciliation and Arbitration Commission dated February 25, 1983 (Print F1957).

Where the procedure prescribed by this subclause is being followed, work shall continue normally.

A site allowance determined in accordance with this subclause shall be deemed to be prescribed by this Award.

2. Clause 9.—Special Rates and Provisions: Delete this clause and insert in lieu the following—

(1) In addition to the rates otherwise prescribed in this Award, the following rates shall be payable to employees covered by the said Award—

(a) Insulation

An employee handling charcoal, pumice, granulated cork, silicate of cotton, insulwool, slag wool, limpet fibre, vermiculite or other recognised insulating material of a like nature or working in the immediate vicinity so as to be affected by the use thereof 53 cents per hour or part thereof.

(b) Hotwork

An employee who works in a place where the temperature has been raised by artificial means to between 46 degrees and 54 degrees Celsius—43 cents per hour or part thereof, exceeding 54 degrees celsius—53 cents per hour or part thereof.

Where such work continues for more than two hours, the employee shall be entitled to 20 minutes rest after every two hours work without loss of pay, not including the special rate provided by this paragraph.

(c) Cold Work

An employee who works in a place where the temperature is lowered by artificial means to less than zero degrees Celsius shall be paid 43 cents per hour.

Where such work continues for more than two hours, the employee shall be entitled to 20 minutes rest after every two hours work without loss of pay, not including the special rate provided by this paragraph.

(d) Confined Space

An employee required to work in a confined space shall be paid 53 cents per hour or part thereof.

("Confined Space" means a place the dimensions or nature of which necessitate working in a cramped position or without sufficient ventilation.)

(e) Swing Scaffold—

(i) an employee required to work from any type of swing or any scaffold suspended by rope or cable, bosun's chair, or suspended scaffold requiring use of steel or iron hooks or angle irons shall be paid the appropriate allowance set out below corresponding to the storey level at which the anchors or bracing, from which the stage is suspended, has been erected.

Such allowance shall be paid for minimum of four hours' work or part thereof until construction work (as defined) has been completed.

Height of Bracing	First Four Hours $	Each Additional Hour $
0-15 storeys	3.12	0.65
16-30 storeys	4.03	0.83
31-45 storeys	4.74	0.97
46-60 storeys	7.79	1.61
Greater than 60 storeys	9.93	2.05

Provided that an apprentice with less than two years' experience shall not use a swing scaffold or bosun's chair, and further provided that solid plasterers when working off a swing scaffold shall receive an additional 11 cents per hour.

(f) Explosive Powered Tools

An operator of explosive powered tools, as defined in this award, who is required to use an explosive powered tool, shall be paid 1.02 cents for each day on which he/she uses such a tool.

(g) Wet Work

An employee working in any place where water is continually dripping on him/her so that clothing and boots become wet, or where there is water underfoot, shall be paid 43 cents per hour whilst so engaged.

(h) Dirty Work

An employee engaged on unusually dirty work shall be paid 43 cents per hour.

(i) Towers Allowance

An employee working on a chimney stack, spire, tower, radio or television mast or tower, air shaft (other than above ground in a multi-storey building), cooling tower or silo, where the construction exceeds fifteen metres in height shall be paid 43 cents per hour for all work above fifteen metres, and 43 cents per hour for work above each further fifteen metres.

Provided that any similarly constructed building, or a building not covered by Clause 10.—Multi-Storey Allowance, which exceeds 15 metres in height may be covered by this subclause, or by that clause by agreement or where agreement is not reached, by determination of the Commission.

(j) Toxic Substances

(i) An employee required to use toxic substances shall be informed by the employer of the health hazards involved and instructed in the correct and necessary safeguards which must be observed in the use of such materials.

(ii) Employees using such materials will be provided with and shall use all safeguards as are required by Clause 29.—Protection of Employees and the appropriate Government authority or in the absence of such requirement such safeguards as are defined by a competent authority or person chosen by the union and the employer.

(iii) Employees using toxic substances or materials of a like nature shall be paid 53 cents per hour. Employees working in close proximity to employees so engaged shall be paid 43 cents per hour.

(iv) For the purpose of this paragraph toxic substances shall include epoxy based materials and all materials which include or require the addition of a catalyst hardener and reactive additives or two pack catalyst system shall be deemed to be materials of a like nature.

(k) Fumes

An employee required to work in a place where fumes of sulphur or other acid or other offensive fumes are present shall be paid such rates as are agreed upon between him/her and the employer; provided that, in default of agreement, the matter may be referred to a Board of Reference for the fixation of a special rate.

Any special rate so fixed shall apply from the date the employer is advised of the claim and thereafter shall be paid as and when the fume condition occurs.

(l) Asbestos

Employees required to use materials containing asbestos or to work in close proximity to employees using such materials shall be provided with and shall use all necessary safeguards as required by the appropriate occupational health authority and where such safeguards include the mandatory wearing of protective equipment (i.e. combination overalls and breathing equipment or similar apparatus) shall be paid 53 cents per hour extra whilst so engaged.

(m) Furnace Work

An employee engaged in the construction or alteration or repairs to boilers, flues, furnaces, retorts, kilns, ovens, ladles and similar refractory work shall be paid $1.14 per hour. This additional rate shall be regarded as part of the wage rate for all purposes.

(n) Acid Work

An employee required to work on the construction or repairs to acid furnaces, acid stills, acid towers and all other acid resisting brickwork shall be paid $1.14 per hour. This additional rate shall be regarded as part of the wage rate for all purposes.

(o) Cleaning Down Brickwork

An employee required to clean down bricks using acids or other corrosive substances shall be paid 40 cents per hour. While so employed employees will be supplied with gloves by the employer.

(p) Bagging

Employees engaged upon bagging brick or concrete structures shall be paid 40 cents per hour.

(q) Bitumen Work

An employee handling hot bitumen or asphalt or dipping materials in creosote shall be paid 53 cents per hour.

(r) Roof Repairs

Employees engaged on repairs to roofs shall be paid 53 cents per hour.

(s) Computing Quantities

Employees who are regularly required to compute or estimate quantities of materials in respect to the work performed by other employees shall be paid $3.12 per day or part thereof.

Provided that this allowance shall not apply to an employee classified as a leading hand.

(t) Underground Allowance

(i) An employee required to work underground for no more than 4 days or shifts in an ordinary week shall be paid $ 1.86 a day or shift in addition to any other amount prescribed for such employees elsewhere in this award.

Provided that an employee required to work underground for more than four days or shifts in an ordinary week shall be paid an underground allowance in accordance with the provisions of subclause (8) of Clause 8.—Rates of Pay.

(ii) Where a shaft is to be sunk to a depth greater than 6 metres the payment of the underground allowance shall commence from the surface.

(iii) This allowance shall not be payable to employees engaged upon "pot and drive" work at a depth of 3.5 metres or less.

(u) Plumbing

(i) A plumber doing sanitary plumbing work or repairs to sewer drainage or waste pipe services in any of the following places—

(aa) Infectious and contagious diseases hospitals or any block or portion of a hospital used for the care of or treatment of patients suffering from any infectious or contagious disease; or

(bb) Morgues—

shall be paid 40 cents per hour or part thereof.

(ii) A plumber required to enter a well 9 metres or more in depth for the purpose in the first place of examining the pump, pipe or any other work connected therewith shall be paid $1.85 for such examination and 82 cents per hour thereafter for fixing, renewing or repairing such work.

(iii) A plumber or an apprentice to plumbing, other than one in his/her first or second year of apprenticeship, on work involving the opening up of house drains or waste pipes for the purpose of clearing blockages or for any other purpose or on work involving the cleaning out of septic tanks or dry wells shall be paid a minimum of $2.29 per day.

(v) (a) An employee who—

(i) is appointed by his or her employer to be responsible for carrying out first aid duties as they may arise; and

(ii) holds a recognised first aid qualification (as set out hereunder) from the Australian Red Cross Society, St John Ambulance Association or similar body; and

(iii) is required by his or her employer to hold a qualification at that level; and

(iv) the qualification satisfies the relevant statutory requirement pertaining to the provision of first-aid services at the particular location where the employee is engaged;

(v) those duties are in addition to his or her normal duties, recognising what first aid duties encompass by definition;

shall be paid at the following additional rates to compensate that person for the additional responsibilities, skill obtained, and time spent acquiring the relevant qualifications—

(A) an employee who holds the Basic First Aid certificate or equivalent qualification recognised under the Occupational Safety and Health Act 1984—$1.84 per day; or

(B) an employee who holds at least a Senior First Aid certificate, Industrial First Aid certificate or equivalent, or higher qualification recognised under the Occupational Safety and Health Act 1984—$2.88 per day.

(b) In payment of an allowance under this clause, a person shall be paid only for the level of qualification required to be held, and there shall be no double counting for employees who hold more than one qualification.

(c) An employer shall be under no obligation to provide paid training leave or other payment of any kind to employees to acquire or update first aid qualifications.

(w) Heavy Blocks

(i) Employees lifting other than standard bricks

An employee required to lift blocks (other than cindcrete blocks for plugging purposes) shall be paid the following additional rates—

Where the blocks weigh over 5.5 kg and under 9 kg—43 cents per hour.

Where the blocks weigh 9 kg or over and up to 18 kg—77 cents per hour.

Where the blocks weigh over 18 kg—$1.09 cents per hour.

An employee shall not be required to lift a building block in excess of 20 kg in weight unless such employee is provided with a mechanical aid or with an assisting employee; provided that an employee shall not be required to manually lift any building block in excess of 20 kg in weight to a height of more than 1.2 metres above the working platform.

Provided that this subclause shall not apply to employees being paid the extra rate for refractory work.

(ii) Stonemasonry Employees

The employer of stonemasonry employees shall provide mechanical means for the handling, lifting and placing of heavy blocks or pay in lieu thereof the rates and observe the conditions prescribed in paragraph (i) herein.

(x) Plaster or Composition Spray

An employee using a plaster or composition spray shall be paid an additional 43 cents per hour whilst so engaged.

(y) Slushing

An employee engaged at "Slushing" shall be paid 43 cents per hour.

(z) Dry Polishing of Tiles

Employees engaged on dry polishing of tiles (as defined) where machines are used shall be paid 53 cents per hour or part thereof.

(aa) Cutting Tiles

An employee engaged at cutting tiles by electric saw shall be paid 53 cents per hour whilst so engaged.

(bb) Second Hand Timber

Where, whilst working with second hand timber, an employee's tools are damaged by nails, dumps or other foreign matter on the timber he/she shall be entitled to an allowance of $1.69 per day on each day upon which his/her tools are so damaged, provided that no allowance shall be payable under this paragraph unless it is reported immediately to the employer's representative on the job in order that he/she may prove the claim.

(cc) Height Work—Painting Trades

An employee working on any structure at a height of more than 9 metres where an adequate fixed support not less than 0.75 metres wide is not provided, shall be paid 40 cents per hour in addition to ordinary rates. This subclause shall not apply to an employee working on a bosun's chair or swinging stage.

This provision shall not apply in addition to the Towers Allowance prescribed in paragraph (i) of this subclause.

(dd) Brewery Cylinders—Painters

A painter in brewery cylinders or stout tuns shall be allowed 15 minutes' spell in the fresh air at the end of each hour worked by him/her.

Such 15 minutes shall be counted as working time and shall be paid for as such. The rate for working in brewery cylinders or stout tuns shall be at the rate of time and one-half. When an employee is working overtime and is required to work in brewery cylinders and stout tuns he/she shall, in addition to the overtime rates payable, be paid one half of the ordinary rate payable as provided by Clause 8.—Rates of Pay of this award.

(ee) Certificate Allowance

A tradesman who is the holder of a scaffolding certificate or rigging certificate issued by the Department of Industrial Affairs and is required to act on that Certificate whilst engaged on work requiring a certificated person shall be paid an additional 43 cents per hour.

Provided that this allowance shall not be payable cumulative on the allowance for swing scaffolds.

(ff) Spray Application—Painters

An employee engaged on all spray applications carried out in other than a properly constructed booth approved by the Department of Industrial Affairs shall be paid 43 cents per hour extra.

(gg) Bricklayer Operating Cutting Machine

One bricklayer on each site to operate the cutting machine and to be paid 53 cents per hour or part thereof whilst so engaged.

(hh) Spray Painting—Painters

(i) Lead paint shall not be applied by a spray to the interior of any building and no surface painted with lead paint shall be rubbed down or scraped by a dry process.

(ii) All employees (including apprentices) applying paint by spraying shall be provided with full overalls and head covering and respirators by the employer.

(iii) Where from the nature of the paint or substance used in spraying a respirator would be of little or no practical use in preventing the absorption of fumes or materials from substances used by an employee in spray painting, the employee shall be paid a special allowance of $1.23 cents per day.

(ii) Grindstone Allowance

Where a grindstone or wheel is not made available as required by Clause 32(5)(b) of the award, an allowance of $4.59 per week shall be paid in lieu of same to each Carpenter or Joiner.

(2) Conditions Respecting Special Rates

(a) The special rates prescribed in this award shall be paid irrespective of the time at which work is performed and shall not be subject to any premium or penalty conditions.

This limitation does not apply to the "All Purpose" special rates prescribed in paragraphs (m) and (n) of subclause (1) of this Clause.

(b) Where more than one of the above rates provides payments for disabilities of substantially the same nature then only the highest of such rates shall be payable.

(3) (a) Loads

Where bricks are being used the employee shall not be required to carry—

(i) more than 40 bricks each load in a wheelbarrow (on a scaffold) to a height of 4.5 metres from the ground.

(ii) more than 36 bricks each load in a wheelbarrow over and above a height of 4.5 metres on a scaffold.

The type of wheelbarrow shall be agreed upon with the union.

(b) (i) The employer shall supply a safety helmet for each of his/her employees requesting one on any job where, pursuant to the regulations made under the Construction Safety Act 1972, an employee is required to wear such helmet.

(ii) Any helmet so supplied shall remain the property of the employer and during the time it is on issue the employees shall be responsible for any loss or damage thereto, fair wear and tear attributable to ordinary use excepted.

(c) Attendants on Ladders

No employee shall work on a ladder at a height of over six metres from the ground when such ladder is standing in any street, way or lane where traffic is passing to and fro, without an assistant on the ground.

(d) Electrical Sanding Machines

The use of electrical sanding machines for sanding down paint work shall be governed by the following provisions—

(i) The weight of each such machine shall not exceed 6 kilograms.

(ii) Every employer operating any such machine shall endeavour to ensure that each such machine, together with all electrical leads and associated equipment, is kept in a safe condition and shall, if requested so to do by any employee, but not more often than once in any four weeks, cause the same to be inspected under the provisions of the Electricity Act and the regulations made thereunder.

(iii) Employers shall provide and supply respirators of a suitable type, to each employee and shall maintain same in an effective and clean state at all times. Where respirators are used by more than one employee, each such respirator shall be sterilised or a new pad inserted after use by each such employee.

(iv) Employers shall also provide and supply goggles of a suitable type. Provided that goggles with celluloid lenses shall not be regarded as suitable.

(v) All employees shall use the protective equipment supplied when using electrical sanding machines of any type.

(e) Adequate precautions shall be taken by all employers for the safety of employees employed on the retaining walls of dams. Any dispute as to the adequacy of precautions taken shall be referred to the Board of Reference.

(f) The Secretary or any authorised officer of the union shall have the right to visit any job for the purpose of ascertaining whether work is being performed in accordance with the provisions of the Construction Safety Act 1972, and any regulations made thereunder. Should he/she be of the opinion that the work being carried out is not in accord with those provisions the Secretary or any authorised officer of the union shall inform the employer and the employees concerned accordingly and may report any alleged breach of the Act or the regulations to the Chief Inspector of Construction Safety.

(g) Where the employer provides transport to and from the job the conveyance used for such transport shall be provided with suitable and weatherproof covering.

(h) Protective clothing for bricklayers and their labourers engaged on construction or repair of refractory brickwork—

(i) Gloves shall be supplied when employees are engaged on repair work and shall be replaced as required, subject to employees handing in the used gloves.

(ii) Boots shall be supplied upon request of the employee after six weeks' employment, the cost of such boots to be assessed at $20.00 and employees to accrue credit at the rate of $1.00 per week.

Employees leaving or being dismissed before 20 weeks' employment shall pay the difference between the credit accrued and the $20.00. The right to accrue credit shall commence from the date of request for the boots.

In the event of boots being supplied and the employee not wearing them while at work, the employer shall be entitled to deduct the cost of the boots if the failure to wear them continues after one warning by the employer.

Upon issue of the boots, employees may be required to sign the authority form in or to the effect of the Annexure to this clause. Boots shall be replaced each six months, dating from the first issue.

(iii) Where necessary, when bricklayers are engaged on work covered by paragraphs (m) and (n) of subclause (1) of this clause overalls will be supplied upon the request of the employee and on the condition that they are worn while performing the work.

3. Clause 10.—Multi-Storey Allowance: Delete subclause (3) of this clause and insert in lieu the following—

(3) Rates For Multi-Storey Buildings

Except as provided for in subclause (4) of this clause, an allowance in accordance with the following table shall be paid to all employees on the building site. The second and subsequent allowance scales shall, where applicable, commence to apply to all employees when one of the following components of the building—structural steel, re-inforcing steel, boxing or walls, rises above the floor level first designated in each such allowance scale.

"Floor Level" means that stage of construction which in the completed building would constitute the walking surface of the particular floor level referred to in the table of payments.

From commencement of Building to Fifteenth Floor Level—35 cents per hour extra;

From Sixteenth Floor Level to Thirtieth Floor Level—42 cents per hour extra;

From Thirty-first Floor Level to Forty-fifth Floor Level—65 cents per hour extra;

From Forty-sixth Floor Level to Sixtieth Floor Level—82 cents per hour extra;

From Sixty-first Floor Level Onwards—$1.03 cents per hour extra.

The allowance payable at the highest point of the building shall continue until completion of the building.

4. Appendix B—Wagerup Alumina Refinery Construction Site: Delete this appendix and insert in lieu the following—

(1) Liberty to Apply

Liberty to Apply to insert provisions relating to future project is reserved.

5. Appendix C—Pinjarra and Kwinana Alumina Refineries: Delete this appendix and insert in lieu the following—

(1) Liberty to Apply

Liberty to Apply to insert provisions relating to future project is reserved.

6. Appendix D—North West Shelf Gas Project: Delete this appendix and insert in lieu the following—

(1) Liberty to Apply

Liberty to Apply to insert provisions relating to future project is reserved.

4. Appendix F—Asbestos Eradication: Delete clause (5) of this appendix and insert in lieu the following—

In addition to the rates prescribed in this award, an employee engaged in asbestos eradication (as defined) shall receive $1.44 per hour worked in lieu of Special Rates prescribed in Clause 9(1) with the exception of subclauses (b), (c), (e), (x), (ab) and (af).

5. Appendix G—Laser Equipment: Delete clause (4) of this appendix and insert in lieu the following—

Where an employee has been appointed by his employer to carry out the duties of a laser safety officer he shall be paid an allowance of $1.78 per day or part thereof whilst carrying out such duties. The allowance shall be paid as a flat amount without attracting any premium or penalty.

Schedule.

1. Clause 12.—Leading Hands: Delete this clause and insert in lieu the following—

Leading Hands in charge of not less than three and not more than ten employees shall be paid at the rate of	$16.20
More than ten and not more than 20 other employees at the rate of	$24.30
More than 20 employees at the rate of	$31.60

2. Clause 13.—Special Rates and Provisions:

A. Delete subclause (1) of this clause and insert in lieu the following—

(1) Disabilities Allowance: An employee employed outside of his/her shop on construction work shall for the time so employed be paid a disabilities allowance at the rate of $1.95 per week in addition to the prescribed rate.

B. Delete subclause (16) of this clause and insert in lieu the following—

(16) Plumbers on Sewerage Work: Plumbers employed on work involving the opening up of house drains or waste pipes for the purpose of clearing blockages or for any other purpose, or on work involving the cleaning of septic tanks or dry wells, shall be paid 42 cents per day in addition to the prescribed rate.

2001 WAIRC 03807

BUILDING TRADES (GOLDMINING INDUSTRY) AWARD

Nos. 29 and 32 of 1965 and No. 4 of 1966.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	CONSTRUCTION, MINING, ENERGY, TIMBERYARDS, SAWMILLS AND WOODWORKERS UNION OF AUSTRALIA—WESTERN AUSTRALIAN BRANCH, APPLICANT *v.* LAKE VIEW AND STAR LIMITED, GREAT BOULDER GOLD MINES LTD, GOLD MINES OF KALGOORLIE (AUST) LTD, RESPONDENTS
CORAM	COMMISSIONER J F GREGOR
DELIVERED	THURSDAY, 20 SEPTEMBER 2001
FILE NO	APPLICATION 1351 OF 2001
CITATION NO.	2001 WAIRC 03807

Result Award Varied

Order.

HAVING heard Ms J. Harrison on behalf of the Applicant and there being no appearance on behalf of the Respondents, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders—

THAT the Building Trades (Goldmining Industry) Award be varied in accordance with the following Schedule and that such variation shall have effect from the first pay period on and from 17th September 2001.

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

2001 WAIRC 03819

BUILDING TRADES (GOVERNMENT) AWARD 1968

No. 31A of 1966.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	THE WESTERN AUSTRALIAN BUILDERS' LABOURERS, PAINTERS & PLASTERERS UNION OF WORKERS, CONSTRUCTION, MINING, ENERGY, TIMBERYARDS, SAWMILLS AND WOODWORKERS UNION OF AUSTRALIA—WESTERN AUSTRALIAN BRANCH, APPLICANTS *v.* CONTRACT AND MANAGEMENT SERVICES, HEALTH DEPARTMENT OF WESTERN AUSTRALIA, AGRICULTURE WESTERN AUSTRALIA, RESPONDENTS
CORAM	COMMISSIONER J F GREGOR
DELIVERED	THURSDAY, 20 SEPTEMBER 2001
FILE NO	APPLICATION 1360 OF 2001
CITATION NO.	2001 WAIRC 03819

Result Award Varied

Order.

HAVING heard Ms J. Harrison on behalf of the Applicants and Ms A. Davison on behalf of the Respondents, and by consent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders—

THAT the Building Trades (Government) Award 1968 be varied in accordance with the following Schedule and that such variation shall have effect from the first pay period on and from 17th September 2001.

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

Schedule.

1. Clause 9.—Wages—

A. Delete subclause (3) of this clause and insert in lieu the following—

(3) Allowance for Lost Time: Thirteen days' sick leave and follow the job (per week)—

An employee whose employment is terminated through no fault of his/her own and who has not completed nine months' continuous service with his/her employer shall, for each week of continuous employment with that employer, immediately prior to his/her termination of employment be paid the lost time allowance prescribed hereunder less any payments made to him/her in respect of sick leave during that employment—

	$
(a) Bricklayers, stoneworkers, carpenters, joiners, painters, glaziers, signwriters, plasterers, plumbers and stonemasons	43.33
(b) Special Class Tradesperson (as defined)	45.50
(c) Registered Plumbers	45.01
(d) Builders Labourers	
(i) Classifications (i) to (iii) inclusive	42.48
(ii) Classifications (iv) to (ix)	39.94
(iii) Classification (x)	38.61
(iv) Classification (xi)	35.97

NOTE: In the event of any increase or decrease in the wages and other allowances prescribed in this clause, except the tool allowances, the amounts prescribed in this subclause shall be increased or decreased by an amount equal to 9.7% of that increase or decrease.

B. Delete subclause (4) of this clause and insert in lieu the following—

(4) Disabilities Allowance (Per Week): $18.94

(a) Subject to the provisions of paragraph (b), of this subclause an allowance of $18.94 shall be paid to all employees excepting employees who are employed for the major portion of any week in or about a permanent maintenance depot or who are usually employed in or about the employer's business when an employee coming within the exception is engaged on the erection or demolition of a building exceeding 250 square feet in floor area.

(b) Employees who are directed to work temporarily in or about a permanent maintenance depot and who immediately prior to being so directed were in receipt of the allowance for a period of not less than three months shall be paid two-thirds of the allowance prescribed herein.

C. Delete subclause (7) of this clause and insert in lieu the following—

(7) Plumbing Trade Allowance

Plumbers shall be paid an allowance at the rate of $14.61 per week to compensate for the following classes of work and in lieu of the relevant amounts in Clause 13.—Special Rates and Provisions of this award whether or not such work is performed in any one week. When working outside the categories listed hereunder, a plumber shall receive the appropriate rates provided for in the said Clause 13.—Special Rates and Provisions.

(a) General Plumber—

(i) clearing stoppages in soil or waste pipes, or sewer drain pipes, also repairing and putting same in proper order;

(ii) work in wet places;

(iii) work requiring a swing scaffold, swing seat or rope;

(iv) dirty or offensive work;

(v) work in any confined space;

(vi) work on a ladder exceeding eight metres in height;

(vii) work in and around abattoirs.

(b) Mechanical Services Plumber—

(i) handling charcoal, pumice, granulated cork, silicate of cotton, insulwool, slag wool, or other recognised insulation material of a like nature or working in the immediate vicinity so as to be affected by the use thereof;

(ii) work in a place where the temperature has been raised by artificial means to between 46° and 54° Celsius or exceeding 54° Celsius;

(iii) work in a place where fumes of sulphur or other acid or other offensive fumes are present;

(iv) dirty or offensive work;

(v) work in any confined space;

(vi) work on a ladder exceeding eight metres in height;

(vii) work in and around abattoirs.

(c) Roof Plumber—

(i) work in the fixing of aluminium foil insulation on roofs or walls prior to the sheeting thereof;

(ii) use of explosive powered tools;

(iii) work requiring use of materials containing asbestos or to work in close proximity to employees using such materials shall be provided with, and shall use, all necessary safeguards as required by the appropriate occupational health authority including the mandatory wearing of protective equipment (i.e. combination overalls and breathing equipment or similar apparatus);

(iv) dirty or offensive work;

(v) work requiring a swing scaffold, swing seat or rope;

(vi) work on a ladder exceeding eight metres in height;

(vii) work in and around abattoirs.

2. Clause 11.—Leading Hands: Delete subclause (1) of this clause and insert in lieu the following—

(1) Any employee referred to in Clause 9.—Wages of this award or a leading hand defined in paragraph (h) of subclause (3) of Clause 6.—Definitions of this award, who is placed in charge for not less than one day of—

(a) not less than three and not more than ten other employees referred to in Clause 9.—Wages shall be paid at the rate of $30.77 per week extra;

(b) more than ten and not more than twenty other employees referred to in Clause 9.—Wages shall be paid at the rate of $41.16 per week extra;

(c) more than twenty other employees referred to in Clause 9.—Wages shall be paid at the rate of $51.54 per week extra.

3. Clause 13.—Special Rates and Provisions: Delete this clause and insert in lieu the following—

(1) Conditions respecting Special Rates—

(a) The special rates prescribed in this award shall be paid irrespective of the times at which work is performed and shall not be subject to any premium or penalty conditions.

(b) Where more than one of the above rates provides payments for disabilities of substantially the same nature then only the highest of such rates shall be payable.

(2) Swing Scaffold—

(a) An employee employed—

(i) on any type of swing scaffold or any scaffold suspended by rope or cable or bosun's chair or cantilever scaffold, or

(ii) on a suspended scaffold requiring the use of steel or iron hooks or angle irons at a height 6.1 metres or more above the nearest horizontal plane, shall be paid $3.00 for the first four hours or part thereof: and 61 cents for each hour thereafter on any day in addition to the rates otherwise prescribed.

(b) A solid plasterer when working on a swing scaffold shall be paid an additional 13 cents per hour.

(c) No apprentice with less than two years' experience shall use a swing scaffold or bosun's chair.

(d) Provided that no allowance shall be payable for working on such scaffolds when used under bridges or jetties unless the height of the scaffold above the water exceeds 0.9 metres.

(3) Insulation—

An employee handling charcoal, pumice, granulated cork, silicate of cotton, insulwool, slag wool or other recognised insulation material of a like nature or working in the immediate vicinity so as to be affected by the use thereof: shall be paid 49 cents per hour part thereof: in addition to the rates otherwise prescribed.

(4) Work in Dust Laden Atmosphere

Working in a dust laden atmosphere in a joiner's shop where dust extractors are not provided in or such atmosphere caused by the use of materials for insulating, deafening or plugging work (as, for instance, pumice, charcoal, silicate of cotton, or any other substitute) or from earthworks, 49 cents per hour extra.

(5) Confined Space—

An employee required to work in a confined space, being a place the dimension or nature of which necessitates working in a cramped position or without sufficient ventilation, shall be paid 49 cents per hour or part thereof: in addition to the rate otherwise prescribed.

(6) Sewer Work—

An employee engaged in repairs to sewers shall be paid 39 cents per hour or part thereof: in addition to the rates otherwise prescribed.

(7) Sanitary Plumbing Work—

A plumber doing sanitary plumbing work on repairs to sewer drainage or waste pipe services in any of the following places—

(a) Infectious and contagious disease hospitals or any block or portion of a hospital used for the care or treatment of patients suffering from any infectious or contagious disease.

(b) Morgues—

shall be paid 42 cents per hour or part thereof: in addition to the rates otherwise prescribed.

(8) Ship Plumbing—

A plumber doing work on a ship of any class—

(a) Whilst under way; or

(b) In a wet place being one in which the clothing of an employee necessarily becomes wet to an uncomfortable degree or one in which water accumulates underfoot; or

(c) In a confined space; or

(d) In a ship which has done one trip or more in a fume or dust laden atmosphere, in bilges, or when cleaning blockages in soil pipe or waste pipes or repairing brine pipes, shall be paid 60 cents per hour or part thereof: in addition to the rate otherwise prescribed.

(e) A plumber carrying out pipe work in a ship of any class under the plates in the engine and boiler rooms and oil fuel tanks shall be paid $1.22 per hour or part thereof: in addition to the rates otherwise prescribed.

(9) Well Work—

A plumber or labourer required to enter a well nine metres or more in depth for the purpose in the first place of examining the pump, pipe or any other work connected therewith, shall be paid $2.14 for such examination and 70 cents per hour extra thereafter for fixing, renewing or repairing such work.

(10) Permit Work—

Any licensed plumber called upon by his/her employer to use the licence issued to him/her by the Metropolitan Water Supply, Sewerage and Drainage Board for a period in any one week shall be paid $12.87 for that week in addition to the rates otherwise prescribed.

(11) Plumbers on Sewerage Work—

Plumbers or apprentices in their third, fourth or fifth year, on work involving the opening up of house drains or waste pipes for the purpose of clearing blockages or for any other purpose, or work involving the cleaning out of septic tanks or dry wells, shall be paid a minimum of $2.13 per day or part thereof: in addition to the prescribed rate.

(12) Height Money—

An employee required to work on a chimney stack, spire, tower, air shaft, cooling tower, water tower exceeding fifteen metres in height shall be paid for all work above fifteen metres, 42 cents per hour thereof: with an additional 42 cents per hour or part thereof: for work above each further fifteen metres in addition to the rates otherwise prescribed.

(13) Barge Work

A Main Roads Employee required to work on scaffolding which is mounted on a barge is to be paid an allowance of $3.83 per day, or majority thereof, or $1.90 per half day, or part thereof, for such work.

(14) Furnace Work—

An employee engaged in the construction or alteration or repairs to boilers, flues, furnaces, retorts, kilns, ovens, ladles and similar refractory work or on underpinning shall be paid $1.09 per hour or part thereof: in addition to the rates otherwise prescribed.

(15) Hot Work—

(a) An employee required to work in a place where the temperature has been raised by artificial means to between 46° Celsius and 54° Celsius shall be paid 42 cents per hour or part thereof: in addition to the rates otherwise prescribed, or in excess of 54° Celsius shall be paid 49 cents per hour or part thereof: in addition to the said rates.

(b) Where such work continues for more than two hours the employee shall be entitled to a rest period of twenty minutes after every two hours' work without loss of pay, not including the special rate prescribed in paragraph (a) hereof.

(16) Cold Work—

(a) An employee required to work in a place where the temperature is lowered by artificial means to less than 0° Celsius shall be paid 42 cents per hour or part thereof: in addition to the rates otherwise prescribed in this award.

(b) Where such work continues for more than two hours the employee shall be entitled to a rest period of twenty minutes after every two hours' work without loss of pay, not including the special rate prescribed in paragraph (a) hereof.

(17) Swanbourne and Graylands: Employees required to work at the Swanbourne and Graylands Hospitals controlled by the Mental Health Service shall be paid at the rate of 42 cents per hour in addition to the prescribed rate.

(18) Flintcote: Plasterers using flintcote shall be paid 42 cents per hour or part thereof: except when flintcote is applied by hawk and trowel to walls and ceilings when the rate shall be 72 cents per hour extra in addition to the prescribed rate.

(19) Dirty Work—

(a) An employee employed on excessively dirty work which is more likely to render the employee or his/her clothes dirtier than the normal run of work, shall be paid 42 cents per hour extra in addition to the prescribed rate (with a minimum payment of four hours when employed on such work).

(b) This shall not apply to an employee in receipt of the allowance prescribed in subclause (4) of Clause 9.—Wages of this award nor to a worker in receipt of the allowance prescribed in subclause (27) hereof.

(20) Stonemason on Wall—

A stonemason working on the wall (cottage work and foundation work in coastal stone excepted) shall be paid 42 cents per hour thereof: in addition to the rates otherwise prescribed.

(21) Setter Out—

A setter out (other than a leading hand) in a joiner's shop shall be paid $4.01 per day in addition to the rates otherwise prescribed.

(22) Detail Employee—

A detail employee (other than a leading hand) shall be paid $4.01 in addition to the rates otherwise prescribed.

(23) Spray Painting—Painter—

(a) Lead paint shall not be applied by a spray to the interior of any building.

(b) All employees (including apprentices) applying paint by spraying, shall be provided with full overalls and head covering and respirators by the employer.

(c) Where from the nature of the paint or substance used in spraying, a respirator would be of little or no practical use in preventing the absorption of fumes or materials from substance used by an employee in spray painting, the employee shall be paid a special allowance of $1.09 per day.

(24) Lead Paint Surfaces—

(a) No surface painted with lead paint shall be rubbed down or scraped by a dry process.

(b) Width of Brushes: All brushes shall not exceed 127 millimetres in width and no kalsomine brush shall be more than 177.8 millimetres in width.

(c) Meals not to be taken in paint shop. No employee shall be permitted to have a meal in any paint shop or place where paint is stored or used.

(25) Spray Application—Painters—

A painter engaged on all applications carried out in other than a properly constructed booth approved by the Department of Labour and Industry shall be paid 42 cents per hour or part thereof: in addition to the rates otherwise prescribed in this award.

(26) An employee who is a qualified first aid person and is appointed by his/her employer to carry out first aid duties in addition to his/her usual duties shall be paid an additional rate of $1.41 per day.

(27) Toxic Substances—

(a) An employee required to use toxic substances or materials of a like nature shall be informed by the employer of the health hazards involved and instructed in the correct and necessary safeguards which must be observed in the use of such materials.

(b) An employee using such materials will be provided with and shall use all safeguards as are required by the appropriate Government Authority in the absence of such requirement such safeguards as are determined by a competent authority or person chosen by the union and the employer.

(c) An employee using toxic substances or materials of a like nature shall be paid 49 cents per hour extra. Employees working in close proximity to employees so engaged shall be paid 39 cents per hour extra.

(d) For the purposes of this subclause all materials which include or require the addition of a catalyst hardener and reactive additives or two pack catalyst system shall be deemed to be materials of a like nature.

(28) Abattoirs—

An employee, other than a plumber in receipt of the plumbing trade allowance, employed in an abattoir shall be paid such rate as is agreed upon between the parties, or, in default of agreement, the rate determined by the Board of Reference.

(29) Fumes—

An employee required to work in a place where fumes of sulphur or other acid or other offensive fumes are present shall be paid such rates as are agreed upon between him/her and the employer.

(30) Asbestos—

Employees required to use materials containing asbestos or to work in close proximity to employees using such materials shall be provided with and shall use all necessary safeguards as required by the appropriate occupational health authority and where such safeguards include the mandatory wearing of protective equipment (ie. combination overalls and breathing equipment or similar apparatus) such employees shall be paid 49 cents per hour whilst so engaged.

(31) Explosive Powered Tools—

An operator of explosive powered tools, being an employee qualified in accord with the laws and regulations of the State of Western Australia to operate explosive powered tools, who is required to use an explosive powered tool shall be paid 97 cents for each day on which he/she used a tool in addition to the rates otherwise prescribed.

(32) Wet Work—

An employee required to work in a place where water is continually dripping on him/her so that his/her clothing and boots become wet or where there is water underfoot shall be paid 42 cents per hour or part thereof: in addition to the rates otherwise prescribed in this award.

(33) Cleaning Down Brickwork—

An employee required to clean down bricks using acids or other corrosive substances shall be supplied with gloves and be paid 39 cents per hour or part

thereof: in addition to the rates otherwise prescribed in this award.

(34) Bagging—

An employee engaged upon bagging brick or concrete structures shall be paid 39 cents per hour or part thereof: in addition to the rates otherwise prescribed in this award.

(35) Bitumen Work—

An employee handling hot bitumen or asphalt or dripping materials in creosote shall be paid 49 cents per hour or part thereof: in addition to the rates otherwise prescribed in this award.

(36) Scaffolding Certificate Allowance—

A tradesperson who is the holder of a scaffolding certificate or rigging certificate issued by the Department of Labour and Industry and is required to act on that certificate whilst engaged on work requiring a certified person shall be paid 42 cents per hour or part thereof: in addition to the rates otherwise prescribed in this award but this allowance shall not be payable cumulative on the allowance for swing scaffolds.

(37) Dry Polishing or Cutting of Tiles—

An employee required to dry polish tiles with a machine or to cut tiles with an electric saw shall be paid 49 cents per hour or part thereof: in addition to the rates otherwise prescribed in this award.

(38) Secondhand Timber—

Where, whilst working with second-hand timber, an employees tools are damaged by nails, dumps or other foreign matter on the timber, he/she shall be entitled to an allowance of $1.41 per day on each day upon which his/her tools are so damaged, provided that no allowance shall be payable under this clause unless it is reported immediately to the employer's representative on the job in order that the claim may be proved.

(39) Roof Repairs—

An employee engaged on repairs to roofs shall be paid 45 cents per hour or part thereof: in addition to the rates otherwise provided in this award.

(40) Computing Quantities—

An employee, other than a leading hand, who is required to compute or estimate quantities of materials in respect of the work performed by others shall be paid $3.02 per day or part thereof: in addition to the rates otherwise prescribed in this award.

(41) Loads—

Where bricks are being used the employee shall not be required to carry—

(a) More than 40 bricks each load in a wheelbarrow (or a scaffold) to a height of 4.6 metres from the ground.

(b) More than 36 bricks each load in a wheelbarrow over a height of 4.6 metres on a scaffold.

The type of wheelbarrow shall be agreed upon with the union.

(42) Grinding Facilities—

The employer shall provide adequate facilities for the employees to grind tools either at the job or at the employer's premises and the employees shall be allowed time to use the same whenever reasonably necessary.

(43) First Aid Outfit—

On each job the employer shall provide sufficient supply of bandages and antiseptic dressings for use in case of accidents.

(44) Water and Soap—

Water and soap shall be provided in each shop or on each job by the employer.

(45) (a) The employer shall supply a safety helmet for each of his/her employees requesting one on any job where, pursuant to the regulations made under the Construction Safety Act, 1972, an employee is required to wear such helmet.

(b) Any helmet so supplied shall remain the property of the employer and during that time it is on issue the employee shall be responsible for any loss or damage thereto, fair wear and tear attributable to ordinary use excepted.

(46) Provision of Boiling Water—

The employer shall, where practicable provide boiling water for the use of his/her employees on each job at lunch time.

(47) Sanitary Arrangements—

The employer shall comply with the provisions of section 102 of the Health Act, 1911.

(48) Attendants on Ladders—

No employees shall work on a ladder at a height of over 6.1 metres from the ground when such ladder is standing in any street, way or lane where traffic is passing to and fro, without an assistant on the ground.

(49) Electrical Sanding Machines—

The use of electrical sanding machines for sanding down paint work shall be governed by the following provisions—

(a) The weight of each such machine shall not exceed 5.9 kilograms.

(b) Every employer operating any such machine shall endeavour to ensure that each such machine, together with all electrical leads and associated equipment, is kept in a safe condition and shall if requested so to do by any employee but not more often than once in any four weeks cause the same to be inspected under the provisions of the Electricity Act and the regulations made thereunder.

(c) Employers shall provide and supply respirators of a suitable type, to each employee and shall maintain same in an effective and clean state at all times.

Where respirators are used by more than one employee, each such respirator shall be sterilised or a new pad inserted after use by each such employee.

(d) Employers shall also provide and supply goggles of suitable type provided that the goggles with celluloid lenses shall not be regarded as suitable.

(e) All employees shall use the protective equipment supplied when using electrical sanding machines of any type.

(50) Dam Walls—

Adequate precautions shall be taken by all employers for the safety of workers employed on the retaining walls of dams. Any dispute as to the adequacy of precautions taken shall be referred to the Board of Reference.

(51) The Secretary or any authorised officer of the union shall have the right to visit any job for the purpose of ascertaining whether work is being performed in accordance with the provisions of the Construction Safety Act, 1972, and any regulations made thereunder. Should he/she be of the opinion that the work being carried out is not in accordance with those provisions the Secretary or any authorised officer of the union shall inform the employer and the employees concerned accordingly and may report any alleged breach of Act or the regulations to the Chief Inspector of Construction Safety.

(52) Where the employer provides transport to and from the job the conveyance used for such transport shall be provided with suitable seating and weatherproof covering.

(53) An employee engaged on work at Fremantle Prison shall be paid 42 cents per hour extra.

(54) Any dispute which may arise between the parties in relation to the application of any of the foregoing special rates and provisions may be determined by the Board of Reference.

(55) Building tradespersons engaged solely on outside work at Homeswest shall be given one winter jacket per year to be replaced on a fair wear and tear basis.

4. Schedule C—Hospital Environment Allowance: Delete this schedule and insert in lieu the following—

Notwithstanding the provisions of Clause 13.—Special Rates and Provisions of this Award, the following allowances shall be paid to maintenance employees employed at hospitals listed hereunder—

1. (a) For work performed in a hospital environment—$11.11 per week.

(b) For disabilities associated with work performed in—

Difficult access areas;

Tunnel complexes;

Areas with great temperature variation:—$3.87 per week.

Princess Margaret Hospital
King Edward Memorial Hospital
Sir Charles Gairdner Hospital
Royal Perth Hospital
Fremantle Hospital

2. For work performed in a hospital environment—$7.48 per week.

Kalgoorlie Hospital
Osborne Park Hospital
Albany Hospital
Bunbury Hospital
Geraldton Hospital
Mt Henry Hospital
Northam Hospital
Swan Districts Hospital
Perth Dental Hospital

3. For work performed in a hospital environment—$5.30 per week.

Bentley Hospital
Derby Hospital
Narrogin Hospital
Port Hedland Hospital
Rockingham Hospital
Sunset Hospital
Armadale Hospital
Broome Hospital
Busselton Hospital
Carnarvon Hospital
Collie Hospital
Esperance Hospital
Katanning Hospital
Merredin Hospital
Murray Hospital
Warren Hospital
Wyndham Hospital

4. The monetary amounts prescribed in this Schedule shall be adjusted in accordance with any decision of the Commission in Court Session which alters wage rates generally following movements in the Consumer Price Index and which is subsequently reflected by amendment to the allowances contained in Clause 13.—Special Rates and Provisions of the Building Trades (Government) Award No. 31A of 1966.

5. Appendix D—Award Restructuring: Delete paragraph (b) of clause 8 of this appendix and insert in lieu the following—

(b) (i) In addition to the rates contained in paragraph (a) of this subclause, employees designated in classification levels to 7 inclusive shall receive an all purpose industry allowance of $11.78.

(ii) This allowance shall be paid in two instalments as follows—

(aa) $5.95 of the allowance shall be paid after the first twelve months of government service; and

(bb) the remaining $5.83 shall be paid on 24 months of government service.

EARTH MOVING AND CONSTRUCTION AWARD.

No. 10 of 1963.

2001 WAIRC 03853

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	CONSTRUCTION, MINING, ENERGY, TIMBERYARDS, SAWMILLS AND WOODWORKERS UNION OF AUSTRALIA—WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	GOLDFIELDS CONTRACTORS W.A., BELL BROS PTY LTD, HOT MIX LTD, RESPONDENTS
CORAM	COMMISSIONER J F GREGOR
DELIVERED	TUESDAY, 25 SEPTEMBER 2001
FILE NO	APPLICATION 1352 OF 2001
CITATION NO.	2001 WAIRC 03853

Result Award Varied

Order.

HAVING heard Ms J. Harrison on behalf of the Applicant and Mr K. Dwyer on behalf of the Respondents, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders—

THAT the Earth Moving and Construction Award be varied in accordance with the following Schedule and that such variation shall have effect from the first pay period on and from 17th September 2001.

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

Schedule.

1. Clause 24.—Allowances and Special Provisions: Delete this clause and insert in lieu the following—

(1) Dirt Money—

A dirt allowance of $0.44 per hour shall be payable in connection with work deemed to be more than ordinarily dirty; cases of dispute to be determined by the Board of Reference.

(2) Confined Space—

Workers working in confined space shall be paid an allowance of $0.53 per hour. "Confined space" means one of which the dimensions are such that the workman must work in an unusually stooped or cramped position or without adequate ventilation or where confinement within a limited place is productive of unusual discomfort to him.

(3) Wet Work—

(a) Any worker working in water or "wet places" shall be paid an extra allowance of $3.47 per day or part of a day.

(b) "Wet places" shall mean places where, in the performance of the work the splashing of

water and mud saturate the worker's clothing or where protection is not provided to prevent splashings or dripping sufficient to saturate his clothing, and shall include wet material or wet ground in which it is impracticable for the worker wearing ordinary working boots to work without getting wet feet. Provided that this clause shall not apply to men working on surfaces made wet by rain.

(c) In exceptional cases where the work is excessively wet and which are not covered by paragraph (b) hereof, an extra allowance may be agreed upon, or failing agreement, determined by the Board of Reference.

(d) Subject to paragraph (c), the engineer in charge or the foreman shall decide whether any allowance is payable under this clause.

(e) Workers called upon to work overtime in water or in wet places shall receive an extra $3.47 or the appropriate allowance fixed by the Board of Reference for each eight hours or portion thereof, of overtime worked and such allowance shall be treated as portion of the wage for the calculation of overtime. For all other purposes, the extra payment shall be deemed an allowance.

(4) A multi-storey allowance shall be paid to all employees to whom this award applies engaged on site in the construction of a multi-storey building as defined in accordance with the following—

From commencement of building to 15th floor level—$0.34 per hour extra.

From 16th floor level to 30th floor level—$0.42 per hour extra.

From 31st floor level to 45th floor level—$0.65 per hour extra.

From 46th floor level to 60th floor level—$0.82 per hour extra.

From 61st floor level onwards—$1.05 per hour extra.

For the purposes of this subclause a multi-storey building means a building which will, when complete, consist of 5 or more storey levels and any other structure which does not have regular storey levels but which exceeds 15 metres in height.

2. Appendix I—

A. Delete clause (5) of this appendix and insert in lieu the following—

(5) Industry Allowance

In addition to the rates specified in subclause (2) an industry allowance of $18.86 per week should be paid to all employees under this award to compensate for the disabilities usually associated with building and steel construction work.

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

(8) Allowances and Special Provisions

(a) Dirt Money

A dirt allowance of 44 cents per hour shall be payable in connection with work deemed to be more than ordinarily dirty; cases of dispute to be determined by the Board of Reference.

(b) Confined Space

Workers working in confined space shall be paid an allowance of 53 cents per hour. "Confined space" means one of which the dimensions are such that the workperson must work in an unusually stooped or cramped position or without adequate ventilation or where confinement within a limited place is productive of unusual discomfort to him/her.

(c) Wet Work

(i) Any worker working in water or "wet places" shall be paid an extra allowance of $3.47 per day or part of a day.

(ii) "Wet places" shall mean places where, in the performance of the work the splashing of water and mud saturate the worker's clothing or where protection is not provided to prevent splashings or dripping sufficient to saturate his/her clothing, and shall include wet material or wet ground in which it is impracticable for the worker wearing ordinary working boots to work without getting wet feet. Provided that this clause shall not apply to workers working on wet surfaces made wet by rain.

(iii) In exceptional cases where the work is excessively wet and which are not covered by paragraph (ii) hereof, an extra allowance may be agreed upon, or failing agreement, determined by the Board of Reference.

(iv) Subject to paragraph (iii), the engineer in charge or the foreperson shall decide whether any allowance is payable under this clause.

(v) Workers called upon to work overtime in water or in wet places shall receive an extra $3.47 or the appropriate allowance fixed by the Board of Reference for each eight hours or portion thereof, of overtime worked and such allowance shall be treated as portion of the wage for the calculation of overtime. For all other purposes, the extra payment shall be deemed an allowance.

(d) A multi-storey allowance shall be paid to all employees to whom this Appendix applies engaged on site in the construction of a multi-storey building as defined in accordance with the following—

From commencement of building to 15th floor level—34 cents per hour extra.

From 16th floor level to 30th floor level—42 cents per hour extra.

From 31st floor level to 45th floor level—65 cents per hour extra.

From 46th floor level to 60th floor level—82 cents per hour extra.

From 61st floor level onwards—$1.05 per hour extra.

For the purposes of this subclause a multi-storey building means a building which will, when complete, consist of 5 or more storey levels and any other structure which does not have regular storey levels but which exceeds 15 metres in height.

3. Appendix II: Delete this appendix and insert in lieu the following—

(1) Liberty to Apply

Liberty to Apply to insert provisions relating to future project is reserved.

ENGINE DRIVERS' (BUILDING AND STEEL CONSTRUCTION) AWARD.
No. 20 of 1973.

2001 WAIRC 03804

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	CONSTRUCTION, MINING, ENERGY, TIMBERYARDS, SAWMILLS AND WOODWORKERS UNION OF AUSTRALIA—WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	MASTER BUILDERS' ASSOCIATION OF WESTERN AUSTRALIA (UNION OF EMPLOYERS), CIVIL AND CIVIC PTY LTD, TOM'S CRANE & PLANT HIRE, RESPONDENTS
CORAM	COMMISSIONER J F GREGOR
DELIVERED	THURSDAY, 20 SEPTEMBER 2001
FILE NO	APPLICATION 1350 OF 2001
CITATION NO.	2001 WAIRC 03804

Result	Award Varied

Order.

HAVING heard Ms J. Harrison on behalf of the Applicant and Mr P. Cooke and with him Mr K. Dwyer on behalf of the Respondents, and by consent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders—

THAT the Engine Drivers' (Building and Steel Construction) Award No. 20 of 1973 be varied in accordance with the following Schedule and that such variation shall have effect from the first pay period on and from 17th September 2001.

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

Schedule.

1. Clause 24.—Allowances and Special Provisions: Delete this clause and insert in lieu the following—

(1) An employee required to work in a place where the temperature has been raised by artificial means to between 46° and 54° Celsius shall be paid $0.43 per hour or part thereof in addition to the rates otherwise prescribed in this award, or in excess of 54° Celsius shall be paid $0.53 per hour or part thereof in addition to the said rates.

(2) Dirt Money: a dirt allowance of $0.43 per hour or part thereof shall be payable in connection with work deemed to be unusually dirty; cases of dispute to be settled by a Board of Reference.

(3) Height Allowance:

(a) Tower crane drivers shall be paid a height allowance in accordance with the following schedule, the height to be measured from ground level, i.e. street level to floor of crane cabin—

From ground level up to and including 30 metres—$0.34 per hour.

Over 30 metres and up to 45 metres—$0.42 per hour.

Over 45 metres and up to 60 metres—$0.71 per hour.

Over 60 metres—$0.34 per hour additional for each 15 metres over 60 metres.

(b) Mobile crane drivers, when employed for any day or part thereof on a building site where a multi storey building is being or is to be constructed shall be paid a multi-storey allowance in accordance with the following table—

From commencement of building to 15th floor level—$0.34 per hour extra.

From 16th floor level to 30th floor level—$0.42 per hour extra.

From 31st floor level to 45th floor level—$0.63 per hour extra.

From 46th floor level to 60th floor level—$0.80 per hour extra.

From 61st floor level onwards—$1.03 per hour extra.

2. Clause 27.—Allowances and Special Provisions: Delete this clause and insert in lieu the following—

(5) Industry Allowance

In addition to the rates specified in subclause (2) an industry allowance of $18.60 per week should be paid to all employees under this award to compensate for the disabilities usually associated with building and steel construction work.

3. 4th Schedule—Special Site Provisions: Delete this Schedule and insert in lieu the following—

In addition to the rates of pay set out in clause 27.—Wages the following site allowances and provisions shall be paid and apply to employees covered by this award who are engaged on the sites specified in this Schedule.

PART 1—METROPOLITAN SITES

	SITE	ALLOWANCE
1.	S.E.C. Kwinana	$0.89 per hour for each hour worked and 5 cents per hour footwear allowance for each hour worked.

PART 2—RESOURCE DEVELOPMENT PROJECT SITES

(1) Liberty to Apply

Liberty to Apply to insert provisions relating to future project is reserved.

ENGINE DRIVERS' (GENERAL) AWARD.
No. R 21 A of 1977.

2001 WAIRC 03808

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	CONSTRUCTION, MINING, ENERGY, TIMBERYARDS, SAWMILLS AND WOODWORKERS UNION OF AUSTRALIA—WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	COCA COLA BOTTLERS, MASSEY-FERGUSON (AUST) LTD, JAMES HARDIE & CO PTY LIMITED, RESPONDENTS
CORAM	COMMISSIONER J F GREGOR
DELIVERED	THURSDAY, 20 SEPTEMBER 2001
FILE NO	APPLICATION 1354 OF 2001
CITATION NO.	2001 WAIRC 03808

Result	Award Varied

Order.

HAVING heard Ms J. Harrison on behalf of the Applicant and Mr K. Dwyer on behalf of the Respondents, and by consent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders—

THAT the Engine Drivers (General) Award be varied in accordance with the following Schedule and that such variation shall have effect from the first pay period on and from 17th September 2001.

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

Schedule.

Clause 19.—Wages—

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

(2) Additions to Weekly Wage Rates

(a) An Engine Driver, Electric Motor Attendant or Fireperson engaged as hereinafter specified shall have his/her wage increase as follows—

	Per Week $
(i) Attending to refrigerating and/or air compressor or compressors	$22.00
(ii) Attending to an electric generator or dynamo exceeding 10 kw capacity	$22.00
(iii) Attending to switchboard where the generating capacity is 350 kw or over	$7.00
(iv) An Engine Driver who attends a boiler or boilers	$22.00

(b) Employees employed on boiler cleaning inside the boiler of flues of combustion chamber shall be paid an additional rate of $1.08 per hour whilst so engaged.

B. Delete subclause (3) of this clause and insert in lieu the following—

(3) Industry Allowance

(a) In addition to the rates prescribed in this clause an amount of $19.15 per week shall be paid to employees engaged under this award in rock quarries, limestone quarries and sand pits to compensate for dust and climatic conditions when working in the open and for deficiencies in general amenities and facilitates. Provided that employees in the limestone quarries of Cockburn Cement Ltd shall be paid an amount of $0.46 per hour in lieu of the $19.15 referred to in this subclause.

(b) (i) In addition to the rates prescribed in this clause a driver of an overhead electric crane, mobile crane, front end loader or tractor, employed by Cockburn Cement Limited shall, subject to as hereinafter provided, be paid an allowance of $0.18 per hour.

(ii) The allowance prescribed in this paragraph is to compensate for the extra duties, including servicing and re-fuelling of machines, associated with the work practices of Cockburn Cement Limited and shall be paid for each hour worked in a quarry, or for each hour worked elsewhere on shifts other than day shift Monday to Friday.

ENGINE DRIVERS (GOVERNMENT) AWARD 1983.
No. A 5 of 1983.

2001 WAIRC 03805

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	CONSTRUCTION, MINING, ENERGY, TIMBERYARDS, SAWMILLS AND WOODWORKERS UNION OF AUSTRALIA—WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	FREMANTLE HOSPITAL, BOARD OF MANAGEMENT, PRINCESS MARGRET HOSPITAL, RESPONDENTS
CORAM	COMMISSIONER J F GREGOR
DELIVERED	THURSDAY, 20 SEPTEMBER 2001
FILE NO	APPLICATION 1353 OF 2001
CITATION NO.	2001 WAIRC 03805

Result	Vary Award

Order.

HAVING heard Ms J. Harrison on behalf of the Applicant and Ms A. Davison on behalf of the Respondents, and by consent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders—

THAT the Engine Drivers (Government) Award 1983 be varied in accordance with the following Schedule and that such variation shall have effect from the first pay period on and from 17th September 2001.

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

Schedule.

Clause 24.—Wages:

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

(b) Employees employed on boiler cleaning inside the boiler or flues or combustion chamber shall be paid 97 cents per hour while so engaged. Provided that this allowance shall not be payable to employees who are in receipt of the industry allowance or construction work allowance prescribed in subclause (1) of Clause 19.—Special Provisions of this Award.

B. Delete subclause (3) of this clause and insert in lieu the following—

(3) Additions to Wage Rates

	Per Week $
(a) A classified employee engaged as hereinafter specified shall have his/her wage rate increased as follows:	
(i) Attending to refrigerator and/or air compressor or compressors	21.20
(ii) Attending to an electric generator or dynamo exceeding 10 watt capacity	21.20
(iii) Attending to a switchboard where the generating capacity is 350kw or more	6.80
(iv) In charge of plant as defined	21.20
(v) Leading Fireperson, where two or more Firepersons are employed on one shift (per shift)	0.46

(b) Employees employed on boiler cleaning inside the boiler or flues or combustion chambers shall be paid $1.02 per hour while so engaged. Provided that this allowance shall not be payable to employees who are in receipt of the industry allowance or construction allowance prescribed in subclause (1) of Clause 19.—Special Provisions of this Award.

INDUSTRIAL SPRAYPAINTING AND SANDBLASTING AWARD 1991

No. A33 of 1987.

2001 WAIRC 03852

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	THE WESTERN AUSTRALIAN BUILDERS' LABOURERS, PAINTERS & PLASTERERS UNION OF WORKERS
APPLICANT	
	v.
	ABRASIVE BLASTING SERVICES PTY LTD, BLASTWORKS PTY LTD, BLASTCOATERS PTY LTD, RESPONDENTS
CORAM	COMMISSIONER J F GREGOR
DELIVERED	TUESDAY, 25 SEPTEMBER 2001
FILE NO	APPLICATION 1362 OF 2001
CITATION NO.	2001 WAIRC 03852

Result Award Varied

Order.

HAVING heard Ms J. Harrison on behalf of the Applicant and Mr K. Dwyer on behalf of the Respondents, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby orders—

THAT the Industrial Spraypainting and Sandblasting Award 1991 be varied in accordance with the following Schedule and that such variation shall have effect from the first pay period on and from 17th September 2001.

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

Schedule.

1. Clause 8.—Rates of Pay—

A. Delete paragraph (a) of subclause (4) of this clause and insert in lieu the following—

(a) (i) Subject to paragraph (b) hereof, an employee required to work underground shall be paid an allowance of $9.25 per week in addition to the allowance prescribed in subclause (3) of this clause and any other amount prescribed for such employee elsewhere in this award.

B. Delete paragraph (a) of subclause (5) of this clause and insert in lieu the following—

(a) A person specifically appointed to be a leading hand shall be paid at the rate of the undermentioned additional amounts above the rate of the highest classification supervised, or his/her own rate, whichever is the highest, in accordance with the number of persons in his/her charge—

	Weekly Base Only $	Rate Per Hour $
(i) In charge of not more than one person	11.90	0.33
(ii) In charge of two and not more than five persons	26.60	0.73
(iii) In charge of six and not more than ten persons	33.90	0.93
(iv) In charge of more than ten persons	45.00	1.22

2. Clause 9.—Special Rates and Provisions: Delete subclause (1) of this clause and insert in lieu the following—

(1) In addition to the rates otherwise prescribed in this Award, the following rates shall be payable to employees covered by the said Award—

(a) Insulation

An employee handling charcoal, pumice, granulated cork, silicate of cotton, insulwool, slag wool, limpet fibre, vermiculite or other recognised insulating material of a like nature or working in the immediate vicinity so as to be affected by the use thereof 52 cents per hour or part thereof.

(b) Hot Work

An employee who works in a place where the temperature has been raised by artificial means to between 46 degrees and 54 degrees Celsius—43 cents per hour or part thereof, exceeding 54 degrees Celsius—52 cents per hour or part thereof.

Where such work continues for more than two hours, the employee shall be entitled to 20 minutes rest after every two hours work without loss of pay, not including the special rate provided by this paragraph.

(c) Cold Work

An employee who works in a place where the temperature is lowered by artificial means to less than zero degrees Celsius shall be paid 43 cents per hour.

Where such work continues for more than two hours, the employee shall be entitled to 20 minutes rest after every two hours work without loss of pay, not including the special rate provided by this paragraph.

(d) Confined Space

An employee required to work in a confined space shall be paid 52 cents per hour or part thereof.

("Confined Space" means a place the dimensions or nature of which necessitate working in a cramped position or without sufficient ventilation.)

(e) Swing Scaffold

(i) An employee required to work from any type of swing or any scaffold suspended by rope or cable, bosun's chair, or suspended scaffold requiring use of steel or iron hooks or angle irons shall be paid the appropriate allowance set out below corresponding to the storey level at which the anchors or bracing, from which the stage is suspended, has been erected.

Such allowance shall be paid for minimum of four hours' work or part thereof until construction work (as defined) has been completed.

Height of Bracing	First Four Hours	Each Additional Hour
0-15 storeys	3.08	0.64
16-30 storeys	3.96	0.83
31-45 storeys	4.68	0.96
46-60 storeys	7.68	1.59
Greater than 60 storeys	9.78	2.03

Provided that an apprentice with less than two years' experience shall not use a swing scaffold or bosun's chair, and further provided that solid plasterers when working off a swing scaffold shall receive an additional 13 cents per hour.

(ii) Payments contained in this subclause are in recognition of the disabilities associated with the use of swing scaffolds.

(iii) For the purpose of Clause 9(1)(e)(i) hereof—

"Completed" means the building is fully functioning and all work which was part of the principle contract is complete.

"Storeys" shall be given the same meaning as the storey level in Clause 10(2) of this Award.

(f) Wet Work

An employee working in any place where water is continually dripping on him/her so that clothing and boots become wet, or where there is water underfoot, shall be paid 43 cents per hour whilst so engaged.

(g) Dirty Work

An employee engaged on unusually dirty work shall be paid 43 cents per hour.

(h) Towers Allowance

An employee working on a chimney stack, spire, tower, radio or television mast or tower, air shaft (other than above ground in a multi-storey building), cooling tower or silo, where the construction exceeds fifteen metres in height shall be paid 43 cents per hour for all work above fifteen metres, and 43 cents per hour for work above each further fifteen metres.

Provided that any similarly constructed building, or a building not covered by Clause 10.—Multi-Storey Allowance, which exceeds 15 metres in height may be covered by this subclause, or by that clause by agreement or where agreement is not reached, by determination of the Commission.

(i) Toxic Substances

(i) An employee required to use toxic substances shall be informed by the employer of the health hazards involved and instructed in the correct and necessary safeguards which must be observed in the use of such materials.

(ii) Employees using such materials will be provided with and shall use all safeguards as are required by Clause 27.—Protection of Employees and the appropriate Government authority or in the absence of such requirement such safeguards as are defined by a competent authority or person chosen by the union and the employer.

(iii) Employees using toxic substances or materials of a like nature shall be paid 52 cents per hour. Employees working in close proximity to employees so engaged shall be paid 43 cents per hour.

(iv) For the purpose of this paragraph toxic substances shall include epoxy based materials and all materials which include or require the addition of a catalyst hardener and reactive additives or two pack catalyst system shall be deemed to be materials of a like nature.

(j) Fumes

An employee required to work in a place where fumes of sulphur or other acid or other offensive fumes are present shall be paid such rates as are agreed upon between him/her and the employer; provided that, in default of agreement, the matter may be referred to a Board of Reference for the fixation of a special rate.

Any special rate so fixed shall apply from the date the employer is advised of the claim and thereafter shall be paid as and when the fume condition occurs.

(k) Asbestos

Employees required to use materials containing asbestos or to work in close proximity to employees using such materials shall be provided with and shall use all necessary safeguards as required by the appropriate occupational health authority and where such safeguards include the mandatory wearing of protective equipment (i.e. combination overalls and breathing equipment or similar apparatus) shall be paid 52 cents per hour extra whilst so engaged.

(l) Furnace Work

An employee required to work on the construction or alteration or repairs to boilers, flues, furnaces, retorts, kilns, ovens, ladles and similar refractory work shall be paid $1.14 per hour. This additional rate shall be regarded as part of the wage rate for all purposes.

(m) Acid Work

An employee required to work on the construction or repairs to acid furnaces, acid stills, acid towers and all other acid resisting brickwork shall be paid $1.14 per hour. This additional rate shall be regarded as part of the wage rate for all purposes.

(n) Roof Repairs

Employees engaged on repairs to roofs shall be paid 52 cents per hour.

(o) Underground Allowance

(i) An employee required to work underground for no more than four days or shifts in an ordinary week shall be paid $1.84 a day or shift in addition to any other amount prescribed for such employees elsewhere in this award.

Provided that an employee required to work underground for more than four days or shifts in an ordinary week shall be paid an underground allowance in accordance with the provisions of subclause (3) of Clause 8.—Rates of Pay.

(ii) Where a shaft is to be sunk to a depth greater than six metres the payment of the underground allowance shall commence from the surface.

(iii) This allowance shall not be payable to employees engaged upon "pot and drive" work at a depth of 3.5 metres or less.

(p) First Aid

An employee who is qualified to provide first aid and who is appointed by his/her employer to carry out first aid duties shall be paid $1.82 per day.

(q) Fireproofing Spray: An employee using a fireproof or composition spray shall be paid an additional 43 cents per hour whilst so engaged.

(r) Height Work: An employee working on any structure at a height of more than nine metres where an adequate fixed support not less than 0.75 metres wide is not provided, shall be paid 40 cents per hour in addition to ordinary rates. This subclause shall not apply to an employee working on a bosun's chair or swinging stage.

This provision shall not apply in addition to the Towers Allowance prescribed in paragraph (h) of this subclause.

(s) Brewery Cylinders—Painters

A painter in brewery cylinders or stout tuns shall be allowed 15 minutes' spell in the fresh air at the end of each hour worked by him/her.

Such 15 minutes shall be counted as working time and shall be paid for as such. The rate for working in brewery cylinders or stout tuns shall be at the rate of time and one-half. When an employee is working overtime and is required to work in brewery cylinders and stout tuns he/she shall, in addition to the overtime rates payable, be paid one half of the ordinary rate payable as provided by Clause 8.—Rates of Pay of this award.

(t) Certificate Allowance

A tradesman who is the holder of a scaffolding certificate or rigging certificate issued by the Department of Industrial Affairs and is required to act on that Certificate whilst engaged on work requiring a certificated person shall be paid an additional 43 cents per hour.

Provided that this allowance shall not be payable cumulative on the allowance for swing scaffolds.

(u) Spray Application—Painters

An employee engaged on all spray applications carried out in other than a properly constructed booth approved by the Department of Industrial Affairs shall be paid 43 cents per hour extra.

(v) Spray Painting—

(i) Lead paint shall not be applied by a spray to the interior of any building and no surface painted with lead paint shall be rubbed down or scraped by a dry process.

(ii) All employees (including apprentices) applying paint by spraying shall be provided with full overalls and head covering and respirators by the employer.

(iii) Where from the nature of the paint or substance used in spraying a respirator would be of little or no practical use in preventing the absorption of fumes or materials from substances used by an employee in spray painting, the employee shall be paid a special allowance of $1.20 per day.

3. Clause 10.—Multi Storey Allowance: Delete subclause (3) of this clause and insert in lieu the following—

(3) Rates For Multi-Storey Buildings

Except as provided for in subclause (4) of this clause, an allowance in accordance with the following table shall be paid to all employees on the building site. The second and subsequent allowance scales shall, where applicable, commence to apply to all employees when one of the following components of the building—structural steel, re-inforcing steel, boxing or walls, rises above the floor level first designated in each such allowance scale.

"Floor Level" means that stage of construction which in the completed building would constitute the walking surface of the particular floor level referred to in the table of payments.

From commencement of Building to Fifteenth Floor Level—33 cents per hour extra;

From Sixteenth Floor Level to Thirtieth Floor Level—42 cents per hour extra;

From Thirty-first Floor Level to Forty-fifth Floor Level—64cents per hour extra;

From Forty-sixth Floor Level to Sixtieth Floor Level—81 cents per hour extra;

From Sixty-first Floor Level Onwards—$1.01 per hour extra.

The allowance payable at the highest point of the building shall continue until completion of the building.

4. Appendix A—North West Shelf Gas Project: Delete this appendix and insert in lieu the following—

(1) Liberty to Apply

Liberty to Apply to insert provisions relating to future project is reserved.

5. Appendix B—Asbestos Eradication: Delete clause (5) of this appendix and insert in lieu the following—

In addition to the rates prescribed in this award, an employee engaged in asbestos eradication (as defined) shall receive $1.40 per hour worked in lieu of Special Rates prescribed in Clause 9(1) of this award with the exception of subclauses (b), (c) and (e).

MONUMENTAL MASONRY INDUSTRY AWARD 1989.

No. A36 of 1987.

2001 WAIRC 03811

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION.

PARTIES	CONSTRUCTION, MINING, ENERGY, TIMBERYARDS, SAWMILLS AND WOODWORKERS UNION OF AUSTRALIA—WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	BELLEVUE MONUMENTAL WORKS PTY LTD, CATHOLIC MONUMENTAL WORKS, CLAREMONT MONUMENTAL WORKS, RESPONDENTS
CORAM	COMMISSIONER J F GREGOR
DELIVERED	THURSDAY, 20 SEPTEMBER 2001
FILE NO	APPLICATION 1356 OF 2001
CITATION NO.	2001 WAIRC 03811

Result Award Varied

Order.

HAVING heard Ms J. Harrison on behalf of the Applicant and Mr K. Dwyer on behalf of the Respondents, and by consent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders—

THAT the Monumental Masonry Industry Award 1989 be varied in accordance with the following Schedule and that such variation shall have effect from the first pay period on and from 17th September 2001.

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

Schedule.

1. Clause 7.—Wages—

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

(2) Industry Allowance—

An industry allowance at the rate of $13.30 per week shall be paid for all purposes to each adult employed in the workshop to compensate for the following disabilities associated with monumental masonry—

(a) Working in wet conditions with water underfoot.

(b) Working on dirty work.

(c) The use of acid or other corrosive substances when cleaning down stone.

(d) Working in a dusty atmosphere.

Before exercising a power of inspection the representative shall give notice of not less than 24 hours to the employer.

B. Delete paragraph (a) of subclause (3) of this clause and insert in lieu the following—

(a) An employee specifically appointed to be a leading hand who is placed in charge of—

(i) not more than one employee, other than an apprentice, shall be paid $12.70 per week; or

(ii) more than one and not more than five other employees shall be paid $28.10 per week; or

(iii) more than five and not more than ten other employees shall be paid $36.50 per week; or

(iv) more than ten other employees shall be paid $47.50 per week in each case, in addition to the rate prescribed for the highest classification of employee supervised or his/her own rate, whichever is the highest.

2. Clause 9.—Special Rates and Provisions—

A. Delete subclause (3) of this clause and insert in lieu the following—

(3) Computing Quantities—

An employee, other than a leading hand, who is regularly required to compute or estimate quantities of materials in respect of the work performed by others shall be paid $2.96 per day or part thereof in addition to the rates otherwise prescribed in this Award.

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

(8) An employee holding a Third Year First Aid Medallion of the St. John Ambulance Association, appointed by the employer to perform first aid duties, shall be paid at the rate of $7.97 per week in addition to the prescribed rate.

PLASTER, PLASTERGLASS AND CEMENT WORKERS' AWARD.

No. A29 OF 1989.

2001 WAIRC 03814

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	THE WESTERN AUSTRALIAN BUILDERS' LABOURERS, PAINTERS & PLASTERERS UNION OF WORKERS, APPLICANT
	v.
	BELMONT CONCRETE CO, ANDERSON INDUSTRIES PTY LTD, COLOCRETE CEMENT PRODUCTS, RESPONDENTS
CORAM	COMMISSIONER J F GREGOR
DELIVERED	THURSDAY, 20 SEPTEMBER 2001
FILE NO	APPLICATION 1361 OF 2001
CITATION NO.	2001 WAIRC 03814

Result Award Varied

Order.

HAVING heard Ms J. Harrison on behalf of the Applicant and Mr K. Dwyer on behalf of the Respondents, and by consent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby orders—

THAT the Plaster, Plasterglass and Cement Workers' Award No. A29 of 1989 be varied in accordance with the following Schedule and that such variation shall have effect from the first pay period on and from 17th September 2001.

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

Schedule.

1. Clause 7.—Adult Trainee Casters: Delete subclause (4) of this clause and insert in lieu the following—

(4) A caster responsible for the training of a trainee under this clause shall be paid $2.62 per week extra whilst so engaged.

2. Clause 14.—Adult Trainee Casters: Delete subclause (1) of this clause and insert in lieu the following—

(1) Leading Hands: An employee placed in charge for not less than one day of—

(a) Not less than three and not more than ten other tradesperson shall be paid $12.53 per week extra;

(b) More than ten and not more than twenty other tradesperson shall be paid $19.80 per week extra;

(c) More than twenty other tradesperson shall be paid $26.48 per week extra.

(d) The rates herein prescribed shall be deemed to form part of the ordinary rate of wage of the employees concerned for all purposes of this Award.

Where the leading hand works under the supervision of a foreperson or of the employer for the major portion of the day, the extra rates set out in this subclause shall be halved.

TIMBER YARD WORKERS AWARD.

No. 11 of 1951.

2001 WAIRC 03812

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	CONSTRUCTION, MINING, ENERGY, TIMBERYARDS, SAWMILLS AND WOODWORKERS UNION OF AUSTRALIA—WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	BUNNINGS LIMITED, WHITTAKERS LIMITED, TIMBER TRADERS COCKBURN, RESPONDENTS
CORAM	COMMISSIONER J F GREGOR
DELIVERED	THURSDAY, 20 SEPTEMBER 2001
FILE NO	APPLICATION 1358 OF 2001
CITATION NO.	2001 WAIRC 03812

Result Award Varied

Order.

HAVING heard Ms J. Harrison on behalf of the Applicant and Mr K. Dwyer on behalf of the Respondents, and by consent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby orders—

THAT the Timber Yard Workers Award No. 11 of 1951 be varied in accordance with the following Schedule and that such variation shall have effect from the first pay period on and from 17th September 2001.

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

Schedule.

1. Clause 6.—Special Rates and Conditions—

A. Delete subclause (7) of this clause and insert in lieu the following—

(7) Disability Allowance—

Employees shall be paid an allowance in accordance with the following—

(a) Employees employed in bush or logging operations (other than log truck drivers)—at the rate of $16.37 per week.

(b) Employees employed in or in the immediate vicinity of sawmills and log truck drivers—at the rate of $10.79 per week.

(c) The allowance shall be paid during overtime but shall not be subject to penalty additions.

B. Delete subclause (9) of this clause and insert in lieu the following—

(9) Drivers who handle cash during any week or portion of a week as part of their duties and account for it shall be paid in addition to the rate of wage prescribed by Clause 29.—Wages, as follows—

For any amount up to	$ 20	$0.83 per week
Over $ 20 but not exceeding	$ 200	$1.53 per week
Over $ 200 but not exceeding	$ 600	$2.91 per week
Over $ 600 but not exceeding	$1,000	$4.02 per week
Over $1,000 but not exceeding	$1,200	$5.69 per week
Over $1,200 but not exceeding	$1,600	$8.30 per week
Over $1,600 but not exceeding	$2,000	$9.68 per week
Over $2,000		$11.08 per week

2. Clause 29.—Wages: Delete subclause (6) of this clause and insert in lieu the following—

(6) Leading Hands—

In charge of 3—10 employees—extra	$17.71
In charge of 11—20 employees—extra	$26.64
In charge of over 20 employees—extra	$34.60

AGREEMENTS—
Industrial—Retirements from—

THE WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

No. 1677 of 2001

IN THE MATTER of the Industrial Relations Act 1979

and

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

Department of Productivity and Labour Relations, 2 Havelock Street, West Perth W.A. 6005 will cease to be a party to the Department of Productivity and Labour Relations Agreement 1999 No. PSAAG 39 of 1999 as and from 18 October 2001.

DATED at Perth this 25th day of September 2001.

(Sgd.) J.A. SPURLING,
Registrar.

IN THE WESTERN AUSTRALIANINDUSTRIAL
RELATIONS COMMISSION

No. 1720 of 2001

IN THE MATTER of the Industrial Relations Act 1979

and

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

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division, WA Branch will cease to be a party to the Metro Meat International Limited Linley Valley Division Maintenance Employees Enterprise Agreement No. AG 373 of 1997 on and from the 26th day of October 2001.

DATED at Perth this 27h day of September 2001.

(Sgd.) J.A. SPURLING,
Registrar.

NOTICES—
Award/Agreement matters—

Application No. A 4 of 2001

APPLICATION FOR AN AWARD
ENTITLED "BURSWOOD CATERING AND ENTERTAINMENT PTY LTD EMPLOYEES AWARD 2001"

NOTICE is given that an application has been made to the Commission by The Australian Liquor, Hospitality and Miscellaneous Workers' Union, Western Australian Branch under the Industrial Relations Act 1979 for the above Award.

As far as relevant, those parts of the Award which relate to area of operation or scope are published hereunder.

3—SCOPE AND PARTIES BOUND

This award shall be binding upon all employees employed by Burswood Catering and Entertainment Pty Ltd Award 2001 and any successor, assignee or transmittee of the Burswood Catering and Entertainment Pty Ltd Award 2001 in the callings described in clause 5—Wages of this award.

4—TERM

The term of this Award shall be for the period until 1 July 2002 commencing on the first pay period after 3 October 2001.

5—WAGES

A. FOOD & BEVERAGE

1. Bar Attendant (Grade 1)
2. Bar Attendant (Grade 2)
3. Head Bar Attendant
4. Cellarperson
5. Waiter/Waitress
6. Steward/Stewardess
7. Head Waiter/Waitress
8. Head Steward/Stewardess
9. Snack-Bar Attendant
10. Bar Useful
11. Host/Hostess

B. KITCHEN

1. Chef
2. Qualified Cook
3. Cook Employed Alone
4. Breakfast and/or other Cook
5. Kitchen Hand
6. Qualified Butcher
7. Other Butcher

C. MISCELLANEOUS

1. Cafeteria Attendant (Grade 1)
2. Cafeteria Attendant (Grade 2)
3. Commissionaire
4. Valet/Carparking Attendant
5. Storeperson
6. Cleaner
7. General Hand
8. Guest Services Officer
9. Cashier
10. Wardrobe Attendant

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

J. SPURLING, Registrar.

PUBLIC SERVICE ARBITRATOR— Matters Dealt With—

2001 WAIRC 03822

PROPER CLASSIFICATION OF DEVELOPMENT OFFICER POSITIONS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION.

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	CHIEF EXECUTIVE OFFICER WATER CORPORATION, RESPONDENT
CORAM	COMMISSIONER P E SCOTT PUBLIC SERVICE ARBITRATOR
DELIVERED	FRIDAY, 21 SEPTEMBER 2001
FILE NO	PSACR 7 OF 2001
CITATION NO.	2001 WAIRC 03822

Result	Matter dismissed pursuant to s.27(1)
Representation	
Applicant	Mr B Cusack
Respondent	Mr S Rooke

Reasons for Decision.

1 The applicant on behalf of two of its members, Phillip James Dixon and John Nahun Mighall, seeks reclassification of their positions as Client Consultant—Development Section, South West Region of the respondent's operations from Level 4 to Level 5.

2 The respondent has raised a preliminary issue which, in essence, is that after some years of dispute between the two officers and the respondent as to the correct classification, a meeting was convened by Mr Damien Hutchens, the respondent's Senior Human Resources Consultant, with Mr Winston Holmes, the respondent's Manager South West Region and the two officers in October 2000. The evidence is that following a detailed discussion about a method of resolving the matter a proposal was put by Mr Hutchens to use the human resource consultancy firm Mercer Cullen Egan and Dell ("MCED") to provide a fair and reasonable process for a job evaluation with a view to resolving the appropriate classification. Mr Hutchens asked Mr Holmes if the South West Region which he managed would be prepared to accept such a process as the final determination of the matter and he said that it would. Mr Hutchens then asked if the two officers would be prepared to accept the outcome as a final resolution, "to accept the umpire's decision". Mr Hutchens says that acceptance of the review as final was a condition of the respondent undertaking the expense of engaging MCED. The respondent's two witnesses say that the two officers so agreed i.e. that they agreed to the process of having MCED provide a job evaluation with a view to establishing the classification as the final resolution of the matter.

3 The respondent says that on the basis of this agreement, the agreed process was implemented and MCED undertook the review and concluded that Level 4 was appropriate, that the parties are bound to accept that outcome and that it is inappropriate for the Public Service Arbitrator to proceed to deal with the matter. It seeks that the Arbitrator exercise the powers pursuant to s.27(1) of the Industrial Relations Act 1979 and in accordance with the requirements of s.26 and the Objects of the Act, to deal with the matter on the basis of equity, good conscience and substantial merits and therefore not proceed to hearing and determination of the merits of the claim.

4 The officers say that they did not agree to forgo their rights to take the matter further if the outcome of the MCED review was unsatisfactory.

5 The first question to be determined is whether Messrs Dixon and Mighall agreed to the MCED review constituting a final resolution of the matter. The evidence of the two officers is the key to this matter.

6 Mr Dixon's evidence was that at the end of the meeting in October 2000, Mr Hutchens made the statement that the Water Corporation would agree to have their positions reviewed again by MCED provided that "we would agree to "*accept the umpire's decision*"" (Exhibit 3). In his witness statement Mr Dixon said that to his recollection, his response was that "we would accept the decision "*provided it was fair and reasonable*"". Mr Mighall says in his witness statement (Exhibit 4) that "I recall that Mr Dixon and I agreed to accept the decision of MCED provided that it was "fair and reasonable"". Each says that he did not give any undertaking, either orally or in writing, to eliminate any right of appeal against MCED's conclusions.

7 In cross examination, Mr Dixon firstly said that there was no agreement in place to "sign away" his right to contest the outcome if he considered that it was not fair and reasonable. He then said that fairness and reasonableness related to the process and the results. He then said that he and Mr Mighall gave qualified agreement to the process but did not sign away their rights to contest the process or the result. He said that Damien Hutchens had asked "if we go through this process, do you agree to abide by the umpire's decision?" To which he claims he responded "yes, provided it is fair and reasonable." When asked what this related to he said "the umpire's decision". He then said that a fair and reasonable result would have been a classification consistent with what he says are the identical positions within the Perth region, which was level 5, which was what they were seeking. He then said that there was agreement with the process, that he accepted that the process was fair and reasonable—i.e. to get MCED to review the classification. He then said that his qualification, claimed to have been given in response to Mr Hutchens' question, did not relate to the process. He said that he was confident that Mr Hutchens and Mr Holmes understood his meaning that "provided it was fair and reasonable" meant provided it resulted in Level 5, even though he said "provided it is fair and reasonable". He said that he could have accepted the result as Level 4, but MCED's report showed that advice from other managers within the respondent had been considered in the process, the result was not merely based on his and Mr Mighall's submissions. He said this other information was, in his view, flawed. He went on to say that if MCED's report had simply made a recommendation of Level 4 without providing reasons, they would have had to accept it.

8 Mr Mighall's evidence in cross examination was that his response to Mr Hutchens' question about accepting the outcome was merely to say "yes" or "I agree", and he says that that should be considered in the context of his agreeing to what he claims Mr Dixon had said immediately before he spoke, being provided it was fair and reasonable, although he did not use those words himself. "Fair and reasonable" referred to both the process and the outcome. He could not say what Mr Dixon had meant but he made an assumption about it.

9 The first thing I note is that Mr Dixon's evidence, in particular, was contradictory and self serving. His initial reference to "fair and reasonable" was firstly intended to cover the process and outcome, then not to the process, only to the outcome. Initially, his reference to a fair and reasonable result was Level 5, and then he backtracked and said that under certain conditions he could have accepted Level 4. His objection to MCED considering information other than that provided by him and Mr Mighall is naïve.

10 I am not satisfied that Mr Dixon put any qualification on his acceptance of the proposition put by Mr Hutchens. In that regard I accept the evidence of Mr Hutchens. Even if he had put such a qualification, I conclude that in the context of a lengthy discussion about setting up a fair and reasonable or fair and equitable process, Mr Hutchens was entitled to conclude that any reference to it being fair and reasonable was merely reference to the process which had been agreed. It is highly unlikely that Mr Hutchens would have entered into a costly process of engaging an external consultant to undertake the review to finally resolve the long running matter if it was not agreed by all parties before knowing the result that they would accept whatever outcome the review brought as a final resolution. That was the purpose of the question he posed.

11 Further, even if Mr Dixon had given conditional agreement, notwithstanding the backtracking in his evidence, I conclude that his intention was only ever to accept the outcome if it achieved his purpose of a reclassification to Level 5. Nothing else would have satisfied him.

12 Mr Mighall's evidence was unconvincing. He assumed he knew what Mr Dixon's purported conditional agreement meant and has merely supported Mr Dixon's story.

13 In all of the circumstances, I conclude that agreement was given by all parties to accept the outcome of the MCED review, without conditions.

14 However, the applicant says that even if such an agreement was reached by the respondent's management personnel and Messrs Dixon and Mighall, that it is the applicant in this matter and its members have no authority to bind it to such an arrangement—it is entitled to pursue the matter in its own right. Further, it says that if it had been aware of any situation of its members being asked to forfeit any right to review by the Public Service Arbitrator, it would have strongly counselled its members against forgoing that right.

15 The objects of the Industrial Relations Act 1979, set out in s.6 include, amongst other things, objects of promoting goodwill in industry; encouraging and providing means for conciliation with a view to amicable agreement thereby preventing and settling industrial disputes; providing means for preventing and settling industrial disputes not resolved by amicable agreement; and providing for the observance and the enforcement of agreements and awards made for the prevention or settlement of industrial disputes.

16 Section 26 of the Act provides that the Commission in the exercise of its jurisdiction is to act according to equity, good conscience, and the substantial merits of the case without regard to technicalities or legal forms.

17 The respondent seeks that the Commission exercise its discretion pursuant to s.27(1)(a) of the Act to dismiss the matter or refrain from further hearing or determining the matter on the basis that further proceedings are not necessary or desirable in the public interest or for any other reason.

18 I am satisfied that Mr Dixon and Mr Mighall entered into an agreement with the respondent for the purpose of finally resolving a long standing disagreement about their level of classification, that they would all enter into a process of review which would involve MCED being engaged by the respondent to undertake that review. For the Public Service Arbitrator to now proceed to hear and determine the matter of the appropriate classification for these two officers would be to negate an agreement into which the two officers freely entered. They did not enter into the agreement in good faith. Accordingly, it is not appropriate that their case be dealt with.

19 I recognise that the role of the applicant in this is that of representing its members but that it is acting in its own right. I make no criticism of the applicant in this matter as I am satisfied that it was only in the process of cross examination that the lack of good faith on the part of Mr Dixon in particular, has been demonstrated and that the applicant in conducting this case was entitled to act on the representations made to it by its members. That being said, the respondent should not be put to the effort and the expense to defend, nor the Commission be required to spend its time and resources to hear and determine, a matter when the two officers the beneficiaries of the claim agreed to a means of resolution but when they did not like the outcome sought to have it overturned notwithstanding the terms of their agreement.

20 If the Arbitrator were to proceed to hear and determine this matter, it would be contrary to the objects of the Act particularly s.6(d) by not providing for the observance of the agreement reached between the parties in resolution of their dispute.

21 In all of the circumstances it is appropriate that the matter be dismissed in accordance with s.27(1).

2001 WAIRC 03820

PROPER CLASSIFICATION OF DEVELOPMENT OFFICER POSITIONS

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	CHIEF EXECUTIVE OFFICER WATER CORPORATION, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DELIVERED	FRIDAY, 21 SEPTEMBER 2001
FILE NO	PSACR 7 OF 2001
CITATION NO.	2001 WAIRC 03820

Result Matter dismissed pursuant to s.27(1)

Order.

HAVING heard Mr B Cusack on behalf of the applicant and Mr S Rooke on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT this matter be, and is hereby dismissed.

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

2001 WAIRC 03861

APPLICATION FOR INTERIM ORDER

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	DIRECTOR GENERAL/CHIEF EXECUTIVE OFFICER, FAMILY AND CHILDRENS SERVICES, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DELIVERED	TUESDAY, 25 SEPTEMBER 2001
FILE NO/S	P 26 OF 2001
CITATION NO.	2001 WAIRC 03861

Result	Application for interim order dismissed.
Representation	
Applicant	Ms M in de Braekt
Respondent	Mr D Matthews (of Counsel)

Reasons for Decision.

1. This is an application to the Public Service Arbitrator ("the Arbitrator) said to be pursuant to s.80E and 80F of the Industrial Relations Act 1979 ("the Act") filed on 6 September 2001. The application sets out a very detailed schedule of Grounds for the application; Particulars; and that an urgent interim order is sought to prohibit the respondent from continuing any disciplinary action including but not limited to any investigation, formal or informal, against Mr Han, the officer the subject of the application, in relation to an allegation made against him by a Ms Sylvester, until the matter is finally determined. The application also sought final orders in respect of that investigation. The applicant sought that the matter be brought on as a matter of urgency. The Arbitrator convened a conference pursuant to s.32 of the Act on 14 September 2001 at 9.00am. Late on the afternoon of 13 September 2001, the applicant forwarded to the Commission a further lengthy and detailed submission in support of the application for interim orders.
2. At the commencement of the conference on 14 September 2001, I indicated that it was not my intention at that stage to deal with the application for the interim orders on the basis that there was a need for the parties to discuss the substantive matter to ascertain whether conciliation might assist in resolving the matter, and that the respondent had had no real opportunity to prepare a response to the detail of the application and the applicant's additional submission. However, I proposed that, on the basis of the respondent's undertaking to take no further action in respect of Mr Han's case until the Arbitrator could reconvene for the purpose of addressing the interim orders application, that we reconvene to do that within a day or so. Due to difficulties in the parties' respective schedules, the matter was set down for Thursday, 20 September 2001 at 4.15pm and the applicant was invited to put any further written submissions by a specified time, and the respondent was to respond within a specified time.
3. Also at the commencement of the conference on 14 September 2001, the applicant expressed the view that the matter could not be resolved by conciliation and maintained that view throughout the course of the conference. It became clear to the Arbitrator that this view was correct, that the matter would not be resolved by conciliation.
4. In accordance with the procedures set out in the conference on 14 September 2001, the applicant presented a further written submission by facsimile transmission at 11.02 am on Tuesday, 18 September 2001. The respondent's submission was received at 8.50am on Thursday, 20 September 2001, the day of the anticipated speaking to submissions in respect to the interim order.
5. Also on the morning of 20 September 2001, I directed my Associate to advise the parties that at the hearing that afternoon I would invite their submissions regarding a number of decisions relating to the Commission's powers to issue interim orders. At 12.26pm on 20 September, the respondent filed an amended submission. Also that day, Ms in de Braekt, for the applicant, contacted my Associate expressing her concern at the lateness of the respondent's amended submission and that she would not have had adequate time to prepare a response before the hearing that afternoon. In short, the hearing scheduled for 4.15pm that day was vacated and rescheduled for 3.30pm on Monday, 24 September 2001. The applicant has subsequently filed a consolidated submission. The Arbitrator has heard from the parties as to their submissions.
6. The first issue to be noted is that the Arbitrator is without inherit jurisdiction. The jurisdiction and powers are limited to those set out in legislation, in this regard, pursuant to the Act. The question which arises is the power of the Arbitrator in exercising its jurisdiction. The powers of the Arbitrator are set out in s.80G of the Act by reference to Part II, Division 2 of the Act. Section 80G says—

   80G. Provisions of Part II, Division 2, to apply

   (1) Subject to this Division, the provisions of Division 2 of Part II that apply to or in relation to the exercise of the jurisdiction of the Commission constituted by a Commissioner shall apply with such modifications as are prescribed and such other modifications as may be necessary or appropriate, to the exercise by an Arbitrator of his jurisdiction under this Act.

   (2) For the purposes of subsection (1), section 49 shall not apply to a decision of an Arbitrator on a claim mentioned in section 80E(2).
7. Part II, Division 2 contains sections 22A to 49 inclusive. The powers contained within s.27 apply as do those

contained within s.32 which applies to the process which commenced proceedings in this matter.

8. The Full Bench in Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers—Western Australian Branch, in dealing with a s.72A matter relating to Ingham Chickens, (80 WAIG 4613 at 4614) described s.27(1), with possibly two or three exceptions, as procedural, and as machinery provisions only.

9. *RRIA v Federated Engine Drivers' and Firemens' Union of Workers of Western Australia* (IAC) (67 WAIG 315) dealt with the Commission's powers to make interim orders pursuant to s.44 of the Act. It also considered the Commission's powers elsewhere in the Act. At page 317 Brinsden J. noted—

> "Where then is the power to be found in the Act to make an order in the nature of this interim order, not within conciliation proceedings, but while arbitration proceedings are pending? The Act makes a distinction between conciliation and arbitration especially in section 32 which by subsection (1) requires the Commission in respect of any industrial matter which has been referred to it unless it is satisfied that the resolution of the matter would not be assisted by so doing, endeavour to resolve the matter by conciliation. By subsection (6) where the Commission does not endeavour to resolve a matter by conciliation or having endeavoured to do so, is satisfied that further resort to conciliation would be unavailing or is requested by all the parties to the proceedings to decide the matter by arbitration, it may decide the matter by arbitration. The conciliation proceedings pursuant to section 44, which is an alternative method as already explained of resolving disputes by conciliation, had broken down so the only method then left to the Commission to resolve this particular dispute was by arbitration. It seems clear that the power the Commission thought justified the making of the Order was the provisions of section 27(1)(v). I come to that conclusion because of the final sentence quoted in the passage of Chief Commissioner Collier addressed to the parties at the opening of the proceedings before the interim order was made which is set out earlier in these reasons since the words he uses mirror the words in section 27(1)(v) which I now set out—
>
> > "27.( ) Except as otherwise provided in this Act, the Commission may, in relation to any matter before it—
> >
> > (v) generally give all such directions and do all such things as are necessary or expedient for the expeditious and just hearing and determination of the matter.
>
> Under section 27(1)(v) the only things that may be done are giving of directions and doing all such things as are necessary or expedient "for the expeditious and just hearing and determination of the matter". All the other items of power provided by section 27 with possibly two or three exceptions are particular matters of procedure relevant to the hearing and determination of the matter. Three of the items are concerned with entry upon a manufactory or similar type of building, inspection of work and machinery and other items in any such manufactory or building, and questioning any person who may be in or upon any such manufactory or building, all of which items might be regarded as items giving the Commission power to better inform itself in respect of the subject matter of a dispute. The interim order is one which directly deals with an industrial procedure in the industry in respect of which the parties are engaged. The respondent contends that section 27(1)(v) supports such an order but for that to be so then the subsection must be given a very wide interpretation beyond merely a dragnet clause to cover any other form of direction or order or action of a procedural nature not covered specifically by the foregoing items. The Commonwealth Conciliation and Arbitration Act 1904 and Amendments has a similar provision to section 27 in section 41 and it contains in section 41(1)(o) an identical provision to section 27(1)(v). That subsection in the Commonwealth Act, when it was section 40(1)(p), was considered in the case of Gas Employees (Victoria) Award and Ors (1948) 61 CAR 2000 when it was held that it amounted to a machinery provision only. As the Court held, a section like section 40 or 41 is a section which enables the Court to deal with matters which have been properly brought before it. They do not confer substantive jurisdiction but merely legislate for the method by which the Court may exercise the jurisdiction already conferred upon it by other sections. I see no significant difference between the Commonwealth Act and the Act to justify us in giving to section 27(1)(v) any wider construction other than as a machinery provision. It would not support an order which is in the nature of an interlocutory injunction directly dealing with the manner in which the parties to an industrial dispute are to continue to conduct a facet of the industrial enterprise in which they are jointly engaged upon.
>
> In any event I am unable to see that the interim order has any relevance either directly or indirectly to furthering "the expeditious and just hearing and determination" of the matter referred to the Commission in Court Session. It seems clear enough from the remarks made by the Chief Commissioner to the parties, that the reason for making the order was to hold the status quo until the merits of the matter could be gone into and so as to prevent likely repercussions throughout the whole iron ore industry. Such a reason for making the interim order no doubt is justifiable in the interests of industrial harmony but the legality of such an order cannot find a resting place in section 27(1)(v).
>
> …
>
> If it were the case that nowhere else in the Act could be found a power to make interim orders coming within the definition of "finding" there may be strength in the argument of the respondent but in fact there are other sections as, for example, section 32."

Kennedy J. noted that—

> "It was very properly conceded by Mr Stone that the Commission had no inherent jurisdiction to make the order which it did—see The Queen v. Forbes (1972) 127 CLR 1—and further that the order had not been made pursuant to section 32 of the Act.
>
> In the end, therefore, the question came down simply to whether the order is capabale(sic) of being sustained by the power contained in section 27(1)(v) of the Act. In my opinion, it is not, that power being limited essentially to procedural matters. Subsection (1) is in the following terms—
>
> > Except as otherwise provided in this Act, the Commission may, in relation to any matter before it—
> >
> > (a) at any stage of the proceedings dismiss the matter or any part thereof or refrain from further hearing or determining the matter or part of it is satisfied—
> >
> > (i) that the matter or part thereof is trivial;
> >
> > (ii) that further proceedings are not necessary or desirable in the public interest;
> >
> > (iii) that the person who referred the matter to the Commission does not have a sufficient interest in the matter;
> >
> > (iv) that for any other reasons the matter or part should be dismissed or the hearing thereof discontinued, as the case may be;

(b) take evidence on oath or affirmation;

(c) order any party to the matter to pay to any other party such costs and expenses including expenses of witnesses as are specified in the order, but so that no costs shall be alloed(sic) for the services of any legal practitioner, or agent;

(d) proceed to hear and determine the matter or any part thereof in the absence of any party thereto who has been duly summoned to appear or duly served with notice of the proceedings;

(e) sit at any time and place;

(f) adjourn to any time and place;

(g) (deleted in 1982) conduct its proceedings in public unless the Commission, at any stage of the proceedings is of the opinion that the objects of the Act will be better served by conducting the proceedings in private;

(h) direct any person, whether a witness or an intending witness or not, to leave the place wherein the proceedings are being conducted;

(i) refer any matter to an expert and accept his report as evidence;

(j) direct parties to be struck out or persons to be joined;

(k) permit the intervention, on such terms as it thinks fit, of any person who, in the opinion of the Commission has a sufficient interest in the matter;

(l) allow the amendment of any proceedings on such terms as it thinks fit;

(m) correct, amend, or waive any error, defect, or irregularity whether in substance or in form;

(n) extend any prescribed time or any time fixed by an order of the Commission;

(o) make such orders as may be just with respect to any interlocutory proceedings to be taken before the hearing of any matter, the costs of those proceedings, the issues to be submitted to the Commission, the persons to be served with notice of proceedings, delivery of particulars of the claims of all partis, admissions, discovery, inspection or production of documents, inspection or production of property, examination of witnesses, and the place and mode of hearing;

(p) enter upon any manufactgory,(sic) building, workshop, factory, mine, mine-working, ship or vessel, shed, place, or premises of any kind whatsoever, wherein or in respect of which any industry is or is reputed to be carried on, or any work is being or has been done or commenced, or any matter or thing is taking or has taken place, which is the subject of a matter before the Commission or is related thereto;

(q) inspect and view any work, material, machinery, appliance, article, book, record, document, matter, or thing whatsoever being in any manufactory, building, workshop, factory, mine, mine-working, ship or vessel, shed, place or premises of a kind referred to in paragraph (p);

(r) question any person who may be in or upon any such manufactory, building, workshop, factory, mine, mine-working, ship or vessel, shed, place or premises in respect or in relation to any such matter or thing;

(s) consolidate or divide proceedings relating to the same industry and all or any matters before the Commission;

(t) with the consent of the Chief Commissioner refer the matter or any part thereof to the Commission in Court Session for hearing and determination by the Commission in Court Session;

(u) with the consent of the President refer to the Full Bench for hearing and determination by the Full Bench any question of law, including any question of interpretation of the rules of an organisation, arising in the matter; and

(v) generally give all such directions and do all such things as are necessary or expedient for the expeditious and just hearing and determination of the matter.

With the exception of the powers contained in paragraphs (a) and (c), each of the paragraphs prior to paragraph (v) deals with evidentiary or interlocutory procedural matters, and it is with respect to such matters that paragraph (v), in my opinion, also deals. The present order bears no relation to the 'hearing' of the matter as such. Nor does it, in my view, relate to the determination of the matter, "determination" representing the final disposition of a matter. (Compare the use of the words 'hear' and 'determine' in section 44(9) of the Act). To hold otherwise would be to give the Commission a very great scope for making coercive interim orders without any firm criteria and without the special procedures required by section 32(4) in the case of orders under section 32(3)(c)(i)."

10. Therefore, it is clear that the powers set out in section 27(1) do not provide the answer to this matter. The question then arises as to whether other sections of the Act provide the power. I note that the proceedings commenced pursuant to a s.32 conference. The decision in *RRIA v FEDFU* (supra) indicates that while s.44, under which the conciliation before the Commission in that matter proceeded, did not at that time provide any such power, that s.32 might do so. As His Honour, the President noted in *Thomas James Brown and President, State School Teachers Union of WA (Inc) and Others* (69 WAIG 1390 @ 1392) the provisions in s.32(3)(c) were added in 1984 to provide power to make specific interim directions and orders and that s.44 subsection (6)(ba), (i), (ii) and (iii) and (bb) were added later. His Honour went on to say "in *RRIA v FEDFU* (67 WAIG 315), it was not argued that s.32 empowered an interim order, because it did not exist in s.32 or indeed in section 44."

11. However, in the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers—Western Australian Branch (FBM 1 of 2000) (80 WAIG 4613) the Full Bench noted amongst other things that "certainly, s.27 and s.72A contain no express power to make interim orders. Nowhere in the Act is there power conferred expressly to make interim orders in the nature of injunctions in s.72A matters."

12. I have considered these decisions and conclude that if there is a power for the Arbitrator to make any orders of an interim injunctive nature as sought by the applicant in this matter, then it most likely arises from s.32. I note that s.32(3) provides—

"(3) Without limiting the generality of subsection (2) the Commission may, for the purposes of that subsection —

(a) arrange conferences of the parties or their representatives presided over by the Commission;

(b) arrange for the parties or their representatives to confer among themselves at a conference at which the Commission is not present;

(c) give such directions and make such orders as will in the opinion of the Commission—

(i) prevent the deterioration of industrial relations in respect of the matter until conciliation or arbitration has resolved the matter;

(ii) enable conciliation or arbitration to resolve the matter; or

(iii) encourage the parties to exchange or divulge attitudes or information which in the opinion of the Commission would assist in the resolution of the matter;"

13. Section 32(3) is to be read in context. That context is set out in subsection (2) to which it refers. Subsection (2) provides—

"(2) In endeavouring to resolve an industrial matter by conciliation the Commission shall do all such things as appear to it to be right and proper to assist the parties to reach an agreement on terms for the resolution of the matter."

14. Subsection (3) then provides that without limiting the generability of subsection (2), that is, without limiting the things which the Commission might do in endeavouring to resolve an industrial matter by conciliation, it may do those things set out in s.32(3). Paragraphs (a) and (b) of subsection (3) are clearly matters aimed at involving the parties in resolving the dispute between them by discussion. Paragraph (c) provides for the Commission to give such directions and make such orders as will prevent deterioration of industrial relations, while conciliation or arbitration resolve the matter; enable conciliation or arbitration to resolve the matters, or encourage the parties to exchange views. Paragraph (d) provides for the Commission to give any direction or make any order or declaration which it is otherwise authorised by the Act to give or make.

15. All of these provisions in subsection (3) are conditioned by the provisions of subsection (2) being that those things may be done "in endeavouring to resolve (the dispute) by conciliation". That is not the case here. The dispute was not going to be resolved by conciliation as the applicant correctly pointed out at the commencement of the conference pursuant to s.32 and is now to be arbitrated. Accordingly, the powers under s.32(3) are not available for the purposes of the interim order sought. Section 32(3) is not a general power to make those orders of an interim injunctive nature pending the arbitration of the matter but is specifically provided as a tool to conciliation.

16. The applicant submits that the jurisdiction and powers of the Public Service Arbitrator set out in s.80E and 80G, and particularly with reference to the necessary or appropriate modifications to Division 2, Part II referred to in s.80G (1), recognise that public sector matters were intended by the legislature to be special, and that the Public Service Arbitrator has power to make necessary modifications to his or her powers. The applicant says that if this were not so then the legislature would have so provided.

17. Section 80G(1) does not provide that where the Arbitrator deems necessary or appropriate, there is authority for the Arbitrator to do things which are not otherwise authorised by the Act. The provision is merely a machinery one whereby such references to, for example, "the Commission" in Division 2 of Part II can be modified to refer to the "Public Service Arbitrator" or where there are processes which are not appropriate, they do not apply. There is no substantive jurisdiction or power conferred by the section. Rather, it provides that other sections of the Act are imported. It does not provide for the Public Service Arbitrator, without there being a particular power or jurisdiction, to extend its own powers.

18. In all of these circumstances, whether or not the circumstances of this case meet the tests for an interim order as noted by the Full Bench in the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers (supra), there is no power for the Arbitrator to make the interim order sought. Therefore, the application for an interim order shall be dismissed.

APPLICATION FOR INTERIM ORDER

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	DIRECTOR GENERAL/CHIEF EXECUTIVE OFFICER, FAMILY AND CHILDRENS SERVICES, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DELIVERED	TUESDAY, 25 SEPTEMBER 2001
FILE NO/S	P 26 OF 2001
CITATION NO.	2001 WAIRC 03860

Result	Application for interim order dismissed
Representation	
Applicant	Ms M in de Braekt
Respondent	Mr D Matthews (of Counsel)

Order.

HAVING heard Ms M in de Braekt on behalf of the applicant and Mr D. Matthews (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders—

THAT the application for an interim order be and is hereby dismissed.

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

2001 WAIRC 03916

ACTIONS IN RELATION TO MR PETER HAN

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	DIRECTOR GENERAL/CHIEF EXECUTIVE OFFICER, FAMILY AND CHILDRENS SERVICES, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DELIVERED	THURSDAY, 4 OCTOBER 2001
FILE NO	P 26 OF 2001
CITATION NO.	2001 WAIRC 03916

Result	Application for interim order granted
Representation	
Applicant	Ms M in de Braekt
Respondent	Mr D Matthews (of Counsel)

Reasons for Decision.

1 On 25 September 2001 I dealt with an application for an interim order in respect of this matter and found that in accordance with the terms of s.32(2) of the Industrial

Relations Act 1979, in the context of conciliation not being able to resolve the matter and arbitration being required, 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).

2 Following that decision, on 26 September 2001, the applicant wrote to the Commission indicating that a decision of the Full Bench in *Minister for Education v State School Teachers Union of WA Inc.* number 116 of 1995 (75 WAIG 2684 at 2687) held to the contrary and asked that the matter be reopened to enable submissions on that decision. A conference was convened on 28 September 2001 at which time the respondent indicated that there was no opposition to the hearing being reopened for the purpose of dealing with that decision. I conclude that as this matter involves an application for an interim order and that the matter has not been finally disposed of, it is open to me to reopen the hearing of the application for the interim order to deal with the matter of the Full Bench decision. In particular, it is important that the Public Service Arbitrator's powers be dealt with.

3 The respondent provided a submission on 2 October 2001 in response to the applicant's written submission by its letter dated 26 September 2001 in respect of the impact and significance of the Full Bench decision in *Minister for Education v State School Teachers Union*.

4 I note in passing that the decision referred to by the applicant was the majority decision and that as a member of that Full Bench the Public Service Arbitrator as currently constituted came to a decision consistent with that issued on 25 September 2001. Having said that though, the decision of the majority of the Full Bench was that—

> "To say that the Commission cannot make an order under s.32 where conciliation has failed, that order being of an interim nature to enable arbitration (which is the next and final step under s.32), is to reduce the Act to an absurdity. It would mean that one would have to have concurrent applications under s.32 and s.44 of the Act, with the latter application existing purely to enable interim orders to be made to enable arbitration or to prevent further deterioration of the situation. That would be to read the powers under s.32 down to absurdity. To read the section as conferring the powers exercised in this case at first instance is to read the plain words in their ordinary natural meaning as conferring powers. Further, that interpretation would achieve the obvious purposes of the section of the Act (expressed through the objects of the Act, s.6(b) and (c) of the Act in particular)."

5 The respondent in its submission of 2 October 2001 sought to distinguish the decision of Full Bench in *Minister for Education v State School Teachers Union* on the basis that that decision dealt with a matter where the "conciliation process had been embarked on and had perhaps ended, although this is not unequivocally clear." The respondent says that the situation is quite different from the present one where the Commission found that it was clear that the matter was not going to be resolved by conciliation, and contradicts the applicant's letter of 26 September 2001 in which the applicant said that it had not absolutely ruled out the prospect of conciliated settlement of the conference on 14 September 2001.

6 Having considered the submissions of the parties, notwithstanding the view expressed in my earlier Reasons for Decision, I am bound to comply with the decision of the Full Bench as being binding upon a single member of the Commission. I am not satisfied that the decision of the Full Bench can be distinguished on the grounds noted by the respondent. Accordingly, and in compliance with the Full Bench decision, I am bound to conclude that s.32 enables an interim order to be made, where appropriate, even though conciliation may have been exhausted.

7 The question then arises as to whether or not the order sought, being to require the respondent to cease any disciplinary action, including but not limited to any investigation against Mr Han in relation to allegations made by Ms Barbara Silvester, until the matter is finally determined, is one which meets the requirements of s.32(3). Section 32(3) provides—

> "(3) Without limiting the generality of subsection (2) the Commission may, for the purposes of that subsection—
>
> (a) arrange conferences of the parties or their representatives presided over by the Commission;
>
> (b) arrange for the parties or their representatives to confer among themselves at a conference at which the Commission is not present;
>
> (c) give such directions and make such orders as will in the opinion of the Commission—
>
> (i) prevent the deterioration of industrial relations in respect of the matter until conciliation or arbitration has resolved the matter;
>
> (ii) enable conciliation or arbitration to resolve the matter; or
>
> (iii) encourage the parties to exchange or divulge attitudes or information which in the opinion of the Commission would assist in the resolution of the matter;"

8 It is subsection (3)(c) which provides the power, in accordance with the decision of the Full Bench, to make the orders. It is to make such orders as will in the opinion of the Commission prevent the deterioration of industrial relations in respect of the matter until conciliation or arbitration has resolved the matter; enable conciliation or arbitration to resolve the matter; or encourage the parties to exchange or divulge attitudes or information which in the opinion of the Commission would assist in the resolution of the matter.

9 Subsection (3)(c)(ii) and (iii) do not appear to be relevant to this matter because the orders sought will not actually enable arbitration to resolve the matter, such a matter would involve procedural machinery, issues such as exchanges of documents etc or the scheduling of the hearing, or other similar matters. Paragraph (iii) is in respect of encouraging the parties to express views and attitudes which is not the issue here. Therefore, the basis of the application would be that the Commission would make the order where it is of the view that it would prevent the deterioration of industrial relations in respect of the matter until arbitration resolved the matter. There is no formal evidence before me that industrial relations between the parties will deteriorate during the course of the hearing and determination of this matter in the absence of the order sought. However, in its submission of 24 September 2001, the applicant says that industrial relations between the parties will be prevented from deteriorating further if the interim orders are issued "because an alleged unlawful process will be restrained from continuing against a current employee of the organisation, until the final determination of the Commission. Faith and confidence in the employment relationship not only between Mr Han and the respondent, but also among other employees, will be further and perhaps irreparably damaged if the unlawful process is permitted to continue. It would also be inconsistent with facilitating a productive and harmonious workplace to allow the unlawful disciplinary process to continue against Mr Han, because it will entail Mr Han and other employees of the organisation to bear witness to the respondent breaching the very Act which it is attempting to enforce "albeit unlawfully and unreasonably" in disciplinary proceedings against Mr Han".

10 The applicant also urges that the tests set out by the Commission in *Brown v President SSTU and Others* (69 WAIG 1390 at 1393) and in *Corse v Robinson* (77 WAIG 321) be applied. These tests are—

1. That there is a substantial prima facie case to be tried.

2. The granting of the order sought will not produce a greater detriment to the respondent than would accrue to the employee if the order was not granted.
3. The consequence of the interim order is not irreversible.
4. The promptness of the lodgement of the application.
5. The issuing of the order is consistent with the objects and other relevant sections of the Industrial Relations Act 1979.
6. Other relevant issues as each case may require.

11 The respondent says that the process undertaken to date has been reasonable and appropriate in the circumstances, and denies that any interim order is necessary. It says that no injustice will accrue to Mr Han should the investigation proceed. In respect of the first ground I accept that there is a substantial prima facie case to be tried. An allegation that a public sector agency is undertaking an unlawful and unfair process in dealing with a disciplinary matter is indeed a serious claim. It is alleged that there are serious and incurable flaws in the process adopted by the respondent and this of course is a matter to be dealt with in the substantive hearing of this matter.

12 I accept that the granting of the order would not produce a greater detriment to the respondent than would accrue to the employee if the order were not granted. This is on the basis that the detriment to the respondent would be a delay of some weeks in it being able to pursue its investigation if the substantive application is not granted. The respondent did not commence to investigate the complaint until some months had passed after the alleged misconduct. I do not say this by way of concluding that the respondent has acted inappropriately in this delay but rather noting that the processes which occurred by way of Ms Silvester making a complaint to the employer followed criminal charges against the applicant in relation to, what I understand to be, the same incident being dismissed when no evidence was produced.

13 The consequence of the interim order is not irreversible in that it would be an interim order which, if the substantive application is not upheld then the respondent could proceed with its investigation. There is no question that the application was not lodged promptly. The application was made on 4 September 2001 following the commencement of disciplinary proceedings on 31 August 2001.

14 The issuing of the order may be consistent with the objects and other relevant sections of the Industrial Relations Act 1979 and there are certainly other relevant considerations in this matter.

15 The allegations raised by the applicant constitute serious challenges to the process undertaken by the respondent including the prejudice which may be created in the proper investigation in accordance with the Public Sector Management Act requirements if Dr Smith's investigation and report are found to be so flawed as alleged. Further, if the matter the subject of the allegation is beyond the employment relationship as alleged by the applicant then this too would create a serious issue of injustice for the applicant to face the continuation of an investigation where no right might exist for the employer to be involved in such a matter. Having said those things, I make is clear that I have not decided those matters but merely note that they are serious allegations being raised in respect of the investigation being undertaken by the respondent. It may be that those allegations are unfounded but nonetheless, if they are found to be true they would constitute a genuine injustice to Mr Han which could not be remedied by the declaration that the process be declared void ab initio.

16 Notwithstanding my concerns previously expressed as to the powers contained within s.32(3)(c), I am satisfied that there is the potential for injustice to Mr Han should the allegations raised by the applicant have foundation. Notwithstanding that there is no formal evidence before me, I accept 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. This is because there is serious prospect that faith and confidence in the employment relationships of the applicant and other employees with their employer may be damaged. Accordingly, the interim order sought ought issue.

2001 WAIRC 03919

ACTIONS IN RELATION TO MR PETER HAN

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT *v.* DIRECTOR GENERAL/CHIEF EXECUTIVE OFFICER, FAMILY AND CHILDRENS SERVICES, RESPONDENT
CORAM	COMMISSIONER P E SCOTT PUBLIC SERVICE ARBITRATOR
DELIVERED	FRIDAY, 5 OCTOBER 2001
FILE NO	P 26 OF 2001
CITATION NO.	2001 WAIRC 03919
Result	Application for interim order granted

Order.

HAVING heard Ms M in de Braekt on behalf of the applicant and Mr D Matthews (of Counsel) on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

1. THAT the respondent shall forthwith cease any disciplinary action (including but not limited to any investigation, whether formal or informal) against Mr Peter Han in relation to allegations made by Ms Barbara Silvester;
2. THAT this Order shall come into effect from the date hereof and shall remain in force until the determination of application P 26 of 2001 at which time it shall cease to have effect;
3. THAT either party may apply for the variation or cancellation of this Order prior to that time upon giving 24 hours notice of the intention to do so to each other.

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

2001 WAIRC 03772

UNION MEMBER TO RECEIVE A PERSONAL RECLASSIFICATION

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT *v.* MANAGING DIRECTOR, WATER CORPORATION, RESPONDENT
CORAM	COMMISSIONER P E SCOTT PUBLIC SERVICE ARBITRATOR
DELIVERED	MONDAY, 17 SEPTEMBER 2001
FILE NO	PSAC 10 OF 2001
CITATION NO.	2001 WAIRC 03772
Result	Memorandum of Agreement issued

Order.

WHEREAS this is an application for a conference pursuant to Section 44 of the Industrial Relations Act, 1979; and

WHEREAS on the 13th day of August 2001 and the 10th day of September 2001 the Commission convened conferences for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of the conference convened on the 10th day of September 2001, the parties reached agreement; and

WHEREAS the parties have requested that a Memorandum of Agreement be issued pursuant to Section 44(8) of the Industrial Relations Act, 1979;

NOW THEREFORE, the Commission, pursuant to the powers set out in Section 44(8) of the Industrial Relations Act 1979, hereby orders—

THAT the terms of the agreement between the parties set out in the attached memorandum reflect the final resolution of the matter in dispute between the parties.

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

MEMORANDUM OF AGREEMENT

BETWEEN

THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

and

MANAGING DIRECTOR, WATER cORPORATION

(No. PSAC 10 of 2001)

The parties agree that the following terms constitute the appropriate process to be applied to the claim that Mr Phillip Jackson's work be classified at Level 3.

1. THAT a review of the work performed by Mr Phillip Jackson be undertaken by Mr John Holland of Austral Training and Human Resources with a view to determining whether the work was appropriate to be classified at Level 2 or Level 3.
2. THAT if Mr Holland recommends that Mr Jackson's work was at Level 3 standard then the respondent shall pay Mr Jackson at the Level 3 salary for the period 1 July 1995 to 31 October 1999.
3. THAT the cost of the review referred to in paragraph 1. be borne by the Water Corporation.
4. THAT the results of the review be the final and a complete resolution of this matter.

2001 WAIRC 03898

DISPUTE OVER CONTRACTS OF EMPLOYMENT

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	HOSPITAL SALARIED OFFICERS ASSOCIATION OF WESTERN AUSTRALIA (UNION OF WORKERS), APPLICANT
	v.
	METROPOLITAN HEALTH SERVICE BOARD, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DELIVERED	WEDNESDAY, 3 OCTOBER 2001
FILE NO	PSAC 15 OF 2000
CITATION NO.	2001 WAIRC 03898
Result	Application divided

Order.

WHEREAS this is an application pursuant to Section 44 of the Industrial Relations Act 1979; and

WHEREAS on the 2nd day of August 2001 and the 28th day of September 2001 the Commission convened conferences for the purpose of conciliation; and

WHEREAS the conference on the 28th day of September 2001, dealt with a matter arising from the general matters raised in application PSAC 15 of 2000, concerning a particular officer, Mr Mark Wheeler;

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

THAT Application No. PSAC 15 of 2000 be divided into two parts, to become Application No. PSAC 15A of 2000 which shall deal with the claim in relation to Mr Mark Wheeler and Application No. PSAC 15 of 2000 which shall deal with the remainder of the matters raised in Application No. PSAC 15 of 2000.

[L.S.] (Sgd.) P.E. SCOTT,
Commissioner,
Public service arbitrator.

INDUSTRIAL MAGISTRATE—
Complaints before—

THE INDUSTRIAL MAGISTRATE'S COURT OF WESTERN AUSTRALIA
HELD AT PERTH

Claims No M 91 and M 98 of 2001

Date Heard: 29 August 2001

Date Delivered: 29 August 2001

BEFORE: G. Cicchini I.M.

BETWEEN—

The Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia

Claimant

and

AlintaGas Networks Pty Ltd

Respondent

Appearances—

Mr C Young of *the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* appeared for the Claimant

Mr RL Hooker instructed by *Messrs Mallesons Stephen Jaques, Solicitors*, appeared for the Respondent.

Reasons for Decision.

(Given extemporaneously at the conclusion of the hearing, extracted from the transcript of proceedings and edited by His Worship)

I will now deliver my decision in respect of the *"no case to answer"* submission that has been made.

I am dealing with matters No M 91 and M 98 of 2001 in which the claimant, ***The Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia*** alleges that the respondent, namely ***AlintaGas Networks Pty Ltd*** has breached clause 17.6(a) of the ***"AlintaGas—ASU and CEPU Varied Certified Agreement 2000"***, certified in accordance with section 170MD of the *Workplace Relations Act 1996*.

It is alleged that the respondent breached the agreement on or about 4 April 2001 and again on or about 12 April 2001 by refusing to allow, without loss of pay *"a union delegate"* in

each instance the necessary time during work hours to confer with ***AlintaGas Networks Pty Ltd*** on matters affecting employees whom they represented.

The evidence given by Mr Shane O'Byrne, being the claimant's organiser, together with that of each of Mr Cameron Mableson and Mr Mark Christopher Pratt clearly establishes that each of Mr Mableson and Mr Pratt were employees of the respondent. The evidence also establishes that both Mr Mableson and Mr Pratt were shop stewards at the material times. They engaged themselves in matters concerning employees of the respondent. Each of them was refused permission to attend a meeting in the first instance and a report back meeting in the second instance. It is in respect of those meetings that the matters are before me.

The issue, succinctly put, and which is the subject of the *"no case to answer"* submission made, concerns whether the claimant on its own evidence can establish that each of Mr Mableson and Mr Pratt were union delegates at the material times. Were they persons to whom clause 17.6(a) of the agreement applied?

It is axiomatic that the respondent submits that it is not possible to establish either directly or by inference that each of them was in fact a union delegate.

The term *"union delegate"* is not defined within the agreement.

I am asked by the claimant to infer that, given the duties exercised by each of Mr Mableson and Mr Pratt in their capacity of shop stewards, and given their conduct and interrelationship with the respondent in the past, that I should regard them as being union delegates. I should find that it is possible to infer, on the evidence that is before me, that *"shop stewards"* and *"union delegates"* are one and the same. To some extent the argument is one developed on the basis of custom. In my view, that is an incorrect approach. The approach to be taken is one of determining what *"union delegate"* means. As stated, it is without definition in the agreement. It is not for me, in some casual way, unsupported by evidence, to link the two. It may be that the positions of shop steward and union delegate are one and the same, but for me to hold that they are one and the same, I must have evidence to that effect.

There is no evidence that would enable me to so find, even on a prima facie basis. The meaning of *"union delegate"* can only be resolved by reference, in my view, to the agreement, having regard to the context of the term within agreement. I agree with the submissions made by Mr Hooker in that regard.

It is clear that pursuant to clause 17.6 of the varied certified agreement, a union delegate is given certain rights. Those rights are conferred by virtue of his or her position being one that is recognised by the respondent. It is that issue of recognition that clause 17.5 concerns itself with. Upon written notification by the union that certain employees are appointed as union delegates, such will be recognised and accredited by the respondent. A person who is not recognised cannot exercise the rights conferred in clause 17.6. At the very least, to enable the claimant's claim to proceed, there must be some evidence before the Court going to the notification of the appointment of both Mr Mableson and Mr Pratt as union delegates. There is no such evidence of written notification before the Court.

In my view, it matters not that Mr Mableson or indeed Mr Pratt may have been appointed prior to the inception of the agreement. There is a formal requirement within the agreement that there be written notification for their rights to accrue pursuant to the provisions of clause 17.6. There is a requirement under the agreement that there be written notification given to enable that accreditation to take place, which would then enable clause 17.6 to apply. There is simply no evidence of that.

Furthermore, there is no evidence of the appointment of Mr Mableson and Mr Pratt in any event. It is not possible to conclude that being elected as a shop steward equates to being appointed as a union delegate. In my view, the very fact that there is a difference in that terminology must draw into doubt whether or not a union delegate equates to a shop steward. The reference by each of the witnesses to being elected stands in stark contrast with the terminology used within clause 17.5 which, in my view, must be looked at in order to define what "union delegate" means. Of course that clause refers to an appointment. The evidence, as it stands, draws into question whether or not the positions are one the same.

Additionally, I conclude that both estoppel and acquiescence do not apply. I accept Mr Hooker's arguments in relation to those issues. I do not intend to comment with respect to the same, other than to say that it appears that custom does not assist the claimant in this instance in view of the decision in Constan ***(Constan Industries of Australia Pty Ltd v. Winterthur Insurance (Australia) Ltd, (1986) 60ALJR 294).*** I agree with Mr Hooker's conclusions in regard to the application of that authority. In my view custom does not assist the claimant in any event.

For the reasons that I have given I have concluded that I am bound to find with respect to each of the claims that there is *"no case to answer"*.

The claims will accordingly be dismissed.

G. CICCHINI,
Industrial Magistrate.

THE INDUSTRIAL MAGISTRATE'S COURT OF WESTERN AUSTRALIA
HELD AT PERTH

Complaint No. 315 of 2000

Date Heard: 20 September 2001

BEFORE: WG.Tarr I.M.

BETWEEN—

Robert William McLeod

Complainant

and

BRL Hardy Limited

Defendant

Appearances—

Mr D Clarke appeared as agent for the Complainant.

Mr J Brits (of Counsel) appeared for the Defendant.

Reasons for Decision.

(Given extemporaneously at the conclusion of the hearing, extracted from the transcript of proceedings and edited by His Worship)

HIS WORSHIP: This is an application by way of complaint by the Complainant that he was unfairly, harshly or oppressively dismissed from his employment with BRL Hardy Limited contrary to the provisions of section 18 of the *Workplace Agreements Act 1993.*

The Complainant, in his particulars of claim, states that he was employed by BRL Hardy Limited at Moondahbrook Vineyard from November 1997 until 4 November 2000 as a casual employee. The Complainant however claims that his employment was actually full time.

The Complainant was employed under a workplace agreement (see exhibit B), which provides for the employment of casual employees under clause 19. There are a number of classifications of employees under the agreement, including full time employees, casual employees and annual employees and much has been made of the hours worked having regard to clause 19 and, in particular, the provisions of clause 19.9.1.1. That provision provides for the review of the status of the employment of a casual employee with a view to a full time position under a certain formula and a similar formula applies in relation to annual employees.

The Complainant has claimed, not with any conviction I would suggest, that he was a full time employee. He used words like he "felt" he was a full time employee and produced a schedule of his hours of employment from 17 April 1997 through to 3 November 2000 (see exhibit C). It is interesting to do a break-up of the time worked using that schedule. For the twelve months between 17 April 1997 and 10 April

1998, the Complainant worked 26 weeks. Nine of those 26 weeks were 38-hour weeks and in the other 17 weeks, less than 38 hours were worked, the least number of hours worked in any of those weeks was 22. It is clear during that twelve-month period the Complainant only worked half the number of weeks in the year.

The following year, from 17 April through to the end of March 1999, the Complainant worked 47 weeks and 19 of those 47 weeks were 38-hour weeks. In all the others, less than 38 hours were worked and the least hours worked in one of those weeks in that period was 8 hours.

The evidence before me in relation to that year and the following year is that they were years of capital works, explained as the establishment of the vineyard, but as the vineyard is established, it then goes onto maintenance and the number of employees required in the maintenance period is considerably less.

For the following year, from April 1999 to 24 March 2000, the Complainant worked 43 weeks. Twenty of those weeks were 38-hour weeks. In the other 23 weeks, less than 38 hours were worked and the least hours worked was 22 hours in the week ending 7 January 2000.

From 24 March 2000 through to 3 November 2000 is a period of eight months and I have calculated that in that period there would be approximately 34 pay weeks. The Complainant worked 28 weeks and of those 28 weeks, 12 were 38-hour weeks and in the others, less than 38 hours were worked and the lowest number of hours worked in any one of those weeks in that period was 14 hours.

In item 3 of the statement of claim of the Complainant it is said that he was paid a gross wage of $646.44 per week for 38 hours in each week between November 1997 and 4 November 2000. That is clearly not the evidence before this Court. The evidence before this Court is that the Complainant was not working on a full time basis and did not work 38 hours per week for every week during that period.

The witness for the Defendant, Mr Anthony James Kennar, gave in his evidence some insight into the industry. He has given evidence that at the time of capital works, when establishing a vineyard, there is a need to employ more employees than when a vineyard has been established. He said within the industry there is a ratio of one permanent employee per 100 acres and because of the seasonal nature of the industry, employers in the industry were reluctant to make employees permanent, notwithstanding the provisions of the workplace agreement. He said that, from his memory, there are only two people who have worked the hours in excess of those mentioned in clause 19 but there was a consideration given as to whether or not those two should be made permanent, but, at the end of the day, it was decided that it was not appropriate because at the end of the capital works period the vineyard would go back to a more seasonal operation.

There is, I suppose, what can be called a label test in relation to whether or not an employee is a casual or full time employee. As the authorities say, just because someone is labelled a casual employee, it does not necessarily follow that the Court cannot find otherwise. There are a number of matters that a Court should take into account. I think one of those would be the nature of the industry. The evidence before me is that this is an industry which employs a lot of casual people because of its nature. In this case the Complainant was paid an hourly rate under the award which applied to the industry, and the hourly rate had a twenty per cent component added which compensated the employee for annual leave, sick leave and other types of leave.

The Complainant has been employed on this basis over a period of 10 years, as I understand the evidence. He has, as do most employees in the industry, moved around trying different work and then come back. The relationship between Mr Kennar and the Complainant has been described as generally cordial, although that was not the word they used. But both admitted that neither had had a harsh word between them. There is some evidence of a conversation outside a shop in Gingin on 4 November 2000. There is some dispute as to how the conversation went. The Complainant in his statement of claim and in evidence, to some extent, raised the question of letters that had been written to South Australia. As I understand the evidence, he was not involved in that although a member or members of his family were. This was some time in November and it seems to me that there was nothing affecting the relationship between Mr Kennar and the Complainant as a result of those letters, which had been written and discussed some time in June of that year.

I have not dissected exhibit C any further than I have articulated in these reasons, but it is clear to me that in that period the Complainant was plainly not working 38 hours each and every week as a full time worker would. He worked less than that in most weeks. As I said in relation to the second example where the Complainant worked 47 weeks in that year, only 19 of those weeks were 38-hour weeks. The Complainant at the time, it would seem, accepted his employment status and it was because of a medical condition that he, on 4 November 2000, said he would have to go on light duties in a week's time or so. It is Mr Kennar's evidence that the Complainant said he would have to go on "very" light duties. As I understand the evidence, after the Complainant's hernia operation he was on light duties and had been for some time. That was why he was given the job of driving the lawnmower and not more onerous duties.

The letter from the medical practitioner tendered (see exhibit F) suggested the Complainant was going to be unfit for duty for most of November and then for the next 2 months could be placed on light duties. It was the evidence of Mr Kennar that when there was some discussion about light duties, there was a suggestion, which is not in dispute, that Mr McLeod make use of his unemployment insurance policy and then after Christmas his situation would be reviewed. That seems to be credible evidence taking into account the relationship between Mr Kennar and Mr McLeod.

The Complainant, on 19 November 2000, only a short time after the discussion on 4 November 2000, and still within the four week period during which the Complainant was declared by his medical practitioner to be unfit for work, made this complaint. The complaint was listed for mention only on 13 December 2000. Mr Kennar was criticised for not taking some conciliatory action after receiving the complaint but by 13 December 2000 when the matter was listed for mention only, agents, as I understand it, represented both parties. I cannot see that Mr Kennar can be criticised and in breach of his obligation under the workplace agreement for not trying to conciliate on his own initiative. Both parties were represented and could well have sought a pre-trial conference at that time. The Defendant had an obligation to give an indication to the Court as to what its attitude was to the complaint and it is clear that Mr Kennar refuted the allegation that there had been an unfair, harsh or oppressive dismissal.

The matter went to a pre-trial conference, which was the next step, called for in March and scheduled in April 2001 and at that time there was no settlement. The statement of claim was clearly incorrect in a number of fundamental issues, and that prolonged proceedings to some extent and by then a defence had been filed. I do not see that there can be any criticism of Mr Kennar in these circumstances. It was not he who initiated the proceedings.

I think it is open to me, on the evidence, to conclude, firstly, that Mr McLeod was a casual employee. That had been the relationship for a long time although, as I said, during the period covered by the schedule that has been tendered (exhibit C) he worked longer hours and more days because of a number of reasons. Having found that, I suppose there is no need to take the matter further. As was mentioned, the onus of proof in these matters is on the Complainant to satisfy the Court on the balance of probabilities that there was a dismissal contrary to the provisions of section 18 or section 51 of the *Workplace Agreements Act 1993*. There is little reason, I believe, why I should not accept the versions of both parties that there had never been a harsh word between them. There was some discussion on 4 November 2000 but the casual employment, as I have found, was left up in the air and probably had Mr McLeod, when was ready to go back to work, did as he had done in the past, and gone along to see Mr Kennar, it may well be that he would still be employed on a similar basis.

I do not believe, for the reasons that I have given, that there was any dismissal from employment. I find the complaint not proven. I find in favour of the Defendant and the matter will be dismissed.

There will be no order as to costs.

W.G. TARR,
Industrial Magistrate.

UNFAIR DISMISSAL/ CONTRACTUAL ENTITLEMENTS—

2001 WAIRC 03746

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	DEAN ANTHONY AMOROSO, APPLICANT
	v.
	BELLVALE NOMINEES PTY LTD, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	THURSDAY, 13 SEPTEMBER 2001
FILE NO	APPLICATION 7 OF 2001
CITATION NO.	2001 WAIRC 03746

Result	Order for costs made.
Representation	
Applicant	Mr D. Amoroso (by way of written submissions)
Respondent	Mr A. Beer (by way of written submissions)

Reasons for Decision—Costs

1 Further to the Commission's Reasons for Decision which issued on 28 June 2001 the respondent claimed costs as follows—

"(a) Wages for the Transport Manager
3 hours x $40.00 $120.00

(b) Wages for the Heavy Haulage Manager
3 hours x $40.00 $120.00

(c) Wages for the Paymaster
3 hours x $30.00 $ 90.00

(d) Wages for Gd 8 Truck Driver
3 hours x $20.00 $ 60.00

(e) Lost of cartage fee—truck driver
3 hours x $95.00 $285.00

(f) Travel—vehicle expenses—
36 kilometres x 2 vehicles @ 55.8c per kilometre $ 40.00

(g) Trial preparation costs—
A Beer, 16 hours x $30.00 $480.00

Total Costs = $1,195.00"

2 Mr Amoroso disagrees with the amount claimed. He does however agree to pay the amount claimed for the transport manager being $120.00 and also the expense for one vehicle of $20.00. Mr Amoroso objects to the other persons brought along to the Commission. He refers to them as the transport manager's "friends", that he did not know them and certainly did not request that they came along. He does not agree with the trial preparation costs claimed by Mr Beer and he disputes the wages claimed for the Gd 8 Truck Driver.

3 Both parties have requested the Commission to decide this matter on the basis of the written material provided by them. This includes the further submission of the respondent that they would be prepared to accept the sum of $200.00. Mr Amoroso disputes this figure and relies upon his letter to the Commission already referred to.

4 The reason why the Commission provided the respondent with an opportunity to claim costs is because the respondent attended on the 22 June 2001 in order to defend the claim made against it by Mr Amoroso that he had been unfairly dismissed. The claim the respondent was required to defend was Mr Amoroso's claim that he had been told that if he did not drive a certain truck he would have no job, what he had related to his supervisor regarding the reliability of the truck and that other employees had refused the job before himself. Mr Amoroso would have been aware from the respondent's Notice of Answer and Counter Proposal that the respondent would be opposing his claim by bringing evidence about what he had been told regarding the refusal of work from his supervisor, the reliability of the truck in question, the normal practice carried out by other drivers of travelling at any time to avoid the heat of the day, that the majority of drivers "jump" at the opportunity to do long distance travelling, that no driver has been issued an ultimatum and that a number of drivers who work regularly on specific jobs are not offered the job as they are too suited for the role they are performing.

5 On that basis, Mr Amoroso's response to the issue of costs is not reasonable. It may have been the transport manager who dismissed Mr Amoroso, but the reasons given by Mr Amoroso for making his claim in this Commission properly required the respondent to bring evidence from other drivers. I have little doubt that the costs properly incurred by the respondent which were wasted due to Mr Amoroso's non-attendance exceed the minimum $200.00 which the respondent is prepared to accept. I have no hesitation therefore in ordering Mr Amoroso to pay the respondent within 7 days of today's date the sum of $200.00 by way of costs. A Minute of Proposed Order now issues to that effect.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	DEAN ANTHONY AMOROSO, APPLICANT
	v.
	BELLVALE NOMINEES PTY LTD, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	TUESDAY, 18 SEPTEMBER 2001
FILE NO	APPLICATION 7 OF 2001
CITATION NO.	2001 WAIRC 03788

Result	Order for costs made.
Representation	
Applicant	Mr D. Amoroso (by way of written submissions)
Respondent	Mr A. Beer (by way of written submissions)

Order.

HAVING HEARD Mr D. Amoroso (by way of written submissions) on his own behalf as the applicant and Mr A. Beer (by way of written submissions) on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders—

THAT Dean Anthony Amoroso pay the sum of $200.00, by way of costs, to Bellvale Nominees Pty Ltd within 7 days of the date of this Order.

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

2001 WAIRC 03756

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	JAMES PETER BARRETT, APPLICANT *v.* 6PR SOUTHERN CROSS RADIO PTY LIMITED, RESPONDENT
CORAM	COMMISSIONER J H SMITH
DELIVERED	FRIDAY 14 SEPTEMBER 2001
FILE NO	APPLICATION 190 OF 2001
CITATION NO.	2001 WAIRC 03756

Result	Applicant unfairly dismissed. Order made that the Respondent pay the Applicant compensation of $79,250.
Representation	
Applicant	Mr A L Drake-Brockman of counsel
Respondent	Mr R L Hooker of counsel

Reasons for Decision.

1 The Applicant, James Peter Barrett, made an application under s.29(1)(b)(i) and (ii) of the *Industrial Relations Act* 1979 ("the Act"). The Applicant claims that he was harshly, oppressively and unfairly dismissed by 6PR Southern Cross Radio Pty Ltd on 12 January 2001. At the time the Applicant's employment was terminated he held the position of Sales Director of Radio Stations 6PR and 6IX.

2 The Respondent conceded at the opening of the Applicant's case, that the Applicant was unfairly dismissed by the Respondent on grounds that the Respondent failed to comply with s.41 of the *Minimum Conditions of Employment Act* 1993. Further, it was conceded by the Respondent that the Commission should make an order for compensation to the Applicant for unfairly dismissing him. The only substantial issue in dispute between the parties in relation to the claim for unfair dismissal is the quantum of compensation the Commission should order.

3 The Applicant also claims pursuant to s.29(1)(b)(ii) of the Act that he was denied the following benefits under his contract of employment, not being benefits he was entitled to under an award or industrial agreement—

(a) Payment of full remuneration for the period 13 January 2001 to 31 August 2001 being an amount for liquidated damages at law, arising from the Applicant's contract of employment which was for a fixed term from 1 September 2000 to 31 August 2001;

(b) Payment of remuneration for at least twelve months, being payment in lieu of reasonable notice;

(c) Payment of remuneration of up to six months' pay as a redundancy payment, being a reasonable redundancy payment.

4 The Applicant gave evidence at the hearing which was substantially unchallenged by the Respondent in cross-examination.

Background

5 At the time of termination of his employment with the Respondent, the Applicant was aged 53. He has had a long career in radio broadcasting having worked in the industry for 28 years in Victoria, New South Wales, Queensland and Western Australia. Throughout this time the Applicant has been engaged in sales and advertising. Further, he has held sales management positions since May 1975.

6 The Applicant was first employed by the owners of Radio 6PR in Perth from sometime in 1990 until 1994, when his employment was terminated on grounds of redundancy. His termination at that time occurred shortly after the Respondent took over the running of Radio 6PR. In January or February of 1996, the Respondent's Managing Director, Mr Tony Bell, approached the Applicant and offered him the position of General Sales Manager for Radio 6PR and 6IX. When Mr Bell offered the position, he (Mr Bell) informed the Applicant that he should have a fairly solid and lengthy career with the Respondent as it was projected that the Respondent's business would grow over the next few years.

7 On 1 May 1996 the Applicant entered into a written agreement with the Respondent to take up the position of General Sales Manager of 6PR and 6IX. The agreed remuneration was as follows—

"Remuneration Package Summary—

* Annual salary of $50,000 paid in fortnightly instalments;
* Commissions on all sales in Perth for 6PR and 6IX, paid at the rate of 0.85%. You will receive commission at this rate on all sales booked and broadcast in each month, excluding production costs;
* You will be provided with a fully maintained company vehicle and a total of $1,200 will be paid annually to cover phone costs;
* You will be directly responsible to the General Manager, and
* You are entitled to four weeks annual leave.

6PR and 6IX reserves the right to alter the commission structure in the event that ratings for the two stations improve resulting in a substantial increase in demand for advertising on the two stations."

8 In July 1997 the Applicant entered into an arrangement with the Respondent that he would continue to personally carry out the duties of the position of General Sales Administration of 6PR and 6IX but that he would be engaged to carry out the work through Barzar Pty Ltd, a company created by himself and his partner. The Applicant testified that the reason his company was formed was because his partner was intending to carry out consultancy work with a number of radio stations. A draft of the proposed contract was tendered as evidence in these proceedings. As part of the arrangement the Applicant tendered a written resignation on 17 July 1996. It is apparent from the draft and from the evidence given by the Applicant that the duties of the position and the remuneration that was paid to Barzar Pty Ltd was not substantially different to the remuneration agreed in the 1996 contract of employment.

9 The Respondent entered into a further contract for the Applicant to provide his services to the Respondent through Barzar Pty Ltd on 1 July 1998. Pursuant to the 1998 contract, it was agreed Barzar Pty Ltd would provide services for the position of General Sales Administration for not only Radios 6PR and 6IX, but also for 96FM, which is another radio station owned by the Respondent. The 1998 contract provided for some changes to remuneration which included a monthly cash incentive which was geared to increasing the combined "Direct Price Waterhouse" share of the Perth radio broadcasting market for 6PR/6IX and 96FM.

10 In July 2000 Mr Shane Healy, the Respondent's General Manager, advised the Applicant that he intended to engage a Sales Manager for 96FM and the Applicant would be offered the position of Sales Director of 6PR/6IX. At the time the offer was made the Applicant was solely responsible for twenty salespersons, two agency salespersons and interstate co-ordinators. The Applicant testified that he was devastated about the proposed change. He said that he had consistently asked for assistance, which had been denied. The Applicant testified that Mr Healy told him, "Frankly, you haven't been able to do the job". The Applicant gave uncontradicted evidence that he could not understand why this comment would be made by Mr Healy as he had just received a national industry RAWARD. The RAWARD he received was for "Best Station Sales Achievement—Metropolitan Finalist" for 2000. The certificate stated the award was to "96FM-James Barrett". The Applicant had previously received

the same award in 1993 and 1998. Despite the fact the Applicant was unhappy about the loss of 96FM, he accepted Mr Healy's decision and a contract of employment was entered into between the Applicant and the Respondent on 16 October 2000. The contract, by its terms, took effect from 1 September 2000. The material terms of the contract are as follows—

"Contracted Package—

a. An annual contracted fee of $50,000 paid in fortnightly instalments.

b. Commissions on all sales in Perth for 6PR and 6IX paid at the rate of 1.1% till

c. 28th February 2001 then 1%. You will receive commission at this rate on all sales booked and broadcast in each month, excluding production costs.

1. Further, you will receive a monthly incentive should the Direct Price Waterhouse share for 6PR/IX be as follows—

6PR Direct:

36% to 37.9%	$1,000
38% to 39.9%	$2,000
40% plus	$3,000

2. Further, a monthly cash incentive which is geared to increasing the combined "overall" Price Waterhouse share for 6PR and 6IX. The incentive is therefore tiered accordingly—

6PR / 6IX Overall:

21% to 22.9%	$2,000
23% to 24.9%	$5,000
25% plus	$10,000

3. If the 12 months figure for 2000—2001 achieves above $9,000,000, then you will receive $1,000 for every $100,000 above that figure, payable in a lump sum at the end of the financial year.

4. a. You will be provided with a fully maintained company vehicle.

b. you will be directly responsible to the General Manager.

6PR reserves the right to alter the commission structure in the event that ratings for the two stations improve resulting in a substantial increase in demand for advertising.

Responsibilities:

a. To represent 6PR and 6IX to the business community in Perth.

b. Develop and maintain a sales department of the highest ethical and performance standards in order to optimise our revenue position out of the Perth market.

Superannuation:

We will immediately pay an amount equal to the requirements of the Occupational Superannuation Standards Act.

Taxation:

Tax will be deducted using tables supplied by the Australian Taxation Office.

Termination:

a. You may terminate this agreement by giving the company four weeks notice in writing.

b. The Company may terminate your employment at any time by the giving of notice in writing in accordance with Section 170DB(s) of the Industrial Relation Act.

c. Additionally, 6PR may dismiss you without notice for negligence, misconduct or other sufficient cause in which case you will be entitled to payment only up to the date of dismissal.

d. **Payment of commission on Termination—**

In the event of your resignation, or termination of employment by 6PR other than by summary dismissal, commission shall be payable on advertising booked by and attributable to you and broadcast up to and including the last day of the month in which termination takes effect. In the event of summary dismissal, commission shall be payable on advertising booked by and attributable to you and broadcast up to and including the day of dismissal."

11 The Respondent appointed Mr Declan Kelly as a Sales Director for 96FM. Mr Kelly commenced in the position of 96FM Sales Director on 24 August 2000. Mr Barrett then resumed his former role as 6PR/6IX Sales Director with responsibility for national, agency and Perth direct business for the two stations.

12 On 1 September 2000 Mr Bell was reported in the "West Australian" newspaper as saying that the Respondent had posted a 33.7% rise in net full year profit to $19.3M. After making some comments about Channel 9 in Adelaide and improvements in ratings and revenue for 96FM, Mr Bell was also reported as saying that he stopped short of breaking down the performance of individual businesses, but that the 6PR-96FM combination had achieved earnings growth of 42%.

13 In the June 2000 Price Waterhouse revenue survey for the Perth market, it was reported that 6PR and 6IX, as at June 2000, had increased sales within the market overall by 1.42% in the preceding year and overall. By December 2000 it appears that the 6PR and 6IX share of sales had declined by 4.9%. Mr Barrett, however, testified that 6PR/6IX's share of the market was fairly strong and that there were three occasions a couple of years ago when 6PR achieved a 40% market share for direct business and 6PR/6IX combined had a 94.5% share of the market. No figures were produced for 96FM.

14 On 8 January 2001 Mr Healy invited the Applicant into his office and informed him that he was going to restructure the Sales Department so that there would only be one overall Group Sales Director for 6PR/6IX and 96FM. The Applicant said that Mr Healy asked if he would be interested in the position, to which the Applicant replied, "Yes, of course". The Applicant testified that about an hour later Mr Healy informed him that he intended to appoint Mr Kelly to the position. The Applicant testified that he asked Mr Healy whether Mr Bell, was aware of this decision and Mr Healy replied, "I've been told to cut costs." The Applicant said that Mr Healy indicated that he would perhaps look for some other opportunities within the company for him (the Applicant).

15 On 9 January 2001 Mr Healy advised all staff by a memorandum and issued a press release at the same time 6advising that Mr Kelly had been appointed the Group Sales Director for both 96FM and 6PR. Further, it was stated to the staff and to the community at large in the media release, that "the former 6PR Sales Director, James Barrett, is currently considering his future options."

16 A couple of days later Mr Healy met with the Applicant and informed him that there was nothing available for him in Perth or in Melbourne and that Mr Bell had informed him (Mr Healy), that the Respondent could not create a new position for the Applicant. Mr Healy then handed the Applicant a document setting out the terms of a proposed redundancy package. The Applicant rejected the proposed package. Mr Healy then advised the Applicant that from 8.30 o'clock that morning he had been made redundant and he was no longer employed with the company.

17 The Applicant testified that when he was informed by Mr Healy that the Respondent was intending to restructure the Sales Department by having only one overall Group Sales Director, he was not given the opportunity to submit a formal application or to make a verbal submission regarding the position. He said he spent two days after that interview wandering around in a haze. He said that after he was advised by Mr Healy that Mr Kelly was to be appointed to the position, on 9 January 2001, he went to visit a doctor and obtained some medication. He testified that he was really stressed and that at the time of giving his evidence he still did not understand

why his employment was terminated. He said he was still affected by the decision. He said that he had worked extremely hard, had been efficient and achieved results for the Respondent. He said he thinks about the termination everyday and that it had affected his focus on his current employment. He said that whilst he was told that his employment was terminated because of cost cutting, he found it insulting and extremely rude to be demoted and then kicked out of the company.

18 After the Applicant's employment was terminated the Applicant was paid accrued annual leave and paid $3,846 for 4 weeks' leave in lieu of notice. He was not paid redundancy pay as the Applicant rejected the Respondent's offer to pay him redundancy pay. The offer, if accepted, required the Applicant to forebear any rights to sue the Respondent in relation to his employment or the termination of his employment.

19 In the financial year June 1999 to June 2000 the Applicant earned approximately $100,000 in commissions. From 1 July 2000 until 31 December 2000 he earned approximately $48,000 in commissions. Whilst employed by the Respondent the Applicant had the use of a fully maintained Ford Fairmont Ghia, which he used for work and private purposes. The Applicant testified that he travelled approximately 25,000 kilometres per year in the vehicle provided to him by the Respondent and that about 60% of the kilometres travelled were for work purposes. The Respondent concedes the value of the private use of the car to the Applicant was between $10,000 to $12,000 per annum. The Applicant owned his own mobile phone for which the Respondent paid for all calls. Whilst employed by the Respondent the Applicant's annual mobile telephone account was about $1,200. Some of the calls made were for business and others were private.

20 The Applicant gave uncontradicted evidence that after his employment was terminated there were no positions available in broadcasting in Perth or the Eastern States. In mid March 2001 he sought and obtained a sales position with a newspaper which has an annual remuneration, including commissions, of approximately $70,000 to $75,000 per annum. The Applicant's current position does not entitle him to the use of a motor vehicle.

The Applicant's Contract of Employment

21 Mr Drake-Brockman, on behalf of the Applicant, contended that the contract of employment the Applicant entered into commencing on 1 September 2000 was a contract for a fixed term. In support of this submission it is contended that the remuneration provisions in the contract make it clear that the contract was only to be for a period of twelve months. In particular the words "an annual contracted fee of $50,000….., Commissions on all sales in Perth for 6PR and 6IX paid at the rate of 1.1% till 28th February 2001 then 1%", and the words "If the 12 months figure for 2000—2001 achieves above $9,000,000 then you will receive…." are relied upon.

22 The difficulty with the Applicant's argument is that whilst cash incentives were to be calculated by reference to commissions paid in 2000 and 2001, the annual contracted fee is not restricted to a 12 monthly period. Further, the contract expressly provides that "6PR reserves the right to alter the commission structure in the event that ratings for the two stations improve, resulting in a substantial increase in demand for advertising." Consequently, the contract contemplates that the commission structure can be reviewed sometime in the future. In my view the contract cannot be characterised as a contract for a fixed term but is for an indeterminate period of time, whereby it is contemplated that remuneration may be reviewed at some time in the future.

Notice of termination

23 It is contended on behalf of the Applicant that clause b. of the termination clause is meaningless as it referred to "s.170DB(s) of the Industrial Relation Act" and it is not capable of rectification, so as to render the whole of clause b. term ineffective. The basis of the Applicant's argument is that termination clause b. refers to defunct legislation, namely s.170DB of the *Industrial Relations Act* 1988. Accordingly, it is argued that clause gives way to an implied term of reasonable notice. Section 170DB was repealed and re-enacted in substantially the same form by s.170CM of the *Workplace Relations Act* 1996. As Mr Drake-Brockman points out, s.170DB, did not contain a subsection (s). The Respondent contends that the reference to subsection (s) is a slip and it is plain when regard is had to s.170DB that the entire provision was intended to be incorporated, in particular it was intended to incorporate the table in s.170DB(2), as it contained a community standard for termination. Prior to being repealed s.170DB of the *Industrial Relations Act* provided;

"**Employee to be given notice of termination**

170DB(1) [Reasons warranting termination] An employer must not terminate an employee's employment unless—

(a) the employee has been given either the period of notice required by subsection (2), or compensation instead of notice; or

(b) the employee is guilty of serious misconduct, that is, misconduct of a kind such that it would be unreasonable to require the employer to continue the employment during the notice period.

170DB(2) [Required period of notice] The required period of notice is first worked out using this table—

Employee's period of continuous service with the employer	**Period of notice**
Not more than 1 year	At least 1 week
More than 1 year but not more than 3 years	At least 2 weeks
More than 3 years but nor more than 5 years	At least 3 weeks
More than 5 years	At least 4 weeks

The period of notice is increased by one week if the employee is over 45 years old and has completed at least 2 years continuous service with the employer.

170DB(3) [Ascertaining period of continuous service] The regulations may prescribe events or other matters that must be disregarded, or must in prescribed circumstances be disregarded, in ascertaining a period of continuous service for the purposes of subsection (2).

170DB(4) [Amount of compensation instead of notice] The amount of compensation instead of notice must equal or exceed the total of all amounts that, if the employee's employment had continued until the end of the required period of notice, the employer would have become liable to pay to the employee because of the employment continuing during that period.

170DB(5) [Calculations of compensation amount] That total must be worked out on the basis of—

(a) the employee's ordinary hours of work (even if they are not standard hours); and

(b) the amounts payable to the employee in respect of those hours, including (for example) allowances, loading and penalties; and

(c) any other amounts payable under the employee's contract of employment."

24 In construing a document courts may supply, omit or correct words if it is necessary to avoid obscurity or inconsistency. The fact that a document contains infelicities and mistakes is not a sufficient reason for a court to interpret its provisions in a narrow or unreal way. (*Cheshire and Fifoot's Law of Contract* (7th Australian ed.) (1997) Seddon and Ellinghaus at [10.36] See also *Fitzgerald v Masters (1956)* 95 CLR 420 per Dixon, CJ and Fullagar J at 426-427).

25 It is clear from the submissions made on behalf of the Applicant that termination clause b. refers to the repealed s.170DB. In light of the fact that it is agreed that it was intended to incorporate s.170DB into the contract, it is

my view that clause b. should be and is capable of correction. I do not agree that it was intended that s.170DB in its entirety was to be incorporated, as clause b. only incorporates s.170DB in relation to the Respondent's right to give notice to the Applicant to terminate the contract in writing. It is apparent from the express words of clause b. that only s.170DB(2) was intended to be incorporated into the contract.

26 It is apparent from the payment made following termination that the Respondent calculated the Applicant's payment in lieu of period of notice in accordance with s.170DB(2) of the repealed Act on the basis that he had been continuously employed by the Respondent since 1 May 1996. Accordingly, the Applicant's claim for payment in lieu of reasonable notice fails.

Redundancy pay and compensation

27 It is clear from the evidence and the way in which the case was run on behalf of the Applicant that reinstatement is impracticable.

28 Mr Hooker, on behalf of the Respondent, made a submission that the Applicant was not entitled to be paid any sum as redundancy pay as at the time of termination of his employment he was engaged as an employee for less than one year. I do not accept this proposition. The Applicant's uncontradicted evidence was that he exclusively carried out the position of General Sales Manager from 1 May 1996 to 31 August 2000, and the position of Sales Director from 1 September 2000 until 11 January 2001. Whilst he was engaged for part of that time through his company, Barzar Pty Ltd, I am of the view that the circumstances of the Applicant's engagement together with the limited availability of similar positions in the industry, that in assessing a reasonable redundancy payment the Applicant's entire period of service should be considered. However, it is submitted on behalf of the Respondent that there is an overlap between the contractual benefit claim for redundancy pay and the claim for compensation for loss arising out of the unfair termination. This submission has merit as the Applicant contends, and it is accepted by the Respondent, that his termination was unfairly brought about.

29 In this matter the Applicant lost the opportunity to put a case why he should not be selected for redundancy. Accordingly, the loss that flows from unfair dismissal is that the Applicant lost the chance to retain his position which carried an average remuneration of $158,500 per annum per year. I have calculated that figure on the basis of an average remuneration per annum of a retainer of $50,000, commissions of $96,000, private use of a vehicle $12,000, and $500 for mobile telephone calls. He has mitigated that loss by obtaining a position that will pay him up to $75,000 per annum. He was unemployed for about two months. If he had been successful in retaining his position, his loss per annum from the middle of March 2001 is approximately $83,500 per annum. Regard, however, should be had to the principles set out by Deane, Gaudron and McHugh JJ in *Malec v J C Hutton Pty Ltd* (1990) 169 CLR 638 at 643 where their Honours explained that when assessing future or hypothetical events, a court is to assess the degree of probability that an event would have occurred, or might occur and adjust its award to reflect the degree of probability (applied in *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 at 350—353 and 355; see also *Sprigg v Paul's Licensed Festival Supermarket* (1998) 88 IR 21). Given that the Applicant had recently won a national broadcasting award, and the Respondent's report to the *West Australian* in September 2000 indicating strong growth in the earnings of 6PR and 96FM, the Applicant should have been able to put a strong case that he not be made redundant. Whether he would have been successful is not known, however, after having regard to the evidence I apply a discount of 40% and assess his loss for the two months that he was unemployed as $15,850 and his ongoing loss from the middle of March 2001 as $50,100 per annum. In light of his age and the limited availability of similar positions in the radio broadcasting industry I am satisfied that his future loss will exceed six months' remuneration. Accordingly, I will make an order that the Respondent pay the Applicant $79,250.

30 I do not intend to make an order that the Respondent pay the Applicant a reasonable redundancy payment in addition to an amount of compensation, as the award for compensation is assessed on the basis that the Applicant may not have been terminated if he had been afforded a proper opportunity to put a case why he should not be made redundant.

31 If I was to make an order that the Applicant had been denied a reasonable redundancy payment, I would assess that payment, having regard to the Applicant's age, seniority and specialised nature of his work to require a payment of two weeks' pay for each completed year he carried out work for the Respondent.

Injury

32 The authorities establish that a certain level of shock and distress on behalf of an employee is to be anticipated in any dismissal and there must be evidence that the dismissed employee has sustained damage of the kind claimed (*Lynam v Lataga Pty Ltd* [2001] WAIRC 2420 at [55-57]; (2001) 81 WAIG 986 at 989).

33 In this matter, three days prior to the Applicant being terminated Mr Healy issued a press release announcing that Mr Kelly had been appointed Group Sales Director for 6PR and referred, without explanation, to the fact that the Applicant formerly held the position of Group Sales Director for 6PR, and made the statement that he (the Applicant) was considering his position.

34 I accept the Applicant's evidence that he has suffered, and continues to suffer, hurt and humiliation as a result of his termination and that he has sought medical assistance for the shock sustained in the days immediately preceding his termination. He was obviously very distressed when he gave his evidence in these proceedings. I am satisfied that an award for injury could be made in this case because whilst it is apparent the Applicant was engaged in a "publicity conscious" industry, I am satisfied the Applicant has proved that he sustained damage. In particular, I am satisfied that the timing and content of the press release contributed to the hurt and humiliation suffered by the Applicant. In the circumstances, but for the statutory limit on making an order for compensation, I would have made an award of $3,000 for injury.

2001 WAIRC 03785

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	JAMES BARRETT, APPLICANT *v.* 6PR SOUTHERN CROSS RADIO PTY LIMITED, RESPONDENT
CORAM	COMMISSIONER J H SMITH
DELIVERED	TUESDAY 18 SEPTEMBER 2001
FILE NO/S	APPLICATION 190 OF 2001
CITATION NO.	2001 WAIRC 03785

Result	Applicant unfairly dismissed. Order made that the Respondent pay the Applicant compensation of $79,250.
Representation	
Applicant	Mr A L Drake-Brockman of counsel
Respondent	Mr R L Hooker of counsel

Order.

HAVING heard Mr Drake-Brockman of counsel on behalf of the Applicant and Mr Hooker of counsel on behalf of the Respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* hereby—

1. DECLARES that James Peter Barrett was unfairly dismissed from his employment by 6PR Southern Cross Radio Pty Limited on 12 January 2001;

2. DECLARES that it is impracticable to reinstate the Applicant to his former position;
3. ORDERS that the Respondent pay the Applicant within 10 days of the date of this Order the sum of $79,250;
4. ORDERS THAT the application is otherwise hereby dismissed.

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

2001 WAIRC 03917

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	ANTONY ALAN CHEESMAN, APPLICANT
	v.
	JAMCO NOMINEES PTY LTD, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	THURSDAY, 4 OCTOBER 2001
FILE NO	APPLICATION 628 OF 2001
CITATION NO.	2001 WAIRC 03917

Result	Application alleging unfair dismissal struck out for want of prosecution.
Representation	
Applicant	No appearance on behalf of the applicant.
Respondent	No appearance on behalf of the respondent.

Reasons for Decision.

1 By this application filed in the Commission on 5 April 2001 Mr Cheesman claims that he was unfairly dismissed. A Notice of Answer was filed on 23 April 2001 and on 26 April 2001 Mr Cheesman requested that his matter be dealt with in accordance with the Industrial Relations Act.

2 The matter was allocated to Commissioner Beech on 26 April 2001 and by letter dated 7 May 2001 the Commission listed this application for a conference on 7 June 2001.

3 On 14 May 2001 the respondent requested that the Commission refrain from dealing with this application until the outcome of a claim by the respondent against Mr Cheesman in the Small Disputes Division of the Local Court. The Commission raised the respondent's request with Mr Cheesman's solicitor, Mr Nevin, who advised the Commission that he would obtain instructions from his client. On 30 May 2001 Mr Nevin advised the Commission that Mr Cheesman agreed that this application be adjourned until he returned from overseas in order that Mr Cheesman may deal with both the matter before the Commission and the matter in the Local Court at the same time. Mr Nevin advised the Commission that Mr Cheesman was due to return from overseas on 19 July 2001.

4 On 5 August 2001 the Commission telephoned Mr Nevin to enquire into Mr Cheesman's intentions. Mr Nevin advised the Commission that he would confirm Mr Cheesman's position in writing to the Commission within approximately 1 week. On 29 August 2001 in the absence of any letter from Mr Nevin, the Commission sent an email request to Mr Nevin to confirm the current status of this application. No response was received by the Commission from Mr Nevin.

5 By letter dated 6 September 2001 the Commission set out the history of this application to Mr Nevin and noted the fact that there had been no reply to its previous communications. The Commission advised both parties in that letter that it had listed the application For Mention Only on 3 October 2001 in order to be advised of the current status of the application. The respondent was advised that it was not required to attend the hearing.

6 On 3 October 2001, when this matter came on for hearing, there was no appearance on behalf of Mr Cheesman. The Commission has formed the view that Mr Cheesman no longer intends to proceed with his application. As presently advised he was due to return to the country on 19 July 2001 and there has been no further contact from either Mr Cheesman or his solicitor after that time. I am satisfied that the Commission has taken appropriate steps to request advice from Mr Cheesman culminating in the matter being listed for hearing for that purpose. There is no obligation upon the Commission to do more (*McConkey v M&A's of Denmark* (2001) 81 WAIG 1561) and in the circumstances the Commission will now issue an Order striking out this application for want of prosecution.

2001 WAIRC 03918

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	ANTONY ALAN CHEESMAN, APPLICANT
	v.
	JAMCO NOMINEES PTY LTD, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	THURSDAY, 4 OCTOBER 2001
FILE NO	APPLICATION 628 OF 2001
CITATION NO.	2001 WAIRC 03918

Result	Application alleging unfair dismissal struck out for want of prosecution.
Representation	
Applicant	No appearance on behalf of the applicant.
Respondent	No appearance on behalf of the respondent.

Order.

THERE being no appearance on behalf of the applicant and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby orders:

THAT the application be struck out for want of prosecution.

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

2001 WAIRC 03761

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	JULIE ANN CHRISTIAN, APPLICANT
	v.
	EMERALD COLONIAL LODGE, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DELIVERED	MONDAY, 17 SEPTEMBER 2001
FILE NO	APPLICATION 208 OF 2001
CITATION NO.	2001 WAIRC 03761

Result	Application alleging unfair dismissal and contractual benefits dismissed
Representation	
Applicant	Mr A J Christian
Respondent	Mr D Beere (of Counsel)

Reasons for Decision.

1 The applicant claims that she has been harshly, oppressively and unfairly dismissed from employment with the respondent and she originally sought reinstatement. However, during the course of proceedings the applicant indicated that she no longer seeks reinstatement but now seeks compensation. The respondent denies that the applicant was dismissed by it.

2 The Commission has heard evidence from the applicant; her husband Allan John Christian; the respondent's head chef at the time of the applicant's employment coming to an end, Erminio Iannarelli; Jennifer Lynette O'Meara, a director of the respondent and the person in charge of the front office; and Gregory James O'Meara, a director of the respondent and performing the role of general manager of the respondent's business. The respondent operates a licensed hotel, function centre and restaurant.

3 Having observed the witnesses as they gave their evidence and having considered on the balance of probabilities what might have occurred I make the following findings. There is a good deal of conflict in the evidence as to what occurred between the applicant and Mr Iannarelli in the last 10 days of her employment and as to the outcome of a discussion between the applicant, Mr Christian and Mrs O'Meara.

4 The applicant was very defensive in giving her evidence. On a number of important issues relating to discussions between herself and Mr Iannarelli she said that she did not want to listen to what he was saying, it was not going to change the situation to have a discussion with him, and she walked out. In respect of one important occasion, she cannot remember what Mr Iannarelli said. However, she was adamant about other things she said to him and he to her. I am not satisfied that where her evidence conflicts with that of Mr Iannarelli, that the applicant's evidence is to be preferred. I found Mr Iannarelli to be credible and I accept his evidence. There is one issue in particular about which I will comment later where their evidence conflicts but it does not appear to relate to the circumstances of the termination.

5 Mr Christian's relevant evidence related to his and the applicant's meetings with Mrs O'Meara and his discussion with Mr O'Meara. Mr Christian's credibility did not match his passion for the claim. Where Mr Christian's and Mrs O'Meara's evidence conflicts as to the result of the conversation on Saturday 27 January 2001, I prefer the latter which is more likely to have been true.

6 Having made those findings, I will now set out the history of the applicant's employment with the respondent. The applicant commenced working in the respondent's restaurant kitchen in January or February 2000. There is dispute about the nature of her duties in the early part of her employment. However, there is no dispute that after some months, she was working week day evenings on 3-4 days per week, from 8-10 hours per fortnight up to 70-80 hours per fortnight as chef's assistant and, after December 2000, doing weekend breakfasts.

7 Until December 2000, the head chef was Mr Ramsey, and Mrs Ramsey undertook the weekend breakfast cooking. Mr Iannarelli was a chef working under the head chef. The applicant had previously asked for additional hours but they were not available to her. In December 2000, Mr and Mrs Ramsey left the employment of the respondent and Mr Iannarelli then became the head chef. At around that time the applicant and Mr Iannarelli were staffing the kitchen between them. The applicant's hours increased when she commenced doing the breakfasts on weekends in addition to up to five evenings per week as chef's assistant, preparing desserts and working in the cold larder. During the summer months including December and January, the respondent's business was busy on account of it being the seasonal peak for the business. Mr Iannarelli told the applicant that once proper staffing levels were reintroduced in the kitchen, he would see what could be done about the applicant having two clear days off each week.

8 I accept that by the beginning of 2001 the applicant was unhappy to be working up to 7 days per week and, on 16 January 2001, she sought to have 2 days per week off. At this point she was working up to five evenings per week in the kitchen as chef's assistant and Saturday and Sunday doing breakfasts. I accept that Mr Iannarelli told her that he would do what he could but at the present, the only way to allow her to have two full days off was to reduce her overall hours per week as they could not be made up elsewhere within the roster. I find that the applicant responded that on that basis she would prefer things left as they were, however the matter was clearly not resolved.

9 Some 10 days later, on Thursday, 26 January 2001, the applicant was unhappy that the situation was unresolved. It was agreed between the parties that until around this time the applicant and Mr Iannarelli had worked well together and except for one issue, on which I will comment later, had no difficulties in their working relationship. The applicant made clear in her evidence that on Thursday, 26 January 2001, when she attended for work, that she did not want to talk to Mr Iannarelli other than to deal with immediate work related issues. Mr Iannarelli described her conduct as passing loud comments, throwing plates around noisily and generally showing her unhappiness. However, Mr Iannarelli did not know what the problem was.

10 At the end of her shift, when the applicant was ready to leave she approached Mr Iannarelli and said "do I have my two days off or not," Mr Iannarelli said that he tried to explain the situation and to reason with the applicant. He says that she walked out and he called out to her to come back and resolve the matter but she did not. In her evidence, the applicant acknowledges that she did not want to listen, she thought things were not going to change and that she was not in a mood to stand there and argue, "I just walked out." The next day, Friday 26 January 2001, at the commencement of a long weekend in the middle of the peak season for the respondent, the applicant attended for work at 4.00pm as scheduled. She put her things in the office and went to put on her work shirt. Mr Iannarelli approached her and directed her to go into the office to discuss the situation. I find that following the applicant's conduct on the previous night, Mr Iannarelli's approach may have been somewhat firm if not condescending.

11 The applicant says that she cannot remember what Mr Iannarelli said although she described him as being angry, aggravated and slapping his hands on the desk. She said that she found it frightening and intimidating. She also claims that he said that he could not work with her anymore. Having considered the evidence of the applicant and Mr Iannarelli regarding this conversation, I find that it is more probable that given the applicant's conduct on the previous night, and her refusal to sit down and discuss the matter, that in frustration, Mr Iannarelli asked why she was behaving like this, and said that he could not understand why she would walk out and not try to resolve the matter. I am satisfied that if he made any comments about not being able to work with the applicant it was to the effect that in the circumstances of her conduct, unless the matter was resolved, they could not work together. Mr Iannarelli says that the applicant became upset and raised her voice, and again she walked out. At this point the applicant had not commenced her scheduled Friday shift.

12 The applicant was due to do the breakfasts the next day. She did not attend for work. Later in the day, the applicant and Mr Christian went to the respondent's premises with a letter. I note that this letter was not put before the Commission although I infer from the evidence that it made reference to the applicant having been dismissed. The applicant and Mr Christian asked at reception to see Ms O'Meara and met with her in the car park. The applicant and Mr Christian say that Mrs O'Meara said that the applicant should take the weekend off and Mrs O'Meara would look at the letter and talk to her husband, and that some one would contact them on the Sunday or Monday. Mrs O'Meara says that she would not have told the applicant to take the weekend off. This was a matter for the head chef, as the person in charge of kitchen staff to deal with. As this was the busiest weekend of the year,

I accept that Mrs O'Meara would have been unlikely to have told the applicant to take the weekend off without consulting the head chef. However, Mrs O'Meara says that she probably indicated that someone would get back to the applicant and Mr Christian.

13 I accept Mr Christian's evidence that by this time he had assumed that the applicant's employment had terminated, and it appears from his evidence he made this assumption without any confirmation from the respondent.

14 However, if the applicant's employment had terminated by this time it was because the applicant, having refused to discuss roster arrangements with Mr Iannarelli, her supervisor, on Thursday night, and having walked out after completion of her shift, she again walked out on the Friday night before performing any work. She also failed to turn up for the Saturday shift, and she did not attempt to return to work on the Sunday or subsequently.

15 In any event, it seems that between the Monday and Tuesday, Mr Christian and Mr O'Meara unsuccessfully attempted to contact one another. Eventually, possibly on Tuesday, they were able to speak on the telephone. Mr Christian said that this was around 3 February 2001, that is the Saturday after the long weekend. However, Mr O'Meara says that it was more likely to have been on Tuesday, 30 January 2001. I accept that it is more likely to have been the Tuesday 30 January 2001 or the Wednesday, 31 January 2001 that this discussion took place. I note that the applicant said in her evidence that she did not contact the respondent after leaving the letter with Mrs O'Meara. She says in her evidence that she did not feel like talking to them and she was too upset.

16 In the discussion between Mr Christian and Mr O'Meara, possibly on 30 January 2001, Mr Christian put to Mr O'Meara that the applicant probably was no longer employed by the respondent or no longer had a job, and Mr O'Meara concurred with this comment. Mr Christian then asked for the respondent to provide an employment separation certificate. He says that this employment separation certificate was never for the purpose of claiming unemployment benefits but was for the purpose of ascertaining the reason for termination, in support of this application. I note that the reason provided in the employment separation certificate dated 3 February 2001 and completed by Mr O'Meara was "walking out on her supervisor during attempts to resolve a dispute concerning rosters" (Exhibit 1), although it did not indicate who terminated the employment.

17 Having considered the evidence I am at a complete loss to understand why the applicant was in such a bad mood on the evening of Thursday, 26 January 2001 such as to cause her behaviour to be as described as Mr Iannarelli and, as the applicant indicated, she did not wish to speak to Mr Iannarelli about matters other than work. Yet she refused to discuss her concerns with Mr Iannarelli and did not want to listen to him or resolve any problems when that was the only way of coming to a satisfactory conclusion. I find this particularly perplexing bearing in mind that all of the evidence indicates that there was a very good relationship between the applicant and Mr Iannarelli until then, and that nothing had arisen between 16 January and 25 January 2001 to cause her behaviour to be as it was. The applicant seems simply to have decided that she was unhappy with the situation, even angry, that she wanted to have 2 days off but was not prepared to discuss the situation. Even if Mr Iannarelli had been cross with her and "told her off" as the applicant said in her evidence, on 26 January 2001, it would hardly be surprising that he would take this approach given her attitude the previous evening.

18 I conclude the applicant walked out of her employment on 26 January 2001 prior to working her shift. Mr Iannarelli did not say that he would not work with her in the kitchen. Rather I infer that he told her that they could not work together in the current environment and needed to resolve the situation. As the applicant said in her evidence, she did not want to listen or hear what he had to say. She left, and claimed that she had been dismissed. Yet, nothing said or done on behalf of the respondent brought the employment to an end. By the following Tuesday or Wednesday, when Mr Christian and Mr O'Meara talked the situation was that the respondent was not prepared to have the applicant back—that there was no job for her. She had already terminated her employment by walking out on the Friday night, not attending for work and conducting herself in the manner in which she had. In these circumstances, I find that the applicant was not dismissed by the respondent, nor was she entitled to assume that the respondent had by any of its conduct brought the employment to an end. Accordingly, the claim must fail.

19 If I am wrong in this and the respondent has dismissed the applicant, I am not satisfied that in the circumstances of the applicant's conduct, and by her apparently claiming in the letter provided to Mrs O'Meara on the Saturday 27 January 2001 and subsequently that she had been dismissed, that her dismissal was unfair. However, if the dismissal was unfair then there are a couple of matters that require consideration.

20 The first issue is whether reinstatement was practicable. The applicant signed the Schedule of Particulars of Claim attached to Form 1 on 31 January 2001. In that form, the applicant ticked the box indicating that she sought reinstatement. The Form 1 and attachments were lodged with the Commission on 2 March 2001 and served on the respondent according to the Declaration of Service on 6 February 2001. By letter dated 13 February 2001, the respondent's solicitors wrote to the applicant offering to reinstate her, to pay her lost wages and to not require her to work more than five days in seven. As an alternative to reinstatement, the respondent offered an amount of $2000.00 on a without prejudice basis in full and final settlement of the situation.

21 On 20 February 2001 Mr Christian replied on behalf of the applicant saying that the offer was rejected as all matters had not been resolved. No counterproposal was put and the application was pursued.

22 The applicant in her evidence says that although, on 31 January 2001, she signed the Particulars of Claim indicating that she sought reinstatement, she changed her mind after considering the situation and by 20 February she no longer sought reinstatement.

23 As the evidence is that the applicant and Mr Iannarelli got on well until the last 2 days of employment, and as Mr Iannarelli was attempting to discuss the resolution of the rostering problem with the applicant, there appears to be no reason why, with good will on both sides, reinstatement would not be practicable. My only reservation in that regard is that I did not perceive much good will on the part of the applicant.

24 The applicant's credibility has not been enhanced by her refusal of what, on its face, appeared to be a very reasonable offer by the respondent to either reinstate her and reorganise her roster to meet her demand for two days off, or to pay her an amount which, two weeks after the termination of employment, appears to be a reasonable settlement offer. In failing to accept the offer, or even to enter into discussions with a view to resolving any outstanding issues, the applicant has failed to mitigate her loss.

25 Further, the applicant's evidence of attempting to find employment after termination was that in the period from early February to mid September 2001 when the matter was heard, she made 3—4 job applications and had not heard from any of those to whom she had applied. She does not appear to have followed up with any of those with whom she made application who did not reply to her. She says in her evidence that she assumed that there was talk about town about her termination of employment from the respondent. She commenced employment 3 weeks prior to the hearing of this matter and she says that she had no other employment during the period between termination and the hearing but undertook a TAFE course. I am not satisfied that this constitutes reasonable efforts to discharge her onus to mitigate her loss. If I had found that there had been an unfair dismissal, the only loss which might have been reasonable for the

purposes of compensation of the applicant might have been the period 26 January 2001 until the offer by the respondent on 13 February 2001.

26 Earlier during these reasons I indicated that there was an issue between Mr Iannarelli and the applicant. That is that the applicant says that for a number of months, Mr Iannarelli, having given up smoking, would want a cigarette. Without the applicant's approval, he would go into her handbag looking for cigarettes. She says that she told him not to do so and that he continued. She said that she complained to Mr Ramsey who told her that he had instructed Mr Iannarelli not to do so.

27 Mr Iannarelli strongly denies that he ever went into the applicant's handbag. I make no findings as to whether or not the applicant's allegation is true. Whatever the truth of this matter there is no suggestion that it soured the working relationship between the applicant and Mr Iannarelli, nor do I find that it played any part in the employment coming to an end. I find that if it was at the back of the applicant's mind then that is where it stayed. At the time of termination it was not an issue.

28 The application is to be dismissed.

2001 WAIRC 03762

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	JULIE ANN CHRISTIAN, APPLICANT
	v.
	EMERALD COLONIAL LODGE, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DELIVERED	MONDAY, 17 SEPTEMBER 2001
FILE NO	APPLICATION 208 OF 2001
CITATION NO.	2001 WAIRC 03762

Result	Application alleging unfair dismissal and contractual benefits dismissed

Order.

HAVING heard Mr A J Christian on behalf of the applicant and Mr D Beere (of Counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT this application be, and is hereby dismissed.

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

2001 WAIRC 03795

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	ANTHONY FRANCIS FINCH, APPLICANT
	v.
	MODULAR METALS (AUSTRALIA) PTY LTD, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	WEDNESDAY, 19 SEPTEMBER 2001
FILE NO	APPLICATION 631 OF 2001
CITATION NO.	2001 WAIRC 03795

Result	Application alleging denied contractual entitlements granted
Representation	
Applicant	Mr A. Finch
Respondent	No appearance

Reasons for Decision
(Extemporaneous).

1 The claim before the Commission is brought by Mr Finch that he was employed by Modular Metals (Australia) Pty Ltd in the position of a sales representative selling garages and domestic doors and what he has described as outbuildings. I am satisfied from the evidence before me that he was so employed and I am satisfied that he was employed from 24 May 2000 until 14 November 2000.

2 The claim that Mr Finch brings to the Commission is that he has not been paid benefits due to him under his contract of employment, they being commissions for sales made by him on the respondent's behalf prior to the date of the termination of his employment.

3 Mr Finch's terms and conditions of employment, so far as they are relevant to this matter, are set out in the terms of an employment agreement which was attached to the Notice of Application. The employment agreement is signed by Mr Finch and also bears the name of Modular Metals (Australia) Pty Ltd. Relevantly, Mr Finch is entitled to be paid a commission on the following basis and I now quote from the document—

> " Domestic Doors 5%
>
> Garages 2%
>
> Industrial Products 2%
>
> Factories by negotiation
>
> - of project value on achieving 91% of sales target payable on receivable (sic) of full payment to Modular Metals. Non-conformance faults and errors are deducted from commission, no discounting without management approval."

4 Mr Finch has attached to his claim a number of outstanding commissions totalling $2,861.21. In the absence of the Notice of Answer and Counter Proposal from the respondent, I am prepared to find that Mr Finch did complete the work that is set out in the document headed "Outstanding Commissions" which was attached to his Notice of Application and it follows that on the face of it I believe that Mr Finch is entitled to be paid for that work.

5 Mr Finch has stated to me that in practice he was paid once both the deposit and the final payment were received by the respondent and that is entirely consistent with the employment agreement which states that his commission is payable on receivable, if that is the correct word, of the full payment to Modular Metals. Mr Finch has said on oath that in his understanding the full payment for each of these jobs has been received by Modular Metals and he is therefore due the commission payable. I have no reason not to disbelieve Mr Finch's evidence, in fact in my view, I might observe that I believe gave his evidence quite truthfully.

6 The issue that possibly forms the difference between Mr Finch and Modular Metals (Australia) Pty Ltd is revealed in the two pieces of paper brought by their representatives to the conference held in the Commission. As I understand those two pieces of paper, they do not challenge Mr Finch's allegation that he did the work and that he is due the commission. Rather, the documents handed to me in the conference indicate that a number of jobs were "below budget" and if that is the case, from the respondent's point of view, it would argue that either no commission is payable because the job did not meet the 91% target, or alternatively, as indeed the documents allege, Mr Finch was overpaid from at least 20 June 2000 by virtue of jobs not being to budget.

7 The two matters that need to be said in relation to that are firstly, if I have correctly stated the respondent's position, the respondent has not attended the Commission today nor has it provided by any other means any documentation to prove whether a job was or was not below budget. As a matter of evidence, all I have before me are two sheets of paper with figures on them but no one to attest to their accuracy nor to put to Mr Finch that the figures are accurate. So on that basis, I am not in a position in these formal proceedings to attach great weight to those documents.

8 Secondly, Mr Finch's evidence, evidence which I accept, is that during the entire time of his employment at Modular Metals (Australia) Pty Ltd he was not refused any commission on the basis of the 91% figure in his employment agreement. That is not to say that the 91% figure was not relevant. Clearly it was because it is part of the employment agreement: it is in the written terms and cannot be denied. However, in practice if no commission was refused to Mr Finch during his employment on that basis, nor was there any discussion, as I understand Mr Finch's evidence, in relation to him achieving or not achieving sales targets on any job, then I am inclined for the purposes of these proceedings to attach less weight to the documents. In part that is because I would need to be alert to the possibility that the respondent in turn is trying, somewhat retrospectively, to re-interpret the contract of employment. To interpret the employment agreement now in a way in which it was not interpreted either at the time Mr Finch was employed and this agreement was drawn up or during the course of Mr Finch's employment is inconsistent.

9 In the absence of any evidence from the respondent to contradict the evidence given by Mr Finch this morning, then in my view, Mr Finch has established that he is owed the sum of $2,861.21 being the outstanding commissions he has attached to his claim.

10 The final matter to which I now refer to is Mr Finch has stated that it was his understanding that the respondent was in liquidation. There has been nothing from the respondent to indicate that is so. If the respondent has been placed in liquidation then the provisions of the *Corporations Law* would prevent this Commission from making any Order against a company that is in liquidation. Nevertheless, upon my questioning Mr Finch, he indicated that he may have chosen his words somewhat inaccurately and rather he believed that the respondent was in financial difficulties. This Commission is only prevented from dealing with Mr Finch's claim if it is prevented by operation of the *Corporations Law*. The mere fact that Modular Metals (Australia) Pty Ltd may be in financial difficulties is not a reason in law why this Commission is not able to make an Order this morning against Modular Metals (Australia) Pty Ltd. In that regard, I do not regard it as Mr Finch's duty or responsibility to provide this Commission with up-to-date knowledge of the financial status of the respondent given that it itself has not seen fit to do so.

11 So for all of the above reasons, I am of the view that an Order now ought to issue which states that Modular Metals (Australia) Pty Ltd forthwith pay Anthony Francis Finch the sum of $2,861.21 by way of benefits due to him under his contract of employment.

12 Order accordingly.

2001 WAIRC 03796

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	ANTHONY FRANCIS FINCH, APPLICANT *v.* MODULAR METALS AUSTRALIA PTY LTD, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	WEDNESDAY, 19 SEPTEMBER 2001
FILE NO	APPLICATION 631 OF 2001
CITATION NO.	2001 WAIRC 03796

Result	Application alleging denied contractual entitlements granted
Representation	
Applicant	Mr A. Finch
Respondent	No appearance

Order.

HAVING HEARD Mr A. Finch on his own behalf as the applicant and there being no appearance on behalf of the respondent, the Commission, pursuant to powers conferred on it under the *Industrial Relations Act 1979* hereby orders—

THAT Modular Metals Australia Pty Ltd forthwith pay Anthony Francis Finch the sum of $2,861.21 by way of benefits due to him under his contract of employment.

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

2001 WAIRC 03696

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	JOHN WILLIAM HARTWIG, APPLICANT *v.* RANSBERG PTY LTD TRADING AS W A BLUEMETAL, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	THURSDAY, 6 SEPTEMBER 2001
FILE NO/S	APPLICATION 1930 OF 2000
CITATION NO.	2001 WAIRC 03696

Result	Claim for unfair dismissal upheld, claim for denied contractual benefits dismissed
Representation	
Applicant	Mr S Kemp of counsel
Respondent	Mr P Quinlan of counsel

Reasons for Decision.

1 On 6th November 2000 the applicant John Hartwig commenced employment with Ransberg Pty Ltd (trading as WA Blue Metal) in a position titled "quarry manager" at its Byford operation. The appointment included a probationary period of 3 months (see Exhibit 2). The applicant's services were terminated on 17th November 2000. He was advised that he was unsuited to the position.

2 Mr Hartwig claims that his dismissal was harsh, oppressive or unfair and arising from this that compensation for loss and injury should be awarded to the statutory limit based on a rate of remuneration of $77 100 per annum. An amount of $15 000 is included in the claim for injury associated with alleged shock, distress and humiliation arising from the dismissal. Furthermore the applicant claims an outstanding contractual entitlement to bring payment in lieu of notice up to one month's salary.

3 The respondent objects to and opposes these claims.

4 The Notice of Answer and Counter Proposal states that the applicant was unsuited to the position and given that he was dismissed during the probationary period, denies that the dismissal was harsh, oppressive or unfair. It submits that the entitlement in the contract of employment to a month's notice of termination arises only on completion of the probationary period. Mr Hartwig was not yet a permanent employee and his contract of employment was therefore terminable at will. Alternatively Mr Hartwig was paid a sum in lieu of notice that was at least equal to reasonable notice. The respondent denies that the applicant was not allowed a benefit to which he was entitled under his contract.

5 This was the position which confronted the applicant at the commencement of the hearing.

6 In attempting to discharge the burden of showing that the dismissal was harsh, oppressive or unfair the applicant focussed to a significant extent on the conversation he'd had with the respondent's Managing Director Mr Renzo Della Bona immediately prior to his termination of

employment. This related to whether Mr Hartwig could certify material tests under the National Australian Testing Authority (NATA). This was dependent upon him being an accredited examiner and operating from a NATA approved laboratory. The certification involved mechanical testing of aggregates to meet client specifications. Mr Hartwig informed Mr Renzo Della Bona that although he had been an accredited examiner with his previous employer, Boral, the respondent did not have a NATA approved laboratory. In his opinion this would be too expensive to set up. From experience gained at Boral Mr Hartwig believes it is more economic to outsource the testing. The substance of this conversation was on Mr Hartwig's evidence a reiteration of what had been discussed some months earlier when he had been interviewed for the position of Quality Product Manager and when the respondent had expressed an interest in setting up a laboratory. The position that was subsequently offered to him was that of Quarry Manager. When he accepted that appointment certification of material was not part of his duties.

7 It is argued for the applicant that on Mr Renzo Della Bona's evidence even before the applicant was employed the respondent wanted to establish a laboratory to enable it to certify its product. Mr Renzo Della Bona knew that Mr Hartwig certified product when he was with Boral but that he did not realise the laboratory accreditation requirements until he raised the matter of testing with Mr Hartwig on the 8th or 9th day of the applicant's employment. When Mr Renzo Della Bona realised that Mr Hartwig could not undertake certification without incurring the cost of setting up an accredited laboratory he terminated his employment.

8 In these circumstances it is submitted that where it was not Mr Hartwig's duty to provide certification and indeed could not perform that task, it was harsh, oppressive or unfair to terminate his employment. The applicant submits that the respondent seized upon the probationary period and regarded that as a licence to dismiss the applicant without regard to fairness.

9 The respondent argues that it was not the case that Mr Hartwig was required to undertake laboratory testing but that avenue was explored as Mr Renzo Della Bona explained, in an attempt to find a role for the applicant when it was clear to the Managing Director that he could not satisfactorily perform the duties of safety, quality control and moisture testing. The respondent submits that Mr Hartwig's employment was bought to an end at an early time to enable him to pursue other avenues and not to prolong the inevitable. That process was successful in as much as Mr Hartwig was able to obtain employment with his former employer, Boral, albeit at a much lower level than when he was previously employed there.

10 In developing its case, the respondent elaborated on what had been previously stated to have been Mr Hartwig's unsuitability for the position of Quarry Manager. Notwithstanding this, the respondent maintains the view that Mr Hartwig was employed in a senior position as someone who could 'hit the ground running'. He was a probationary employee in the sense that they wished to see whether he was capable in the job and suitable for the respondent's workplace. He was expected to immediately take some of the load being carried by the Quarry Foreman. When this didn't happen and when he allegedly failed to show initiative and commitment sufficient to engender confidence in the respondent the availability to terminate his employment within the probationary period was exercised.

11 While the Notice of Answer and Counter Proposal declared that as a probationary appointee, the applicants employment was "terminable at will", the arguments and evidence presented on the respondent's behalf moved somewhat from this strident position.

12 It was put to Mr Hartwig by the respondent that he had stated to Mr Enrico Petrone, the Quarry Foreman, that he would not be applying for a certificate of competency, the formal qualification for recognition as a registered Quarry Manager for a couple of years. It was the Managing Director's understanding from interviews with Mr Hartwig that obtaining the qualification was a mere formality and that he would obtain it in the near future albeit that may be in six months time. Mr Hartwig claimed that he had never discussed the matter with Mr Petrone. Mr Petrone's evidence turned out to be that Mr Hartwig had said that he would get the qualifications "within a couple of years".

13 Next it was put to the applicant that Mr Renzo Della Bona had told him that Mr Petrone was the boss at the quarry. The context within which this direction had been given was not explained. It was denied by Mr Hartwig. He acknowledged that he was required to work with Mr Petrone and while the Quarry Foreman handled the men on site, Mr Petrone was subordinate to him. It was not put to Mr Hartwig that he had been summoned to a meeting with Mr Renzo Della Bona and his brother to get it clear that Mr Petrone was the boss at the quarry. Mr Peter Bullock the General Manager of WA Bluemetals gave evidence that Mr Hartwig answered to Mr Renzo Della Bona. Mr Bullock participated in the interviews which lead to Mr Hartwigs appointment. He drafted the letter in which the applicant was appointed as Quarry Manager with responsibility for "managing the complete quarry operation including drill and blast, crushing and screening and stockpiling" (Exhibit 2).

14 Mr Hartwig denied the assertion that on a number of occasions Mr Petrone had to press him to check the screens to ensure that the correct quantity of aggregate was being produced. It was put to him that his response had been that this was fitters work. Mr Hartwig denied all of this.

15 Questions were put to Mr Hartwig about his commitment to the job. These went to the time he arrived for work, the lack of priority given to checking loads for moisture and his attempt to leave the site early Saturday morning when there was a full days production under way. Mr Hartwig denied these allegations.

16 The incompleteness of the evidence moved the applicant's counsel to have much of what had been presented through Mr Petrone disregarded under the rule in Brown v Dunne.

17 Despite the incompleteness of much of the evidence it is clear that none of the misgivings harboured by the respondent were ever taken up with Mr Hartwig by Mr Renzo Della Bona, Mr Peter Bullock nor by Mr David Della Bona the registered Quarry Manager who visited the Byford operation regularly and who spoke with Mr Hartwig from time to time. Most importantly it was Mr Renzo Della Bona who on his own evidence prevailed on Mr Hartwig to stay at work on Saturday morning 11th November 2000 did not put to the applicant the misgivings allegedly being conveyed to him by Mr Petrone.

18 It is insufficient to say that this was not necessary given Mr Hartwig's experience in hard rock quarrying, and that Mr Renzo Della Bona didn't want to put Mr Hartwig down nor place Mr Petrone and Mr Hartwig in conflict. The fact that Mr Hartwig was a probationary appointee does not overcome the requirement to treat him fairly particularly when it is acknowledged by the respondent that he should be afforded a period in which to settle in. Eight days would hardly seem reasonable.

19 The evidence shows that between the time when the applicant attended the first interview for a position with the respondent and when an appointment was confirmed in September 2000, there was a significant shift associated with the change from the initial Quarry Products Manager's position for which Mr Hartwig was invited to apply to that of Quarry Manager to which he was appointed. I do not accept that this went unnoticed by Mr Renzo Della Bona nor that in drafting the letter of offer Mr Bullock made an error which misconstrues what the position was about. I am satisfied on Mr Hartwig's evidence that he was appointed to the most senior position at the quarry. His wage was double the hourly rate of the person who it is submitted was his boss. The position put by Mr Renzo Della Bona on the line of authority within the Byford operation is untenable.

20 Given the lack of consultation with Mr Hartwig by any member of the respondents management team on any of the duties of Quarry Manager, the absence of any induction process with the respondent and the complete failure to point out any perceived shortcomings, it is difficult not to conclude from all of the evidence that generally Mr Hartwig was dealt with harshly in being terminated from employment after such a short time.

21 On the basis of these considerations it is unnecessary to determine the issue of whether Mr Hartwig's inability to test materials was used as an excuse to terminate his employment. However there is no doubt that Mr Renzo Della Bona relied on that issue to portray Mr Hartwig as lacking initiative. I reject the respondent's assertion that it was a bona fide inquiry prompted by a desire to look after Mr Hartwig and find something else for him to do so that he could fit into the organisation. The evidence discloses that the respondent considered that the establishment of a laboratory was too expensive. The possibility of expending $50 000 or $100 000 to continue Mr Hartwig's employment in a different role after he had only been employed for eight or nine days does not ring true. This professed concern is at odds with the evidence that the respondent had failed to even speak to Mr Hartwig over any alleged concerns when it recognised the need for a settling in period.

22 Another issue which was pursued in evidence was the applicants allegation that he had been "poached" from the security of a position within Boral to take up placement with the respondent. The inference is that this compounded the unfairness of the applicants dismissal. While it is accepted that the initiative came from Mr David Della Bona for the respondent to inquire as to whether Mr Hartwig was interested in being considered for the position of Quarry Products Manager that was initially on offer, it is clear that the applicant pursued the matter at his own discretion without misrepresentation or duress. Mr Hartwig negotiated a higher salary than was initially offered. I accept Mr David Della Bona's evidence that Mr Hartwig had indicated that he wanted to leave Boral.

23 Having concluded that the general unfairness with which the applicants employment was terminated the issue then is whether the operation of a probationary term in the contract of employment makes it easier for the respondent to terminate the contract of employment than would otherwise apply under the principles set down in Miles and Others trading as Undercliffe Nursing Home v FMWU 65 WAIG 385. The notion that the termination could be effected at will without regard to fairness is rejected.

24 It is the case that probation remains an extension of the selection process, a period of training and importantly a time for criticism, assessment and adjustment to standards of performance and conduct (Airline Hostesses Association v Qantas Airways Ltd (1974) AILR 785). The fact that the applicant bought twenty years experience in hard rock quarrying to the appointment does not negate the need for consultation, direction and guidance during the probationary period.

25 While an employer can more easily terminate the employment of an employee whose employment is subject to a probationary term than one who is not (Carter and Another v Community Aid Abroad Trading Pty Ltd (1991) AILR 264), the Full Bench has expressed the view that;

> "more easily" would seem "to be a description of the process which follows the terms of the contract, which provide for prohibition. However, probation is not a licence for harsh, oppressive, arbitrary capricious or unfair treatment of a probationer" (Hutchinson v Cable Sands (WA) Pty Ltd 70 WAIG 951).

26 In my view in the absence of anything to the contrary being expressed in the letter of appointment covering the operation of the probationary employment, the need for consultation on standards of performance and conduct would seem to be at least a minimum requirement, particularly where the respondent professed some reservations about appointing the applicant in the first place.

27 Here, where lines of authority were confused, where the respondents operation was under considerable pressure and where the particular features of the respondents plant equipment and procedures required some familiarisation it would be harsh, oppressive or unfair to consider that the application of the probationary term reduced the standard to where the respondent could more easily terminate the applicants employment by merely claiming unsuitability without having discussed any perceived difficulties in performance or attitude.

28 Any reduction in the standard through the operation of the probationary term in this case has not rendered the dismissal fair.

29 Upon this finding it is necessary to address the question of relief.

30 It is common ground that reinstatement or reemployment is impracticable. While agreement between the parties does not itself dispose of the issue, in the circumstances of this matter it is apparent from the evidence that the working relationship between Mr Hartwig and Mr Renzo Della Bona could not be re-established.

31 The principles to be applied in assessing compensation have been set down in Bogunovich v Bayside Western Australia Pty Ltd (1999) 79 WAIG 8 (See Sharkey, P at 8—9).

32 Without restating all of those principles for the purpose of determining compensation in this matter it is sufficient to note that the applicant bears the onus of establishing the loss or injury for which compensation is claimed and that there must be a causal link between the loss or injury alleged and the unfair dismissal. The Commission is required to compensate the applicant to the fullest extent in respect to such loss or injury up to the statutory limit specified by Section 23A(4) of the Act. Compensation as much as is possible should put the applicant in the position in which he would have been but for the loss or damage. The conduct of the employee or the employer and issues that went to the determination of whether the termination was unfair or not are not relevant in assessing the loss or injury.

33 As set out in the Bogunovich Case (op cit) the Commission must first of all make a finding as to the loss and/or injury. That is a different exercise from assessing compensation. Here finding of future loss may involve findings on the balance of probabilities as to how long the claimant might have remained in employment had he not been unfairly dismissed.

34 In the event of a finding that Mr Hartwig was unfairly dismissed the respondent submitted the loss would be until the expiry of the probationary period. This it is submitted is supported by evidence of the inevitability of that occurring at that time. This it was submitted should be concluded from how the relationship between the parties was perceived and the likelihood that it would have occurred at that time. In this respect the Commission should have regard to the practical realities in a commercial environment.

35 On the face of it the applicants loss was ongoing employment with the respondent in a managerial position which involved a three month probationary period applying prior to permanency being confirmed. It was, with respect more than employment for a probationary term. The contract was not limited to a finite period of three months with future employment being the subject of a new contract. Here there was a commitment to permanent employment. The loss arising from the unfair termination extended beyond the opportunity to perform for the period of probation, it extended to the permanency of the position within the respondent's organisation. This was made clear by the General Manager's evidence. The opportunity was for employment for an indefinite period.

36 I find on the balance of probabilities that the applicant would have remained in employment for an extended period save for the unfair dismissal.

37 It is accepted that the applicant's level of remuneration was $77 100 per annum, comprising $60 000 per annum

salary, $4 800 per annum superannuation (8%), the private use of a vehicle $12 000 per annum and $300 for a mobile phone. This amount ($77 100 per annum) should be used for the purpose of calculating compensation for the purpose of his loss.

38 There is no disagreement on the extent to which Mr Hartwig mitigated his loss. The issue is the calculation of the amount of compensation by reference to his ongoing loss. I accept the submission that this equates to a weekly loss of some $682 for an indefinite period.

39 I do not accept that injury warranting the payment of $15 000 is justified. An element of distress accompanies almost every termination of employment. In Timms v Phillips Engineering Pty Ltd (1999) WAIG 1318 at 1326 it is noted that in most cases where loss of dignity, anxiety, humiliation or stress have been recognised as injury for the purpose of compensation that physical and/or emotional manifestations of injury have been attested to by professional experts. In this case there is no such evidence. While Mr Hartwig has suffered a setback in the development of his career he is young enough to overcome the adversity. In my view, his experience does not fall outside the limits which generally can be taken to be associated with a harsh or oppressive dismissal.

40 As to the claim for the contractual benefit amounting to two weeks payment in lieu of notice, that is dismissed. There was no contractual entitlement to that payment. The evidence shows that the applicant negotiated the payment he received along with some limited use of the respondent's motor vehicle. That arrangement is not displaced by implying something else to give efficacy to the contract.

41 An order giving effect to this decision compensating the applicant to the limit provided for pursuant to Section 23A(4) of the Act will issue.

2001 WAIRC 03759

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	JOHN WILLIAM HARTWIG, APPLICANT *v.* RANSBERG PTY LTD TRADING AS WA BLUEMETAL, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	THURSDAY, 6 SEPTEMBER 2001
FILE NO/S	APPLICATION 1930 OF 2000
CITATION NO.	2001 WAIRC 03759

Result	Claim for unfair dismissal upheld, claim for alleged contractual benefits dismissed
Representation	
Applicant	Mr S Kemp (of Counsel)
Respondent	Mr P Quinlan (of Counsel)

Order.

HAVING heard from Mr S Kemp (of Counsel) on behalf of the applicant and Mr P Quinlan (of Counsel) on behalf of the respondent,

NOW the Commission, having found the applicant to have been harshly, oppressively or unfairly dismissed,

HEREBY orders pursuant to powers under the Industrial Relations Act 1979 that,

(a) the respondent pay to the applicant an amount of $38 550 being equivalent to six (6) months salary at the rate of $77 100 per annum;

(b) the above payment be made within 28 days of the date of the order; and

(c) claims pursuant to Section 29(1)(b)(ii) of the Act be dismissed.

(Sgd.) W.S. COLEMAN,
[L.S.] Chief Commissioner.

2001 WAIRC 03903

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	PETER JOHN JEFFREY, APPLICANT *v.* IPF FINANCE LTD, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	TUESDAY, 2 OCTOBER 2001
FILE NO	APPLICATION 1420 OF 2001
CITATION NO.	2001 WAIRC 03903

Result	Application alleging denied contractual benefits granted.
Representation	
Applicant	Mr P.J. Jeffrey
Respondent	No appearance

Reasons for Decision
(Extemporaneous)

1 The claim before the Commission by Mr Jeffrey is against IPF Finance Ltd and it is for a payment of accrued annual leave and also payment of one week's pay in lieu of notice.

2 On the evidence provided by Mr Jeffrey, I find as follows. Firstly, in relation to IPF Finance Ltd, I am satisfied from the first exhibit that Mr Jeffrey tendered that the company is correctly named, that is, it is IPF Finance Ltd and it has the A.C.N. number 092 301 301. I note in doing so that its principal place of business is listed at 1315 Hay Street, West Perth, that also being the address on Mr Jeffrey's Notice of Application and the address to which the application was served.

3 I am also satisfied from Mr Jeffrey's evidence and also in particular from the exhibits that form the pay advice slip, the Australian Taxation Office PAYG Payment Summary and then the letter of termination which became exhibit 5, that Mr Jeffrey was an employee of IPF Finance Ltd. In doing so, I note that the letter of termination is on the letterhead of a different company however, the text of the letter states—

> "This letter will serve notice to confirm my advice earlier today that IPF Finance Limited will be ceasing business and your services will no longer be required, effective immediately."

4 I am therefore satisfied that Mr Jeffrey was employed by IPF Finance Ltd. One reason why the Commission needed to be satisfied of this is because of the earlier application lodged by Mr Jeffrey against Easyrent Pty Ltd claiming the same benefit. I am satisfied from Mr Jeffrey's evidence this morning that he believed that the source of finance for IPF Finance Ltd meant that he should make his claim against Easyrent Pty Ltd. However, as is now, I suspect, apparent to him, the earlier application lodged by him against Easyrent Pty Ltd is effectively a nullity in the sense that Easyrent Pty Ltd was not Mr Jeffrey's employer and apparently never has been.

5 Another reason why the Commission needed to be satisfied is that in that earlier application there is correspondence by way of a Notice of Answer and Counter Proposal from the administrator of Easyrent Pty Ltd indicating that on 11 June 2001 administrators were appointed not just to Easyrent Pty Ltd but also to

Insurance Premium Finance Pty Ltd, a name which is not, of course, dissimilar from the name of the current respondent. However, I am satisfied from the company search extract, that Mr Jeffrey has tendered, that IPF Finance Ltd is correctly named and is indeed a different entity from Insurance Premium Finance Pty Ltd and accordingly, I am of the view that the Notice of Answer and Counter Proposal in the earlier matter against Easyrent Pty Ltd is not relevant to this matter this morning.

6 Being satisfied that Mr Jeffrey was employed by IPF Finance Ltd and that the company is properly identified and is still currently registered, it then becomes necessary to consider the claims that he has lodged. Mr Jeffrey brings two claims, one being annual leave accrual and the second one being payment in lieu of notice.

7 I am satisfied from the evidence of Mr Jeffrey that the terms and conditions of his employment were as set out in a letter to him dated December 1998 from a company known as Retail Management Australia Pty Ltd. Mr Jeffrey has given evidence which I accept that that company subsequently changed and became IPF Finance Ltd and that at the time of the change there were no discussions between IPF Finance Ltd and Mr Jeffrey regarding any change to his conditions of employment, it therefore seems to me to follow that the terms and conditions of employment of Mr Jeffrey at IPF Finance Ltd are the terms and conditions of employment as set out in the Retail Management Australia Pty Ltd document dated 22 December 1998.

8 As part of those conditions of employment Mr Jeffrey was entitled to four weeks' annual leave per annum. I am therefore satisfied that the source of Mr Jeffrey's entitlement to annual leave is his contract of employment and not the *Minimum Conditions of Employment Act 1993* and that therefore his claim is one that can be brought to this Commission.

9 I am also satisfied from the pay advice slip that Mr Jeffrey has tendered and the corresponding document which he has annotated, that arithmetically Mr Jeffrey is entitled to 326.65 hours of accrued annual leave and I agree with his calculations that that amounts to a sum of $8,166.25. I also accept Mr Jeffrey's evidence that he has not been paid that amount and accordingly an Order will now issue requiring IPF Finance Ltd to pay Peter John Jeffrey the sum of $8,166.25 by way of annual leave entitlement accrued and due upon termination of employment.

10 The second claim brought by Mr Jeffrey relates to one week's pay lieu of notice. It was a term of his employment that both parties would give seven day's notice in writing of the intent to terminate or the payment or forfeiture of an equivalent amount of salary in lieu. It was also a term and condition of employment that termination could be effected without notice in the event of neglect of duty, dishonesty, misconduct or inadequate work performance. I am satisfied from the letter of termination which became exhibit 5, that Mr Jeffrey's employment was not terminated for any of those latter reasons. Rather, his termination occurred as a result of the respondent ceasing business and his services no longer being required. Accordingly, IPF Finance Ltd was required to give seven days' notice in writing or the payment of an equivalent amount of salary in lieu. I am satisfied from Mr Jeffrey's evidence that that has not occurred and accordingly IPF Finance Ltd should have paid the sum of $1,000.00 being one week's salary in lieu of notice and an Order will now issue requiring IPF Finance Ltd to pay that sum forthwith to Peter John Jeffrey.

11 Order accordingly.

2001 WAIRC 03904

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	PETER JOHN JEFFREY, APPLICANT *v.* IPF FINANCE LTD, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	TUESDAY, 2 OCTOBER 2001
FILE NO	APPLICATION 1420 OF 2001
CITATION NO.	2001 WAIRC 03904

Result	Application alleging denied contractual benefits granted.
Representation	
Applicant	Mr P.J. Jeffrey
Respondent	No appearance

Order.

HAVING HEARD Mr P. J. Jeffrey on his own behalf as the applicant and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* hereby orders—

THAT IPF Finance Ltd forthwith pay Peter John Jeffrey—

(a) the sum of $8,166.25 gross by way of annual leave entitlements accrued and due upon the termination of his employment; and

(b) the sum of $1,000.00 being one week's salary in lieu of notice upon the termination of his employment;

both being benefits denied to him under his contract of employment.

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

2001 WAIRC 03848

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	NIGEL ASHLEY JONES, APPLICANT *v.* DRY CREEK ENTERPRISES PTY LTD T/A JACKIE CRANK REAL ESTATE, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	TUESDAY, 25 SEPTEMBER 2001
FILE NO	APPLICATION 422 OF 2001
CITATION NO.	2001 WAIRC 03848

Result	Application alleging denied contractual entitlements dismissed.
Representation	
Applicant	Mr N. Jones
Respondent	Mr M. O'Connor (as agent)

Reasons for Decision.

1 Mr Jones had been employed by the respondent as a real estate representative. The claim brought by Mr Jones is that he ought to have been paid the full commission due to him upon the sale of a property known as number 43 Caledonia Avenue. However, at the time settlement occurred, Mr Jones had resigned his employment. The respondent paid him 50% of the commission that was otherwise due.

2 It is necessary for Mr Jones to show on the balance of probabilities that it was a term of his contract of employment with the respondent that he would be paid

the full commission for the sale notwithstanding that he was no longer an employee of the respondent when the settlement occurred. It is agreed that Mr Jones' terms and conditions of employment were not put in writing. The only term of employment agreed between Mr Jones and the respondent prior to him commencing employment in November 1999 is that his rate of commission would be 50%. There was no discussion between the parties at that time, or later, regarding what commission would be paid in the event of a settlement occurring after the termination of his employment.

3 From the evidence, there is a practice within the real estate industry that real estate representatives receive a reduced commission when settlement occurs subsequent to the termination of the representatives' employment. I am satisfied from the evidence that Mr Jones knew of that practice. I reach this conclusion because of his knowledge of the written terms of employment with his previous employer which covered this eventuality. I also find that Mr Jones had a discussion with Mrs Crank on 27 March 2001 and raised the commission issue because of that knowledge.

4 Mr Jones relies upon the content of that discussion. Mr Jones' evidence is that he stated to Mrs Crank that he intended to leave the respondent's employment and he raised with her the pending settlement of 43 Caledonian Avenue. The settlement was conditional upon the provision of a white ant certificate and the final inspection prior to handover. His evidence is that Mrs Crank stated that she would do those for him. Mr Jones states that he stated to Mrs Crank that he did not want to lose any commission and that she indicated that he would not lose any commission. He states that he trusted Mrs Crank and although he could have stayed in her employment longer, he left her employment on that day and indeed left the country on 15 April 2001. Settlement occurred on 27 April 2001.

5 Mrs Crank confirms that a discussion occurred. However, Mrs Crank's evidence is that Mr Jones came to her and handed her a document (exhibit D). She states that Mr Jones told her that he was leaving, that he was going on a world trip and that his pregnant wife did not want to have the baby in Australia. Mrs Crank said that she took the document but did not read it. She stated that Mr Jones indicated his preparedness to do the final inspection on 14 April 2001 and she replied that the final inspection had to be done not at the convenience of the agent but rather at or close to the date of settlement. Therefore that was not appropriate and if Mr Jones was leaving the respondent's employment early he would not be able to represent the respondent at the time of the final inspection. Mrs Crank's evidence is that while she agreed with Mr Jones to "see the deal through" she did not agree to pay the full commission. Mrs Crank stated that she would calculate the commission due at the time of settlement, depending upon the amount of work required remaining to be done to get the property to settlement. At no stage did she agree that she would pay the full commission.

6 Her evidence is that in relation to the white ant certificate, the respondent had to arrange to give access to the property for the purposes of the inspection, and also do the final inspection.

7 As I indicated at the conclusion of the hearing, the task of the Commission in determining which of two recollections of a discussion is correct is not an easy task. I observed both Mr Jones and Mrs Crank when they gave evidence. I believe both of them gave evidence truthfully according to their individual recollections of the discussion. It is apparent that they cannot both be correct. However, that does not mean, as Mr Jones might be suggesting, that one or the other is lying. It is perfectly possible for two persons to have different recollections of a conversation and each of them honestly believe their recollection to be correct.

8 In that regard, it is up to Mr Jones to prove that on balance it is his recollection that is to be preferred. If he is unable to do so, then he has not proven his claim. In this regard, I think it is quite likely that Mrs Crank agreed to finalise the arrangements in relation to 43 Caledonia Avenue. However, I am not persuaded that in doing so she agreed to pay the full commission. While the finalisation of the sale of 43 Caledonia Avenue was the subject of discussion, I am not persuaded from the evidence overall that an agreement was reached between Mr Jones and Mrs Crank in that conversation that Mr Jones would nevertheless receive the full commission. The most that can be said is that there was an understanding from the discussion that the respondent would see the matter through. I have little doubt from Mr Jones' evidence, and the strength of his evidence on this point, that he believed that meant he would not lose any commission. I am equally of the view from Mrs Crank's evidence that she did not go that far.

9 In order for the entitlement to a full commission on the sale of 43 Caledonia Avenue to have become a term of Mr Jones' contract of employment there needed to have been a clear and common understanding that it would occur. There cannot be an agreement if one side has a different view of its terms than the other side, as I find is the case here. I note, for example, that in Mr Jones' evidence, the white ant certificate was "outside my control" because of an arrangement he believed the respondent has with a pest control company. Mr Jones states that Mrs Crank said that her sister-in-law would take care of the white ant certificate. However, on the evidence, the white ant inspection was arranged by the purchaser with the purchaser's own contacts and completely independently of the respondent and to my mind this suggests that Mrs Crank might not have undertaken to arrange matters through her sister-in-law. I note Mrs Crank's evidence that she had not at the time of the conversation even looked at the file for the property. While that issue is not central to these proceedings, I regard it as a reason why the discussion between Mr Jones and Mrs Crank, upon which Mr Jones so emphatically relies, might not be entirely in accord with his own recollection. I have not, on balance, been persuaded that Mr Jones has discharged the onus upon him. Accordingly, his application will be dismissed.

10 Order accordingly.

2001 WAIRC 03850

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	NIGEL ASHLEY JONES, APPLICANT *v.* DRY CREEK ENTERPRISES PTY LTD t/a JACKIE CRANK REAL ESTATE, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	TUESDAY, 25 SEPTEMBER 2001
FILE NO	APPLICATION 422 OF 2001
CITATION NO.	2001 WAIRC 03850

Result	An application alleging denied contractual entitlements dismissed.
Representation	
Applicant	Mr N. Jones
Respondent	Mr M. O'Connor (as agent)

Order.

HAVING HEARD Mr N. Jones on his own behalf as the applicant and Mr M. O'Connor (as agent) on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders—

THAT the application be dismissed.

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

2001 WAIRC 03004

Editor's Note: Order published in Vol. 81—Part 2, Sub-part 4 at page 2478.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	WARREN IAN JONES, APPLICANT *v.* PAULOWNIA SAW MILLING, TIMBER SUPPLIERS AND MANUFACTURING PTY LTD (ACN 081 463 452), RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DELIVERED	TUESDAY, 12 JUNE 2001
FILE NO	APPLICATION 37 OF 2001
CITATION NO.	2001 WAIRC 03004

Reasons for Decision.

1 By this application, the applicant claims that he has been harshly, oppressively or unfairly dismissed from his employment with the respondent.

2 The Commission convened a conference for the purpose of conciliating between the parties however agreement was not reached. The applicant indicated his intention to have the matter proceed to formal hearing and determination. However, he said that the application ought be held in abeyance until criminal proceedings which relate to the circumstances of the termination of employment are dealt with by the District Court. The respondent was of the view 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.

3 The parties have provided to the Commission written submissions setting out their respective cases as to whether the matter should proceed to hearing and determination at this point.

4 The applicant has dealt with the matter on the basis of it being an application to stay the proceedings of the Commission. Reference is made to *Myers v Myers* 1969 WAIR 19 at 21 where a refusal of an adjournment would result in a serious injustice, the adjournment should be granted unless in turn it would mean serious injustice to the other party.

5 The applicant says that he has not yet received an indictment or brief of the prosecution in the matter before the District Court. However, he says that the police witnesses in that matter include the Managing Director of the respondent company, and that he was dismissed by the Managing Director. The applicant says that the circumstances of dismissal arise from exactly the same facts as give rise to criminal proceedings. The applicant says that there would be a requirement in pursuing his claim that he give evidence and put his case before the Commission. To do this, prior to putting forward his defence in the court of criminal jurisdiction, would have the effect of eroding his right to silence whereby a suspect does not have to answer police questions, state a case or put forward any defence, or examine any witness unless he or she chooses to do so and at a time of his or her choosing.

6 The applicant referred to the decision of His Honour the President in the *Civil Service Association of Western Australia (Incorporated) v Director General, Department of Transport* [2000] WAIRC 16.

7 As to the question of any hardship to the respondent, the applicant concedes that reinstatement is "potentially not an option" and therefore if the application is successful then the matter would be one of the consideration of compensation, and that the delay in dealing with issues before the Commission can be readily accommodated. The applicant says that if the criminal proceedings take their course and he is found guilty in those proceedings then he will, in all probability, discontinue the matter before the Commission. This is said to minimise any potential prejudice to the respondent.

8 The respondent refers to the decisions of French J. in *State of Western Australia v Bond Corporation Holdings Ltd* (1992) 114 ALR 275 (at 296 to 297) where a number of considerations are set out when a court is asked to stay proceedings on the grounds that they may affect a party in contemporaneous criminal proceedings. Those considerations are—

"(a) Prima facie a plaintiff is entitled to have his action tried in the ordinary course of the procedure and business of the Court.

(b) It is a grave matter to interfere with this entitlement by a stay of proceedings, which requires justification on proper grounds.

(c) The burden is on the defendant in a civil action to show that it is just and convenient that the plaintiff's ordinary rights should be interfered with.

(d) Neither an accused nor the Crown is entitled as of right to have a civil proceeding stayed because of a pending or possible criminal proceeding.

(e) The Court's task is one of "the balancing of justice between the parties", taking account of all relevant factors.

(f) Each case must be judged on its own merits, and it would be wrong and undesirable to attempt to define in the abstract what are the relevant factors.

(g) One factor to take into account where there are pending or possible criminal proceedings is what is sometimes referred to as the accused's "right of silence", and the reasons why that right, under the law as it stands, is a right of a defendant in a criminal proceeding.

(h) However the so called "right of silence" does not extend to give such a defendant as a matter of right the same protection in contemporaneous civil proceedings. The plaintiff in a civil action is not debarred from pursuing action in accordance with normal rules merely because to do so would or might, result in the defendant, if he wished to defend the action, having to disclose, in resisting an application for summary judgment in the pleading of his defence, or by way of discovery or otherwise, what his defence is likely to be in the criminal proceedings.

(i) The Court should consider whether there is a real and not merely notional danger of injustice in the criminal proceedings.

(j) In this respect factors which may be relevant include—

I. The possibility of publicity that might reach and influence jurors in the civil proceedings;

II. The proximity of the criminal hearing;

III. The possibility of miscarriage of justice e.g. by disclosure of a defence enabling the fabrication of evidence by prosecution witnesses, or interference with defence witnesses;

IV. The burden on the defendant of preparing for both sets or proceedings concurrently;

V. Whether the defendant has already disclosed his defence to the allegations;

VI. The conduct of the defendant including his own prior invocation of civil process when it suited him.

(k) The effect on the plaintiff must also be considered and weighed against the effect on the defendant in which regard it may be relevant to consider the nature of the defendant's obligation to the plaintiff: and

(l) In an appropriate case the proceedings may be allowed to proceed to a certain stage e.g. setting down for trail (sic) and then stay it."

9 The respondent said that in the matter before French J., the plaintiff was not seeking to stay his own proceedings and that His Honour's strong reservations about staying proceedings apply with even more force in the matter before the Commission. The respondent says its prima facie entitlement to have the action tried in the ordinary course is stronger than the applicant's entitlement because

the respondent did not choose to bring the proceedings and if the stay were granted the respondent would have proceedings hanging over its head and be subject to uncertainty.

10 The respondent says that the issues in the criminal proceedings are entirely different from the issue in the proceedings before the Commission and refers to the respective standards of proof in the criminal proceedings and before the Commission. The respondent also says that the applicant's right to silence is irrelevant because the accused person is the applicant in civil proceedings. The respondent seeks to distinguish the *Civil Service Association of Western Australia Inc v Director General Department of Transport* (supra) on the basis that the party seeking to stay was a respondent to disciplinary proceedings, not an applicant prosecuting his own proceedings.

11 I have considered the submissions of the parties. It is noted that the considerations set out by French J. in *State of Western Australia v Bond Corporation Holdings Ltd* (supra) appear to be based on the defendant rather than the plaintiff being the party seeking the stay, which is not the circumstance in this case. However, as His Honour notes, the task is to "(balance) justice between the parties, taking account of all relevant factors". I am satisfied that the appropriate test is that set out by His Honour the President in *Civil Service Association of Western Australia Inc v Director General Department of Transport* (supra). In this case he noted that it is for the party seeking the stay to establish that a stay should be granted. For the party seeking the stay to succeed it must be established that there is a serious matter to be tried, that the balance of convenience favours the party seeking the stay and that other factors consistent with s.26(1)(a), s.26(1)(b) and or s.26(1)(c) of the Industrial Relations Act, 1979 if they exist, require that the application be granted.

12 The respondent merely says that the detriment it would suffer by the matter not proceeding at this time is that it will be hanging over its head and cause uncertainty. I am satisfied that in the circumstances of this case, for the applicant to be required to pursue this matter before the Commission at this stage would have the potential to seriously undermine his rights in respect of criminal proceedings. I am satisfied, too, that this circumstance outweighs any inconvenience or detriment which the respondent might suffer as a result of these proceedings being delayed. I have considered the usual issues which relate to a delay in a hearing, including the passage of time potentially having an effect on the ability of witnesses to recall events, inconvenience which may arise to the respondent in terms of the availability of personnel, and of matters being resolved more quickly to enable a degree of certainty in the respondent's operations. 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.

13 Further, the applicant has indicated that should he be found guilty in those criminal proceedings he will in all probability discontinue this matter, and this consideration ought also be given weight.

14 In all of the circumstances, the application to stay the proceedings until the resolution of the criminal proceedings will be granted and the matter will not be listed for hearing and determination at this point.

2001 WAIRC 03734

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	JULIEN KURET, APPLICANT
	v.
	MEDICAL RESOURCES PTY LTD, RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	FRIDAY, 31 AUGUST 2001
FILE NO	APPLICATION 816 OF 2001
CITATION NO.	2001 WAIRC 03734

Result	Contractual benefits claim granted
Representation	
Applicant	Mr T Crossley as agent
Respondent	Mr P Clements

Reasons for Decision.

(Given extemporaneously and subsequently edited by the Commissioner)

1 This is an application pursuant to section 29(1)(b)(ii) of the *Industrial Relations Act, 1979* (the Act). The applicant, Mr Julien Kuret, alleges that he is owed by the respondent, Medical Resources, a denied contractual entitlement of $21,666.67, being 4 months notice.

2 Mr Kuret was employed as a Radiographer with the respondent from 2 February to 26 January 2001. It is clear from the evidence, quite freely and frankly given by Mr Kuret and Mr Pitcher, the Practice Manager for the respondent at that time, that this is a matter that turns on the reading of clause 20.1 of the contract of employment. Both parties agree that [Exhibit JRK1] is the contract of employment. In deciding this matter, I do not need to go past that.

3 This is a matter which is a matter of judicial decision see *Reginald Simons v Business Computers International Pty Ltd 1985* 65 WAIG 2039—

> "Accordingly although the Commission's jurisdiction in proceedings such as these is judicial, there is always room for the Commission to grant relief which has at its roots the ascertainment of rights and obligations which can fairly and properly be implied as terms of the contract of service. In proceedings under section 29(b)(ii) of the Act it is not therefore necessary for an employee to rely upon an express term whether oral or written where the law otherwise recognises that there is legitimate room for the implication of the term relied upon by an applicant."

Having heard the evidence, this is simply a matter of reading a contract and deciding what that contract means. The only provision in the contract which is relevant, as both parties argue, is clause 20.1. Clause 20.1 reads—

> "Notwithstanding clause 3.1 in the event of the Employer ceasing to operate a Radiology Business (either voluntarily or involuntarily) such as to be unable to employ the Employee in the position as referred to in clause 3.1 then either of the Employer or the Employee can thereafter at any time terminate this Agreement by notice in writing to the other and in such case the Employer must pay to the Employee (whether such Notice of Termination was given by the Employer or the Employee) a sum equal to four (4) months Salary and four (4) months Superannuation contributions in addition to any entitlements or moneys due to the Employee up to the date of termination. The Employee acknowledges and agrees that such additional sum is and will be adequate and reasonable in such circumstances."

4 The contract must be read on its face unless there are additional matters which can be rightly implied into the contract, and there are no such additional matters that can be implied in to the contract.

5 The only evidence I have as to any implied terms in the contract go to some evidence from Mr Kuret and Mr Pitcher in relation to the making of the contract. At that time the sale of the business might have been discussed but was not talked about specifically in the context of clause 20.1. There is some evidence from Mr Kuret under cross-examination regarding the meaning of his share options. I do not need to go to that evidence. Albeit Mr Kuret says that he asked for clause 20.1 to be put in the contract and was expecting to be paid 4 months notice if the business was sold, and was never told otherwise.

6 The argument of the respondent is that clause 20.1 is not triggered as the business was sold and Mr Kuret continued in the business with the new employer on substantially the same terms. The applicant in turn says that his terms and conditions of employment were lessened to some degree and his leave was paid out. He was to attain some part ownership of the business, after a period of time.

7 What is clear to me is that there was a sale of the business which happened fairly quickly around about Australia Day in 2001. Mr Kuret was successful in obtaining employment, and I accept his evidence, with Endeavour Health, courtesy of an arrangement made with a Mr Garside that he would continue on the same conditions. It is not in contention that the conditions were mostly the same, albeit with some reduction in relation to consumer price index adjusted pay increases and superannuation.

8 That again is not relevant. What is relevant is that the applicant's employment, on all the evidence, clearly ceased on 26 January 2001 with Medical Resources Proprietary Limited and he was paid out except for his notice. The cessation of his employment triggers clause 20.1 in the contract, which is no more and no less than a normal notice provision in a common law contract. It may not seem to be fair on the respondent's part that Mr Kuret should then benefit from clause 20.1, as he achieved ongoing employment (they would say) with the proprietor of the new business. However, clause 20.1 is about just that. When the employment ceased the notice provision triggered. There is no other provision to the contrary. The contract between the employer and the employee ceased on 26 January 2001 and Mr Kuret was then engaged by Endeavour, under whatever circumstance, effective from 29 January 2001.

9 In all those circumstances, having read the contract, and there are no other provisions in the contract that I need to go to, the notice provision is triggered and the claim that Mr Kuret makes in his application of $21,666.67 is made out and is due and payable, less any normal taxation payable to the Commissioner of Taxation. An order will issue to that effect.

10 The claim for $15 for a dishonoured cheque is not a claim that I would consider can be awarded.

2001 WAIRC 03793

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	JULIEN KURET, APPLICANT
	v.
	MEDICAL RESOURCES PTY LTD, RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	WEDNESDAY, 19 SEPTEMBER 2001
FILE NO	APPLICATION 816 OF 2001
CITATION NO.	2001 WAIRC 03793

Result	Contractual benefits claim granted
Representation	
Applicant	Mr T Crossley as agent
Respondent	Mr P Clements

Order.

HAVING heard Mr T Crossley on behalf of the applicant and P Clements on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the said respondent do hereby pay to Mr Julien Kuret as and by way of a denied contractual benefit, the amount of $21,666.67, less any taxation payable.

(Sgd.) S. WOOD,
[L.S.] Commissioner.

2001 WAIRC 03825

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	GREGORY RICHARD SHUTTLEWORTH, APPLICANT
	v.
	SILVICULTURE MANAGEMENT PTY LTD, RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	FRIDAY, 21 SEPTEMBER 2001
FILE NOS	APPLICATION 169 OF 2001, APPLICATION 170 OF 2001
CITATION NO.	2001 WAIRC 03825

Result	Applicant dismissed unfairly; compensation awarded. Contractual benefits claim discontinued
Representation	
Applicant	Mr L H Pilgrim as agent
Respondent	Mr B Stokes as agent

Reasons for Decision.

1 These applications are made pursuant to section 29(1)(b)(i) and (ii) of the *Industrial Relations Act, 1979* (the Act). The applications were heard together on 11, 12 and 28 June 2001. Final submissions were lodged in writing on 5 July 2001. The applicant Mr Gregory Richard Shuttleworth was employed by the respondent Silviculture Management Pty Ltd, as their South West Area Manager. He commenced employment on 8 December 1999 as a casual and later took on the position of Area Manager. The basis of the applicant's employment is in contention. He was dismissed on 5 January 2001 by Mr Robin Crawford, a director of the company and the then Operations Manager. The applicant says he was on a fixed term written contract of employment, that was signed by the parties on 3 May 2000 and which provided for a period of 3 years from 19 April 2000. In application 169 of 2001 by way of denied contractual benefits the applicant seeks a payout of the balance of the fixed term contract, which in closing submissions the applicant calculates as a total of $126,991 inclusive of salary (with adjusted annual increases), superannuation, motor vehicle, and mobile phone.

The applicant, in application 170 of 2001, says that he was summarily dismissed on 5 January 2001 whilst on annual leave and seeks six months compensation for loss of earnings as follows—

- Six months salary : $17,500
- Value of motor vehicle at $15,000 per annum—$7,500
- Six months superannuation contributions $1,400
- Value of use of mobile phones for six months $250.

Total: $26,650

The applicant adds to this a claim for injury of $3,750, less his earnings through Austudy for the relevant period ie $3,770, to give a final claim in the alternative of $26,630.

2 The respondent was a company that was seeking to raise money for an investment scheme in plantation timbers. The management investment scheme was not completed and operational at the time of the applicant's employment. Instead the applicant was performing work with a view to that scheme coming into operation. The duties the applicant says he performed were to oversee staff for general upkeep and site maintenance, and liaise with landowners, local traders and subcontractors to implement planting when required. He performed these duties within the Manjimup area.

3 The original notice of answer and counterproposal filed in the Commission on behalf of the respondent on 29 March 2001 stated that the applicant had refused to carry out reasonable and lawful directions of the respondent and had thus repudiated his contract of employment. The respondent said in that answer that the applicant's employment was subject to a period of probation of 3 months and the applicant's employment terminated during that period. The respondent at conference was directed to file an amended answer and counterproposal. After some delay and a change of representation, the respondent's amended notice of answer and counterproposal was filed on 25 May 2001 apparently by facsimile and the original bears the stamp of the Commission on 28 May 2001. An earlier answer by the respondent faxed to the Commission on 23 May 2001 with a stamp of Commissioner's chambers of 24 May 2001 appears to be an answer not settled by the respondent. The respondent's answer is as follows:

"1. The Respondent says that ANDREW HUFFER had no authority to promote and engage the Applicant as an area manager for a term of 3 years and that such appointment is ineffective and not binding upon the company for the following reasons—

(a) the appointment was made without the prior knowledge or authority of the board of directors;

(b) the alleged contract has not been stamped or sealed by the Respondent, and

(c) ANDREW HUFFER was not an officer of the Respondent and acted without any lawful delegation.

2. If this appointment was with the purported authority of a director PHILIP BELLAMY then it is ineffective as that director failed to declare a vested interest to the board of directors in so doing, namely a personal friendship with the Applicant.

3. In any event the said appointment was not an arms length bona fide commercial contract but was based upon personal friendship and regard between the Applicant and PHILIP BELLAMY, which association was at all times known to the Applicant.

4. The Respondent says that it would be inequitable to hold the Respondent to the strict terms of the said contract of service.

5. Otherwise the particulars contained in paragraphs 1 to 5 inclusive are admitted

6. The Respondent says that the Applicant was terminated due to a genuine restructuring and downsizing necessitated by lack of investment funds and an inability of the Respondent to proceed with the Management Investment Scheme as then registered with the Australian Securities & Investment Commission (ASIC). It says further that to continue to employ the Applicant would have exposed the directors to personal liability for allowing a corporation to trade and continue to employ staff whilst unable to meet its financial obligations in the normal course of business. Such a restructure was within the Respondent's management prerogative.

7. The Respondent concedes that no redundancy package was offered or paid. It says that none was due under the alleged contract of service or any award. Alternatively the Respondent says that it had no funds to offer any redundancy package.

8. The Respondent denies that the dismissal was unfair but says it was imposed by lack of operating funds and failure to fulfill the planting program.

9. As to paragraph 7 of the said Applicant's particulars, the respondent says—

(a)(i) The Applicant was a good worker but a poor manager. He was responsible for employing 3 family members as tree planters. Progress was very slow and little of the planting program was achieved due in part to poor supervision.

(ii) On or about the 5th January, 01 whilst the Applicant was on annual leave, ROBIN CRAWFORD (for and on behalf of the Respondent) rang him at home and indicated that the planting program wasn't working out and he would have to be terminated. The Applicant replied: "I've been waiting for this for a couple of months now." The parties talked of notice. The Applicant said: "Well if you give me my 2 weeks notice now, I'll have to come back for several days after my leave." ROBIN CRAWFORD replied: "I wouldn't ask you to do that. Take those few days on me."

(iii) The Respondent says this conversation constitutes an mutual agreement to end the Applicant's contract of service and that the Applicant is not entitled to any compensation for such termination.

(iv) The Applicant failed to return the company mobile phone, vehicle & trailer to his place of work at Manjimup and these had to be retrieved. The Applicant has retained a Brother phone facsimile machine worth $750 despite demand for its return claiming it was given to him by ANDREW HUFFER.

(b) It was coincidental that the dismissal was effected whilst the Applicant was on annual leave. The fact that PHILIP BELLAMY withdrew from the Respondent company on the 6th November, 2000 affected the timing of the notice of the decision to the Applicant.

(c) The Respondent agrees that by clause 5.1 the Applicant's alleged contract of service purports to be a fixed term contract for 3 years with no provision for early termination, however it is a contract with ANDREW HUFFER who agreed "to ensure the Terms and Conditions ... are conformed to by (the respondent)". The respondent says that the agreement clearly contemplated written confirmation by the Respondent, which ratification did not occur and in any event this contract was determined by mutual agreement in any event.

(d) The Respondent says that the Applicant is not entitled to any compensation for termination.

(e) Alternatively, the Respondent says that the Applicant has failed to mitigate his loss, has removed himself from the job market by undertaking a course of full time study and is entitled to no compensation pursuant to Section 29 of the Act."

I recite the answer in full as it displays a good summary of the matters in contention. They are in essence that the applicant did not have a properly authorised three year contract, the contract was terminated by mutual consent, there was no unfairness in the termination and the applicant did not mitigate his loss.

4 The contract of employment at [Exhibit GS 1] states, in part, as follows—

5.1 Term of Contract

Three years, beginning 19/04/2000

5.17 Total Package

Silviculture Management P/L has determined the total gross package based on the above components. The package is outlined in the table below.

Item	**Value**
Salary	35 568
Superannuation	2 489
Total	38 057

I agree to ensure the Terms and Conditions, outlined in Section 5 of this contract are conformed to by Silviculture Management P/L

Signed

_____ Andrew Huffer

Date: 3rd May 2000 Operations Manager
Silviculture
Management P/L
A.C.N. 090 393 98

I agree to perform the duties outlined in Section 2 of this contract to the best of my abilities and to comply with Sections 5.4 & 5.13 of this contract.

Signed

_____ Greg Shuttleworth

Date: 3rd May 2000 South West Area
Manager
Silviculture
Management P/L

5 I will deal with the evidence as it relates to each issue. However, I have no difficulty accepting the evidence of Mr Huffer and Mr Shuttleworth. Mr Huffer, in particular, was a very credible witness. His recollection was clear and his evidence very straightforward and consistent. Likewise Mr Shuttleworth, in my view, was very credible and his evidence was not dented in any way under cross-examination. Where there are inconsistencies between the evidence of Mr Shuttleworth and Mr Huffer, as opposed to that of Mr Crawford and Mr Osborne, I would prefer the evidence of Mr Shuttleworth and Mr Huffer. I say this not as an adverse comment upon Mr Crawford or Mr Osborne as they both presented themselves honestly to the Commission. However, the impression which I have gained is one where they were less involved in the operational requirements of the business than the other two witnesses and hence their evidence in my view has to be judged against this fact. I would place less reliance on the evidence of Mr Bellamy.

6 There is no doubt in my view that the termination of Mr Shuttleworth was unfair. The clear impression gained from the evidence is that Mr Crawford was not impressed with the attitude of Mr Shuttleworth in not ensuring that the planting occurred at a faster rate. He transferred responsibility for that to the landowners, namely the Pessottos. Mr Crawford was newly involved with the respondent and had had limited contact with Mr Shuttleworth. However, an incident which he witnessed of the removal of pebbles from the small ginko plants, he took as unnecessary and indicative of poor priorities. This came across in his evidence as a point of particular importance causing a breakdown in Mr Crawford's trust in Mr Shuttleworth. He perceived Mr Shuttleworth as being negative or resistant to his desires to move the project forward.

7 Mr Crawford telephoned Mr Shuttleworth whilst the applicant was on annual leave to advise him that his services were no longer required. Mr Shuttleworth says that the termination was unwarranted. The respondent argues that there was a termination by mutual consent, but I consider this improbable and would accept the evidence of Mr Shuttleworth as to the nature of the discussions on that day. Mr Crawford was a man of action, he wanted to get things moving, he had spoken to his co-director, Mr Osborne, and got his agreement to terminate Mr Shuttleworth's employment and hence he dismissed Mr Shuttleworth without any real explanation, notice or I would say justification. The respondent complains that Mr Shuttleworth was a good worker but a poor manager. It seems clear that much of the difficulties that the applicant experienced with slow progress in planting were due to the unavailability of seedlings. Mr Shuttleworth's evidence was very thorough and essentially unchallenged in that regard. This was in turn due to a conflict which the company had with Mr Barber. Mr Barber would not release the seedlings due to this conflict. In my view, Mr Shuttleworth can not be blamed for the slow progress with planting caused by this conflict. He also gave convincing evidence of the other difficulties with planting in having to prepare ground on separate occasions, receiving poor seedling stock and a lack of irrigation planning. Mr Shuttleworth raised his concerns with Mr Crawford on a number of occasions. Exhibit GS2 deals with this in part.

8 In all of these circumstances I find the dismissal of Mr Shuttleworth whilst on annual leave was unfair and amounted to a summary dismissal for no valid reason. If Mr Shuttleworth had been dismissed on notice it would likewise have been unfair due to the lack of any warning, counselling or valid reason (see *Undercliffe Nursing Home—v- Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* 65 WAIG 385). Mr Crawford had lost confidence in Mr Shuttleworth but I doubt the basis upon which this view was formed, the haste with which it was formed, and the haste with which the dismissal was carried out. No doubt Mr Crawford wanted to restructure operations, at Mr Shuttleworth's expense, but he made no attempt to deal with this issue properly or to treat the termination as a redundancy. It is clear from the evidence also that neither Mr Crawford or Mr Osborne had regard to the contract of employment at the time of dismissal. I am prepared to accept that there was some ignorance of the contract, even though Mr Osborne was warned by Mr Bellamy about the contracts. However, in no way could the employment of Mr Shuttleworth have been characterised as casual in nature and hence subject to such ready termination of his services.

9 The evidence is also clear as to a continuing conflict between Mr Osborne and Mr Bellamy. The latter is related to the applicant, was previously a director of the company and was eventually bought out from the company. In my view, this has coloured the respondent's attitude to this claim but I do not consider that the fault lies with Mr Shuttleworth or that those matters in conflict between Mr Bellamy and Mr Osborne have a bearing or are a justification for the dismissal of Mr Shuttleworth.

10 The applicant in closing submissions says—

> "The Applicant submits that it should not be necessary for the Commission to consider Application No 170 of 2001 at all because the grounds have been made out for a judgement favourable to the Applicant's claim in Application 169 of 2001."
>
> In other words the applicant should get the balance of the contract as the contract is a contract of fixed duration, not terminable by notice, and hence would not receive the more limited compensation for unfair termination.

11 The two issues which have been more difficult to address in this matter have been whether the contract is properly made and is of a fixed duration, and whether the applicant has mitigated the loss he has suffered.

12 In *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 at 506 Diplock J formulated special rules to apply when the agent is the agent of a company. The applicant seeks to apply these rules which are—

> "(1) That a representation that the agent had authority to enter on behalf of the company into a contract of the kind sought to be enforced was made to the contractor;
>
> (2) Such representation was made by a person or persons who had 'actual' authority to manage the business of the company either generally or in respect of those matters to which the contract relates;
>
> (3) The contractor was induced by the representation to enter into the contract, that is that he/she in fact relied upon it; and
>
> (4) That under the memorandum of articles of association the company was not deprived of the capacity either to enter into the contract of the kind sought to

be enforced or to delegate authority to enter into the contract of that kind to the agent."

13 Mr Huffer was delegated to establish the employment relationships. Mr Osborne says that he was not aware that a contract was signed for a three year period and I accept this. He also says that he did not act when Mr Bellamy warned him of the contracts which were signed on behalf of the company. This is of less relevance than the fact that Mr Huffer, in my view, had authority to act for the company and did so. The criteria as outlined by Diplock J have been met in this instance with the exception of point 4 of which there was no evidence to which would lead to a denial of the validity of the contract. The best that can be said for the respondent's case in that regard is that as finance was still to be settled for the scheme then Mr Shuttleworth could not have expected a definite three year contract at that time. Mr Huffer's evidence, which I accept speaks directly against this. The contract is plain in its terms. It is a contract of fixed duration, i.e for three years, and properly made. No additional implication of terms is necessary or warranted.

14 The respondent says that the words next to the signature block of Mr Huffer (as cited previously), whereby he agreed to ensure the respondent conformed to the contract, are indicative that he was not the proper authority. I disagree and Mr Huffer in his evidence was clear about what task he was delegated to do.

15 The evidence of Mr Huffer is that arising from the Management Team meeting of 29 March 2000 [Exhibit PB2], which was attended by Mr Bellamy, Mr Osborne, Mr Hodges (the other director), Ms Eyers and Mr Huffer, he was delegated to finalise and have signed the employment contracts by 7 April 2000. He says at transcript pg 207—

> "The term, we looked at, I guess, from two angles. One was to ensure that Silviculture Management could basically minimise employment costs by not having—- by having a term which would keep the employee for a sufficient time without having to re-negotiate contracts or having to re-advertise positions; those sort of processes. We also looked at something which would be sufficiently attractive to the employee as far as a security point of view."

16 He says that it was intended to be a three year contract. I note that Mr Huffer's own contract for services, as signed by Mr Osborne on 8 February 2000 [Exhibit PB1], has a three year term. Mr Huffer says that he consulted with Mr Bellamy (a then director of the company) over the contracts and says they agreed that three years would be sufficiently attractive to keep the managers involved (Transcript p216). He says that Mr Shuttleworth had been casual up to that point in time.

17 The evidence of Mr Shuttleworth is that he was offered a term of three years in the contract and the first time he was aware of the three year term was when he read it in the contract. He says that it was a long term project. In other words the three year term appeared not out of context.

18 Based on this evidence, which I accept, I find that the contract is a fixed term contract of three years duration. The applicant references the decision in *Perth Finishing College Pty Ltd v Susan Watts* 69 WAIG 2307. That decision and the decision of Beech C from which the appeal arose (*Susan Watts v Perth Finishing College Pty Ltd* 69 WAIG 709) are on point. The Full Bench upheld the decision of the Commissioner that the contract in question was for a fixed period and that the applicant should have been paid for the unexpired balance of the period. The decision states at page 2315:

> "Thus, when the contract was terminated, Ms Watts had a right which accrued.
>
> If the employment is for a fixed term not subject to termination by notice, damages will be equivalent to the salary over the entire period [see *Re* English Joint Stock Bank; Yelland's Case (1867) LR 4 EQ 350], subject on the same authority, to reduction for likelihood of re-employment within the remaining contractual period.
>
> In our opinion, the entitlement to a benefit exists "under" i.e. by virtue of the contract of service, and the benefits are still an entitlement even though the contract has been terminated, because the entitlement is not terminable simultaneously with the contract. In addition, insofar as this relates to a dismissal, it is an industrial matter, and jurisdiction exists for that specific reason, notwithstanding that the contract of service has been terminated."

And further at page 2316—

> "In any event, it has long been the case relating to fixed term contracts of service not subject to termination by notice (which the Commission at first instance correctly held this contract to be), that damages will be equivalent to the salary over the entire period, subject to reduction for likelihood of re-employment within the remaining contractual period [see *Re* English Joint Stock Bank; Yelland's Case (1867) LR 4 EQ 350]. That was the remedy available at law."

19 I am bound by that decision. The contract was for a fixed term and there was no mutual termination of the contract. The benefit was not a benefit under an award. There was no misconduct and in fact no justifiable reason for the termination. The benefit denied as per section 29(1)(b)(ii) is the balance of the contract, subject to the issue of mitigation.

20 Ms Watts obtained employment at a lesser rate of pay some 13 week after her termination. She was bound to mitigate her loss by obtaining other employment, which she did at a lesser rate of pay and hence she suffered a continuing loss. In granting relief the Commission must have regard to equity, good conscience and the substantial merits of the case. The Commission is not restricted to the specific claim made or the subject matter of the claim. I say this because the remedy to be applied in this matter is not straightforward. The applicant has made out his claims for denied contractual benefits and for unfair dismissal, and on their own submission cannot and does not claim both for reasons which I will explain, and which go to mitigation. I would discontinue the contractual benefits claim and deal solely by way of remedy with the claim for unfair dismissal. The issue to next address is whether reinstatement is practicable and I find that it is not. The evidence at the hearing was that the landowners were now performing the duties previously performed by Mr Shuttleworth. In other words it is not the usual situation of simply another employee taking over the job. Additionally, I do not consider that a productive relationship between Mr Crawford and Mr Shuttleworth could be re-established. For these reasons I find reinstatement to be impracticable.

21 The applicant has a duty under both applications to mitigate his loss. Mr Shuttleworth's unchallenged evidence is that he tried to get a job through Jobs South-West but that due to the downturn in the timber industry he was unsuccessful. He then decided to commence a course of full-time study in holistics counselling. He was terminated on 5 January 2001, he commenced his course on 10 February 2001 and received no monies (except his irregular performance fees as a musician) until 15 March 2001 when he received an Austudy payment, not backdated (Transcript pgs. 69-71). Based on this evidence I find that the applicant has not sought to properly mitigate his loss upon taking up the course of full-time study. Therefore the loss suffered is limited by these actions, it is not ongoing, and does not represent the six months compensation as claimed. Similarly based on this finding the contractual benefit as claimed, ie the balance of the fixed term contract, cannot be awarded, in full.

22 Mr Shuttleworth says that he had to make a decision about the course fairly quickly and made the positive choice, under considerable financial strain, to commence the course. I would take from his evidence that had he not received the Austudy payment then he would not have been able to sustain himself whilst studying and so not have been able to study. For those reasons I would accept that the loss suffered should represent the period from

5 January to 15 March 2001, rather than the period to 10 February 2001. The period I calculate to be 9.6 weeks. The applicant's annual salary and superannuation was $38,057 [Exhibit GS1]. Hence the loss is $38,057 divided by 52.166 equals $729.54 per week. This sum multiplied by 9.6 weeks equals $7,003.58.

23 I have taken for the purposes of calculation simply the salary and superannuation expressed in the contract. The amounts claimed for vehicle and mobile phone have not been included as they are not expressed in the contract and even though Mr Shuttleworth had use of them while employed, they were simply company property for work purposes which on Mr Shuttleworth's evidence were quickly returned on dismissal.

24 The last issue which is to be addressed is the claim for injury of $3,750. The evidence of Mr Shuttleworth which I accept is that the dismissal led to a change of lodgings and he had to separate from his children due to financial pressures. He says that it also led to a separation from his wife and to some sickness. A similar element was considered in awarding monies for injury in *John Joseph Moreno v Serco (Australia) Pty Limited* 76 WAIG 2855 @ 2857. The applicant's agent submitted that an award of $3,000 to $5,000 was justified and referred to the Full Bench decision in *Nicholas Richard Lynam v Lataga Pty Ltd* 81 WAIG 986 where an award of $3,500 was granted. I have had the benefit of hearing that application also and would say having seen both applicants and heard their evidence that an award of compensation for injury to Mr Shuttleworth above that described in the *Lynam* matter is warranted, given Mr Shuttleworth's circumstances following the dismissal. I would award the injury component as claimed of $3,750. Therefore the total compensation to be awarded is $10,753.58.

25 In summary, as the sum claimable, based on my findings, is the same for the contractual benefits claim and the unfair dismissal claim, leaving aside the component of injury, and both sums cannot be awarded, I will discontinue application 169 of 2001 and award by way of compensation $10,753.58 in application 170 of 2001. The applicant sought any payment awarded to be paid within 7 days and I would so order.

2001 WAIRC 03914

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	GREGORY RICHARD SHUTTLEWORTH , APPLICANT *v.* SILVICULTURE MANAGEMENT PTY LTD , RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	THURSDAY, 4 OCTOBER 2001
FILE NO/S	APPLICATION 169 OF 2001, APPLICATION 170 OF 2001
CITATION NO.	2001 WAIRC 03914

Result	Applicant dismissed unfairly; compensation awarded Contractual benefits claim discontinued
Representation	
Applicant	Mr L H Pilgrim as agent
Respondent	Mr B Stokes as agent

Order.

HAVING heard Mr L H Pilgrim on behalf of the applicant and Mr B Stokes on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby—

(1) DECLARES that the applicant, Gregory Richard Shuttleworth, was unfairly dismissed by the respondent on the 5th day of January 2001.

(2) ORDERS that the respondent shall pay the applicant the sum of $10,753.58 as and by way of compensation within 7 days of this order.

(3) ORDERS that application 169 of 2001 for denied contractual entitlements be and is hereby discontinued.

(Sgd.) S. WOOD,
[L.S.] Commissioner.

2001 WAIRC 03951

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	JANICE KIM SPENCER, APPLICANT *v.* AUSCLEAN ENTERPRISES PTY LTD, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	FRIDAY, 5 OCTOBER 2001
FILE NO/S	APPLICATION 931 OF 2001
CITATION NO.	2001 WAIRC 03951

Result	Jurisdictional issue. Employment relationship exists.
Representation	
Applicant	Mr B Stokes, agent on behalf of the applicant
Respondent	Mr Sokil and with him Mr N Sica on behalf of the respondent

Reasons for Decision.

1 The applicant, Ms Spencer claims to have been unfairly dismissed from her position of cleaning supervisor with Ausclean Enterprises Pty Ltd. The circumstances of her termination are claimed to have amounted to a constructive dismissal. However in the first instance the issue is whether or not the applicant was an employee. The respondent company through its principals Mr Sica and Mr Sokil assert that Ms Spencer's relationship was that of an independent contractor.

2 The applicant was represented by Mr Stokes, a registered industrial agent. Mr Sica and Mr Sokil represented the respondent company. They are the principals of that company. It was made clear at the outset that proceedings were limited to consideration of the preliminary jurisdictional issue. In this regard the parties were given a copy of the resume of the recent High Court Judgement in Hollis v Vabu Pty Ltd [2001] HCA 44; 9th August 2001 ('High Court declares bicycle couriers are employers (sic)—is the control test back in the saddle?" Shiels, Carrol and O'Dea (CCH Summary)).

3 For Ms Spencer's part it was submitted that although she was initially appointed to the position of part time cleaner working 18 hours per week at the Coles Crosslands store in South Bunbury, she was subsequently promoted to the position of supervisor by Mr Sica. Her new role involved recruitment, staff training and supervision of cleaners at the Crosslands store as well as the Coles stores at Australind and Busselton. It was claimed that Ms Spencer liaised with the management of the Coles stores on standards and particular demands for cleaning. She delivered gas bottles and equipment to cleaners, collected time sheets and completed taxation and other pre employment documentation for new employees. In the performance of her duties she was in regular telephone contact with Mr Sica and forwarded work reports to him by fax.

4 This new role of supervisor was said to have commenced following a telephone call from Mr Sica at 2:00 am in the morning some time early in April 2001. Under the terms of her promotion Ms Spencer's wage was claimed to have

been increased from $11.22 per hour to $15.00 per hour. Mr Sica was said to have also agreed to pay 'fuel money'.

5 The principals of the respondent company stated that the operation functions on the basis that cleaning services are rendered by independent contractors. To this end Ausclean Enterprises Pty Ltd contracts with Australian Contracting Solutions ("ACS") and Nationwide Recruiting Centre for the provision of cleaning services; it is noted that at various times in proceedings ACS was also referred to as 'Australian Cleaning Services' and 'Advanced Cleaning Systems'. It appears that the respondent company holds the franchise for Western Australia for ACS which has the contract to clean Coles stores in South Bunbury, Australind and Busselton. What was important as far as Mr Sica and Mr Sokil were concerned was that Ausclean Enterprises Pty Ltd 'does not have a payroll'.

6 In regard to Ms Spencer the respondent's position seems to be that her initial employment as a cleaner at Crosslands South Bunbury was with ACS. She was never promoted to supervisor but that she was given additional duties akin to "leading hand". Her employment was with ACS until such time as she initiated a change to become an independent contractor herself. Ms Spencer was claimed to have approached the respondent company with the proposal and supplied them with an "ABN number". Her reports to Ausclean Enterprises Pty Ltd and liaison with management were initiated by her and Ms Spencer submitted invoices to Mr Sica for payment. The argument proffered by the respondent seemed to be that as its only relationships were with independent contractors for the provision of cleaning services there could not have been an employment relationship with Ms Spencer. However, if there was an employee-employer relationship, that relationship could only have been with ACS. The respondent's position was not put in precisely these terms but that seems to me to be the only way to interpret the thrust of what was being submitted.

7 I accept Ms Spencer's evidence that early in April her role and status changed from that of cleaner to a more supervisory position. I doubt whether it was designated "supervisor" as such and consider that title was an embellishment by Ms Spencer. However, it was clearly more than a cleaner's role that she was being asked to fill. As Mr Sica stated, it was more likely that of "leading hand". Although the title is of little consequence, my conclusion in this regard is based on the evidence provided by Mr Sica that there was already a supervisors position within the structure of the cleaning operation albeit that it was within the ACS operation. Nevertheless I find that Ms Spencer was asked to supervise and train other cleaners, she had to travel to various locations and liaise with the management of Coles. It was also the case that her wage was increased and that there was a commitment to pay her for petrol. Furthermore I accept that Ms Spencer was in regular contact with Mr Sica although I consider the frequency of this communication to have been exaggerated. As to reports faxed to Mr Sica I consider these to have been at Ms Spencer's initiative but as a direct consequence of the requirement for her to report to Mr Sica. It is clear that he did not attempt to stop the practice or in any way curtail her reporting to him. In all respects Ms Spencer provided a direct link between the management of Coles and the respondent company in addressing issues concerning the standard of cleaning and the attendances and performances of cleaners at the Crosslands and Australind stores. Her involvement in Busselton appears to have been somewhat less.

8 I accept the respondent's evidence that Ms Spencer initiated the move for her to work as an independent contractor. She provided the ABN registration and sought to develop her role in the respondents operation. It is apparent that Mr Sica and Mr Sokil were happy to accept this involvement until such time as they received invoices from Ms Spencer. At this point they tried to revert to the position that had prevailed previously, i.e. that Ms Spencer was an employee of ACS. I do not accept that the payments made by Ausclean Enterprises Pty Ltd were either loans or amounts to be offset against wages from ACS. As the evidence shows, payments that were made were based on the respondents assessment of the work performed for it by Ms Spencer.

9 The fact of payments being made to Ms Spencer by Ausclean Enterprises Pty Ltd and the direct relationship between Ms Spencer and Mr Sica for the purpose of undertaking cleaning services makes it clear the Ms Spencer was not an employee of ACS. What then was the character of the relationship between her and Ausclean Enterprise Pty Ltd?

10 The legal character of that relationship is not determined by the bald assertion that the respondent does not have a payroll, that it only contracts with independent contractors or that the applicant submitted invoices and proffered an "ABN number".

11 The High Court's decision in Hollis v Vabu Pty Ltd [2001] HCA 44 dated 9th August 2001 shows that the interposition of a corporate structure will have no effect in securing a relationship of independent contractor and principal if all of the other factors demonstrate an employment relationship between the service provider and the ultimate beneficiary of that service. Considerations respecting economic independence and freedom of contract are not determinative of the legal character of the relationship. It is the totality of the relationship which has to be assessed. This approach subsumes the "control test" within the general arrangements of contemporary working relationships.

12 Here the applicant is not providing skilled labour or labour which required special qualifications. She would be unable to make an independent career as a free-lancer or to generate any "good will" as a cleaning "supervisor" or "leading hand". As was the case with bicycle couriers in Hollis v Vabu Pty Ltd (op cit) the notion that somehow she was running her own business is "intuitively unsound" (op cit at paragraph 48).

13 The evidence showed that Ms Spencer had limited control over the manner in which she performed her work. Cleaning standards and control were closely monitored by Mr Sica.

14 Ms Spencer did not present to Coles as the operator of a separate entity. Quite the contrary she was identified as Mr Sica's on-site representative.

15 Apart from driving her own car to various locations where cleaning contracts were being undertaken (and for which she was to be reimbursed for fuel), Ms Spencer did not provide any of her own equipment or material. She used those already supplied and when replacements or repairs were deemed necessary, that was arranged under Mr Sica's control and direction.

16 In all the circumstances of the relationship, the work practices followed by Ms Spencer were those imposed by the respondent company through Mr Sica. These included not only the standards of cleaning but also the level of payments (which were designated by the principals), the times at which services were to be rendered and processes by which staff were to be recruited and designated as employees of specific corporate entities.

17 I am satisfied that the totality of the relationship was one of a contract of service between Ms Spencer the employee and Ausclean Enterprises Pty Ltd the employer. As such the Commission has jurisdiction to consider the substantive claim.

2001 WAIRC 03733

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	HERMANN J A VAN TOBRUK II, APPLICANT *v.* BURYMORE PTY LTD (ABN/ACN 720 855 490 060), RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	MONDAY, 3 SEPTEMBER 2001
FILE NO	APPLICATION 483 OF 2001
CITATION NO.	2001 WAIRC 03733

Result	Applicant dismissed unfairly; compensation awarded
Representation	
Applicant	Mr Hermann JA Van Tobruk II on his own behalf
Respondent	No appearance

Reasons for Decision.

(Given extemporaneously and subsequently edited by the Commissioner)

1 This matter comes to the Commission pursuant to section 29(1)(b)(i) and (ii) of the *Industrial Relations Act, 1979* (the Act). The applicant, Mr Van Tobruk II, was employed by the respondent Burymore Pty Ltd, as a bar manager from 8 September 2000 to 23 February 2001. He has claimed 8 weeks compensation for allegedly being dismissed unfairly on 23 February 2001; it being a summary dismissal.

2 The application was made on 16 March 2001. No answers were lodged by the respondent, even following requests from the Commission. The matter was brought on for conference pursuant to section 32 of the Act on 2 July 2001, 15 minutes prior to the conference the respondent's office advised the Commission that the respondent's principal was interstate due to a medical emergency and unable to attend.

3 The matter was again listed for conference on 24 July 2001 at which time the respondent did not appear. The matter was subsequently referred to hearing. The parties were advised on 24 July 2001 by notice that the matter would be heard on 3 September 2001.

4 At hearing there was no appearance by the respondent. I have heard Mr Van Tobruk II give credible evidence in relation to his dismissal, being that he was telephoned on 23 February 2001 and was advised without warning that his employment would be terminated.

5 The test to be applied is that in *Undercliffe Nursing Home -v- Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* 65 WAIG 385. On the evidence before the Commission I find that the applicant has not been given a fair go all round and hence has been dismissed unfairly.

6 The applicant provided pay advices, bank statements and a separation certificate as evidence that he was employed by the respondent and paid $1,000 per week. He does not seek reinstatement and I find that it would be impracticable to order reinstatement. He has also given credible evidence of his gap in employment.

7 Given my findings in regards to reinstatement I would order that Mr Van Tobruk II be paid an amount of $8,000 as and by way of compensation, being the loss the applicant incurred while seeking to obtain new employment.

2001 WAIRC 03794

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	HERMANN J A VAN TOBRUK II, APPLICANT *v.* BURYMORE PTY LTD (ABN/ACN 720 855 490 060), RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	WEDNESDAY, 19 SEPTEMBER 2001
FILE NO	APPLICATION 483 OF 2001
CITATION NO.	2001 WAIRC 03794

Result	Applicant dismissed unfairly; compensation awarded
Representation	
Applicant	Mr H J A Van Tobruk II on his own behalf
Respondent	No appearance

Order.

HAVING heard Mr H JA Van Tobruk II, on his own behalf and in the absence of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby—

(1) DECLARES that the applicant, H JA Van Tobruk II, was unfairly dismissed by the respondent on the 23rd day of February 2001.

(2) ORDERS that the respondent shall pay the applicant the sum of $8,000.00 by way of compensation.

(Sgd.) S. WOOD,
[L.S.] Commissioner.

2001 WAIRC 03876

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	ANNA WELLINGTON, APPLICANT *v.* BUCKS CLEANING & PROPERTY SERVICES, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DELIVERED	MONDAY, 10 SEPTEMBER 2001
FILE NO/S	APPLICATION 2157 OF 2000
CITATION NO.	2001 WAIRC 03876

Result	Application upheld. Order issued.
Representation	
Applicant	Ms A Wellington in person
Respondent	No appearance by the respondent

Reasons for Decision.

(Given extemporaneously at the conclusion of the proceedings, taken from the transcript as edited by the Commission)

1. This is a claim pursuant to s 29(1)(b)(i) and (ii) of the Industrial Relations Act, 1979 ("the Act") by which Ms Anna Wellington ("the applicant") says she was unfairly dismissed and also by the application seeks contractual entitlements in respect of a fuel allowance. The respondent has not appeared and the Commission has proceeded to hear and determine the matter in the absence of the respondent, being duly satisfied that it has had good and proper notice of these proceedings, and no reason has been shown why the matter should not proceed.

The Facts

2. The facts are relatively straightforward. The applicant gave evidence that she commenced employment with the

respondent as a cleaning supervisor on or about 9 November 2000. The applicant was employed on a casual basis. She was initially paid the rate of $13.00 per hour which rate of pay increased to $15.00 per hour. It is also the case that apparently the Contract Cleaner's Award 1986 ("the Award") governed the applicant's employment. The applicant testified that she worked consistently in the period from her commencement on or about 9 November 2000 through up to and including 22 December 2000 when she says her employment was brought to an end summarily by the respondent.

3. It is the applicant's evidence that she worked regularly Monday through to Saturday each week. Her work hours varied but the evidence was that the work was in the order of six to eight hours per day subject to variation on request by the employer. The applicant also testified that as a supervisor she attended the respondent's premises to collect materials for cleaning duties and also to submit time and wages records for work performed each week. The evidence was also that her terms of employment were consistent with a document shown to the applicant in her evidence, that document dated 14 November 2000 bearing her signature headed up "Conditions of Employment" which document was annexed to the notice of answer and counter proposal filed by the respondent on 4 January 2001.

4. For all present material purposes that document indicated that employees are casually employed on call with no set work times. The employer will pay taxation and superannuation and it is specified in the document that the employees will be paid every 14 days by cash or by cheque. Employees would be covered by worker's compensation. The employer would provide all equipment for all jobs and rates of pay set out for cleaners at $13.88 per hour and supervisors, of which the applicant was one, at $15.00 per hour. Additionally, the document specified an allowance of $40.00 per week which the applicant said in her evidence was a fuel allowance paid each week as a flat rate of pay, which allowance did not relate to mileage in her vehicle used for the purposes of the employment.

5. The applicant says that on 22 December 2000 she attended the respondent's office to hand in time sheets for that week. The proprietor of the business, a Mr Reid, was present along with apparently, another person. That other person was introduced to the applicant as being a person who apparently, on the evidence, would engage in further supervision of the employees of the respondent. The applicant testified that at that meeting, the respondent accused her of performing less than satisfactorily and also of wrongly claiming time on her time sheets, all of which the applicant strongly denied.

6. The applicant's evidence also was that some time prior to that she had an absence for two or three days as a result of a shoulder injury on or about 12 and 13 December 2000. The applicant's evidence was that as a result of that meeting, Mr Reid summarily dismissed her by using words to the effect that "she was sacked or dismissed". The applicant's evidence was that she had no doubt that her employment was being brought to an end by the respondent in circumstances that she strongly disagreed with. The applicant's evidence also was that at that same meeting the respondent requested that she sign a piece of paper to the effect that any payments made to her were in full and final settlement of all moneys due, which the applicant appeared to have refused to have done.

7. Also in evidence is exhibit A1 which were the applicant's wage and salary envelopes for the relevant period of the employment, which do not include the final fortnight to 22 December 2000, in relation to which the fuel allowance claim is concerned.

8. There is no evidence from the respondent, it having failed to appear in the proceedings this morning. In the absence of any evidence from the respondent, I am bound to accept the applicant's evidence unless I have formed the view that it is inherently incredible, which I am not persuaded it is. I therefore accept the applicant's evidence in toto and I find accordingly, based on my narration of the evidence that I have just set out for the record.

Conclusions

9. Accordingly, I turn to the applicant's claim that she was unfairly dismissed. I am satisfied on the evidence that the applicant was employed on the terms and conditions that she testified she was employed as a supervisor/cleaner and that on or about 22 December 2000 her employment was brought to an end summarily without any warning whatsoever by the employer.

10. I accept the evidence of the applicant that she was not counselled or warned about any concerns regarding her work performance, and accordingly I am satisfied on the basis of her evidence that she had an expectation of ongoing employment and indeed had worked regularly and continuously for the employer up to that date and that she was indeed dismissed, although she was casually employed. Moreover, I am satisfied on the evidence that indeed she was unfairly dismissed in those circumstances.

11. In relation to the applicant's claim for fuel allowance, I am satisfied on the evidence, having regard to the contract document which is set out in the respondent's notice of answer and counter proposal, identified by the applicant in her evidence as headed up "Conditions of Employment" and signed by her effective 14 November 2000, that she did indeed have as a term of her contract of employment with the respondent an entitlement to an allowance of $40.00 per week for fuel, which allowance in my opinion bears no relation to clause 19—"Fares and Travelling and Transport" of the Contract Cleaners Award 1986 ("the Award") and therefore is a matter properly within the Commission's jurisdiction.

12. I am satisfied on the evidence that the applicant has been denied her contractual entitlement to that allowance for one week in the period commencing 10 November 2000, in the sum of $40.00 and for a fortnightly period in the fortnightly period commencing 11 December 2000, in the sum of $80.00, making a total of $120.00.

13. In relation to the applicant's claim for unfair dismissal, I am, as I have said, satisfied that she was harshly, oppressively and unfairly dismissed. The applicant does not seek reinstatement, rather seeks compensation as she is now employed, as she told me on her evidence. I am satisfied the applicant has sought, but has not been successful in obtaining other employment since she was dismissed on or about 22 December, 2000.

14. However, I note for the purposes of the record that from the respondent's notice of answer and counter proposal it appears more likely than not that the respondent company ceased to trade in or about mid February 2001, and I find accordingly.

15. On the basis of my findings and my conclusions, I am satisfied that the applicant should be compensated for the unfairness of her dismissal. In my view, having regard to the circumstances of the respondent as recorded in the papers before the Commission, it would be fair and equitable to compensate the applicant in money terms for the period from the date of her dismissal to in or about mid February 2001 at an average weekly earnings rate which, from the records tendered in exhibit A1, appears to be approximately $375.05 per week or thereabouts.

16. Accordingly, taking approximately a ten week period to mid February, I award compensation in the sum of $3,750.00 payable by the respondent within seven days hereof. Secondly, I award the applicant contractual entitlements in the sum of $120.00 reflecting the payment of fuel allowances due but not paid to the applicant in the period that I have specified in my findings. Additionally, that sum will be due and payable by order of the Commission within seven days.

2001 WAIRC 03818

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	ANNA WELLINGTON, APPLICANT *v.* BUCKS CLEANING & PROPERTY SERVICES, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DELIVERED	THURSDAY, 20 SEPTEMBER 2001
FILE NO/S	APPLICATION 2157 OF 2000
CITATION NO.	2001 WAIRC 03818

Result	Application upheld. Order issued.
Representation	
Applicant	Ms A Wellington in person
Respondent	No appearance by the respondent

Order.

HAVING heard Mr A Wellington on her own behalf and there being no appearance by the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby—

1. DECLARES that Ms Anna Wellington was harshly, oppressively and unfairly dismissed from her employment, as a cleaner supervisor, by the respondent on or about 22 December 2000.
2. DECLARES that the reinstatement of Ms Wellington is impracticable;
3. ORDERS the respondent to pay to Ms Wellington compensation in the sum of $3,750.00 less any amount payable to the Commissioner of Taxation pursuant to the Income Tax Assessment Act 1936 and actually paid within 7 days of the date of this order.
4. ORDERS the respondent to pay to Ms Wellington the sum of $120.00 as a denied contractual benefit less any amount payable to the Commissioner of Taxation pursuant to the Income Tax Assessment Act 1936 and actually paid within 7 days of the date of this order.

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

CONFERENCES—
Matters arising out of—

2001 WAIRC 03729

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS & THE COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING & ELECTRICAL DIVIVISION, WA BRANCH, APPLICANTS *v.* DAMPIER SALT PTY LTD, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DELIVERED	TUESDAY, 11 SEPTEMBER 2001
FILE NO/S	C 190 OF 2001
CITATION NO.	2001 WAIRC 03729

Result	Interim orders refused.
Representation	
Applicant	Mr M Llewellyn on behalf of the AWU Mr J Murie on behalf of the CEPU
Respondent	Mr E Hartley of counsel

Reasons for Decision.

1. By this application pursuant to s 44 of the Industrial Relations Act 1979 ("the Act") the applicants are in dispute with the respondent in relation to terms and conditions of employment to apply at a salt production and processing business previously operated by another employer, Cargill Salt ("Cargill"), recently acquired by the respondent. The applicants seek an order that the previous award having application, that being the Cargill Australia Ltd—Salt Production and Processing Award 1988 ("the Cargill Award") apply to the respondent, by reason of there being an alleged transmission of business. The applicants also seek interim relief of that kind, pending the ultimate determination of this matter by the Commission, if that becomes necessary.
2. The respondent strongly opposed the applicants' claim for interim orders, which issue the Commission deals with in these reasons.
3. A compulsory conference was convened by the Commission. The parties were directed to confer as to the matters in dispute between them. At the conclusion of the compulsory conference, the parties were invited to file further written submissions in relation to the issue of interim orders. The parties did so.

Brief Facts

4. To the extent that it is before the Commission at this stage of the proceedings, the factual background can be shortly stated. Employees of Cargill, along with the applicants, were notified on or about 20 July 2001 that the respondent was purchasing the assets of Cargill. The employees and the applicants were advised at that time, that all Cargill employees would be offered employment with the respondent on completion of the sale transaction. Employees would be given a choice of employment regulation either between a contract of employment "underpinned" by the terms of the Dampier Salt Award 1990 ("the Dampier Award") or an individual workplace agreement under the Workplace Agreements Act 1993. The respondent submitted that at the time of discussions with employees of Cargill, it was made clear that the respondent was purchasing the assets of Cargill and not it as an ongoing business. Changes would be made to the running of the operation and the organisation of work.
5. The Cargill employees were also notified by Cargill that they would, in accordance with the relevant provisions of the Cargill Award, be paid a redundancy payment on the termination of their employment, irrespective of whether they took up employment with the respondent or not. I should say that this was the description of the payment to be made to employees. Whether indeed in the circumstances of the transaction, the employees who accepted employment with the respondent were truly redundant, is in issue in these proceedings. I note the provisions of clause 34—Redundancy of the Cargill Award, that, for its purposes, dismissals for or arising out of a merger or take-over, are deemed to constitute "redundancy" for the purposes of entitlements under that clause. It seems to be an open question in my view, whether the transaction effected, was or could reasonably be described as a "take-over", at least in so far as that concept is understood under the Corporations Law. However, it is not necessary to decide any of these issues at this juncture.
6. It is also not entirely clear from the material before the Commission at this stage, whether the "transferring employees" actually had their contracts of employment terminated by Cargill before being offered and accepting employment by the respondent or whether their employment with Cargill came to an end by agreement on the acceptance of offers of employment by the

respondent. This seems to me to also be a material issue as to whether there has been a transmission of business.

7. It is common ground that some 60 odd of the 80 Cargill employees accepted employment with the respondent, most of whom elected to have their employment "underpinned" by the Dampier Award. I pause to observe that from the offer of employment documents before the Commission, it is not readily apparent how this arrangement could be readily enforceable as a matter of law. There is no express incorporation by reference, of the terms of the Dampier Award into the contract documents. However, the respondent assured the Commission that this would be remedied and indeed has foreshadowed an application to extend the terms of the Dampier Award to the new operation at Port Hedland, to remove any doubt. This is because in my opinion, it is at least strongly arguable that the Dampier Award has no application to the relevant employees in Port Hedland, hence those employees being presently award free.

Contentions

8. The applicants in summary, submitted that interim orders extending the Cargill Award to the respondent, on its acquisition of the assets of Cargill, should be made because—
   (a) there is a serious issue to be determined as to whether there has been a transmission of business;
   (b) there is no award presently having application to the relevant employees; and
   (c) the Act requires the Commission act according to equity and good conscience and the interim orders sought are consistent with this.
9. The respondent, in summary, submitted in relation to the claim for interim relief that—
   (a) there is no substantial case to be determined;
   (b) that the detriment to the respondent, if an interim order was made, would out way any detriment to the applicants if it were not made;
   (c) that any interim order made would have consequences that would generally be irreversible;
   (d) that the application was not promptly made relative to the time of the acquisition of the Cargill operation by the respondent; and
   (e) ss 26(1)(a), (c) and (d) (where relevant) militate against the grant of interim relief.
10. The applicants submitted that the scheme of the Act is such that in the main, awards of this Commission operate by common rule, in which event situations such as the present generally do not arise. However, in the present circumstance, there is an enterprise specific award, which clearly, the Act does not extend to the respondent by its terms, in contrast to for example, s 149(1)(d) of the Workplace Relations Act 1996 (Cth) ("WRA"), in relation to successors, assignees or transmittees of a business or part of a business. The applicant therefore submitted that employees of a vendor, who transfer to a purchaser in such circumstances of a transmission of business, stand to suffer a detriment.
11. It was submitted that in this case, there was really no genuine redundancy because the employees who transferred to the respondent effectively continued working in much the same manner as they had done previously by Cargill, and work in the production and harvesting of salt was continuing. Whilst the employees who transferred to the respondent would receive the same hourly rate of pay, housing and housing allowances as provided by Cargill, it was submitted there were some differences between the awards detrimental to the employees. The applicant also submitted that it would be doing equity and good conscience for there to be the issuance of interim orders, to preserve the employment conditions existing prior to the sale, pending the hearing and determination of final relief.
12. The respondent argued that there was no substantial case to be determined as at all material times, the relevant employees were fully aware of the arrangements to be put in place. The employees took advantage of the substantial "redundancy" payments to be made and were advised by the respondent that it was offering new positions with it on different terms and conditions to those applying to Cargill. Changes would be made to the running of the business. The submission was that if interim relief was granted, employees who accepted employment with the respondent, having received substantial "redundancy" payments under the Cargill Award, would be unjustly enriched. It was said that these payments were to compensate for the loss of employment with Cargill.
13. The respondent also submitted that it would suffer significant detriment if an interim order was made, substantially greater than that any detriment caused to the applicants by not granting interim relief at this stage of the matter. It was said that the respondent has incurred significant costs in establishing payroll and other systems at Port Hedland, to operate in accordance with the Dampier Award. Further, it was said that there are significant differences between the Dampier Award and the Cargill Award that would impose operational burdens on the respondent. The respondent also submitted that the grant of interim relief would establish a practically irreversible set of benefits for the employees and that would be unfair upon the respondent. It was also submitted that the applicants were less than prompt in bringing the present application.

Consideration

14. The Cargill Award is an enterprise specific award which had application to the operations of Cargill and the unions named in the award, at Port Hedland. It is not a common rule award having application to the salt production and processing industry throughout this State. The Cargill Award does not contain any provisions in relation to transmission of business, save for reference to long service leave in clause 18.
15. The Dampier Award is also an enterprise specific award having application to the respondent and the named unions, in the area occupied and operated upon by Dampier Salt Ltd—Dampier and Lake MacLeod Divisions, and is restricted in its operation to the area of the State between the 18th and 26th parallel of south latitude.
16. The respondent relied upon a number of authorities in relation to what it submitted should be the relevant tests as to whether an interim order should issue. I note however, that the authorities referred to and relied upon by the respondent are those relating to proceedings pursuant to s 66 of the Act. A different statutory scheme exists under ss 32 and 44 of the Act, in relation to the Commission' powers to issue interim orders at the conciliation stage of a matter. Specifically, for present purposes, s 44(6) relevantly provides as follows—

> "(6) *The Commission may, at or in relation to a conference under this section, make such suggestions and give such directions as it considers appropriate and, without limiting the generality of the foregoing may —*
>
> *(a) direct the parties or any of them to confer with one another or with any other person and without a chairman or with the Registrar or a Deputy Registrar as chairman;*
>
> *(b) direct that disclosure of any matter discussed at the conference be limited in such manner as the Commission may specify;*
>
> *(ba) with respect to industrial matters, give such directions and make such orders as will in the opinion of the Commission—*
>
> *(i) prevent the deterioration of industrial relations in respect of the matter in question until conciliation or arbitration has resolved that matter;*
>
> *(ii) enable conciliation or arbitration to resolve the matter in question; or*
>
> *(iii) encourage the parties to exchange or divulge attitudes or information which in the opinion of the Commission*

would assist in the resolution of the matter in question;"

17. It is trite to observe that orders of the kind contemplated by s 44(6) (ba) are in the nature of an interim measure: *Registrar v AMWSU* (1989) 69 WAIG 1954. Furthermore, without wanting to in any way delineate the circumstances in which such orders will be made by the Commission, nor to conclusively determine the appropriate tests to apply, it is clear that the Commission, as a pre-requisite to making such an order, needs to form an opinion as to the matters set out in sub paras 44(6)(ba)(i)-(iii). That will involve the exercise of a discretion by the Commission, having regard to the particular circumstances of the industrial matter or industrial dispute before it. For example, obvious occasions where this discretion may be exercised is in the event of industrial action or where circumstances are such that it is appropriate to order that the "status quo" apply, pending the determination of the matter, to prevent any further deterioration in industrial relationships between parties to proceedings.
18. There is nothing before the Commission, at least at this stage of the matter, to indicate that there is any immediate prospect of a deterioration in the industrial relationship between the parties in the workplace. The submission of the respondent was that employees, who transferred to it from Cargill, are working normally in accordance with their contracts of employment.
19. Moreover, the statutory scheme contained in the Act, is in contrast with that applying under the WRA, and for example in New South Wales, under Part 8 of the Industrial Relations Act 1996 (NSW). The legislature in this State, has not introduced provisions into the Act to provide for the transmission of entitlements and industrial instruments, on the transfer of a business. In my opinion, this, along with the relevant factors I am obliged to take into account in sub paras 44(6)(ba)(i)-(iii) of the Act, militates against the applicants in their claim for interim relief.
20. I have considered all of the submissions and materials before the Commission, which at this stage of the proceeding are necessarily less than extensive. I am not persuaded on balance, that the applicants have established a case for interim relief of the kind sought. However, my decision in relation to this interim application should not be taken as an expression of any view as to whether final relief should be granted, in light of a full consideration of all of the relevant evidence and issues, at a later stage.

2001 WAIRC 03751

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS & THE COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING & ELECTRICAL DIVISION, WA BRANCH, APPLICANTS *v.* DAMPIER SALT PTY LTD, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DELIVERED	THURSDAY, 13 SEPTEMBER 2001
FILE NO/S	C 190 OF 2001
CITATION NO.	2001 WAIRC 03751
Result	Order issued.
Representation	
Applicant	Mr M Llewellyn on behalf of the AWU Mr J Murie on behalf of the CEPU
Respondent	Ms E Hartley of counsel

Order.

WHEREAS on 7 August 2001 the applicants commenced proceedings pursuant to s 44 of the Industrial Relations Act 1979 ("the Act") for a compulsory conference.

AND WHEREAS on 24 August 2001 the Commission convened a compulsory conference pursuant to s 44 of the Act.

AND WHEREAS the background to the dispute and the issues in controversy are set out in reasons for decision of the Commission dated 11 September 2001 in relation to a claim by the applicants for interim relief.

AND WHEREAS at the conclusion of the compulsory conference on 24 August 2001 the parties were directed to confer in relation to employment arrangements at the respondent's operations at Port Hedland.

AND WHEREAS the Commission has received copies of correspondence between the parties dated 6, 7, 10, and 11 September 2001 outlining, regrettably, various difficulties the parties are having in making arrangements to meet to confer on the issues the subject of these proceedings.

AND WHEREAS it is the view of the Commission that representatives of the parties confer at the location of the operations in dispute that being Port Hedland, with the matter of whom should attend and by which means those attendances should be effected, i.e. in person or telephonically or otherwise, is a matter for the parties.

NOW THEREFORE the Commission, having regard for the public interest and the interest of the parties directly involved and to prevent any further deterioration in industrial relations in respect of the matters in question and pursuant to the powers vested in it by the Act hereby orders—

(1) THAT the parties to the herein proceedings confer in relation to the matters the subject of this dispute at the respondent's Port Hedland site on Friday 21 September 2001 at 10:00am.

(2) THAT the parties report back to the Commission the outcome of their discussions referred to in para 1 of this order by no later than 4.00pm Monday 24 September 2001.

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

CONFERENCES—
Matters referred—

2001 WAIRC 03823

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS & OTHERS, APPLICANT *v.* BHP IRON ORE LTD, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DELIVERED	THURSDAY, 20 SEPTEMBER 2001
FILE NO/S	CR 40 OF 2001
CITATION NO.	2001 WAIRC 03823
Result	Order Issued.
Representation	
Applicant	Mr M Llewellyn
Respondent	Mr T Lucev of counsel and with him Mr H Downes of counsel

Order.

HAVING heard Mr M Llewellyn on behalf of the applicants and Mr T Lucev of counsel and with him Mr H Downes of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

1. THAT the memorandum of matters for hearing and determination dated 5 September 2001 in the herein matter be and is hereby revoked.
2. THAT the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australian Branch, the Construction, Mining, Energy Timberyards, Sawmills and Woodworkers Union of Australia, Western Australian Branch, the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division, WA Branch and the Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch be and are hereby joined as applicants to the herein application.
3. THAT the applicants file and serve any witness statements upon which they intend to rely including any annexed documents referred to by the witnesses by 24 September 2001.
4. THAT the respondent file and serve any witness statements upon which they intend to rely including any annexed documents referred to by the witnesses by 8 October 2001.
5. THAT the applicants and the respondent file and serve any witness statements in reply by 17 October 2001.
6. THAT the applicants and the respondent file and serve a list of documents upon which they intend to rely, which documents are not annexed to their witness statements, by 24 September and 8 October 2001 respectively.
7. THAT the applicants and the respondent give notice to one another of witnesses in respect of whom witness statements have been filed, that they require for cross examination by 19 October 2001.
8. THAT the applicants and the respondent file and serve an outline of submissions by no later than 3 days prior to the date of hearing.

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

2001 WAIRC 03902

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS, APPLICANT
	-v-
	PROSCAPE, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	WEDNESDAY, 3 OCTOBER 2001
FILE NO	CR 265 OF 2000
CITATION NO.	

Result	Application alleging unfair dismissal granted.
Representation	
Applicant	Mr M. Llewellyn
Respondent	Mr M. Stephenson

Reasons for Decision.

1 Mr Booth was employed by the respondent as a trainee landscaper commencing in January or February 2000. He claims that he was dismissed on Monday, 25 September 2000.

2 Mr Booth's evidence is that he arrived at work at 7:00am on that day. He states that he was asked by the proprietor of the respondent, Mr Stephenson, to build a retaining wall that day. Mr Booth refused to do so because his back was sore from having completed a retaining wall the previous Friday. He stated that his back was sore and asked Mr Stephenson how his back was. His evidence is that Mr Stephenson replied that if Mr Booth was not prepared to start the wall he should leave and not come back. Mr Booth states that he then telephoned his wife and also telephoned the union. He states that he then showed Mr Stephenson his union membership ticket upon which Mr Stephenson expressed surprise, and some panic, and told Mr Booth that "if the union was involved they would only get you another week's pay". Mr Stephenson said that he would not be able to have Mr Booth back if he was a union member. Mr Booth's evidence is that Mr Stephenson said that Mr Booth should go and become a ticket conductor on a bus or a pin-up boy. Mr Booth said that Mr Stephenson was childish and Mr Stephenson agreed. Mr Booth then left the site.

3 Mr Stephenson's evidence is somewhat different. He states that at approximately 8:15am on the Monday he spoke to Mr Booth who was unloading the truck. There were several other employees present. Mr Booth informed Mr Stephenson that it was his intention to take the truck back to the job location of the previous Friday in order to collect the blocks remaining on the site. Mr Stephenson asked why the blocks had not been brought back on the truck when the job was completed and Mr Booth stated there was not enough room. There was a heated discussion between them and Mr Stephenson recalls Mr Booth saying "that if I no longer, you know, wanted him, and he grabbed his gear and off" (transcript p.48). Mr Booth grabbed his gear from the truck and Mr Stephenson stated to him that due to Mr Booth's unhappiness it might be in his best interest to leave. At that point Mr Booth stormed off. He returned and threatened to bring in the union. He then took the work mobile telephone and made a telephone call. After that, Mr Booth went home.

4 Under cross-examination, Mr Stephenson indicated that Mr Booth had said that he was not going to build any more walls. However, Mr Stephenson maintained that he did not mention building walls to Mr Booth on that day. While there was a wall to be built, it did not have to be done that day. The issue for Mr Stephenson became Mr Booth's abuse of Mr Stephenson at the time that he indicated he was leaving. That abuse showed no respect and had taken place in front of other employees. Mr Stephenson agreed that he did refer to Mr Booth becoming a ticket conductor or a pin-up boy. After Mr Booth indicated he was leaving, Mr Stephenson stated that he had got to the point of Mr Booth not coming back.

5 The Commission also heard evidence from Mr Fitch. Mr Fitch is one of the employees who was present for most of their discussion. Mr Fitch struck me as a person who was relatively disinterested in the matter and while I accept that Mr Fitch has been an employee of Proscape for some years, the answers he gave to the various questions put to him suggested to me that he was a witness who was careful about ensuring that he spoke truthfully. His evidence is that he saw Mr Stephenson go to Mr Booth and heard them have an argument. He believed the argument was about why Mr Booth had not brought back the unused blocks at the end of the job on Friday. He observed Mr Booth being quite upset and heated. He heard Mr Booth saying that he was leaving, and that he had had enough and he heard Mr Stephenson say that if that was the case he should go and that would probably be for the last time.

6 Mr Fitch saw Mr Booth hand in his gear, leave and then return. He heard Mr Booth mention the union and saw Mr Stephenson walking away.

7 Mr Fitch's assessment is that both Mr Booth and Mr Stephenson became heated towards the end of their discussion. Mr Booth did say that he would not build any more walls because his back was sore and asked about Mr Stephenson's back. He does not recall hearing Mr Stephenson directing Mr Booth to go home.

8 Importantly, however, Mr Fitch's evidence is that the truck was to be used to build a wall on the Monday. That is why it was not available to return to the Friday job to collect the unused blocks. Further, Mr Fitch's evidence is that the wall was in fact built that day. This evidence is in marked contrast to the evidence of Mr Stephenson that he did not mention building a third wall to Mr Booth that day, "there was no going out and doing it that day" (transcript p. 36) and that the wall would not have been started for a few days.

9 On balance, I am therefore less inclined to accept Mr Stephenson's evidence regarding what was said that Monday morning. Certainly Mr Stephenson asked Mr Booth why the unused blocks had not been brought back and I accept Mr Fitch's evidence that Mr Booth became upset and heated. I find it more likely than not that Mr Stephenson also became heated. Mr Stephenson admits that at times he and Mr Booth "bristled". I also find it is more likely than not that Mr Stephenson did say to Mr Booth that he wanted Mr Booth to build a third wall that day. That would explain why Mr Booth mentioned his sore back. It is also quite consistent with Mr Fitch's evidence that the building of the wall was commenced that day. I find it more likely than not that Mr Stephenson stated that he wanted Mr Booth to build a third wall, and that Mr Booth refused.

10 I find that it is also likely that Mr Booth's refusal did lead to Mr Stephenson giving him an ultimatum to do the job or leave. I note Mr Fitch does not recall that happening. However, in the context of the heated discussion between Mr Stephenson and Mr Booth, where Mr Stephenson was upset with Mr Booth not having brought back the unused blocks, and Mr Stephenson's view that Mr Booth had simply not cared whether or not they were brought back, I find on balance that is what occurred. It is consistent with the deteriorating relationship between the two which saw Mr Booth abusing Mr Stephenson and led Mr Stephenson towards the end of the conversation to say to Mr Booth that he should get a job as a pin-up boy or a ticket collector.

11 The issue is whether or not Mr Booth was dismissed. I have little doubt that the words used did amount to a dismissal. Mr Booth was given an ultimatum and upon his refusal to build another wall he was to leave. Even Mr Stephenson's evidence that Mr Booth had indicated before that he was leaving the worksite and that this occasion was one too many leads to the conclusion that he dismissed Mr Booth. As I understand it, Mr Stephenson was no longer going to accept Mr Booth leaving or saying he was leaving. Further, Mr Stephenson believed that Mr Booth's abuse of him that morning exceeded the usual level of language they each used to the other on previous occasions. I therefore conclude that Mr Booth was dismissed that morning.

12 The claim before the Commission is that the dismissal was unfair. I do not reach a conclusion on the claim without hesitation. It has necessitated a close reading, and re-reading, of the transcript. I have reached my conclusion for the following reasons.

13 Mr Stephenson summed up the essence of his position as:

> "It was - - it got to the stage where, because of direct abuse to the employer in an open forum on a number of occasions - that being the final one - it got to the thing where when the employee said that he was leaving, the employer accepted that as being the final situation."
>
> (transcript p.122)

14 Therefore, I turn to consider Mr Booth's behaviour towards Mr Stephenson that morning. Mr Booth does not give evidence of the language he used towards Mr Stephenson. Mr Fitch's evidence is that the language used by Mr Booth was more that the usual swearing. It was "… pretty foul". Not just swearing, which is probably a general thing in the workplace, but, you know, actual swearing - names and things like that" at Mr Stephenson (transcript p.93). I accept Mr Fitch's evidence.

15 While an employee's abuse of his or her employer may be a ground for dismissal, much depends upon the context. Where as here, it appears that the behaviour of the employee is matched by the behaviour of the employer, it is more difficult to conclude that dismissal of the employee for that behaviour is fair. Mr Stephenson himself became heated towards Mr Booth that morning and saying to Mr Booth that he should get "a job as a pin-up boy or a ticket collector" (a reference in part apparently to Mr Booth regularly attending a gymnasium) was itself hardly appropriate language from an employer. It appears that the relationship between Mr Booth and Mr Stephenson had involved each using language towards the other previously. If so, there is no suggestion that Mr Stephenson warned Mr Booth not to act in that manner in the future. Further, there is evidence that Mr Stephenson has used bad language to his employees himself even if, as Mr Fitch states (transcript p. 92), it is not on a regular basis.

16 I am reluctant to conclude that Mr Booth's language on that day constitutes a complete defence to the claim of unfair dismissal. As Malcolm CJ observed in *Re Railway Appeal Board* (1999) 21 WAR 1 at 21 insulting or objectionable language may constitute misconduct depending on the standards of conduct and language used in everyday intercourse at that workplace and accounting for the "give and take" atmosphere of the modern workplace. Mr Booth's language towards Mr Stephenson was wrong and excessive. However, Mr Stephenson is not blameless and his insulting words to Mr Booth strongly suggests that Mr Booth's language towards him did not warrant his dismissal for that reason. His language on that day might have warranted a reprimand. If the evidence was that Mr Booth had been told that such language was unacceptable and he had repeated the language, then a different conclusion might be warranted.

17 Mr Stephenson also justifies what occurred on the basis that Mr Booth had left the job early on previous occasions and his statement that morning that he was leaving was one further occasion, and one too many. This submission appears mainly to refer to occasions when Mr Booth left work at 4:00pm to attend a gymnasium for his back or for family reasons. Mr Fitch's evidence is that jobs occasionally had to be re-scheduled for these reasons. There is no credible evidence that Mr Booth had gone home on other occasions, even from Mr Stephenson's cross-examination of Mr Booth. This evidence is to be seen in the context that when Mr Booth had been employed he had been quite open and honest about his bad back and his wish to learn a new vocation where his back would not be at risk. His condition is amply supported by the medical references tendered during the hearing. Mr Stephenson employed Mr Booth as a trainee landscaper with that knowledge. His leaving a job at 4:00pm in order to attend a gymnasium for that reason appears less of an issue in that context. Further, and importantly, if Mr Stephenson had reached the conclusion that the occasions when Mr Booth did leave the job for that reason, or for other family reasons, was unacceptable, fairness would oblige him to inform Mr Booth of that and warn him that it was not to occur again. Mr Stephenson acknowledges "that it was never mentioned as being part of any unsatisfactory work or reason for dismissal" and therefore I do not find it justification for the dismissal which occurred.

18 I accept that Mr Stephenson believed that Mr Booth was wrong not to have brought back the unused blocks when he left the job on the preceding Friday. He maintains there was enough room on the truck to do so. Mr Booth maintains that there was not enough room to do so safely. The statement of Mr Dunstone (exhibit B) which was accepted into evidence by the Commission over the objection of Mr Llewellyn, does not address the issue of

room on the truck. However, I think the real reason why the blocks were not returned with the truck that Friday afternoon became apparent from the question Mr Stephenson put to Mr Booth about that part of Mr Dunstone's statement where he asked Mr Booth: "What about the blocks?" and Mr Booth replied:

> "I wasn't taking them back, Mark. I didn't have the use of a fork-lift and I was not manually physically strong enough or fit enough to do that, and I wasn't going to do it, no."
>
> (transcript p.26)

19 Mr Booth's answer suggests that the reason he did not bring back the blocks had more to do with the physical lifting of the blocks rather than the issue of room and safety on the truck. I find it likely that there was enough room on the truck. The issue was the lifting of the pallet of unused blocks.

20 Mr Booth maintained that he had not been told of the availability of a forklift from a neighbouring hire firm. Mr Dunstone was not called to give evidence and his knowledge of the availability of a forklift remains unknown. However, I note that even if a forklift was available from a neighbouring hire firm, Mr Stephenson himself did not see the failure to bring back the blocks as warranting Mr Booth's dismissal because, as I find, he proceeded to ask Mr Booth to build another wall. Even in these proceedings Mr Stephenson does not expressly rely on Mr Booth's failure to bring back the blocks as a reason in itself why his dismissal was fair. Rather it forms part of the background. Therefore, on the evidence before me, it would not be fair to justify Mr Booth's dismissal by reference to the failure to bring back the blocks the previous Friday.

21 That is not to say that Mr Booth is blameless for what occurred that Monday morning. His language towards Mr Stephenson that morning was wrong. His manner of refusing to build another wall suggests he became upset quickly. Mr Booth presented in court as a person who might become upset easily. It was apparent in his presentation when cross-examined by Mr Stephenson. Nevertheless, the fairness of the dismissal is to be assessed on the whole of what occurred. On balance, I find that whether the dismissal was unfair turns upon Mr Stephenson's request that Mr Booth build a wall that day and Mr Booth's refusal to do so. I appreciate Mr Stephenson's evidence that he was merely trying to find work for Mr Booth to do, however given that his employment included consideration of his back, Mr Booth's refusal was reasonable. While in relation to operational matters a direction to an employee must be both lawful and reasonable, I would be surprised if it was reasonable to request Mr Booth to build a third wall, even if the walls were not high walls, given that he was employed on the understanding that he had a bad back.

22 The question of fairness involves a balance of all of the evidence. Mr Booth had not been given any warnings about his performance or attitude at work. Apart from his leaving work to attend a gymnasium he was regarded as a satisfactory employee. His language towards his employer on the Monday morning was wrong, but in a context where the employer has not set a standard in the workplace, that incident does not warrant dismissal. Mr Booth's failure to bring back the unused blocks did not warrant Mr Booth's dismissal.

23 That balance also takes into account Mr Stephenson's evidence that he believed Proscape had been "looking after [Mr Booth] at all times and giving him work, mainly because of his family situation and trying to work around his back problem" (transcript p.49). However, for the above reasons, I find that the events of the morning do constitute an unfair dismissal.

24 The Commission considers whether or not to order that Mr Booth now be reinstated in his employment. Neither Mr Stephenson nor Mr Booth see reinstatement as practicable and I respectfully agree with their views. Accordingly, I find that reinstatement is impracticable.

25 In relation to compensating Mr Booth for the unfair dismissal, his loss is to be assessed as the wages he would have earned had he not been dismissed for as long as he is likely to have remained in employment, less whatever he has earned, or should have earned had he actively sought alternative employment, in the meantime, provided it does not exceed 6 months' remuneration. On the evidence, I cannot with confidence conclude that Mr Booth would have remained in employment for any considerable period of time after the incident on the Monday. I note Mr Booth's evidence that he was happy in the job and liked the diversity of tasks. I also have had regard for Mr Llewellyn's reference to Mr Fitch's evidence that there has been work for 4 employees in the field since September last year (transcript p.102). Nevertheless, I am left with the distinct impression that Mr Booth's attitude towards Mr Stephenson, and Mr Stephenson's view of Mr Booth, means that the employment relationship is unlikely to have lasted. Mr Stephenson's evidence on this issue suggests that he is of the view that the working relationship between them had broken down "some weeks before" (transcript p. 41). This is not inconsistent with the submission of Mr Llewellyn that the relationship had soured and changed earlier, at the time Mr Booth disposed of his car.

26 There is also some evidence which I accept that the work for Mr Booth was becoming spasmodic. In particular, Mr Stephenson's evidence was that the landscaping work was reducing in favour of the African thatch work ("which was probably 90 per cent of our work from then through till Christmas") which might require employees to go to the country. Mr Booth was not available to go to the country, and on some days would not want to work a full day in order to do therapy for his back, and while that is not a criticism of Mr Booth, it is a fact which limited the work he was able to do. Further, the range of work in the industry of landscape gardening for Mr Booth to do was limited. Mr Stephenson described the work Mr Booth eventually was doing was "one-dimensional sort of work" (transcript p.40). He had been concentrating on Mr Booth doing limestone work and the wall he had completed the previous Friday had been largely to ensure that Mr Booth had continuity of work (transcript p.41, 42).

27 That evidence, together with my impression that the working relationship between Mr Stephenson and Mr Booth had deteriorated, even if it was due in part to Mr Stephenson's requests for Mr Booth to build walls, leads me to conclude that it is unlikely that Mr Booth would have remained at Proscape for any considerable time had the events of the Monday morning not occurred.

28 It is not entirely clear how much longer Mr Booth's employment would have lasted. Mr Stephenson's evidence does not suggest that there would have been no further work for Mr Booth once he refused the third wall. Rather, there would have been "mulching and jobs like that, and they only come up sort of more and more on a daily basis" (transcript p.50). I would be surprised if there would have been continuing work for Mr Booth, had the events of that Monday not occurred, for more than a week or two before Mr Booth would have been laid off. In my assessment therefore, Mr Booth's loss, including a period of notice taking into account that he commenced in January or February 2000, is the wages he would have earned for a further three weeks of employment. It is not suggested that Mr Booth did not actively seek alternative employment during that time. A Minute of Proposed Order now issues which requires Proscape to pay Mr Booth a sum of money equivalent to the wages he would have earned for that period of time as compensation for the dismissal which occurred.

2001 WAIRC 03920

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS, APPLICANT -v- PROSCAPE, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	FRIDAY, 5 OCTOBER 2001
FILE NO	CR 265 OF 2000
CITATION NO.	2001 WAIRC 03920

Result	Application alleging unfair dismissal granted.
Representation	
Applicant	Mr M. Llewellyn
Respondent	Mr M. Stephenson

Order.

HAVING HEARD Mr M. Llewellyn on behalf of the applicant and Mr M. Stephenson on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby—

(1) DECLARES THAT:

(a) Joel Booth was unfairly dismissed by Proscape

(b) Re-instatement is impracticable.

(2) ORDERS that Proscape forthwith pay Joel Booth a sum equal to 3 weeks' wages as compensation for the dismissal which occurred.

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

PROCEDURAL DIRECTIONS AND ORDERS—

2001 WAIRC 03952

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION.

PARTIES	MARK DEAN MALLAND, APPLICANT *v.* AUSTRALIAN CAPITAL EQUITY PTY LTD, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DELIVERED	THURSDAY, 11 OCTOBER 2001
FILE NO	APPLICATION 1354 OF 2000
CITATION NO.	2001 WAIRC 03952

Result	Order of 25th September 2001 cancelled

Order.

WHEREAS on 25th September 2001 the Commission made orders that the application be discontinued; and

WHEREAS on 2nd October 2001 the Commission received written submissions from solicitor for the Applicant seeking that the matter re-opened; and

WHEREAS it is clear from the supporting documentation that the issues raised by the application had not been resolved at the time the Order of Discontinuance was issued; and

WHEREAS having considered the matter ex parte the Commission has decided that the Order made on 25th September 2001 was made in error in that the matter was still alive; and

WHEREAS the Commission has concluded that it is not functus officio in the matter and the Applicant is entitled to proceed with the application; and

WHEREAS the Commission while issuing this Order of cancellation has decided that there should be finality in the matter and for that reason has decided that if the Applicant does not advise the Commission of the disposition of the application by 30 October 2001 the matter will be listed to show cause why it should not be dismissed for want of prosecution.

NOW THEREFORE pursuant to the powers vested in it by the *Industrial Relations Act, 1979*, the Commission, hereby orders—

1. THAT Application No. 1354 of 2000 Citation No. 2001 WAIRC 03888 be, and is hereby, cancelled.
2. THAT the Applicant is required to advise the Commission of the disposition of the Application by 30 October 2001 failure to do so will result in the matter being listed for the Applicant to show cause why the Application should not dismissed for want of prosecution.

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

2001 WAIRC 03937

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION.

PARTIES	JEREMY ROBERT PARKER, APPLICANT *v.* AURORA GOLD LTD (ACN 006 568 850), RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	WEDNESDAY, 10 OCTOBER 2001
FILE NO	APPLICATION 127 OF 2001
CITATION NO.	2001 WAIRC 03937

Result	Direction issued
Representation	
Applicant	Mr D Heldsinger of Counsel and with him Ms S Holgate of Counsel
Respondent	Mr S Ellis of Counsel and with him Mr D Fletcher of Counsel

Direction.

THE Commission, having heard Mr D Heldsinger of counsel on behalf of the applicant and Mr S Ellis of counsel on behalf of the respondent, and having determined that the following orders and directions were necessary and expedient for the just hearing and determination of the matter, it is this day, the 10th day of October 2001, ordered and directed as follows:—

1. THAT the applicant is to file and serve, by close of business Wednesday 31 October 2001, statements in reply to the respondent's witness statements.

(Sgd.) S. WOOD,
[L.S.] Commissioner.

2001 WAIRC 03875

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION.

PARTIES	JULIE-ANNE LEISHA HURST, APPLICANT *v.* HOUSE OF STUART, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	WEDNESDAY, 26 SEPTEMBER 2001
FILE NO	APPLICATION 773 OF 2001
CITATION NO.	2001 WAIRC 03875

Result	Further Order in relation to Order for Discovery issued.
Representation	
Applicant	Mrs J. Hurst
Respondent	Ms J. Auerbach (as agent)

Order.

WHEREAS an Order for Discovery issued on 24 August 2001 requiring the respondent to provide to Julie-Anne Leisha Hurst on affidavit, copies of the contracts, notes and worksheets relevant to Julie-Anne Leisha Hurst's claim in this Commission.

AND WHEREAS the applicant has requested that a further Order issue requiring the respondent to comply with that Order within a specified period of time;

AND HAVING HEARD Mrs J. Hurst on behalf of herself as the applicant and Ms J. Auerbach on behalf of the respondent;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979*, hereby order—

THAT the House of Stuart provide to Julie-Anne Leisha Hurst, by 4.00pm on Friday, 28 September 2001, on affidavit, copies of the contracts, notes and worksheets relevant to Julie-Anne Leisha Hurst's claim in this Commission.

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

2001 WAIRC 03865

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	GLENN BURLEY, APPLICANT *v.* LAC LOSS ADJUSTORS, A DIVISION OF LAC OPERATIONS PTY LTD , RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DELIVERED	WEDNESDAY, 26 SEPTEMBER 2001
FILE NO	APPLICATION 798 OF 2001
CITATION NO.	2001 WAIRC 03865

Result	Direction issued

Direction.

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

WHEREAS on the 25th day of September 2001 the Commission convened a conference for the purpose of dealing with scheduling matters associated with the hearing of the application; and

WHEREAS at the conclusion of the conference the Commission issued directions as to the manner of dealing with a preliminary matter;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, and by consent, hereby directs—

1. THAT by no later than the 9th day of October 2001 the Applicant shall file with the Commission and serve on the Respondent submissions in relation to the issue of jurisdiction.
2. THAT by no later than the 23rd day of October 2001 the Respondent shall file with the Commission and serve on the Applicant submissions in reply.

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

2001 WAIRC 03797

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT *v.* DIRECTOR GENERAL, EDUCATION DEPARTMENT OF WA, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DELIVERED	TUESDAY, 18 SEPTEMBER 2001
FILE NO/S	P 16 OF 2001
CITATION NO.	2001 WAIRC 03797

Result	Application granted. Order issued.
Representation	
Applicant	Ms M In de Braekt
Respondent	Mr J Ayling

Order.

HAVING heard Ms M In de Braekt on behalf of the applicant and Mr J Ayling on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

(1) THAT discovery on affidavit is to be given by the respondent by 2 October 2001 of the following documents or classes of documents—

(i) all documents produced and/or considered by the respondent in connection with Mr Lewis' medical condition or access to sick leave or any related issue, including but not limited to any reports, notes, memorandums, briefing notes or letters;

(ii) the respondent's Code of Conduct;

(iii) the respondent's policies, guidelines, leave forms or any other such documents in relation to paid or unpaid sick leave and the respondent's approach thereto;

(iv) instructions to staff or management or information contained in a manual in relation to paid or unpaid sick leave;

(v) the report or any other documents produced by Dr Pearce in relation to Mr Lewis;

(vi) any documentation sent to or received from any other entity by the respondent in relation to Mr Lewis;

(vii) any documents forwarded to staff, in particular directions to Principals and the like, on the issue of paid or unpaid sick leave in the last 12 months;

(viii) all of the documents contained on Mr Lewis' personal file.

(2) THAT inspection of documents shall be completed by 9 October 2001.

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